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

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

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

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

For the French Delegation

LOUIS RENAILT

Records of the Conference

Convened in Berlin October 14 to November 14, 1908

The other[^1] studied the questions concerning mechanical musical instruments; its conclusions were submitted to the Committee, were approved by it and are recorded within the present report. Finally, it should be added that, to comply with Rule 7 of the Rules of Procedure as much as with the nature of things, the texts emerging from the Committee’s successive votes were submitted to a Drafting Committee which carefully revised them in eight sessions; it was after that revision that they were presented to the Committee which passed them definitively at its session on November 11, 1908. The Conference is therefore in a position to come to its decisions in full knowledge of the facts.

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

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

[^1]: This report was submitted first to a Drafting Committee comprising Messrs. Dungs and von Goebel (Germany), de Borchgrave (Belgium), G. Lecomte and Renault (France), Sir Henry Bergne and Askwith (Great Britain), Ferrari (Italy) and Baron de Ugglas (Sweden) and then to the Committee, which approved it at its session on November 11, 1908. It comprised Messrs. Robolski and Osterrieth (Germany), Wauwermans (Belgium), Ferraz (Spain), Breton and Gout (France), Sir Henry Bergne and Askwith (Great Britain), Ferrari (Italy) and Kraft (Sweden).

[^2]: It comprised Messrs. von Goebel (Germany), Breton (France), Askwith (Great Britain), Ottolenghi (Italy), Hoel (Norway) and Kraft (Switzerland).
whose intelligent, persevering activity could not be forgotten without ingratitude, the Swiss Federal Government kindly invited the various Governments to be represented at a Conference which was to deal with the international protection of authors of literary or artistic works, no one thought that agreement would be easy to reach as the various Governments' views still differed widely. However, after two arduous Conferences in 1884 and 1885, it proved possible to sign the Convention of September 9, 1886, which is still our Union's charter today. This Convention, signed by Germany, Belgium, Spain, France, Great Britain, Haiti, Italy, Liberia, Switzerland and Tunisia, contained two provisions of great importance for the internal and external development of the Union which had just been founded. The first is that of Article 17: 'The present Convention may be submitted to revisions with a view to the introduction of amendments designed to improve the system of the Union. (. . .) Questions of this kind, as well as those which in other respects are of interest to the Union, shall be considered in Conferences to be held successively in the countries of the Union among the delegates of the said countries. (. . .) It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries which are members of it'. It is by virtue of this provision that a first revision Conference took place in Paris in 1896 and that the present Conference has met. It is by means of these discussions between people who are familiar with these delicate problems that real progress can be achieved because they correspond to realities which have been fully perceived; light is shed mutually on the import and raison d'être of the respective legislations which are often criticized because they are not understood; we see to what extent it is possible to enact an international rule which is superimposed on the various national laws, and to what extent it is essential to confine ourselves to referring matters back to them. The happy outcome of such discussions could be seen in 1896 and we should like to think that the same will also be seen in 1908.

The other beneficial provision referred to above is that of Article 18 which allows countries that have not become party to the Convention to accede to it at their request. It is the progressive expansion of the Union which is thus facilitated. In 1886 the Union's power of attraction had perhaps been somewhat overestimated. The accession of some States represented at the 1884 and 1885 Conferences appeared imminent. And yet, between 1886 and 1896, the Union was enlarged by Luxembourg, Monaco, Montenegro and Norway. From 1896 to date, while it has lost Montenegro, it has gained some notable new members, namely Denmark, Japan and Sweden. Is it not entitled to hope to gain others? By virtue of a sensibly liberal practice, non-Union States are invited to send representatives to the Union's Conferences, and many accept the invitation. Thus 20 such States currently have delegates at our Conference. If the majority only show interest in the Union by their presence and the attention they are kind enough to pay to our discussions, there are some that have made kind declarations, that have taken part in the deliberations to which they have contributed useful observations; doubtless they were thinking that their countries would not always stand aloof from the work they were seeking to improve. It will be permissible to note a few declarations of which the Conference has appreciated the great interest, especially those of the Netherlands, Russia and the United States of America.

The Netherlands was represented at Berne in 1884 and 1885; it did not sign the 1886 Convention and did not even take part in the 1896 Conference. Its representation at this Conference and the number and quality of its delegates therefore have an importance which has been highlighted to great effect by Dr. Snyder van Wissenkerke. The Dutch Government seriously wishes to end its country's present state of isolation in this regard, and it is hoping that the Conference's decisions will enable it to achieve this end.

The Russian Government, for its part, thinks that the time has come for the exchange of literary, artistic and musical productions to

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4 The State of Liberia did not ratify the 1886 Convention, but has just acceded to it at the very beginning of the Berlin Conference.
be governed by international arrangements and, amongst these arrangements, there is no doubt that those brought about by the work of the International Union hold pride of place.

The Conference's applause bore witness to the satisfaction which greeted these declarations, which are quite the opposite of polite, banal promises. It will be seen that the Conference is perfectly aware of the difficulty that these countries, which have hitherto remained outside the Union, are experiencing in making up the ground it has itself covered, and in achieving at their first attempt the goal we are going to attain. The transitions will be contrived and time will be left to do its work.

Mr. Thorvald Solberg, the Head of the Copyright Department at the Library of Congress, for his part read a declaration which does not allow the same hopes to be entertained as the previous two declarations, but which, nevertheless, is of interest in that it comes from a country which plays such an important role in literary and scientific production. The United States Government shows its sympathy for the goal pursued in general by the Berne Union and wishes to be informed about the Conference's discussions. In undertaking such a long journey for the sole purpose of being with us, Mr. Solberg has testified to his personal interest in and his admiration for our work which he is helping, and will go on helping, to make known in his country; we can only be grateful to him for this.

The preceding observations are of value from two viewpoints: they enable us to hope for a further extension of our Union; they show us that the nature of our regulations must be flexible enough to adapt to greatly differing situations.

In the speech he made at the Conference's inauguration, His Excellency Mr. De Schoen said that he considered the Berlin Conference, as a whole, to be a continuation of the Paris one. 'You know the so very important results of that memorable meeting. The wishes it expressed have set in advance the task before the Berlin Conference and have laid its foundations.' The starting point for our discussions was the proposals presented by the Imperial Government, preceded by explanatory memoranda drawn up with the assistance of the International Bureau; special proposals from France and Japan were added to them. During the Conference various proposals were formulated relating to the German ones. This report will attempt to give an exact physiognomy of the debates. First the result of the elaboration indicated above should be noted in its essential features.

In 1896, an Additional Act established that amendments had been made to Articles 2, 3, 5, 7, 12 and 20 of the 1886 Convention and to Nos. 1 and 4 of the Final Protocol which is attached to it; in addition, a Declaration interpreted certain provisions of the 1886 Convention and the 1896 Additional Act. It had been necessary to have two distinct Acts because some States, while accepting one, were unwilling to accept the other. Thus the Union's Convention rules currently result from a combination of the 1886 Convention and Final Protocol and the 1896 Additional Act and Interpretative Declaration. Obviously this is not simple, but the complexity was imposed by circumstances.

The outcome of your Committee's discussions has been to amend or replace Articles 2 to 7, 9 to 12, 14 and 18 of the 1886 Convention and Nos. 1, 2, 3 and 4 of the Final Protocol, that is to say, in actual fact, all the provisions which are of some interest and on which a query may arise. The Paris Additional Act would disappear because the provisions it contains are again amended or replaced by others; finally, the Interpretative Declaration would also disappear because the rules it contains have been incorporated in the actual text of the provisions to which they refer.

Is the Union undergoing a revolution in other words? We do not think so any more in 1908 than in 1896. The principles laid down at the beginning are developing, they produce consequences before which the Union had first retreated, they are relieved of awkward restrictions which had been deemed necessary in the short term, they are applied to new cases which were hardly contemplated in 1886. This, we believe, is the general characteristic of the work that has been accomplished. Naturally it is not to everyone's complete satisfaction; agreement necessarily implies sacrifices which must be reciprocal. Occasionally agreement could not be reached and that is easily understandable, each country having its interests, its legal, moral, social and political conceptions which naturally influence the solution to the various international issues. In such cases the majority cannot lay down the law for the minority, since our
assembly does not constitute the expression of a will which must be the only one, but the juxtaposition of separate wills which can only be effective if they are in agreement. What is to be done then? We can either totally abandon what was proposed or accept it while allowing dissidents the option of departing from it. The first system is certainly the simpler since it maintains uniformity within the Union, but it impedes the relations between a number of States; the second introduces a complication but reconciles the rights of all the parties; those wishing to move on are not obliged to mark time until their companions are ready to accompany them. This is what explains the procedure of limited Unions which may doubtless be criticized but which has rendered great services in various spheres: it mitigates the drawbacks of a Union which imposes the same limits on all its members, so that the particular ideas of a small group would check the whole. The purpose of these considerations is to justify several of the Committee's proposals which, although establishing a rule, only require it to be applied to the extent that individual legislation allows it. Again it is easy to mock and to say that no country will thus be committed unless it chooses to be. This is doubtless true, strictly speaking, but it is nevertheless useful to lay down the rule because it indicates the direction it is desirable for the Union to take; it will have a de facto influence even if it is not binding. If a great association is to last and expand, the ties between its members must not be too rigid; it is enough for there to be uniformity on the essentials which are the Union's very condition and raison d'être.

What form should our decisions be given? This is certainly a delicate question. It has already been seen to what a combination of texts we have to have recourse in order to ascertain the present state of the Convention right in our sphere. If we take the form of another Additional Act we add to the complexity which is already quite sufficient. What is more, an Additional Act to the Berne Convention which introduced amendments to almost all its articles and, it may be said, to all those which are of some importance, would look rather odd. Lastly, if we are the Paris Conference's successors and perpetuators, should we not have some consideration for the wish it expressed? At its Session on May 1, 1896, it said: 'It is desirable that the outcome of the deliberations of the next Conference should be a single Convention text.' The vast majority would have liked to have adopted there and then a totally new Convention which would have introduced simplicity and clarity to the Union; it bowed to reasons of opportuneness, these reasons no longer appear to exist or, at least, precautions can be taken to remove them and to ensure that the single text has only advantages and no serious drawback. This text will naturally only replace the previous texts for the Powers which adopt it in its entirety; for those which do not adopt it at all or which do not adopt it outright, the present texts will subsist either in whole or in part. It is also appropriate to lay down the conditions under which new States can join. Explanations will be given when it is time to present the provisions which aim to deal with these various points (see Articles 25 et seq. of the draft). We wanted to justify at the outset the order of the report, which will not necessarily be that of the 1886 Convention because sometimes, to be methodical and to introduce new rules, it has been necessary to alter the old order. We trust we will also be forgiven the length of this work, which has to make up for the absence of minutes for the Committee's sessions, and which will attempt to comment on the whole of the revised Convention.

It is only right to thank the German authorities who undertook to facilitate the accomplishment of the Paris wish by submitting to our deliberations a complete provisional text, the articles of which are kept in line with the existing articles of the Convention.

**Principle of the Union**

Article 1 of the Berne Convention, which does not call for any comments, needs only to be maintained.

**Article 1**

The contracting countries constitute a Union for the protection of the rights of authors in their literary and artistic works.

**Protected Works**

It is natural to give now the definition of literary and artistic works which, in the original Berne Convention, only appears in Article 4.
We might have thought and we did think of replacing a list by a concise formula which would cover the various works to be protected. The German authorities rightly considered that, as a rule for courts and as a guide for new accessions to the Union, the usefulness of a list has been proved and hence it would be better merely to complete it by taking into account the wishes expressed in various quarters. But before examining the proposals made to this effect, it would be appropriate to resolve an important preliminary question which has arisen with regard to the Berne Convention’s Article 4, not amended in Paris. What value does this enumeration have? Two opinions are possible. The contracting countries are obliged to protect the works in question so that if their legislations are inadequate, they must complete them to satisfy the Convention. Conversely, it is said that, if every country is required to protect what, under its legislation, are considered to be literary and artistic works, it would not be obliged to protect a work, even if listed in Article 4, if, under its legislation, it was not recognized as having the character of a literary or artistic work. The contracting countries are only obliged to protect works in so far as their legislation permits it; nothing compels them to complete their legislation.

The question was raised by the Belgian Delegation which dealt with this and other questions in a special Memorandum (appended to the minutes of the second session). The Italian Delegation joined the Belgian Delegation, the two considering that the enumeration in Article 4 did indeed have a compulsory character; they asserted notably that if, under certain circumstances, the introduction of works of one kind or another in Article 4 had been strongly urged, it was because it was thought that the protection of those works would be guaranteed throughout the territory of the Union by the fact of their introduction; thus it was that in 1886 choreographic works were not included in the list, because certain countries declared that their legislation made no provision for them, and they were only mentioned in the Final Protocol, No. 2. This point of view raised objections particularly with regard to the proposed additions; several delegates declared that their legislation would not allow them to commit their countries to protecting some of the works in question.

Finally, agreement was reached on the need to avoid any ambiguity. It was thus understood that a clear distinction would be made between the works in respect of which the contracting countries would have to guarantee protection and the works for which it would be enough for them to grant the protection which existed for national works under their legislation.

Various proposals were made to complete Article 4.

The German authorities asked for the insertion of works of art applied to industrial purposes, collections of works by different authors, adaptations and other reproductions in an altered form of a work; they replaced the last sentence by the following words: and any other production whatsoever in the literary, scientific or artistic domain, whatever the mode of reproduction. The reasons for those additions or changes are as follows: ‘There did not seem to be any need to mention chromolithographs specifically, these being most certainly included within lithographs, but this is not the case of works of art applied to industrial purposes or industrial art; when legislative revisions were undertaken recently in some important countries this category of works was formally assimilated to works of art; this is understandable as their production has expanded rapidly and the artificial limits established between pure art and art which is put to the use of real or ordinary life can no longer be maintained either from the doctrinal point of view or that of practical necessities.’

The French and Italian Delegations supported the German proposal as regards art applied to industrial purposes, adding, to avoid any difficulty in application, whatever their merit and purpose. These three Delegations also asked for ‘works of architecture’ to be inserted.

The Italian Delegation proposed a very comprehensive formula: the expression ‘literary and artistic works’ shall include any production in the literary, scientific and artistic domain, whatever may be its merit and mode or form of reproduction, such as books, pamphlets and other writings; dramatic or dramatico-musical works, choreographic works and entertainments in dumb show; musical compositions with or
without words; works of drawing, painting, architecture, photography or those obtained by a process analogous to photography; works of sculpture, etc. These works had to be protected in all the countries of the Union while works of art applied to industrial purposes had to be protected only to the extent that each country's domestic legislation allowed it.

The British Delegation asked for the words art applied to industrial purposes to be deleted and the Swiss Delegation seconded this request. The British Delegation observed that the term 'works of art applied to industrial purposes' has a very wide meaning. In its opinion, most works to which that expression applied hardly fell within the scope of 'artistic protection' as such. Industrial designs already enjoyed protection under the domestic legislation of the majority of countries by virtue of a set of provisions which had nothing in common with those concerning the protection afforded literary and artistic works.

These various proposals gave rise to lengthy discussions of which it suffices to indicate the conclusion.

Choreographic works and entertainments in dumb show were mentioned only in No. 2 of the Final Protocol and in a rather restrictive form: 'As regards Article 9 it is agreed that those countries of the Union whose legislation implicitly includes choreographic works amongst dramatico-musical works expressly admit the former works to the benefits of the Convention'; the German authorities proposed amending the Protocol in this regard: 'It is agreed that the stipulations of the present Convention shall also apply to choreographic works and entertainments in dumb show of which the dramatic action is fixed in writing.' The proposal coincided with the Italian one in that both aimed to grant protection to choreographic works and entertainments in dumb show; they seemingly differed as to where the provision should be placed; it was obvious that, since there was agreement, matters were simplified by including the works in the list. To avoid great difficulties of proof, the German proposal added a specification by requiring the action to be fixed in writing. The Italian Delegation accepted this provided the words or otherwise were added, because sometimes the action is fixed by a drawing or any other process which would not constitute writing.

'Works of architecture' had hitherto met with opposition. It was recognized that plans and sketches should be protected, but it was said that 'the work of architecture' itself, i.e. the construction, was not required to be protected and some legislation refused to grant such protection. In 1896, the Belgian and French Delegations had asserted that there is no reason to distinguish between the sculptor and the architect, that the latter's work deserved protection just as much as the former's. They had to content themselves with a reference inserted in the Final Protocol, No. 1, whereby 'it is agreed ... [that] in countries of the Union where protection is accorded not only to architectural plans, but also to the architectural works themselves, these works shall be admitted to the benefits of the Berne Convention and of this Additional Act.' It was observed that, on the part of the countries in question, a concession was made in this regard to the countries of the Union whose legislations did not protect works of architecture themselves.

The German authorities, which had been against protecting works of architecture in 1896, abandoned their initial viewpoint in their proposals to the Conference. The text of the Final Protocol as given earlier would be replaced by the following: 'The stipulations of the present Convention shall also apply to works of architecture.' It was logical then to ask, as the German, French and Belgian Delegations did, for works of architecture to be mentioned in Article 4 next to works of drawing, painting. The objection was raised that there was little point in doing so because difficulties never seemed to have arisen in that connection and, furthermore, because it was unacceptable that a building contractor or an architect who built a house with a façade comprising a door and six windows could complain because another building also had a door and six windows. In response, legal decisions were produced which established, first, that difficulties were indeed possible and, second, that they could be settled rationally by the courts. All protection would be denied to a very ordinary building in which the creator's personality is not revealed; it was the original, artistic work.
that was to be protected. In the end, the inclusion of works of architecture in the list of protected works was accepted without opposition; only the Swedish Delegation made reservations. The desires expressed on numerous occasions by the societies of architects of various countries have thus been rightfully met.

A person's individual work may have someone else's work as its starting point; it should nonetheless be protected in itself. The most obvious example is that of a translation. The translator has accomplished intellectual and often difficult work; he is entitled to protection. Of course he may have to consider the author of the original work, and may have to obtain authorization without which the publication of his translation would be unlawful. This does not mean, however, that he is not entitled to prevent someone else from appropriating his work, and to take infringement action against anyone who reproduced it.

Article 6 of the present Convention appears to be in disagreement; indeed, it states that 'lawful translations shall be protected as original works,' which would imply that 'unlawful translations are not protected and may be reproduced with impunity. It was to remove this consequence that the German authorities proposed amending Article 6 by stating: 'Subject to the rights of the author of the original work, translations shall be protected as original works.' The second paragraph of the present Article 6 should be considered superfluous: it is obvious that, if a translator cannot avail himself of the author's copyright, his only right is to prevent others from appropriating his work, but he could not oppose another translation being made of the same work.

Adaptations, musical arrangements and other reproductions in an altered form of a literary and artistic work may be compared to translations. The work done in this respect may be lawful or unlawful depending on whether or not it has been authorized by the author of the original work but it must also be protected in both cases pursuant to what has just been said for translations.

The German authorities proposed inserting collections of works by different authors in Article 4, saying that this was a fairly common form of publication with an international market. The nature of the proposal was clearly explained in the Committee. What was to be protected was the task which consisted in assembling various works according to a definite plan and following a more or less ingenious method of grouping them. If the plan, if the combination constituted a piece of work which was individual, protection was due regardless of the nature of the materials used. They might have been taken from the public domain; for example, the collection might be an anthology of works by Voltaire, Goethe or Schiller. They might have been taken from the copyright domain, in which case, to be lawful, the consent of the author or authors was required and infringement action could be taken if it had not been obtained, but that was another aspect, as had been explained for translations and adaptations.

All the works which are thus listed in the first two paragraphs of Article 2 of the draft are entitled to protection, and the contracting countries must guarantee them that protection. This is what is stated in paragraph 3 so as to remove any doubt. If, by chance, protection is requested for one of these works in a country of the Union, and refused there because the legislation does not protect works of that kind, the government of the country would be at fault for not having taken the necessary steps to apply the Convention.

It has been said earlier that agreement could not be reached on including works of art applied to industrial purposes in the list which has just been discussed, despite the efforts made by the German, Belgian, French and Italian Delegations in particular. The opponents only consented to these works being placed in a second category so as to guarantee them the national legislation's protection, such as it is. To avoid difficulties which have occasionally
arisen before the courts, the French Delegation notably would have liked whatever their merit and whatever their purpose to be added in order to indicate clearly that the label work of art cannot, any more than the label literary work, cannot be dependent on a judge’s aesthetic opinions or the purpose to which the object to be protected is to be put. Reference was made to France’s experience. A law was adopted there in 1902 along the lines which have just been indicated; it was welcomed as a good thing and it put an end to numerous difficulties. It was only ever a matter of protecting an individual, original, new work which had been appropriated probably because it was recognized as having some value. These reasons were taken into consideration by several delegations but, in the face of the implacable opposition of some others, we had to confine ourselves to mentioning works of art applied to industrial purposes under the conditions indicated earlier. The benefit of national treatment, whatever its nature, may be invoked by virtue of the present Convention.

At the Paris Conference, on a proposal by the French and Italian Delegations, a paragraph had been added to Article 2 of the Convention to state that posthumous works shall be included among those to be protected. This cannot create any difficulty and, although the Committee did not think it necessary to reproduce the provision, it considers that the situation has not changed in the slightest. The draft deals with the term of protection of posthumous works (Article 7, paragraph 3) and implies by that very fact that the protection exists.

Article 2
The expression ‘literary and artistic works’ shall include any production in the literary, scientific or artistic domain, whatever may be the mode or form of its reproduction, such as books, pamphlets, and other writings; dramatic or dramatico-musical works, choreographic works and entertainments in dumb show, the acting form of which is fixed in writing or otherwise; musical compositions with or without words; works of drawing, painting, architecture, sculpture, engraving and lithography; illustrations, maps; plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Translations, adaptations, arrangements of music and other reproductions in an altered form of literary or artistic works as well as collections of different works, shall be protected as original works without prejudice to the copyright in the original work.

The contracting countries shall be bound to make provision for the protection of the above-mentioned works.

Works of art applied to industrial purposes shall be protected so far as the legislation of each country allows.

(Cf. Articles 4 and 6 of the 1886 Convention; Final Protocol No.2; 1896 Additional Act, Article 2)

With regard to photographs, the Union legislation has followed a course which it is worth noting.

In certain countries, photographic works do not enjoy specific protection but are assimilated to artistic works and consequently benefit from the protection afforded to them. Such countries naturally asked for photographs to be included in the list of works to which the Convention applied. This was refused by the countries which did not protect photographs or only protected them on a specific basis, not as artistic works. Thus, in 1886, the following provision was merely put in the Final Protocol: ‘As regards Article 4, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs engage to admit them to the benefits of the Convention concluded today, from the date of its coming into force. They shall, however, not be bound to protect the authors of such works further than is permitted by their own legislation except in the case of international arrangements already existing, or which may hereafter be entered into by them. (. . .) It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as provided for by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private agreements between owners of rights.’ It should be noted at the outset that this last paragraph is totally unnecessary. A copyright
work of art, such as a painting or a statue, cannot be reproduced by means of photography, any more so than by any other means, without the author's permission. If a sculptor has given a photographer the exclusive right to reproduce his statue, the photographer may take legal action against unauthorized photographs; he exercises a derived right, irrespective of the right he may have in his own name. This provision—maintained in 1896—was rightly considered to be superfluous by the German authorities; they asked for its deletion, which was accepted by the Committee without any difficulty.

Let us return to the main rule of the 1886 Final Protocol. As a result of it, it was only in those countries where the character of artistic works was granted, or, at least, not refused to photographs that protection could be claimed by virtue of the Convention. Where the character of artistic works was excluded, advantage could not be taken of whatever specific protection might be established by law. At the Paris Conference significant progress was made on the German Delegation's initiative. The first paragraph of No. 1 of the Final Protocol as quoted above was replaced by the following text: 'Photographic works and works produced by an analogous process shall be admitted to the benefits of these provisions [1886 Convention and 1896 Additional Act] in so far as the laws of each State may permit, and to the extent of the protection accorded by such laws to similar national works.' Thus, in the relations between the countries of the Union, it was possible to claim the protection, as such, granted to photographs or works obtained by a process analogous to photography. Each country maintained its principles while nonetheless granting national treatment to the Union countries. The essential thing is that some form of protection is granted; the exact nature of the protection is of secondary importance.

The consequence of the clause adopted in 1896 was that those countries of the Union where the legislator did not grant photographs any protection were not obliged to protect the photographs of the other Union countries, and yet benefited from the protection granted by the latter countries. A concession was thus made here without reciprocity. The hope had been expressed that this situation would not last, and the Conference had adopted the following resolution: 'It is desirable ( . . . ) that in all the countries of the Union the law should protect photographic works or works obtained by analogous processes, and that the term of protection be at least 15 years.'

It was left for the Berlin Conference to make another step forward. Agreement was quite easily reached on the need for photographs to be protected in all the countries of the Union, and thus satisfaction was given to the first part of the Paris wish. No explanation is provided about the nature of the protection, which may vary from country to country. As the German authorities state: 'Although opinions on the intrinsic nature of photographs still differ a great deal, it matters little whether they are considered to be works of art under the domestic regime or whether they are subject to any particular treatment; the main thing is that, in every country of the Union, they are guaranteed such protection as exists.' But there must be protection; the contracting countries are bound in this respect; this is the difference which is established in relation to the Paris resolution.

From protection being guaranteed to photographs by virtue of the Convention it follows that it is not subject, under the present system, to any special conditions and formalities other than those which may be required in the country of origin. The Paris Interpretative Declaration had thought it necessary to point this out formally (No. 1 in fine); there can be no doubt about it. We should add that, in future, Article 4, paragraph 2, of the draft will be applicable.

As for the second part of the Paris resolution, a number of delegations were willing to comply with it by establishing in the Convention itself that photographs would be protected for at least 15 years from the date of publication. A variety of objections were made in relation to either the term or the starting point and, despite the great interest there would be in having a uniform duration for the international protection of photographs, it proved necessary to remain silent on this point, which implies, as will be explained later (in connection with Article 7, paragraph 3), that in each country the term laid down by the national legislation...
may be claimed without it being possible to require protection for a longer period than in the country of origin.

Certain delegates, notably, the French ones, observed that it would be advantageous to complete these provisions on photography in the various countries by organizing the recognition of the signatures and symbols which photographers placed on their works (See, by analogy, Paris resolution IV). It emerged from the discussion that the question was not one to which the present Conference could provide a solution.

**Article 3**

This Convention shall apply to photographic works and to works produced by a process analogous to photography. The contracting countries shall be bound to make provision for their protection.

(1886 Final Protocol, No. 1; Paris Additional Act, Article 2)

**Protected Authors. Nature and Scope of the Protection**

Preliminary remark: it will only be a question of authors, and no reference will be made anywhere to their successors in title. It was deemed unnecessary to mention successors in title as this makes the sentence cumbersome and gives rise to a doubt if, by chance, the reference has been omitted. Copyright is not exclusively personal: the author may dispose of it; by virtue of an agreement, a will or the law, his successors in title may exercise the rights which are granted to him personally. There is no need to mention them explicitly. In 1886 all reference to contractual or legal agents, which appeared in the old conventions, had been deleted; the work of simplification is being completed by deleting that of successors in title.

Protected authors may be nationals of Union countries and nationals of countries outside the Union. The two cases must be distinguished.

**National Authors**

At present the position of national authors is determined by Article 2 of the 1886 Convention, in respect of which the German authorities are proposing important amendments; the Delegations of France, Great Britain, Italy, Monaco, Sweden and Switzerland also submitted amendments. The questions are complex and an overall exposition of these various proposals would cause confusion. It is thus necessary to proceed by means of analysis.

The general principle is fairly simple. Nationals are protected (to the extent that will be indicated) in respect of their published or unpublished works. As far as the latter works are concerned, there are no conditions; as regards the former, on the other hand, they must have been first published in a country of the Union (this makes the question of what constitutes publication of great interest, as will be stated later). This latter condition has always been required and, until now, has never given rise to any objection. Mr. DE BORCHGRAVE has criticized it, however, saying that it seemed to him to be in the spirit of the Union Convention that nationals should be protected whatever the country in which they had been led by circumstances to publish their works. However, it was felt that the Convention was quite liberal enough, and that the territory of the Union should at least have the advantage of a publication to which it guarantees effective protection, not to mention that the consequence of the proposed amendment would be to favour publishers in non-Union countries.

The protection provided by the Union comprises:

1. the rights which the respective laws do now or may hereafter grant to nationals,
2. the rights specially granted by the Convention.

The principle is thus that, as regards an unpublished work or a work published in a Union country, a national may first claim national treatment in each of the other Union countries; the Convention did not stop there: it enacted certain rules which must be applied whatever the case and irrespective of the national treatment, for example in relation to translation. What is called, in short, Union treatment is thus made up of these two elements.

So far we have not introduced any innovation to the existing right. The wording we are proposing, following the German authorities,
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introduces only changes of pure form in Article 2, paragraph 1, of the 1886 Convention, intended to make the thinking clearer; Article 4, paragraph 1, of our draft would thus read as follows: ‘Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to nationals as well as the rights specially granted by this Convention.’ The additional words inserted at the beginning of the paragraph clearly show, as Germany’s preamble explains, that, in the case of published works, it is the country of first publication which becomes the country of origin of the work; even when he is not one of its nationals, the author is subject in that country to the system applicable to national authors, and it is in the other countries, including his own, that he enjoys the benefit of Union treatment. The work of a Belgian published in France is a work which is considered to be French by the country’s legislation; it is protected by the Convention in all the countries of the Union, including Belgium; in France, it is protected by the national law. The wording added at the end brings out the second element of the protection.

The enjoyment and exercise of these rights shall not be subject to any formality. It should be noted that it is exclusively the rights claimed by virtue of the Convention that are involved here. The legislation of the country in which the work is published and in which it is nationalized by the very fact of publication continues to be absolutely free to subject the existence or the exercise of the right to protection in the country to whatever conditions and formalities it thinks fit; it is a pure question of domestic law. Outside the country of publication, protection may be requested in the other countries of the Union not only without having to complete any formalities in them, but even without being obliged to justify that the formalities in the country of origin have been accomplished. This is what results, on the one hand, from a general principle which is going to be stated and explained and, on the other, from the deletion of the third paragraph of Article 11 of the 1886 Convention. This paragraph provides that: ‘It is, nevertheless, agreed that the courts may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, in accordance with Article 2.’ That Article does indeed state, at the beginning of its paragraph 2, that ‘the enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work’ and, to remove difficulties which had arisen in certain countries, the Paris Interpretative Declaration had emphasized this idea—which was evidently that of the authors of the 1886 Convention—that protection depends solely on the accomplishment, in the country of origin, of the conditions and formalities which may be required by the legislation of that country. This was already a great simplification which will be appreciated if it is recalled that there was a time not so long ago when, to guarantee a work protection in a foreign country, even by virtue of an international convention, it was necessary to register and often even to deposit that work in the foreign country within a certain time limit. The new Convention simplifies matters still further since it requires no justification. Difficulties had arisen with regard to the production of a certificate from the authority of the country of origin—this production having been considered, occasionally, as the preliminary to infringement action, which caused delays. The new provision means that a person who acts by virtue of the Convention does not have to provide proof that the formalities in the country of origin have been accomplished, as the accomplishment or non-accomplishment of these formalities must not exert any influence. However, if it is in his interest to produce a certificate to establish a particular fact, he cannot be prevented from doing so (the Article in the draft only refers to formalities, but this is meant to cover the conditions and formalities to which the 1886 Convention refers).

We now come to a very important question. The German authorities proposed making a radical change to the existing right whereby there is a link between the protection in the country of origin and the protection in the country in which it is claimed; this link is
certain as far as the duration is concerned since, after stating that the enjoyment of the rights accorded authors shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, paragraph 2 of Article 2 continues in the following terms: '[it] must not exceed in the other countries the term of protection granted in the said country of origin.' Does this relationship exist only in connection with the duration? The German authorities’ preamble states in this respect: ‘According to an opinion which is accepted in practice, the work is required, moreover, by its constituent characteristics, to be one of the works which the legislation of the country of origin protects as literary and artistic works.’ And yet the 1885 Diplomatic Conference, which created the Convention, had already warned the courts against a too restrictive interpretation of this Act—as can be seen from the following passage out of its Committee’s report: ‘The Committee considered the words “during the existence of their rights in their countries of origin” to be too absolute, as it could be concluded from them that, even outside the context of the term of protection, the courts would always be obliged to apply the law of the country of origin to an author even when that law was less favourable to him that that of the country in which protection was sought. Yet such a system would have the serious drawback of requiring either the courts or the publishers to have a thorough knowledge of all specific legislation which would be contrary to the very concept of the Union to be created. The Committee therefore made the wording of the Article more specific by saying that the term of protection could not be longer, in the other countries of the Union, than that granted in the country of origin. What is the real meaning which should be attached to the Convention in this regard? There is room for doubt: the German authorities themselves, although convinced that, in practice, the Convention has been misinterpreted, accept that this interpretation is fairly widely adopted; they wish to remove any doubt by means of an explicit rule which would go far beyond what the 1885 Committee wanted. Indeed, they propose stating without restriction: ‘The enjoyment and the exercise of these rights are independent of the existence of protection in the country of origin of the work. . . . Apart from the express stipulations contained in the present Convention, the extent and term of protection, as well as the means of redress secured to the author to safeguard his rights shall thus be governed exclusively by the laws of the country where protection is claimed.’ There would thus be complete independence, from all points of view, between the legislation of the country of origin and the legislation of the country where protection is claimed. For example, for a work published in Germany, protection could be claimed in France for 50 years after the death of the author whereas it will have fallen into the public domain in Germany after 30 years; on the other hand, a French work would be protected in Germany for only 30 years.

According to the German authorities, ‘the proposed new ruling may be considered to be the development of the fundamental idea behind the Berne Convention whereby, in all the countries of the Union, the Union author should be treated as a native author with, additionally, the guarantees stipulated by the Convention. Even now, it is the legislation of the country in which the author requests protection that determines each of the exclusive rights to which he is entitled, whether or not the author enjoys similar rights in the country of origin of the work. Even now, the Convention grants its protection in this respect without taking the question of reciprocity into account at all; no objection drawn from the differences between the legislations of the various countries of the Union could thus be produced against the proposal for amendment. Doubtless, in those countries where works of art applied to industrial purposes are protected, for example, protection will have to be granted to such works even if they are not protected in the country of origin, that is to say, without any condition of reciprocity. But the laws hardly differ between one another as to the legal conditions for protecting the work. Differences in relation to the term of protection are much greater. However, the number of works for which these divergences have any real importance is relatively limited. In view of this situation, it would truly be showing too much narrow-mindedness to want to measure the
value of the guarantees which the countries of the Union accord each other reciprocally in the copyright sphere according to the broad or not so broad provisions of their legislation. In actual fact, what is decisive in this respect is the size of the market which the works of one country find in another, as it is this which determines the extent to which they may be exploited by the author or his successors in title in the foreign territory, whether they disseminate copies of the work there or whether they find equitable compensation there in exchange for assigning the right of reproduction, translation or public performance.

The German proposal was fought with regard to its principle first and then with regard to its consequence in relation to the duration. It was said that it went against the nature of things; indeed, protection must extend from the country of origin to the other countries, and it is hard to imagine absence of protection in the country of origin combining with protection in the other countries. Reference was also made to the idea of the personal status and, on behalf of the dignity of the legal profession, an argument was rejected which was based on the difficulty for judges—unfamiliar with questions as complicated as those of copyright—to interpret foreign laws.

In fact, only in a fairly small number of cases will works be found which are totally bereft of protection in one country while being protected in another and, consequently, the question of the independence of the two legislations is of more theoretical than practical importance. But this is not the case as regards the duration. Thus the strong opposition which the German proposal met in this regard is understandable. It was observed that in no country public opinion would readily accept that, for works which people wished to reproduce or perform, it would be necessary to reckon with the rights of the authors' heirs many years after those works had fallen into the public domain in the country of origin. An advantage would be granted here without reciprocity by the countries which protect authors the best to those which protect them the least and it would not encourage those countries to amend their legislation to lengthen the term of protection.

The French Delegation accepted the principle of the independence of protection but adding that the term of protection would be the same in all the countries of the Union, and that it would comprise the life of the author and 50 years after his death. It linked the two things because, although it was claimed that the two questions of independence and duration were totally separate, they were really connected in that the question of independence could not be settled without thinking about the major consequence of the solution adopted.

The Swedish Delegation proposed accepting that the enjoyment of rights was subject to the accomplishment of the conditions and formalities prescribed by the country of origin of the work, and also that the term would be the same in all the countries of the Union (French proposal on this point).

To make the vote easier, the Italian Delegation made two proposals, one repeating the principle of the German proposal and the other appropriating the French proposal in respect of the duration. The two proposals were passed by the majority so that, if the majority could bind the minority, it would be the French Delegation's draft which we would have submitted to you. This is not the case and the compulsory fixing of the duration met with opposition in the face of which it was necessary to give way. The French Delegation and those which supported its viewpoint agreed to separate the two solutions given for independence and duration. This result is in conformity with a proposal made by Monaco's Delegation.

Reference will be made later to the duration which is governed by a special Article (Article 7 of the draft). It suffices at this stage to note the very clear rule that the enjoyment and the exercise of the author's rights are independent of the existence of protection in the country of origin of the work. Is it in keeping with real principles? An attempt was made to argue the rule adopted for patents, but it would seem that the argument does not hold. A patent is a title issued by a country's authority; this title naturally has consequences only where this authority has control and, conversely, it produces effects without there being reason to take account of whether or not the invention is patented abroad. With copyright it is the work itself which is protected and it is more easily understandable that, pursuant to international
conventions, the country of origin’s protection extends into the other countries. However, it is not a question of principle which is involved here but one of practice. Indisputably the rule of independence is easier to apply; it prevents quarrels over nothing which the owner of rights might face from quibblers who asked him to bring back clear justification of the existence of his right in the country of origin while, before a foreign court, a rule of custom or case law is fairly difficult to establish. The first two paragraphs of Article 4 of our draft are thus explained.

Under Article 9, paragraph 2, of the draft, the copyright in newspaper articles is occasionally subject to a prohibition to reproduce which the author has to give. This is not a formality within the meaning of Article 4 and the accomplishment of the condition is necessary to guarantee the right.

Article 4

Authors who are nationals of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to their nationals as well as the rights specially granted by this Convention.

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(Article 2, paragraphs 1 and 2, 1886 Convention as revised at Paris)

With the principle stated in the second paragraph of Article 4, it is of less interest to determine the country of origin of the work, since that country’s legislation is no longer important as regards the existence and the scope of protection. Nevertheless, it is still useful as far as the duration is concerned, as will be seen later, and also in terms of the first condition required in order to be entitled to the benefits of the Convention, i.e. that first publication has been effected in the territory of the Union. It is necessary therefore to know what constitutes publication.

We propose maintaining the existing right, as established by the Berne Convention and the Paris Interpretative Declaration, with a few amendments or additions.

First of all, a distinction is required between unpublished and published works. As regards the former, the country of origin is that of which the author is a national; in the case of the latter, it is the country of first publication. It was necessary to provide for the relatively frequent case of simultaneous publication in several Union countries; here it is the country whose legislation grants the shortest term of protection which is taken; this relates to a rule on duration which will be encountered later. The British Delegation drew attention to the hypothesis of a publication effected simultaneously, i.e. on the same day, in a country of the Union and in a non-Union country, for example, in Berlin and Vienna, in London and New York. It would appear that difficulties have been raised as to how to solve this hypothesis. The solution was considered to be easy by the Committee, which adopted the British Delegation’s viewpoint. Under such circumstances—assuming the publication in a Union country is genuine and not fictitious—there is no reason to take account of the publication effected in a non-Union country whose legislation cannot have any influence over the position of a work which is published in the Union.

In the definition of published works, we have reproduced the Paris Interpretative Declaration while adding a reference to the construction of a work of architecture which corresponds to the exhibition of a work of art. This definition was adopted after a serious discussion; it was accepted by the Powers which signed the Declaration; it was not challenged in our Committee. Only it is clearly understood, as the Italian Delegation observed, that this definition is only compulsory in international relations and a slight addition is intended to indicate this. Each country’s domestic legislation may have other rules for works published

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in its territory; thus, in certain countries, the performance of a dramatic work constitutes publication.

**Article 4, Paragraph 3**

The country of origin of the work shall be considered to be: in the case of unpublished works, the country to which the author belongs; in the case of published works, the country of first publication; and in the case of works published simultaneously in several countries of the Union, the country whose legislation grants the shortest term of protection.

In the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin.

The expression ‘published works’ means, for the purposes of this Convention, works copies of which have been made available to the public. The performance of a dramatic or dramatico-musical work, or of a musical work, the exhibition of a work of art, and the construction of a work of architecture shall not constitute publication.

(Article 2, paragraphs 3 and 4, of the 1886 Convention; 1896 Interpretative Declaration, No.2)

The provision of Article 4 strictly suffices for nationals. Indeed, the first paragraph guarantees them protection in the countries of the Union other than the country of origin of the work. If they are nationals of that country, naturally it is not for the Convention to deal with the situation governing them, which comes within the province of the domestic law in every respect; if they are not subjects or citizens of that country, their works are naturalized there by the very fact of their publication, and such authors are assimilated to national ones under the legislation of almost all the Union countries. The German authorities nevertheless proposed settling this situation expressly. ‘The question of whether or not the work will be protected in the country of origin would appear at first glance to be a matter which does not concern the Convention. But since the latter establishes first publication in the territory of the Union as an indispensable condition of all protection, it seems abnormal that it should take no interest at all in the situation reserved to the work in the very country where this work will be nationalized, so to speak.’ The proposal was accepted without difficulty; it is set out in a separate Article because Article 4 is long enough.

**Article 5**

Authors who are nationals of one of the countries of the Union, who first publish their works in another country of the Union, shall have in the latter country the same rights as authors who are nationals of that country.

**Non-National Authors**

The position of non-national authors has not always been the same. Under Article 3 of the 1886 Convention, the provisions of the Convention apply to the publishers of literary or artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to it. Thus, as far as these works are concerned, protection is not for the author but for his publisher who publishes the work in a country of the Union. This odd solution, which could give rise to real legal difficulties, as the German Delegation had brilliantly shown, was fortunately amended by the Paris Conference, which granted a right directly to the authors themselves. Under Article 3 as revised in 1896, ‘Authors who are not nationals of one of the countries of the Union, who first publish, or cause to be first published, their literary or artistic works in one of those countries, shall enjoy, in respect of such works, the protection granted by the Berne Convention, and by this Additional Act.’ The German authorities observed that this wording lets doubts subsist as to whether an author who is not a national of one of the Union countries enjoys, for his works which are published in the territory of the Union, the protection of the Convention even in the country where the work has been published or whether he only enjoys it in the other countries. Only the latter solution is fair; it is in keeping with the one which has been given in respect of a work published by a national of another Union country. This work should be treated in the same way as those of national authors. It may be felt that by laying down a rule in this regard we are stepping outside the sphere of the conventional right. If we take the case of a Russian author publishing his
work in Berlin, the question of whether or not he will be protected in Germany appears to be outside the scope of the Berne Convention, since Russia is not yet a party to the Convention. But if it is accepted that, by this publication in Germany, the author will be protected in the other countries of the Union, how can it not be accepted that he will also be protected in Germany where first publication has taken place? Protection extends quite naturally from the country of origin to the other countries with which it is in association, but an absence of protection in the country of origin would be difficult to reconcile here with the existence of protection in the other countries. It must be decreed therefore that protection applies throughout the territory of the Union; this is what the Paris Conference had done by not making any express distinction between the situation in the country of publication and the situation in the other countries. This distinction is made for the sake of principles; it will not have any great practical consequences.

One would thus arrive at the following rule:

**Article 6**

Authors who are not nationals of one of the countries of the Union, who first publish their works in one of those countries, shall enjoy in that country the same rights as authors who are nationals of that country, and in the other countries of the Union the rights granted by this Convention.

(Article 3, 1886 Convention and Paris Additional Act, Article 1)

This wording calls for two observations, one concerning the form and the other the substance. In the case of publication in a country of the Union, the work is protected in the same way, whether its author is a national or a non-national; this is what ensued from a combination of Article 4, paragraph 1, Article 5 and Article 6. This being so, could there not have been a single text for both cases? Yes, just; however, the distinction provides greater clarity, and also Article 6 has a history which should not be erased; this Article 6, linked to Article 3 of the 1886 Convention, testifies to the progress achieved.

As regards the substance, the question was raised as to whether nationals and non-nationals should be assimilated in this way. Do reasons of justice and reasons of usefulness not seem to demand that their situation should not be identical, that there should be quite notable differences so that countries outside the Union are induced to join it not only from a desire to pay tribute to the right but in the very interest of their nationals? Assimilation is not total. There will first be this difference that protection will not be granted to non-nationals for their unpublished works. Consequently, pursuant to the very definition of publication (Article 4, paragraph 4), a dramatist, a composer, a painter, a sculptor, an architect of a country outside the Union will not be protected by the Convention in respect of any work of his which is performed, executed or constructed—even for the first time—in a Union country; first publication of their works must have taken place there. The difference is not very marked, and it may be felt that the Union is generous indeed towards nationals of the countries which are not parties to it. This is true, but the Paris Conference thought—and the Berlin Conference will not disagree with it in this respect—that this generosity was worthy of the high principles which govern the Convention and might in the end have a similar effect to that of the measure by which France, more than half a century ago, granted unconditional protection to works published outside its territory.

**Term of Protection**

Reference has already been made to the French Delegation’s proposal to harmonize the term in the relations between the Union countries. The Delegation could not accept that the author’s copyright should be governed solely by the legislation of the country where protection was claimed, if the term of protection was not uniform, in view of the outrageous absence of reciprocity which would result. It has been seen that the two questions had been separated. As to the duration, the rule is that it comprises the life of the author and 50 years after his death; it is already to be found in several of the Union countries’ legislations. In their majority, the delegations of the countries which have a shorter term agreed to this rule being introduced in the Convention as a general principle; they merely reserve the action of their legislation
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The British Delegation was even more reserved, and the fact that it will sign the Act in which Article 7, paragraph 1, appears does not in any way imply that the duration thus fixed has its a priori approval; the British Government wishes to retain its complete freedom of assessment with regard to the proposals it may make to its Parliament.

The rule is very clear therefore. The term of 50 years after the death of the author will only apply at this stage in the relations between those countries whose legislation conforms. It is desirable that the other countries adopt this rule and probably most of them will do so, but they are not committing themselves. What will be the situation until uniformity is established? A work will only be protected in a country for the period laid down by that country’s law, for example, 30 years in Germany until the 1901 law has been amended; but it is not enough to be content with this, because then a German work would have to be protected for 50 years in France or in Belgium, which would be excessive, as shown earlier. It is necessary to add therefore that protection may not be claimed for a longer period than in the country of origin. In other words, as far as the duration is concerned, we maintain the interdependence, removed in other respects, of the legislation of the country of origin and the legislation of the country where protection is sought; we maintain the rule which results from a combination of paragraphs 1 and 2 of Article 2 of the 1886 Convention.

Article 7

The term of protection granted by this Convention shall be the life of the author and 50 years after his death.

However, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be governed by the legislation of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their national legislation.

This last rule has a general scope of application, and it permits satisfaction to be given to certain countries which, although having a normal term of 50 years for copyright in general, give a shorter term for some forms of this right. Thus the Norwegian Delegate observed that the Norwegian law permits a published work to be read aloud three years after its publication and the Swedish law only protects the performance of a dramatic or dramatico-musical work for the life of the author and 30 years after his death. He asked whether these two exceptions could be maintained and, if so, whether a few words should not be included to place the solution beyond doubt.

The Committee thought that no amendment was necessary as it expressly stated that each country is only bound to apply the provisions of paragraph 1 in so far as they are consistent with its national legislation. Consequently, for as long as the rules mentioned earlier subsist in Norwegian or Swedish legislation, the general rule of paragraph 1 will not be able to apply in those countries, since their domestic laws do not permit it.

This same principle means that we are spared the necessity of resolving very delicate questions in respect of which there are many differences between the laws of the Union countries.

Thus for posthumous works which come within the province of the Convention and which, as was explained earlier, it was not deemed necessary to mention expressly amongst protected works, the duration is fixed in very different ways (e.g. 30 years from the death of the author or ten years from publication in Germany, 50 years in France). There may also be difficulties for anonymous works or works published under a pseudonym. It would be difficult and without sufficient interest to seek an international rule. Let us rely on the law of the country where protection is claimed, subject to the influence of the law of the country of origin along the lines which have just been explained.

It was seen earlier that it had not been possible to agree on a uniform duration for the protection afforded to photographs. The consequence is that we confine ourselves to what has just been explained. Those countries in which
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Photographs are protected as artistic works will grant them the duration they afford to the latter—which will apply, for example, in the relations between France, Belgium and Italy. If protection is claimed in Germany for a French photograph, it will only be granted for the limited period established by the German law; if protection is claimed in France for a German photograph, the latter will not be protected there for a longer period than in Germany.

Article 7, Paragraph 3
For photographic works and works produced by a process analogous to photography, for posthumous works, for anonymous or pseudonymous works, the term of protection shall be governed by the legislation of the country where protection is claimed, provided that the said term shall not exceed the term fixed in the country of origin of the work.

On Translation
We come to one of the most important points in the Convention. As it has often been said, for literary and scientific works, between countries which do not speak the same language, copyright has little import if it is limited to reproduction and does not include translation. When the reputation of an English or French work has spread into Germany we may be tempted to translate it so that it will be accessible to German readers; we will not think of simply reprinting it. If, therefore, reproduction is forbidden and translation is permitted, this amounts to protecting the author by prohibiting something which will never happen while allowing the only possible breach of his right.

It is perhaps in relation to translation that we can gain the best idea of the progress accomplished in the process of the international recognition of copyright.

Under the treaty concluded on August 2, 1862, between France and Prussia, the author could prevent the publication of any translation he had not authorized for five years, but provided he had indicated his intention to reserve the translation right at the beginning of his work and had availed himself of that right by having an authorized translation published, at least in part, within a year and in its entirety within three years; the formality of registration had to have been completed for both the original work and the translation. There was thus a veritable plethora of conditions imposed on the author and, even if he succeeded in satisfying them, he was only protected for five years from publication of the translation. Those who negotiated treaties of this kind seem to have been thinking mainly about occasional works which must be translated almost immediately after the original publication. These conditions could hardly be met for serious works of science or history where there is no telling immediately if they will interest a foreign public, and which take a long time to translate.

The French legislation does not contain any provisions on translation. But authors and the courts had no hesitation in accepting that translation was only a method of reproduction and that, consequently, it could not be carried out without the author’s permission. This is the thesis for which the French Delegation had tried to win acceptance at the 1884 Berne Conference, but without success. The Conference had considered only that it should submit the following wish to the Governments of all the countries: ‘It would be appropriate to encourage as far as possible the tendency towards complete assimilation of the translation right to the reproduction right in general.’

The system adopted by the 1885 Conference, which is expressed in Article 5 of the 1886 Convention consists in this, that for ten years from publication of the original work authors shall enjoy the exclusive right of making or authorizing the translation of that work. No condition is imposed on them and their right is absolute during that period. On the other hand, once the period has expired the exclusive right disappears: whether there has been no translation or whether the author has made or authorized one, anyone may translate provided, of course, that the work of the author of the translation which has already been published is not appropriated, this work being protected in its own right.

This system had generally been considered only as a transition, the 1884 Conference having indicated the goal towards which the Union should strive. In 1896, the German Delegation, the Belgian Delegation, the
French Delegation and the Swiss Delegation asked for translation to be assimilated to reproduction; but it still proved necessary to make a compromise. The Conference adopted the following rule: 'Authors who are nationals of any of the countries of the Union, or their successors in title, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works throughout the term of their right in the original work.' Here we have the principle clearly asserted, but it includes a restriction: 'Nevertheless, the exclusive right of translation shall cease to exist if the author shall not have availed himself of it, during a term of ten years from the date of the first publication of the original work, by publishing or causing to be published, in one of the countries of the Union, a translation in the language for which protection is to be claimed.'

The 1896 rapporteur stated: 'Thus the principle of assimilating translation to reproduction is clearly stated in the first sentence, and our successors will only have to delete all that follows that sentence.' He certainly had no idea that he would be given the honour of actually recording the deletion.

Noting the progress of the 1884 idea, the existence of statutory and Convention provisions seen since 1896 which purely and simply assimilate translation to reproduction, and the acceptance of the reform without protest or difficulties, the German authorities thought the time had come to introduce this both equitable and logical rule in the Union. The proposal was supported by a very interesting memorandum from Dr. OSTERRIETH, who showed that the innovation was not only justified by theoretical considerations but had the backing of experience. Germany went through various systems in this regard, that of 1886, that of 1896 and, finally, the system of assimilation resulting from the 1901 Copyright Law and from various conventions concluded by Germany recently with Belgium, France and Italy. The public and publishers cannot help but be pleased about the protection granted the author, and this is understandable. Doubtless, it would appear to be easier to make a translation of a successful work cheaply without having to ask the author who may require remuneration, but the publisher is not guaranteed against competition from other translations issued by publishers who also wish to take advantage of the success. On the other hand, if the publisher has negotiated with the author and if he thus obtains a guarantee against competition, he will not only be able to remunerate the author—who does not usually ask for much—but also pay more for the translation which the author will be able to check. The public will therefore be likely to have better translations, which is the important thing. Dr. Osterrieth summarized the result of an inquiry by stating that the denial of copyright sometimes increased the quantity of translations but to the detriment of their quality.

The number of French works translated was said to have greatly increased over the last 12 years.

Mr. GEORGES LECOMTE, on behalf of the French Delegation, looked at the situation particularly from the point of view of the author's right, his moral right as much as his economic one, in supporting the German proposal, in keeping with traditional French doctrine. The author is the best judge of whether his work can be translated, and which translator is the most competent to do so: in this way he is in a position to prevent any distortion of his thought. The obligation to publish within a given time would be unjust for a number of those serious works which take a long time to spread in their country of origin first and then in other countries and which require prolonged work on the part of the translator.

Mr. HOEL, the Norwegian Delegate, outlined the evolution of his Government's ideas about translation. It was precisely because of the translation question that Norway did not sign the Convention in 1886, although it had been represented at the 1884 and 1885 Conferences. An 1893 law having granted the author an exclusive right for ten years, it was able to accede to the 1886 Convention. At the Paris Conference the experience was too recent, and the Norwegian Government did not accept the Additional Act. Recently the question was studied again; The Danish publishers consulted by Mr. Hoel on the effect that the extension of the translation right had had in their country told him that there was a lot to be gained from being protected against
competing translations and that, moreover, authors were not in the habit of making exaggerated claims. The Norwegian Delegation has therefore been instructed to accept the principle of assimilation.

These explanations are intended to show that the Union's forward march is determined by experience and, consequently, that there is no reason to be afraid of an innovation which is of great importance in terms of the complete recognition of copyright.

The principle of assimilation gave rise to fears on the part of the Netherlands Delegation; the Japanese Delegation made a proposal which was quite the opposite.

The Netherlands Delegation said that too strict a rule on translation might be an obstacle to the Netherlands joining the Union; the reasons of justice indicated in favour of the author's copyright were fully recognized, but the transition needed to be carefully contrived. A similar observation was made on behalf of the Russian Delegation. The reply we should give is that, while it desires the Union's progress, the Conference does not claim that all nations will go forward at the same pace as those whose relations have been developed by association; it understands that they want to pass through the same stages and to advance only after the same experiences. A clause will enable non-Union States to join on the basis that they confine themselves to the rules laid down either in 1886 or in 1896 (see Article 25 of the draft).

The situation could not be the same for Japan, which is a Union State. It made an extremely simple proposal: 'The translation into Japanese of a work written in a European language and vice versa shall be completely free.' What is involved here is no longer a general principle but a provision aimed at Japan's particular situation in relation to the other countries of the Union. The Japanese Delegation was kind enough to present the Conference with a Preamble (appended to the minutes of the second session) which was confirmed orally in the Committee. It laid stress on the difference which cannot be denied between the customs, practices, religion and traditions of the Japanese, on the one side, and the European and American peoples, on the other, on the difficulty of becoming acquainted, of understanding one another, which could create misunderstandings. The remedy would be the reciprocal freedom to translate, which would not have the harmful consequences for authors that it could produce in the relations between the European peoples, but rather would be to their advantage by making Western works known and even, if the translation were successful, inspiring the desire to read the original work and thus facilitating the sale of original editions. The Delegation insisted also on the difficulty of translating European works into Japanese—a difficulty which is due to the fact that the Japanese language is fundamentally different from the other languages.

We followed with great interest the ingenious arguments, presented with much art by the Japanese Delegation in support of its proposal. If we were not convinced, it was by no means for the reason which the preamble imagines: 'I am well aware,' he states, 'of the objection which will immediately be made: we Europeans, it will be said, can be proud of possessing a literary heritage which is almost inexhaustible in its wealth. If we open this treasure to you, what will you give us in exchange? The freedom to translate would be a fool's bargain from which you alone would benefit since you Orientals have no literature as such.' No, we most certainly do not think of saying any such thing and, to be prevented from doing so, we did not need the eloquent protest which follows: 'Gentlemen, it is precisely in this respect that one can judge just how necessary it is to raise barriers and facilitate intellectual contacts. Our literature is as rich as Europe's, as are also our artistic productions. It possesses sublime beauties, it abounds in remarkable works but, regrettably, it does not exist in Europe's eyes because, regrettably, it is not known. It is easy to count those who have taken the trouble to study our language and our literature, and even more so, those who have revealed their beauties to their compatriots . . . . No obstacle must prevent European genius from coming into contact with the works of nations which are latecomers to the international concert. If to the difficulties of translation resulting from natural differences in idioms and customs you also add the restrictions of the Convention on literary property, translators, disheartened, will give up the struggle.'
We can promise our colleagues from Japan that we certainly do not have the disdain they imagine for their country’s literature and art, that we very much wish to know them more and more, but we think that the remedy they propose would far from facilitate the exchanges of ideas they desire. If a Japanese person is disposed to undertake the translation of a European work, is it likely that it is the demands of the author or the publisher which prevent him from executing his plan? Sincerely, we think not. The experience noted for translations in Europe is decisive. The very difficulties of translating European works into Japanese which our colleagues pointed out so well show that such a delicate task must not be entrusted to just anyone, that it is essential for the author to have the possibility of finding out if he can have confidence in the knowledge and intelligence of the person who offers to interpret his thinking. Otherwise, the Japanese public will run a great risk of being deceived. Thanks to the author’s authorization, the translator is recommended to readers; under the Union’s system, he is protected against competition from other translators; it cannot be said therefore that this system is liable to discourage translators and to prevent intellectual relations between the West and the Far East. Finally, as Dr. Osterrieth showed so well, there would be no reason why the exception claimed by Japan should not apply to other languages which, even in the Union, are difficult to translate. A fundamental principle would thus be overturned. We draw the attention of our Japanese colleagues to these considerations and we should be happy to see their opposition disappear.

Article 8

The authors of unpublished works, who are nationals of one of the countries of the Union, and the authors of works first published in one of those countries shall enjoy, in the other countries of the Union, throughout the term of the right in the original work, the exclusive right of making or authorizing a translation of their works.

(Cf. Article 5, paragraph 1, Berne Convention as revised in Paris)

The deletion of the second paragraph of the former Article 6 will be noted, on grounds which have already been given in the preceding explanations. The above provision aims to establish the protection of the author in relation to translation; the translator’s right and the scope of this right are not involved. The translator has the right to be protected for his personal work pursuant to Article 2, paragraph 2, of the draft. Can he prevent another translation of the same work? It depends. If the author, having retained the translation right, has assigned it in full to a translator for a particular language, the translator has a monopoly and can prevent any competition. If he has simply been authorized to translate, another translation may be made providing it is not the reproduction of his. The observation applies in particular to works which have fallen into the public domain. Under the rule laid down in Paris and especially as it had been laid down in Berne, the work could frequently be copyright as far as reproduction was concerned and in the public domain as regards translation; it was especially in view of this last hypothesis that it had been deemed appropriate to include the provision—which is deleted by us as totally superfluous.

Newspaper Articles

The question of newspaper articles has always given rise to long discussions. The Berlin Conference has nothing to envy its predecessors in this regard.

Under Article 7 of the Convention as revised in Paris, the subject matter of periodicals may be divided into three categories: (1) serial novels and short stories, which are protected like any literary work, that is to say, without the author’s copyright being subject to the obligation to make any sort of reservation; (2) articles in newspapers or periodicals, which are duly protected in that the author may forbid their reproduction but their reproduction is lawful (provided their source is indicated) if he has not expressly forbidden it; (3) articles of political discussion, news of the day and miscellaneous information, which may be freely reproduced and for which prohibition cannot apply; it is not even necessary to indicate the source for this category.

Objections were raised in various quarters, where greater respect was sought for the rights
of journalists. Why was an article of political discussion, which might constitute a literary work of great value, thus left to the public in such a way that it might be freely appropriated without it even being necessary to mention the newspaper and the author’s name? It was absolutely scandalous.

The German authorities made a proposal containing several lines of thinking. There would be no change for serial novels and short stories about which, moreover, everyone was in agreement; they were literary works which were published in newspapers but were not newspaper articles as that expression was usually understood. Articles of political discussion would no longer be distinguished from other articles; they could all be reproduced if the author had not forbidden it, but the source would have to be clearly indicated. The reproduction of news of the day and miscellaneous information could not be forbidden, but the source would have to be indicated with regard to news of the day described in their first publication as telegraphic or telephone communications when they are reproduced, in full or in a modified form, within 24 hours, whether or not they constitute works to be protected (these last words clearly show that the proposal departs somewhat from the sphere of the Convention). Finally, the legal consequences of failing to provide a clear indication of the source would be determined by the domestic laws of the country where protection was claimed.

The Italian Delegation’s proposal was quite different. It extended the rule laid down for serial novels and tales to all newspaper articles, including articles of political discussion, i.e. their reproduction should be subject to the author’s express authorization. News of the day and miscellaneous information could be reproduced, but if the reproduction took place, even in a modified form, within 24 hours of their first publication, the source had to be clearly indicated; this corresponded to the same concern as the German proposal in this regard. The German rule was adopted for the legal consequences concerning the obligation to indicate the source.

The British Delegation drew close to the Italian Delegation by stating the following principle: ‘Serial novels, short stories and all other works, whether literary or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced, in original or translation, in the other countries without the authorization of the authors or their successors in title.’ Where it differed was in that it permitted articles of political discussion to be reproduced provided the source was indicated. News of the day and miscellaneous information could be reproduced under the same condition; but that would not apply to the exact reproduction of such information when they were presented in the first publication in a form which gave them a literary character.

The Belgian Delegation kindly presented a special Memorandum to the Conference (appended to the minutes of the second plenary session) in support of a proposal aiming to settle the matter. It approves the spirit of the German proposal but makes a few amendments to it. It asks the Berlin Conference to take a further step in applying the ordinary right to any work whatsoever in the literary or artistic sphere, whatever its form of publication, without other restrictions than those demanded by the very interests it is sought to protect. It therefore asserts the principle that serial novels, short stories or any other articles, whatever their object, published in the newspapers or periodicals of one of the countries of the Union, may not be translated or reproduced in the other countries without the author’s authorization—which is the ordinary right for any literary or artistic work. The purpose of this express application of the ordinary right is notably to affirm that articles appearing in newspapers or periodicals are not allowed to be reproduced in off-prints, pamphlets or volumes without the authorization of their authors. After asserting the principle, the Belgian Delegation proposes a restriction to it; it accepts that any newspaper may reproduce an article published by another newspaper provided the source and the author—if the article is signed—are indicated unless the article bears an express notice that its reproduction is forbidden (to avoid any misunderstanding, it should be stated that, in the discussion, the Belgian Delegation explained that it was not proposing any change for serial novels and
short stories which, in its view, were not newspaper articles). This system of the author's presumed authorization, the Delegation said, corresponds to the wishes expressed by the corporations concerned; it serves the interests of author-journalists, the reproduction of their articles by other newspapers being the best—and most desired—reward for their intellectual work. The option reserved for them to prohibit reproduction by a special notice safeguards their right in any eventuality. But the restriction is not justified for articles in periodicals; there are no legal grounds for applying different rules to the copyright in a literary work depending on whether it has been published on its own or in a periodical. As far as news of the day and miscellaneous information are concerned, the German proposal creates a special protection for them which is inspired, not by copyright, but by the need to protect newspapers against the plagiarism of their most rapid and dearly purchased news. The reproduction of press news should only be forbidden if it constitutes an act of unfair competition. The reproduction of any telegraphed or telephoned information received from a special correspondent which is indicated as such in its first publication shall be considered to have this character if the news is reproduced without indicating the source or before at least 24 hours have elapsed since its first publication.

The discussion thus began on these various proposals.

Agreement was reached fairly easily on certain points. Newspapers must be clearly distinguished from periodicals. The reasons which may be put forward in favour of a greater or lesser degree of facility to be allowed for reproducing daily newspaper articles does not apply at all as far as periodicals are concerned. There would thus be no need to mention the latter in an article intended to restrict copyright to some extent; silence in their regard would imply that they simply come under the system of the ordinary right. However, account must be taken of the fact that periodicals have always been mentioned, and that there could be a misunderstanding about the consequence to be drawn from the deletion of a reference to them. They thus appear in the part of the Article in which the author's copyright is clearly asserted, and they do not appear in the part in which the right is subject to a restriction. No notice of reservation will therefore be necessary in future for articles in periodicals; this is a step forward which we owe to the Belgian Delegation.

There was also agreement not to change the system for serial novels and short stories, which will continue to enjoy complete protection. It might just have been possible not to mention them any longer, since they are not true newspaper articles; but this latter expression is often given a very wide meaning and it is better to provide a formal explanation. The meaning of the term 'short stories' is less clearly apparent at first than that of the established expression ‘serial novels.’ Your Committee repeats what the 1896 report said on this subject: 'It was observed that the words short stories, linked with serial novels and as opposed to news of the day, to which reference is made in the last paragraph of the Article, had a sufficiently precise meaning, that they denoted novelettes, short tales and works of fantasy often combined in a single newspaper or magazine article. The term is equivalent to the English expression works of fiction and the German word Novellen.' In the Committee, short dialogues, short historical narratives, etc. were indicated as coming within the same line of thinking.

Agreement was also reached on articles of political discussion. The present rule, which does not allow their reproduction to be prohibited, was abandoned; their reproduction will only be permitted if the author has not expressly forbidden it. When reproduction is effected the source and, if the article is signed, the author's name must be clearly indicated. Indeed, the rapporteur only has to repeat what he already outlined in this regard in the report presented to the 1896 Conference (p. 171 of the Paris Records) in the following terms: '. . . it has been understood that the notice of source shall include not only an indication of the newspaper or periodical in which the article had appeared but also the author's name if the article is signed.' There is an improvement on two points: the author's copyright is no longer ignored as it is in the present text.

The Belgian proposal applied the rule it laid down—reproduction being permitted unless
expressly forbidden—to drawings, and this proposal was supported by the Swedish Delegation. It was not adopted. The Conference is seeking rather to extend copyright; this would be a restriction which has not been thought of before now, and in support of which it is not possible, it seems, to put forward the reasons given for certain articles. The Belgian and Swedish Delegations kindly withdrew their proposal.

The reproduction of news of the day and miscellaneous information, which are simply press news without any literary character, cannot be forbidden. It is an accepted point; they do not come within the subject matter of copyright. Press news may have been obtained by a newspaper at great expense; an unethical act may be committed by a competitor who takes them and reproduces them without indicating the source and as if he had procured them by his own means. It was this act that various proposals sought to curb: but it had to be acknowledged that, on the one hand, it would be very difficult to lay down fairly precise rules, to distinguish, for example, between the methods by which information reaches a newspaper and that, on the other, we were departing from our sphere and were entering that of unfair competition. The provisions proposed along these lines were abandoned. The Committee’s view was shown by a significant vote. It had first accepted that the reproduction of news of the day and miscellaneous information should be accompanied by an indication of the source. It ended up by adopting an entirely different proposal after a further discussion in which it was asserted in particular that the obligation would be imposed by the idea, not of protecting the copyright, but of protecting a commercial interest, which was just what we had wanted to avoid. Finally, with regard to news of the day and miscellaneous information, the Committee is proposing a formula which differs from those adopted hitherto and which it thinks is more in keeping with the truth. It is not a question of stating that their reproduction is always permitted or cannot be forbidden—which would prevent any claim even in relation to acts which quite obviously constituted unfair competition; we merely declare that the protection of the Convention does not apply here because this does not come within the province of copyright. Commercial questions may arise in this regard but they are outside our sphere.

Lastly, no difficulty arose in accepting the final part of the German proposal whereby ‘the legal consequences of failing to provide a clear indication of the source shall be determined by the domestic laws of the country where protection is claimed.’ For example, in the absence of any prohibition, an article of political discussion may be freely reproduced but the source must be indicated. What will happen if an article of this type is reproduced without any such indication? It may be held that there is unauthorized reproduction or piracy since the condition under which the reproduction was lawful has not been met. Legislators may judge that this strictly legal consequence is too severe and that a fine or even a civil compensation may suffice. Each country will be free to proceed as it thinks fit.

The French expression ‘la sanction de cette dernière obligation’ is a more concise reproduction of the words the legal consequences of the breach of this obligation. Several delegations observed that their languages did not contain any word which corresponded exactly to sanction; needless to say that in such a case it may be replaced, in the official translations, by the words underlined which have exactly the same meaning.

Leaving aside these various points on which agreement was easily reached, the Committee was faced with two conflicting proposals:

(1) ‘Serial novels, short stories and all articles, whether literary, scientific or artistic, whatever their object, published in the newspapers of one of the countries of the Union, may not be reproduced in the other countries without the authorization of the authors. Articles of political discussion published in a newspaper may be reproduced in another newspaper unless the authors or publishers have expressly declared that they forbid their reproduction. The source and, if applicable, the author’s name must be clearly indicated. The legal consequences of the breach of this obligation shall be determined by the legislation of the country where protection is claimed.’
The principle of this proposal is thus that the author's express authorization is required for all newspaper articles. There is a dispensation for articles of political discussion, in respect of which authorization is presumed unless formally prohibited, and for news of the day and miscellaneous information, which may always be reproduced.

(2) 'Serial novels, short stories and all other works, whether literary, scientific or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the authorization of the authors.

'Nevertheless, as regards the reproduction by a newspaper of an article published in another newspaper, the author is presumed to have given his authorization in the absence of any express prohibition; but reproduction may only take place if the source and, if applicable, the author's name are indicated. The legal consequences of the breach of this obligation shall be determined by the legislation of the country where protection is claimed.'

It is the opposite point of view. Apart from serial novels and short stories which, it would seem, enjoy the same status as before, the author would be presumed to have given authorization in the absence of any formal prohibition. It was principally the Belgian Delegation which defended this opinion on the grounds outlined earlier.

The majority of the Committee had adopted the first formula. An attempt was made to agree on a compromise text which everyone could accept. This attempt had been inspired by a declaration from the German Delegation that its Government would not refuse to accept for foreign newspapers what was accepted in respect of German newspapers by the 1901 Empire Law. Article 18 of that Law reads: 'The reproduction of single newspaper articles shall be lawful, provided that these articles do not bear a notice that the copyright is reserved and as long as their sense is not distorted and the source is clearly indicated. The reproduction of work of a scientific, technical and recreative nature is prohibited even in the absence of any notice that the copyright is reserved. Miscellaneous information relating to real life and news of the day included in newspapers and magazines may be lawfully reproduced.' In a spirit of conciliation, the German Delegation had accepted the following text which departed from the one it had proposed initially:

'Serial novels, including short stories, and all work of a scientific, technical or recreative nature, published in the newspapers of one of the countries of the Union, may not be reproduced in the other countries without the authorization of the authors.

'The same shall apply for other newspaper articles, including articles of political discussion, when the authors or publishers have expressly declared in the newspaper itself in which they have had them published, that they prohibit their reproduction. The source must be clearly indicated. The legal consequences of the breach of this obligation shall be determined by the legislation of the country where protection is claimed.

'The reproduction of news of the day and miscellaneous information cannot be forbidden.'

The majority of the Committee's delegations had accepted this text, which did not give complete satisfaction to their ideas, since the principle of absolute protection was not laid down for articles in general but only for certain categories of articles. The attempt to reach a compromise failed as the members of the minority did not rally to the proposed text. It is thus the principle of the second proposal which must be considered adopted.

With one accord we came to a wording which indicates the solution accepted in an unequivocal fashion. The principle is that serial novels, short stories and all other literary, scientific or artistic works published in the newspapers or periodicals of one of the countries of the Union may not be reproduced without the consent of the authors; their right is thus very clearly asserted. Then comes the restriction: a newspaper article may be reproduced by another newspaper unless its reproduction is expressly forbidden. Two points should be noted: (1) only newspaper articles are involved; periodicals are not included therefore and, as stated earlier, protection is absolute as far as they are
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concerned; in addition, the provision cannot apply to serial novels and short stories which, as explained, are not true newspaper articles: but, to remove any doubt, it was deemed necessary to say so formally; (2) only reproduction by a newspaper is involved. This is a clarification and not an innovation as this emerges from the 1896 report.

Article 9

Serial novels, short stories and all other works, whether literary, scientific, or artistic, whatever their purpose, and which are published in the newspapers or periodicals of one of the countries of the Union shall not be reproduced in the other countries without the consent of the authors.

With the exception of serial novels and short stories, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

The protection of this Convention shall not apply to news of the day or to facts having the character of mere items of press information.

(Cf. Article 7 of the 1886 Convention as revised in Paris.)

Chrestomathies

The question of chrestomathies gave rise to a very animated discussion at the 1884 Conference; it was settled there by an Article which was eventually rejected in 1885. The provision included in the 1886 Convention amounts to saying that the attempt to reach agreement on this subject was abandoned; it refers the matter back to domestic legislation and to special arrangements existing or to be concluded between the Union States. This provision may seem superfluous but, on the one hand, the Conference had wanted to show that it had duly considered a point dealt with in most conventions and, on the other, it had wanted to remove an element of doubt which could have arisen in that the Additional Article of the 1886 Convention stipulates the maintenance of existing Conventions between the contracting countries provided always that such Conventions confer on authors, or their successors in title, rights more extensive than those granted by the Union; obviously, when provisions are laid down on chrestomathies, it is to limit the copyright of the authors whose writings are included in these collections and not to extend it. As the Convention affirmed the author's absolute right in relation to reproduction, it could have been maintained that it negated the earlier provisions restricting it.

Since the 1886 provision is to be retained in the new Convention, it is worth including a passage here from the 1885 report: 'During the discussion that took place in connection with this Article, it was asked whether it covered the right of quotation, and the Spanish Delegation in particular wished to know whether such quotations as were necessary in commentaries, critical studies or other scientific or literary works were authorized under the Article concerned. The French Delegation said that, in spite of the lack of legal provisions in the legislation of its country, concerning the right to quote, that right has always been recognized by case law. The delegations of the other countries, several of which did have legal provisions on the subject, endorsed the above statement with respect to their countries.'

Article 10

As regards the right to include excerpts from literary or artistic works for use in publications for teaching purposes, or having a scientific character, or for chrestomathies, the effect of the legislation of the countries of the Union and of special arrangements existing or to be concluded between them is not affected by this Convention.

(Article 8 of the 1886 Convention)

Public Performance of Musical Works

Performance of Dramatic or Dramatico-Musical Works

Article 9 of the 1886 Convention was not amended in 1896. It had given rise to a discussion, however. Under the third paragraph of this Article, the author's consent is not required for the public performance of published musical works unless the author has expressly
declared on the title page or commencement of the work that he forbids the public performance thereof. It was argued that the author should not be compelled to affirm that he intends to exercise his rights and that it should not be assumed from his silence that he abandons them. The French authorities proposed deleting this requirement but they met with total opposition from certain delegations which asserted in particular that, in their countries, public opinion would not accept that, in the absence of any express reservation, the author or his agents could prevent the public performance of his musical works under certain circumstances (non-profit-making concerts, performances of musical works by social clubs, students, military bands); nobody questioned the fact that there was progress to be made in this regard, but such progress seemed to be dependent on preliminary work being done by the national legislatures, because the customs peculiar to certain countries needed to be taken into account. The 1896 Conference confined itself to stating (Resolution No. II): ‘It is desirable (...) that the legislation of the countries of the Union should fix the limits within which the next Conference could adopt the principle that published musical works must be protected against unauthorized performance without the author being obliged to give notice of reservation.’

Today the German authorities propose deleting the notice of reservation, and they rightly present this deletion as a return to the ordinary right, in view of the fact that, as the other right derived from the principal right—the right of translation and the right of representation—are guaranteed without any special condition, there are no doctrinal grounds for maintaining this requirement in respect of the performing right which is just as worthy of respect. This will also have the advantage of removing certain particular de jure or de facto difficulties. As the requirement only concerns published works, in the present circumstances it is necessary to establish a precise distinction between published and unpublished works. The compulsory affixing of the notice creates conflicts between authors and publishers, it being in the latter’s interest to avoid affixing the notice in order to facilitate the sale of the work.

Since, by deleting the requirement, the ordinary right applies, it would seem possible not to specify anything in this regard. However, the German authorities deem it useful to give a formal explanation because, first, it is a good thing to show clearly that a very old practice has been abandoned and, second, it must be fully understood that the reserved rights notice cannot be required in the country where protection is claimed by virtue of the Convention, even if the country’s legislation still makes provision for it where nationals are concerned.

The British Delegation recognized the merit of the proposed innovation; it also wants authors to be protected. But it is concerned about the situation of people who—guided by old habits—might believe in good faith that they were entitled to perform musical works on which they saw no reserved rights notice; it did not want them to be liable to severe punishment. The reply given was that the Convention required authors to be protected without specifying the form of protection. Each country is free to legislate in this regard; it may take account of the circumstances in which infringements are committed and graduate the penalties according to the circumstances. The only thing it could not do legitimately would be to make a distinction according to whether the works to be protected were national or foreign, as the same protection must be guaranteed to them all. Adoption of the proposal will not prevent Great Britain therefore from maintaining the viewpoint indicated by its Delegation.

The proposal had only met with opposition from Sweden and Switzerland, which asked for paragraph 3 of Article 9 to be retained. In a spirit of conciliation, the two Delegations withdrew their opposition.

Notable progress has thus been achieved; however, composers of music, whose copyright is thus better asserted, must not think that, henceforward, their works can no longer be publicly performed without their authorization in the territory of the Union. They have to reckon with national legislation which may authorize such performance under certain conditions and to which, in this respect, the 1886 Convention confines itself to referring the
matter, as does our draft. As an example we can give the provision contained in Article 27 of the German Copyright Law of June 19, 1901: ‘The copyright owner’s consent shall not be required for public performances of a published musical work which are not organized for any gainful purpose and which the audience may attend free of charge. Furthermore, similar performances to which the copyright owner has not given consent shall be permissible in the following cases: (1) when they take place at fairs and festivals, with the exception of musical festivals; (2) when the proceeds are to go exclusively to a charity and the performers obtain no remuneration for their services; (3) when they are organized by societies or clubs and the audience is confined to members, including their families. These provisions do not apply to the stage performance of an opera or another musical work with a text.’ This text was introduced in the German Law to comply with the wish expressed by the Paris Conference, and to make it possible to delete the reserved rights notice.

An amendment was made in the second paragraph of Article 9 of the 1886 Convention to take account of the reform introduced in relation to the right of translation. The author is henceforward protected against the unauthorized public performance of the translation of his work throughout the existence of the right in the original work.

The Swiss Delegation presented a Memorandum to the Committee concerning the translator’s rights in the performance of his translation. It observes that, as the Convention classes translations amongst protected works in principle, the logical consequence of this would appear to be that the translator also possesses, notably, the right to perform the translation publicly, subject to the restrictions placed on his right by that of the original author. However, neither the present Convention nor the German proposals seem to settle the question. It is desirable that it should be settled, states the Swiss Delegation, which is not putting forward any proposal but wants a solution to be provided and to be established by an unequivocal text.

We must thank the Swiss Delegation for having drawn our attention to this point; we are going to try and give it satisfaction without a text appearing necessary.

The situation must be examined by considering the relations between the author of the original work and the translator and the relations between the translator and third parties.

The translator has negotiated with the author of a dramatic work; the latter may have granted him only the right to publish the translation or, alternatively, both the right to translate and the right to have it performed. To determine their relations we need not look beyond their agreements.

The translator has a right of his own in his translation, as stated in Article 6 of the 1886 Convention and as repeated in Article 2, paragraph 2, of our draft. This individual right exists in all cases, that is to say, even if the translator has infringed the author’s copyright; this is what follows from the latter provision. Since the translation is protected as an original work, the translator can claim all the author’s copyright. As the author of a dramatic work enjoys the right of reproduction and the right of performance, the translator must also enjoy these two rights, without prejudice always to the rights of the original author, as Article 2, paragraph 2, of the draft states. If he has translated the work without the necessary authorization, action may be taken against him by the author in respect of the publication of the translation as well as any performance he gave of it. This would not deprive him of the right he would have to take action against a third party who appropriated his own translation in order to publish it or have it performed. In our view, this results quite clearly from assimilating a translation to an original work, as our draft does.

It seems to us that this should also come under Article 6 of the 1886 Convention, the first paragraph of which states that ‘Lawful translations shall be protected as original works.’ There we have the principle; afterwards only unauthorized reproduction is mentioned, it is true, and no reference is made to Article 9 which deals with the right of representation. However, we think that to refuse the translator the benefit of the right of representation, even under the system of the 1886 Convention, would be to interpret the provision too strictly.
Article 9, paragraph 2, does indeed only refer to the protection of the original author against the unauthorized public representation of a translation, but this is of little consequence since a translation is protected as an original work.

Article 11

The provisions of this Convention shall apply to the public performance of dramatic or dramatico-musical works, and of musical works, whether such works be published or not.

Authors of dramatic or dramatico-musical works shall be protected during the term of their right in the original works against the unauthorized public performance of translations of their works.

In order to enjoy the protection of this Article, authors shall not be bound in publishing their works to forbid the public performance thereof.

(Article 9 of the 1886 Convention)

Indirect Appropriations

Article 10 of the 1886 Convention was not amended in Paris; its purpose was to indicate the most common unlawful reproductions other than material ones; it only referred expressly to adaptations and musical arrangements. The German and French Delegations had proposed mentioning the transformation of a novel into a theatre play and vice versa; they regarded this as involving not an innovation but an interpretation. The majority accepted it willingly but had to bow to a formal objection and make do with a reference in No. 3 of the Interpretative Declaration. The same objection was not repeated this year and it was possible to include the interpretation, with a slight addition (short story or poem), in the Article itself.

Article 10 contains a second paragraph worded as follows: 'It is agreed that, in the application of this Article, the tribunals of the various countries of the Union shall, if there is occasion, conform themselves to the provisions of their respective laws.' In 1896, the French authorities asked for this paragraph to be deleted as being superfluous or harmful; they did not obtain satisfaction. The French Delegation made the same request to the Committee and no objection was raised. The provision was superfluous if it meant that the courts assess in fact whether the offending piece is indeed drawn from a novel; the power of assessment is natural and necessary, authors being fairly prone to complain of plagiarism. The provision was dangerous if the consequence of it was that a judge, acknowledging that a play has indeed been drawn from a novel, could refuse to accept the claim because his law conflicts with it. The Convention must take precedence over domestic legislation here. Of course if, under a country's constitutional provisions, the Convention has not been incorporated in legislation, or if the domestic legislation has not been amended along the lines of the Convention, a judge is bound to apply his own law, but there would be justified grounds for complaint against his Government, which would not have taken what steps were required to ensure that the Convention it had signed was respected in its territory.

We would call to mind that, pursuant to Article 2, paragraph 2, of our draft, the appropriations involved here are protected as original works without prejudice to the rights of the author of the original work.

(Article 9 of the 1886 Convention)

Mechanical Musical Instruments

The Final Protocol of the 1886 Convention states, in No. 3: 'It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical works in which copyright subsists shall not be
considered as constituting an infringement of musical copyright. 'We find in this regard the following reference in the report of the 1885 Conference: ‘In view of the difficulty of settling the question of sound reproduction, the Committee proposes that the Conference should not pronounce on whether the public performance of any musical work by means of the instruments mentioned in No. 3 is lawful or not.’

This provision, which has raised so many difficulties, was taken from a French law of 1866, enacted to keep a promise made to Switzerland in a commercial treaty dating from June 30, 1864. It has not been amended to date, but it did give rise to a discussion at the 1896 Conference. The French Delegation observed that, in granting such immunity, the Berne Convention had in mind those instruments which included their own notation and had a reproduction capability limited to certain airs. The immunity should not, it said, apply in fairness to instruments which were capable of playing an infinite number of airs by introducing—in the form of perforated cards—notations which are external to them, movable and unlimited in number. There was no longer a fusion between instrument and notation, the latter being but an edition in a particular form, which could not be lawful without the author’s consent. The proposal gave rise to quite an animated discussion and it did not prove possible to come to an agreement.

Since 1896 the manufacture of mechanical musical instruments has undergone an unexpected development; substantial industries have formed in various countries, and thousands of copies of pieces of music in ever-increasing numbers have been reproduced. The German authorities considered it entirely appropriate to look at the question again, the more so as the divergences which exist at present in this regard in the legislation and case law of the various countries create a degree of insecurity in the international trade of this industry’s products.

Before examining the proposals made by the German authorities, an outline should be given of the principal questions which have arisen in theory and practice concerning these musical instruments (phonographs, gramophones, talking or singing machines, etc.).

First of all, the right to manufacture and sell instruments reproducing tunes in which copyright subsists implies that public performances are allowed without the consent of the authors and without paying them anything at all! We saw earlier that the 1885 Conference had not wished to come to a decision in this regard. In certain countries, France in particular, it was considered that the provision constituted a restriction of copyright and could therefore not be extended. Any unauthorized performance of tunes in which copyright subsists would thus constitute an unlawful performance.

Should the provision of the 1886 Protocol be regarded as interpreting or restricting copyright? We can understand the very different solutions which will be given to the unexpected difficulties, depending on whether this general question is resolved along the former or the latter lines.

Finally, does the Protocol concern all the instruments by means of which tunes can be mechanically reproduced or just the limited number of instruments which were known in 1886 and which the negotiators could have had in mind?

Long papers can be and are written on all these questions, defences, lectures and petitions have been made, legal decisions have been rendered, wishes have been expressed. It is not for us to give an account of them here when all the elements will be found in the Union’s excellent mouthpiece, 

Le Droit d’auteur. We must look at the matter from the practical point of view and try to reconcile the conflicting interests equitably, without losing ourselves in theoretical considerations.

The German authorities proposed the following text: ‘The authors of musical works, or their successors in title, shall have the exclusive right in the countries of the Union in which their works are protected by the present Convention: (a) to transcribe these works on parts of musical instruments for the mechanical reproduction of musical works; (b) to authorize their public performance by means of such instruments.’

The general principle of the right of the author of musical works is asserted as far as reproduction and public performance are concerned; the two questions are linked together
whereas, in the Berne Protocol, reference is made only to reproduction.

After a discussion within the Committee, it was considered appropriate to make use of the option of setting up a Sub-Committee whose decisions, explained in an oral report by Dr. Osterrieth, were approved by the Committee.

With the exception of the Swiss Delegation which had proposed that No. 3 of the 1886 Final Protocol should simply be maintained, there was general agreement to assert the author's copyright in this regard, and very strong reasons, couched in excellent terms, were given in support. The right of the author and the right of the inventor of instruments must not be weighed against each other; the latter may have achieved wonders, shown true genius, but his right stops at that of others; he cannot appropriate a raw material which does not belong to him and, in this case, the raw material is precisely the musical expression. It matters little what method is used and how difficult it may or may not be to read the disk or the cylinder, the musical expression is nonetheless incorporated in that disk or that cylinder. Why should the author's consent not be just as necessary for this particular type of incorporation as it is for the reproduction of a musical work by means of printing? We see no reason to make a distinction.

Authors thus suffer a material injury, since large profits are made from the reproduction of their works without them receiving any remuneration; their interest seems to be at least as deserving as that of the manufacturers. In addition, authors suffer a moral injury as, more often than not, their works are distorted by the necessities of adaptation to the mechanical instrument; occasionally the orchestration of a piece has to be rewritten, melodies are altered because certain notes record badly; scenes have to be cut and arranged owing to the limited length of the disks. Is it acceptable that the author should have to suffer such a distortion of his work in spite of himself? He will often prefer no remuneration to a travesty. The manufacturers of phonographs claimed of course that authors were ungrateful, that the circulation of the disks or cylinders did them a twofold service by spreading their names far and wide and by making people want to procure copies of the printed edition. Authors replied that they were the best judges of their interest.

Agreement was easily reached on the principle itself to be posed and those delegations which would have preferred, to begin with, that the question of performance be kept separate did not press their point.

Article 13, Paragraph 1

The authors of musical works shall have the exclusive right of authorizing: (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

(Cf. 1886 Final Protocol, No. 3)

We must not consider only one side of the problem and adopt too rigid a stand. Strictly speaking, we could have confined ourselves to laying down the preceding principle: the authors' copyright is recognized, how will they exercise it? That is their business, it may be said: authors of literary works also have a right which they exercise in their best interests by publishing themselves—which is rare—or by going through a publisher under agreed conditions. Why should phonograph manufacturers not do the same as publishers and negotiate with the composers whose works they wish to reproduce? In the Conference itself, some delegates were in favour of this solution. After asserting the author's copyright, the German authorities added: 'Once the author has used his work or has permitted its use under the aforementioned conditions, any third party shall be able to claim the rights of transcription and public performance defined under letters (a) and (b) of the preceding paragraph, by offering equitable compensation. It shall be a matter for the domestic legislation of the countries of the Union to determine the way in which the amount of compensation will be fixed in cases of dispute.' As they state in their preamble, the German authorities were seeking to safeguard the interests of small manufacturers by protecting them both against the too heavy costs they could face as a result of excessive estimates on the part of authors and publishers and against the danger of the
establishment of monopolies in favour of some manufacturers with large amounts of capital at their disposal. This is what the obligation to grant licences would aim to do.

Thus the author's right would continue to be absolute in that he could prohibit all reproduction by a mechanical instrument; but if he had authorized a reproduction of this kind in favour of a manufacturer, other manufacturers could ask for a similar concession *in return for an equitable compensation*; if an agreement was not reached, each country's legislation would determine the way in which the compensation would be fixed.

This system of compulsory licences which exists in the German patent legislation gave rise to quite strong opposition on the part of a number of delegations whose legislation contained nothing of the kind. It was quickly ascertained that it would be impossible to come to an agreement on the terms of the restrictions which it would be suitable or opportune to place on the author's copyright. In view of this impossibility, the British Delegation proposed replacing paragraphs 2 and 3 of the German proposal by the following text: 'The reservations and conditions relating to this Article shall be determined by domestic legislation in the Union countries, each in so far as it is concerned.' A country could thus adopt the compulsory licence system with this or that method, or place another form of restriction on the author's clearly asserted copyright. In view of this impossibility, the British Delegation proposed replacing paragraphs 2 and 3 of the German proposal by the following text: 'The reservations and conditions relating to this Article shall be determined by domestic legislation in the Union countries, each in so far as it is concerned.' A country could thus adopt the compulsory licence system with this or that method, or place another form of restriction on the author's clearly asserted copyright. In view of this impossibility, the British Delegation observed, it was necessary to guard against a danger and to avoid any surprise. A country could make rules in the manufacturers' favour, permit them to reproduce tunes under conditions which were very mild for the manufacturers and very harsh for the authors. Adaptations made in compliance with these rules will obviously be lawful in that country, but could they, as such, freely enter the other countries of the Union? It is not admissible because a country which protects authors cannot be forced to suffer the import of objects which are prejudicial to their rights and particularly to the rights of its own authors. This is what the British proposal meant by the words *each in so far as it is concerned*. The idea was accepted without difficulty by everyone but it was considered that it should be expressed even more formally. First it was proposed that the provision should state that instruments manufactured in this way *could not be imported into the other countries*. This seemed too absolute. It would depend on the conventions that were concluded between the Governments or between the parties. Even in a country whose legislation took little account of authors' rights, a manufacturer could deal directly with a composer and obtain authorization from him to reproduce this or that work; there would be no reason to refuse to allow disks or cylinders manufactured under these conditions access to the country in which the authors were guaranteed the better protection. It was necessary and indeed enough for the effect of the reservations and conditions established along the lines we have in mind to be—by virtue of our Convention—strictly limited to the country which has put them in force.

Article 13, Paragraph 2

Reservations and conditions relating to the application of this Article may be determined by the legislation of each country in so far as it is concerned; but all such reservations and conditions shall apply only in the countries which have imposed them.

For many people, the rule in the first paragraph of our Article does not introduce a new right but is simply declarative of the existing right. For others, this is not the case and a real innovation is being made; moreover it is certain that, at least for certain instruments, the situation created in 1886 is being altered. As the German proposal's preamble states, this proposal aims to *remove the privilege established by No. 3 of the Final Protocol*. A part *de jure*, part *de facto* situation is changed if various opinions are to be taken into account. Are there not therefore legitimate interests and even, to some extent, established rights which must be respected? It is permissible to think so. Thus the French Delegation declared that its adherence to the principle of the German proposal was subject to the non-retroactivity of this principle. This did not raise any objection as to its substance, and agreement was reached quite easily on the wording we are submitting to you.
The new rule will apply first of all to all the works which are published after the Convention comes into force. As to works published earlier, those which have been lawfully adapted to mechanical instruments will not be able to benefit from the Convention. The character of the adaptations which have already been made will have to be determined pursuant to the legislation of the country where the adaptation has taken place. If it is in a country whose legislation prohibited the use of the work without the author’s consent, the adaptation will obviously be unlawful. It is understood, moreover, that the option left open to the countries of the Union by paragraph 2 extends to the rules laid down on the retroactive effect.

However, in those countries where the public performance by means of these instruments was considered to be unlawful in the absence of the author’s consent the protective provision of paragraph 1 (2) fully applies even for works which have already been adapted, i.e. the performance will not become lawful by application of paragraph 3.

Article 13, Paragraph 3

The provisions of paragraph 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of this Convention.

The Italian Delegation asked for Article 13 of the draft to be completed by a provision recognizing the right to seize adaptations made pursuant to paragraphs 2 and 3 of this Article and imported, without the authorization of the interested parties, into a country in which they would not be lawful. This concerned the situation in Italy where the authors’ copyright is clearly recognized and where adaptations to musical instruments cannot be made without their consent. It does not wish to be obliged to allow in adaptations which might be lawful in the countries where they were made, by application of paragraph 2 or paragraph 3 of Article 13 but which in the absence of the authors’ consent, would be unlawful under Italian legislation. The concern of our colleagues in this regard is perfectly legitimate: nobody wants to force a country to allow adaptations which it considers unlawful into its territory. This emerges in the clearest of terms from a provision which was included in the draft at the request of the Italian Delegation itself. The latter had a paragraph introduced in Article 12 of the Berne Convention (Article 16 of our draft) which ran. In these countries [where the work enjoys legal protection] the seizure shall also apply to reproductions coming from a country where the work is not protected or has ceased to be protected. It seemed to us that this provision was literally applicable to the case the Italian Delegation had in mind and that, consequently, an express provision added to Article 13 was totally unnecessary. However, on the insistence of our colleagues from Italy we agree to propose a fourth paragraph to Article 13 which would be worded as follows:

Article 13, Paragraph 4.

Adaptations made in accordance with paragraphs 2 and 3 of this Article, and imported without permission from the interested parties into a country where they are treated as infringing works, shall be liable to seizure.

Article 13 of the draft was worded with No. 3 of the 1886 Final Protocol in mind—which it aims to replace. But we must not hide the fact—and precisely due to this—that it only partly resolves the matter. Our Article only refers to musical works because the Protocol itself only refers to musical works, but phonographs do not just reproduce musical works, as the commonly used expressions talking machines or singing machines indicate. What rule should be followed for literary or dramatico-musical works which are reproduced in this way? Does the principle laid down in paragraph 1 of Article 13 not apply in full? What justification could be given for a different rule in respect of the reproduction of a tune and the reproduction of a ditty, a piece of singing, a monologue? Agreement would easily have been reached in this regard, but difficulties soon arose. Should reference be made both to performance and to reproduction, as in Article 13? Should we confine ourselves, in the case of works other than purely musical ones, to the principle itself, or add to the principle
the restrictions deriving from paragraphs 2 and 3 of Article 13? This latter solution met with very strong resistance. Those who, by way of a compromise, had accepted Article 13 of the draft because it was necessary to take account of the de facto situation created by the 1886 Protocol, did not want to consent to restrict copyright in cases which were not covered by the Protocol, that is to say, take a veritable step backwards in the protection of authors. It clearly follows from the principles of the Union that only the author of a literary work has the right to reproduce his work and that any unauthorized reproduction constitutes piracy; a domestic law which ignored this principle would be violating the Convention. For tunes, a certain degree of dispensation was introduced by the 1886 Final Protocol, but this dispensation cannot extend beyond the terms of the text which establishes it. Tunes do not include words on their own or even accompanied by music. And the scope of the expression is also fixed by the fact that in 1886 what were in mind were principally music boxes and barrel organs, which only reproduced tunes. Consequently, we noted with regret that courts sometimes misunderstood this. Thus, in a decision rendered by the Brussels Court on December 29, 1905, in proceedings instituted by the composers Massenet and Puccini against a phonograph company, we find the following passage: ‘Considering that the respondents argue that the phonograph or gramophone reproduces both the music and the words which are adapted to it; but that when, as in the present proceedings, it is a question of words which are written for the music and are inseparable from it, the tunes with words are no less musical works, coming under the terms of the Final Protocol which has not distinguished between instrumental and vocal music; that, moreover, if it were to be decided otherwise, the authors of the words would alone have grounds for complaint, whereas it is not being alleged that the respondents, who are composers of music, are at the same time the authors of the words reproduced by the appellant companies’ machines; considering that the fact cannot be ignored that the mechanical musical instruments industry, and in particular that of phonographs and their accessories, has undergone an unexpected expansion which calls for the attention of Governments; that it seems hardly equitable that, except in the case of public performances, authors should neither be able to derive any benefit from the reproduction of their works, nor oppose such reproduction as may be prejudicial to them under certain circumstances, but that it must be ruled that authors have no right as long as the Berne Convention has not been amended or denounced.’ By a decision of May 2, 1907, Belgium’s Supreme Court rejected the appeal for special reasons, the judgement pronounced being upheld by de facto findings, ‘even assuming that the Court of Appeal was wrong to extend the aforementioned Article 3 to words instead of restricting it to music.’ Thus Belgium’s Supreme Court did not come to a decision on the issue, but neither did it adopt the grounds of the appeal decision. We wish to make a point of affirming that the Berne Convention does not need to be amended for the authors of words to be protected against the reproduction of these words by a phonograph or a gramophone; that Article 13 of our Convention which refers to musical works should be understood in the same way as the 1886 Protocol which refers to musical airs. The reproduction of words—with or without music—is outside the cases provided for in our draft.

We wanted to make a point of giving these explanations because people might have been surprised at the draft’s silence on such an important part of the matter. The question concerning the reproduction or performance of sung pieces or literary pieces is left untouched by the provision of Article 13 on musical works; it must be resolved by the general principles of the Convention.

**Cinematographs**

In the last few years, cinematographs have undergone an extraordinary development and, although it may rightly be maintained that there is less reason to enact completely new rules for them than to apply to them the general principles on the matter, the French authorities thought that specific provisions should be laid down to put an end to regrettable uncertainties. That is why they asked for
the questions concerning them to be included in the programme for the Berlin Conference.

A literary work can be appropriated by means of the cinematograph; this is the case when the cinematograph produces scenically an idea taken from a novel or a dramatic work. This then comes under the terms of Article 10 of the 1886 Convention and Article 12 of our draft. By means of the cinematograph, there may well be an indirect appropriation which is only the reproduction of a literary work in the same form or in another form without essential additions or alterations. To show clearly how the questions arise in practice and how they are liable to be judged, we think it necessary to reproduce the essential part of five judgements rendered on July 7 last by the Civil Court of the Seine (First Chamber) in proceedings instituted by various authors who complained that their works had been reproduced without their authorization by means of cinematographic adaptation:

‘Considering, juridically, that the Law of July 19–24, 1793, must not be interpreted in a narrow and restricted sense, that its provisions are only enunciative; that the legislator, in fact, did not mean to protect only editions in the strict sense—which are printed or engraved—but also all methods, whatever their nature, of publication of the work which is the personal property of its author;

‘Considering that the cinematographic strip or film on which the various happenings, whether of a dramatic work, a fairy tale, a pantomime or an opera, are represented by means of a sequence of photographs and which can be read and understood by anyone by itself, without adaptation to a mechanism of some sort, must be considered to be an edition coming under the application of the law of July 19–24, 1793;

‘Considering, furthermore, that if, in the absence of dialogue, the cinematographic projection is most certainly incapable of reproducing in all its subtleties and its nuances, the analysis of characters, the psychological study to which the author of a dramatic work would have devoted himself; in certain cases and while only reproducing mimed scenes of a purely material nature, in any case constitute a performance within the meaning of the Law of January 13–19, 1791, if it brings the author’s work to life before the eyes of the viewer by means of the unfurling of successive scenes; that this is especially true in the case of fairy tales, pantomimes and opera—with settings—which particularly lend themselves to cinematographic projection;

‘Considering, without a doubt, that an author could not claim an exclusive right of property in an idea taken in itself, as this belongs, in reality, to the common fund of human thought, but that the same could not be said when, by the composition of the subject, the arrangement and the combination of the episodes, the author presents an idea to the public in a concrete form and gives it life; that the creation to which a dramatic author can claim a right of personal property consists, apart from the material form he gives this conception, in the sequence of situations and scenes, i.e. in the structure of the plan, comprising a starting point, an action and a denouement; that any undermining of this monopoly of exploitation, in whatever form it is concealed, constitutes piracy.’

Having stated these premises, the Court ruled that, in the cases which had been submitted to it, there was piracy and it based its decision on de facto considerations which differ for each judgement.

For Gounod’s Faust, for example, the Court finds ‘that the scenes represented by the cinematographic shots reproduce exactly all the scenes of the plaintiffs’ work, with décors, costumes and the accompaniment of music and singing taken from the opera, and are, so to speak, the near-slavish copy of it; that these projections, however imperfect and rapid the form in which they are reproduced, are nonetheless an adaptation of the plaintiffs’ opera and constitute therefore an infringement of the aforementioned laws, those which protect authors against the reproduction and against the performance of their works.’

The Court establishes analogies in each of the cases, and finds that the differences are not significant enough to constitute an original work.

For cinematographic projections accompanied by phonographic sound or not, this corresponds exactly to the application of the rules adopted by the Berne Convention for
adaptations. The addition of a word in Article 12 would have just sufficed, but it was considered preferable to make an Article concerning cinematographs which would be complete in itself. It will be more convenient for the parties concerned who have not necessarily penetrated the depths of our subject.

The situation which has just been outlined could be regulated by the following provision:

**Article 14, Paragraph 1**
Authors of literary, scientific or artistic works shall have the exclusive right of authorizing the reproduction and public performance of their works by cinematography.

We have just seen the cinematograph being used for purposes of reproduction or adaptation. It can also serve to give form to a creation. The person who takes the cinematographic shots and develops the negatives will also be the person who has imagined the subject, arranged the scenes and directed the moves of the actors. For example, one may wish to represent the life of Mary Stuart by means of the cinematograph; there is intellectual work consisting in choosing the principal episodes of her life—those which are of interest in themselves or which lend themselves the best to scenic action—and placing the characters in an appropriate setting. Whether the characters speak by a combination of the cinematograph and the phonograph or whether they do not speak, we have here a dramatic work of a particular genre which it must not be possible to appropriate with impunity. Doubtless a competitor could take the Mary Stuart story in his turn and combine the episodes which will take place before the eyes of the spectator, but he cannot merely reproduce someone else's work. It is still the ordinary right which applies, as the judgement quoted earlier shows very well. It is not a question of monopolizing an idea or a subject but of protecting the form given the idea or the development of the subject. Judges will assess the matter in the same way as for ordinary literary and artistic works; they are perfectly able to make such an assessment, as we have seen.

**Article 14, Paragraph 2**
Cinematographic productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Finally, to complete the parallel established between the questions concerning cinematographs and the other questions concerning literary and artistic works, it would be appropriate to introduce here a provision similar to that of Article 2, paragraph 2, of our draft. A novel has been used to plan a cinematograph’s scenes; if this work has been done without the novelist’s consent, it constitutes an act of piracy. Nevertheless, there is no reason why a competitor should appropriate a pirate’s work with impunity. This is what was explained earlier in respect of a translation.

**Article 14, Paragraph 3**
Without prejudice to the copyright in the original work the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

As can be seen, Article 14 which has just been explained is merely the application of the ordinary right and the principles laid down by our Convention.

The above also applies to processes analogous to that of cinematography, whatever development this industry may undergo and the inventive means at its disposal; this explains the last paragraph of the Article which runs as follows:

**Article 14, Paragraph 4**
The preceding provisions apply to reproduction or production effected by any other process analogous to cinematography.

**Justification to Be Given in Case of Proceedings**
In connection with Article 4, paragraph 2, of the draft it was explained that, in addition to the country of publication, protection may be requested in the other countries of the Union not only without having to complete any formality in them, but even without being obliged to justify the accomplishment of such formalities as may be required in the country of origin. This is what followed from the general principle laid down in Article 4, paragraph 2, as well as
Appendix

from the deletion of the third paragraph of Article 11 of the 1886 Convention, undertaken, at the request of the German authorities, as a consequence of this principle.

There are grounds for maintaining the other two paragraphs of this same Article 11 which merely establish very simple presumptions. It is desired that the author’s copyright can be protected without him being obliged to indicate his real name.

Article 15

In order that the author of a work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the various countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner.

For anonymous or pseudonymous works the publisher, whose name appears on the work, shall be entitled to protect the rights belonging to the author. He shall, in the absence of proof to the contrary, be deemed to be the lawful representative of the anonymous or pseudonymous author.

(Cf. Article 11 of the 1886 Convention)

Seizure of Infringing Works

Under Article 12 of the 1886 Convention, ‘Infringing copies of a work shall be liable to seizure on importation in any country of the Union where the work enjoys legal protection.’ At the Paris Conference it was explained that the import of the expressions used should not be misunderstood in the belief that, in the case in point, seizure constitutes an optional measure for the countries of the Union. It is for the interested parties that the option exists; they have recourse to seizure or not as they think fit. But if they wish to seize they must be able to do so and the legislation of Union countries is bound to enable them to do so; they may, however, lay down as they wish the forms such seizure will take and determine the authorities which are competent to effect it. The words on importation were deleted in Paris so that it would be fully understood that seizure was possible not only on importation but also inside the country.

At the Italian Delegation’s request, a new paragraph was inserted without difficulty in order to reserve the right of seizure in a country on the basis of a work which is protected there even though the reproduction comes from a country where the work was not, or has ceased to be, protected. This may arise in fairly numerous cases, notably by application of the new principle of Article 4, paragraph 2, of the draft; it will also arise in respect of adaptations of musical works which may be lawful in a country by virtue of the rules laid down pursuant to Article 13, paragraph 2, of the draft, while being unlawful in another country which is more respectful of authors’ copyright.

Article 16

Infringing copies of a work shall be liable to seizure by the competent authorities of any country of the Union where the work enjoys legal protection.

In these countries the seizure shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

The seizure shall take place in accordance with the legislation of each country.

(Cf. Article 12 of the 1886 Convention as revised in Paris)

The Individual Country’s Regulatory Right

The aim of the Berne Convention is to regulate private rights and interests; it does not interfere in any way with a Government’s regulatory right, the freedom of the press, etc. In actual fact, it was unnecessary to provide any explanations in this regard. As the 1886 Convention thought it right to do so, there is no reason for not maintaining its provision while deleting, however, the first words it is understood that which add nothing to the sense (the same deletion has been made in other Articles).

Article 17

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or
exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

(Cf. Article 13 of the 1886 Convention)

Retroactivity

Pursuant to Article 14 of the 1886 Convention, the Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain, under the reserves and conditions to be determined by common agreement. Account had to be taken of the de facto situation existing in certain countries at the time the Convention came into force, of the interests of those who might have lawfully reproduced or performed foreign works without their authors' authorization. Under No. 4 of the Final Protocol, application of the Convention on this point was to be determined either in conformity with the special provisions contained in such literary conventions as existed or were to be concluded to that effect, or, in the absence of such stipulations, in accordance with the provisions of domestic legislation. The Paris Conference did not touch Article 14 of the Convention but it did complete the Final Protocol on two points: (1) Retroactivity was applied with its provisos to the right of translation as emerging from the new wording of Article 5, paragraph 1. If, on the date of this latest text coming into force, ten years had not yet elapsed since the publication of a work, and if an authorized translation of this work had been published—all this in a country of the Union—the exclusive right of translation would be maintained, pursuant to the new Article 5, as regards the language for which use had been made of it. On the other hand, the expiration of the ten-year period, even very shortly before the new Article 5 had come into force, without an authorized translation having been issued, would have permitted a lawful translation to be made, and the new provision would not have rendered it unlawful; but, without prejudice to this translator's right, the author could invoke the provision against anyone who wanted to translate without his authorization. (2) The temporary provisions were declared to be applicable with regard to new accessions to the Union. Countries joining the Union may need to take transitional measures just as much as countries which have been party to it from the outset.

The general rule remains the same: it is appropriate to take account of the new principle laid down in Article 4, paragraph 2, of the draft, under which protection may be claimed in a country for a work which is not or which is no longer protected in the country of origin, barring a reservation in respect of the duration (Article 7, paragraph 2). Thus account no longer has to be taken of the fact that a work has fallen into the public domain in the country of origin, for example due to the failure to complete certain conditions or formalities; this will not prevent the benefit of the Convention being invoked for it in the other countries where it would be legally protected. But, of course, this would no longer be applicable if the work had fallen into the public domain in the country of origin due to the expiration of the general term of protection, because in that case it would be necessary to keep to Article 7, paragraph 2. Let us take the case of two countries, one of which provides for a term of 30 years and the other 50 years after the author's death. By the interplay of two principles, as explained earlier, it is the shorter term which serves as the norm for the relations between these two countries; consequently, as far as the latter country is concerned, a work published in the former has fallen into the public domain after 30 years, whether protection is claimed in the one or the other.

Let us now assume that the country which has a term of 30 years increases it to 50; this will not bring back the protection for those works whose authors have been dead for more than 30 years when the new term comes into force, since those works have already fallen into the public domain, but the works for which the 30-year period has not expired will benefit from the extension.

The rule particularly applies to the translation right which is assimilated under Article 8 of the draft to the reproduction right. If a work has been published for less than ten years when the Convention comes into force, it will benefit from the new protection; if it has been published for more than ten years and if, by virtue
of the Convention, translations have been lawfully published in the country where protection is claimed, it will not be possible to invoke the provision of Article 8 against the translations; that apart, the author will enjoy the benefit of the new provision.

Needless to say, in the case of an accession to the Union, the benefit of this accession will be enjoyed by works which have already been published in countries other than the acceding one; under the terms of Article 18 below, the country may regulate the transitional situation but not claim that works which were not previously protected in its territory are to be considered to have fallen into the public domain there.

Article 18
This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiration of the term of protection.

If, however, through the expiration of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

The preceding provisions shall also apply in the case of new accessions to the Union, and also to cases in which the term of protection is extended by the application of Article 7.

(Cf. Article 14 of the 1886 Convention and No. 4 of the Final Protocol)

Combination of the Convention and National Legislations
This combination relates to a proposal by the Belgian Delegation, developed in a special Memorandum (appended to the minutes of the second session). This proposal, to which the Italian Delegation expressly subscribed, is summarized in the following formula: the Convention comprises only a minimum of protection. Consequently, the Belgian Delegation states, its provisions cannot hinder the application of wider provisions established by the national law of a country of the Union and they do not in any way affect current conventions, or those which may be concluded, under the conditions provided for by Article 15 (of the 1886 Convention). The second part of the proposal, which relates to Article 20 of the draft, will not be dealt with here.

In connection with Article 4 of the draft, it was explained that the protection guaranteed by the Convention involved two elements: (1) national treatment; (2) the benefit of the Convention's special provisions. As the Belgian Memorandum observes, the first element is variable, since it depends on a great diversity of domestic legislation; the second is fixed, since it is laid down in a uniform way by the Convention itself. On the points regulated by the Convention, can Union nationals, in a country, only claim the rights expressly guaranteed by the Convention itself, or can they not benefit from the more liberal treatment guaranteed to foreigners by domestic legislation? In order not to confine ourselves to abstractions and, accordingly, to show clearly the import of the proposal, we only have to imagine that protection is requested today in Belgium for an English work which has been translated when the translation right has fallen into the public domain in Belgium by the operation of Article 5 of the Berne Convention as revised in 1896. The claim would not be justified if that Convention alone were applicable. But is it not possible to invoke the liberal provision of the 1886 Belgian Law, which assimilates translation to reproduction, and let foreign works in general benefit from this assimilation regardless of any treaty and any reciprocity, or must it be said that only the rules of the Convention are applicable? If this latter solution is accepted, the Convention then forms an indivisible whole, but it would lead to the consequence, which would be odd at least, of a non-Union author being treated better than a Union one as regards the right in question. The Dutch, by joining the Union, would hence be protected less in Belgium than they are at present, at least as far as translation is concerned.
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The Belgian and Italian Delegations think that the spirit of the Convention is contrary to a result of this kind, and that an explanation should be given, because doubts have been expressed in this regard by a number of courts.

The proposal did not meet with any objection. The Committee is submitting the following wording to you:

Article 19

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union in favour of foreigners in general.

Right of Union Countries to Conclude Special Agreements

By Article 15 of the 1886 Convention, the Governments of the countries of the Union reserved to themselves respectively the right to enter into special arrangements among themselves. This is the system of limited Unions to which reference has been made in this report's general considerations. A group of States could be formed, for example, in order to afford authors greater protection against adaptations of their works by phonograph.

An Additional Article was along the same lines. 'The Convention concluded this day shall in no way affect the maintenance of existing Conventions between the contracting countries, provided always that such Conventions confer on authors, or their successors in title, rights more extensive than those granted by the Union, or contain other provisions which are not contrary to this Convention.' It was France which had insisted on this provision, because it had conventions which afforded authors better protection than the Berne Convention, notably in relation to translation; it agreed not to go as far as it would have liked, but not to step backwards.

Difficulties and complications can result from the Berne Convention being combined with earlier conventions: frequently doubts arise as to whether certain of their provisions are still in force. On a proposal by the German Delegation, the Paris Conference expressed the following wish: 'It is desirable ( . . . ) that the special conventions concluded between countries which belong to the Union should be examined by the respective contracting parties with a view to determining the clauses which may be considered to have remained in force pursuant to the Additional Article of the Berne Convention; that the outcome of this examination should be established by an authentic act and notified to the countries of the Union by the International Office before the next conference meets.' What effect was given to this wish?

We think we should insert here the note delivered to us by the International Bureau:

'Only one group of treaties was submitted to the examination which the above-mentioned wish recommended conducting; it was the group of special literary treaties concluded in 1883 and in 1884, thus before the creation of the Union, by Germany with Belgium, with France and with Italy. In conjunction with the Governments of these countries, Germany replaced these treaties by new acts drawn up on a simpler, clearer and wider basis and which determine more precisely the transitional right as it is called (conventions of April 8, 1907, with France, of October 16, 1907, with Belgium and of November 9, 1907, with Italy). Once these new treaties had been ratified and enacted, the change which thus occurred in the international relations between Union countries was conveyed to the authorities of the signatory States of the Berne Convention by a circular from the International Bureau dated July 27, 1908.'

We thought it possible to combine the provisions of Article 15 of the 1886 Convention and the Additional Article in a single Article; it corresponds to the same idea.

1 The treaties and agreements between Union countries which still subsist will be listed in a separate table which will be published in the 'Records of the Conference,' and it is to be hoped that the movement of simplification inaugurated on Germany's initiative will be imitated, that all the texts which become superfluous or are duplicated following the enactment of this Convention will disappear, that the number of special agreements subsisting alongside the Union Convention will diminish and that the provisions maintained will be reduced to the strict minimum. There is no doubt that the countries which observe this rule will facilitate the task of their courts by making the application of the Convention easier.
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Article 20

The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Union, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

(Cf. Article 15 of the 1886 Convention; 1886 Additional Act)

International Bureau

It can only be a question of consolidating an institution which has rendered so many services and which, by its intelligent activity, has contributed a great deal to the progress of the Union. We have only to retain the existing provisions which appear either in the 1886 Convention itself or in the appended Final Protocol by including all of them in the text of the new Convention, which will simplify matters. To do so, we are using the text prepared by the German authorities.

Reference should not be made to the creation or the institution of a Bureau which has now been in operation for over 20 years, but to its maintenance.

Article 21

The international office established under the name of the 'Bureau of the International Union for the Protection of Literary and Artistic Works' shall be maintained.

That Bureau is placed under the high authority of the Government of the Swiss Confederation, which shall regulate its organization and supervise its working.

The official language of the Bureau shall be the French language.

(Cf. Article 16 of the 1886 Convention; Final Protocol No. 5, paragraph 2)

The International Bureau's role is clearly indicated in the Final Protocol, the provisions of which are reproduced in the following Article.

We merely note that this Article obliges the Bureau to supply information to the members of the Union alone: in actual fact, it supplies such information with a great deal of good grace to all those who apply to it, and this can only be useful to the Union itself.

Article 22

The International Bureau shall collect information of every kind relating to the protection of the rights of authors over their literary and artistic works. It shall coordinate and publish such information. It shall conduct studies of general utility concerning the Union, and by the aid of documents placed at its disposal by the different Administrations, it shall edit a periodical publication in the French language on questions relating to the objects of the Union. The Governments of the countries of the Union reserve the right to authorize, by common agreement, the publication by the Bureau of an edition in one or more other languages, if experience should show this to be necessary.

The International Bureau shall always place itself at the disposal of members of the Union in order to provide them with any special information which they may require relating to the protection of literary and artistic works.

The Director of the International Bureau shall make an annual report on his administration, which shall be communicated to all the members of the Union.

(Cf. 1886 Final Protocol, No. 5, paragraphs 3, 4 and 6)

The distribution of the Office's expenses is obviously determined on an arbitrary basis, but it cannot be otherwise, and no State is entitled to complain of this, since it is at liberty to choose the class in which it wishes to be placed. Not without reason was trust placed in the dignity and self-esteem of the States to ensure that the classification is effected as it ought to be.

Article 23

The expenses of the Bureau of the International Union shall be shared by the contracting countries. Until a fresh arrangement is made, they cannot exceed the sum of 60,000 francs a year. This amount may be increased, if necessary, by the simple decision of one of the Conferences provided for in Article 24.
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The share of the total expense to be paid by each country shall be determined by the division of the contracting and acceding countries into six classes, each of which shall contribute in the proportion of a certain number of units, viz.:

- Class I . . . . . . . . . . 25 units
- Class II . . . . . . . . . 20 "
- Class III . . . . . . . . 15 "
- Class IV . . . . . . . . 10 "
- Class V . . . . . . . . 5 "
- Class VI . . . . . . . . 3 "

These coefficients shall be multiplied by the number of countries of each class, and the total product thus obtained will give the number of units by which the total expense is to be divided. The quotient will give the amount of the unit of expense.

Each country shall declare, at the time of its accession, in which of the said classes it wishes to belong.

The Swiss Administration shall prepare the budget of the Bureau, supervise its expenditure, make the necessary advances, and draw up the annual account which shall be communicated to all the other Administrations.

(Cf. 1886 Final Protocol, No. 5, paragraphs 7 to 11)

Revision; Periodical Conferences

International Unions are destined to progress. No institution achieves perfection from the very start. This is especially true of an association which includes members who have not reached the same point, who are all willing to embark on the same course but who do not all want to go all the way to the end. It will be necessary to go in stages; the most advanced members will have to be patient, will have to resign themselves to stop half way in order to be more numerous there, then wait for experience, reflection and the contagion of the good example to lead to a general march forward. This report has made a point of showing the evolution which had taken place in the Union on many important points. It is precisely in the periodical Conferences that the mutual education of the partners takes place. It goes without saying that each State can only be bound by its own will.

Article 24

This Convention may be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

Questions of this kind, as well as those which in other respects concern the development of the Union, shall be considered in Conferences to be held successively in the countries of the Union among the delegates of the said countries.

The Administration of the country where a Conference is to meet shall prepare, with the assistance of the International Bureau, the programme of the Conference. The Director of the Bureau shall attend the sessions of the Conferences, and shall participate in the discussions without the right to vote.

No amendment to this Convention shall be binding on the Union except by the unanimous consent of the countries which are members of it.

(Cf. Article 17 of the Convention; Final Protocol, No. 5, paragraphs 5 and 6)

Accessions

The principle is that States outside the Union may join it at their request, and it is our keen desire that the circle of our association should widen. We have already mentioned a difficulty which then arises. Our Union has been functioning for 21 years; it has grown stronger; it ensures the protection of literary and artistic works in an increasingly effective manner. Is it going to require that the States in which this protection is not yet as effectively guaranteed, in which practices exist which conflict with the international recognition of copyright, should reach the point it has reached by stages at their first attempt? Some of our associates have not yet followed the main body of the company; should newcomers be treated more harshly? We could have let the original Convention subsist and allow those who, on certain points, for example on that of translation, do not wish to go any further for the time being, to accede to it. This is what we had thought to begin with.
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But is it not preferable for the States to accede to our new Convention subject to reservations on the points which they do not feel able to accept for the moment? Thus they will be able to benefit from all the improvements we think we have made in the Union's system, and we too will benefit from these in our relations with them. In notifying their accession they will indicate the provisions to which, provisionally, they do not think they can subscribe. Does this mean that they could replace these provisions with others which suit them? Of course not, that would be anarchy. They will be able to choose the provisions they prefer in the 1886 Convention or the 1896 Additional Act. Obviously this will not be a very simple situation, but we must hope that the acceding States do not abuse this power to make reservations, and that gradually they will come to adopt the Union's statutes as a whole. It is essential not to want to go too fast and to let matters take their course.

Article 25

States outside the Union which make provision for the legal protection of the rights forming the object of this Convention may accede thereto on request to that effect. Such accession shall be notified in writing to the Government of the Swiss Confederation, which shall communicate it to all the other countries of the Union. Such accession shall automatically entail acceptance of all the provisions and admission to all the advantages of this Convention. It may, however, contain an indication of the provisions of the Convention of September 9, 1886, or of the Additional Act of May 4, 1896, which they may judge necessary to substitute, temporarily at least, for the corresponding provisions of this Convention. (Cf. Article 18 of the 1886 Convention)

Accession of Colonies

The Convention does not extend automatically to colonies. However, contracting States may extend it to them by a declaration of their wish to do so when signing or ratifying the Convention or by a subsequent notification. The principle of Article 18 of the 1886 Convention should be maintained with the added proviso that the accession of colonies subsequent to ratification must be the subject of a notification in the same way as the accession of a State. Needless to say that the declarations made in 1886 and 1887 by Spain, France and Great Britain concerning their possessions or colonies (Record of Signature of September 9, 1886, and Protocol of the Exchange of Ratifications of September 5, 1887) remain fully valid.

Article 26

Contracting countries shall have the right to accede to this Convention at any time for their colonies or foreign possessions. They may do this either by a general declaration comprising in the accession all their colonies or possessions, or by specially naming those comprised therein, or by simply indicating those which are excluded. Such declaration shall be notified in writing to the Government of the Swiss Confederation which will communicate it to all the other countries of the Union.

(Cf. Article 19 of the 1886 Convention)

Effect of the New Convention as Regards Its Earlier Acts

The Convention we are preparing is meant to replace the Acts which have preceded it. Obviously it will only be possible for this effect to be produced in the relations between those States which accept the new Convention in its entirety. As to those which remain outside it, the relations between them and with the other States will continue to be governed by the previous Acts, that is to say, by the Acts of 1886 and 1896 or by the 1886 Convention alone, as the case may be.

One could imagine a State which had acceded to the 1886 and 1896 Acts for its colonies signing the new Convention for itself alone, and leaving its colonies under the earlier system. An intermediate situation is also possible, that of a Union State which duly accepted the new Convention as a whole but made reservations on this or that point. It is to be desired and even to be hoped that our associates will not be tempted to make numerous reservations of this kind, as considerable sacrifices have been
accepted in order to reach an agreement. But after all, a State may not wish to accept one or two of the new solutions. Can it be told all or nothing? You will accept the new Convention in its entirety or you will remain under the previous system. This does not seem possible. We cannot treat a Union State worse than a non-Union one. Since we are allowing the latter to accede to the new Convention subject to reservations, a Union State will be able to do the same. However, the situation is not identical in that we can indeed agree to a Union State not following us and stopping at the point at which it is at that moment, but not to it stepping backwards. For instance, a State is currently bound by the 1886 Convention and the 1896 Additional Act; it is not happy with the rule laid down by the new Article 8 on the right of translation; it may confine itself to Article 5 of the 1896 Additional Act, which will govern its relations with the other States, but not return to Article 5 of the 1886 Convention.

The reservations, should they be necessary, would be made on exchanging ratifications, which would permit reflection and could give reason to hope that, on considering the work as a whole, a State would consider it sound, despite the regret it might have felt at the time that its opinion did not prevail on this or that point.

Article 27

This Convention shall, as regards relations between the contracting States, replace the Berne Convention of September 9, 1886, including the Additional Article and the Final Protocol of the same date, as well as the Additional Act and the Interpretative Declaration of May 4, 1896. These Acts shall remain in force in relations with States which do not ratify this Convention.

The signatory States of this Convention may declare at the exchange of ratifications that they desire to remain bound, as regards any specific point, by the provisions of the Conventions which they have previously signed.

Ratification and Implementation

The clauses on this subject cannot present any difficulty and do not require any comment. We are proposing to give a fairly long time limit for the exchange of ratifications.

Article 28.

This Convention shall be ratified, and the ratifications exchanged at Berlin not later than July 1, 1910.

Each contracting party shall, as regards the exchange of ratifications, deliver a single instrument, which shall be deposited with those of the other countries in the archives of the Government of the Swiss Confederation. Each party shall receive in return a copy of the records of the exchange of ratifications, signed by the Plenipotentiaries who took part.

(Cf. Article 21 of the 1886 Convention and No. 7 of the Final Protocol)

Article 29

This Convention shall be put in force three months after the exchange of ratifications, and shall remain in force without limitation as to time until the expiration of a year from the day on which it has been denounced.

Such denunciation shall be made to the Government of the Swiss Confederation. It shall only take effect in regard to the country making it, the Convention remaining in full force and effect for the other countries of the Union.

Notification of the Decisions Taken by the Contracting States with Regard to the Term of Protection and the Renunciation of Their Reservations

Developments may take place in the various countries of the Union which they all have an interest in knowing about, because they have consequences for the relations governed by the Convention.

Thus, under Article 7 of the draft, the term of protection comprises the life of the author and 50 years after his death. Not all the States are ready to apply this provision, because the legislation of some of them only recognizes a shorter term, 30 years for example. Until such legislation is changed, it is the 30-year term which will be taken into consideration in those
States’ relations with those which have a 50-year term. But let us suppose that a State which hitherto had only 30 years amends its legislation and introduces the 50-year period; it is a development which interests all the other States of the Union, especially those which already have 50 years since, in future, that 50-year period will apply in their relations with the State whose legislation has just been amended. It is essential therefore that this development is properly notified to everyone.

Some Union States may only ratify the Convention subject to reservations, maintaining the existing rule on this or that point. It is to be hoped that this will only be a temporary situation and that, after a time, they will abandon their reservations and accept the new Convention in its entirety. The same thing may take place as regards the non-Union States which, although anxious to join the Union, wish to make some intermediate stops before joining us. Tomorrow, for certain points which are of special interest to them, it will be the 1886 rule that they prefer; the day after it will perhaps be the 1896 one, unless they go beyond this stop to arrive at 1908 immediately. It is also essential that the various decisions taken along the lines which have just been indicated should be brought to everyone’s attention.

Needless to say the Union’s mouthpiece, *Le Droit d’auteur*, will most certainly announce the matter in its *Official Part*, and draw attention to developments of such interest to the Union, but its notice cannot replace a diplomatic communication which must motivate official action on the part of the various Governments.

The States thus notified will take such measures as are necessary to enable the new situation to produce its effects in their territories. For example, an official promulgation will inform the courts and individuals. Accordingly, we are submitting the following wording to you.

**Article 30**

The States which shall introduce in their legislation the duration of protection for fifty years provided for in Article 7, first paragraph, of this Convention, shall give notice thereof in writing to the Government of the Swiss Confederation, which shall immediately communicate it to all the other States of the Union.

The same procedure shall be followed in the case of the States withdrawing the reservations made by them in accordance with Articles 25, 26 and 27.

In conformity with a practice adopted in recent years, a sole copy of the Act will be made, bearing the signatures of the various Plenipotentiaries; certified true copies will then be remitted to the various Powers through diplomatic channels. This simplifies matters considerably.

We confidently submit to you the draft which, after you have adopted it, will become the Union’s charter. It is the result of great labour which was accomplished during the Conference and also before it. It is a work of tradition and of progress at the same time; we have remained faithful to the spirit of our predecessors; on many points we have followed their indications, given satisfaction to their wishes; we have been fortunate enough to eliminate a number of restrictions to which they had to resign themselves. It will suffice to cite the case of some works of art which, after spending a period in the Final Protocol, have gone on to enter the Convention itself; the right of translation recognized with the scope the 1884 Conference had already assigned to it; the notice of reserved rights required for the performance of musical works, which we have succeeded in eliminating. For the really new matters dealt with, for phonographs and cinematographs, we were inspired above all by the general principles which had already been laid down in 1886 and 1896. We have respected the autonomy of domestic legislation as far as possible. It is to be noted, indeed, that the Convention does not ask any State to sacrifice a fundamental principle. Ideas are still very divergent as to the nature of the copyright belonging to the author of a literary or artistic work. Is it a concession on the part of legislation or does it merely recognize and regulate it? As members of the international Union, it is not for us to take a stand on this serious question. That is why, in 1885, it was decided not to use the expression *literary and artistic property*, which some preferred and the majority had adopted. Reference was made to the protection of literary and artistic works because in that way nothing is prejudged. It is enough for us that a State protects the works with which we are concerned, without us needing to know on what basis it protects them. If, in some of our texts,
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reference is made to rights granted by domestic legislation, it should not be thought that we have taken a stand on the serious question of the nature of copyright: from the position we take here, rights granted and rights recognized are absolutely synonymous expressions.

In appearance it would seem that we have achieved maximum simplicity, since we are providing you with the single text called for by the wishes of the Paris Conference. The reality is not so brilliant, and we do not hide the fact. The new Convention will only put an end to the previous Acts in the relations between the States which sign it and, consequently, it is to be feared that these Acts will subsist for some. Furthermore, we have accepted the fact that signatory States, on ratification, could make reservations and that non-Union States, on joining, could also prefer the earlier right. This will necessarily produce something of a mixture, white we do have the Union, we do not have unity. This should not come as a surprise: simplicity is not achieved at the first attempt and complexity should not be regretted when it is the only means of guaranteeing the freedom of some and of bringing about the accession of others. Time will do its work, the anomalies will disappear, the notifications referred to in our last article will announce their gradual disappearance and a time will come when all the provisions of our Convention will be the only ones to apply. Let us also hope that our Union will develop externally, that it will come to include all the European States and even gain members from across the seas. It would be a glorious triumph for international law in a limited but extremely interesting sphere.

And now permit the Rapporteur to end with a personal word. He would like to make a point of expressing his sincere gratitude for the kindness you have all shown him in carrying out his duties as Chairman, for the assistance which the members of the Drafting Committee have given him especially, and thanks to which he hopes to have succeeded in providing you with an exact commentary on your decisions. He would add his particular gratitude to our devoted Secretary General, Mr. ROTHILSBERGER, who, with tireless zeal, has been his real collaborator in an often delicate task. It is not without a touch of melancholy that, after participating in the creation and development of a piece of work which is dear to him, the Rapporteur sets down his pen and sincerely hopes that his successors will receive the same kind assistance.

Louis Renault
Committee Chairman and Rapporteur

Records of the Conference
Convened in Rome May 7 to June 2, 1928

Reports

I. Memorandum by the Italian Delegation Concerning the Protection of the Personal (Moral) Rights of the Author

The Italian Delegation proposes the addition to the Convention of the following text:

'Article 6bis

Independently of the protection of economic rights provided for in the following articles, and notwithstanding any assignment, the author shall at all times have:

(a) the right to claim authorship of the work,
(b) the right to decide whether the work should appear,
(c) the right to object to any alteration of the work that would be prejudicial to his moral interests.

It shall be a matter for the domestic legislation of the Contracting Parties to introduce provisions to regulate the above rights, and especially to reconcile the exclusive right of publication with the dictates of the public interest, as well as to reconcile the right mentioned under (c) with the right of the owner of the physical object embodying the work.