

The Universal Copyright Convention

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The contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows:¹

The Universal Copyright Convention, adopted at Geneva on September 6, 1952, is a landmark in the field of copyright law.² It creates no new law of copyright, but in harmonizing existing national systems, on a simplified reciprocal national treatment basis,³ it represents the culmination of more than five years of preparatory work. It represents a contract, through a plan of copyright, between groups of countries until then radically opposed to one another.⁴ For the first time, countries in the Pan-American area, adherents to Berne, and those in neither orbit, combined to establish a workable system of international copyright.⁵ All parts of the free world were represented—all concepts of jurisprudence followed in such parts were made known. The impact and importance of this Convention to the peoples of the free world may, in some measure, have been the cause for the absence from the Convention of the Soviet Union and her satellite lackeys. The Convention accepts the fact that divergent concepts exist and provides for a pragmatic accommodation for them—it is a realistic and workable treaty.⁶

Following a proposal made at the First General Session of the General Conference of Unesco, held in Paris in 1946,⁷ a meeting of copyright ex-

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¹ Preamble, Universal Copyright Convention.

² Schulman, *A Realistic Treaty*, AMERICAN WRITER, November, 1952.

³ Report of Edward A. Sargoy, Chairman of the American Bar Association, Committee on International Copyrights, May 15, 1953.

⁴ LE DROIT D'AUTEUR, November 15, 1952, pp. 135-139.

⁵ Schulman, *A Realistic Treaty*, AMERICAN WRITER, November, 1952.

⁶ *Ibid.*

⁷ I COPYRIGHT BULL., UNESCO, No. 2, December 1948, p. 70.

perts took place in Paris in September, 1947,⁸ at which time there was promulgated a series of recommendations adopted at the Second Session of the General Conference of Unesco, held in Mexico City in November of 1947,⁹ among them being a resolution that Unesco should consider the problem of improving copyright on a worldwide basis.¹⁰ The second meeting of the experts took place in Paris in July of 1949 and, following the meeting, a request for views was submitted to all governments of the world.¹¹ The third meeting of experts to consider the views expressed and to develop the underlying principles of a universal copyright convention was held in Washington in October and November of 1950,¹² and the principles developed at that meeting were circulated to all governments. A committee of copyright specialists, consisting of representatives of governments, meeting as part of the General Conference in Paris in June of 1951, considered the replies received¹³ and prepared and circulated a draft of a proposed Convention. The replies from the various governments were analyzed by the Copyright Division of Unesco and circulated in advance of the Geneva Conference that took place August 18-September 6, 1952.¹⁴

The Convention was signed by the United States and thirty-five other countries; four other countries subsequently added their signatures.¹⁵

⁸ I COPYRIGHT BULL., UNESCO, No. 2, December 1948, p. 70. Dr. Edith Ware and John Schulman represented the United States on the Committee.

⁹ I COPYRIGHT BULL., UNESCO, No. 2, December 1948, p. 62.

¹⁰ I COPYRIGHT BULL., UNESCO, No. 1, July 1948, p. 2.

¹¹ II COPYRIGHT BULL., UNESCO, Nos. 2-3, 1949, pp. 162, *et seq.* Luther Evans, then Librarian of Congress, served as Rapporteur. The United States was also represented by Arthur Fisher, then Associate Register of Copyrights, John Schulman and Judge C. E. Wyzanski, Jr.

¹² III COPYRIGHT BULL., UNESCO, Nos. 3-4, 1950, pp. 3, *et seq.* Luther Evans, then Librarian of Congress, served as Chairman; John Schulman and Judge C. E. Wyzanski, Jr., as experts; Arthur Fisher, then Acting Register of Copyrights, as Adviser. Present as guests were many attorneys representing all aspects in the field of literary, artistic and scientific property.

¹³ IV COPYRIGHT BULL., UNESCO, No. 3, 1951, pp. 3, *et seq.* Luther Evans, then Librarian of Congress, served as a Vice-President; John Schulman and A. L. Kaminstein of the Copyright Office, were on the panel of experts.

¹⁴ At Geneva, the United States delegation consisted of Luther H. Evans, Chief; Congressmen Jos. R. Bryson and Shepard J. Crumpacker acted as advisers, as did Arthur Fisher, Register of Copyrights, Herman Finkelstein (Counsel for A.S.C.A.P.), Sydney M. Kaye (Counsel for B.M.I.), John Schulman (Counsel for the Authors' League), Arthur Farmer (Counsel for the American Book Publishers' Council), and Robert C. Dixon (Chief, Business Practices and Technology Staff, Department of State). Robert Tumbleson (Chief of the Office of Scientific Information, National Science Foundation), Jos. Greenwald (Economic Officer, Resident U.S. Delegation to International Org.), and Edward A. Sargoy acted as unofficial advisers.

¹⁵ *Countries participating and signatories of convention and all three protocols unless otherwise indicated:* Andorra, Argentina (1, 2), Australia, Austria, Belgium, Brazil, Canada, Chile (2), Cuba (1, 2), Denmark, Eire, El Salvador, Finland (2, 3), France, Germany, Guatemala, Haiti, Holy See, Honduras, India (1, 2), Israel, Italy, Japan, Liberia (1, 2), Luxembourg, Mexico (2), Monaco (1, 2), Netherlands (3), Nicaragua, Norway, Peru, Portugal, San Marino,

On June 10, 1953, President Eisenhower submitted Executive M to the Senate of the 83rd Congress, for its advice and consent to ratification of the Universal Copyright Convention. He transmitted therewith Secretary of State Dulles' report to him of June 5, 1953, on the Convention.¹⁶ Such report advised that, since the Convention was not self-executing and thus required implementing legislation, the United States would not deposit its ratification until the necessary legislation had been enacted by the Congress.¹⁷

The Convention rests on the principle of national treatment—the protection afforded to literary, artistic and scientific works of nationals of an adhering state must be no less effective than that granted to works of nationals of the adhering state in which protection is sought. Certain minima as to duration, simplification, and elimination of formalities and minimum translation rights are set forth. There is no retroactive protection. The Convention will become effective when ratified by twelve countries, at least four of whom are not members of Berne. It contains provisions as to the continuing effectiveness of Berne among the existing adherents of that Union. It does not abrogate other existing international copyright treaties and arrangements, except to the extent specifically required by the Convention.¹⁸

Spain (2), Sweden, Switzerland (1, 2), United Kingdom, United States of America, Uruguay, Yugoslavia.

Signatures were received at the end of the Geneva Conference, with these exceptions: Belgium on December 30, 1952, Japan on January 3, 1953, Israel on December 16, 1952, and Peru on December 2, 1952.

Participating countries but not signatories: Columbia, Dominican Republic, Egypt, Greece, Iran, Indonesia, Thailand, Turkey, Venezuela, Vietnam.

In addition, representatives of the following governmental and nongovernmental organizations attended: United Nations, International Labor Organization, International Civil Aviation Organization, International Telecommunication Union, International Bureau of the Universal Postal Union, High Commissioner's Office for Refugees, Organization of American States, Permanent Bureau of International Union for Protection of Literary and Artistic Works, International Institute for Unification of Private Law, International Law Association, International Literary and Artistic Association, International Federation of Societies of Authors and Composers, International Federation of Newspaper and Periodical Publishers, International Federation of the Phonographic Industry, International Union of Architects.

¹⁶ Also enclosed were copies of the Convention and three related protocols. The Convention, the President's message and all accompanying papers were referred to the Committee on Foreign Relations.

¹⁷ On July 29, 1953, Congressman Crumpacker introduced H.R. 6616, 83d Cong., 1st Sess. (1953), and on July 30, 1953, Congressman Reed introduced H.R. 6670, 83d Cong., 1st Sess. (1953) (an identical bill). Senator Langer, on August 1, 1953, introduced S. 2559, 83d Cong., 1st Sess. (1953) (also an identical bill). These bills, referred to the House and Senate Committees on the Judiciary, are intended to supply the necessary legislation to enable the United States to adhere to the Convention and will be discussed *infra*.

¹⁸ Report of Luther H. Evans, Chairman of the United States Delegation to the Secretary of State, January 15, 1953.

DEVELOPMENT OF INTERNATIONAL COPYRIGHT IN EUROPE

The right of an author in his own work—the acquired proprietary interest in intangibles—has been defined by Le Chapelier, a member of the French National Convention and the reporter of the French Copyright Law of 1793, as “the most sacred, the most unassailable, and the most personal of all forms of property.”¹⁹

Culminating in England with the Statute of Anne in 1709,²⁰ and in Europe generally in the middle of the 18th Century, there was no problem of the international protection of the author’s rights, since the privileges of protection were granted to individual publishers or authors, with the author deriving a secondhand benefit (pecuniary rights) through the protection afforded the publisher.

The Statute of Anne was the first general legislation designed to protect the rights of authors. Denmark was next with the Decree of June 7, 1741, and France, with the law of July 19, 1793, which followed the abolition of the privileges by the French Revolution, extended its provisions to those countries coming under the sway of Napoleon.²¹

The problem of protection of the author’s rights in another country now faced not only the author but governments as well, since the author’s only protection was afforded him in his own country. As was stated by Curtis:²²

The copyright law of nations knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere but in its own jurisdiction. As soon as a copy of a book is landed in any foreign country, all complaint of its republication is, in the absence of a treaty, fruitless, because no means of redress exist, except under the law of the author’s own country. It becomes public property, not because the justice of the case is changed by the passage across the sea, or a boundary, but because there are no means of enforcing the private right.

Denmark, by a Decree in 1828, extended the provisions of the law of 1741 to foreign works, on condition, however, of reciprocity—this was the

¹⁹ Francois Hepp, *The Possible Bases for a Draft Universal Convention on Copyright*, I COPYRIGHT BULL., UNESCO, No. 2, December 1948, p. 2. See Art. 27(2) of Declaration of Human Rights, adopted by the United Nations General Assembly in December, 1948: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” II COPYRIGHT BULL., UNESCO, No. 1, 1946, p. 92.

The right of the author was also recognized in the preambles of the various copyright laws passed by the original American states.

²⁰ 8 ANNE c. 19 (1709).

²¹ LADAS, *INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 18, 19 (1938).

²² CURTIS, *TREATISE ON THE LAW OF COPYRIGHT* 22 (1847). See also “Morocco Bound” *Syndicate Ltd. v. Harris*, [1895] 1 Ch. 534.

first provision for international protection of authors' rights, and was the first enactment in which the principle of reciprocity was introduced. Denmark was closely followed by Greece, which enacted similar provisions in its Penal Code of 1833.²³

As a result of the French Decree of March 28, 1852, which protected, in French territory, works published in foreign countries, and which was hailed as the broadest recognition of literary and artistic property, France, between 1852 and 1862 was able to conclude twenty-three treaties for reciprocal protection of authors' rights as contrasted with four treaties in the previous decade. Similar arrangements for the reciprocal protection of authors' rights were concluded between other countries as well, so that the rights of foreign authors gradually came to be recognized and protected.²⁴

In England, it had been held in 1831 that anyone had the right to publish a work which had first been published in a foreign country,²⁵ but this situation was rectified by the Law of July 31, 1838.²⁶ The International Copyright Act of May 10, 1844,²⁷ with its various amendments,²⁸ empowered the Crown to extend protection to works first published in a foreign country, provided that protection had been secured by such country for similar works of British subjects first published in England. This Act remained in effect until the passage of the Act of June 25, 1886²⁹ which enabled England to join Berne.

Until 1854, it had not been questioned that an alien could not acquire copyright by first publication in England, but in *Jeffreys v. Boosey*,³⁰ it was decided that English copyright would not vest in the work first published in England of a foreign author resident abroad at the time of publication.

The case of *Routledge v. Low*³¹ modified the ruling in *Jeffreys v. Boosey*, by holding that an alien became entitled to English copyright by first publishing in the United Kingdom, providing he was anywhere within the British Dominions at the time of publication.³² Nevertheless, Lord Chancellor Cairns and Lord Westbury expressed the view that actual residence in the British Dominions was not necessary and that an alien, residing outside the British Empire, could acquire valid copyright in Great

²³ LADAS, *op. cit. supra* note 21 at 22, 23.

²⁴ *Id.* at 28, 29.

²⁵ Guichard v. Mori, 9 L.J. Ch. (o.s.) 227 (1831).

²⁶ 1 & 2 Vic., c. 59 (1838).

²⁷ 8 Vic., c. 12 (1844).

²⁸ 16 Vic., c. 12 (1852); 25 & 26 Vic., c. 68 (1862); 38 & 39 Vic., c. 12 (1875).

²⁹ 49 & 50 Vic., c. 33 (1886).

³⁰ 4 H.L.C. 815, 24 L.J. Ex. 81, 3 C.L.R. 625, 1 Jur. 615 (1854).

³¹ 3 H.L. 100, 18 L.T. 874, 37 L.J. Ch. 454, 16 W.R. 1081 (1868).

³² DRONE, COPYRIGHT 230 (1879).

Britain by first publishing in the United Kingdom. This view became the accepted law, without any court decision to support it—public opinion having overruled a decision of the House of Lords.³³

As a result of the efforts of the International Literary and Artistic Association, founded in 1878, with Victor Hugo as President, the Berne Union came into being on September 9, 1886. The varied copyright laws of different countries with their burdensome formalities and complicated systems of bilateral treaties, had produced a situation of great complexity and practical difficulty in the sphere of copyright, and there had been general agreement that governments should come together to take some action to establish a common basis for protection.³⁴ An additional Act and Declaration was signed at Paris, May 4, 1896. A revision took place at Berlin, November 13, 1908, with an additional protocol signed at Berne, March 20, 1914. Two other revisions occurred—at Rome, June 2, 1928, and at Brussels, June 26, 1948.³⁵

Berne, a self-executing Convention, is a multilateral treaty as well as a uniform statute. Its essence is that an unpublished work of the national of a Convention state, and all works first published in a Convention state, are entitled to protection throughout the Convention area, and this protection may not be conditioned upon formalities.³⁶

The Revision at Brussels had, as its main aim, the establishment of more up-to-date regulations covering the newer ways of exploiting literary and artistic works (radio, films, television, etc.),³⁷ but an enumeration of the amendments will be helpful in comparing the provisions of Berne with those of the U.C.C.

The principle of direct protection resulting from the Convention itself was realized. Prior to Brussels, the Convention had relied on international legislations of contracting countries,³⁸ or had ensured protection of certain works only by obliging the countries of the Union to adopt legislation to

³³ *Falcon v. Famous Players Film Co.*, [1926] 1 K.B. 393; [1926] 2 K.B. 474, 95 L.J.K.B. 148; 42 T.L.R. 666; 70 S.J. 756, held that an alien nonresident author could obtain performance rights by first publicly performing his dramatic work in England and could acquire copyright by first publishing his work as a book, in England. The Court upheld the views of the two Justices as having been the law in England in 1886.

³⁴ De Wolf, *International Copyright Union*, 18 J. PAT. OFF. SOC'Y 33 (1936).

³⁵ The Berlin Revision replaces Berne, the additional Article and the final Protocol of Paris, but they remain in effect as to those countries which do not desire to ratify the Revision of Berlin. Berlin, Art. 27. The Rome Revision replaces Berne and the previous revisions, with a clause for reservations. Rome, Art. 27. The Brussels Revision replaces Rome and the previous revisions, with a clause for reservations. Brussels, Art. 27.

³⁶ Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] WISC. L. REV. 297, 300.

³⁷ I COPYRIGHT BULL., UNESCO, No. 2, December 1948, p. 10.

³⁸ Rome, Art. IV(2).

such effect.³⁹ The nature of the Convention underwent a change—it grew into an actual international statute.

The Convention ensures uniformity as to the works of persons protected,⁴⁰ the period of protection,⁴¹ the mode of calculation,⁴² and the presumption as to authorship.⁴³ It recognizes protection for the right to make a collection of certain speeches,⁴⁴ the right of translation,⁴⁵ the right of public performance of dramatic, musical and dramatico-musical works,⁴⁶ the right of authorizing public recitation,⁴⁷ the right of adaptation,⁴⁸ film rights⁴⁹ and moral right during the life of the author.⁵⁰

The Convention protects foreign authors, without any formalities and independent of the existence of protection in the country of origin.⁵¹ It also protects the contents of periodicals with reservation of the right of quotation, with credit to source.⁵² But it leaves to domestic legislation the extent of application,⁵³ reservations and conditions,⁵⁴ works of applied art,⁵⁵ reproduction of certain speeches,⁵⁶ radio rights,⁵⁷ recording rights,⁵⁸ translations of certain types,⁵⁹ designs and models,⁶⁰ political speeches,⁶¹ moral right after death of author,⁶² protection for cinematographic works,⁶³ *droit de suite*,⁶⁴ radiophonic recordings,⁶⁵ and retaliation.⁶⁶

³⁹ Rome, Art. II(3).

⁴⁰ Art. II.

⁴¹ Arts. I, VII(1).

⁴² Arts. VII (4, 5, 6), VII-bis.

⁴³ Art. XV.

⁴⁴ Art. II-bis. (3).

⁴⁵ Art. VIII.

⁴⁶ Art. XI.

⁴⁷ Art. XI-ter.

⁴⁸ Art. XII.

⁴⁹ Art. XIV.

⁵⁰ Art. VI-bis. (1).

⁵¹ Arts. IV (1, 2, 3, 4, 5), V, VI, (1, 3).

⁵² Arts. IX, X (1, 3).

⁵³ Arts. II(5), II-bis. (2), XI-bis. (2).

⁵⁴ Art. XIII(2).

⁵⁵ Art. II(5).

⁵⁶ Art. II-bis. (2).

⁵⁷ Art. XI-bis. (1, 2).

⁵⁸ Art. XIII (1, 2).

⁵⁹ Art. II(2).

⁶⁰ Art. II(5).

⁶¹ Art. II-bis. (1).

⁶² Art. VI-bis. (2).

⁶³ Art. VII(3).

⁶⁴ Art. XIV-bis. The term "*droit de suite*" is intended to permit the author or artist to share in the money which changes hands upon sales of his work, subsequent to the transaction wherein he transferred such work. The right exists in Belgium (Laws of June 25, 1921, September 23, 1921, October 1, 1921), Czechoslovakia (Art. 35, Laws of November 24, 1926 and April 24, 1936), France (Law of May 20, 1920), Italy (Law of May 18, 1942; decree of April 22, 1941), Poland (Art. 25, Law of 1935) and Uruguay (Art. 9, Laws of 1937 and 1938).

The Brussels revision was signed by thirty-three Union countries⁶⁷ and has been ratified by fourteen Union⁶⁸ and three non-Union countries.⁶⁹ Six Union countries failed to sign⁷⁰ and only two adhered with reservations.⁷¹

PROTECTION OF FOREIGN WORKS IN THE UNITED STATES

Works of alien authors not resident in the United States were not protected under our Copyright Law until the passage of the Chace Act of March 3, 1891.⁷² The resolution passed by the Continental Congress on May 2, 1783, which recommended the various states to secure copyright, related only to citizens of the United States. By 1786, all of the original states, with the exception of Delaware, had adopted copyright laws,⁷³ and with the exception of Maryland and South Carolina, protection was afforded only to citizens, subjects, inhabitants or residents of the United States. Maryland and South Carolina extended protection to any author.

The First Copyright Act enacted by the First Congress granted protection only to work of an author who was a citizen of the United States or a resident within the same, and Section 5 of that Act expressly sanctioned the piracy of works of alien authors.⁷⁴ These provisions were contained and carried forward in the revisions that took place in 1831,⁷⁵ 1870⁷⁶ and 1873.⁷⁷

France and Belgium apply the doctrine in every transaction, regardless of any gain, whereas the other four countries allow the author to share when there is an increase resulting from the sale. With the exception of Uruguay, the doctrine is imposed only upon works of art. Uruguay imposes it upon all works. The beneficiaries are the artist and his heirs. The amounts involved differ in each country.

⁶⁵ Art. XI-bis. (3).

⁶⁶ Art. VI(2). I COPYRIGHT BULL., UNESCO, No. 2, December 1948, pp. 10, *et seq.*; II COPYRIGHT BULL., UNESCO, Nos. 2-3, 1949, pp. 136, *et seq.*

⁶⁷ Australia, Austria, Belgium, Brazil, Canada, Denmark, Spain, Finland, France and Algeria, Great Britain and Northern Ireland, Greece, India, Eire, Iceland, Italy, Lebanon, Liechtenstein, Luxembourg, Morocco (Fr.), Monaco, Norway, New Zealand, Pakistan, Netherlands, Portugal, Sweden, Switzerland, Czechoslovakia, Tunisia, Union of South Africa, Vatican City, Hungary and Yugoslavia.

⁶⁸ Belgium, Brazil, Spain, Italy, France and Algeria, Liechtenstein, Luxembourg, Morocco (Fr.), Monaco, Portugal, Tunisia, Union of South Africa, Vatican City and Yugoslavia.

⁶⁹ Israel, Philippines, and Turkey.

⁷⁰ Poland, Germany, Bulgaria, Japan, Romania and Thailand.

⁷¹ Yugoslavia and Turkey reserved right of translation.

⁷² 26 STAT. 1106 (1891); see *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833 (2d Cir. 1910).

⁷³ Connecticut, January 4, 1783; Massachusetts, March 17, 1783; Maryland, April 21, 1783; New Jersey, May 27, 1783; New Hampshire, November 7, 1783; Rhode Island, December, 1783; Pennsylvania, March 15, 1784; South Carolina, March 26, 1784; Virginia, October, 1785; North Carolina, November 19, 1785; Georgia, February 3, 1786; New York, April 29, 1786.

⁷⁴ 1 STAT. 124, c. 15 (1790).

⁷⁵ 4 STAT. 436, c. 16, § 8 (1831).

⁷⁶ 16 STAT. 198, c. 230, § 103 (1870).

⁷⁷ REV. STAT. 968, § 4971 (1873).

On February 16, 1837, Senator Henry Clay, acting upon a petition signed by fifty-six eminent British authors, introduced a bill to extend the benefits of our Copyright Act to subjects of Great Britain, Ireland and France in the same manner as if they were residents and citizens of the United States, but conditioned upon simultaneous reprinting of the books of foreign authors in the United States—the first use of the manufacturing clause in our domestic legislation.⁷⁸ Subsequently, Senator Clay introduced like bills,⁷⁹ and on May 12, 1842, the Senate Committee reported adversely to the last bill introduced.

Attempts were made to negotiate a treaty with Great Britain, and one, the Lord Palmerton Treaty, was concluded on February 17, 1853. On February 18, 1853, the President sent it to the Senate for ratification, but the Treaty was killed when Attorney General Cushing, on February 16, 1854, advised that it would supersede our domestic copyright legislation.⁸⁰ A draft of a treaty was proposed by Lord Clarendon in 1870 which contained a manufacturing clause, but the proposal died a natural death. Criticism in the press against the draft of a treaty as proposed in 1878 by Harper & Bros. (the Publishers' Copyright Convention) caused its proponents to discontinue all activities.

The Chace Act, which contained a manufacturing clause in Section 3, extended, under certain specified conditions, the privilege of copyright to aliens by providing that the Act should apply to a citizen or subject of a foreign state when (a) such state permitted to United States citizens the benefits of copyright on substantially the same basis as its own citizens or (b) when such nation was a party to an international agreement providing for reciprocity in granting of copyright and by the terms of which the United States could become a party.⁸¹

Our present law protects works of aliens who are domiciled in this country at the time of first publication.⁸² Those not domiciled are protected only if the foreign state of which the alien author is a citizen or subject grants to United States citizens the benefit of copyright on substantially the same basis as its own citizens or protection substantially equal to the protection granted to such foreign author under our law, or when such foreign state is a party to an international agreement providing for reciprocity

⁷⁸ S. 223, 24th Cong., 2d Sess. p. 258 (1836).

⁷⁹ S. 32, 25th Cong., 2d Sess. p. 44 (1837); S. 75, 25th Cong., 3rd Sess. p. 51 (1838); S. 129, 26th Cong., 1st Sess. p. 78 (1839); S. 115, 27th Cong., 2d Sess. p. 73 (1841).

⁸⁰ 6 OPS. ATT'Y GEN. 291 (1854).

⁸¹ See note 72 *supra*. 33 STAT. 1000, c. 1432, deleted paragraph (b). 35 STAT. 1075 restored (b) and also provided for protection where foreign nations granted United States citizens protection substantially equal to protection accorded subjects of such foreign country in the United States. See *Bentley v. Tibbals*, 223 Fed. 247 (2d Cir. 1915).

⁸² A domiciled alien is not entitled to protection for his unpublished work if his country is unproclaimed. *Leibowitz v. Columbia Graphophone Co.*, 298 Fed. 342 (S.D.N.Y. 1923).

in the granting of copyright, to which agreement this country may become a party. The existence of reciprocal conditions must be determined by Presidential proclamation⁸³ with a special proclamation required for the extension of mechanical musical rights under Section 1(e) except where the original general proclamation also covered these rights.⁸⁴

The United States has never adhered to Berne, primarily because it contains concepts which are foreign to our concepts of copyright such as copyright without formalities, protection of moral rights,⁸⁵ retroactivity and also because of the requirement of our manufacturing clause. We are not a party to the Montevideo,⁸⁶ Rio de Janeiro,⁸⁷ Caracas⁸⁸ or Havana⁸⁹ Conventions and although a signatory to the Washington⁹⁰ Convention, have never ratified the same. We are parties to the Mexico City⁹¹ and Buenos Aires⁹² Conventions, but these Conventions do not apply to unpublished works.⁹³ We have copyright treaties with China,⁹⁴ Hungary(?),⁹⁵ and Thailand.⁹⁶

Generally, therefore, with the exception of the Buenos Aires Conven-

⁸³ 17 U.S.C. § 9 (1946); the proclamation does not create the right but is merely evidence of the existence of reciprocity and is conclusive on the courts until revoked by the president. *Chappell & Co. v. Fields*, 210 Fed. 864 (2d Cir. 1914). Stateless authors are protected, *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939).

⁸⁴ *Todamerica Musica v. RCA*, 171 F.2d 369 (2d Cir. 1948); *Portuondo v. Columbia Phonograph Co.*, 81 F. Supp. 355 (S.D.N.Y. 1937). Both these cases construe the application of the Buenos Aires Convention.

⁸⁵ This doctrine has been used as a club to exact additional revenue. Testimony of E. P. Kilroe, *Hearings before Committee on Patents*, 74th Cong., 2d Sess. 1012 (1936).

⁸⁶ Convention on Literary and Artistic Property, Montevideo, January 11, 1889.

⁸⁷ Convention for the Protection of Patents of Invention, Drawings and Industrial Models, Trade-Marks and Literary and Artistic Property, Rio de Janeiro, August 23, 1906.

⁸⁸ Convention on Literary and Artistic Property, Caracas, July 17, 1911.

⁸⁹ Convention of Buenos Aires on the Protection of Literary and Artistic Property, revised by the Sixth Pan-American Conference, Havana, February 18, 1928.

⁹⁰ Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Washington, June 22, 1946. Our objection to the Washington Convention was its rejection of any formality as a condition of international protection. See Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] *Wisc. L. Rev.* 297, 302.

⁹¹ Convention for the Protection of Literary and Artistic Property, Mexico, January 27, 1902. This appears applicable now only to El Salvador.

⁹² Convention on the Protection of Literary and Artistic Property, Buenos Aires, August 11, 1910.

⁹³ Buenos Aires Art. 2; Mexico City Art. 2; *Copyright Protection in the Americas*, Pan American Union, 1950, p. 13; LADAS, *op. cit. supra* note 21, at 661.

⁹⁴ Treaty of November 4, 1946. But right of translation does not exist. (Sec. 5(c) of Protocol). Our proclamation of January 12, 1949 did not accept Sec. 5(c) of the Protocol and stated that we would interpret our rights in accordance with the earlier treaty of October 8, 1903 under which the right of translation was protected for ten years from the date of registration (Art. XI).

⁹⁵ Treaty of January 30, 1910.

⁹⁶ Treaty of November 13, 1937. Published works are not protected. Art. 5(a), Law of June 16, 1931.

tion,⁹⁷ we must comply with formalities in the countries where such compliance is made necessary. We may obtain protection in Berne, through the back door, by "simultaneous publication" but that method has been questioned.⁹⁸ By such publication, Berne gives protection to the nationality of the work as being first published in a Berne Union country, but in view of the requirements of our manufacturing provisions,⁹⁹ Berne Union countries may now retaliate against the United States upon the ground that we fail to protect, in an adequate manner, the works of nationals of a Berne country.¹⁰⁰ The provisions of the British Copyright Act that publication within fourteen days may be deemed simultaneous¹⁰¹ would not protect the work in other Berne countries since the publication must be an actual simultaneous one¹⁰² and compliance with the British Act would afford protection only in that country.

At the present time, the United States enjoys reciprocal relations with 53 countries¹⁰³ but, for example, we have no protection for unpublished works in Argentina,¹⁰⁴ Austria,¹⁰⁵ Brazil,¹⁰⁶ Colombia,¹⁰⁷ Dominican Republic,¹⁰⁸ Ecuador,¹⁰⁹ Guatemala,¹¹⁰ Haiti,¹¹¹ Honduras,¹¹² Panama,¹¹³

⁹⁷ See note 92 *supra*.

⁹⁸ In *De Handelsvenn o. d. firma Uitgevers Mij. "De Combinatie" of Rotterdam v. A. H. Sarsfield Ward (Sax Rohmer)*, the Hooge Raad on June 26, 1936, held that publication in the United States and simultaneous distribution in Canada did not constitute a simultaneous publication. In the "Gone With the Wind" case, *Marsh v. Zuid Hollandsche Boeken Handel Drunkkery*, the *Sax Rohmer* decision was reversed by the Hooge Raad on May 23, 1941, and the case was remanded to the lower court. World War II interrupted further proceedings. Another case is pending involving the same question, the "Daddy Longlegs" case, *20th Century Fox Film Corp. v. Neerlandia Film Productie Maatschappij*.

There have been other decisions: *Luta v. Jacobsthal, Reichsgericht*, March 6, 1909, involving "Tom Sawyer, Detective," held that the appearance in England of a magazine published in New York did not constitute a publication because no "edition" took place in England. In *Plivinski v. Le Cointe et Cie, Tribunal of the Seine*, May 4, 1908, involving "The Merry Widow," the court held that publication in a non-Union country by a firm having a branch office in a Union country did not constitute a publication. In *Francis Day & Co. v. Feldman & Co.* (1914) 2 Ch. 728, involving "You Made Me Love You," it was held that the publication of a song in New York and Canada, and on the same day the publication of twelve copies in England was a colorable publication only. *LADAS, op. cit. supra* note 21, at 305.

⁹⁹ 17 U.S.C. § 16, 17 (1946).

¹⁰⁰ Brussels, Art. 6(2), (4).

¹⁰¹ British Copyright Act, 1911, 1 & 2 GEO. V, c. 46, § 35(3).

¹⁰² *LADAS, op. cit. supra* note 21, at 310.

¹⁰³ Annexed to the back of this issue are illustrative charts.

¹⁰⁴ Art. 13, Law 11723 of September 26, 1933. See also note 93 *supra*.

¹⁰⁵ Order of Minister of Justice, December 9, 1907, refers to published works.

¹⁰⁶ See note 93 *supra*.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Right of translation exists only in favor of native of Ecuador. Sec. 42, Law of August 3, 1887. See note 93 *supra*.

¹¹⁰ See note 93 *supra*.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

Peru,¹¹⁴ El Salvador,¹¹⁵ Switzerland¹¹⁶ and Uruguay.¹¹⁷ There is no protection for published works (unless within the definition of simultaneous publication) in Australia,¹¹⁸ Eire,¹¹⁹ Great Britain,¹²⁰ India,¹²¹ New Zealand,¹²² Pakistan¹²³ and Union of South Africa,¹²⁴ nor in Thailand.¹²⁵ There is no so-called "common law protection" for unpublished works in Australia,¹²⁶ Denmark,¹²⁷ Great Britain,¹²⁸ India,¹²⁹ New Zealand,¹³⁰ Pakistan¹³¹ and South Africa,¹³² and we have no protection whatsoever in Afghanistan, Albania, Bolivia,¹³³ Bulgaria,¹³⁴ Iceland,¹³⁵ Iran, Japan,¹³⁶ Liechtenstein,¹³⁷ Netherlands,¹³⁸ Turkey, U.S.S.R., Vatican City, Venezuela¹³⁹ and Yugoslavia.¹⁴⁰

¹¹⁴ See note 93 *supra*.

¹¹⁵ *Ibid.*

¹¹⁶ Decree of September 26, 1924.

¹¹⁷ See note 93 *supra*.

¹¹⁸ British Copyright Act, 1911, 1 & 2 GEO. V, c. 46, § 35(3); Copyright Act of 1912, Arts. 3, 8.

¹¹⁹ Arts. 154, 175, Act of 1927; see British Copyright Act, 1911, 1 & 2 GEO. V, c. 46, § 35(3).

¹²⁰ British Copyright Act, 1911, 1 & 2 GEO. V, c. 46, § 35(3).

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Treaty of November 13, 1937; Sec. 5(a), Law of June 16, 1931.

¹²⁶ Order of March 15, 1918.

¹²⁷ Order of February 22, 1913; Decree of September 12, 1933.

¹²⁸ Order of February 3, 1915.

¹²⁹ *Ibid.*

¹³⁰ Order of February 2, 1916.

¹³¹ See note 128 *supra*.

¹³² *Ibid.*

¹³³ Published works may be protected if first published in one of the signatory states. Montevideo 2.

¹³⁴ Art. 4, Law of July 11, 1921.

¹³⁵ Art. 27, Law of October 20, 1905.

¹³⁶ The United States did not notify Japan which of pre-war treaties was to remain in force; all treaties relating to copyright are at an end as of April 22, 1953. (Treaty of September 8, 1951, Art. 7). *Reciprocal relations between this country and Japan, including mechanical musical rights under Section 1(e), were established by President Eisenhower's Proclamation dated November 10, 1953.*

¹³⁷ Art. 6, Law of October 26, 1928.

¹³⁸ On November 22, 1899, Secretary of State Hay wrote to Stanford Newell of the United States Legation at the Hague, that Holland had complied with Section 13 of the Copyright Act of 1891, and that the President had issued a proclamation dated November 20, 1899, with respect to subjects of the Netherlands. On June 7, 1922, Louis Sussdorff, Jr., Charge d'Affaires at the Hague, wrote to the Secretary and stated that he had received assurance from the Foreign Office that American citizens were extended the benefits of Dutch copyright legislation, on the same basis as Dutch subjects, and with no formalities other than the placing of the author's name upon his work, where necessary, in order to secure copyright protection in Holland. On February 26, 1923, a proclamation was issued by the President, granting reciprocity on mechanical rights in the United States to the nationals of Holland. At the time of the "Daddy Longlegs" case, *20th Century Fox Film Corporation v. Neerlandia Film Productie Maatschappij*,

ARTICLES OF THE CONVENTION

The Preamble expresses the desire to assure in all countries copyright protection, without impairing existing national conventions, so as to ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts, by facilitating a wide dissemination of the works of the human mind and increasing international understanding.¹⁴¹

Proposals by other countries to cover "droit moral" were voted down, thus indicating that the Convention was concerned with "copyright" rather than the civil law definition of "droits des auteurs."¹⁴²

Art. I. Undertaking to Provide Protection

Adequate and effective protection will be afforded in each contracting state to the rights of authors and other copyright proprietors in literary, artistic and scientific works. Each country must have an effective copyright system, for the Treaty is not self-executing and, under Article X, each country at the time of the deposit of the instrument of ratification, must be in a position to give effect to the Convention.

There is neither definition nor enumeration of rights or works protected. The details are left to domestic legislation, such as coverage of oral works, architecture, industrial designs, applied art, public performance, compulsory license, moral right, etc. Berne and the various Pan-American Conventions had enumerated the works and the rights protected,¹⁴³ but it was

in 1938, it was presumed that reciprocal copyright relations existed between the United States and Holland, based on the presidential proclamations of November 20, 1899 and February 26, 1923. The Dutch Minister of Foreign Affairs caused an investigation to be made of the reciprocal copyright relations claim. It was claimed by the Dutch Government that the reciprocal copyright relations were cancelled on November 2, 1926, by a note from the Netherlands Government sent to the United States Government on that date. In the summer of 1940, there was discovered at the Dutch Embassy in Washington a note dated November 2, 1926, cancelling the reciprocal copyright relations between the two countries. On the back of the note there was endorsed a statement that a copy of the note had been delivered to the "Solicitor-General of the State Department" on November 2, 1926. There appears to be no record in the Department of State or the Office of the Solicitor-General showing that the memorandum had been delivered, and until the summer of 1940, the United States had no knowledge that copyright relations between the two countries had terminated.

¹³⁹ Arts. 172, 193, Law of 1928.

¹⁴⁰ Art. 1, Law of May 25, 1946.

¹⁴¹ The Convention is open to all countries, but Berne (Art. XVII) and arrangements among the American republics (Art. XVIII) are protected. The purpose is not to substitute a new international agreement for those already in existence.

¹⁴² Some delegations wished to refer to human rights, others desired to avoid any reference to "droit moral." The United States delegation stated that although it was a keen supporter of the Declaration of Human Rights, the covenants implementing the Declaration and not the Convention were the proper place for reference to it. Blake, Report of the Rapporteur-General, Sept. 6, 1952, V COPYRIGHT BULL., UNESCO, Nos. 3-4, 1952, p. 46.

¹⁴³ Defined and enumerated at the indicated conventions are:

felt that the rights and works should include those given to authors by civilized countries and that an enumeration was dangerous since it might be read limitatively.¹⁴⁴

Art. II. Protection for Published and Unpublished Works on a National Treatment

Each contracting state will grant national treatment to works of nationals of any other contracting state and works first published in the other contracting state. This Article establishes the basic principle upon which the Convention was founded: the principle of national treatment, but subject to the special provisions of Articles III, IV and V on formalities, duration and translation rights.

Subdivision 1 represents a fusion of the idea of national treatment (the United States) and nationality of the work (Berne), thus providing the widest scope for protection of published works. While it is true that works of Iron Curtain authors first published in one of the contracting states would thus be protected in this country, this may be a considered, calculated risk that we would have to take.¹⁴⁵

Subdivision 3¹⁴⁶ also represents a concession to the United States. This subdivision gives any contracting state the right to regard as its own national any person domiciled therein.¹⁴⁷ This allows us to retain¹⁴⁸ the same formalities and other requirements with respect to nationals of other con-

Works and rights: Berne 4, 7, 8, 9, Final Protocol; Paris 2(5), 7; Berlin 2, 3, 9, 10, 11, 13, 14; Rome 2, 2-bis, 3, 6-bis, 9, 10, 11, 11-bis, 13, 14; Brussels 2, 2-bis, 3, 6-bis, 9, 10, 11, 11-bis, 11-ter, 13, 14, 14-bis; Montevideo 3, 5, 7, 8; Mexico 2, 3, 8, 11; Buenos Aires 2, 4, 8, 9, 10, 11, 12; Caracas 3, 4, 5, 6, 7; Havana 2, 4-bis, 5, 13-bis; Washington 2, 3, 4, 5, 6, 11, 12, 14.

Unlawful acts: Berne 10; Paris 3; Berlin 12; Rome 12; Montevideo 9; Buenos Aires 13, 14; Washington 13.

Remedies: Berne 12; Paris 12; Berlin 16; Rome 16; Brussels 16; Mexico 13.

Moral right: Rome 6-bis; Brussels 6-bis; Havana 13-bis; Washington 11.

Cinematographic works: Berlin 14; Rome 3, 14; Brussels 2, 14; Havana 4; Washington 2, 3, 5.

Mechanical reproductions: Berne Final Protocol (3); Berlin 13; Rome 13; Brussels 13; Havana 5; Washington 2.

Radio: Rome 11-bis; Brussels 11-bis; Washington 2.

Television: Brussels 11-bis; Washington 2.

Public recitation of literary works: Brussels 11-ter, 12.

Title: Washington 14.

Droit de suite (see note 64 *supra*): Brussels 14-bis.

¹⁴⁴ Blake, *supra* note 142, at 46-47.

¹⁴⁵ It must be pointed out that nationals of Iron Curtain countries receive protection for unpublished works, under state law, and we still maintain reciprocal relations with Czechoslovakia, Hungary, Poland and Romania.

¹⁴⁶ Subdivision 2, relating to unpublished works, will be discussed in connection with Article III, *infra*.

¹⁴⁷ Stateless persons and refugees may be assimilated under Protocol I.

¹⁴⁸ Pursuant to 17 U.S.C. § 9 (1946).

tracting states domiciled in the United States as we impose upon our own nationals. This subdivision, together with Article III(2), will enable us to adhere to the Convention while still retaining, if we so desire, the manufacturing provisions with respect to items published in the United States as well as to works written by United States citizens, or persons domiciled herein, wherever first published.¹⁴⁹

Art. III. Elimination of and Limitations Upon Formalities

All ratifying states which, as a condition of copyright, require compliance with formalities, such as deposit, registration, notice, notarial certificates, payment of fees, local manufacture, publication, etc., undertake to exempt from these formalities works which bear the symbol © and indicate the copyright proprietor and year of first publication, in such manner and location as to give reasonable notice of claim of copyright.

Under this Article, we may still impose formalities, as a condition of copyright, in respect of works first published in this country or works of United States nationals, wherever published, as well as requiring formalities for any renewal term. The Article itself was another major concession to the United States, since it has always been our contention that copyright in published works must be asserted by notice, if protection is to be claimed, and is contrary to the concept of Berne.¹⁵⁰

At the same time, the Article provides that a state may insist upon certain procedural requirements, such as domestic counsel, or deposit, as a prerequisite to seeking judicial relief, provided that such requirements shall not affect the validity of the copyright and shall not be imposed upon

¹⁴⁹ Farmer, *Universal Copyright Convention Signed—Now Awaits Ratification*, PUBLISHERS WEEKLY, Sept. 27, 1952.

Art. II(3) and Par. 1 of Protocol I use the term "assimilate." The translation uses "domiciled" in Art. II(3) and "habitual residence" in the Protocol. In the Draft of the Convention (IV COPYRIGHT BULL., UNESCO, No. 3, 1951, p. 7) the term "permanently residing" is used and the French term "resident d'une facon permanente." The use of the various terms presents no problem since the U.S. always indicated that "domicile" must be regarded as the equivalent of nationality, and this definition is in no way in conflict with the definition of "ressortissant" as used in Berne since 1884. The term "national" depends upon domestic law and in the United States alone is the basis of protection. There is no logical reason why domicile should therefore not be regarded as its equivalent.

The United States delegation insisted that we must be allowed to assimilate persons domiciled in this country to our own nationals for the purpose of formalities and it refused to accept a proposal by France that nationals of one state who published within that state but who resided permanently in another state should be assimilated to nationals of the latter state. As to corporate bodies, anonymous and pseudonymous works, if they are protected in a particular state, that state will afford protection to entities and such works of another state. Blake, *supra* note 142, at 47-49.

¹⁵⁰ Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] WISC. L. REV. 297.

a national of another state unless imposed upon a national of the state in which protection is claimed.¹⁵¹

Subdivision 4 provides that there shall be legal means in each contracting state of protecting, without formalities, unpublished works of nationals of other contracting states. Article II(2) provides that unpublished works of nationals of each contracting state shall enjoy in each other contracting state the same protection as that other state accords to unpublished works of its own nationals.

The term "unpublished works" would seem to encompass not only those certain classes of works, prior to general publication, and not reproduced in copies for sale, copyrightable by deposit under 17 U.S.C. 12, but also works protected under the common laws in some and under statutory law in other of our states.¹⁵²

¹⁵¹ Under the doctrine of *Washingtonian Co. v. Pearson*, 306 U.S. 30 (1939), the deposit and registration may take place at any time in advance of the filing of the action, and such a deposit is not a prerequisite to the validity of the copyright.

The United States insisted that the provisions regarding formalities could only be accepted for the first term of 28 years. It was also pointed out that the existence of the symbol © on all copies could be proved by producing one copy bearing the symbol and testimony that the symbol appeared on all copies—the burden would then be upon the other party to refute this contention. The enumeration of types of formalities is by way of example, only. Blake, *supra* note 142, at 49, 51.

Specific formalities imposed: Petition with two copies, Mexico 4; reservation of right, Buenos Aires 3; notice, payment of fee, and fulfillment of requirement of deposit, Caracas 2; reservation of right, name, country of origin and of first publication, year, Havana 3.

Subject to formalities in country of origin: Berne, Interp. of Paris II(2).

Not subject to any formalities: Berlin 4(2), Rome 4(2), Brussels 4(2), Washington 9 (once protection is obtained. May have notice, year, name, address, place of origin (10) and deposit 16), but not as conditions to copyright).

Author is the one whose name is indicated: Berne 11 (although proof may be required of compliance in country of origin), Berlin 15, Rome 15, Brussels 15, Montevideo 10, Mexico 9, Buenos Aires 6, Caracas 8.

Protection is based on the law of the country where protection is claimed: Berlin 4(2) (and independent of protection in the country of origin); Rome 4(2) (and independent of protection in the country of origin), Brussels 4(2) (and independent of protection in the country of origin), Montevideo 11, Caracas 9, Washington 8.

The restriction that public performance of dramatic or dramatico-musical work may be prohibited by a statement on the title page, imposed by Berne 9, is no longer in effect: Berlin 11, Rome 11, Brussels 11.

News articles may be reproduced if not prohibited and the source is indicated: Berne 7, Paris 7, Berlin 9, Rome 9, Brussels 9, Montevideo 7, Mexico 8.

Extracts may be reproduced for educational and scientific purposes if the source is indicated: Brussels 10.

¹⁵² Germany proposed that all unpublished works should be protected without formalities. The United States stated that unpublished works were protected by common law, without formalities, and could also obtain statutory protection by registration and would support the German proposal provided it was understood that the United States was free to continue formalities for statutory copyright of unpublished works, so long as they gave protection to unpublished works without formalities, by another means, i.e., the common law. Blake, *supra* note 142, at 50.

Since there is no federal common law, and since some of our states may not in the future protect unpublished works of nonnationals,¹⁵³ it is possible that the United States will not be in a position "to insure the application of this Convention," as required under Article X(1), prior to deposit of its ratification. Thus, it may be necessary for Congress to enact legislation¹⁵⁴ to take over the protection of unpublished works without the formality of a registration, instead of leaving such matters within the hands of the respective states.¹⁵⁵

Art. IV. Duration of Protection

Duration in several countries shall not be less than certain minimum periods, which our law meets or exceeds. Duration is governed by the law of the state where protection is claimed (National Treatment) and the minimum term is not less than 25 years after death, or the term may be computed from the date of first publication, or registration, if not less than 25 years from that date.

The second paragraph in subdivision 2 was inserted to take care of situations in many countries where certain classes of works have terms computed from the date of first publication. Such countries may maintain such exceptions and may extend them to other classes of works with the minimum term of protection to be not less than 25 years from first publication. However, this minimum term of 25 years does not apply in situations of photographic works or works of applied art. A number of countries protect such works for a short term; other countries grant no protection what-

¹⁵³ Note, however, that protection has been afforded to unpublished works, under so-called "common law copyright," when the question has been presented for judicial determination. The states protecting unpublished works, either under common law or by statute, will no doubt continue to do so. See note 155 *infra*.

¹⁵⁴ Under the power to secure to authors exclusive right to their writings for a limited period of years. U. S. CONST. Art. I, § 8.

¹⁵⁵ At the present time there is statutory protection prior to first dedicatory publication. CAL. CIV. CODE § 980, *et seq.*; MONT. REV. CODES ANN. c. 11, tit. 67 (1947); N. D. REV. CODE c. 47-07 (1943); S. D. CODE tit. 51, c. 51.08 (1939); CANAL ZONE CODE tit. 3, c. 12, § 252, c. 18, § 381-386 (1934). GUAM CIV. CODE § 655, 980-985 (1947).

Other jurisdictions impose penalties for unauthorized performance of dramatic and musical works. CONN. GEN. STAT. tit. 64, c. 419 (1949); ILL. ANN. STAT. c. 38, § 489 (1951); LA. CODE CRIM. LAW & PROC. ANN. § 1303 (1943); MASS. ANN. LAWS c. 110, § 16, 27 (1946); N. H. REV. LAWS c. 207, § 8-9 (1942); N. J. REV. STAT. tit. 2, c. 108, § 108-2 (1937); N. Y. PEN. CODE § 441; OHIO CRIM. CODE c. 16, § 13, 48 (1945); ORE. COMP. LAWS ANN. tit. 23, c. 13, § 23-1307 (1940); PA. STAT. ANN. tit. 18, c. 2, § 4878 (1941); WASH. CODE § 439.1.23 (Pierce 1943); ALASKA COMP. LAWS ANN. tit. 35, c. 2, Art. 4, § 35-2-91-104 (1949).

There may be "common law" protection in Oklahoma.

There are no provisions for protection in Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, Hawaii and Puerto Rico.

See Stine, *Report on State Legislation Concerning Copyright*, Copyright Office (1950).

ever.¹⁵⁶ Therefore, where protection is given, the minimum term provided in subdivision 2 shall not apply, but the term of protection shall be not less than 10 years.¹⁵⁷ The "class of work" in subdivisions 2 and 4 includes not only kinds of work, such as photographs and cinematographic works but also recognized categories of work, i.e., anonymous, pseudonymous and posthumous. If the class to which a work belongs is not protected in the country of origin, other states need not afford protection. If the class is protected in the country of origin, the fact that the work is not protected (because of failure to comply with formalities) would not relieve other countries from protecting it.¹⁵⁸

Subdivision 4 represents a compromise between the United States and Berne—the doctrine of "comparison of terms" is an exception to the principle of national treatment. As far as our country is concerned, no state is required to protect a work first published in the United States for longer than the United States protects it, even though that other state gives its own nationals protection after death. It is thus possible that protection for a term of 56 years will be afforded if the original term is renewed. This would mean that United States works might be protected in most countries for life plus 25 years, and in other countries (where we have no protection) for at least 25 years from publication.

¹⁵⁶The United States does not protect works of applied art.

¹⁵⁷Blake, *supra* note 142, at 51, 52.

The following countries have a term of protection less than 25 years from first publication for the following classes of works ("p.p." denotes "after publication"; numerals indicate number of years):

Argentina: photographs, 20 p.p. (Art. 34, Law 11723).

Austria: photographs, 20 from taking (Art. 74, Law 111 of April 9, 1936).

Bulgaria: photographs (single), 5 p.p., photographs (collection), 10 p.p. (Art. 60, Law of July 11, 1921).

China: photographs and films, 10 p.p. (Art. 9, Law of April 27, 1944).

Czechoslovakia: photographs, 10 p.p. (Art. 41, Law of April 24, 1936).

Denmark: photographs, 10 after fulfillment of formalities (Law of May 13, 1911).

Dominican Republic: photographs, 10 p.p., films, 20 p.p. (Art. 31(4)(5), Law 1381 of March 17, 1947).

Finland: photographs, 10 p.p. (Art. 7, Law of June 3, 1927).

Hungary: photographs, 15 p.p. (Art. 69, Law LIV of December 31, 1921).

Italy: photographs, 20 from taking (Art. 92, Law 633 of April 22, 1941).

Japan: photographs, 10 from taking (Art. 23, Laws of 1899, 1931, 1934, 1944).

Norway: photographs, 15 p.p. (Art. 10, Law of May 11, 1909).

Poland: photographs, 10 from taking, films, 10 p.p., recordings, 10 from manufacture (Art. 21, Laws of March 29, 1926, March 22, 1935, July 10, 1952).

Sweden: films, 15 p.p. (Art. 7, Law 383 of May 30, 1919).

U.S.S.R.: photographs (single), 5 p.p., photographs (collection), 10 p.p. (Art. 12, Order of May 16, 1928), films, 10 p.p. (Art. 11, Order of May 16, 1928).

Venezuela: photographs, 10 from registration (Art. 164, Laws of June 28 and September 16, 1928), anonymous works, 10 from deposit (Art. 26).

Yugoslavia: films, 5 p.p. (Arts. 9, 10, Law of May 25, 1946).

¹⁵⁸See note 149 *supra*.

For the purpose of comparison of terms, the work of a national of a contracting state first published in a noncontracting state shall be considered as though first published in the state of which he is a national.

In cases of simultaneous publication (within 30 days) the state granting the shortest term shall be considered the state of first publication.¹⁵⁹ It is reasonable to limit the term of protection to the term enjoyed in the country of origin, since that is a well-known concept of international law.¹⁶⁰

¹⁵⁹ See note 149 *supra*. This was a very controversial article. Some countries desired a term after the author's death, others thought an over-all period of 25 years was too short, while still others desired the protection for cinematographic and photographic works to be left to national legislation. It was stated that if the United States was to join, there must be retained the principle of a fixed term after publication. Blake, *supra* note 142, at 51-52.

• *National treatment*: Berlin 5.

Protection based on the law of the country where protection is claimed: Berlin 4(2), 7; Rome 4(2), 7; Brussels 4(2), 7; Montevideo 4; Havana 6; Washington 8.

Term may not exceed the term in the country of origin: Berne 2, Berlin 7, Rome 7, Brussels 7, Montevideo 4, Mexico 5, Buenos Aires 6, Havana 6, Washington 8.

Nationality of the work determined by country of first publication: Berne 2, Paris 2, Berlin 4(3), Rome 4(3), Brussels 4(3), Montevideo 2, Caracas 2, Buenos Aires 7.

Nationals of member countries enjoy national rights in other countries: Berne 3; Paris 3; Berlin 4(1), 5; Rome 4(1), 5; Brussels 4(1), 5.

Enjoyment of rights based on the law the respective country affords: Mexico 5, Buenos Aires 6.

Provision for censorship by domestic legislation: Berne 13, Berlin 17, Rome 17, Brussels 17, Montevideo 12, Mexico 74, Buenos Aires 15, Caracas 10, Washington 15.

25 years after death: Rio de Janeiro 7.

50 years after death: Havana 6, Berlin 7, Rome 7, Brussels 7(2).

Anonymous works, 50 years after publication, but if author is known, then 50 years after death: Brussels 7(4).

Posthumous works, 50 years after death: Brussels 7(5).

Term runs from January 1 of the year following the event: Brussels 7(6).

Joint authors, term runs from death of last survivor: Brussels 7-bis, Rome 7-bis.

If there are two successive terms, protection is for the aggregate: Washington 8.

Country of origin is deemed to be country of first publication: Berne 2(3), Berlin 4(3), Rome 4(3), Brussels 4(3), Mexico 6, Buenos Aires 7.

For unpublished works, country of origin is deemed to be country to which author belongs: Berne 2(4), Berlin 4(3), Rome 4(3), Brussels 4(3).

If published simultaneously, country of origin is that granting shortest terms: Berne 2(3), Berlin 4(3), Rome 4(3), Brussels 4(3), Mexico 6.

Publication within 30 days is regarded as simultaneous publication: Brussels 4(3).

¹⁶⁰ A country need not protect the works of a foreign author for a period longer than that granted in the country of origin. Berne 2, Berlin 7, Rome 7, Brussels 7, Montevideo 4, Mexico 5, Buenos Aires 6, Havana 6, Washington 8. Australia, Order of March 15, 1918; Belgium, Art. 38, Law of March 22, 1886; Denmark, Order of February 22, 1913, Decree of September 12, 1933; Eire, Order of 1929; France, Decree of March 28, 1852; Great Britain, Order of February 3, 1915; New Zealand, Order of February 2, 1916; Norway, Decree of December 11, 1931; Romania, Note of May 12, 1928. *Grus v. Ricordi*, Cour de Cassation (France), July 25, 1887; see also *Leduc v. Bessel*, Cour de Cassation (France), May 6, 1924. LADAS, *op. cit. supra* note 21, at 61, 338; Solberg, *International Copyright Union*, 36 YALE L.J. 68, 87 (1926); Solberg, *Copyright Reform Legislation and International Copyright*, 14 NOTRE DAME LAW. 343, 353 (1939).

Art. V. Translations

In order to satisfy special needs of certain countries to make foreign writings available to their peoples in their native languages, the Convention permits limitation on the exclusive right of an author to translate his works if safeguards, such as correct translation of the work and just and effective compensation to the owner of the translation rights, are assured by the domestic law of such countries.

The protection of the right of translation is co-extensive with the duration of copyright, but subject to a compulsory license, in the case of writings:

(1) After 7 years from first publication, there may be the right of non-exclusive compulsory license.

(2) Available only if no authorized translation has been published in the national language and then only to a national of the state in which application is made.

(3) License may be granted only by a competent authority.

(4) Applicant must establish a request and denial of authorization or inability to find the owner.

(5) Applicant may obtain the license if all previous copies are out-of-print.

(6) If applicant is unable to find the owner, copies of the application must be sent to the publisher, and if the nationality of the owner is known, to the diplomatic representative of his state or to an authors' society.

(7) A license may not be granted until two months after the dispatch of copies of the application.

(8) Domestic legislation must provide for just compensation.

(9) The legislation must provide for payment and transmittal of such compensation (no blocking of funds).

(10) The legislation must provide for a correct translation.

(11) The original title and name of the author must be printed on all copies.

(12) The license is valid only in the particular state where it has been applied for and copies may be sold in another state only if (a) the national language is the same as that contained in the translation, and (b) the other state's legislation provides for such license and does not prohibit the importation and sale of copies.

(13) The license is not transferable.

(14) No license shall be granted when the author has withdrawn all copies of the work from circulation.

This article was enacted for the benefit of states whose cultures are not

advanced. As a practical matter the article should have no real effect in this country.¹⁶¹

Art. VI. Definition of Publication

Publication . . . means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

This definition would not seem to include copies of a work distributed in such form from which it could not be read or otherwise visually perceived, thus excluding recordings or any works perceived through the sense of hearing, since such works are not to be deemed "publication" for the purposes of the Convention.¹⁶²

While sound films are not specifically covered, Article 1 covers cinematographic works, and it is inconceivable that sound films, in existence for more than 25 years, were not intended to be covered.¹⁶³

An argument has been advanced that protection is only afforded to the visual and not to the nonvisual part of a motion picture. A sound motion

¹⁶¹ See note 149 *supra*. The article was a compromise between a group desiring full protection for the author for the full term, and a group asserting protection only for a limited period. Blake, *supra* note 142, at 53-55.

Right of translation is protected for the full term: Berlin 8, Rome 8, Brussels 8, Montevideo 3, Mexico 3, Buenos Aires 4, Caracas 3, Washington 5.

Ten year limitation on protection of right of translation: Berne 5, Paris 5.

¹⁶² Some countries wanted the inclusion of works which could be audibly perceived so that the issuance of records would be a publication, but this was rejected since in the United States that is not deemed a publication. Blake, *supra* note 142, at 55. However, in this connection it is interesting to note the decision of Judge Igoe in *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950); see *Blanc v. Lantz* (L.A.S.C. 1949); see also note 143 *supra*, indicating that the protection of recordings was left to domestic legislation.

Works of nationals are protected according to Article 2 as published or unpublished works, and while recordings are excluded from being deemed "published" works, they are protected as "unpublished" works. The definition of publication is limited in its application to the purposes of the Convention and will not affect the concept of publication existing under domestic law. Blake, *supra* note 142, at 55; see also notes 3 and 143 *supra*.

"Publication" defined as works issued to the public: Paris 2, Berlin 4(4), Rome 4(4), Brussels 4(4).

Performance of music or representation of drama is not a publication: Paris 2, Berlin 4(4), Rome 4(4), Brussels 4(4).

Presentation of a cinematographic work, public recitation of a literary work, transmission or radio diffusion of a literary or artistic work is not a publication: Brussels 4(4).

Recordings are specifically protected by statute in Australia, Art. 8, Copyright Act of 1912; Austria, Art. 76, Law 111 of April 9, 1936; Canada, Art. 43, Copyright Act of 1921; Eire, Art. 169, Act of 1927; Great Britain, Art. 19(1), Copyright Act of 1911; India (see Great Britain); Israel (see Great Britain); Italy, Law of 1941; Lebanon, Articles 138, 139, Laws of 1924, 1926; New Zealand (see Great Britain); Pakistan (see Great Britain); Poland, Laws of 1926, 1935, 1952; Syria (see Lebanon); Thailand, Art. 17, Law of 1931; Union of South Africa (see Great Britain).

¹⁶³ See *Page & Co. v. Fox Film Corp.*, 83 F.2d 196 (2d Cir. 1936); *Rosenberg and Lesser v. Wright* (L.A.S.C. 1934).

picture is an integrated unit, and since cinematographic works are covered by the Convention, a sound motion picture published within the meaning of the Convention would be protected as a "published" work both as to the visual and the sound track material.¹⁶⁴ If, however, one were to adopt the contrary view, namely, that only the visual part is protected, it must be pointed out that the visual part is protected as a "published" work, and the audible part as an "unpublished" work. The contention that is raised hardly merits any further discussion in view of the protection that has been afforded motion picture photoplays in so many countries since the advent of sound.¹⁶⁵

A further contention has been raised that there is no provision for protection of the interpretation by a particular artist reproduced in a sound recording. It would appear in this connection that existing protection is continued by the Convention and if there is protection in the performance in a particular country, the same protection will be afforded nonnationals.¹⁶⁶

It has also been claimed that assuming there is no protection in the sound track of a film, the visual portion would be considered merely a series of photographs as to which the minimum term of protection would be ten years, rather than 25 years, under Article 4(3). It is difficult to see the merit of this claim in view of the fact that in countries where there is a 10-year term of protection for photographs, films are specifically protected for a longer period.¹⁶⁷

It is to be noted that the article refers to the reproduction in tangible form and the distribution of "copies" of the work.¹⁶⁸ For example, the rent-

¹⁶⁴ See note 3 *supra*.

¹⁶⁵ The only countries not providing specific protection for cinematographic works are Egypt, Ethiopia, Hashemite Jordan, Iran, Iraq, Liberia and Saudi Arabia. All other countries protect such works, either by specific legislation or by court decision.

¹⁶⁶ See note 3 *supra*. There is protection in performance in Argentina, Art. 56, Law 11723; Austria, Arts. 66-72, Law 111; Czechoslovakia, Art. 9, Law of 1936; Denmark, Art. 5, Law of 1933; Germany, Laws of 1901, 1910, 1934; Uruguay, Law of 1937.

¹⁶⁷ Bulgaria: photographs are protected for 5 years or 10 years (Art. 60), films are protected for 25 p.p. (years after publication) (Art. 14).

Denmark: photographs, 10 from fulfillment of formalities, films, 50 p.p. (1(c) 3).

Dominican Republic: photographs, 10 p.p. (31(5)), films, 20 p.p. (31(4)).

Finland: photographs, 10 p.p. (Art. 7), films, 50 p.p. (Arts. 2(8), 14), Decision of Supreme Court October 28, 1936, K.K.O. 1936, No. 476.

Hungary: photographs, 15 p.p. (Art. 69), films, 50 p.p. (Arts. 68-76).

The only exceptions appear to be:

China: term of 10 p.p. for both photographs and films (Art. 9).

Japan: term for photographs of 10 from taking (Art. 23).

Poland: Under its new law of July 10, 1952, providing for a period of 10 years for both photographs and films.

¹⁶⁸ Motion pictures are not usually sold or placed on sale but are distributed on a contractual basis, and when so distributed, they would constitute a "publication." *Jewelers Mercantile Agency Co. v. Jewelers Weekly Pub. Co.*, 155 N.Y. 241, 49 N.E. 872 (1898); *Ladd v. Oxnard*, 75 Fed. 703 (C.C. Mass. 1896), and there would be no publication where copies are distributed for restricted exhibition on a noncommercial basis. *Patterson v. Century Productions, Inc.*, 93 F.2d 489 (2d Cir. 1937).

ing or sale of a single copy for the purpose of television, whether to homes or for theatrical exhibition, would not appear to come within the definition of "publication." It must be kept in mind, however, that such use would not appear to come within the definition of "publication" under our present law.¹⁶⁹

The fact that motion picture films or television programs might be distributed by some new means, such as tape, wire or some unknown process, would not raise any problems, providing the films or programs could be visually perceived and even though such new processes may have been commercially unknown at the time of the adoption of the Convention.¹⁷⁰ There appears to be an increasing tendency to liberalize the construction of copyright statutes to meet new conditions which have rapidly developed and which are continuing to develop.¹⁷¹

Art. VII. Retroactivity

The Convention does not apply retroactively to works already in the public domain of any contracting state. The fact that certain works in certain countries may never fall permanently in the public domain is a condition existing without and despite the Convention.¹⁷²

¹⁶⁹See note 3 *supra*.

¹⁷⁰See note 163 *supra*. The fact that the particular method may have been unknown at the time the Convention was signed, and the means of transmission and reception now employed was wholly unlike any then in use, would be immaterial. *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 191 (1931); *MGM Corp. v. Bijou Theatre, Inc.*, 59 F.2d 70 (1st Cir. 1932); *MGM Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933). See also note 4 *supra*.

¹⁷¹*MGM Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D. Mass. 1933).

¹⁷²*A work not registered within one year after publication falls into the public domain, but after ten years the author may effect registration within the ensuing next year:* Costa Rica, Art. 63, Law of June 28, 1896; Cuba, Law of January 10, 1879; Panama, Articles 1906, 1907, 1915, Adm. Code of July 1, 1917; Spain, Articles 36-38-39, Law of January 10, 1879.

A work not registered falls into public domain but after five years author may effect registration within the next two years: Dominican Republic, Law 1381 of March 17, 1947.

The exclusive right to publish a work in the public domain may be acquired for two years or a maximum of twice the period indicated if required: Mexico, Law of January 14, 1948.

The exclusive right to publish a work in the public domain may be acquired for the time required to publish plus one year: Nicaragua, Art. 759, Civil Code of 1904.

Works of general interest may be reprinted with protection for five years, if edition is correct and consent of the owner is obtained: Salvador, Art. 10, Law of March 2, 1900.

Perpetual protection may be secured: Guatemala (but work falls in public domain if the author dies without heirs), Articles 5, 24, Decree of October 29, 1879, Regulation of October 1, 1951; Nicaragua (other than dramatic and musical works), Art. 35, Civil Code of 1904; Portugal, Art. 15, Law of May 27, 1927.

No term has been fixed: Egypt, Ethiopia, Iran.

The United States indicated it could not adhere unless Article VII was adopted. Blake, *supra* note 142, at 55-56. Unpublished works of nondomiciled nationals of countries with whom we have no relations are not in the public domain while unpublished, but do fall into public domain upon first publication, since statutory copyright would be unavailable to them.

The Berne Convention (Art. 14) applies to all works which have not fallen into the public domain in the country of origin.

*Art. VIII. Ratification, Acceptance and Accession*¹⁷³*Art IX. Effective Date*¹⁷⁴*Art. X. Treaty Is Not Self-Executing*

Each state agrees to adopt, in accordance with its Constitution, such measures as are necessary to insure the application of the Convention within its jurisdiction, and each state agrees that it will be in a position under its domestic law to give effect to the Convention at the time it deposits its instrument of ratification.

The Berlin (Art. 18), Rome (Art. 18), and Brussels (Art. 18) Conventions apply to all works which have not fallen into the public domain in the country of origin, but if the work has fallen into the public domain because of the expiration of the term of protection, it will not be protected anew.

Under the doctrine of *domaine public payant*, after expiration of the normal period of protection, the work cannot be freely used without payment of royalty (generally to authors' societies, which utilize such funds for cultural purposes or to aid needy authors or their families). In such cases, the government also participates in such funds. The doctrine is in existence in Bulgaria (Art. 11(5), Law of 1939), Italy (Arts. 175-179, Law 633 of April 22, 1941), Romania (Art. 66, Law of July 19, 1946), Uruguay (Art. 42, Law 9739 of December 17, 1937), Yugoslavia (Arts. 3, 4, 8-11, Law of May 25, 1946). In Bulgaria, Uruguay and Yugoslavia, the use in any way of any work which has fallen into the public domain is subject to royalty. In Italy, the doctrine is applicable only to radio broadcasting and the sale of works published in volumes. In Romania, the doctrine is applicable to the publication and presentation of literary and dramatic works. With the exception of Bulgaria, where the doctrine endures only for twenty years after the work has fallen into the public domain (following a period of thirty years after the death of the author), the system is perpetual. The fees differ according to the laws of the various countries. In Bulgaria, Romania and Uruguay, the authors' societies are the beneficiaries; in Italy, the revenues go to the state, which transfers a part of the funds for authors' aid; in Yugoslavia, half of the revenues belongs to the state, while the other half goes to the authors' society. II COPYRIGHT BULL., UNESCO, Nos. 2-3, 1949, pp. 128, *et seq.*

¹⁷³ The Convention, dated September 6, 1952 shall remain open for signature by all states for a period of 120 days, but any state which has not signed may accede thereto. Ratification, acceptance or accession is effected by deposit of an instrument to that effect.

The Berne Convention provided for any adherence by countries whose domestic law grants protection of rights under the Convention (Art. 18) and ratification to be exchanged within one year (Art. 21). Other Conventions provided for ratification by a certain date: Berlin, July 1, 1910 (Art. 28); Rome, July 1, 1931 (Art. 28); Brussels, July 1, 1951 (Art. 28).

¹⁷⁴ The Convention will come into force three months after deposit of twelve instruments of ratification, acceptance or accession, among which must be at least four states which are not members of Berne. Thereafter the Convention will come into force in respect of each state three months after it has deposited its instrument of ratification, acceptance or accession.

It was stated that four ratifications by those not members of Berne, rather than six, was sufficient on a numerical basis of representation, and by reason of the fact that several member countries did not belong to Berne. Blake, *supra* note 142, at 56-57.

Effective three months after exchange of ratification: Berne 20, Berlin 29, Mexico 15, Buenos Aires 16, Havana 17.

Effective one month after a certain date, but if before that date ratified by six countries, then, as to those countries, effective one month after deposit of the sixth ratification; for other countries, one month after notice of each ratification: Rome 28(2), Brussels 28(2).

Effective as soon as two states have deposited instrument of ratification: Washington 19.

The Treaty is not self-executing, and requires domestic legislation. This article was proposed by the United States, since in some countries the Convention becomes effective upon ratification, but in other countries, domestic legislation is required. It is noted that there is no time limitation in this article, for some countries would require a period of time in order to revise their domestic law.¹⁷⁵ The United States' instrument of ratification will not be deposited until after the adoption of such legislation as is necessary to conform the domestic law of the United States to the provisions of the Convention.¹⁷⁶

*Art. XI. Provision for Inter-Governmental Committees for Administration and Cooperation with Other International Organizations*¹⁷⁷

*Art. XII. Revisions*¹⁷⁸

Art. XIII. Application to Territories

Any contracting state may, at the time of deposit of its instrument of ratification, advise that the Convention shall apply to all or any of its territories, and, in the absence of such notification, the Convention will not apply to such territories.¹⁷⁹

¹⁷⁵ Any country whose domestic law protects rights under Berne may accede: Berne 18, Berlin 25 (with provision for acceptance of previous revisions), Rome 25, 28(3) (with provision for acceptance of previous revisions), Brussels 28(3) (with provision for acceptance of previous revisions).

¹⁷⁶ See note 17 *supra*.

¹⁷⁷ A *voeu* was adopted that UNESCO should continue its activities to strengthen copyright protection throughout the world and should designate a professional advisory committee and, in cooperation with the contracting states, should concern itself with the setting up of the committees referred to in Article 11. Blake, *supra* note 142, at 58-59.

Provision for establishment of an international bureau: Berne 16, Protocol 5; Berlin 21, 22, 23; Rome, 21, 22, 23; Brussels 21, 22, 23.

¹⁷⁸ A conference may be convened for revision whenever the inter-governmental committee deems it necessary or at the request of ten contracting states or a majority if there are less than twenty contracting states. No decision was reached as to the majority required for revision. That was left to future conference. Blake, *supra* note 142, at 60.

Revisions may take place only by unanimous consent: Berne 17, Berlin 24, Rome 24, Brussels 24.

Provision for introduction of modifications: Montevideo 15.

¹⁷⁹ It was pointed out by France and Great Britain that it was their practice to consult their overseas' territories and receive their views before binding them. Spain requested that the problem of the application of the Convention to Tangier be considered. Blake, *supra* note 142, at 60-61.

Contracting states may accede for territories and possessions, in whole or in part: Berne 19, Berlin 26, Rome 26, Brussels 26.

If there is no notification, the Convention is not applicable to territories; a country may also advise that the Convention is no longer applicable to its territories, to be effective twelve months after notification: Rome 26, Brussels 26.

*Art. XIV. Denunciation*¹⁸⁰*Art. XV. Settlement of Disputes Between Contracting States Before International Court of Justice*

Any disputes between two or more contracting states shall, in the absence of settlement by negotiation, or unless some other method is agreed upon, be brought before the International Court of Justice. This clause is identical with Article XXVII-bis of the Brussels Revision. The Article implies an obligation of a contracting state taken before the Court by another contracting state, to accept and not deny the competence of that Court.¹⁸¹

*Art. XVI. Official Languages*¹⁸²*Art. XVII. Application to Berne*

The Convention shall not, in any way, affect Berne. However, according to the annexed declaration, a Berne country which withdraws from Berne, is prevented from having any subsequent benefits under the U.C.C., and the signature to the Convention implies acceptance of the declaration. However, nationals of non-Berne countries would have the benefit of the minimum protection provided by Berne in any particular Berne country which joins the U.C.C., since it would be a part of its national treatment.¹⁸³

¹⁸⁰ The Convention may be denounced by notification addressed to UNESCO, to take effect twelve months after the date of notification. In the history of Berne, two withdrawals have taken place: Liberia withdrew February 22, 1930, and Haiti withdrew March 26, 1943.

Contracting countries may denounce, effective one year from notification: Berne 20, Berlin 29, Rome 29, Mexico 15, Buenos Aires 16, Havana 17, Washington 21.

While the denunciation may take effect one year from notification, there may not be a denunciation until five years after ratification or accession: Brussels 29.

Contracting countries may withdraw after two years notice: Montevideo 15.

¹⁸¹ Blake, *supra* note 142, at 61. Some conventions provide that when a nonmember country, does not protect the works of nationals of a member country, a contracting state may restrict protection of the works of authors who are citizens of such nonmember country, and not actually domiciled in the member country, without prejudice to rights previously acquired: Berne, Additional Protocol, 1914; Rome 6(2), (3), (4); Brussels 6(2) (in addition, if a member country avails itself of this right, other member countries shall not be required to give a wider protection than that given by the retaliating country).

¹⁸² The official languages are English, French and Spanish, and texts in those languages shall be signed. There may be additional official texts in German, Italian and Portuguese without any necessity for signing any texts in such languages. However, any state or group of states shall be entitled to have established other texts in the language of its choice.

French is the official language: Berne, Protocol 5, Berlin 21, Rome 21, Brussels 21.

While the official language is French, an equivalent text shall be established in English, but in the event of dispute, the French version shall control: Brussels 31.

English, Spanish, Portuguese and French are the official languages: Washington 18.

¹⁸³ See note 3 *supra*. Several countries of Berne stated that this article would be a prerequisite to their signature and ratification. Other countries considered the article derogatory to the sovereignty of a state. Blake, *supra* note 142, at 62-63.

As to the interrelationship of the earlier conventions and revisions, see note 35 *supra*.

Art. XVIII. Application to American Republics

The Convention shall not abrogate any present or future Conventions or arrangements affecting two or more American republics. In the event of any difference between those arrangements and the U.C.C., the Convention or arrangement most recently formulated shall prevail. Rights acquired in any state under existing arrangements before the effective date of the U.C.C., shall not be affected.¹⁸⁴

Art. XIX. Application to Arrangements Between Other Countries

The Convention shall not abrogate other arrangements in effect between two or more contracting states, but in the event of any differences between the U.C.C. and such arrangements, the U.C.C. shall prevail. Rights in works acquired in any state under such existing arrangements before the effective date of the U.C.C., shall not be affected.¹⁸⁵

Art. XX. No Reservations

Reservations to the Convention shall not be permitted. This Article disposes of one of the most troublesome features in Berne.¹⁸⁶

This provision prevents emasculation of the Convention by reservations and makes it quite certain that among the contracting states, obligations and rights shall be equal in all respects. Several countries insisted that ad-

¹⁸⁴ The date of formulation rather than the date of ratification is the test. The United States pointed out that the U.C.C. should not abrogate existing American Conventions, but should prevail in the event of a conflict. The difference between the highly developed Berne Convention and the old and confused Pan-American Convention, justified a different treatment. Blake, *supra* note 142, at 63.

Countries may enter into arrangements with each other, conferring greater rights upon authors, but not contrary to Berne: Berne 14, Berlin 20, Rome 20, Brussels 20.

A country may make more favorable terms in favor of foreigners: Berlin 19, Rome 19.

Claim may be made to the benefit of greater rights afforded by a Union country: Brussels 19.

¹⁸⁵ This Article was revised to avoid reference to any future international arrangements. Blake, *supra* note 142, at 63-64. See note 184 *supra*.

¹⁸⁶ Several conventions provide for reservations: Berlin 25(3), 27(2); Rome 27(2); Brussels 27(2); Havana 16. Turkey and Yugoslavia, in adhering to the Act of Brussels, reserved as to translations.

As to Berne, prior to Brussels, there are a total of 34 reservations, as follows:

Works of architecture: Norway.

Works of art applied to industry: France, Thailand, Tunisia.

Conditions and formalities: Thailand.

Translation rights: Eire, Greece, Ireland, Italy, Japan, Netherlands, Thailand, Turkey, Yugoslavia.

Contents of newspapers and magazines: Denmark, Finland, Greece, Netherlands, Norway, Romania, Sweden, Thailand.

Representation and performing rights: Greece, Italy, Japan, Netherlands, Thailand.

Retroactivity: Australia, Great Britain, India, New Zealand, Norway, Thailand, Union of South Africa.

herence to the Convention would be most difficult unless they could make a reservation as to Article V (translations), but the United States insisted that adherence to the Convention with such a reservation would make the Convention of less value to the contracting states, and the stand of the United States was adopted as the attitude of the Convention.¹⁸⁷

Art. XXI. Administration Under UNESCO

*Resolution Regarding Article XI: Intergovernmental Copyright Conference*¹⁸⁸

Protocols

The first Protocol provides for stateless persons and refugees.¹⁸⁹ The second permits works first published by, as well as unpublished works of, United Nations, the specialized agencies in relation thereto, and by the organization of American states, to protection.¹⁹⁰ The third Protocol permits any state, upon becoming a party, to advise that its ratification is dependent upon the ratification of another state.¹⁹¹ All three Protocols require separate execution.

In addition various *voeux*¹⁹² were adopted, such as: establishment of an intergovernmental committee (Art. XI), application of the Convention to Tangier, desirability of studying the problem of double taxation, foreign

¹⁸⁷ See note 149 *supra*; Blake, *supra* note 142, at 64-66.

¹⁸⁸ Provision is made for the states to comprise the International Governmental Committee of twelve, its personnel, term of office and replacements, and requests UNESCO to provide its secretariat. The first members shall be representatives of Argentina, Brazil, France, Germany, India, Italy, Japan, Mexico, Spain, Switzerland, United Kingdom and the United States, thus consisting of representatives of Berne, Pan-American republics, and countries belonging to neither classification.

At Brussels a Resolution was adopted, providing for the creation of a Committee at the office of the Union, consisting of twelve members, with one-third being changed every three years, the members to consist of representatives of Brazil, Canada, Czechoslovakia, France, Great Britain, Hungary, India, Italy, Netherlands, Norway, Portugal and Switzerland.

¹⁸⁹ See note 149 *supra*.

¹⁹⁰ This Protocol was intended to avoid difficulties in relation to extraterritoriality, the status of international organizations as legal persons, and the vesting of copyright in those organizations. It assimilates organizations to the status of nationals of the contracting state. Blake, *supra* note 142, at 48.

¹⁹¹ At first it was suggested that the ratification be dependent upon the United States and Great Britain ratifying, but this proposal was rejected. The present language was placed in the Protocol instead, since it might expedite ratification and avoid any hesitancy on the part of countries to ratify prior to the United States. Blake, *supra* note 142, at 56-57.

¹⁹² The following *voeux* were adopted at Brussels: (1) A more complete and general recognition of the rights of intellectual works, (2) universal copyright protection, (3) protection of literary and artistic works, with a view of preventing their destruction, (4) *domaine public payant*, (5) double taxation of authors, (6) protection of manufacturers of recordings, (7) protection of radio transmission, (8) rights akin to copyright, and, notably, the protection of performing artists, and (9) status of the Berne Bureau.

exchange and restriction on copyright royalty payments, and utilization of the system of *domaine public payant*.¹⁹³

MINIMUM DOMESTIC REVISIONS NECESSARY TO ENABLE ADHERENCE
TO THE CONVENTION

As has been pointed out, the Convention is not a self-executing document and requires legislation, as set forth in Article 1, for the adequate protection of authors and other copyright proprietors, which each state party to the Convention, under Article 10(1), undertakes to adopt to insure the application of the Convention. At the time of ratification, each contracting state must be in a position, under its domestic law, to give effect to the terms of the Convention.

It would appear, therefore, that the minimum revisions would be along the following lines:¹⁹⁴

- (1) The provisions of Section 1(e) concerning the control by the proprietor of copyrighted musical compositions over recordings, insofar as reciprocity is required, should be repealed as to the nationals of other contracting states.
- (2) An amendment to Section 2 to provide for protection of unpublished works (not registerable under the present law).
This requirement is necessary for reasons set forth, *supra*, and in order to meet the provisions of the Convention. It would also serve to place litigation affecting literary and artistic works within the exclusive jurisdiction of the Federal courts, where they should be properly instituted, maintained and tried, rather than leaving the protection of so-called "common law rights" to the diversified and confused rulings of the various state courts.
- (3) An amendment to Section 9 to add appropriate language to provide that the protection referred to therein would be granted to nationals of a foreign state, which state is a party to the Convention, or to works first published in such state.
- (4) An amendment to Section 9 to provide that the provisions of Sections 16 and 17 (manufacturing provisions) shall not be applicable to the writings of authors within the category referred to in the preceding sub-paragraph.

Proposed legislation of this nature would do away with the objectionable provisions of the manufacturing clause, and would also meet the requirements of Article III(1), (2), (3) and (5) of the Convention. At the same time, the manufacturing provisions would still be applicable to:

¹⁹³ *Domaine public payant* is discussed in note 172 *supra*.

¹⁹⁴ The sections discussed are those appearing in 17 U.S.C. (1946).

- (a) Works of United States citizens or of aliens domiciled therein;
 - (b) Works first published in the United States;
 - (c) All works printed in the English language, written by authors who are nationals of foreign states or nations that are not parties to the Convention.
- (5) An amendment to provide that the provisions of Section 13 (insofar as there is reference to the manufacturing provisions specified therein) shall not apply to works by such foreign authors.
- (6) An amendment to provide that the language contained in Section 14 (providing for forfeiture of the copyright) is to be deleted in reference to works by such foreign authors.
This requirement is necessary by reason of Article III(3) of the Convention, providing that a failure to comply with a provision governing deposit shall not affect the validity of the copyright.
- (7) An amendment regarding the notice provisions of Section 19, to meet the requirements of Article III(1) of the Convention, and to provide substantially that the notice referred to in Section 10 may consist merely of a symbol ©, instead of the word "copyright" or the abbreviation "copr."
This proposed amendment should also be made applicable to domestic situations.
- (8) An amendment to cover Section 20, namely, to provide that the notice in respect to such foreign works is to be applied in such manner and location, as to give reasonable notice of claim of copyright.
- (9) An amendment to provide that present *ad interim* copyrights be extended for the full term.^{194a}

CONCLUSION

It must be kept in mind that the United States is the heart and soul of the Convention. As has been so aptly stated, "the key to the vitality of the Convention is the United States for our action will chart the course for other nations to follow."¹⁹⁵

The delegations of other governments strove to the utmost to reach an agreement which all might find acceptable by making concessions towards accommodating their systems to that of the United States in order to harmonize the final text of the Convention with our copyright law so as to require a minimum number of changes in our domestic legislation.¹⁹⁶ We have sold to the rest of the world our concept of copyright law.¹⁹⁷

^{194a} See note 17 *supra*. With the exception of Revision No. 2, these bills contain the proposed suggested changes.

¹⁹⁵ Schulman, *A Realistic Treaty*, AMERICAN WRITER, November, 1952.

¹⁹⁶ See note 3 *supra*.

¹⁹⁷ While European orthodox copyright was roughly handled at Geneva, it is felt that authors will derive benefits from the Universal Copyright Convention if it is ratified by the United States and other American Republics. (Legislative Commission, International Confed-

The Convention is of vital importance not only to our economic and financial interests abroad but it is an important part of our foreign policy. We are a great creditor nation and a world economic power not only in the field of tangible properties but also in the intellectual and artistic sphere. Our investments in this latter field are tremendous and through the medium of world commerce, hundreds of millions of dollars are returned annually to this country. We also are a great market for these same properties originating in other countries. An international arrangement which will protect our own products by harmonizing our copyright system with the systems of other countries is, needless to say, most desirable.¹⁹⁸

The Convention was carefully drawn to encourage the entry of free world countries, many of them

. . . in the fringe areas of the world in which propaganda from behind the Iron Curtain has its greatest impact and where programs for the exchange of cultural and educational materials are particularly important. A broad multilateral copyright coverage which includes those countries would serve as a stimulus to the flow of books and other educational media between them and other free countries . . . Participation in the Universal Copyright Convention by the United States will not only significantly improve the protection accorded to United States private interests abroad, but will make a substantial contribution to our general relations with other countries of the free world. Early action by the United States with respect to ratification of the convention will enable the United States to play a leading part in helping to improve international relations in this important field.¹⁹⁹

eration of Societies of Authors and Composers, Naples, October 13-18). *Le Droit d'Auteur*, November 15, 1952, pp. 135-139.

¹⁹⁸ See note 3 *supra*.

¹⁹⁹ See note 16 *supra*.