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CONVENTION DE BERNE

BERNE CONVENTION

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COMITÉ D'EXPERTS GOUVERNEMENTAUX
COMMITTEE OF GOVERNMENTAL EXPERTS

(1965)

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RAPPORT GÉNÉRAL DU GROUPE D'ÉTUDE
SUÉDOIS/BIRPI
ÉTABLI AU 1^{er} JUILLET 1964

GENERAL REPORT OF THE SWEDISH/BIRPI STUDY GROUP
ESTABLISHED AT JULY 1, 1964

ARTICLE 9

In the present text, this Article deals with works published in newspapers or periodicals. The Study Group proposes that the provisions in paragraphs 1 and 2 relating to newspaper articles should be deleted and replaced by a general rule concerning protection against reproduction. It is further proposed that the provision on items of news, which is now in paragraph 3, should be placed in paragraph 7 of Article 2.

(1) New provisions instituting protection against reproduction

Article 8, and the succeeding Articles up to and including Article 14bis, contain the provisions constituting the jus conventionis (minimum of protection), as well as certain restrictions of these rights.

Prerogatives recognised jure conventionis are :

- the right of translation (Article 8),
- the right of authorising the reproduction of works published in newspapers or periodicals (Article 9),
- the right of authorising the presentation and performance of dramatic, dramatico-musical and musical works (Article 11),
- the right of authorising radiodiffusion (Article 11bis),
- the right of authorising public recitation (Article 11ter),
- the right of authorising adaptations (Article 12),
- the "mechanical rights" in relation to musical works (Article 13),
- the cinematographic rights (Article 14),
- the "droit de suite" (Article 14bis).

It follows from this enumeration that the Convention does not establish a general right of reproduction (manufacture of copies).

The question whether this right should be recognised by the Convention was discussed at the Brussels Conference, but the proposals in this respect were withdrawn and the Conference did not pursue them²²⁾.

22) Brussels, p. 237 et seq.

In drawing up its 1963 report, the Study Group considered that the chances of a provision on this matter being accepted were probably no more favourable than in 1948 and it consequently did not feel able at this point to submit any proposals on a subject which, at the same time, had not been discussed by the 1963 Committee of Experts.

However, after further deliberation the Study Group reached the conclusion that a provision on the right of reproduction should be proposed. This prerogative was of fundamental importance in the legislation of member countries of the Union; the fact that it is not recognised in the Convention would therefore appear to be an anomaly. However, if a provision on the subject is to be incorporated in the text of the Convention, a satisfactory formula will have to be found for the inevitable exceptions to this right.

On the one hand, it is obvious that all the forms of exploiting a work which have, or are likely to acquire, considerable economic or practical importance must in principle be reserved to the authors. Exceptions that might restrict the possibilities open to the authors in these respects are unacceptable. On the other hand, it must not be forgotten that national legislations already contain a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that States would be ready at this stage to do away with these exceptions to any appreciable extent ²³⁾.

23) The exceptions most frequently recognised in national legislation seem to relate to the following works or methods of use : 1) public speeches; 2) quotations; 3) school books and chrestomathies; 4) newspaper articles; 5) reporting current events; 6) ephemeral recordings; 7) private use; 8) reproduction by photocopying in libraries; 9) reproduction in special characters for the use of the blind; 10) sound recordings of literary works for the use of the blind; 11) texts of songs; 12) sculptures on permanent display in public places, etc.; 13) artistic works used as a background in films and television programmes; 14) reproduction in the interests of public safety. The present text of the Convention contains provisions relating to exceptions 1 to 6 (the Study Group proposes below to delete exception 4).

After examining a number of possible solutions, the Study Group suggests the following text in the proposed draft Convention :

"Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.

However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of that right, for specified purposes and on the condition that these purposes should not enter into economic competition with these works."

It emerges from the proposed text that the right of national legislation to make exceptions is limited in three respects :

(a) Account must be taken of the other provisions in the Convention. This implies that the provisions already existing for certain special purposes (Articles 10, 10bis and 11bis, paragraph 3) must be regarded as rules exercising limits on the questions with which they deal. Thus, the special conditions, whose presence these exceptions imply, must always be respected. Furthermore, the reservation in favour of other provisions in the Convention implies that the presumption established in Article 14 remains. It finally results from this reservation that the new provision places no restriction on the right granted to countries of the Union, under Article 13, paragraph 2, to institute a compulsory licence in respect of the right to record musical works.

(b) Exceptions should only be made for clearly specified purposes, e.g. private use, the composer's need for texts, the interests of the blind. Exceptions for no specified purpose, on the other hand, are not permitted.

(c) Exceptions should not enter into economic competition with the work. By using these words, which are patterned on Italian legislation, the Study Group intended to give expression to the principle stated above : all the forms of exploiting a work, which have, or are likely to acquire, considerable economic or

practical importance, must be reserved to the authors. At the same time, the formula chosen opens the way for other exceptions of lesser importance.

The formula proposed expresses, among other things, the thought that it is advisable to take special precautions before countenancing exceptions that may be applied without giving authors the right to claim remuneration. If this right is granted, the scope of the power to make exceptions widens to some extent 24).

(2) Deletion of the provisions relating to newspaper articles

(a) Paragraph 1 of Article 9 provides, in its present wording, that serial novels, short stories and all other works, whether literary, scientific or artistic, whatever their purpose, and which are published in the newspapers or periodicals of one of the countries of the Union shall not be reproduced in the other countries without the consent of the authors.

This provision may clearly be deleted if a general rule on the right of reproduction is incorporated in the Convention.

24) Another solution of the problem under discussion would be, of course, to indicate the exceptions in the text of the Convention by means of a list intended to be restrictive. However, after an exhaustive discussion, the Study Group came to the conclusion that this solution should not be adopted. On the one hand, a list of this kind - even if it were to be limited to the main exceptions - would be very long and would in fact considerably restrict the authors' rights. At the present time, most countries only recognise some of the exceptions indicated above - they vary from one country to another - or else they grant a remuneration to the authors for the use permitted by certain of these rules of exception, as in the case of the Nordic countries. There is every reason to fear that the introduction of a list of this kind would encourage the adoption of all the exceptions allowed and abolish the right of remuneration. On the other hand, a list, however long, would be inadequate, because it could never cover all the special cases existing in national legislation.

(b) Paragraph 2, in its present wording, provides, in favour of the press, a right freely to reproduce articles on current economic, political or religious topics, unless their reproduction is expressly reserved.

In its 1963 report, the Study Group proposed deleting this Article for the following reasons :

The International Federation of Journalists has, in the course of recent years, adopted several resolutions expressing the desire for the abolition of this provision.

The Study Group supports this desire. It is possible that, in the more remote past, there was a certain need to reproduce entire articles of this kind, without permission of the author, this need being experienced particularly by small newspapers. On the other hand, at the present time, it is hardly compatible with the moral principles recognised by the press to reproduce an article published in another newspaper without having first obtained permission of the author. It is true that in the interest of the discussion that takes place in the press on public affairs and other questions, there is need to report such articles freely, and to a fairly general extent. However, it should be observed that there is no legal obstacle to giving an account of protected works. In cases where there is a genuine need for literal reproduction, means for so doing should be provided, but within the framework of the right of quotation. To this end, the Study Group refers to the developments proposed in connection with Article 10.

For these reasons, the Study Group proposes to delete paragraph 2 of Article 9.

The 1963 Committee of Experts, having heard the observer of the International Federation of Journalists express his satisfaction with regard to the work of the Study Group and the proposals submitted, expressed itself in favour of the deletion by 6 votes to 2, with 2 abstentions.

The proposed draft Convention also provides for the deletion of the provision in question.

(3) Press information

Paragraph 3 of the existing text - which corresponded to paragraph 2 of the first proposals of the Study Group - refuses protection to news of the day or to miscellaneous information having

the character of mere items of news.

In its 1963 report, the Study Group discussed in the following terms the question whether this provision should be modified :

The precise meaning of this provision is far from clear. As outlined above, the Permanent Committee, on the occasion of its session at Geneva in 1958, expressed the view that the question should be examined whether, or in what form, improvement or clarification of the protection of modes of expression of news and other press information by means of copyright could be included in the programme of the Stockholm Conference.

The various opinions expressed on the interpretation of this provision may be summarised as follows :

(a) The expressions "news of the day" and "miscellaneous information" used in the text only refer to facts (events) described, and not to the form given to the description of these events by the journalist who is the author of it. The principle expressed by this provision would thus simply be that these facts are not protected, as such.

(b) The purpose of the provision in question is to exclude from protection all informative matter which merely constitutes news of the day or miscellaneous information even if, in exceptional cases, such informative matter can be regarded as literary or artistic works. Consequently, it constitutes a positive exception to copyright.

(c) The correct meaning of this provision is to exclude from protection articles containing news of the day or miscellaneous information, provided such articles have the character of simple press information, since news of this kind does not fulfil the conditions essential for admission to the category of literary or artistic works.

For its part, the Study Group adopts the last of these interpretations. It follows that the immediate object of the provision is to recall the general principle according to which the title to protection of articles of this kind, as in the case of other intellectual works, pre-supposes the quality of literary or artistic work for the purposes of the Convention. On the other hand, the provision also permits the conclusion that if the articles in question are protected by virtue of other legal provisions, for example, by legislation against unfair competition, this protection is outside the field of the Convention. Accordingly, there is occasion to draw a second conclusion : the right to assimilation to national authors established by the Convention does not extend to the protection claimed by virtue of these other rules.

In the opinion of the Study Group, the provision could be considered, from the systematic aspect of the texts, as being a superfluous element. However, it has formed part of the Convention for over fifty years and, at the same time, constitutes a good expression of a principle from which legislation and jurisprudence can take a lead, and a reminder of the freedom of information. Further, to a certain extent the practical importance must be recognised of fixing, in a developed manner, in relation to the interpretation of the rule discussed, the line of demarcation between copyright and other means of protection. The Study Group concludes, for these reasons, that it would be desirable to retain the provision in question.

The possibility could be considered of making the text easier to understand by means of certain amendments. The Study Group concludes, however, that it would be sufficient to discuss the questions of interpretation in the General Report of the future Conference.

In the proposed draft Convention, the Study Group still maintains that this provision should not be altered. However, since it is proposed to delete the rule relating to newspaper articles, it should not be kept in Article 9. The Study Group proposes therefore to make it the last paragraph of Article 2 (see page 17 above).

ARTICLE 10

This Article deals with "lawful quotations".

Paragraph 1

In the existing wording, this provision specifies that in all countries of the Union short quotations from newspaper articles and periodicals are lawful, even in the form of press summaries.

In its 1963 report, the Study Group proposed the following wording for this paragraph :

"It shall be permissible to make quotations from a work which has already been lawfully made accessible to the public, provided that they are compatible with fair practice, and to the extent justified by the purpose".

Here are the reasons given in support of this amendment :

The Study Group observes, in relation to Article 9, paragraph 2, that the right of quotation should be sufficient to satisfy the needs of the press as regards giving accounts of the ingredients of articles which have appeared in other newspapers and periodicals. From this point of view, the existing wording of Article 10, paragraph 1, is not particularly happy, since it restricts the right to "short quotations". It is true that, normally, a quotation should be short, but this principle does not have absolutely universal validity. It is one of the chief tasks of the press to guide its readers in relation to current problems in the fields of politics, economics, religion, cultural life, and other questions which may form the subject of public discussion. Sufficient direction in these various fields cannot be achieved unless it is possible to reproduce, in certain cases, fairly considerable portions of articles which constitute the contributions of other newspapers to public discussion. Further, the author can have an interest in the reproduction of a certain length, when this is necessary to ensure the reporting of his opinions in a proper and exact manner. In other cases, a fairly extensive quotation may be necessary as the point of departure for a reply. A satisfactory delimitation could be reached by modelling the text upon rules generally accepted and developed in this field, and in emphasising the principle that the right of quotation can only be exercised to the extent delimited by its purpose.

For the reasons thus set out, the Study Group proposes that restriction of the right of quotation permitted in the existing text by the rule which only permits "short" quotations should be replaced by a provision stipulating that quotations are permitted, provided they are compatible with fair practice, and to the extent justified by the purpose.

Interpreted literally, the existing provision only relates to quotations from newspaper articles, but in actual fact it is applied, by analogy, to quotations from other works. The Study Group proposes that the field of universal application should be covered expressis verbis. The criteria of the right of quotation proposed by the Study Group would seem usable without modification, even outside the field of the press. Thus, it is generally recognised in the field of science that a right exists of quoting from theses, books, etc., which, in conformity with certain principles, should be considered as lawful from the point of view of copyright.

It may be observed that the proposed provision is not to the effect that any type of use should be accepted as permissible; it is essential for it to be "fair practice".

This implies that the use in question can only be accepted after an objective appreciation.

If the right contemplated by this provision is enlarged in the manner proposed, it may be desirable to establish yet another condition of the right of quotation, namely, that the work quoted has been lawfully made accessible to the public. Manuscripts or works printed for the use of a private circle should not be the subject of a right of quotation which can be exercised in respect of works intended for the public in general. The expression "made accessible to the public" relates to every form of publication of the work, not merely to the measures envisaged in the first sentence of Article 4, paragraph 4, but also to radiodiffusion and other measures mentioned in the second sentence of this paragraph.

After an exhaustive discussion, the 1963 Committee of Experts, with 2 abstentions, unanimously expressed itself in favour of a new draft for paragraph 1 of Article 10, framed in the following terms :

"It shall be permissible to make quotations from a work which has already been lawfully made accessible to the public, provided that they are compatible with fair practice, and to the extent justified by the scientific, critical, informatory or educational purpose, including quotations from newspaper articles and periodicals in the form of press summaries."

After further discussion within the Study Group, it became apparent that there was some hesitation regarding this proposal of the Committee of Experts. The Study Group could not rid itself of the impression that the list of purposes was too restricted - for instance, quotations made for an artistic purpose are not included - and that, generally speaking, it was practically impossible to indicate satisfactorily all the purposes by which quotations must be justified. For these reasons, the Study Group considered it advisable to keep its original proposal in this connection. It was of the opinion, however, that the views expressed by the experts meeting in Geneva should be adopted in so far as these views included maintaining, by way of an example, the existing provision concerning permission to make quotations in the form of press summaries.

Paragraph 2

This provision deals with the possibility open to countries of the Union to recognise the right to include excerpts from protected works in educational or scientific publications, or in chrestomathies. No changes are proposed here.

Paragraph 3

Even if paragraph 1 is amended in the manner proposed by the Study Group, it is possible to retain unchanged the provisions of paragraph 3 concerning the obligation to acknowledge the source and the name of the author in quotations and excerpts.

ARTICLE 10bis

This Article, which was incorporated in the Convention by the Brussels Conference, deals with the right of utilising protected works in the reporting of current events. In the existing wording, it is a matter for legislation in the countries of the Union to regulate the conditions under which the recording, reproduction, and public communication of short extracts from literary or artistic works can be made for the purpose of reporting current events by means of photography, cinematography or radiodiffusion.

In the 1963 report, the following wording was proposed for this provision :

"It shall be a matter for legislation in countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography or cinematography, or by radiodiffusion, it shall be permissible to record, reproduce and communicate to the public:

- (a) short extracts from literary or artistic works,
- (b) works of architecture, isolated works of graphic, plastic or applied art and isolated photographic works

which may be seen or heard in the course of the event."

The Study Group based its proposal on the following reasons :

This provision (Article 10bis) relates to the use of music, cantatas, speeches or other works used on the occasion of public events, for example, the reception of a Head of State, military parades or sporting displays, when such use occurs in the cinematographic or broadcast reports of such events. In the first instance, the rule should specify the type of programme of current events that only transmits certain episodes of an event; it is expressly provided that it is only short extracts that can be utilised. Provided this restriction is respected, the application of the provision to programmes of greater extent should not be prohibited. The rule should only be applicable to works which can be seen or heard in the course of the actual event; it will not extend to the subsequent synchronisation of music for use with a film of topical events.

Works of art, for example works of architecture of plastic art, can also fall within the scope of this provision. By way of example may be cited the reproduction of a statue or several works of art which are visible when the reproduction occurs in a cinematographic or televised programme of current events, on the occasion of the inauguration of the statue or art exhibition in question; to a certain extent, this reproduction thus becomes lawful. Photographs are expressly mentioned in the text; according to the most probably interpretation of the provision in this respect, it is permissible to illustrate reports of current events in the press by reproductions of works of art visible at the time of the event described.

The fact that the condition expressed by the term "short extracts" is not strictly applicable to the reproduction of works of art has again been raised. Certain persons have declared that it could hardly have been the intention of the authors of the Convention only to permit the reproduction of portions of a work of art - an action which, in certain circumstances, could involve injury to the moral interests of the artist - and that it is necessary to complete the text in this respect in such a manner as to make clear that in such cases it is permissible to reproduce entire works of art.

For its part, the Study Group adopts this point of view and, in consequence, proposes that the wording should be modified in such a manner that the restriction expressed by the words "of short extracts" should be deleted as regards the reproduction of works of art. If this modification is accepted, it will become necessary to replace the restriction thus deleted by another one,

since, for example, reproduction of a large number of the works displayed would not be permissible in a report upon an art exhibition. The solution to be given to this problem should, in the opinion of the Study Group, establish, in relation to works of art, that, in order to be lawful, free reproduction should only apply to "isolated" works. For practical reasons, this restriction should not apply to works of architecture; in such an event, there would, for example, be the risk of making reproduction impossible in a report of events occurring in the squares of a town.

It is likewise proposed, in this context, that the wording should be made clearer by explicit restriction of the right of free reproduction to works which can be seen or heard during the course of the event.

Finally, the Study Group considers it relevant to indicate that in the course of reports of events it can happen that the reproduction of a work is so diffuse or brief that there is no occasion to consider it as a use capable of involving copyright. Thus, to give an example, it is possible that listeners to a broadcast or televised sporting event would only be conscious of the isolated notes of a military march performed on such an occasion, or that the picture of a person who has given an interview in his house reproduced, by chance, certain works of art visible in the background. In such cases, the reproduction could be published independently of copyright.

The 1963 Committee of Experts stated that it shared the Study Group's view that Article 10bis should be amended for the reasons shown above. However, the Committee recommended that, instead of specifying the limits of the freedom thus allowed by the expressions "short extracts" and "isolated works", the general concept of "the extent justified by the informatory purpose" should be written into the text. It unanimously accepted the following new draft for this Article :

"It shall be a matter for legislation in countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography or cinematography, or by radiodiffusion, it shall be permissible, to the extent justified by the informatory purpose, to record, reproduce and communicate to the public literary or artistic works which may be seen or heard in the course of the event."

In the proposed draft Convention, this proposal was taken over without amendment.

It should be added that one of the experts within the 1963 Committee of Experts proposed that, from a general point of view and not only with regard to the reporting of current events, it should be a matter for national legislation to determine the conditions under which artistic works can be included, incidentally and by way of background, in photographs, cinematographic films and broadcasts. The Committee rejected this proposal by 6 votes to 5. It was noted in this respect that this was a minor exception to the right of reproduction which did not necessarily have to be included in the text of the Convention and that countries were free to determine such conditions in their national legislation.

With regard to this proposal, the Study Group refers back to the developments in connection with Article 9 (under (1) on page 46 and following pages).

ARTICLE 11

This Article contains provisions on the scenic and performing rights granted to authors : the rights of presentation and performance of their dramatic, dramatico-musical and musical works.

(1) In the present wording, paragraph 1 reserves to the authors of these works the exclusive right to authorise :

1. public presentation and public performance of their works,
2. public distribution by any means of the presentation and performance.

To these rules has been added a provision reserving the application of Articles 11bis and 13. Paragraph 2 specifies that the same rights shall be accorded to the authors of dramatic or dramatico-