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Report

on the Work of Main Committee II (Protocol Regarding Developing Countries)

by

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1. The protection of authors' rights in countries that have recently gained independence is one of the problems that have solicited the attention of the Swedish Government as the host country of the Revision Conference and that of BIRPI for several years. The history of the preparatory work and studies is to be found in document S/1 (pages 67 to 74).

2. After the publication of document S/1, there was an important event in this domain, whose influence has been apparent both on the discussion and on the results of the Conference. This was the East Asian Seminar on Copyright, which was held at New Delhi in January, 1967.

3. At the proposal of the Government of Sweden, a Main Committee was set up to produce a final text on the basis of document S/1. This Main Committee called Main Committee II in the Conference documents and hereinafter referred to as "the Committee" met ten times. It appointed two Working Groups for certain special problems, one to consider matters of substance (Chairman: Mr. Hesser (Sweden); members: Czechoslovakia, France, India, Ivory Coast, Tunisia, United Kingdom), and the other to consider the definition of the criterion of countries that would be entitled to avail themselves of this Protocol (Chairman: Mr. Lennon (Ireland); members: Brazil, Congo (Kinshasa), Czechoslovakia, France, India, Italy, Ivory Coast, Senegal, Sweden, Tunisia, United Kingdom).

4. Several amendments were submitted with respect to the *definition* of countries beneficiaries of the Protocol mentioned in the introduction to Article 1 of the Protocol with a view to the clarification of the general formula: the object of

a proposal by France (document S/176) was to make countries that adhered to the Berne Union only after the signing and entry into force of the Brussels Act beneficiaries of the provisions of the Protocol; a proposal by Italy (document S/213) introduced technical criteria (illiteracy, school attendance) into the idea of a developing country; two proposals, one by the United Kingdom (document S/149), and the other by Denmark, Finland, Norway and Sweden (document S/253), suggested as a solution an international authority competent to decide in each case (the Executive Committee of the Berne Union in the former and the General Assembly of the United Nations in the latter proposal). After discussion, the Working Group proposed to the Committee a text referring to Resolution No. 1897 (XVIII) adopted by the General Assembly of the United Nations at its eighteenth session on November 13, 1963, for application to any country subsequently designated as a developing country. A proposal by the Ivory Coast (document S/234) brought the list up to date by adding seven new African States to it.

5. The Committee dealt with the question and, while accepting the idea that the countries listed in the Annexes to document S/249 should be beneficiaries of the Protocol, it noted that simple reference to the decisions of the United Nations would entail a delay for countries that had recently gained their independence that would prevent them from acceding to the Convention and the Protocol immediately or at least before a decision by the United Nations. A more flexible wording was sought. A joint proposal by Denmark, Finland, Norway and Sweden submitted in document S/253 stipulated that a developing country would be considered to be any country designated as such under the established practice of the General Assembly of the United Nations, it being understood that the term "established practice" implies that the country concerned receives assistance from the United Nations Development Programme through the United Nations or its Specialized Agencies. The country which considers that it is in a position to have recourse to the Protocol shall notify the Director General of WIPO, who shall, if necessary, after consultation with the organs of the United Nations, communicate the notification to the other countries members of the Union together with his observations. The final text was produced by the Committee's Drafting Committee under the chairmanship of Mr. Essén (Sweden) (members: Mr. Abi-Sad (Brazil), Mr. Strnad (Czechoslovakia), Mr. Desbois (France), Mr. Krishnamurti (India), Mr. Ciampi (Italy), Mr. Amon d'Aby (Ivory Coast), Mr. Goundiam (Senegal), Mr. Fersi (Tunisia), Miss White (United Kingdom)). The text was adopted by the Committee at its last meeting.

6. The *substantive provisions* were also examined on the basis of document S/1 submitted by the Government of Sweden with the assistance of BIRPI. The order of the items included in the Protocol was altered by the Drafting Committee so that the provisions concerning the term of protection — following the system of the Convention itself — were mentioned first among the questions of substance, and the others were inserted thereafter. In the course of the proceedings of the Committee they underwent the following changes.

7. As an outcome of the insertion of Article 9, paragraph (2), of the Rome Act of 1928 and the Brussels Act of 1948 in a new draft of the text of the Convention itself, in which it appears as Article $10^{bis}(1)$, paragraph *(c)* of Article 1 in document S/1 became superfluous in the Protocol and was deleted.

8. A group of countries (Congo (Brazzaville), Congo (Kinshasa), Gabon, India, Ivory Coast, Madagascar, Morocco, Niger, Senegal and Tunisia) submitted a new drafting of the text of the Protocol (document S/160), stemming from document S/1 and adopting its scheme, but adding certain new features.

9. The *term of protection* has been decided without change in the manner proposed by the Government of Sweden with the assistance of BIRPI. The term of protection may therefore be fixed by domestic legislation at a period shorter than the compulsory term of fifty years referred to in Article 7 of the Convention.

10. The *translation license* combines the translation license referred to in Articles 25 and 27 of the Convention (Brussels text) and traditional in the Berne Union with certain elements of the license referred to in Article V of the Universal Copyright Convention; the definition of the languages into which the translation may be made has been clarified.

11. Several proposals were submitted for regulating the régime of published works on the basis of a statutory license (the proposals of Italy, document S/162; of Denmark, document S/146; of Greece, document S/181; and of Israel, document S/199). Japan made a proposal in document S/127 for simplification of the translation license by simply taking over the system as it exists in the Berne Convention.

12. The result of the proceedings of the Working Group and of the Committee, which is set out in document S/249, corresponds with certain slight alterations to the desire to replace the text of Article 5 of the Paris Act of 1896 quoted in paragraph *(b)* of Article 1 of the Protocol by an up-to-date wording without affecting the substance of the provisions concerned.

13. The principles of the Universal Copyright Convention (see Article V, paragraphs 2 and 5), which are incorporated in the system of the translation license provided for by the Protocol (Article 1, paragraph *(b)*(iv)) have also undergone modification: the compensation stipulated should be just and the explicit reference to international usage in this matter was deleted; the transmittal of such compensation, also referred to in the above Article of the Universal Copyright Convention, is made subject to national currency regulations by the text of the Protocol.

14. It should be noted that neither of the two International Conventions that might be regarded as having served as a model for paragraph *(b)* of Article 1 of the Protocol stipulates precisely where a translation must be published by the author himself if he does not wish a statutory license to come into force. Article 5 of the Paris Act of 1896 merely stipulates that the publication of such a translation must take place in a country of the Union. The Protocol adds an important clarification: the translation must be published in the country invoking the reservation concerning the translation license. Publication does not mean printing in the strict sense; this is an essential distinction for countries that do not possess even the technical means needed to publish translations or reproductions under the conditions laid down by the Protocol.

15. The proposals on the right of *reproduction* contained in Article 1*(e)* of document S/1, corresponding to Article 1*(c)* of the final text, have undergone profound modification. After discussion and examination of the various proposals (see the proposal of the United Kingdom, document S/149, paragraph 3, and the joint proposal of ten developing countries, document S/160), the Working Group proposed the text contained in document S/249, Article 1, paragraph *(d)*. The final solution adopted for the reproduction license is modeled on the translation license to the extent that the analogy is possible. It provides for the possibility of the introduction of a reproduction license for educational or cultural purposes — the wording should not be interpreted in a restrictive manner, given that the addition "for exclusively . . . purposes . . ." was intentionally deleted.

16. On the other hand, restriction of the right of reproduction to educational or cultural purposes excludes from the field of application of this reservation all works whose educational or cultural purpose is not evident; as an example, detective and adventure stories were mentioned in the discussion.

17. The procedure to be followed in order to obtain such a license, the conditions concerning payment of the compensation, the place of publication, respect for the right of the author to withdraw the work from circulation, and the possibility of having recourse to such a license even after the copies of the original edition of the work are out of print, have been established on the same basis as for translations.

18. Paragraph *(d)* of Article 1 of the Protocol, which concerns the *broadcasting* of literary and artistic works, permits the countries beneficiaries of the Protocol to substitute for paragraph (1) and paragraph (2) of Article 11bis of the Convention the text of the Rome Act of 1928 with two changes. The first, which represents a modernization of the text, is to replace the words "communication by radiodiffusion" of the Rome Act of 1928 by the word "broadcasting". The second change settles a basic matter: the public communication of broadcast works for profit-making purposes shall not be permitted except on payment of equitable remuneration fixed, in the absence of agreement, by competent authority. That addition takes over the wording of the proposal by the United Kingdom (document S/149, paragraph 2).

19. A new possibility for restriction open to domestic legislation has been adopted for uses destined *exclusively for teaching, study and research in all fields of education.* It should be noted that that reservation does not apply solely to the rights of translation and reproduction; it may also be invoked equally for the other uses of literary and artistic works. A new formula has been inserted for the determination of compensation, by which the latter shall "conform to standards of payment made to national authors". The addition of the words "in all fields of education" and the exclusivity of the purposes for which the reservation can be utilized indicate that industrial or commercial research or research of the same nature is outside the scope of this reservation.

20. In the case of copies of works translated and reproduced on the basis of the reservations in a country availing itself of the Protocol, the general principle adopted is that their export and sale are not permitted in a country not availing itself of these reservations. The prohibition does not apply if the legislation of a country which cannot avail itself of the Protocol, or the agreements concluded by that country, authorize such importation. The reference to domestic law and to agreements concluded has been replaced, in the case of the works mentioned in Article 1*(e)*, by the condition of the agreement of the author. In the same paragraph it has been made clear that only copies of a work published in a country for the said educational purposes may be imported

and sold in other countries availing themselves of the reservations; the effect, therefore, is that such copies will be in a language relevant to the educational needs of that country. An example quoted in the discussions was that of a translation made in India which could be imported into Ceylon but not into Japan.

21. The above reservations may be maintained for ten years from the time of ratification by the country concerned (see Article 1, introduction *in fine);* countries that do not consider themselves in a position to withdraw the reservations made under this Protocol may continue to maintain them until they accede to the Act adopted by the next revision conference; the "maintaining of reservations" therefore implies that it will be essential for a declaration to that effect to be addressed to the Director General by the country concerned, and that in default thereof the reservations shall cease to be applicable. The country concerned would then be bound by the Convention itself.

Various proposals made in the course of the Conference by the Delegations present, and concerning one or other of the problems mentioned above, have either been incorporated in the final text or withdrawn (see, for example, publication of serials, abridgements or translations in newspapers or periodicals, document S/160, or the provisions for the institution of certain measures of control over the application of the Protocol submitted by Israel, document S/199), or have found their place in a resolution (for example, the creation of a fund intended for the authors of works affected by the reservations stipulated in the Protocol, as proposed by Israel, document S/228).

22. Article 6 was added to the text as the result of a proposal by the United Kingdom which was adopted by the Committee at its eighth meeting. Even a developing territory, judged by the same principles as sovereign countries, which has not acceded to independence by the day on which the Convention is signed may enjoy the benefits of the Protocol.

23. With regard to this Article, the Delegations of Tunisia, Czechoslovakia, India and Israel made statements evidencing their opposition in principle to clauses of this kind in conventions. Later on, in the Plenary of the Berne Union this Article was expanded to indicate that the declaration referred to in it could be made only by a country bound by the Protocol.

24. The reference to the practice established by the United Nations made it necessary to solve the problem of the legal consequences of a contrary situation, namely, to deal with the case of a country to which the status of developing country

ceases to be applicable. The solution proposed by the Drafting Committee is that such a country will no longer be able to avail itself of the Protocol at the expiry of a period of six years from the appropriate notification.

25. To provide a possibility for developing countries to benefit immediately from the Protocol, an Article 5 has been added to the text, offering this possibility even before the text of the Convention itself has been ratified within the meaning of Article 28(1)*(b)*(i).

26. Another question that was the subject of consideration by the developing countries in the course of the preparatory work, that of the protection of folklore, was resolved by Article 15, paragraph (3), of the Convention itself.

[This Report was unanimously adopted by Main Committee II in its meeting on July 8, 1967.]