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International Copyright and the Needs of Developing Countries: The Awakening At Stockholm and Paris

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Of the many problems which have confronted the development of international copyright law in recent years, none has aroused so much concern as that of reconciling the needs of developing and advanced countries. This article will examine the various efforts which have been made during the past seven years to resolve this dilemma and will suggest some new approaches which might be taken in the quest for a unified system of international copyright amenable to the needs of virtually all the countries of the world.

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I

INTERNATIONAL COPYRIGHT ON THE EVE OF THE
STOCKHOLM CONFERENCE OF 1967

The protection of literary and artistic property during the past century has been governed by numerous bilateral treaties and several multilateral conventions. Bilateral treaties and reciprocal arrangements, such as those entered into by the United States under its proclamation system,¹ have traditionally served as the primary source of international copyright relations. In recent years, however, the need for uniformity and simplicity has moved multilateral conventions into a position of preeminence. On the eve of the Stockholm Conference in mid-1967, three multilateral systems dominated the copyright relations of the majority of developed nations of the world. These were the Berne Union, the Universal Copyright Convention, and the Inter-American System.

A. THE BERNE UNION

The Berne Union was created in 1886 by the adoption of the Berne Convention for the Protection of Literary and Artistic Works, and by mid-1967 it had already undergone three major revisions and incorporated two supplementary agreements.² Its membership at that time, some fifty-seven countries,³ included a number of developing countries from Latin America, Africa, and Asia, as well as most of the major developed nations of the world with the exception of the United States and the Soviet Union. Though not all countries of the Union adhere to the same

1. Copyrights, 17 U.S.C. § 9 (1970).

2. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 12 Martens Nouveau Recueil (ser. 2) 173; Additional Act and Interpretative Declaration, May 4, 1896, 24 Martens Nouveau Recueil (ser. 2) 758; Revision of Berlin, Nov. 13, 1908, 1 L.N.T.S. 217; Additional Protocol, Mar. 20, 1914, 1 L.N.T.S. 243; Revision of Rome, June 2, 1928, 123 L.N.T.S. 233; Revision of Brussels, June 26, 1948, 331 U.N.T.S. 217. These are discussed in some detail by Masouye's article, *The Berne Convention from 1886 to 1967*, in *INTERNATIONAL COPYRIGHT: NEEDS OF DEVELOPING COUNTRIES—SYMPOSIUM* 105 (India, Ministry of Education ed. 1967) [hereinafter cited as *INDIAN SYMPOSIUM*].

3. Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Cameroon, Canada, Congo, Cyprus, Czechoslovakia, Dahomey, Denmark, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Greece, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Ivory Coast, Japan, Lebanon, Liechtenstein, Luxembourg, Madagascar, Mali, Mexico, Monaco, Morocco, the Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, South Africa, Spain, Sri Lanka (Ceylon), Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom, Yugoslavia, Zaire. 3 *COPYRIGHT* 132-33 (1967).

revisions, by mid-1967 the vast majority of Union members had ratified the Brussels Act of 1948⁴ and were applying it in their mutual relations.

The Brussels Act protected the rights of creators in a broad range of literary and artistic works, encompassing "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . ." This included not only books and other writings, but also dramatic, choreographic, and cinematographic works; lectures; works of drawing, painting, and architecture; and a host of others.⁵

The Brussels Act's basic provisions contained both referral rules and conventional rules. Among the former was national treatment, the keystone of the Berne Convention's protection. Also known as the principle of assimilation, it required that a foreign author who had acquired his copyright under the treaty be given the same scope of protection in the state where protection was sought as that state gave to its own nationals. Such treatment was accorded to authors who were nationals of any of the countries of the Union, if their works were unpublished or first published in a Union country,⁶ as well as to authors who were not Berne nationals but who first published their works in a Union country.⁷ No formalities were necessary to obtain copyright protection under the Berne Convention, and the enjoyment and exercise of such rights was independent of the existence of protection in the work's country of origin.⁸

In terms of underlying legal philosophy, the Berne Union viewed the author's right as a non-transferable "moral right." Thus, independently of his copyright, an author possessed the right "to claim authorship of the work and to object to any distortion, mutilation, or other alteration thereof, or any other action in relation to the said work which would be prejudicial to his honor or reputation."⁹

4. Berne Convention for the Protection of Literary and Artistic Works Revised at Brussels, June 26, 1948, 331 U.N.T.S. 217 [hereinafter cited as Brussels Act].

5. *Id.* art. 2, para. (1).

6. *Id.* art. 4, para. (1).

7. *Id.* art. 6, para. (1). This latter provision has come to be known as the "Back Door to Berne," for it allowed a national of a non-Union state to obtain protection for his works throughout the Union merely by simultaneous first publication in his home country and in a Berne Union state. Though it had been used by American authors for some time, the approach was not particularly dignified, and was subject to several drawbacks, including the difficulties and expenses of a bona fide simultaneous publication, and the possibility that one or more Berne members would invoke the provision of the Convention which permitted a restriction of the protection accorded to works from non-Berne countries. *Id.* art. 6, para. (2).

8. *Id.* art. 4, para. (2).

9. *Id.* art. 6*bis*, para. (1).

Aside from referral rules and fundamental principles, the Brussels Act also contained a number of conventional rules setting up minimum standards as to the content, scope, and term of copyright protection.¹⁰ Furthermore, the convention recognized a number of exclusive rights possessed by authors, including the rights of making and authorizing the translation of their works for the whole duration of copyright in the original,¹¹ the public presentation or performance of dramatic, dramatico-musical, or musical works,¹² the broadcasting or public communication of their works,¹³ and adaptations, arrangements, and other alterations of their works.¹⁴

B. THE UNIVERSAL COPYRIGHT CONVENTION

The second major multilateral system which governed international copyright relations on the eve of the Stockholm Conference was the Universal Copyright Convention (UCC).¹⁵ By mid-1967 it adherents numbered fifty-five, including many states which were also members of the Berne Union, as well as the United States and a number of countries which had not previously adhered to any multilateral convention.¹⁶

The UCC, like the Berne Convention, was based on the principle of national treatment. This it accorded to published and unpublished works of nationals of any contracting state, as well as to works of others first published in a contracting state.¹⁷ It differed from Berne in a great many other respects, however, including such matters as formalities¹⁸ and the minimum levels of protection provided by the conventional rules.¹⁹

10. For example, a minimum term of protection extending throughout the life of the author plus fifty years after his death was ordinarily prescribed by the Convention. *Id.* art. 7.

11. *Id.* art. 8.

12. *Id.* art. 11.

13. *Id.* art. 11*bis*.

14. *Id.* art. 12.

15. Universal Copyright Convention, *done* Sept. 6, 1952, [1955] 3 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 132 [hereinafter cited as UCC].

16. Andorra, Argentina, Austria, Belgium, Brazil, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, Ecuador, Finland, France, Germany (Federal Republic), Ghana, Greece, Guatemala, Haiti, Holy See, Iceland, India, Ireland, Israel, Italy, Japan, Kenya, Khmer Republic (Cambodia), Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Malawi, Mexico, Monaco, the Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Spain, Sweden, Switzerland, United Kingdom, United States, Venezuela, Yugoslavia, Zambia. 1 COPYRIGHT BULL.: QUARTERLY REV., No. 1, at 4-6 (1967).

17. UCC, *supra* note 15, art. II.

18. As far as formalities were concerned, the UCC provided that published foreign works were exempt from the domestic formalities of a contracting state in which

Where Berne adopted the notion that copyright was an inherent or natural right of the author, the UCC treated it more as a monopoly license granted by the state in order to stimulate artistic creation. While this difference between the conventions seemed largely to be one of degree, it was nevertheless reflected in their provisions in several respects, and this was one of the factors which led the United States to ratify only the UCC.²⁰ Also, the UCC left unanswered most questions concerning the nature and level of protection to be accorded to the author's rights, while the Berne Convention was quite explicit in this regard.²¹ The UCC merely established the obligation of each contracting country to provide for "the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works"²² with the result that convention protection depended almost entirely on the prevailing level of protection in the country where protection was sought.

An important exception was the author's right of translation, which was dealt with specifically in article V of the UCC. Paragraph 1 established the author's exclusive right of translation for the duration of the copyright, while paragraph 2 created an exception by providing for the issuance of compulsory licenses for the translation of writings which had not been published in a country's national language within seven years

protection was sought only if there were placed on all copies of the work the Convention Notice, "©", accompanied by the name of the copyright proprietor and the year of first publication. UCC, *supra* note 15, art. III. No formalities were required for unpublished works. The Berne Convention, it will be recalled, did not call for any formalities whatever, either for published or unpublished works.

19. Generally, the UCC specified minimum levels of protection for authors which were substantially lower than those required by the Berne Convention. The UCC's minimum term of protection varied, but for most works it was either the life of the author plus twenty-five years after his death, or twenty-five years from the date of first publication. UCC, *supra* note 15, art. IV, para. 2. Both of these were shorter than the Berne Convention's minimum term of life plus fifty years.

20. The classical American view of copyright was formulated by Mr. Justice Holmes:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. . . . It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore . . . it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 19 (1907).

21. *E.g.*, Brussels Act, *supra* note 4, arts. 8, 11, 11*bis* & 12.

22. UCC, *supra* note 15, art. I.

from the date of first publication. The grant of such nonexclusive licenses was conditioned upon compliance with prescribed administrative procedures, and the assurance that the owner of the right of translation would receive a compensation which was just and which conformed to international standards.

When the UCC was adopted in 1952 there were already in existence more than a dozen multilateral conventions and nearly a hundred bilateral treaties governing international copyright relations. Thus, there arose the need for avoiding conflict. This was accomplished by the introduction of several provisions which dealt specifically with the relation of the UCC to the Berne Union, to conventions or arrangements between the American Republics, and to other conventions.²³ Of particular interest was article XVII, which affirmed co-existence with the Berne Union by indicating that the UCC should "not in any way affect the provisions of the Berne Convention . . . or membership in the Union created by that Convention." An Appendix Declaration to the article contained the controversial "Berne Safeguard Clause," which provided that works which had as their country of origin a state which withdrew from the Berne Union would not be protected by the UCC in other Berne countries.

C. INTER-AMERICAN TREATIES

Apart from the Berne Union and the Universal Copyright Convention, international copyright protection in the Americas was governed, on the eve of the Stockholm Conference, by a web of inter-American treaties²⁴ that were generally open only to the adherence of the American republics.

23. *Id.* art. XVII and Appendix Declaration relating thereto; arts. XVIII & XIX.

24. Montevideo Treaty on Literary and Artistic Property, Jan. 11, 1889, in PAN AMERICAN UNION, COPYRIGHT PROTECTION IN THE AMERICAS 143 (3d rev. & enlarged ed. 1962); Mexico City Convention on Literary and Artistic Copyrights, Jan. 27, 1902, 35 Stat. 1934, (1909), T.S. No. 491; Rio de Janeiro Convention on Patents of Invention, Drawings and Industrial Models, Trade Marks, and Literary and Artistic Property, Aug. 23, 1906, in PAN AMERICAN UNION, COPYRIGHT PROTECTION IN THE AMERICAS 148 (3d rev. & enlarged ed. 1962); Buenos Aires Convention on Literary and Artistic Copyright Aug. 11, 1910, 38 Stat. 1785 (1915), T.S. No. 593; Caracas Agreement on Literary and Artistic Property, July 17, 1911, in PAN AMERICAN UNION, COPYRIGHT PROTECTION IN THE AMERICAS 155 (3d rev. & enlarged ed. 1962); Havana Revision of Convention of Buenos Aires on the Protection of Literary and Artistic Copyright, Feb. 18, 1928, 132 L.N.T.S. 275; Washington Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, June 22, 1946, in PAN AMERICAN UNION, COPYRIGHT PROTECTION IN THE AMERICAS 16 (3d rev. & enlarged ed. 1962). Additional English language texts of all of the above may be found in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD.

lics.²⁵ The status of copyright relations between these countries was somewhat confused, however, because a number of the republics had failed to ratify the more recent revisions. By the late 1960's, the Buenos Aires and Washington Conventions were the only inter-American treaties which retained any real significance.

Signed in 1910, the Buenos Aires Convention²⁶ had been ratified by seventeen countries at the time of the Stockholm Conference,²⁷ making it the most widely-accepted of the inter-American treaties. Its main features include national treatment, recognition of the author's right of translation, and no specified minimum term of protection. With respect to formalities, the convention required that published works include a statement indicating the reservation of the property right.

The Washington Convention of 1946,²⁸ the most recent multilateral copyright treaty adopted by the American republics, replaced all previous inter-American conventions on copyright as between its parties.²⁹ It had fourteen adherents in 1967,³⁰ including many of the countries which had ratified the Buenos Aires Convention; a notable exception was the United States. Based on national treatment, the Washington Convention was quite similar to the Buenos Aires Convention; their differences, however, were rather striking on a number of points. On the matter of formalities, the Washington Convention abandoned the requirement of a statement indicating reservation of the property right, although use of a copyright notice was to be encouraged.³¹ Furthermore, it provided that other contracting states should grant protection to a work once it had secured protection in its country of origin.³²

As to the duration of protection, the Washington Convention, like

25. "American republics" may be defined as the sovereign republics of the Western Hemisphere.

26. Convention on Literary and Artistic Copyright, Aug. 11, 1910, 38 Stat. 1785 (1914), T.S. No. 593.

27. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, United States, and Uruguay. [1968] TREATIES IN FORCE 352-56.

28. Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, June 22, 1946, PAN AMERICAN UNION, COPYRIGHT PROTECTION IN THE AMERICAS 160 (3d rev. & enlarged ed. 1962) [hereinafter cited as Washington Convention].

29. *Id.* art. XVII, para. 1.

30. Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Paraguay. PAN AMERICAN UNION COPYRIGHT PROTECTION IN THE AMERICAS 141 (3d rev. & enlarged ed. 1962); COPYRIGHT LAWS AND TREATIES OF THE WORLD (1966).

31. Washington Convention, *supra* note 28, art. X.

32. *Id.* art. IX.

other inter-American conventions, adopted no fixed minimum. It did differ from the Buenos Aires Convention, however, in providing that the duration of copyright protection was governed largely by the law of the contracting state in which protection was originally obtained, rather than by the law of the state in which protection was sought.³³ Also, the Washington Convention recognized the author's exclusive right of translation,³⁴ as well as the moral right to claim paternity of a work and prevent modification or use which might be prejudicial to his reputation.³⁵

From the point of view of the future development of international copyright law, with particular regard to the needs of developing countries, the inter-American conventions appeared on the eve of the Stockholm conference to have relatively limited usefulness. This stemmed in part from the fact that these treaties were only open to the adherence of the American republics, and from the fact that the vast majority of those countries which had ratified the Buenos Aires or Washington Conventions had also adhered to either the UCC or the Berne Convention.³⁶ The inter-American treaties retained vitality only with regard to rights acquired in works prior to the adoption of the UCC and among countries which had never adhered to, or had since denounced, the UCC.³⁷

II

THE NEEDS OF DEVELOPING COUNTRIES IN THE FIELD OF INTERNATIONAL COPYRIGHT

Of the many problems facing developing countries, none is more urgent than the need for wider dissemination of knowledge, for ultimately this will act to further the educational, cultural, and technical development of their people. From the point of view of international copyright rela-

33. *Id.* art. VIII.

34. *Id.* art. II(f).

35. *Id.* art. XI.

36. The UCC had been ratified by fifteen of the American republics: Argentina, Brazil, Chile, Costa Rica, Cuba, Ecuador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, and Venezuela. *See* note 16, *supra*. Canada also ratified the UCC, but was not involved in the 1946 Inter-American Convention held at Washington, D.C.

37. Article XVIII of the UCC dealt with the relation of that convention to the inter-American conventions by providing that the convention or arrangement most recently formulated would prevail between the parties thereto when a difference existed. Hence, the UCC would generally have been applied *inter se* by the fifteen American republics which had ratified both an inter-American convention and the UCC. For a detailed discussion of this subject, see A. BOGSCH, *THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION* 127-35 (3d rev. ed. 1968).

tions, this problem takes on two aspects. The first is the promotion of the rapid transfer of knowledge from advanced areas to the developing countries, particularly in the fields of science and technology; the second is the encouragement of the growth of local publishing industries in the developing countries, through creation of incentives for authors and publishers, as well as through technical assistance.

Turning to the first aspect, it is apparent that if developing countries are to have ready access to the knowledge of advanced nations it is essential to provide them with a quick means of obtaining necessary translations and reprints of learning materials and other such works first published abroad. This could be accomplished either by publication in the country of origin of the requisite translations and reprints, with their immediate shipment to the developing countries in which they are needed, or by institution of a scheme of licensing so as to permit publication of translations and reprints in the developing countries themselves. Upon examination, it is apparent that a licensing system is preferable.

The trade position of developing nations today is typically quite unfavorable, with conservation of foreign exchange a major factor in the formulation of their economic development plans. Faced with the necessity of importing a large quantity of their basic requirements for furthering industrial growth, these nations are in no position to expend their valuable foreign exchange by purchasing from abroad translations and reprints which could be more cheaply produced at home.³⁸ Neverthe-

38. Typical of this position was the statement made by India's Minister of Education at a joint meeting of the Permanent Committee of the Berne Union and the Inter-Governmental Copyright Committee:

Now what is happening in India today? Many books published abroad are not published here at all. The authors or the publishers from countries abroad send their books here. The result is a large expenditure of foreign exchange on the part of this country. As you know, we can ill-afford to spend our foreign exchange; we have to conserve all the foreign exchange that we have. . . . [I]f we can devise some method whereby we can prevent foreign exchange being spent on the import of books, we must think about it because it would, as I said, not merely affect India, but would also affect the African countries.

Address by Shri M. C. Chagla, Minister of Education of India, at the Inauguration of the Eleventh Session of the Permanent Committee of the Berne Union and the Seventh Session of the Inter-Governmental Copyright Committee, Dec. 2, 1963, in INDIAN SYMPOSIUM, *supra* note 2, at 2-3.

The exact magnitude of the foreign exchange problem is difficult to assess, and there has been surprisingly little in the literature to date which sheds light on this problem. One likely explanation for this is the relatively disorganized state of publishing in most developing countries. This was suggested by one Indian publisher, who indicated that "[u]nfortunately our publishing industry is not very much organized at the moment to collect enough data and statistics to make out a case for such protection." Bhatkal, *The Needs of Developing Countries in the Field of International Copyright*, in *id.* at 3, 8.

less, it is clear that of new books distributed in developing countries, sometimes as many as ninety-five percent are translations of foreign works,³⁹ the majority of which are imported rather than published within the developing country. Furthermore, there are many books published in London, New York, or Tokyo which sell up to eighty percent of particular editions in developing nations.⁴⁰

The foreign exchange problem, then, would seem to dictate that a licensing system be devised to permit the developing nations to publish domestically translations and reprints of needed foreign works. But what would be the main features of such a system? Surely, administrative formalities should be kept to a minimum, so that local publishers in developing countries are not burdened with lengthy procedural delays and expenses in their efforts to obtain reproduction or translation rights from foreign publishers. This is particularly important since "over ninety percent of all material used for education and entertainment is of contemporary production"⁴¹ and must be made available as soon as possible. Considering this necessity for the rapid transfer of learning materials and recognizing that local publishers in developing countries are often small operations lacking sophisticated equipment, adequate funds, and proper contacts abroad, a central clearing house would seem to be a necessity.

A licensing system which did no more than simplify the administrative procedures involved in obtaining reproduction and translation rights from abroad would be extremely helpful. It would, however, fall short of what is needed, for there must also be provision in such a system for ensuring the availability of works to the people of developing countries at prices they can afford. Prices for books produced in the advanced nations generally reflect the higher costs of labor, materials, and distribution which prevail in such countries, and are exorbitant from the point of view of the inhabitants of developing countries. To take advantage of

39. Pazhwak, *The Question of Copyright in Developing Countries*, in *id.* at 46.

40. Bhatkal, *supra* note 38, in *id.* at 7.

Also pertinent to this inquiry are estimates made in late 1967 that the various relaxations of copyright protection introduced by the Stockholm Protocol in favor of developing nations would cost British publishers *alone* between £4 million and £12 million annually. It was originally represented by the Assistant Secretary of the Publishers Association that yearly losses to the British publishing industry from the Protocol would be between £10 million and £12 million. *The Times* (London), July 17, 1967 at 1, col. 6. This figure seemed unjustifiably high, and it was later reported that "[i]f the British Government signed the Stockholm Protocol it would cost British authors between £4m. and £6m. a year." *The Times* (London), Jan. 20, 1968, at 2, col. 4.

41. R. WHALE, *PROTOCOL REGARDING THE DEVELOPING COUNTRIES* 23 (1968).

the lower costs of book production in developing countries, so as to make translations and reprints available to the reading public at reasonable prices, it is imperative that the licensing system instituted provide some restriction on the magnitude of royalties paid to foreign authors and publishers, while nevertheless continuing to recognize the rights of such parties to fair compensation.⁴²

The necessity for a licensing system presupposes, of course, that developing nations recognize the rights of foreign authors in their literary and artistic property, and thus adhere to one of the major international copyright conventions. Piracy of foreign works is the principal alternative to such recognition, and has been engaged in to a substantial degree in the past by many countries of the world, including Belgium, the United States, and Taiwan.⁴³ Nevertheless, the position of the developing nations today differs in a number of important respects from that enjoyed by these countries during their period of active piracy, and it appears unlikely that large-scale piracy will flourish in today's developing nations.⁴⁴ This fact, coupled with the general beneficent effects of

42. See notes 110 & 123 *infra* and accompanying text.

43. See generally A. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* (1960); and D. KASER, *BOOK PIRATING IN TAIWAN* (1969).

44. Of the various countries which have engaged in literary piracy during the twentieth century, none has achieved such infamy as Taiwan. Blessed with ambiguous domestic copyright legislation, lax enforcement by government officials, and surging demand for reprints, Taiwanese pirates went on a rampage which reached its zenith in the early 1960's. See generally Huang, *The Protection of American Copyrights under Nationalist Chinese Law*, 12 HARV. INT'L L.J. 71 (1971). The total number of titles which were made available by the Taiwan book pirates at one time reached over 5,000, and included works of all kinds. See Huang, *supra* at 71. Academic books were emphasized, however, and "by far the largest number of piracies were in the English language." D. KASER, *supra* note 43, at 49. This last fact takes on special significance when comparing the situation of developing nations today with that of Taiwan in the late 1950's and early 1960's.

While poorly drafted copyright legislation and lack of enforcement on the part of the Nationalist Government contributed substantially to the success of pirating in Taiwan, there were a number of more fundamental factors which gave impetus to its growth. The low cost of labor and materials, and the increased availability of photo-offset equipment, which tended to making copying simpler and cheaper than ever, were determinative. Above all else, however, book pirating flourished in Taiwan due to the huge demand which arose in Asia for English language reprints. By 1960 English had established itself as the *lingua franca* of the Orient. Indeed, English was being taught in virtually all the schools of such countries as Taiwan and Korea, and increasingly more Asian scholars were pursuing their education in the United States. *Id.* at 20. This situation created a huge demand for English reprints, a situation in which publishers in Taiwan could make substantial profits merely by acquiring an American original and by turning on the photo-copy machine. Clearly, publishers in the developing nations of Africa and many other parts of the world are not generally presented with such an opportunity today.

The number of inhabitants of today's developing countries who read one of the major international languages is considerably less than that prevailing in and around

copyright protection on authors' and publishers' incentives, indicates that recognition of international copyright is indeed the best course to be followed by developing countries.

Apart from the question of the feasibility of book pirating, a number of factors indicate that recognition of the rights of both domestic and foreign authors in their literary and artistic property is the most constructive approach which can be taken by developing countries to the problem of creating incentives for the development of authors and publishers at home.

In their quest to free themselves from the remnants of colonialism and to achieve full cultural independence, developing nations must, at some point, cease relying on the literature and ideas of foreign authors and begin to stimulate the development of their own writers, composers, and artists. Only in this way will they begin the creation of a new and unique cultural heritage of their own and promote the full dissemination of knowledge to their people. American authors, fighting for United States recognition of international copyright obligations in the nineteenth century, were well aware of this, and their petition presented to the Senate by Henry Clay emphasized the point:

Native writers be as indispensable as a native militia; that, although foreign writings may be had *cheaper*, owing to the present law of copyright, our people must look for the defense of their habits, their opinions, and their peculiar institutions to those who belong to them and have grown up with them—to their own authors, as to their own soldiers.⁴⁵

At the national level, recognition of domestic copyright protection seems to be mandatory if a country hopes to create an atmosphere con-

Taiwan. Even in countries typically characterized as "francophile" or "anglophile," it is generally only the upper and more highly educated classes which possess reading capacity in the colonial language. Indeed, illiteracy rates are frequently quite high in such countries. There is, then, no substantial commercial demand for reprints in most developing countries, and foreign works generally must be translated into a variety of national or regional languages, as well as adapted and abridged, before they can be effectively distributed to the bulk of the populace. This is an expensive and time-consuming task, not nearly so desirable from the pirate's point of view as reprinting.

Aside from this lack of demand for reprints, there is another factor which tends to reduce the likelihood that large-scale piracy will ever flourish among today's developing nations. This is the changed political climate towards copyright which has been evolving in recent years, and which culminated in the decision by the Soviet Union to accede to the Universal Copyright Convention. 7 COPYRIGHT BULL.: QUARTERLY REV., No. 2/3, at 3 (1973). When the UCC became effective in the Soviet Union on May 27, 1973, book pirating lost one of its few remaining claims to legitimacy, and developing nations will now have to stand alone in their defense of this practice. Political pressures and the threat of a discontinuance of foreign aid will no doubt act to chill substantially the impetus for pirating, as they have in Taiwan.

45. S. Doc. No. 141 24th Cong., 2d Sess. (1836), as quoted in A. CLARK, *supra* note 43, at 48.

genial to the promotion of intellectual creation on the part of its authors. A royalty system, which has become the foundation of copyright protection in most countries, enables authors to live off the receipts arising from the sale of their works and thus stimulates the development of writing as a profession.

At a minimum, domestic protection of copyright in developing countries will involve the enactment of new legislation designed to protect the rights of authors from infringement and ensure them financial rewards. In many countries, however, there will also arise the need to undertake a campaign to educate the public as to the meaning and purpose of copyright, so as to prevent unknowing exploitation by those to whom the notion of intellectual property is alien.

In a country like India, for example, with its great wealth of regional music and literature, most of which is created by persons who have no more than a local reputation, it is not uncommon to find such work exploited by those who believe in living off other people's labours. The reason is obvious. The village bard—to name only one class of copyright owner—just does not know that in making up his latest ballad and giving it his voice he has created something which nobody else may use⁴⁶

Just as domestic copyright protection appears indispensable to the encouragement of a professional class of writers in developing countries, so too does recognition by such countries of the rights of foreign authors in their works. Indeed, if books by foreign authors could be pirated for nothing while compensation was required for the use of domestic works, rare would be the publisher in a developing country who would bother to give the local unrecognized writer any attention at all.

The unfortunate plight of American authors before the United States adopted its first international copyright legislation in 1891 is highly illustrative of this point. Faced with competition from the great masters of Europe whose works were appropriated without cost, even the most talented of American writers were unable to devote their energies to writing full time. Indeed, no American author made a living solely from the profession of writing until the time of Washington Irving and James Fenimore Cooper.⁴⁷

Typical of the sentiment of American authors during this period was the following statement from a speech by William Cullen Bryant at a meeting to organize the International Copyright Association in 1868:

46. Mullick, *The Copyright Situation in Developing Countries*, in INDIAN SYMPOSIUM, *supra* note 2, at 39-40.

47. A. CLARK, *supra* note 43, at 49.

We protect the goods of a traveller landing on our coast. We allow no man to strip him of his garments, to carry off his luggage, or take possession of the wares he has brought for sale, merely because he is a stranger. If we did that, we should be deservedly regarded as having shamefully lapsed into barbarism. Yet by a singular inconsistency, while we have regulations which secure to our own citizens on our own soil their literary property, we have, nevertheless, so framed our laws that the foreigner is robbed of that property here and our own citizens plundered abroad.⁴⁸

Thus, recognition by a developing nation of copyright on both the domestic and international levels is the best means for creating incentives for the development of its own class of full-time authors. Such a policy will also act to encourage the growth of local publishing, which will ultimately help conserve foreign exchange, provide jobs, and stimulate the country's overall economic growth.

Generally, the original publisher of a book bears a number of fixed costs which do not vary with the number of copies ultimately sold.⁴⁹ If the original publisher is not protected by copyright, it becomes apparent that rival pirate printers will be able to market copies of the work without incurring many fixed costs, and will be able to sell books profitably at prices which would not enable the original printer to meet his average costs. Such a state of affairs is hardly conducive to the development of a healthy publishing industry.

Indeed, the state of American publishing in the nineteenth century provides a good example of the chaos and economic waste which results when, for lack of organization and copyright protection, publishers engage in a race to bring out books before their competitors, so as to reap whatever profit is to be found before the market is inundated with reprints. At a time when "[t]he black flag floated over about half of the American best sellers,"⁵⁰ the ruthless struggle between American publishers led to a number of questionable practices, including spying and planting by American firms of workmen in a foreign office to steal galley proofs as they came from the press.⁵¹ Overall, the system took a heavy toll in human resources and cash, resulted in the proliferation of cheap, slovenly-printed texts, and occasioned substantial mutilations to the original works.

In summary, it may be concluded that recognition of copyright in both the domestic and international spheres is in the best interests of devel-

48. INTERNATIONAL COPYRIGHT ASSOCIATION, INTERNATIONAL COPYRIGHT 13 (1868).

49. These include such things as editorial, layout, and composition expenses, and may be rather large as compared with the variable cost elements.

50. F. MOTT, GOLDEN MULTITUDES 92-93 (1947).

51. A. CLARK, *supra* note 43, at 35.

oping nations, provided there are provisions in the international agreements to which they adhere which would create licensing systems to ensure them a quick means of acquiring necessary learning materials from abroad at minimum costs.

III

THE STOCKHOLM CONFERENCE AND THE PROTOCOL REGARDING DEVELOPING COUNTRIES

A. SHORTCOMINGS OF EXISTING CONVENTIONS

As the UCC and the Berne Convention were structured in the mid-1960's, it was very difficult to quarrel with the prevailing view held by the developing nations and expressed at the Brazzaville Meeting:

International copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works; these conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African continent.⁵²

Little or no provision was made in these conventions to assure developing nations of necessary access to translations and reprints of learning materials and to other works published abroad. Nor were adequate steps taken to help such nations conserve foreign exchange or to provide them with needed technical assistance in the development of their own publishing industries.

Article 8 of the Brussels Act of the Berne Convention vested translation rights in the author for a period coterminous with copyright in the original work. Article 25, paragraph 3, introduced the possibility of a reservation, however, under which an author's exclusive right of translation into the language of a reserving country lapsed if he failed to publish such a translation within ten years of the date of first publication. Though taken advantage of by a handful of members of the Union, it actually did very little to ensure that works of foreign authors were readily available in the national languages of all countries. The ten year duration of exclusive rights was simply too long, especially considering the need for contemporaneous learning materials and the rapid speed at which most works of a scientific or technical character become obsolete.

The UCC, for its part, made provision in article V for the issuance of

52. From the *Preamble* to the recommendations adopted by the Brazzaville Conference, August 10, 1963, as quoted in R. WHALE, *supra* note 41, at 10.

compulsory licenses for translation after a seven-year period, provided that complicated and time-consuming administrative formalities were followed. So frustrating have such procedures turned out to be, however, that in the two decades since the UCC came into existence, not a single compulsory license has ever been issued under this provision. This has not come as a complete surprise to all; one writer warned, shortly after the adoption of the convention, that

[t]he compulsory license which may come into existence after a seven-year period has a number of limitations—so many that it is doubtful whether there will be much use of it.⁵³

Other drawbacks to the UCC's compulsory licensing system were that such licenses were nonexclusive; thus providing little incentive for a publisher in a developing country to undertake the relatively expensive costs of translation, editing, and composition; and that the seven-year period of the author's exclusive rights was still too long to be effective. Furthermore, the licenses were restricted to translations in the national languages of a country, which would, for example, have prohibited their issuance to Indian publishers for translations into English.

As to conserving the foreign exchange of developing nations, neither the Brussels Act nor the UCC contained meaningful provisions aimed at reducing the magnitude of royalty payments or for providing developing countries with financial assistance with which to meet such obligations. In addition, little was done in terms of technical aid or encouragement of the development of local publishing in these countries, in order to reduce the quantity of books they had to import.

The developing nations' discontent with the prevailing structure of international copyright relations was apparent as early as 1952 at the Geneva Conference which adopted the UCC. The movement for specific provisions in their favor did not really gain momentum, however, until the needs and demands of these countries became focused at a number of conferences and seminars in the 1960's. Typical of these were the African Study Meeting on Copyright held at Brazzaville in 1962, and the joint session of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee in 1963. Eventually, the Swedish/BIRPI⁵⁴ Study Group, organized to prepare for the Stockholm

53. Finkelstein, *Right of Translation: Article V of the Universal Copyright Convention*, in *UNIVERSAL COPYRIGHT CONVENTION ANALYZED* 51, 57 (T. Kupferman & M. Foner eds. 1955).

54. BIRPI stands for the United International Bureaux for the Protection of Intellectual Property.

Revision of the Berne Convention, became convinced that exceptional measures for the benefit of developing countries were essential, and proposed that a system of reservations in their favor be included in the Berne Convention.⁵⁵ The controversial Stockholm revisions of 1967 were the result.

B. REVISING THE BERNE CONVENTION

While it is the Protocol Regarding Developing Countries which will be the focus of our attention, the Stockholm Act⁵⁶ introduced a number of other revisions to the substantive provisions of the Berne Convention. Several of these warrant mention before turning to an examination of the Protocol.

1. Revisions to Substantive Provisions

Whereas the Brussels Act accorded national treatment to authors who were nationals of any of the countries of the Union, if their works were unpublished or first published in a Berne country,⁵⁷ this principle was broadened by the Stockholm Act to protect works of Berne nationals wherever published. This was the approach accepted by the majority of the national statutes and by the UCC. Furthermore, authors who were not nationals of a Union country but who had their habitual residence in one of them were treated as nationals of that country.⁵⁸

As to the subjects of copyright protection, article 2 of the Brussels Act was extended to include choreographic works and entertainments in pantomime even if there was no fixation, as well as "works expressed by a process analogous to cinematography" and "works expressed by a process analogous to photography."⁵⁹ These latter additions reflected the growth of television. New criteria of secondary eligibility were also introduced for some categories of works, such as cinematographic works, works

55. GOVERNMENT OF SWEDEN & UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY, INTELLECTUAL PROPERTY CONFERENCE OF STOCKHOLM, 1967: PROPOSALS FOR REVISING THE SUBSTANTIVE COPYRIGHT PROVISIONS (articles 1-20) (1966) [hereinafter cited as GOV'T OF SWEDEN & BIRPI].

56. Berne Convention for the Protection of Literary and Artistic Works, Revised at Stockholm, July 14, 1967 (substantive provisions not in force), in UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY, BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (TEXTS) § G1 (1972) [hereinafter cited as Stockholm Act].

57. Brussels Act, *supra* note 4, art. 4, para. (1).

58. Stockholm Act, *supra* note 56, art. 3, paras. (1) & (2).

59. *Id.* art. 2, para. (1).

of architecture, and other artistic works incorporated in a building or structure.⁶⁰

The rights of authors, already well-protected in the Brussels revision, were extended further by establishing the right of reproduction *jure conventionis* for any manner or form of reproduction, including sound or visual recording.⁶¹ The protection of moral rights was strengthened so that such rights could generally be maintained after the author's death, at least until the expiration of his economic rights.⁶²

Overall, these substantive revisions constituted a considerable strengthening of copyright protection in a number of respects, and represented a concession to the more advanced nations. It was hoped that their inclusion would facilitate acceptance of the relaxations of the Protocol by such countries.⁶³

2. Protocol Regarding Developing Countries

a. Structure

The Swedish/BIRPI Study Group recognized that one of the most important tasks facing the Stockholm Revision Conference was the establishment of rules for the benefit of developing nations. These it proposed to insert into the Convention as a new article—article 25*bis*—which would entitle qualified countries to make certain reservations with respect to some of the more important rules of the Convention.⁶⁴ The Study Group's proposals included reservations to the right of translation, term of protection, and right of radio diffusion, as well as specified limitations on copyright where a work was to be used for educational purposes. Developing countries were also to be permitted to make regional arrangements among themselves.

In view of the extent of the proposed rules favoring developing countries and the fact that they were intended to be in force for an interim period only, the Study Group eventually decided that it would be more appropriate to include them in a Protocol annexed to the Convention rather than in a new article included in its main body.⁶⁵ The Protocol

60. *Id.* art. 4.

61. *Id.* art. 9.

62. *Id.* art. 6*bis*.

63. See GOV'T OF SWEDEN & BIRPI, *supra* note 55, at 67-74.

64. *Id.* at 67-68.

65. *Id.* at 72.

was, however, to form an integral part of the Convention, and this was the format actually adopted by the Revision Conference.

The basic principle of the Protocol Regarding Developing Countries⁶⁶ was that any state regarded as a developing country "in conformity with the established practice of the General Assembly of the United Nations"⁶⁷ could avail itself of certain specified reservations for an initial period of ten years, if such country did not consider itself immediately in a position to make provision for full copyright protection due to its economic situation and its social or cultural needs.⁶⁸ It was generally expected that any country no longer needing the reservations would withdraw them.⁶⁹ On the other hand, provision was made for extension of such rights beyond the ten-year period where necessary.⁷⁰ If a state were to cease being regarded as a developing country, its right to continue application of the reservations would automatically expire after six years.⁷¹

b. Scope of Reservations

The Protocol adopted a system of compulsory licenses for translation rights similar to that in article V of the UCC. Significantly, however, such licenses could be obtained under the Protocol after a waiting period of only three years from the date of first publication, instead of seven years under the UCC. Nevertheless, their issuance was still conditioned on compliance with frustrating administrative procedures, including a requirement that the applicant establish

either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right.⁷²

Due provision for "just compensation" to the author was required, though payment of royalties was "subject to national currency regulations."⁷³ Borrowing from article 25 of the Brussels Act, the Protocol also

66. Protocol Regarding Developing Countries, annexed to Stockholm Act, in UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY, BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (TEXTS), § 61, at 34 (1972) [hereinafter cited as Stockholm Protocol].

67. The practice of the General Assembly was that any country listed in the Annex to Resolution No. 1897 (XVIII), adopted November 13, 1963, was to be considered a developing country. G.A. Res. 1897, 18 U.N. GAOR Supp. 15, at 24, U.N. Doc. A/5515 (1964).

68. Stockholm Protocol, *supra* note 66, art. 1.

69. *Id.* art. 2.

70. *Id.* art. 3.

71. *Id.* art. 4.

72. *Id.* art. 1(b)(ii).

73. *Id.* art. 1(b)(iv).

contained the reservation under which an author's exclusive right of translation into the language of a reserving country lapsed entirely if he failed to publish such a translation within ten years of the date of first publication.⁷⁴

To deal with the problem of enabling publishers in developing countries to obtain the rights of reproduction and publication in cases where translation of a work was not necessary, a second system of compulsory licenses was introduced.⁷⁵ It created a regime of nonexclusive legal licenses to reproduce and publish a work "for educational and cultural purposes" if the work had not been published in a country in its original form during a period of three years from the date of first publication.⁷⁶

With regard to the duration of protection, qualified countries were given the right to reduce the post-mortem term of protection from fifty years to a minimum of twenty-five years for most works, and from twenty-five years to a minimum of ten years for photographic works and works of applied art.⁷⁷ Other reservations present in the Protocol included the right to regulate the author's exercise of his broadcasting right,⁷⁸ and a general right to restrict, "exclusively for teaching, study and research in all fields of education," the protection of all literary and artistic works provided that due provision was made to assure to the author a compensation which conformed "to standards of payment made to national authors."⁷⁹ The vagueness and breadth of this last provision seemingly opened a Pandora's Box of potentialities for abuse in view of the flexibility of such standards.

The interrelationship between the substantive provisions of the Stockholm Act (articles 1 to 21) and the Protocol was rather complex, reflecting a number of difficult problems which arose concerning the extent to which the Protocol applied to developed nations which were already members of the Berne Union under an earlier text such as the Brussels Act. As it was finally resolved, any developed country which chose to accede to the substantive provisions of the Stockholm Act would neces-

74. *Id.* art. 1(b)(i).

75. *Id.* art. 1(c).

76. *Id.* Its main features were generally analogous to those of the licensing system for translations, though such reprinting was restricted to the specified purposes. Exportation and sale of works reproduced or translated in accordance with the Protocol's licensing provisions were generally subjected to substantial restrictions.

77. *Id.* art. 1(a).

78. *Id.* art. 1(d).

79. *Id.* art. 1(e).

sarily be bound to the Protocol; conversely, a country needed not apply the Protocol if it failed to accede to the substantive provisions. However, the option was provided for a nation to voluntarily bind itself to the Protocol despite rejecting the substantive provisions.⁸⁰ The significance of this was that a member of the Berne Union which decided neither to accede to the substantive provisions of the Stockholm Act nor to bind itself voluntarily to the Protocol would be in a position to virtually ignore the relaxations in favor of the developing countries. The degree to which this was a problem presented

the great unanswered question of Stockholm. It was made clear rather late in the Conference that a developed country now a member of the Berne Union is under no obligation to allow its works to be used under the Protocol unless it adheres to articles 1 through 21 of the Stockholm Act, and that there is precious little in those articles themselves to induce adherence to Stockholm by present members.⁸¹

c. The Protocol's Failures

A brief analysis of the Protocol's main provisions reveals that it was grossly defective in meeting the needs of developing nations, while at the same time highly objectionable to the more advanced countries. As such, it was nearly a complete failure.

From the standpoint of the developing countries, most of the provisions intended for their benefit appeared to be virtually useless. In view of the need of such countries for contemporaneous materials for use in education and entertainment, it became evident that the reservation permitting reduction of the post-mortem period of protection from fifty to twenty-five years would affect only a small number of the highest quality works, and would result in virtually no saving in royalties paid abroad. Similar reasoning was applicable to the reservation under which an author's translation rights lapsed if he failed to publish a translation in a country's national language within ten years; very few textbooks and technical works would be valuable after such a period.

The systems instituted for obtaining compulsory translation and reproduction licenses suffered from the same defects which characterized the UCC's system. The administrative formalities required to obtain the licenses were simply too expensive, time-consuming, and frustrating. Furthermore, little attempt was made to impose satisfactory limitations

80. Stockholm Act, *supra* note 56, art. 28.

81. Ringer, *The Stockholm Intellectual Property Conference of 1967*, 14 BULL. COPYRIGHT SOC'Y OF THE U.S. 429 (1967).

on royalties, or to provide developing countries with financial assistance to meet such obligations. Though the period of the author's exclusive rights was shortened to three years, this still appeared too lengthy considering the formalities which had to be complied with and the time needed for proper translation, publication, and distribution.

Overall, the Protocol could be criticized by developing nations for its failure to provide them with needed technical and financial assistance in the development of their own publishing industries. Merely permitting translation or reproduction would do very little to ensure that works would actually reach the reading public in such countries. One author summarized the situation in the following manner:

In the developing countries there is a lack of qualified translators, editors, composers, and printers. Paper is scarce or too expensive. Technical facilities are often obsolete. Publishing and bookselling suffer from poor returns. Authors' societies and copyright licensing organizations are only in the course of formation. There is a lack of money and trained specialists. Therefore, the Protocol is no suitable instrument to provide aid for developing countries.⁸²

This fact did not go totally unnoticed at the Stockholm Conference, for there was established, by separate convention,⁸³ the World Intellectual Property Organization (WIPO). Designed to promote the protection of intellectual property throughout the world and to ensure administrative cooperation, WIPO was also charged with providing legal and technical assistance in the field of intellectual property as well as assembling and disseminating information of general interest. Clearly, WIPO possessed potential for providing real assistance to developing nations in a number of important areas.

From the point of view of the advanced countries, the Protocol represented a substantial threat to the existence of copyright protection as it had evolved over a period of several hundred years, as well as a confiscation of the rights of individual authors, composers, and publishers. The use of broad terminology such as "teaching, study and research in all fields of education," and "educational and cultural purposes" aroused fears of substantial abuse, which were magnified by the prospect that developing nations might attain a majority position in the Berne Union if the Protocol were enacted.

82. Schulze, *Advancement of World Copyright Through Aid to Developing Countries*, 44 *INTERNATIONALE GESELLSCHAFT FÜR URHEBERRECHT* E.V. 68 (1970).

83. Convention Establishing the World Intellectual Property Organization, July 14, 1967, [1970] 2 U.S.T. 1749, T.I.A.S. No. 6932 [hereinafter cited as Convention Establishing WIPO].

Of the many arguments advanced against the Protocol, one of the most recurrent was that it was contrary to the original purpose of the Berne Convention, which was to "constitute a Union for the protection of the rights of authors in their literary and artistic works."⁸⁴ Indeed, it was argued to be highly unjust that the burden of the economic aid provided by the Protocol was to be borne almost exclusively by the creators of intellectual property.⁸⁵

Not surprisingly, the Protocol's reception was anything but warm. Of the fifty-eight countries that were members of the Berne Union on July 14, 1967, only thirty-five actually signed the Stockholm Act at that time. Furthermore, such influential countries as the United Kingdom, Canada, and Australia were among those which were present but refrained from signing.⁸⁶ Still more enlightening, however, was the fact that of the twenty-six developing countries belonging to the Berne Union, only Senegal ratified the Protocol without reservations during the six months after its creation. It was thus easy to conclude that "[e]ven the developing countries do not seem to be convinced that a real aid is offered them through the Protocol."⁸⁷

d. Effect of the Protocol

The Stockholm Protocol was adopted largely as a result of political pressures which had been mounting for some time. It has been suggested by one author that

[p]resumably all delegations were . . . bound by instructions from their governments that it was politically inexpedient to vote against the unanimous will of the African and Asian developing countries, for no delegation did so.⁸⁸

84. Stockholm Act, *supra* note 56, art. 1.

85. Typical of the sentiment of most writers in advanced nations was the statement by an Englishman that:

The only decisive and important effects of reducing copyright protection are to discourage the production of works of the mind (particularly of those not created with a view to quick and ephemeral success) and to diminish the means of livelihood of a small number of persons who produce what we have called the fabric of our civilization, at a saving which, in terms of the national exchequer of any country, is insignificant.

R. WHALE, *supra* note 41, at 22 (italics in original).

86. Ringer, *supra* note 81, at 418.

87. Schulze, *supra* note 82, at 68. The substantive provisions of the Stockholm Act (articles 1 to 21) and the Protocol Regarding Developing Countries which formed an integral part of it have never received sufficient ratifications to enter into force. However, the administrative provisions and final clauses of the Act (articles 22 to 38) became effective at the beginning of 1970.

88. R. WHALE, *supra* note 41, at 14.

Another factor which undoubtedly played a role was the intense sense of competition and rivalry between the Berne Union and UCC for new members and greater prestige. Clearly, the Protocol was designed to attract and keep the developing nations within the Berne Union.

It soon became evident that steps needed to be taken to overcome the crisis caused by the Protocol, and at a joint meeting of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee of UNESCO, in 1969, it was decided to form a Joint Study Group. Its purpose was to evaluate the needs of both developing and developed countries in the field of international copyright and to devise a suitable program for making the prevailing conventional structure more responsive to such needs. In October, 1969, the Study Group met in Washington and formulated a number of recommendations which included the creation of an International Copyright Information Center and specific revisions of both the Berne Convention and the UCC.⁸⁹ These recommendations formed the basis for the revisions enacted in Paris during the summer of 1971.

IV

THE PARIS REVISIONS OF 1971 AND THE FUTURE DEVELOPMENT OF INTERNATIONAL COPYRIGHT

The conferences for the revision of the Universal Copyright Convention and the Berne Convention, held concurrently in Paris from July 5-24, 1971, were designed to overcome the crisis caused by the Stockholm Protocol. They would, it was hoped, devise a program to

satisfy the practical needs of developing countries for ready access to educational, scientific, and technical works, without weakening the structure and scope of copyright protection offered by developed countries under both the Universal Copyright Convention and the Berne Convention.⁹⁰

Their success is best evaluated through an examination of the more important revisions which were introduced at the conferences.

A. REVISIONS TO THE UCC

Turning first to the Universal Copyright Convention, the Paris Revision⁹¹ extended authors' basic rights to include the rights of repro-

89. These are discussed in detail in Schulze, *supra* note 82, at 64-82.

90. Kaminstein, *Report of the Gen'l Rapporteur on the Conference for the Revision of the Universal Copyright Convention, Paris, 5-24 July 1971*, 5 COPYRIGHT BULL.: QUARTERLY REV., No. 4, at 4 (1971).

91. Universal Copyright Convention as Revised at Paris, July 24, 1971 (not in effect),

duction, broadcasting, and public performance. At the same time, a number of provisions were introduced for the benefit of the developing countries, including new rules permitting relaxation of certain rights and a suspension of article XVII and its Appendix Declaration.

The extension of the rights of authors was accomplished by the addition of article *IVbis* to the Convention. It refers to article I, which sets forth the undertaking of each contracting state "to provide for the adequate and effective protection of the rights of authors" and indicates that such rights shall include "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting."⁹²

The basic relaxations in favor of developing countries are contained in three new articles—*Vbis*, *Vter*, and *Vquater*—which make limited compulsory licensing systems available for the benefit of developing nations with respect to translations and reproductions; in many respects, the licenses resemble those of the ill-fated Stockholm Protocol. Article *Vbis* sets forth the basic procedure whereby any contracting state "regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations" may by notification avail itself of specified exceptions to copyright protection provided for in articles *Vter* and *Vquater*.⁹³ Such notification is effective for an initial period of ten years, and is generally renewable.⁹⁴ A state which has ceased to be regarded as a developing country, however, loses its renewal right.⁹⁵

Article *Vter* imposes a compulsory licensing system for translations which in several respects resembles that introduced by article V of the Geneva text of the UCC, but which introduces several innovations. Compulsory licenses under this article may be obtained after a period of three years from first publication—and sometimes as short as one year—where a translation of a writing has not been published in a language in use in a developing country.⁹⁶ Such licenses may only be granted, how-

in 5 COPYRIGHT BULL.: QUARTERLY REV., No. 3, at 4 (1971) [hereinafter cited as Revised UCC].

92. *Id.* art. *IVbis*, para. 1.

Exceptions are permitted by paragraph 2, if they do not conflict with the spirit and provisions of the Convention and if authors are still accorded a reasonable degree of protection. The increased protection to authors accorded by article *IVbis* is an important step towards raising the overall level of protection provided by the UCC to a par with that provided by the Berne Convention.

93. *Id.* art. *Vbis*, para. 1.

94. *Id.* para. 2.

95. *Id.* para. 3.

96. *Id.* art. *Vter*, paras. 1(a) & (b). But note that paragraph 2(a) imposes a further waiting period of six or nine months before such licenses may be granted.

ever, if the applicant adheres to specified administrative formalities. He must, for example, "in accordance with the procedure of the State concerned," establish

either that he has requested, and been denied, authorization by the owner of the right of translation, or that, after due diligence on his part, he was unable to find the owner of the right.⁹⁷

In addition, notification must be sent at the time of request to the international copyright information center established by UNESCO or to a properly designated national or regional center. Furthermore, where the owner of the right of translation cannot be found, the publisher is to be contacted.⁹⁸

Licenses for translation under article *Vter* can be granted only for the purpose of teaching, scholarship, or research,⁹⁹ and exportation of works published under such compulsory licenses is generally prohibited by strict regulations.¹⁰⁰ Due provision must be made at the national level to ensure payment and transmittal of "just compensation that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned."¹⁰¹ Should national currency regulations intervene, all efforts are to be made "by the use of international machinery to ensure transmittal in internationally convertible currency or its equivalent."¹⁰²

The other major licensing system introduced into the UCC by the Paris Revision is for the compulsory reproduction licenses contained in article *Vquater*. Under this system, any national of a developing country may obtain a nonexclusive license to publish a particular edition for use in connection with "systematic instructional activities" if copies of the edition have not been distributed in his country at a reasonable price within a stated period.¹⁰³ Such period is generally five years from the date of first publication, though a three-year period is applicable to works of a scientific character, and the term is seven years for works of fiction, poetry, drama and music, and for art books.¹⁰⁴ The administrative procedures for obtaining such licenses are nearly identical to those required for

97. *Id.* para. 1(c).

98. *Id.* para. 1(d).

99. *Id.* para. 3.

100. *Id.* para. 4.

101. *Id.* para 5.

102. *Id.*

103. *Id.* art. *Vquater*, para. (1a).

104. *Id.* para. 1(c). But note that paragraph 1(e) imposes a further waiting period of six months from the date of request.

the translation licenses of article *Vter*, as are the export and royalty payment provisions.

The final relaxation in favor of developing countries was a modification of the "Berne Safeguard Clause" of the Appendix Declaration relating to article XVII. This would enable such countries to exercise free choice regarding their adherence to the Berne Union and/or the UCC.

B. REVISIONS TO THE BERNE CONVENTION

Turning next to the Paris Act of the Berne Convention,¹⁰⁵ the basic revisions consisted of separating the Protocol from the Act and instituting a new preferential system in favor of developing countries. The former was accomplished by modification of article 21 of the Stockholm Act, while the latter involved creation of special provisions which were incorporated in an Appendix which formed an integral part of the Act. This Appendix instituted compulsory licensing schemes which were nearly identical to those of the Revised UCC.¹⁰⁶ The substantive and administrative provisions of the Stockholm Act (articles 1-20 and 22-26) were also incorporated into the Paris Act.

Compared with the Stockholm text, the Paris Act represents a far more satisfactory balancing of the legitimate needs of developing and developed countries in international copyright and appears to cure several defects present in the earlier Act. Generally speaking, authors' rights have been protected to a substantially greater degree in the Paris Appendix than in the Stockholm Protocol. Whereas article 1(e) of the Stockholm Protocol permitted virtually any encroachment upon the rights of foreign authors "exclusively for teaching, study and research in all fields of education" without even a requirement that the author be contacted, the relaxations in the Paris Appendix are largely confined¹⁰⁷ to the specified licensing systems. These are structurally similar to the licensing systems in the Protocol, though they contain several substantive changes as well as a number of modifications in language.

105. Berne Convention for the Protection of Literary and Artistic Works Revised at Paris, July 24, 1971 (substantive provisions not in force), in 7 COPYRIGHT 135 (1971) [hereinafter cited as Paris Act].

106. See generally Ziegler, *The Conferences for the Revision of the Universal Convention and Berne Convention, July 1971*, INTERAUTEURS, No. 182, at 33 (1971).

107. But see Article 5 of the Appendix to Berne Convention for the Protection of Literary and Artistic Works Revised at Paris, July 24, 1971, in 7 COPYRIGHT 146 (1971) [hereinafter cited as Paris Act Appendix], relating to the reservation as to translation rights.

Among the more noteworthy revisions is a redefinition of the uses for which such licenses may be obtained. Licenses for translation, available for any purpose under the Protocol, may only be granted under the Paris Appendix "for the purposes of teaching, scholarship or research."¹⁰⁸ Reproduction licenses, on the other hand, which had previously been available for any "educational or cultural purposes" are now restricted to use "in connection with systematic instructional activities."¹⁰⁹

The author's right to just compensation has been strengthened somewhat in the Paris Appendix. Thus, while such right was subject to national currency regulations in the Protocol, it is now provided that if such regulations intervene the competent authority shall nevertheless "make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent."¹¹⁰ More stringent regulations relating to export of copies published under license have also been included.¹¹¹

Other modifications include a reduction of the applicable period of the author's exclusive rights in some cases to as short as one year,¹¹² and the addition of a further waiting period of six or nine months from the date of compliance with certain administrative procedures.¹¹³ These procedures have been modified to include a system of notification whereby an applicant for a license contacts an international information center when making his request for authorization from the author or publisher.¹¹⁴

V

THE FUTURE

Thus far, neither the Revised UCC nor the substantive provisions and Appendix of the Paris Act have become effective. As revised, the Universal Copyright Convention will come into force after the deposit of twelve instruments of ratification, acceptance, or accession.¹¹⁵ Four have been received to this date—from France, Hungary, the United Kingdom,

108. Paris Act Appendix, art. II, para. (5).

109. *Id.* art. III, para. (2)(a).

110. *Id.* art. IV, para. (6)(a)(ii).

111. *Id.* art. IV, para. (4).

112. *Id.* art. II, para. (3)(a).

113. *Id.* art. II, para. (4)(a).

114. *Id.* art. IV, para. (1) & (2).

115. Revised UCC, *supra* note 91, art. IX, para. 1.

and the United States. The Geneva text, the version currently being applied, now has sixty-four adherents, or nine more than it had in mid-1967.¹¹⁶

The effectiveness of the substantive provisions and Appendix of the Paris Act is conditioned both on the deposit of at least five instruments of ratification or accession, and on France, Spain, the United Kingdom, and the United States becoming bound by the Revised UCC.¹¹⁷ France and Hungary have thus far ratified the Paris Act, while the United Kingdom has declared it will admit the application of the Appendix to works of which it is the country of origin by countries which have made the appropriate declaration or notification under the Appendix.¹¹⁸

Despite the fact that the Paris Revisions have not yet entered into force, there remains room for optimism concerning their ultimate success. The general sentiment following the Paris Conferences and the relatively swift ratifications by such developed countries as the United Kingdom and the United States seem to indicate that the revised texts will indeed replace the earlier versions in the near future. In any case, the Paris Revision Conferences have contributed substantially to the development of international copyright law by serving as a forum for the discussion of differing viewpoints and by reaching a common ground on many highly controversial issues. Nevertheless, in the quest for further refinement and improvement of international copyright we must look beyond the Paris revisions.

The ultimate goal is the creation of a unified system of international copyright which meets the more important needs of virtually all the countries of the world. The recent past has seen a great deal of progress in reconciling the conflicting needs of developing and developed countries; the next step should be the further rapprochement of the Berne Union and the Universal Copyright System leading to their eventual unification.

A number of steps in this direction were taken at Paris in 1971, the most obvious of which was the concurrent meeting in Paris of the revision conferences of the two systems. Substantively, the overall protection accorded to authors in the UCC was raised to a level closer to that of the Berne Convention, and the two Conventions adopted nearly identical

116. See note 16 *supra*. The nine additional contracting parties are: Australia, Cameroon, Fiji, Hungary, Malta, Mauritius, Morocco, Tunisia, and the Soviet Union.

117. Paris Act, *supra* note 105, art. 28, para. (2)(a).

118. 7 COPYRIGHT 189 (1971); 8 COPYRIGHT 199 (1972).

compulsory licensing systems for the benefit of developing countries. Furthermore, the effectiveness of the Paris Act of the Berne Convention was conditioned upon the Revised UCC coming into force in France, Spain, the United Kingdom, and the United States.

While the merger of the UCC and Berne Convention in a unified text does not appear feasible in the near future, the administration of the two systems can be combined and coordinated fairly easily by incorporating the UCC into the World Intellectual Property Organization.¹¹⁹ As previously noted, WIPO was established by Convention at the Stockholm Conference of 1967, and is presently performing the administrative tasks of the Berne Union. Article 4 of the Convention which established the Organization provides that WIPO may agree to assume or participate in the administration of any other international agreement designed to promote the protection of intellectual property.¹²⁰ Thus, the conventional framework seems clearly to contemplate such coordination.

At the end of 1973 WIPO had thirty-two members,¹²¹ and had already begun to aid developing countries in the field of international copyright. Its recent activities have included the operation of a training program for copyright officials from developing countries, assistance to national and regional industrial property offices, and the organization of several seminars on intellectual and industrial property in the Arab States and Africa.¹²² Incorporation of the UCC within the Organization would permit a number of additional improvements in administration of the Conventions which would be of particular value to developing nations. This unified administrative body could aid in the procurement of licenses, and in the management of an international fund which would be used to assist in the transfer of royalties.

The compulsory licensing systems devised at the Paris Conferences contained a number of significant advances over those of the Stockholm Protocol and the Geneva text of the UCC. Nevertheless, several problems do persist, and it would appear that WIPO could be highly effective in

119. See Schulze, *supra* note 82, at 79-81, wherein the author sets forth several proposals.

120. Convention Establishing WIPO, *supra* note 83, art. 4.

121. Australia, Austria, Bulgaria, Byelorussian SSR, Cameroon, Canada, Chad, Czechoslovakia, Denmark, Fiji, Finland, German Democratic Republic, Federal Republic of Germany, Hungary, Iceland, Israel, Jordan, Kenya, Liechtenstein, Malawi, Morocco, Romania, Senegal, Soviet Union, Spain, Sweden, Switzerland, Uganda, Ukrainian SSR, United Kingdom, United States, Yugoslavia.

122. See generally, *The World Intellectual Property Organization in 1972*, 9 COPYRIGHT 2-4 (1973).

dealing with them. Complicated administrative procedures have been a substantial drawback to the licensing systems of the Protocol and the Geneva UCC, and the Paris revisions apparently have done little to simplify them. An attempt must still be made to contact the author or publisher abroad, and notification must also be sent to an international copyright information center. What is needed is a central clearing house which would contain relevant information about works which might be of interest to developing countries, and which could carry out the greater part of the negotiations between the licensee and the owner of the copyright.

WIPO could provide the facilities for such an operation, thus enabling publishers in a developing country to obtain compulsory licenses merely by contacting a national or regional clearing house, and then negotiating directly through WIPO with the author. The potential saving of time and expense which such a system could bring about appears quite substantial.

The matter of authors' compensation has been a problem under all of the compulsory licensing schemes, and the Paris revisions do not appear to be an exception. The requirement that if national currency regulations intervene, the competent authority shall nevertheless make all efforts to ensure transmittal in internationally convertible currency or its equivalent,¹²³ does little to ameliorate the foreign exchange problem of the developing nations. What seems to be necessary is a scheme whereby the developing countries are permitted to credit royalties in their own currency to the author's account in an internationally controlled fund, which would then assist the author in their expenditure. Alternatively, after the deposit of the royalties by the developing countries, the fund could pay the author in his national currency and assist in utilization of the developing country's currency for local expenditures in conjunction with international aid programs. Here again, WIPO would seem to offer the facilities for such an operation.

CONCLUSION

Clearly, the various revisions of the past six years have made substantial progress towards reconciling the differing needs of developing and advanced countries in the field of international copyright, and have

123. See note 110 *supra* and accompanying text.

included a number of steps leading toward the ultimate unification of the Berne Union and the UCC System. Further efforts should be directed toward this latter objective, for measures such as unified administrative control, and an international fund to assist in the transfer of royalty payments will ultimately have a powerful impact on the creators of intellectual property in all parts of the world.