The 1992 Horace S. Manges Lecture — People or Machines: The Berne Convention and the Changing Concept of Authorship*

by Sam Ricketson**

INTRODUCTION

Talk of crisis and upheaval has marked recent discussions and debates on the current state and future prospects of national and international copyright laws. The language of metaphor has always been popular, as commentators have sought to describe the challenges that confront creators of literary and artistic works. One highly experienced observer has spoken of "Disquieting Reports from the Maginot Line of Authors' Copyright."[1] Another, Professor Kernochan, the organizer of the present lecture, has remarked bleakly, "One feels that darkness may descend at any moment in this area."[2] The pervading impression is one of gloom and doom, as the defenders of authors' rights, like King Canute of old, try vainly to hold back the rising tide of modernity and the encroachments of the machine age.

The language of *Sturm und Drang*, however, should not blind us to the fact that the crisis is a real, not imagined, one. Copyright law, both at the national and international level, is now at a very critical stage in its development. This is not to deny that there have been other significant crisis points in its existence—the struggle between developed and

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* This is a revised version of the lecture which I delivered at Columbia University on February 25, 1992. The revisions, and some additional material, have been incorporated, following the very helpful suggestions and criticisms made by Professor Jane Ginsburg and some of the students in her J.D. copyright course while I was still at Columbia in the days following the lecture. However, the central thesis put forward in the lecture remains unchanged.

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1. Mihàly Ficsor, *Disquieting Report from the Maginot Line of Authors: Technological Progress and Crisis Tendencies in Copyright*, 18 COPYRIGHT 104 (1982). *See also* to similar effect: David Ladd, *To Cope with the World Upheaval in Copyright*, 19 COPYRIGHT 289 (1983); André Kerever, *Is Copyright an Anachronism?* 19 COPYRIGHT 368 (1983); Walter Dillenz, *What Is and To Which End Do We Engage in Copyright?* 12 COLUM.-VLA J.L. & ARTS 1 (1987).

2. John M. Kernochan, *Imperatives for Enforcing Authors' Rights*, 11 COLUM.-VLA J.L. & ARTS 587 (1987).

developing countries at the end of the 1960s is still fresh in living memory. But the truth is that the crisis today is both serious and far-reaching: without overstating the matter, there is currently a struggle taking place over the "soul" of copyright, and the need to resolve this conflict is an urgent one. Confronting each other here are differing and rapidly changing conceptions of the role and rationale of copyright. Underpinning this, in turn, is a fundamental dispute about the nature and meaning of the concept of authorship.

Speaking before the present audience, I am all too aware that I am in the company of many who are committed to the preservation and advancement of authors' rights. What else could one expect, in a city which has so long been a world center of so much cultural and intellectual activity and where even the public buildings are great works of art themselves? Indeed, the man in whose honor this lecture series is named, Horace S. Manges, was known above all as a fearless proponent of authors' rights and the advocate and adviser of many prominent American writers. Yet, as we all know, copyright law has never been just concerned with the protection and fostering of the single creative individual, although this has been a very important function of that law. Other themes have also been significant in its development, not the least of these being the "encouragement of learning" and the protection of investment in information creation and processing enterprises. Indeed, another of the eminent scholars present tonight, Professor Jane Ginsburg, has argued convincingly that the protection of both creation and commercial value lie together at the heart of modern copyright law and that both can be complementary, rather than conflicting, objects of protection.[3]

The purpose of my lecture tonight is to discuss these questions in the international context, with particular reference to the premier copyright convention, the Berne Convention for the Protection of Literary and Artistic Works,[4] which now binds this country and eighty-nine others.[5]

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3. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865 (1990).

4. The Berne Convention has a long history, which began with a first text on Sept. 9, 1886, completed at Paris, May 4, 1896. There have been many changes to this text: revised at Berlin, Nov. 13, 1908, completed at Berne, Mar. 20, 1914, revised at Rome, June 2, 1928, at Brussels, June 26, 1948, at Stockholm July 14, 1967, and at Paris, July 24, 1971, amended in 1979. The current text was done at Paris, July 24, 1971. This is the version that entered into force in the U.S. on Mar. 1, 1989, S. TREATY DOC. NO. 27, 100th Cong., 1st Sess. (1989). English translations of all Berne texts are available in Copyright Laws and Treaties of the World (BNA). Throughout this article, all references to differing texts of Berne will be "Berne Convention 1886," "Stockholm Act 1967," etc.

5. According to the most recent list of accessions and ratifications published in the monthly journal of the Berne Union. 28 COPYRIGHT 6-8 (1992). The People's Republic of China recently announced that it will become a signatory to Berne by October 1992. N.Y. TIMES, Jan. 17, 1992, at D1.

More specifically, I will discuss not only the meaning of authorship under the Convention, but also the way in which this concept has evolved and the challenges that now face it. My thesis will be that this concept has now developed close to the breaking point. While it still embodies the values of personal creation traditionally central to copyright law, these values have now reached the point at which they are being steadily undermined and debased. To adopt the terminology used in the title of the lecture, the choice is rapidly becoming one between people and machines: which value should the Berne Convention and national copyright laws embody and protect? Although the Berne Convention has never been completely explicit on this point, there are nonetheless clear guidelines to be found in the Convention, and these set firm boundaries around the concept of authorship to be recognized and protected by member countries. The question which I will address at the end of the lecture is: should this paradigm be retained, or should we now adopt a new one and so move away from the concept of personal authorial creation?

I. THE BERNE CONVENTION AND THE SEARCH FOR A PREVAILING PHILOSOPHY

International instruments, such as the Berne Convention, often contain positive prescriptions of the most general and abstract kind. While there is usually a discrete focus for agreement, there is always a penumbra of ambiguity and uncertainty, which permits accommodation of widely divergent national approaches. This description is certainly true of the Berne Convention, although at a first reading one is struck by the apparent precision of many of its provisions, particularly in the latest text of 1971. Viewed in an historical context, its evolution over the past century has been an astonishing achievement, developing from a limited instrument based on the principle of national treatment to what now is a solid corpus of rights and other prescriptions governing the protection of literary and artistic works. Nonetheless, the search for a clear Convention philosophy is an elusive and frustrating one. It is rather like trying to fold a blanket in a strong wind: once you have hold of one corner, another threatens to fly free. Conflicting signals come from all directions, whether gleaned from a study of the origins and development of the Convention, the process of strict textual analysis, or an examination of the way in which member states individually implement their Convention obligations. Consequently, it is not easy to discern clear signs pointing toward the prevailing philosophy of the Convention. Nonetheless, the inquiry is a necessary one, particularly now, as we commence

the process of preparing for another revision conference.[6] A good starting point, therefore, is the first Berne text, and even before. Is there an "original intent" that can be discerned behind this document?

II. THE TIME BEFORE BERNE

While the messages of the past often appear contradictory, there is always some means of understanding them if we only look hard enough. In the case of copyright and authors' rights, a clear view of the past is often masked by preconceptions about the way in which these rights have developed. In particular, many commentators (myself included) have commonly made certain unquestioning assumptions about the approaches taken by lawyers in both common law and civil law countries to this matter. The former are said to be pragmatic and instrumentalist by inclination, seeing the grant of copyright protection as a means of serving the general public good. The latter are said to view these rights as rooted in natural law concepts and linked indissolubly to the personality of the individual creator.[7] In other words, the common law can be said to be more concerned with questions of incentive, investment and commerce, while the civil law is more centered on authors and their personal rights.

Impressive textual support can be marshalled in support of these paradigms, ranging from the oft-cited preamble to England's 1709 Statute of Anne ("An Act for the Encouragement of Learning. . .")[8] to the lofty perorations of Le Chapelier and Lakanal in their reports on the revolutionary French laws on public performing rights and copyright.[9] Likewise, Lord Macaulay's vivid strictures against the "copyright tax"[10] and the wording of the Copyright and Patents Clause of the U.S. Constitution[11] have come to epitomize the hard-nosed, instrumentalist approach of the common law, while the language of the continental

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6. The World Intellectual Property Organization (WIPO) has instituted a series of meetings of a Committee of Experts to discuss a possible Protocol to the Berne Convention. Meetings already have been held in November 1991 and February 1992, and are next scheduled to continue in late November 1992.

7. *See, e.g.*, André Françon, *Authors' Rights Beyond Frontiers: A Comparison of Civil Law and Common Law Conceptions*, 149 REVUE INTERNATIONALE DU DROIT D'AUTEUR 2 (1991) [hereinafter R.I.D.A.].

8. Statute of Anne, 1710, 8 Anne c. 19.

9. *See generally* Olivier Laligant, *The French Revolution and Authors' Rights or Perenniality of the Subject Matter for Protection*, 147 R.I.D.A. 2 (1991).

10. *See* Macaulay's famous parliamentary speeches on Serjeant Talfourd's bill to extend the term of copyright in HOUSE OF COMMON DEBATES, Feb. 5, 1842, 350.

11. "The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8.

Europeans has generally appeared to be motivated by a natural rights, author-oriented, view of copyright.[12]

Entrenched as these images are, nothing is quite as it seems. All of us here tonight should be indebted to Professor Ginsburg for her recent comparative study of the origins of U.S. and French copyright law.[13] Her conclusion—from a study of the background of the two laws and the resulting decisions under those laws—is that natural rights concepts as well as instrumentalism were motivating factors in the making and operation of both laws. This is undoubtedly true of the early British copyright law as well, as a study of some of the significant cases of the eighteenth and nineteenth centuries shows. If the crass greed of publishers lay behind the famous suit of *Millar v. Taylor*,[14] natural rights formulations were also invoked by some members of the court in reaching the conclusion that there was a perpetual common law copyright after publication. Even as late as the 12th edition of *Copinger and Skone James on Copyright*,[15] there is a natural rights justification of the institution of copyright at odds with that work's otherwise stiff doctrinal analysis.

Professor Ginsburg's study therefore reveals the need to look below the surface, to see not only what legislators and courts were really doing when they granted copyright protection to books, paintings and the like, but also who the principal beneficiaries of that protection were. Ginsburg shows how readily things can be taken out of context and repeated down the centuries until they achieve almost mythical and irrebuttable status in the eyes of later commentators. Her point is one of considerable contemporary relevance: although both common law and civil law traditions may appear to have widely diverging conceptions of copyright and authors' rights, the origins of these conceptions have much in common and provide a solid basis for *rapprochement* in the present. She also suggests that the differences between the two systems may have come later, in the middle of the nineteenth century, with the development of a more personality-based conception of authors' rights on the European continent. Even so, I do not think that this break was as sharp as is generally thought, so that common elements between the two

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12. *See generally* FRANCIS J. KASE, COPYRIGHT THOUGHT IN CONTINENTAL EUROPE: ITS DEVELOPMENT, LEGAL THEORIES AND PHILOSOPHY: A SELECTED AND ANNOTATED BIBLIOGRAPHY 8 (1967); EUGENE POUILLET, TRAITÉ THÉORIQUE ET PRACTIQUE DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE ET DU DROIT DE REPRÉSENTATION chs. I & II (2nd ed. 1894).

13. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 147 R.I.D.A. 125 (1991).

14. 98 Eng. Rep. 201 (1769), Y.B. 4 Burr 2303. *See generally* John Feather, *Authors, Publishers and Politicians: The History of Copyright and the Book Trade*, 10 EUROPEAN INTELLECTUAL PROPERTY REVIEW 377 (1988) [hereinafter E.I.P.R.].

15. E.P. SKONE JAMES, ET AL., COPINGER AND SKONE JAMES ON COPYRIGHT 4 (12th ed. 1980). This has been deleted from the most recent edition (the 13th), published in 1991.

systems still remained at that time. This commonality is reflected in the origins of the Berne Convention itself and continues to be true, even now.

It is important to note that the initial impetus for the Convention came from authors and artists themselves. Thus, in 1883 the newly established International Literary and Artistic Association (*l'Association littéraire et artistique internationale*, or ALAI) formulated a draft text to serve as the basis for a new multilateral treaty on authors' rights to replace the existing web of inconsistent and piecemeal bilateral arrangements.[16] This proposal led directly to the adoption of the Berne Convention three years later. It therefore seems logical to conclude that the object of the new Convention was to protect the interests of authors. It is, however, equally clear that the wider interests of trade and commerce were also at play in the three successive diplomatic conferences that drafted and adopted the final Convention text between the years 1884 and 1886.[17] Despite the obligatory flights of rhetoric, the final text was a minimalist document which sought the lowest common denominator between the countries represented as the necessary price of gaining the largest number of adherents.[18] Although constituting a "Union for the protection of the rights of authors in their literary and artistic works," something that was claimed to be "an imperative necessity of our time,"[19] it achieved this objective through the pragmatic application of the principle of national treatment rather than through the detailing of a set of prescriptions for those rights. Significant limitations on copyright protection were also allowed, particularly in the case of translations,[20] and it is possible to see, at this early date, the competing concerns of copyright users.[21] Impressive as the new Convention was in its multilateral sweep, as a charter of authors' rights, it was merely a blank page with the heading filled in at the top.

It is hardly surprising that this was so, in light of the differences between the countries involved. My main knowledge is of the concerns that motivated the United Kingdom in joining the Convention, and these

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16. For an account of the background to this project, see SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, 41-80 (1987) [hereinafter RICKETSON]. *See generally* ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONAL: SON HISTOIRE, SES TRAVAUX 1-12 (1889) [hereinafter HISTOIRE].

17. *See generally* HISTOIRE, *supra* note 16.

18. *See, e.g.*, speech by Numa Droz, President of the Conference, at the opening meeting of the second Diplomatic Conference at Berne, Sept. 7, 1885, *in* BERNE CONVENTION CENTENARY 1886-1986 109 (1986) (WIPO publication No. 877(E), containing the transcripts of all Diplomatic Conferences on the Convention) [hereinafter CENTENARY VOLUME].

19. CENTENARY VOLUME, *supra* note 18, at 109.

20. Berne Act 1886, art. 5.

21. *See, e.g.*, speech of Dr. Janvier, delegate for Haiti, at the 1885 Conference, with respect to the use of works for scientific purpose *in* CENTENARY VOLUME, *supra* note 18, at 115.

seem to have been as much driven by commercial and practical considerations as by the desire to accord justice to authors. Initially, Her Majesty's Government was of the view that membership in the Convention might be the best means of achieving a long-sought treaty relationship with the other great common law country, the United States.[22] Such a treaty would have been a great financial advantage to British authors and publishers and presumably would have had a positive effect on the balance of trade between the two countries. However, the United States government made it clear at the outset that, while it was generally in favor of international copyright arrangements, there were too many competing domestic interests to make early adherence possible.[23] The United States did not, in fact, join until over a century later.[24] With U.S. participation no longer a possibility, British involvement in the Berne process seems to have become predicated on the efficiencies membership in a multilateral agreement would offer in contradistinction to the bilateral arrangements then in place.[25] The price for British involvement was that the United Kingdom would not be required to undertake any significant amendment to its own laws for the purpose of Berne membership. Thus, the efforts of the British delegates at the second diplomatic conference in 1885 were directed at ensuring that the Convention required a minimum of substantive obligations apart from national treatment. For a number of other countries, even national treatment was too much to be expected, and they withheld from joining,

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22. *See generally* SWITZERLAND NO. 1 (1886), CORRESPONDENCE RESPECTING THE FORMATION OF AN INTERNATIONAL COPYRIGHT UNION, C-4606 (1886).

23. The Government of the United States is in principle disposed to accept the rule that the author of a literary or artistic work, whatever his nationality and the place of reproduction of the work, must be protected everywhere as a national. In practice, however, the Government sees great obstacles to accommodating all countries within one and the same Convention. Differences of tariffs, and the fact that a number of industries in addition to the author or artist are concerned with the production or reproduction of a book or work of art, have to be taken into account when one considers the grant to the author of a work the right to have it reproduced or to prevent its reproduction in all countries. There is a distinction to be made between the painter or sculptor, whose work goes on to the market in the form in which it left his hands, and the literary author, to whose work the paper manufacturer, the typesetter, the printer, the binder and many other persons in business all contribute.

Response of the U.S. Government to the invitation of the Swiss Federal Council to participate in the first Diplomatic Conference at Berne in 1884. CENTENARY VOLUME, *supra* note 18, at 84.

24. *See generally* John M. Kernochan & Jane C. Ginsburg, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988).

25. For an account of these early bilateral conventions, see RICKETSON, *supra* note 16, ch. 1.

citing such reasons as the state of their internal laws or the current level of their cultural development.[26]

It is therefore difficult, when considering the first Berne text of 1886, to discern any clear view that emerges of the nature of authors' rights. Not only was there no definition of "author"—a situation that continues today—but authors were also not the only subjects of protection under the Convention. Thus, under article 2, those who first published works of non-Union authors in a Union country were protected in the same way as Union authors and their successors in title.[27] This was, however, a compromise provision, intended to overcome objections to granting protection to non-Union authors who first published in Union countries. This provision was soon altered at the first revision conference of 1896, thereby creating the famous "back door to Berne" that benefited American authors and publishers for many years.[28]

Despite the omission of a definition of "author," my own view is that there was nonetheless a basic agreement between the contracting states as to the meaning of the term, and, because of this, it was thought unnecessary to define it. There is considerable textual evidence to support this view in the provisions of national laws of the time and those of earlier bilateral conventions, and these sources were drawn on heavily in devising the inclusive list of protected works contained in article 4 of the new Convention. During the early diplomatic conferences, there was very little debate about the subject, so it seems only logical to interpret "authors" and "authorship," for purposes of the Convention, as pertaining to the persons who created such works. It is difficult to believe that there would have been agreement on these items if they did not already have some generally accepted meaning for member states. By contrast, at later revision conferences, there have usually been extended debates over the addition of new categories of works to article 4 (and its successors).[29] The initial list of works in article 4 must therefore be regarded as a clear and agreed statement of current state practice in 1886 that involved no new departures that would cause embarrassment to intending members of the new Union. It read:

> The expression "literary and artistic works" shall include books, pamphlets and all other writings; dramatic or dramatico-musical works; musical compositions with or without words; works of drawing, painting, sculpture and engraving; lithographs, illustrations, maps; plans, sketches and three-dimensional works relative to geography, topography, architecture or science in general; in fact, every production whatsoever in the

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26. *See* speech by Numa Droz at the opening session of the 1886 Conference, Sept. 6, 1886. CENTENARY VOLUME, *supra* note 18, at 131.

27. Berne Act 1886, art. 2.

28. Paris Additional Act 1896, May 4, 1896, art. 1(1).

29. Article 2(1) of the Paris Act of 1971 is the successor to article 4 of the 1886 Act.

> literary, scientific or artistic domain which can be published by any mode of printing or reproduction.[30]

The emphasis here seems as equally on the informational and functional as on the artistic and aesthetic, and this division was reflected in national laws, even those of the countries which were the most ardent advocates of authors' rights. Indeed, useful national statistics on publishing, registration and deposit published in *Le droit d'auteur* over the first years of the Convention's existence reveal that works of an informational or "scientific" character generally outnumbered those of a purely literary or artistic character. For example, while the number of *belles-lettres* and *beaux-arts* published in Germany in the year 1886 was impressive (2,118 items out of a total of 16,253), the numbers in other categories of works published were equally imposing, including encyclopedias and other collections (432), theology (1,517), law, politics and business (1,392), medicine and veterinary science (1,044), natural sciences (1,044), education (1,916) and technology (680).[31] The figures for the United Kingdom and United States in that year were roughly comparable, although the modes of classification differ somewhat, and the British and American figures were confined to books.[32] Similar figures are given for Italy in 1889.[33] By and large, these figures repeat themselves for most Union members over the next decade, although the statistics for some countries, such as France, are insufficiently detailed for it to be possible to make any meaningful observation.

The crucial point, however, that I wish to make is that mundane works of an informational character were as much the object of protection under the laws of early Berne members as were works of a more literary or artistic bent, and it is therefore reasonable to suppose that these states did not intend that the international scheme to which they had just subscribed should be anything different. A brief survey of national case law over the same period, as reported in *Le droit d'auteur*, points to a similar conclusion, namely that the cases often involved informational and factual works or, in the case of more creative works, were brought by those with investments in the work (such as publishers and producers), rather than the initial creator.[34]

It is therefore reasonable to conclude that the founding members of Berne saw the concept of authorship as extending far beyond the creation of *belles-lettres* and *beaux-arts*. In their terms, an author was a creator

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30. Berne Act 1886, art. 4.
31. 1 LE DROIT D'AUTEUR 52 (1888).
32. *Id.*
33. 3 LE DROIT D'AUTEUR 71 (1890).
34. In this regard, I have been inspired by the similar comparison that was made by Professor Ginsburg in her comparative study of the early U.S. and French copyright laws, *supra* note 13.

in the "literary, scientific or artistic domain," but this language clearly embraced works of a utilitarian character intended to inform and educate as well as those intended to cultivate the higher senses. The adjective "scientific" seems to underscore this, as the drafters obviously did not intend to extend protection to subject matter already protected by other industrial property rights, such as inventions, but rather to emphasize that works on scientific subjects were to be included in the Convention as well. In this regard, it is reasonable to give "scientific" the broadest interpretation so as to cover all fields of knowledge, as this seems consistent with the use of that term in most countries in the late nineteenth century.

What was required for authorship under the Convention, therefore, was the creation of some kind of production in the literary, scientific or artistic domain, but the text of 1886 made no reference to the criteria such productions should satisfy. Once again, however, national laws appear to have been in agreement that questions of novelty, invention, merit or purpose were not involved in the calculus. The most general requirement under these laws was one of "originality" or "intellectual creation," and it appears to have been clearly understood that this was also a requirement for the purposes of protection under the Convention. Indeed, this was taken to be such a self-evident proposition that it, too, has gone unquestioned at subsequent revision conferences, and proposals to introduce such a requirement into the Convention have been rejected on the ground that such a requirement is already inherent in the term "literary and artistic works." In the words of Marcel Plaisant, the Rapporteur-General at the 1948 Brussels Conference, "[I]f we are speaking of literary and artistic works, we are already using a term which means that we are talking about personal creation or about an intellectual creation within the sphere of letters and the arts."[35] Although this statement leaves the precise meaning of intellectual and personal creation unsettled, it points to two further attributes of authorship for the purposes of Berne protection: the need for the author to be a human being and for there to be some intellectual contribution above and beyond that of simple effort ("sweat of the brow") or what may be called mere "value in exchange." These help set the outer limits of the concept under the Convention and receive support and substantiation - from a consideration of other provisions of the Convention, as well as an examination of the kinds of works that have been brought within the Convention in its subsequent revisions. It is to these matters that I now turn.

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35. *Report of* Marcel Plaisant, Rapporteur-General at the Brussels Conference, 1948. CENTENARY VOLUME, *supra* note 18, at 179.

III. THE NEED FOR HUMAN AUTHORSHIP AND INTELLECTUAL CREATION

A. TEXTUAL SUPPORT ELSEWHERE IN THE CONVENTION

The notion that an author should be a human creator clearly underpins a number of provisions of the Convention. Thus, article 1 of the present text refers to the need to protect the "rights of authors in their literary and artistic works,"[36] and this seems to be a clear reference to personal, rather than corporate, rights. Further, the general term of protection in article 7(1) is made dependent upon the life of the author (lasting fifty years beyond death),[37] and such a provision would be inappropriate in the case of non-human entities, which may have an infinite existence. Moreover, the requirements with respect to the protection of moral rights (so cautiously safeguarded in your country and my own) make no sense other than in relation to human authors.[38] Finally, the one instance where the Convention explicitly acknowledges the possibility of a non-human author (cinematographic works)[39] is so clearly an exceptional category that it underscores the need for human authorship in all other cases.

B. WORKS SUBSEQUENTLY PROTECTED UNDER THE CONVENTION

Indeed, all works now protected under the Convention still seem to require some manifestation of human authorship and intellectual creation, that quality which Professor Ginsburg has vividly called "the presence of authorial spirit."[40] While this is not subject to any criterion of artistic merit, or limited to any specific literary or artistic form, there must still be evident some human contribution to the form of the work for which protection is claimed. To put it crudely, the work must not be generated by a machine or be the result of some organized industrial undertaking wherein it is impossible to identify an individual human creator or creators. In support of these assertions, one can point to the history of article 4 of the original 1886 text and its successors. As mentioned above, while the original list of works was adopted with almost no debate, each subsequent addition has involved extensive debate and discussion before admission to "list status." The history is instructive, as the acceptance or rejection of each new category has turned around the question of whether the necessary elements of

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36. Paris Act 1971, art. 1.
37. *Id.* art 7(1).
38. *Id.* art. 6bis.
39. *Id.* arts. 14 and 14bis.
40. Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1883 (1990).

(human) authorship and intellectual creation were present. It is therefore useful to review each briefly.

1. Works of Architecture

These were included at the time of the Berlin Revision Conference of 1908, although "plans, sketches and plastic works relative to . . . architecture" had been protected under the original text of 1886.[41] However, there was a long, concerted education campaign in favor of protection of architectural works themselves conducted through the pages of *Le Droit d'auteur*, the activities of ALAI and similar organizations and studies prepared by the International Office of the Berne Union.[42] Countries such as Germany and the United Kingdom were initially opposed to such protection, and a compromise position allowing protection on the basis of reciprocity was reached at the Paris Revision Conference of 1896.[43] Acceptance of full protection of these works at the Berlin Conference of 1908 was only reached after it was made clear that "[a]ll protection would be denied to a very ordinary building in which the creator's personality is not revealed; it was the original, artistic work that was to be protected."[44] This satisfied the United Kingdom, which shortly afterwards legislated to protect "works of architectural art" in its Copyright Act 1911.[45] The U.K. grants protection today on an even wider basis.[46]

2. Choreographic Works and Entertainments in Dumb Show

Once again, these were not included in article 4 of the 1886 text, although a strong early advocate for the protection of such works was Italy, which argued that the efforts of the choreographer constituted a "genuine work of art and the whole . . . a dramatico-musical work."[47] These arguments were resisted by other delegates, particularly Germany, on the basis that such protection might extend to what were derisively called works of "pseudo choreography that did not deserve at all to be included among works of art."[48] Thus, choreographic works were only

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41. Berne Act 1886, art. 4.

42. *See generally* RICKETSON, *supra* note 16, at 253-56.

43. Paris Additional Act, May 4, 1896, art. 2, amending article of the Closing Protocol of the Berne Convention 1886.

44. CENTENARY VOLUME, *supra* note 18, at 146 (report of the main committee of the Conference).

45. Copyright Act of 1911, 1 & 2 Geo. 5, ch. 46, § 1(1).

46. Copyright, Designs and Patents Act, ch. 48, § 4(1)(b) (1988) (Eng.) (to a "work of architecture being a building or model for a building").

47. CENTENARY VOLUME, *supra* note 18, at 112 (speech by Italian delegate, Signor Rosmini, at second meeting of second Berne Diplomatic Conference, Sept. 7, 1885).

48. *Id.* (Reichardt, German delegate).

protected under the 1886 text on the basis of reciprocity,[49] and it was not until the 1908 Berlin revision that they attained full "list status" under the Convention.[50] This change followed the adoption of such protection under the laws of most Berne member states, thus reflecting what had by then become established state practice.[51]

3. Photographic Works

While these works have been within the scope of the Convention since its inception, they finally achieved "list status" in the Brussels Revision of 1948. Herein lies the seeds of a conflict we see being fought out all too readily today in other contexts. The question is: what is the photographer's contribution to the final image that is produced? At the most banal level, all that she may have done is to point the camera and press the button. At the other extreme, there may have been a great deal of care and artistry involved in the arrangement of a subject, choice of an angle and lighting and adjustment of the lens, to achieve the desired result. The quantum of "authorial presence" is therefore highly variable, and this question was debated at length, but inconclusively, at successive revision conferences prior to that of Brussels in 1948.[52] Finally, a French amendment to protect "photographic works or works realized by an analogous process to photography which constitute intellectual creations, but with the exception of ordinary photographic productions" was accepted by the Conference, but the reference to "intellectual creation" was judged to be unnecessary in view of the fact that this restriction was already implied by the term "literary and artistic works."[53]

In consequence, while intellectual creation remains as much a requirement for photographs as for any other work listed in article 2(1), the amount of such creation required is left for national law to determine. In many countries, this requirement is quite rigorously interpreted, with the provision of so-called "neighboring rights" protection for photographs that lack this necessary amount of intellectual creation (for example, news or documentary photographs or the simple snapshot).[54]

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49. Berne Convention 1886, Final Protocol, ¶ 2.

50. Berlin Convention 1908, art. 2.

51. *See generally* RICKETSON, *supra* note 16, at 246-48.

52. *See also id.* at 257-67.

53. CENTENARY VOLUME, *supra* note 18, at 179 (report of Marcel Plaisant). *See* RICKETSON, *supra* note 16, at 264-65.

54. *See, e.g.*, Act Dealing with Copyright and Related Rights, art. 72(3), (Sept. 9, 1965, as amended on June 24, 1985) (F.R.G.), English translation *reprinted in* 1 COPYRIGHT 251 (1965), amendments *reprinted in* 9 COPYRIGHT 88 (1973), 12 COPYRIGHT 277 (1976), 21 COPYRIGHT 368 (1985). *See also* MELVILLE NIMMER & PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, at FRG-130-130.1 (1991) [hereinafter NIMMER & GELLER].

By contrast, in Australia, this requirement is set at the lowest possible level: all photographs are protected, and the requirement of "originality" under the Copyright Act of 1968 is satisfied by the simple act of pressing the camera button.[55] As will be seen below, minimalist interpretations of this kind come perilously close to deeming a human to be the author of what has been, in fact, created by a machine—the camera.

4. Works of Applied Art

This has been the most contentious category of works over the course of the Convention's history, reflecting a continuing paradox that has vexed most national copyright laws as well. While it may be accepted that copyright protection should clearly cover informational and factual works, the intrusion of works of art into the industrial sphere appears to run counter to the rationale for industrial property rights. Although the extension from art to industry can be justified on the theory of "unity of art,"[56] applied art appears to be one area where there is lingering concern about the purpose of the works in question. The presence of intellectual creation may not be doubted, but the suspicion is that in granting protection, copyright moves beyond its mandate to protect productions only in the literary, scientific and artistic domain. This is also one area where the Convention has been unable to find a solution to satisfy all member states. While there is a general presumption that such works are protected under the present article 2(1), member states are free to determine the extent to which their laws apply to works of applied art, designs and models, as well as the conditions under which such subject matter are to be protected.[57] The status of these works under the Convention, therefore, provides little basis for making any general propositions about the concept of authorship under the Convention, except to highlight that this is a highly debated category, in which there are genuine national differences.

5. Cinematographic Works

The products of cinematography have also enjoyed an unstable history under the Convention, although they first entered the Convention not much more than a decade after films were first created. Under the Berlin Act of 1908, such productions enjoyed protection as literary or artistic

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55. Australian Copyright Act of 1968, § 10(1) (definition of "author" of a photograph). The same appears true under Britain's Copyright, Designs and Patents Act of 1988, *supra* note 46, § 4(2) (definition of "photograph") and § 9(1) (definition of "author" as the person creating a work).

56. *See* G. Finniss, *The Theory of 'Unity of Art' and the Protection of Designs and Models in French Law*, 46 J. PAT. OFF. SOC'Y 615 (1964).

57. Paris Act 1971, art. 2(7).

works if, "by the arrangement of the acting form or the combination of the incidents represented, the author has given the work a personal and original character."[58] In the Rome revision of 1928, the provision limiting protection to films of a dramatic character was removed, although the need for the work to have an "original character" was retained.[59] The need for "original character" was deleted in the Brussels Revision,[60] and, finally "cinematographic productions to which are assimilated works produced by a process analogous to cinematography" were included in the list of article 2(1) at the time of the Stockholm and Paris Revisions.[61] On the face of it, this category of work is subject to the same general, though unstated, requirement of human authorship and intellectual creation as the other works listed in article 2(1). Present reality, however, is rather different and is the one clear instance in Convention history where the concept of "authorship" has received explicit consideration, with the consequence that Union countries may treat someone other than a natural person as the author of such works.[62]

The fact is that the processes by which cinematographic works are made create difficulties when it comes to identifying the persons who are "authors" of the final production. Differences in national approach seem only to have emerged in the post-World War II period, but by the time of the Stockholm Revision Conference in 1967 Berne members could be divided into two broad camps: the "film copyright" countries (chiefly those with common law backgrounds),[63] who granted all rights in films

58. Berlin Act 1908, art. 14(2).
59. Rome Convention 1928, art. 14(2).
60. Brussels Convention 1948, art. 14(2).
61. Stockholm Act 1967 and Paris Act 1971, art. 2(1).
62. Paris Act 1971, art. 14bis.
63. In a 1962 study of the question, the United International Bureaux for the Protection of Intellectual Property (BIRPI) gave the following list of "film copyright" countries: Australia, Bulgaria, Canada, Ceylon (now Sri Lanka), India, Ireland, Israel, Japan, Lebanon, Norway, New Zealand, Pakistan, Poland, Portugal, Syria, Thailand, Turkey, South Africa and the United Kingdom. *See* 74 LE DROIT D'AUTEUR 86, 101 (1961). It should be noted, however, that, in common law members of Berne, authorship of cinematographic works was initially vested in human authors: under sections 1(1) and 35(1) of the British Copyright Act of 1911, cinematographic productions were protected as "dramatic works" where "the arrangement or acting form or the combination of incidents represented give the work an original character." Copyright Act of 1911, 1 & 2 Geo. 5, ch. 46. It was only after the enactment of the British Copyright Act of 1956 that protection was given to cinematographic works generally, and these were removed from the category of works. Copyright Act of 1956, § 12. A similar pattern is to be found in other British Commonwealth countries which initially applied the Copyright Act of 1911 to their own territories prior to the adoption of their own indigenous copyright statutes. For example, in Australia this situation did not change until 1968 when the Copyright Act of 1968 was enacted, and cinematographic works were protected under Part IV of that Act upon a similar basis to that in the U.K. Act of 1956.

to one person, usually the producer, often a corporate entity; and those countries which accorded protection to all those human participants involved in the making of the film who could be regarded as its "authors" or intellectual creators. Though conceptually correct in terms of the inclusion of cinematographic works in article 2(1) of the Brussels text, the problem with the second of these approaches was the identification of these authors, particularly when questions relating to the exploitation of rights arose. For example, there was little trouble with choosing the director as the person principally responsible for the creation of a film, but what about others who had contributed to the film, such as camera operators, set designers, makeup artists, actors and the like? Some of these countries solved the problem of diverse co-authors by the device of a deemed assignment of rights in favor of a single person, such as the producer. The effect, then, was much the same as in the film copyright countries, although the starting point was different, in that the rights of ownership were vested initially in the natural persons who were the original co-authors of the cinematographic work.[64] Other countries, however, only went so far as to provide for a presumption of assignment, which led to difficulties in exploitation if individual co-authors stipulated in advance that the presumption was not to apply.[65]

Attempts to resolve these national differences occupied much of the preparatory work for the Stockholm Revision Conference.[66] Although that revision was far from successful in devising a uniform approach to these matters, one consequence was a provision that left the determination of the ownership of copyright in cinematographic works as a matter for legislation in the country where protection is claimed.[67] Another provision stated, "the owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work."[68] These provisions implicitly acknowledge that member countries are free to confer initial ownership of copyright on persons other than the author or co-authors of cinematographic films and thereby accepts the position of the "film copyright" countries, which have granted these rights to the maker of the film. The latter may very well be a non-natural person. It should at once be said, however, that this special treatment of cinematographic works serves to underscore the general principle that authorship of works is limited to natural persons. At the same time, the cinematographic works provision is a striking illustration of the way in which

64. Countries adopting such a system included Italy, Austria, Czechoslovakia, Hungary, Iceland, the Netherlands, Rumania and Yugoslavia. *See* 74 LE DROIT D'AUTEUR 86, 101-102 (1961).

65. *See, e.g.*, France, Law of Mar. 11, 1957, art. 17, *reprinted in* 70 LE DROIT D'AUTEUR 116, 133 (1957).

66. *See generally* RICKETSON, *supra* note 16, at 572-88.

67. Paris Act 1971, art. 14bis(2)(a).

68. *Id.*, art. 14bis(1).

national practice—in this case, of fairly recent origin—can create a new Convention norm, or rather sanction a departure from such a norm.

6. Derivative Works: Translations, Adaptations, Musical Arrangements and Other Transformations of Literary or Artistic Works

Although not included in the enumeration of the current article 2(1), the Convention has, from its inception, accorded protection to derivative works, that is, works which are derived from or based on pre-existing works.[69] Under article 2(3), derivative works now include "translations, adaptations, arrangements of music and other alterations of a literary or artistic work," which are accorded the same protection as the original works from which they are derived, without prejudice to the copyright in those original works.[70] It seems logical to suppose that these derivative works are subject to the same requirements of personal intellectual creation that apply to the works from which they are derived, and no indication to the contrary is to be found in any of the Convention records.

7. Works of Compilation

Such works have received protection under the Convention since the time of the Berlin Revision of 1908.[71] Under article 2(5) of the Paris Act, the conditions of protection are: (a) the collection must be of literary or artistic works, such as an encyclopedia or anthology, and (b) by reason of the selection and arrangement of the contents, it must constitute an "intellectual creation."[72] This is the only reference to "intellectual creation" in the Convention, and must be taken as an indication that works of compilation were considered as marginal claimants for protection. If selection and arrangement are to qualify as acts of authorship, they must clearly display the attribute of "intellectual creation," and this principle is in conformity with recent developments in U.S. law[73] as well as the law in the British Commonwealth.[74] The need for "intellectual creation" also repudiates any argument that the

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69. *See* Berne Act 1886, art. 6 (protection of lawful translations), *reprinted in* RICKETSON, *supra* note 16, at 965.

70. Paris Act. 1971, art. 2(3).

71. Berlin Act 1908, art. 2(2).

72. Paris Act 1971, art. 2(5).

73. *See* Leo Feist Publications v. Rural Telephone Serv., 111 S. Ct. 1282 (1991).

74. *See* Sam Ricketson, *The Concept of Originality in Anglo-Australian Copyright Law*, 9 COPYRIGHT REP. (Australia) 1-16 (1991), to be published shortly in the U.S. in the Journal of the Copyright Society of the U.S.A.

expenditure of labor alone should entitle a compilation to protection under the Convention.

8. Other Derivative Productions: Sound Recordings, Broadcasts and the Interpretations of Performers

If the categories of subject matter discussed under headings 1 to 7 above represent the gradual extension of the boundaries of works of authorship under the Convention, there are other subject matter which have been kept clearly outside those borders at successive revision conferences. Ultimately, these subject matter have been picked up in other conventions and national laws dealing with "neighboring rights," although the current preparations for a further revision conference have seen several of them come back on to the Berne agenda.[75] Those subject matter already rejected by earlier revision conferences are sound recordings, broadcast works and performances. Another proposal that never reached the forum of a revision conference was for the protection of items of press information. The treatment of each of these categories throws further light on the concept of authorship under the Convention.

a. Sound recordings

Claims for protection of these were made as early as the Berlin Revision Conference in 1908, when British delegates raised the issue of giving, in suitable cases, international protection to the actual instruments on which musical works were recorded.[76] The effect of this proposal would have been to grant protection to the investments of the rapidly emerging sound recording industry. The frosty response to this proposal—and it was not pursued further by the British at that time—was that these objects were on the borderline between "industrial property" and copyright and might be thought more properly to belong to the former category.[77] The British Government, however, came back to the fray at the Rome Conference in 1928 with a proposal to protect recordings, perforated rolls and other instruments by which sounds may

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75. WIPO, Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, *Questions Concerning a Possible Protocol to the Berne Convention*, Memorandum prepared by the International Bureau for the First Session of the Committee, Geneva, Nov. 4-8, 1991, (Doc. No. BCP/CE/1/2) at 18.

76. As noted in the report of the British delegates to the Foreign Secretary, Sir Edward Grey, in 1909 GR. BRIT. T.S. MISC. NO. 2 (Cmnd. 4467), *Correspondence Respecting the Revised Convention of Berne for the Protection of Literary and Artistic Works*, signed at Berlin, Nov. 13, 1908, at 14.

77. *Id.* Note that the U.K. legislated for the specific protection of sound recordings several years later in section 19(1) of the Copyright Act of 1911. Copyright Act of 1911, 1 & 2 Geo. 5, ch. 46.

be mechanically reproduced as original works.[78] In advancing this proposal, it seems clear that the British Government had been pressed by its own extensive recording industry for protection at the international level.[79] Once again, this proposal received considerable criticism from other delegations on the ground that it was concerned more with the protection of manufacturing, rather than authors', interests.[80] In consequence, no agreement was reached on the proposal, and it lapsed. At the Brussels Revision Conference in 1948, there was considerable discussion of mechanical recording rights, but a further U.K. proposal in favor of record manufacturers was withdrawn when it failed to gain any widespread support.[81] Perhaps in deference to the U.K. delegation, which had now raised the issue at three successive revision conferences, the Brussels Conference passed a resolution expressing the wish that countries of the Union themselves should consider the best means of assuring the protection of recordings of musical works, without prejudice to the rights of authors.[82] It was in this courteous fashion that the sound recording industry was set adrift from the Berne Convention, finally ending up with its own international conventions.[83] The distinction between "authors" and "makers" (or manufacturers) was thereby made explicit, and this principle has most recently been affirmed at the first session of the Committee of Experts on a Possible Protocol to the Berne Convention, which met in Geneva in November 1991.[84]

b. Broadcasts

Proposals to protect broadcasts came at an early stage—Rome in 1928—and from a surprising source—the French.[85] It does not, however,

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78. Actes de la Conference réunie a Rome du 7 mai au 2 juin 1928, 94 (1929), 123 L.N.T.S. 233 [hereinafter Actes 1928].

79. *See, e.g.*, submission by the Mechanical Music Industry of Great Britain made to the British government just prior to the Rome Conference. G. S. Wood, *Preliminary Observations upon, and Arguments against, the Amendments to the Berne Convention of 1886 . . . proposed by the Italian Government in conjunction with the office of the International Union for the Protection of Literary and Artistic Works, with general suggestions for revision of the Convention along different lines* (1927), (original submission located in British Library, London).

80. Actes 1928, *supra* note 78, at 263 (comments by the French delegate).

81. Report by the Sub-Committee on Broadcasting and Mechanical Instruments to the Brussels Conference (June 13, 1948), *in* CENTENARY VOLUME, *supra* note 18, at 186.

82. For the text of the resolution, see RICKETSON, *supra* note 16, at 976.

83. *See* Rome Convention 1928; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. Done at Geneva, Oct. 29, 1971; entered into force April 18, 1973; for the U.S., Mar. 10, 1974, 25 U.S.T. 309.

84. Report of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, First Session, Geneva, November 4-8, 1991 (BCP/CE/1/4) at 17-18 [hereinafter Ctte. of Experts, 1st Sess.].

85. Actes 1928, *supra* note 78, at 98.

appear that the motive of the French proposal was to protect the rights of broadcasting organizations in their broadcasts as much as the rights of those who created works in the course of broadcasting, such as sports commentators. Following the adoption of article 11bis by the Rome Conference, the French did not continue with their proposal. The broadcasting organizations themselves did not seek protection under the Convention, as it appears that their main concern at this time was to secure access to copyrighted materials, and this need was recognized in article 11bis(2). Subsequently, it has become clear that broadcasts belong outside the framework of the Berne Convention,[86] and they now have their own form of protection under the Rome Convention.[87]

c. Interpretations of Performers

Performers have long hovered on the edge of protection in many countries. So far as the Berne Convention is concerned, however, performers have never been regarded as authors, although the artistic contribution of a performer may well exceed that of authors of other derivative kinds of works and may well be thought to be superior to that of the photographer or compiler. While there was considerable discussion of this question at both the Rome and Brussels Revision Conferences,[88] there was strong opposition to treating performers as authors, reflecting the opposition expressed by a number of international authors' organizations.[89] Ultimately, performers were left to seek separate protection under their own convention as well as under national law.

IV. THE PRESENT MEANING OF AUTHORSHIP UNDER THE CONVENTION

Is it possible, in light of the above, to enunciate a meaningful interpretation of authorship under the Convention for contemporary purposes? At the risk of being repetitive, I think that it is possible to deduce the following six propositions which set the outer limits to what constitutes authorship under the Berne Convention:

1. Each putative work must display some element of intellectual creation. It is not necessary that this be creativity of a purely aesthetic or artistic character or that the author intends to serve

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86. *See* the *voeu* supporting the adoption of such separate protection passed by the Brussels Conference, *reprinted in* RICKETSON, *supra* note 16, at 976.

87. Actes 1928, *supra* note 78.

88. Actes 1928, *supra* note 78, at 229, 256, 260. *See also* DOCUMENTS OF THE BRUSSELS CONFERENCE 1948, at 308-13 [hereinafter DOCUMENTS 1948].

89. *See* list of hostile resolutions passed by these bodies, *collected in* DOCUMENTS 1948, *supra* note 88, at 455-57, 493-94.

these ends; the work may be of the most mundane and practical kind and may simply be the vehicle for the transmission of facts and information. Nonetheless, the work must reveal the presence of some degree of intellectual creativity contributed by the alleged author.

2. Although authorship requires intellectual creation, by no means will all kinds of intellectual creation qualify for this purpose. In this respect, I enter into uncertain territory so far as the Berne Convention is concerned, as conclusions can only be made as a matter of inference, rather than direct evidence. There is no helpful general statement in the Convention, such as that in the U.S. Copyright Act,[90] that copyright protection should not extend to the ideas, concepts and schemes contained in a work. Article 2(8) only excludes from protection "news of the day" and "miscellaneous facts having the character of mere items of press information." Nevertheless, it seems clear that the national laws of all member states of Berne draw a crucial, if difficult to apply, distinction between ideas/facts/discoveries and the expression or form of those ideas.[91] Protection is only accorded to the latter. This dichotomy can be justified in several ways, not the least of which is the need to preserve and enhance the public domain of ideas and information. The idea/expression distinction also underlies the generally accepted postulate that novelty, invention and merit have never been laid down as criteria for protection in national copyright laws, but are integral to the industrial property laws where ideas and information per se can be protected. For copyright purposes, the author is the person who has given the alleged work its form or expression,[92] and it is here that the element of intellectual creation is to be sought. In this regard, the protection of photographs and compilations extends the notion of authorship furthest, as the expressive contributions of photographers and compilers are far removed from those traditionally categorized as authors.

3. It follows logically that the author should be a natural person. Apart from the internal support to be found for this proposition within the Convention, in particular the moral rights provision in article 6bis, this theme is the *leitmotiv* running through all the categories of works presently protected by the Convention. With the arguable

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90. 17 U.S.C. § 102(b) (1988).

91. For an interesting discussion of this question, see IVAN CHERPILLOD, L'OBJET DU DROIT D'AUTEUR (1985).

92. While the Berne Convention contains no prescription for works to be fixed in some material form for the purposes of protection, the requirement that the work be "realized" or "actualized" seems inherent in all national laws.

exception of cinematographic works, each protected type of work seems to be quintessentially the production of a human creator.

4. While the requirement of a human creator does not in any way exclude the possibility of collaborative or joint works,[93] productions by a collective enterprise quite clearly fall outside the scope of the Convention, even though they may utilize high inputs of other literary and artistic works. Thus, sound recordings and broadcasts have been traditionally refused access to the magic circle of Berne protection, and the case of cinematographic works has proved controversial, calling, ultimately, for special treatment. Various reasons for drawing the line in this way can be given, including the so-called "industrial" character of the productions in question. However, it seems to me that the real reasons are twofold: first, the difficulty of actually identifying the human creators responsible for the production in question, and, second, doubts as to whether their contributions, if ascertainable, can really be termed "intellectual."

5. My next proposition moves further into uncertain territory. It is this: under the Berne Convention, works of authorship must be directed towards a human audience, whether for the purpose of aesthetic gratification, education, information, entertainment or whatever. There is no provision of the Convention that directly asserts this; nor do I know of such a provision in any national law. But the proposition is true of all the categories of work presently enumerated in the Berne Convention and seems inherent in the very adjectives "literary" and "artistic" which qualify the substantive noun "works." I therefore take it as axiomatic that literary and artistic works under the Berne Convention must have human addressees and that only creators of such works have status under the Convention as "authors."

6. A final matter concerns the determination of who is an author under the Convention. The Convention embodies or assumes the broad guidelines for authorship listed above in propositions 1 through 5, but how is the question of who is an author to be determined in a particular case? The Convention is not concerned with the protection of authors in their country of origin, but only in countries of the Union other than their country of origin.[94] Absent any specific provision of the Convention dealing with the point, the determination

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93. The Convention recognizes the possibility of works of joint authorship. Paris Act 1971, art. 7bis.

94. *See* Paris Act 1971, art. 5. Under article 5(3), protection in the country of origin is governed by the domestic law of that country.

of authorship in such cases would be a matter for the law of the country where protection is claimed. This state of affairs would inevitably involve consideration of the given country's choice-of-law rules applicable to cases involving a foreign litigant. The Convention does in fact have a specific provision dealing with the determination of ownership, but this clause is limited to cinematographic works, where the ownership of rights is a matter for the law of the country where protection is sought.[95] While it is possible to argue that this specific reference to one category of work means that all others are to be governed by the choice-of-law rules of the country where protection is claimed, it is also possible to argue that the rule for cinematographic works simply exemplifies a general rule that is implicit in the Convention for all other works.

It can be said that this conclusion follows as a logical consequence of the principle of independence of protection, contained in article 5(2). Pursuant to this provision, exclusive reference is to be made to the law of the country where protection is claimed when dealing with the "extent of protection, as well as the means of redress offered to the author to protect his rights."[96] If these matters are determined by that law, it is at least arguable that the same law should govern questions of authorship and entitlement. Traditional conflicts analysis, however, might lead to another conclusion, for example, that the law of the work's country of origin should govern, in the absence of any countervailing public policy of the forum nation. These are issues of considerable importance, and I do not think that they have been directly addressed by any courts in Anglo-American jurisdictions.[97] Perhaps this explains the wide interest that has

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95. *Id.* art. 14bis(2).

96. *Id.* art. 5(2). *See* to the same effect, the views of Professor Spoendlin in his general report to the Centenary Congress of A.L.A.I. in Berne in September 1986. Kaspar Spoendlin, *International Protection of the Author in Report on the 56th ALAI Congress under the Patronage of the Swiss Government, Berne, Sept. 8-12, 1986*, 47-48 (ALAI, 1987).

97. In this regard, the holding of the Full Federal Court of Australia in Enzed Holdings Ltd. v. Wynthea Pty Ltd. 7357 A.L.R. 90-144 (1984), is of interest. In this case, one of the issues involved the entitlement of one of the plaintiffs to sue for infringement of copyright in Australia. The work in question was a "drawing logo" which had been created pursuant to a contract of commission in New Zealand. Under the relevant New Zealand provision, the commissioner of this work was the owner of the copyright. However, this was not the case under § 35(5) of the Australian Act which does not apply to the commissioning of drawings. At first instance, Justice Lockhart found that the entitlement of the plaintiff to bring proceedings in Australia had to be determined under the New Zealand provision. On appeal, the Full Court held that this was purely a question for Australian law, holding that, under regulation 4(1) of the Copyright (International Protection) Regulations, the whole of the Australian Act, including its provisions on ownership, was to be applied to works of authors first published in Berne Convention countries or works authored by nationals of those countries. While the Court felt that there was no ambiguity or uncertainty in these regulations, it also felt that this interpretation was consistent with the

been displayed in the recent decision of the French High Court in the John Huston film colorization case.[98] In that case, the French court apparently disregarded both French conflicts law and the provisions of the Berne Convention in concluding that French law, as "a law of imperative application," was solely determinative of the issue of authorship (and the invocation of moral rights) in the case of an American film.[99] My personal view is that this decision is correct, even if it apparently ignores the fact that such a result was, in any event, mandated by the Convention under article 14bis(2). More generally, however, it can be said that the method for determining authorship of all works protected under the Convention is the same as for cinematographic works—by the law of the country where protection is claimed.

V. APPLICATION OF THESE GUIDELINES TO SOME PRESENT ISSUES

Having attempted to state some general propositions about the nature of authorship under the Berne Convention, it is instructive to see how these are to be applied to some of the issues now in the public arena, particularly as we start a new Berne revision process. In discussing these, I return finally to the theme of "people or machines" outlined at the beginning of this lecture.

A. COMPUTER PROGRAMS

It now seems clear that a significant number of Berne countries have opted to protect computer programs as literary works, rather than to do so pursuant to some *sui generis* form of protection. Considerable impetus has recently been given to this development by the supra-national Directive on software that has been promulgated by the Council of the European Communities.[100] While I have no doubt about the level of

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requirement of national treatment under the Convention. Accordingly, a foreign plaintiff bringing proceedings in Australia to vindicate her rights will need to show that her entitlement to copyright is established under Australian law rather than any other.

98. Huston v. la Cinq, Judgment of May 28, 1991, Cass. civ. 1re, 1991 La Semaine Juridique (Juris-Classeur Periodique) II 21731, note A. Françon. For an English translation of the decision, see 15 COLUM.-VLA J.L. & ARTS 159 (1991).

99. For a penetrating analysis of the implications of this decision, see Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J. L. & ARTS 135 (1991).

100. Council Directive of May 14, 1991 on the Legal Protection of Computer Programs (91/250/EEC). *See also* Thomas Dreier, *The Council Directive of 14 May 1991 on the Legal Protection of Computer Programs*, [1991] E.I.P.R. 319 (text of the Directive is found at 327-30).

intellectual creation involved in the making of computer programs, I query whether this is of a literary or artistic kind, particularly when the purpose of the program is to operate a machine, the computer. It also seems that, where programs are protected in this way, it is still necessary to consider the adoption of new kinds of rights and/or modifications of existing rights to take account of the special character of these creations.[101] At the risk of being provocative, I feel that the protection of programs as literary works leads to a considerable distortion of the concept of authorship and is in no way mandated by the provisions of the Berne Convention.

Doubtless, where a country has opted to treat such subject matter as literary works, the implications of the requirement of national treatment flow onto nationals of other Berne countries together with all the accompanying benefits of Berne protection. But I would be reluctant to agree that such productions presently fall within the ambit of article 2(1) unless it can be argued that such a result now follows as a matter of state practice modifying the interpretation of that provision. "State practice" is a difficult concept to invoke at the best of times, in the absence of uniformity and clear consensus among the states concerned, and it would be difficult to argue that this is the case among the present Berne membership. One example of a contrary tendency is provided by France, that exemplar among authors' rights nations. This country presently affords only limited protection to computer programs under its Law of 1957 (as amended in 1985).[102] While this law will have to be changed now as a consequence of the recent E.E.C. Directive, it does not seem to me that this present law puts France in conflict with its Berne obligations. The preferable view is that France has simply opted for a *sui generis* type of protection,[103] albeit within the framework of its general law on authors' rights.

In truth, to treat the creators of software as authors simply extends the author concept to the protection of intellectual creation in general without any clear qualifying or limiting criteria. In this regard, the failure of the first session of the Committee of Experts on a Possible Protocol to the Berne Convention to agree unanimously upon the status of computer programs under the Convention indicates the general uncertainty that still exists on this matter on the part of member states.[104] Differing views were expressed by the delegates present,

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101. For example, the extent to which decompilation is allowable, the scope of the reproduction and adaptation rights, and the status of such acts as use, storage and display, all must be addressed.

102. Law of Mar. 11, 1957, *supra* note 65.

103. "[I]t is copyright of a rather special kind . . . On the whole, this special system takes the form of a lesser degree of literary property." Andre Françon, *Letter from France*, 22 COPYRIGHT 359, 361 (1986).

104. Ctte. of Experts, 1st Sess., *supra* note 84, at 14.

ranging from those who thought it clear that computer programs were already required to be protected under article 2(1) to those who took the view that some kind of interpretative provision was necessary because "computer programs represented such a specific category of works that silence about them in the Berne Convention or in a possible protocol would contribute to maintaining rather than to eliminating doubts about their legal nature."[105] Matters relating to the protection of computer software were therefore postponed for "possible later consideration" by the Committee, and it seems that the International Bureau of WIPO will continue to work on a revised proposal on this issue.[106] It cannot be supposed that this question will disappear from the Berne agenda as the revision process gathers momentum. It is a matter of immense significance to the economies of many countries, particularly those in the developed world, and there are clearly interests involved that can make strong claims to protection. The issue of rights for software authors, however, goes right to the heart of the Convention, and it would be a pity if a new international norm were pursued and ratified simply because the law of authors' rights provided the easiest pigeon-hole into which to place these creations.

International experience with the adoption of *sui generis* solutions has been mixed,[107] but the special case of computer programs, and the needs of their producers, should enhance the possibility of achieving an international solution that is specifically crafted to meet the conditions of their creation and exploitation. In this regard, I realize that my views might now sound outdated, rather like King Canute objecting to the progress of the tide long after it has covered his head, or the Bourbons maintaining the advantages of the *ancien régime* while on their way to the guillotine. In light of the efforts still required to accommodate

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105. *Id.* at 12.

106. At the Second Session of the Committee of Experts held in Geneva from Feb. 10-18, 1992, the Director General announced that a revised working paper would be prepared by the WIPO Secretariat, in consultation with Committee Chairmen and "outside consultants." There was support for the examination of some issues by a "small working group" from a number of delegates, including Greece, the E.E.C., Italy, Portugal, Norway, France, Netherlands, Sweden, Republic of Korea, Mexico, Argentina and the U.K. (Information supplied to the author by the Australian delegate to the Committee Sessions, Mr. Chris Creswell of the Attorney General's Department, Canberra.)

107. Witness the recent, not yet in force, Treaty on Intellectual Property in Respect of Integrated Circuits (Wash. D.C., May 26, 1989). As of January 1, 1992, only Egypt had ratified this treaty. 28 COPYRIGHT 11 (1992). On the other hand, the membership of the two main neighboring rights conventions has been gradually increasing over time. As of January 1, 1992, there were 37 members of the Rome Convention and 43 members of the Phonograms Convention. 28 COPYRIGHT 9-10 (1992). It should also be noted that the Rome Convention, in particular, has had some effect in influencing non-member states to adopt appropriate levels of neighboring rights protection. For example, Australia now has a limited form of protection for performers' rights although it is not yet a member of the Rome Convention. *See* Copyright Act of 1968, pt. XIA (Australia).

software products within the general framework of copyright law at both the national and international level,[108] however, it can be argued that no greater effort (and, perhaps, less) would be required to fashion specifically tailor-made *sui generis* solutions.

B. DATA BASES

The protection already required to be given to data bases under the Convention is of limited extent, in that it is confined to collections of works and does not extend to collections of non-copyrightable material. There can be no objection to a member state extending protection to the latter kind of collection as a literary work (as many already do), so long as the requisite element of intellectual creation is present. However, it should not be thought that this will offer immediate protection to all data base creators. This is particularly so in the case of electronic data bases, as the elements of selection and arrangement here may be executed by a computer program rather than a human compiler. The obvious response to these difficulties is to think in terms of a lower level, *sui generis* form of protection, and this approach was the clear sense of the Committee of Experts at their First Session in Geneva in November 1991.[109] In principle, such an approach is consistent with the propositions on authorship outlined above.

C. THE CONCEPT OF DEEMED AUTHORSHIP

Perhaps the most obvious denial of the requirement of human authorship occurs where a national law deems someone other than the actual physical creator of a work to be its author. In a number of countries, including my own, this occurs in the case of cinematographic works, where the producer of the film is deemed to be the maker and owner of all the rights in the film. As noted above, this deviation is now sanctioned by the Berne Convention and, indeed, so far as national laws of this kind are concerned, the term "author" is not used at all. The case of films is a clear instance where denial of human authorship can be justified on the following grounds: (1) it is difficult to identify such a person or persons in a meaningful way because of the collective or corporate character of the undertaking, and/or (2) the nature of that undertaking has more of an industrial character than a literary or artistic one. The first of these explanations is clearly the one adopted by

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108. In Australia, the Copyright Law Review Committee has been almost exclusively concerned with these very questions for most of the last four years.

109. Ctte. of Experts, 1st Sess., *supra* note 84, at 14-15. See also the recent draft E.E.C. Directive on this issue, reviewed by Hamish Sandison in COPYRIGHT WORLD 22-24 (Mar.-Apr. 1992).

film copyright countries to justify their position. The second is more appropriate to other kinds of production that achieve protection under a neighboring rights or *sui generis* regime, such as sound recordings, broadcasts and the like. Neither, however, provides a sufficient justification for those provisions in national laws which deem an employer or commissioning party to be the "author" of a work rather than its actual creator.

"Work for hire"-type provisions run directly counter to the basic premises of authorship under the Convention, particularly where the deemed author can be a corporate entity. Obviously Berne contains no prohibitions in relation to these national laws so far as domestic authorship is concerned. Nonetheless, it must be a breach of the Convention to take this approach in the case of foreigners claiming protection under the Convention. This suggestion may appear to be in conflict with the sixth proposition set out above, namely that it is for the law of the country where protection is claimed to determine the authorship of a work. Any such determination must, however, be in conformity with the positive prescriptions of the Convention, and clearly the requirement of human authorship must be regarded as one of these prescriptions. Even if this argument is not accepted, and the protecting country's power to determine authorship is maintained, there would still be a clear breach of the *spirit* of the Convention in so far as such an approach involves a dilution of the concept of authorship and the alienation of the actual creator from her work. A lawyer from a common law country might respond that the point is really a semantic one, as many countries, such as my own, vest ownership of copyright in employers *ab initio* in the case of employee-authors.[110] The point is far from semantic, however, so far as moral rights are concerned, as these lose both their rationale and focus if authorship as well as ownership is deemed initially to reside somewhere else.

The Special Case of Computer-Produced Works

A further example of deemed authorship which has come onto the Berne agenda in the recent sessions of the Committee of Experts on a possible protocol to the Convention concerns the issue of computer-produced works. There is some doubt as to whether such a category of subject matter in fact exists, at least at the present time. On the other hand, it is possible that there are works produced by computers where the "human contributions are so numerous, and merge into the totality of the works in such a way, that it is difficult or impossible to recognize

110. Copyright Act of 1968, § 35(6) (Australia).

each contribution and its individual author separately."[111] With this idea in mind, the International Bureau proposed to the First Session of the Committee of Experts that original ownership of copyright in such a work should vest in the physical or legal entity who undertook the arrangements necessary for the creation of the work; that such works should not enjoy moral rights protection; and that their term of protection should be fifty years from the date of production or twenty-five years from this date in the case of computer-produced works of applied art.[112]

These proposals, if accepted, would have constituted a clear exception to the human authorship requirement of the Berne Convention. Like cinematographic works, the initial ownership of rights, *sans* moral rights, would have vested in a person who might well be a legal entity and whose claim to entitlement derived essentially from ownership or control of a machine—the computer. The rationale for this approach, as in the case of films, was the difficulty of identifying the actual human contributors to the work. This reference to human contributors, however, may well prove fanciful as the development of expert systems and artificial intelligence increases the likelihood of the creation of purely computer-generated works. Indeed, we may already be at this stage in the case of electronic data bases where the work of compilation and assembly can be carried out in accordance with the operation of specially designed computer programs. In such instances, the notion of human contribution becomes meaningless, unless traced back to the creator of the data base program or expert system. I am by no means convinced that such productions should be entitled to any protection at all, but there can be little doubt that they lack the necessary requirements for recognition as works of authorship under the Berne Convention.

In this regard, the provisions of the recent British copyright legislation appear anomalous, as these accord protection to literary, dramatic, musical or artistic works that are computer-generated.[113] The latter term is defined as meaning a work generated by a computer "in circumstances such that there is no human author of the work."[114] The author of such a work is then stated to be the "person by whom the arrangements necessary for the creation of the work are undertaken."[115] The term of protection for such works is a fixed period of fifty years from the date of production,[116] and they do not enjoy moral

111. WIPO, Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, *Questions Concerning a Possible Protocol to the Berne Convention*, *supra* note 75, at 18.

112. *Id.* at 19.

113. Copyright, Designs and Patents Act of 1988 (Eng.), *supra* note 46, § 178.

114. *Id.*

115. *Id.* at § 9(3).

116. *Id.* at § 12(3).

rights.[117] It is curious that the British Parliament should have taken this course, in the absence of any specific requirement to do so under the provisions of the Berne Convention. Having chosen to do so, the U.K. now finds itself in a strange position: by protecting such subject-matter as literary and artistic works, it must accord national treatment to computer-generated works claiming protection under the Convention. On the other hand, the U.K. departs from the strict requirements of the Convention with respect to moral rights and duration of term, and therefore stands in breach of the Convention.

In any event, the Committee of Experts, in its consideration of the WIPO proposals for computer-produced works, has judged that it would be premature to deal with such works in a possible protocol.[118] From the point of doctrinal purity, this is a sensible decision, leaving member states free to deal with such subject matter under their neighboring rights laws.

D. COLLECTIVE ADMINISTRATION OF AUTHORS' RIGHTS

The development with the most far-reaching implications for the concept of authorship under Berne is the collectivization of the administration of authors' rights. In an increasing number of instances, authors are handing over particular rights to be administered by collecting societies and other similar organizations. Sometimes these rights are subject to compulsory licensing schemes; in other instances, they are part of a voluntary licensing arrangement. In either case, however, the net effect is that the author loses the right to control the use of her work and is left only with a right to receive compensation for such use. Good reasons for taking this course of action can be advanced, including the greater bargaining power enjoyed by a collective as opposed to an individual, the advantages of economies of scale in the administration and collection process, and the difficulties encountered by an individual in the enforcement of her rights. Above all, the impact of technological development must be acknowledged along with the capability that this now places in the hands of private individuals to do their own copying, recording and dissemination of protected works. The move towards collective administration of rights has, however, occurred outside the framework of the Berne Convention. Berne does not acknowledge the concept of collective licensing in any way, and there is only grudging recognition of the permissibility of compulsory licensing schemes in certain defined situations.[119] The shifts that have occurred have therefore been at the national level, although many collecting societies

117. *Id.* at § 79(2)(c) (right of identification), § 81(2) (right of integrity).

118. Ctte. of Experts, 1st Sess., *supra* note 84, at 16-17.

119. *See* Paris Act 1971, arts. 13 (recording of music), 11bis(2), (3) (broadcasting rights).

now form, between themselves, effective international networks for the administration and exploitation of particular rights or sub-rights.

In the present context, the issue is whether these changes, which have generally been to the benefit of authors, have nonetheless effected a fundamental change in the nature of authorship. Thus, it can be argued that the person-centered concept of authorship enshrined in the Berne Convention has been transformed, in the area of exploitation, into a collectivist construct in which the author is no more than a cog in the compensation machine. On such a view, the shift from the "people" paradigm of authorship to the "machine" paradigm is already under way, and it therefore makes little sense to cling to the notions of human authorship and personal intellectual creation when considering who and what shall be protected under the Convention. In consequence, the objections raised above in relation to the admission of such subject matter as sound recordings, computer programs, data bases and computer-generated works begin to appear less convincing.

Although attractive, I do not find these arguments compelling for the following reasons:

1. Collective management is not appropriate for all the rights of authors that are protected under Berne. Collective management will not usually be relevant at the point at which rights are initially exploited by an author, for example, at the time the initial publishing contract for a book is signed or the initial agreement commissioning a work of music or art is made. At this stage, the author still remains capable of bargaining freely for the initial disposal or exploitation of her economic rights and is entitled to strike the best bargain that she is able to make through the process of negotiation. Of course, the notion of equal bargaining power between author and would-be exploiter may be largely a matter of fiction, but national courts and legislatures have devised certain techniques for attempting to ensure some sort of fairness in these negotiations. Examples include the doctrine of restraint of trade in Commonwealth countries[120] and specific publishing laws in other countries.[121] The ownership of full exclusive rights at this stage, therefore, remains a vital factor in the initial negotiations that occur over the exploitation of those rights.

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120. *See, e.g.*, the English decisions of A. Schroeder Music Publishing Co. v. Macaulay, 1 W.L.R. 1308 (1974) (H.L.); Clifford Davis Management Ltd. v. W.E.A. Records, 1 W.L.R. 61 (1975) (C.A.). See also the seminal article by Professor Trebilcock which attacks the reopening of apparently oppressive standard form contracts by the courts in these circumstances. Michael Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 1976 U. TORONTO L.J. 359.

121. *See, e.g.*, the German Publishing Act of June 19, 1901, discussed in NIMMER & GELLER, *supra* note 54, at FRG-52.

2. The fact that in some instances collective administration (through either voluntary or compulsory licensing schemes) proves to be the only effective means by which authors can receive recognition of their claims does not alter the person-oriented character of these rights in any real sense. Although in such cases the nature of the right in question shifts from being an exclusive right of control to a simple right to remuneration, the right still remains referable to the person of the author or her successor in title, and is only exercised by the collecting society on behalf of the author. The society here is to be regarded as being an agent or fiduciary of the author. So long as this nexus between author and collecting society is maintained, there should be no diminution of the fundamental concept of authorship protected by the Convention. This situation would, of course, change dramatically in the event that a significant share of the royalties collected by these societies was diverted away from authors to other purposes, or if authors were recompensed on a basis that did not attempt to reflect the proportionate use of their works by third parties. It is notable, however, that the principles governing collective management at both the national and international level are primarily concerned with avoiding such tendencies and are aimed at ensuring that the direct nexus with the individual author/rights owner is maintained.[122]

3. Each of the exclusive rights now enshrined in the Berne Convention stems from, and is molded by, the personal conception of authorship outlined above. This is obviously true in the case of moral rights, but is equally correct in the case of the economic rights guaranteed by the Convention. The latter are essentially concerned with the ability of the author to control and regulate the dissemination of her work in both material form (through the making of copies and adaptations) and non-material form (through public performance, broadcasting, cable diffusion and so on). The last century has seen the expansion of these basic economic rights to take account of the effect of technological developments that now make possible new modes of exploitation of works. Undoubtedly, these rights will continue to expand, as is shown by the recent proposals of WIPO for new rights of public display and distribution.[123] The justifications for according authors such extensive protection are various, including natural rights theories, arguments of fairness and individual justice, as well

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122. *See* draft provisions on collective administration of rights, proposed by WIPO for consideration at the Second Session of the Committee of Experts on a Possible Protocol to the Berne Convention in Geneva from February 10-18, 1992, *supra* note 75. Discussion of this item, however, was held over until the next meeting of the Committee, scheduled for November 1992.

123. *See id.* at ¶¶ 109-30.

as arguments based on incentive and promotion of the public interest. Ultimately, these justifications rest upon the notion of authorship as a human activity, reflected in the lengthy protection accorded to these rights. In the case of non-human creations, however, a different, more materialist, calculus applies. In such cases, the object of protection is not the person of the author, but the interests of the entrepreneur or industrial enterprise that undertakes the making of the production in question. The latter will be strictly economic in character, and the question in each case will be: what degree of protection is necessary by way of incentive and security to ensure that investment in these activities continues? The "people paradigm" of authorship which underlies the Berne Convention is hardly applicable to these kinds of productions and is not relevant to the form of protection which is, or should be, accorded to them.

CONCLUDING COMMENTS — IS IT TIME FOR A NEW PARADIGM?

At the outset of this lecture, I suggested that we are currently faced with a struggle over "the soul of copyright." In light of the general propositions put forward concerning the concept of authorship under the Berne Convention, one might query whether there still remains much in this "soul" worth protecting. So flexible do the current borders of copyright appear, so removed are our everyday concerns from the higher reaches of philosophical debate about these rights, and so surrounded and outflanked are these traditional concepts by the staggering pace of technological change and the growth of the mass market, that it might now be reasonable to conclude that the traditional paradigm is too stretched and exhausted, and a new one should be adopted. Henceforth, so the argument might go, let us declare that copyright is not really concerned with the protection of the fruits of human authorship, but only with the question of commercial value, however that value is embodied or arrived at. One could say that this state of affairs is the logical development of authors' rights protection over the past hundred years. We are now at the stage when humans should be replaced by machines, and the inanimate should take over from the living. The convenience of such a change is obvious: it would make it possible to bring all new forms of technological creation within the broad umbrella of the Berne Convention. Computer programs, data bases, expert systems, sound recordings and broadcasts could be readily accommodated in this way, and who knows what candidates would be thrown up tomorrow? Much angst would thereby be avoided, and considerable expense and time saved to boot, if the ready-to-wear solution of Berne protection were adopted, rather than the individually tailor-made suit of *sui generis* protection. This, therefore, should be the direction taken in the current

meetings to devise a possible protocol to, or revision of, the Berne Convention.

While this suggested approach appears attractive in a pragmatic sense, I do not believe that we should move in this way. Wide as the present boundaries of Berne authorship are, they are nonetheless clear and still contain a "soul" worth maintaining. I fear that this is not the place to mount a detailed philosophical justification of this view, although it would be an ideal theme for another Manges lecturer. My objects today have been more limited: to analyze what the concept of authorship means at present under the Berne Convention, and how this can be applied to issues that are currently arising in the national and international spheres. It would, however, be remiss of me to finish without saying that I believe there are powerful arguments, both of principle and necessity, in favor of retaining this human-centered notion of authorship and authors' rights. It is therefore worth rehearsing these briefly here, by way of conclusion.

1. The human-centered notion of authorship presently enshrined in the Berne Convention embodies a fundamental human right, namely that of the creator over the work he or she creates. There are sound philosophical foundations for this right,[124] and it has been enunciated in article 1 of the Convention from the very start: a Union of States is constituted for the "protection of the rights of authors over their literary and artistic works." It also receives more recent and specific endorsement in the International Covenant on Economic, Social and Cultural Rights[125] and was reaffirmed, in grandiloquent terms, by the Assembly of the Berne Union at the time of the Convention's centenary in 1986.[126] However approximately this goal is achieved, the specific prescriptions of the Berne Convention nonetheless derive from this fundamental conception of authorship as a human activity and a human right. It therefore distorts this conception to extend protection to other forms of creation that do not have identifiable human authors, where the creations in question are not literary or artistic expressions in the true sense (i.e., directed to humans), or where the rights are initially vested in a person who may well not be a human being. The reservation of the concept of

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124. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) for a thoughtful examination of this question.

125. Article 15(1) of which provides:

> (1) The States Parties to the present Covenant recognize the rights of everyone:
>
> . . .
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

126. *See* 22 COPYRIGHT 373 (1986) for the full text of the "solemn declaration" made by member states at this time.

authorship to the realm of humans stands as an affirmation of basic human values, where people are given precedence over machines. In a mass age, this personal conception of authorship stands as a welcome reminder of human individuality and uniqueness.

2. Having said this, it is necessary to meet a strong counter-argument to the effect that this personal conception of authorship, however appealing it may be in theory, has been overtaken by developments that have already occurred within the framework of the Convention with respect to cinematographic works. In the light of this, it can be said that there is no longer any compelling reason to resist the extension of the umbrella of the Convention to other productions of a similar kind, such as sound recordings, broadcasts, computer-generated works and the like. After all, the works of human authors will continue to be protected as before, and all that will happen is that the categories of works protected will be expanded. Arguments like this are sometimes described by their opponents as a "slippery slope" or, in my own country, as the "thin edge of the wedge," on the basis that one exception to a general rule should not be used as a basis for extending that rule to other exceptional cases. My own sympathies obviously lie with this response, and I would simply add the following points by way of amplification:

   (a) Stopping at the top of the "slippery slope" does not mean that the categories of authorship are henceforth closed. While the criteria for authorship under Berne are to be taken as reasonably settled, they can still be applied to new kinds of works that come into existence, so long as they satisfy these criteria. The evolution of article 2(1) of the Convention is an object lesson in this regard, as new categories of subject matter have been steadily added to it at successive revision conferences. At the same time, it has been fairly clear what kinds of production do not meet these criteria and therefore require protection, if at all, upon some other basis, such as under a *sui generis* regime or the general laws of unfair competition or unjust enrichment. To allow such productions within the ambit of the Berne Convention simply because one exception to the general rule has already occurred will mean that henceforth the only criterion of protection will be a showing of some element of commercial value. To put this more crudely, the sole determinant of protection will be the amount of pressure that can be brought to bear on governments by the interest group in question.

   (b) The present exception with respect to cinematographic works is not, in any event, as great as is sometimes asserted. There are still many countries that treat these productions as works of

human authorship and, originally, most of the present "film copyright" countries did so as well. This is clearly a marginal case where there are real divergences in opinion between member states. It does not provide a proper basis for opening up the dyke walls of the Convention more generally to other kinds of productions.

3. A more subtle argument in favor of opening up the concept of authorship under Berne can be called the "slipstream theory." This has a certain strategic appeal and runs as follows. If sound recordings and the like are protected as works of authorship, this will inevitably enhance the protection given to "real authors" who will be picked up in their slipstream. On this view, stronger protection for the first will automatically lead to stronger protection and increased benefits for the second. To insist, therefore, on excluding these productions from protection is simply to indulge in pedantic formalism and to deny the passing on of gains to "real authors." This is an appealing argument that, in essence, says to authors, "Hold on, and let others do the work for you!" It is also a case of history repeating itself, when it is remembered that the prime movers for the adoption of the first copyright statute in the United Kingdom were the members of the Stationers' Company who used the claims of authors as a smoke screen for achieving protection of their own interests.[127] This time, however, it could be the authors who use the industrialists and investors as the means of securing their own welfare.

My own view is that, while there is obviously a congruence of interests between authors and producers, there is no obvious reason why the best way to advance these interests lies through according the latter the status of authors. While they may need strong and effective protection, this need not be the same kind that is given to authors. It is obvious why producers would desire such protection, as it is the best that is available. On the other hand, as I have argued above, the protection presently accorded to authors under the Berne Convention stems from, and is shaped by, the human-centered conception of authorship that is embodied in that Convention. Such protection is not always appropriate or relevant to the interests of producers (as in the case of moral rights). Some aspects of it might be excessive or unnecessary (as in the case of adaptation rights). Others might even be thought insufficient (as in the case of rights of distribution and rental, which are not yet

127. *See* HARRY HUNTT RANSON, THE FIRST COPYRIGHT STATUTE (1956); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); John Feather, *supra* note 14. For a different view of these events, see Peter Prescott, *The Origins of Copyright: A Debunking View*, 11 E.I.P.R. 453 (1989).

protected under Berne) or require careful modification or limitation that is not generally applicable or relevant to traditional works of authorship (as in the case of third party rights to decompile or make other uses of protected subject matter). The question of term of protection also arises, as the convenient yardstick of the author's life will be missing. A different set of justifications must necessarily apply when considering protection for such productions, and authors should benefit just as much from the slipstream effect where producers obtain strong and effective protection under a neighboring rights or *sui generis* regime as where this occurs as a result of the extension of authors' rights.

4. There is a more sinister consequence that may occur if the boundaries of authorship under Berne are opened up in the way suggested above. Whatever happens, it is clear that the scope of protection for these new kinds of productions will need adjustment, modification and, in some instances, extension. Inevitably, this will introduce a patchwork quality to the framework of protection presently accorded under the Convention and the level and intensity of protection will rise and fall depending upon the subject matter in question. In itself, this may not be a great matter for concern, although purists will obviously bemoan the loss of a uniform set of provisions that applies to all categories of works. However, there is the danger that such variations may have insidious flow-on effects so far as the categories of works presently protected are concerned. For example, if moral rights are not applicable to new categories such as sound recordings and computer-produced works, this may produce pressure for a reduction or deletion of such rights in the case of other works. Again, if generous rights of third-party access are allowed in the case of a new kind of subject matter, such as software, this will increase pressure for analogous rights elsewhere. And so on. From the perspective of present authors, it makes sense to argue that these new kinds of subject matter should be kept out of Berne and given their own special legal regimes. In this way, the level of protection already given to works of authorship can be more easily maintained.

I commend these arguments to you for your consideration. As the new Berne revision process gathers momentum, the meaning and scope of the concept of authorship will be the most important single issue that member states will have to consider and decide. I hope that I have shown that the Berne Convention has always embodied a clear approach to this question, and, further, that I have been able to put the case for maintaining this view. People, rather than machines, have always been the object of the Convention, and, from the point of view of principle, doctrine and practicality, this object should continue to be upheld.