

Copyright

Review of the
WORLD INTELLECTUAL PROPERTY
ORGANIZATION (WIPO)

and the United International Bureaux for the
Protection of Intellectual Property (BIRPI)

Published monthly
Annual subscription: Sw.fr. 50.—
Each monthly issue: Sw.fr. 6.—

8th year - No. 3
MARCH 1972

Contents

	Page
WORLD INTELLECTUAL PROPERTY ORGANIZATION	
— Liechtenstein. Ratification of the WIPO Convention	66
BERNE UNION	
— Liechtenstein. Ratification of the Stockholm Act of the Berne Convention (with the exception of Articles 1 to 21 and of the Protocol Regarding Developing Countries)	66
NATIONAL LEGISLATION	
— Nigeria. Copyright Decree 1970 (No. 61)	67
CORRESPONDENCE	
— Letter from the Netherlands (S. Gerbrandy)	74
— Letter from Switzerland (M. M. Pedrazzini)	80
CALENDAR	
— WIPO Meetings	83
— UPOV Meetings	84
— Meetings of Other International Organizations concerned with Intellectual Property	84



WORLD INTELLECTUAL PROPERTY ORGANIZATION

**LIECHTENSTEIN****Ratification of the WIPO Convention**

The Director General of the World Intellectual Property Organization has notified the Governments of the countries invited to the Stockholm Conference that the Government of the Principality of Liechtenstein deposited, on February 21, 1972, its instrument of ratification dated January 28, 1972, of the Convention Establishing the World Intellectual Property Organization (WIPO).

The Principality of Liechtenstein has fulfilled the conditions set forth in Article 14(2) of the Convention by concurrently ratifying the Stockholm Act of the Paris Convention in its entirety and the Stockholm Act of the Berne Convention

with the declaration provided for in Article 28(1)(b)(i) of the said Act to the effect that the ratification shall not apply to Articles 1 to 21 and to the Protocol Regarding Developing Countries.

Pursuant to Article 15(2), the Convention Establishing the World Intellectual Property Organization (WIPO) will enter into force, in respect to the Principality of Liechtenstein, three months after the date of the deposit of the instrument of ratification, that is, on May 21, 1972.

WIPO Notification N° 36, of February 25, 1972.



BERNE UNION

**LIECHTENSTEIN****Ratification of the Stockholm Act of the Berne Convention**

(with the exception of Articles 1 to 21 and of the Protocol Regarding Developing Countries)

The Director General of the World Intellectual Property Organization (WIPO) has notified the Governments of member countries of the Berne Union that the Government of the Principality of Liechtenstein deposited on February 21, 1972, its instrument of ratification dated January 28, 1972, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Stockholm on July 14, 1967, with the declaration provided for in Article 28(1)(b)(i) of the said Act to the effect that the ratification shall not apply to Articles 1 to 21 and to the Protocol Regarding Developing Countries.

Pursuant to the provisions of Article 28(2)(c) of the Stockholm Act of the said Convention, Articles 22 to 38 will enter into force, with respect to the Principality of Liechtenstein, three months after the date of this notification, that is, on May 25, 1972.

A separate notification will be made on the entry into force of the other provisions of the Stockholm Act of the said Convention, when the required number of ratifications or accessions is reached.

Berne Notification N° 35, of February 25, 1972.

NATIONAL LEGISLATION

NIGERIA

Copyright Decree 1970

(No. 61) *

ARRANGEMENT OF SECTIONS

Section

1. Works eligible for copyright.
2. Copyright by virtue of nationality or domicile.
3. Copyright by reference to country of origin.
4. Copyright in works of Government, State Authorities and international bodies.
5. Nature of copyright in literary, musical and artistic works and cinematograph films.
6. Broadcasting of works incorporated in a cinematograph film.
7. Nature of copyright in sound recording.
8. Nature of copyright in broadcasts.
9. First ownership of copyright.
10. Assignments and licences.
11. Infringements.
12. Actions for infringement.
13. Appointment and powers of competent authority.
14. Reciprocal extension of protection.
15. Restriction on importation of printed copies.
16. Abrogation of common law rights.
17. Regulations.
18. Repeals, and transitional and saving provisions.
19. Interpretation.
20. Citation and extent.

Schedules

- Schedule 1 — Term of Copyright.
 Schedule 2 — Exceptions from Copyright Control.
 Schedule 3 — Transitional and Saving Provisions.

Works eligible for copyright

1. — (1) Subject to this section, the following works shall be eligible for copyright—

- (a) literary works,
- (b) musical works,
- (c) artistic works,
- (d) cinematograph films,
- (e) sound recordings, and
- (f) broadcasts.

(2) A literary, musical or artistic work shall not be eligible for copyright unless—

- (a) sufficient effort has been expended on making the work to give it an original character, and
- (b) the work has been written down, recorded or otherwise reduced to material form whether with or without consent.

(3) An artistic work shall not be eligible for copyright if, at the time when the work is made, it is intended by the

author to be used as a model or pattern to be multiplied by any industrial process.

(4) A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other work.

Copyright by virtue of nationality or domicile

2. — (1) Copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is at the time when the work is made a qualified person, that is to say—

- (a) an individual who is a citizen of, or is domiciled in, Nigeria, or
- (b) a body corporate incorporated by or under the laws of Nigeria.

(2) The terms of copyright conferred by this section shall be calculated according to the table set out in Schedule 1 to this Decree.

(3) In the case of anonymous or pseudonymous literary, musical or artistic works the copyright therein shall subsist until the end of the expiration of twenty-five years from the end of the year in which the work was first published:

Provided that, in the event of the identity of the author becoming known, the terms of copyright shall be calculated in accordance with paragraph 1 of the said Schedule 1.

(4) In the case of a work of joint authorship, a reference in the said Schedule 1 to the death of the author shall be taken to refer to the author who dies last, whether or not he is a qualified person within subsection (1) above.

Copyright by reference to country of origin

3. — (1) Copyright shall be conferred by this section on every work, other than a broadcast, which is eligible for copyright and which—

- (a) being a literary, musical or artistic work or a cinematograph film, is first published in Nigeria, or
- (b) being a sound recording, is made in Nigeria, and which has not been the subject of copyright conferred by section 2 of this Decree.

(2) Copyright conferred on a work by this section shall have the same duration as is provided by section 2 of this Decree in relation to the same type of work.

* This Decree came into force on December 24, 1970.

*Copyright in works of Government, State Authorities
and international bodies*

4. — (1) Copyright shall be conferred by this section on every work which is eligible for copyright and is made by or under the direction or control of the Government, a State Authority or a prescribed international body.

(2) Copyright conferred by this section on a literary, musical or artistic work, other than a photograph, shall subsist until the expiration of fifty years from the end of the year in which the work is first published and shall then expire.

(3) Copyright conferred by this section on a film, photograph, sound recording or broadcast shall subsist until the expiration of fifty years from the end of the year in which the film or photograph was first published, the recording was made or the broadcast took place, as the case may be, and shall then expire.

(4) Sections 2 and 3 of this Decree shall not be taken to confer copyright on works to which this section applies.

*Nature of copyright in literary, musical or artistic works
and cinematograph films*

5. — (1) Subject to the exceptions specified in Schedule 2 to this Decree, copyright in a literary, musical or artistic work or in a cinematograph film shall be the exclusive right to control the doing in Nigeria of any of the following acts, namely—

- (a) the reproduction in any material form,
- (b) the communication to the public, and
- (c) the broadcasting,

of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original.

(2) Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original, but not the right to control the reconstruction, in the same style as the original, of a building to which the copyright relates.

Broadcasting of works incorporated in a cinematograph film

6. — (1) Where the owner of the copyright in any literary, musical or artistic work authorizes a person to incorporate the work in a cinematograph film and a broadcasting authority broadcasts the film, the owner of the copyright shall, in the absence of any express agreement to the contrary between the owner and that person, be deemed to have authorized the broadcast.

(2) Notwithstanding subsection (1) above, where a broadcasting authority broadcasts a cinematograph film in which a musical work is incorporated, the owner of the right to broadcast the musical work shall, subject to this Decree, be entitled to receive fair compensation from the broadcasting authority.

(3) In the absence of an agreement on the compensation payable under subsection (2) above, the amount of compensa-

tion shall be determined by the competent authority appointed under section 13 of this Decree.

Nature of copyright in sound recording

7. — Copyright in a sound recording shall be the exclusive right to control in Nigeria the direct or indirect reproduction of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original:

Provided that the exceptions specified in paragraphs (a), (h), (k), (l) and (o) of Schedule 2 to this Decree shall apply to the copyright in a sound recording in like manner as they apply to copyright in a literary, musical or artistic work or in a cinematograph film.

Nature of copyright in broadcasts

8. — (1) Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, namely—

- (a) the recording and the rebroadcasting of the whole or a substantial part of the broadcast, and
- (b) the communication to the public, in places where an admission fee is charged, of the whole or a substantial part of a television broadcast,

either in its original form or in any form recognizably derived from the original.

(2) The exceptions specified in paragraphs (a), (h), (k) and (o) of Schedule 2 to this Decree shall apply to the copyright in a broadcast in like manner as they apply to copyright in a literary, musical or artistic work or a cinematograph film.

(3) The copyright in a television broadcast shall include the right to control the taking of still photographs from the broadcast.

First ownership of copyright

9. — (1) Copyright conferred by sections 2 and 3 of this Decree shall vest initially in the author:

Provided that, notwithstanding section 10(6) of this Decree, where a work—

- (a) is commissioned by a person who is not the author's employer under a contract of service or apprenticeship, or
- (b) not having been so commissioned, is made in the course of the author's employment,

the copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, as the case may be, subject to any agreement between the parties excluding or limiting such a transfer.

(2) Copyright conferred by section 4 of this Decree shall vest initially in the Government on behalf of the Federal Republic, in the State Authority on behalf of the State in question or in the international body in question, as the case may be, and not in the author.

(3) Subject to subsection (2) above—

- (a) the name on a work purporting to be the name of its author shall be presumed to be such, unless the contrary is proved, and

(b) in the case of an anonymous or pseudonymous work, the publisher whose name is indicated in the work as such shall be presumed to be, unless the contrary is proved, the legal representative of the anonymous or pseudonymous author and shall be entitled to exercise and protect the rights belonging to the author under this Decree.

Assignments and licences

10. — (1) Subject to this section, copyright shall be transmissible by assignment, by testamentary disposition or by operation of law, as movable property.

(2) An assignment or testamentary disposition of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the period of the copyright, or to a specified country or other geographical area.

(3) No assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing.

(4) A non-exclusive licence to do an act the doing of which is controlled by copyright may be written or oral, or may be inferred from conduct.

(5) An assignment or licence granted by one copyright owner shall have effect as if granted by his co-owners also, and, subject to any contract between them, fees received by the grantors shall be divided equitably between all the co-owners.

For the purposes of this subsection, persons shall be deemed to be co-owners —

- (a) if they share a joint interest in the whole or any part of a copyright, or
- (b) if they have interests in the various copyrights in a composite production, that is to say, a production consisting of two or more works.

(6) An assignment, licence or testamentary disposition may be effectively granted or made in respect of a future work or an existing work in which copyright does not yet subsist; and the prospective copyright in any such work shall be transmissible by operation of law as movable property.

(7) A testamentary disposition of material on which a work is first written or otherwise recorded shall, in the absence of any contrary indication, be presumed to include any copyright or prospective copyright in the work which is vested in the deceased.

Infringements

11. — (1) Copyright is infringed by any person who, without the licence of the owner of the copyright —

- (a) does, or causes any other person to do, an act the doing of which is controlled by copyright, or
- (b) imports into Nigeria, otherwise than for his private and domestic use, or distributes therein by way of trade, hire or otherwise, or by way of trade exhibits in public, any article in respect of which copyright is infringed under paragraph (a) above.

(2) Notwithstanding subsection (1) above or any other provision of this Decree, where any work in which copyright

subsists, or a reproduction of any such work, is comprised in —

- (a) the archives stored in the National Archives established under the Public Archives Act, or
- (b) the public records of a State, being records for the storage or custody of which provision is made by law, the copyright in the work is not infringed by the making, or the supplying to any person, of any reproduction of the work in pursuance of that Act or law.

Actions for infringement

12. — (1) Subject to this Decree, infringements of copyright shall be actionable at the suit of the owner of the copyright in the High Court exercising jurisdiction in the place where the infringement occurred; and in any action for such an infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

(2) Where in an action for infringement of copyright it is proved or admitted —

- (a) that an infringement was committed, but
- (b) that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates,

the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.

(3) Where in an action under this section an infringement of copyright is proved or admitted, and the court in which the action is brought, having regard (apart from all other material considerations) to —

- (a) the flagrancy of the infringement, and
- (b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.

(4) No injunction shall be issued in proceedings for infringement of copyright which requires a completed or partly built building to be demolished or prevents the completion of a partly built building.

(5) In this section “action” includes a counter-claim, and references to the plaintiff and to the defendant in an action shall be construed accordingly.

Appointment and powers of competent authority

13. — (1) Three persons shall be appointed by the Commissioner to constitute the competent authority for the purposes of this section.

(2) In any case where it appears to the competent authority that a licensing body —

- (a) is unreasonably refusing to grant licences in respect of copyright, or
- (b) is imposing unreasonable terms or conditions on the granting of such licences,

the competent authority may direct that, as respects the doing of any act in relation to a work with which the licensing body is concerned, a licence shall be deemed to have been granted by the licensing body at the time the act is done if the appropriate fees fixed by the competent authority or prescribed under subsection (5) below are paid or tendered before the expiration of such period or periods as the competent authority may determine.

In this subsection "licensing body" means a society, firm or other organization which has as its main object, or one of its main objects, the negotiation or granting of licences in respect of copyright works, and includes an individual carrying on the same activity.

(3) No person shall be appointed under this section, nor shall any person so appointed act, as a member of the competent authority if he, his partner, his employer or any body (whether statutory or not) of which he is a member has any pecuniary interest in any matter which requires to be determined by the competent authority.

(4) Any person aggrieved by a decision of the competent authority may appeal to the Commissioner, who may refer the case for advice to any person or persons appearing to him to be suitable, and whose decision shall be final.

(5) The Commissioner may make regulations —

- (a) prescribing the manner in which any matter may be referred to the competent authority,
- (b) prescribing the procedure to be adopted by the competent authority, the records to be kept by the competent authority and the member of the competent authority who shall preside at its sittings,
- (c) prescribing the manner in which the competent authority shall be convened and the place where it shall hold its sittings,
- (d) prescribing a scale of costs and fees, and
- (e) providing generally for the better carrying out of the functions assigned to the competent authority by this Decree.

Reciprocal extension of protection

14. — Where any country is a party to a treaty or other international agreement to which Nigeria is also a party and the Commissioner is satisfied that the country in question provides for protection of copyright in works which are protected under this Decree, the Commissioner may by order in the Federal Gazette extend the application of this Decree in respect of any or all of the works referred to in section 1(1) of this Decree —

- (a) to individuals who are citizens of or domiciled in that country,
- (b) to bodies corporate established by or under the laws of that country,
- (c) to works, other than sound recordings and broadcasts, first published in that country, and
- (d) to sound recordings made in that country.

Restriction on importation of printed copies

15. — (1) The owner of the copyright in any published literary, dramatic or musical work may give notice in writing to the Board of Customs and Excise (in this section referred to as "the Board") —

- (a) that he is the owner of the copyright in the work, and
- (b) that he requests the Board, during a period specified in the notice, to treat as prohibited goods copies of the work to which this section applies:

Provided that the period specified in a notice under this subsection shall not exceed five years and shall not extend beyond the end of the period for which the copyright is to subsist.

(2) This section applies, in the case of a work, to any printed copy made outside Nigeria which if it had been made in Nigeria, would be an infringing copy of the work.

(3) Where a notice has been given under this section in respect of a work, and has not been withdrawn, the importation into Nigeria, at a time before the end of the period specified in the notice, of any copy of the work to which this section applies shall, subject to the following provisions of this section, be prohibited:

Provided that this subsection shall not apply to the importation of any article by a person for his private and domestic use.

(4) Where a notice is given under subsection (1) above in respect of a work, neither the Board nor any member, officer, servant or agent of the Board shall be liable to the owner of the work or to any other person for any act or omission by the Board or its servants or agents in relation to the notice:

Provided that, where the owner has suffered loss as a result of any such act or omission and a fee has been paid or is payable to the Board in respect of the notice, an amount equal to the loss or to the amount of the fee for one year, whichever is less, shall be repaid by the Board to the owner or, if the fee has not been paid, shall be waived.

(5) The Federal Commissioner for Finance may make regulations prescribing the form in which notices are to be given under this section, and requiring a person giving such a notice, either at the time of giving the notice or at the time when the goods in question are imported, or at both those times, to furnish the Board with such evidence, and to comply with such other conditions (if any), as may be specified in the regulations; and any such regulations may include such incidental and supplementary provisions as the Federal Commissioner for Finance considers expedient for the purposes of this section.

(6) Without prejudice to the generality of subsection (5) above, regulations made under that subsection may include provision for requiring a person who has given a notice purporting to be a notice under this section to pay such fees in respect of the notice as may be prescribed by the regulations.

(7) For the purposes of the Customs and Excise Management Act 1958, any fees paid in pursuance of regulations made under this section shall be treated as money collected on account of customs.

(8) Notwithstanding anything in the Customs and Excise Management Act 1958, a person shall not be liable to any penalty under that Act (other than forfeiture of the goods) by reason that any goods are treated as prohibited goods by virtue of this section.

(9) This section shall have effect as if it formed part of the Customs and Excise Management Act 1958.

Abrogation of common law rights

16. — No copyright, or right in the nature of copyright, shall subsist otherwise than by virtue of this Decree or of some other enactment in that behalf.

Regulations

17. — (1) Where no other provision is made in that behalf, the Commissioner may make regulations prescribing anything required to be prescribed for the purposes of this Decree.

(2) Regulations may be made —

- (a) in the case of works the copyright in which is vested in the Government, by the Commissioner with the prior consent of the Federal Executive Council, and
- (b) in the case of works the copyright in which is vested in a State Authority, by the State Authority or a person designated by the State Authority,

prescribing the public officer or other authority by whom licences may be granted for the reproduction of the works in question and a scale of fees to be charged in respect of any such licence.

(3) Regulations made under subsection (2) above shall be additional to and not in derogation of any enactment or other law regulating the custody of the National Archives of Nigeria or the public records of a State, and shall be without prejudice to the operation of section 11(2) of this Decree.

Repeals, and transitional and saving provisions

18. — (1) The Copyright Act 1911 of the United Kingdom (in so far as it has effect in Nigeria) and the Copyright Act are hereby repealed.

(2) The transitional and saving provisions in Schedule 3 to this Decree shall have effect notwithstanding subsection (1) above or any other provisions of this Decree.

Interpretation

19. — (1) In this Decree, unless the context otherwise requires —

“artistic work” includes, irrespective of artistic quality, any of the following works or works similar thereto —

- (a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints,
- (b) maps, plans and diagrams,
- (c) works of sculpture,
- (d) photographs not comprised in a cinematograph film,
- (e) works of architecture in the form of buildings or models, and
- (f) works of artistic craftsmanship and also (subject to section 1(3) of this Decree) pictorial woven tissues and articles of applied handicraft and industrial art;

“author”, in the case of a cinematograph film or sound recording, means the person by whom the arrangements for the making of the film or recording were undertaken, or in the case of a broadcast transmitted from within any country, means the person by whom the arrangements for the making of the transmission from within that country were undertaken;

“broadcast” means sound or television broadcast by wireless telegraphy or wire or both, and includes rebroadcast;

“broadcasting authority” means any authority established under any law in Nigeria or elsewhere providing broadcasting services for public reception, and includes a broadcasting contractor operating in Nigeria;

“building” includes any structure;

“cinematograph film” includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film;

“Commissioner” means the Federal Commissioner for Trade;

“communication to the public” includes, in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or rebroadcast;

“copy” means a reproduction in written form, in the form of a recording or cinematograph film, or in any other material form, so however that an object shall not be taken to be a copy of an architectural work unless the object is a building or model;

“copyright” means copyright under this Decree;

“Government” means the Federal Military Government;

“licence” means a lawfully granted licence permitting the doing of an act controlled by copyright;

“literary work” includes, irrespective of literary quality, any of the following works or works similar thereto —

- (a) novels, stories and poetical works,
- (b) plays, stage directions, film scenarios and broadcasting scripts,
- (c) text-books, treatises, histories, biographies, essays and articles,
- (d) encyclopaedias, dictionaries, directories and anthologies,
- (e) letters, reports and memoranda,
- (f) lectures, addresses and sermons,
- (g) law reports and enactments or other written laws, and
- (h) written tables or compilations;

“musical work” means any musical work, irrespective of musical quality, and includes works composed for musical accompaniment;

“rebroadcast” means a simultaneous or subsequent broadcast by one broadcasting authority of the broadcast of another broadcasting authority;

“reproduction” means the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording;

“sound recording” means the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film;

“State” means a State of the Federation;

“State Authority”, in relation to a State, means the Military Governor, Administrator or other governmental authority;

“work” includes translations, adaptations, new versions or arrangements of pre-existing works, and anthologies or collections of works which, by reason of the selection and arrangement of their content, present an original character;

“work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is inseparable from the contribution of the other author or authors;

“year” means —

- (a) in section 15 of this Decree and paragraph 5 of Schedule 3 to this Decree, a period of twelve months, and
- (b) elsewhere in this Decree, a calendar year, that is to say, a period of twelve months beginning on 1st January and ending on 31st December.

(2) The following provisions shall apply with respect to publication, that is to say —

- (a) a work shall be deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public;
- (b) where in the first instance a part only of a work is published, that part shall be treated for the purposes of this Decree as a separate work;
- (c) a publication in any country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere if the two publications took place within a period of not more than thirty days.

Citation and extent

20. — This Decree may be cited as the Copyright Decree 1970 and shall apply throughout the Federation.

SCHEDULES

SCHEDULE 1

Section 2

Term of Copyright

<i>Type of Work</i>	<i>Date of Expiration of Copyright</i>
1. Literary, musical or artistic works other than photographs	Twenty-five years after the end of the year in which the author dies.
2. Cinematograph films and photographs	Twenty-five years after the end of the year in which the work was first published.
3. Sound recordings	Twenty years after the end of the year in which the recording was made.
4. Broadcasts	Twenty years after the end of the year in which the broadcast took place.

SCHEDULE 2

Section 5

Exceptions from Copyright Control

The right conferred in respect of a work by section 5(1) of this Decree does not include the right to control —

- (a) the doing of any of the acts mentioned in the said section 5(1) by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast;
- (b) the doing of any of the aforesaid acts by way of parody, pastiche or caricature;
- (c) the inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public;
- (d) the reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public;
- (e) the incidental inclusion of an artistic work in a film or broadcast;
- (f) the inclusion in a collection of literary or musical works which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work;
- (g) the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast;
- (h) any use made of a work in a prescribed educational institution for the educational purpose of that institution, subject to the condition that, if a reproduction is made for any such purpose, it shall be destroyed before the end of the prescribed period or, if there is no prescribed period, before the end of the period of twelve months after it was made;
- (i) the making of a sound recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under licence from him, where the copies thereof are intended for retail sale in Nigeria and the work has already been previously recorded under licence from the owner of the relevant part of the copyright, whether in Nigeria or abroad, subject to such conditions and to the payment of such compensation as may be prescribed;
- (j) the reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement;
- (k) any use made of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work so used;
- (l) the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful broadcast and are destroyed before the end of the period of six months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work, so however that any reproduction of a work made under this paragraph —
 - (i) may, if it is of an exceptional documentary character, be preserved in the archives of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the National Archives established under the Public Archives Act), but
 - (ii) subject to this Decree, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work;
- (m) the broadcasting of a work already lawfully made accessible to the public with which no licensing body of the kind mentioned in section 13 of this Decree is concerned, subject (without prejudice to the other provisions of this Schedule) to the condition that the

owner of the broadcasting right in the work shall receive a fair compensation determined, in the absence of agreement, by the competent authority appointed under the said section 13;

- (n) the communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making;
- (o) any use made of a work for the purpose of a judicial proceeding or of any report of any such proceeding.

SCHEDULE 3

Section 18

Transitional and Saving Provisions

1. Subject to this Schedule, this Decree applies in relation to works made before the commencement of this Decree as it applies in relation to works made after the commencement of this Decree.

2. If immediately before the commencement of this Decree copyright in a work subsisted for a longer period than is provided in respect of that work by this Decree, then, so far as that work is concerned, this Decree shall have effect as if it provided for that longer period to be applicable.

3. (1) Subject to this paragraph, proceedings under section 12 of this Decree for infringement of copyright may be taken notwithstanding that the alleged infringement occurred before the commencement of this Decree.

(2) Proceedings for infringement of copyright instituted and not disposed of before the commencement of this Decree shall be disposed of as if this Decree had not been made.

(3) Where an act done before the commencement of this Decree was then an infringement of copyright but is not an infringement of copyright under this Decree, proceeding in respect of the act may be taken as if this Decree had not been made.

(4) Nothing in this Decree shall render an act done before the commencement of this Decree an infringement of copyright if the act was not an infringement of copyright when it was done.

4. (1) Subject to sub-paragraph (2) below, contracts for the licensing of any act in respect of copyright which were effective immediately before the commencement of this Decree shall continue in force as if they related to the corresponding copyright under this Decree.

(2) If one of the parties to a contract of the kind mentioned in sub-paragraph (1) above is a licensing body within the meaning of section 13(2) of this Decree, any other party to the contract may refer the contract to the competent authority appointed under section 13(1) of this Decree; and if the competent authority is of the opinion that the contract is unreasonable in any material respect, it may direct as provided in the said section 13(2), and the contract shall be varied or determined accordingly.

5. A notice given under section 14 of the Copyright Act 1911 of the United Kingdom (as in force in Nigeria) and not withdrawn before the commencement of this Decree shall continue in force as if it had been given under section 15 of this Decree:

Provided that no such notice shall continue in force for more than five years from the date when it was first given or beyond the end of the period of copyright to which it relates.

6. The regulations appearing on pages 145 to 149, inclusive, of Volume VII of the Laws of the Federation of Nigeria and Lagos 1958 —

- (a) shall continue in force (with the necessary modifications) as if they had been made under section 15(5) of this Decree, and
- (b) may be added to, varied or revoked accordingly.

7. In this Schedule "copyright" means copyright under this Decree or under the law in force in Nigeria immediately before the commencement of this Decree.

Acceptance of the Hardenberg doctrine provides the parties with the possibility of bypassing these public policy provisions.

It seems only normal to us that a transfer of rights effected primarily for the Netherlands should be governed by Netherlands law; whereas other contracts — namely those under which copyright is transferred in respect of all or many countries of the world — may at best be governed by the law of the country in which the center of gravity of the contractual relationship is located, more often than not that of the headquarters of the copyright office, publishing firm or film company which acquires that set of rights. In this connection, compare Troller, *Das internationale Privat- und Zivilprozessrecht im gewerblichen Rechtsschutz und Urheberrecht* (1952), p. 218; Milan Court of Appeal, December 22, 1965, mentioned in *Rivista di Diritto Industriale*, 1965, II, 278, and in *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*, 1968, 167, with a critical note by Auteri; the Hamburg *Oberlandesgericht*, March 27, 1958, mentioned by Schulze in *Rechtsprechung zum Urheberrecht*, OLGZ 32 ("Brotkalender"), with a note of appreciation by Troller. Similarly: Cass., May 28, 1963, *Rev. Crit. D. I. P.*, 1964, 514, with a note by Loussouarn, seems to make a distinction between the rights in a film which was genuinely intended for presentation in France and those in a film which was not. In the *Campbell Connelly & Co. Ltd. v. Noble* case, J. Wilberforce distinguishes between "a contract dealing specifically with the United States copyright" on one hand, and "a clause of worldwide application" on the other. Cf. *Weekly Law Reports* 1963, 1, 252, and *All England Law Reports* 1963, 1, 237, especially p. 243. See also Mackensen, *Der Verlagsvertrag im internationalen Privatrecht* (1964), 60-67; Windisch, *Gewerblicher Rechtsschutz und Urheberrecht im zwischenstaatlichen Bereich* (1969), pp. 110 and 111.

II. Pseudonymous works

In the case mentioned under I above, the name Emmanuelle Arsan was given in the book as being that of the author. Yet the author who entered into the contract transferring her (or his) rights to Losfeld had another name. Was Emmanuelle Arsan a pseudonym? Were the party to the contract with Losfeld and this person one and the same? The Netherlands publisher, who claimed to have acquired his rights from Losfeld, further maintaining that Losfeld had in turn acquired them from the real author, was instructed to provide proof of the latter contention.

III. The legal status of collecting societies

Brinkman v. BUMA (H. R. (Hoge Raad), May 24, 1968; *N. J.* 1968, 252, and the note by Professor G. J. Scholten)

It is prohibited in the Netherlands to "serve as an intermediary for the purposes of the public performance of musical compositions" without the authorization of the Minister of Justice. In the case referred to above the Minister had granted this authorization to one society only, namely BUMA. Practically all authors of musical works (with or without words) have joined this society, which is therefore in

a monopolistic position. Does this make a difference in the judgment of BUMA's activities or the interpretation of contracts concluded by it?

The theory of the matter is quite simple: the fact of an author transferring his rights to BUMA makes the society the fiduciary owner of those rights (H. R., November 28, 1941; *N. J.* 1942, 205). Since a large number of authors do that, BUMA acquires a wide range of authors' rights and, by means of reciprocal contracts with other societies, it is also entitled to act on behalf of foreign authors. Therefore, strictly from the legal point of view, BUMA is a copyright owner with a large number of rights. Basically there is no reason to see it as other than an individual author having few rights or a publishing firm with many.

There is nevertheless a certain amount of quite understandable hesitation, and Netherlands case law is not without decisions in which, for a variety of reasons, BUMA has been treated somewhat differently from an individual author or publisher. These decisions do not reveal any definite trend in one direction or another. An interesting feature of the next case is that both attorneys presented the situation with such perfect clarity that our supreme judicial authority was able to render a straightforward decision which left no room for ambiguity.

First let us examine the facts of the case.

According to a well-established principle of case law, a musical performance in public is in the Netherlands an activity proceeding exclusively from the person or persons who physically cause it to be heard, in other words the members of a music group considered as a whole, the quatuor, the singer and his accompanist, or the orchestra and its conductor. The organizer of a musical competition or the person providing the premises for the purposes of a musical performance cannot be regarded as physically causing the music to be heard. In order to carry out its supervisory function more easily, BUMA introduced a system which we shall call here the Rules for Managers of Premises.

With the aid of tables supplied by BUMA, managers of premises (especially cafés, restaurants and hotels which, in addition to their normal business, provide rooms for meetings of clubs and societies) ask persons using those premises to supply lists of the musical compositions they intend to perform. They then collect the royalties payable and pass them on to BUMA, after having deducted 10% for their trouble and expenses. At the same time the Rules provide for a substantially reduced charge for performances in rented premises when the performer effects payment in accordance with the Rules for Managers of Premises. The principle also works in reverse: where either the manager of the premises or the performer refuses to comply with the Rules, a substantially increased charge is made.

Until quite recently there was on the magnificent market square in Harlem a well-known café-restaurant known as Brinkmann's. The proprietor did not wish to comply with the Rules. The essence of his argument was as follows: he acknowledged that BUMA owned, within the country and abroad, the rights which it claimed. However, he maintained that it was only entitled to assert those rights in dealing with

the persons who caused the music to be heard in public. It could invoke no rights against managers of premises. By introducing the collection system mentioned earlier, it obliged him to carry out indirectly part of its own work of supervision and collection, taking advantage of its monopolistic position to do so. Considering this a misuse of rights, the manager applied for an injunction against BUMA, ordering it to refrain from applying the Rules for Managers of Premises.

The President of the Amsterdam Court and the Amsterdam Court of Appeal both upheld Brinkmann's argument. BUMA entered an appeal with the Supreme Court, which annulled the decision appealed against and referred the case to the Court of Appeal of The Hague.

The Supreme Court held that misuse of rights could be claimed if the cooperation which BUMA asked managers of premises to provide under the Rules was annoying and burdensome to the extent that, in view of all the interests affected by the Rules, BUMA could not in all conscience oblige the managers to provide it. The Supreme Court further considered that, according to the information supplied by BUMA, the Rules in question not only caused no inconvenience but actually embodied an attractive feature for the managers of premises; the latter point remains to be examined.

The Court of The Hague, to which the case was referred, rendered its decision on October 16, 1969 (*N. J.* 1970, 243), stating that there was no misuse of rights in the case in point.

It should be further pointed out that the terms used by the Supreme Court to define the concept of "misuse of rights" were also used later for the misuse of the right of ownership. It departs somewhat from the formula widely used in the past, according to which there can only be misuse where the person in question makes use of the right granted him by the law without having any justifiable interest in it. This formula, which was notably used in a large number of decisions concerning trademark law, shows the influence of the draft Civil Code.

IV. Infringement of copyright

1. *De vervalers* (The Swindlers). *Rijkspostspaarbank* (National Postal Savings Bank) v. *De Bezige Bij*. (Amsterdam Court of Appeal, February 10, 1970; *N. J.* 1971, 130)

A few years ago a group of youths succeeded in obtaining considerable sums of money from the National Postal Savings Bank by false pretenses. Their system was based on the fact that, in the past, it was possible in certain circumstances to withdraw from a post office money deposited in a savings bank account without prior examination as to whether the credit balance was sufficient to cover the withdrawal.

After having completed his sentence one of the swindlers wrote a small work describing the whole affair. This not very endearing story transports the reader into a world of total dishonesty and very aptly illustrates the old saying that crime does not pay. Moreover it is written in a well balanced, very readable style.

The Netherlands publishing firm *De Bezige Bij* (the Busy Bee) planned to publish the work under the title *The*

Swindlers. It also planned to incorporate in the dust-cover an exact copy of a savings book with the words "the swindlers" superimposed. The National Postal Savings Bank learned of this and informed the publisher that it owned copyright in the picture on the front cover of the savings book. *De Bezige Bij* replied that it would ensure that no confusion would be possible. It produced the dust-cover as planned but with the picture on the front cover of the savings book obliterated by a diagonal red cross. The book was published in this form.

The National Postal Savings Bank sued the publisher for damages.

In the course of the proceedings the publisher admitted that the addition of the red cross did not remove the copyright infringement. The National Postal Savings Bank had argued that the cross made the picture on the cover of the book "at best" an "adaptation" or an "imitation" in terms of the law. This argument seems plausible to us. In copyright, unlike what often happens in trademark law, a decision cannot depend on whether or not there is a likelihood of confusion. Reproduction can be claimed even when the work is reproduced in such a way that it is evident that the author is a person other than the author of the original work. Under the Netherlands copyright law (Article 13), this can only change if the later work may be considered "a new and original work".

Therefore, while there was no denial of the allegation of infringement, the question of legal consequences played an important part. Indeed it was not easy for the Savings Bank to provide evidence of its having actually suffered material damages and, for that reason, included a large section on immaterial damages in its action.

De Bezige Bij argued:

- (1) that a legal entity such as the National Postal Savings Bank could not suffer immaterial damages;
- (2) that, if such were possible, there was in any case no evidence of this kind of damages in the case in point.

The Court began by rejecting the first argument: a legal entity may also have immaterial interests; it may for instance have a good or a bad reputation, and an attack on the reputation of a legal entity is an offense.

It was then necessary to settle the question whether or not there was sufficient proof of immaterial damages. In this connection the Savings Bank claimed:

- (a) derogatory action in relation to the work, which is prejudicial to the honor, reputation or authorship of the author (claim of "moral rights"); we shall return to this under heading V;
- (b) use of the dust-cover as an eye-catching feature of a book which connects a case of fraud with the Savings Bank (claim of damage to reputation); this claim was rejected by the Court of Appeal on the grounds that the reactions of the main newspapers at the time of publication of the book provided clear evidence that the reputation of the Savings Bank had not suffered in the least;
- (c) damages suffered as a result of a lessening of the intrinsic value, and therefore of the exclusiveness, of the copyright.

The Court of Appeal accepted the last element of damages. Its views can be summarized as follows: the book's many buyers and the masses who saw it displayed in bookshops noticed how the indication of the exclusive nature of the picture on the cover of the savings books (by adding the words *Nadruk verboden* — reproduction prohibited), combined with the superimposed "The Swindlers", served as an eye-catching device to stimulate the sale of a crime novel in which savings books played an essential part. Consequently the value of the exclusive right owned by the Savings Bank was impaired. The damages mentioned under (c) were granted.

2. *The school at Krabbendijke* (Court of Middelbourg, January 14, 1970; *N. J.* 1970, 297)

Architect S. built a school for the commune of Krabbendijke in Zeeland. In the course of time an extension became necessary and the commune, without even informing the architect, had two classrooms added. These two classrooms, as the Court observed *de visu proprio*, were absolutely identical inside and outside, both in general appearance and in respect of detail, with the building which S. had planned and built. The court further observed, also *de visu proprio*, that the original building was a work of art in terms of the law on intellectual property.

The reader will be surprised to learn that, in spite of the foregoing, the action brought by the architect for infringement of his copyright was rejected.

The architect had argued that if the contention of the commune, according to which such imitative construction was allowed, was correct, the school could also have been enlarged by, say, 15 identical classrooms, and a large office block could have new wings added to it, those wings being identical with an existing one. The Court contradicted him here: portions of his building had been imitated; those portions (the classrooms) were not themselves subjects of copyright, and therefore their imitation was allowed.

This judgment was violently criticized by Mr. L. Wichers Hoeth, and rightly so in our opinion. Either it is contradictory in itself, or it is not backed by sufficient reasoning.

In fact the decision seems contradictory in itself, since the Court first considers the original building to be (a) a work of art, and then maintains (in respect of the imitated part at least) that it is (b) not a work of art.

Or was it that the Court meant to establish that the school as a whole was a work of art, but that this did not make the individual classrooms into independent works of art? This in fact could occur: an artistically designed building, with a pleasing style and showing a very individual taste on the part of the designer, may contain elements manifestly lacking in originality and not even intended to be original. Compare Von Gamm, *Urheberrechtsgesetz*, note 10 to paragraph 15 and the Court decisions referred to. This especially could apply in the case of insignificant details, but it would not be so likely to occur in connection with a whole wing of an office block or an entire classroom in a school (both inside and outside). If this is what the Court meant in the case referred to, it should have given its reasons, yet it did not do so.

V. Moral rights

Until recently, decisions involving moral rights have not been very frequent in the Netherlands. Now, however, this aspect of copyright is steadily increasing in importance.

1. *Again: "The Swindlers". The moral rights of legal entities and fictitious authors*

The National Postal Savings Bank had suffered the bitter experience of the cover of its savings book being used for a crime novel in which the defrauding of the Savings Bank played a part. For this reason it claimed infringement of its moral rights: the work in which it owned copyright had been published in a setting which was unworthy of it, or at least likely to arouse a thirst for thrills in the section of the public which derived pleasure from crime stories. Such use of a work is indeed generally considered an infringement of moral rights: it is not only when parts have been cut out, a table reproduced with the essential parts removed, etc., that the integrity of the work is affected. Compare Bappert-Wagner, *Internationales Urheberrecht*, on Article 6^{bis} of the Berne Convention.

De Bezige Bij, however, had a strong counterargument ready: it maintained that the Savings Bank had no moral rights. In order to understand this means of defense, certain peculiarities of Netherlands law should be mentioned here.

There are two instances in which Netherlands law grants original copyright to a person who is not the creator of a work. Briefly, Article 7 says that, if an employee has been appointed for the specific purpose of producing certain works, the person in whose service they are produced "shall be deemed the author thereof", unless otherwise agreed between the parties. Article 8 then provides that, if a public institution (such as the National Postal Savings Bank), an association, foundation or partnership makes a work public as its own, without indicating any natural person as the author thereof, the institution or other body "shall be regarded as the author of the work", in the absence of proof to the contrary.

Many Dutch critics have raised the question whether the rule according to which, in the cases referred to here, the employer, institution, or other body "shall be regarded as the author" implies that they own moral rights as well as pecuniary rights. Every author who deals with this question regretfully reaches the conclusion that it must be answered in the affirmative. As yet there has been no court decision on the subject.

And yet *De Bezige Bij*, defying all the critics who command authority, dared to take the opposite view and was vindicated by the Court of Appeal.

The Court of Appeal referred to a Supreme Court decision dating back about thirty years according to which the underlying intention of Article 7 — and in its opinion the same applied to Article 8 — was to designate a person as the author of a work by means of a legal provision, whereas in fact he was not involved in the actual creation. On the other hand, continued the Court, moral rights were conferred on the author on account of the strictly personal relationship established between the creator and his work since the former

endowed the latter with a very special, individual character. It is difficult, under this legal system, to confer moral rights on a person who, although alien to the creation of the work, is nevertheless "called" the creator by virtue of a legal fiction.

2. *Again: the school at Krabbendijke. The right to alter a work*

It was mentioned earlier that, in the opinion of the court, the commune of Krabbendijke could, without infringing the architect's pecuniary rights, make an extension to the school built by him consisting of two new elements identical with the original elements.

One question remained to be settled: the extension had modified the outward appearance of the school. By making this modification, had the commune infringed the architect's moral rights? The Court noted that the architect did not claim that the modification had impaired the architectural creation or detracted from the appearance of his original work; moreover an examination of the site had shown the Court that, after modification, the school still gave the impression, and to the same extent, that it was the creation of one and the same architect.

Under these circumstances there was little chance of successfully claiming the architect's moral rights, and the claim was rejected. Indeed, it is a fact that the exclusive right to modify a work cannot be exercised in bad faith.

3. *Harm met de harp* (Herman and his harp). *Elsink v. Bovema* (Amsterdam Court of Appeal, December 1, 1970; *N. J.* 1971, 205)

Somewhere in Amsterdam, Henk Elsink runs a restaurant, where he not only serves toothsome meals to his clients but also entertains them as a singer and humorist relating short anecdotes, often split up and interspersed with songs. It is particularly in the latter that he excels. In 1961, a recording firm, Bovema N. V., contacted him with a view to entering into a contract. The contract was concluded and lasted until 1965. Under it Bovema acquired the exclusive right to record Elsink's cabaret numbers on discs. After expiration of the contract Elsink would be forbidden to perform, for recording by another firm, works which under the contract had been performed for and recorded by Bovema. These were the terms of the 1961 contract.

One day Elsink produced an interesting number which he called *Harm met de harp*. Bovema was interested and proposed that Elsink perform it at the Leyde theater along with a few other numbers, and that it be recorded at the same time. The performance took place as arranged, but it did not attract many people to the theater and Elsink did not manage to establish contact with his audience. Afterwards, he and Bovema agreed that the recording was not suitable for the market.

In the meantime, Elsink kept *Harm met de harp* on his program, and, in 1967, another firm made a recording of it which went on the market and was enormously successful.

Thereupon Bovema brought out its old recording and made some improvements to it: applause and laughter from an artificial audience was added, and in that and other ways

the recording was made suitable for sale. The record was put on the market, and Elsink opposed it in a summary proceeding.

His demands were very far-reaching: Bovema was to stop selling the record and to inform wholesalers and retailers as well as broadcasting organizations that it was taking back records already supplied and prohibiting their sale and playing.

In its defense, Bovema argued, rightly in fact, that it was fully entitled under the contract to take a recording out of its collection and market it, even years later. Furthermore, the contract gave it full authority to decide whether or not a given recording was to be considered successful.

The Court rejected this argument in view of the fact that the recording in question had been condemned by mutual agreement and that Bovema had no right to go back on that agreement.

The dispute might have ended at this juncture if Bovema had not availed itself of a procedural argument which deserves our close attention. Bovema said that in a summary proceeding such as the one in progress the judge was not competent to make as far-reaching a decision as was called for in that instance, considering that its own interests were very extensive and those of Elsink very slight in comparison; while perhaps not of exceptionally good quality, the recording was quite adequate, and Elsink's reputation could not be endangered by its being put on the market. In principle this argument is admissible in a summary proceeding under Netherlands law.

The Court began by asking whether the action of Bovema infringed the plaintiff's copyright and came to the conclusion that it did. It considered that Bovema had recorded the text composed by Elsink not in the form in which Elsink himself had presented it but after having adapted it without the latter's consent.

The Court conceded, however, that the contract — being conceived in very broad terms — left Bovema free to make modifications of a secondary nature. Yet, in the case in point, Bovema had not applied the contract in good faith, having omitted not only to consult Elsink beforehand on the modifications, but also to listen to the result with him afterwards and to decide with him whether or not that result was satisfactory.

Finally, the question of the damage, if any, to Elsink's reputation. Elsink had an exclusive right, and in principle it was he who should have decided (as he himself maintained) whether a given rendering was "within the bounds of his artistic conscience". It transpired from experts' statements submitted during the proceeding that this contention was reasonable to say the least, although another expert had claimed that the opposite view was equally defensible. Under the circumstances Elsink's opinion was bound to prevail, and all his demands were upheld.

4. *The case of "Mijnheer de Uil"* ("Mister Owl") (President of the Court of Amsterdam, March 4, 1969 (unpublished to date))

The rules in the various countries of the Berne Union for the application of copyright to songs put to music are striking in their great diversity. As long as A's music and B's words

are not combined they are regarded as two distinct works; this is the same everywhere. When the writer of the words and the composer of the tune join their two works to make a single work (or if a third party does so with their consent), the two component works nevertheless continue to exist under Netherlands law. However, a third copyright is created at the same time, namely the copyright belonging to the person or persons who effected the combination in an original manner. This right in the whole (for which we reserve the expression "composite work") leaves the rights in the music and the words, taken separately, completely unaffected.

There once was an immensely popular little song which came on television every day before children went to bed, beginning with the words "Hello, Mister Owl, where are you taking us?" — whereupon the owl would give us a glimpse into the animal world, showing us that there too reigned the same vices and virtues as in the world of human beings, and that there too bedtime was bedtime.

Dureco N. V. wished to make a record of the song, and so obtained the approval of BUMA and STEMRA — for the tune — but not that of the author of the words. Dureco was not going to let this get in its way, however: it had new words written (unfortunately on a somewhat lower intellectual plane) and brought out the record. The poet responsible for the original words applied for an injunction against Dureco N. V. ordering it to refrain from selling and distributing the record.

The first argument was that the Dureco song was a non-original adaptation of the poet's. This was rejected, as the difference between the two texts was only too obvious.

Then it was alleged that the adaptation of those particular words to that tune was an offense against the author of the original text. Here is a clear-cut instance of moral rights being invoked. However, as soon as it was established that the second rhyming text was neither identical with the first nor an adaptation or imitation of it, there was little hope of the moral rights claim succeeding, and indeed the result was negative. We do not know — and in any case there is no evidence available — whether the plaintiff used the argument of the banality of the Dureco words, and if so whether it was maintained that this had detracted from the value of the original text. This in fact would have been a valid argument under civil law, quite independently of copyright considerations. Neither does the author seem to have argued that the copyright in the music and the words as a "composite work" belonged solely to the composer and himself together, and that this had an effect on their mutual legal position.

VI. The situation of the performer

Ja zuster, nee zuster (Yes, sister, no, sister) *Blok and others v. Unilever* (H. R., January 16, 1970; *N. J.* 1970, 220, and note by Professor G. J. Scholten; *Ars Aequi* 1970, 377, and note by Professor H. Cohen Jehoram)

1. Here we are leaving the field of copyright in the strict sense and we must therefore be brief. Suffice it to say by way of introduction that the Netherlands have not acceded to the Rome Convention of October 26, 1961, that our legislation

does not recognize any *Leistungsschutzrecht* (performance protection rights) like those in Germany, and there has never been a decision like the one which resulted from the Furtwängler case in France (Cass., January 4, 1964; *Dalloz* 1964, 321, and note by Pluyette). Far from it.

2. Television has altered the situation of actors and actresses in such a way that they are more easily associated with their parts. A theater actress is playing the part of Chimène in Corneille's *Le Cid* at one moment, and the next moment she is in that of Sophie Couficiel in Marc-Gilbert Sauvajon's *Tchao!*. Her success in the latter part drowns her performance in the former.

In television, however, we have become familiar with "series", or stories divided up into successive independent episodes. The actors are in the same parts every week, and they easily become identified with their characters.

3. Annie Schmidt wrote such a series for television under the title *Ja zuster, nee zuster*. The main character was Sister Clivia (played by Hetty Blok), a nurse and the directress of a home — we were never told for whom or what — in which the most unlikely accidents continually happened and never failed to turn out all right in the end. The fantastic situations thought up by Annie Schmidt and her pleasingly witty style fascinated and entertained young and old alike.

Unilever manufactured small figurines to go with its products; the base bore the name of one of the characters in the play — "Sister Clivia", "Daddy", "Gerard" and others for which the consent of the actors had not been obtained.

The actors sued Unilever on the grounds that their "portraits" had been made available to the public without their consent, which was prohibited under the law on intellectual property. They received the reply that the figurines bore no resemblance either to Hetty Blok or to the other actors. This in fact was true, as Unilever had stylized them to such an extent that all likeness was lost. To what, therefore, should most importance be attached: the association resulting from the name on the base or the lack of resemblance?

4. Not only did the Supreme Court consider the second factor to be the deciding one, it did so on the basis of arguments which seem more than somewhat out of date: reference was made to the statement of motives attached to the 1912 draft of the law on intellectual property, in which the word "portrait" is defined as "the image of the face of a person, with or without the other parts of the body".

This definition is evocative of the days when the subject had to sit motionless for minutes on end with a forced smile on his or her mouth, waiting for the photographer to squeeze the shutter. It is a definition which takes no account of the modern snapshot where the footballer, the mountaineer or the diplomat is portrayed in characteristic attitudes without his face being shown, and where association and suggestion play a much more prominent part than was conceivable in 1912.

There are few court decisions concerning the rights of the actor in relation to his part. The Supreme Court of the Federal Republic of Germany (*Bundesgerichtshof*) rendered a decision in 1961 known as *The Schölermann Family*. There too the basic assumption seems to have been that actors

cannot oppose the public showing of a photograph or painting representing them in the parts they play unless they can thereby be "recognized, or at least identified" (*Neue Jur. Wochenschrift* 1961, I, 558; *GRUR* 1961, 138/139). Is this the condition of identification? If so we feel, like Kleine, the author of the note, that one should go a step further. There are pictures hanging in the Amsterdam Municipal Theater which show Louis Bouwmeester in the Part of Shylock and Else Mauhs in that of l'Aiglon. People who have seen the actors stop and marvel at the striking resemblance — not the resemblance to the actor or actress as a person, but to the character represented. Could not this be called a portrait?

However, although Hetty Blok and the other actors had more strings to their bow, none of their arrows hit the mark. The fact that the public would associate the figurines with the actors was considered insufficient grounds to prohibit their use. Moreover, it was decided that it could not be alleged that the identity of the plaintiffs had been used for advertising purposes in view of the fact that it was not "portraits" that were used.

Finally, the plaintiffs claimed that the action of Unilever had made it impossible for them to enter into a contract conferring exclusive rights for the use of their picture, and that consequently such arbitrary distribution constituted an offense; this argument had been frequently accepted in previous court decisions concerning "real" portraits. Here, however, it was rejected for the precise reason that "real" portraits were not involved.

The note by Professor Scholten is brief and to the point: performers have no legal rights in the Netherlands and it is time the legislator intervened. Perhaps so, but we take the liberty of ending with a question. Netherlands civil law and copyright have much in common with French law. In France the protection of performers was built up on court decisions which applied the general principles of private law. Why then should it be impossible to do the same thing in the Netherlands?

S. GERBRANDY

Counsellor at the Amsterdam Court
of Appeal

Letter from Switzerland

1. The present Swiss Federal Law on Copyright in Literary and Artistic Works dates back to December 7, 1922. Although it underwent partial revision in 1955, it can only be described, in this era of rapid change, as somewhat out of date with respect to certain essential features. Its need for adaptation to changed conditions, and especially to technological development, led the authorities to set up a committee of experts in the early nineteen-sixties to prepare the draft of a new, up-to-date copyright law. The draft was completed recently, together with a comprehensive commentary by the Committee referred to above¹.

The purpose of this "Letter" is to report briefly on the considerable amount of work which this draft revision of the Copyright Law involved.

Questions relating to copyright are dealt with not only in the Copyright Law referred to above, but also in the Federal Law of September 25, 1940, on the Collection of Royalties. In future there will be provisions on the collection of royalties in the Copyright Law, and the 1940 law will thus become redundant. The revised Law will also embody certain provisions of the Code of Obligations concerning publishing contracts. On the other hand, the question of "neighboring rights", in terms of the Rome Convention, will be taken out of

the purview of the Copyright Law. In any event, we shall concentrate here more on questions relating specifically to copyright.

2. According to the usual practice in Swiss legislation, the Draft of the new Copyright Law is divided into titles and chapters as follows:

Title 1: General provisions

- Chapter 1: Subject and conditions of protection (Articles 1 to 8)
- Chapter 2: The author (Articles 9 to 12)
- Chapter 3: Content of copyright (Articles 13 to 20)
- Chapter 4: Succession (Article 21)
- Chapter 5: Granting of licenses (Articles 22 to 27)
- Chapter 6: Limitations on copyright (Articles 28 to 41)
- Chapter 7: Term of protection (Articles 42 to 44)
- Chapter 8: Cinematographic works (Articles 45 to 51)

Title 2: Legal protection

- Chapter 1: Protection under civil law (Articles 52 to 63)
- Chapter 2: Protection under criminal law (Articles 64 to 70)
- Chapter 3: Provisions common to protection under both civil and criminal law (Articles 71 to 73)

Title 3: Collection of royalties

- Chapter 1: Compulsory consent (Articles 74 to 80)
- Chapter 2: Obligations of collecting societies (Articles 81 and 82)
- Chapter 3: Federal Commission for arbitration in the collection of royalties (Articles 83 to 88)

Title 4: Implementing and transitional provisions (Articles 89 to 97)

¹ The Draft Law and the commentary are obtainable from the Federal Bureau of Intellectual Property, Berne.

3. With regard to substance, the Draft contains certain important *new features* in relation to the existing Law:

3.1 *Definition of the protected work.* — It may well be significant for the future development of copyright in both this and other countries that, under Article 1 of the Draft, protection is extended to any intellectual creation of individual character which is expressed by literary, musical or artistic means. Therefore, where formerly the prerequisite for copyright protection was that the work be a creation expressing the personality of the author, the “individuality” of the work is now the sole criterion. Consequently, protection is secured when there is no likelihood of the work being independently created by a third party. This is an instance of what Max Kummer, in *Das urheberrechtlich schützbare Werk* (Berne 1968, p. 80) describes as the “statistical uniqueness” (*statistische Einmaligkeit*) of creation.

3.2 *The author.* — In spite of recent technological developments, the Draft adopts the principle according to which only a natural person can be an author. Furthermore, it contains more differentiation than the existing Law with respect to situations where several authors work together. More emphasis is placed on the company-law aspect of such situations, which naturally are based on a cooperation factor (Article 11).

3.3 *Nature and content of copyright.* — In terms of the Draft the author, like the owner of an object, has a right of disposal in respect of his work which in principle is absolute, in other words may be invoked against third parties, and which is subject only to legal restrictions. This right of disposal originates automatically in the fact of creation of the work; it is perpetually vested in the author in the sense that he may always claim authorship and decide whether, when and how, his work is to be disclosed or exploited (Article 13 of the Draft). It follows from this that the author's personal and economic relationships with his work are inseparably linked. Thus the underlying principle of the Draft is based on the so-called monistic theory.

3.4 One feature which is new in relation to the existing legal situation is the express mention of the following two *rights* which accrue to the author: free access to any copy of the work of which ownership has been transferred to a third party, and the right to prevent the destruction of a work existing in one copy only (Articles 18 and 19).

3.5 In view of the individual rights embodied in copyright and in accordance with recent doctrine, copyright is regarded as being *not assignable* during the lifetime of the author. Not only total, but also partial assignment is impossible, since copyright as such is indivisible. It goes without saying, however, that, if practical requirements so dictate, a third party may be accorded the right to exploit the work under precisely defined conditions; this right may also have exclusive character, in which case active powers to prevent third-party interference are conferred on the person to whom the right to exploit the work is granted. With this provision, the Draft eliminates what might be described as the impractical aspect of the non-assignability of copyright and, in fact, admits of the maintenance of existing arrangements.

In the commentary on the Draft of the new Law, these powers are compared to the corresponding restricted real rights in the law of property, usufruct in particular. Where a collecting society is involved, the author gives it exclusive powers of a special kind which enable it to grant non-exclusive licenses to third parties for the exploitation of the works in question.

The Law contains no formal provisions on contracts for the assignment of exploitation rights, in accordance with the basic rules on contractual obligations in Swiss law. With respect to their contents, however, Article 25 of the Draft contains some provisions which supplement contracts in the sense that they are applicable if the parties have not made other arrangements. Their purpose is to protect the author from a too far-reaching interpretation of the contract with respect to the exploitation rights assigned.

3.6 In view of the legal position of the author as described above, *conflict* could occur between the respective claims of the author and the owner of a copy of the work. Therefore, Article 18 of the Draft provides that the author has, for the exercise of his copyright, the right of access to the copy of the work, even when it is owned by a third party. The author also has certain rights when the owner of a copy of the work wishes to destroy it or has destroyed it (Article 19). On the other hand, the right to circulate a copy of the work lapses when it is first put into circulation (Article 20). Therefore, the Draft of the new Copyright Law does not, in particular, provide for the so-called *droit de suite*.

3.7 Considering recent developments in world communications, it seems appropriate that the new Law should, in contrast to the existing one, grant copyright protection to all persons, irrespective of their residence or nationality, or the place in which their work was first disclosed (Article 6).

3.8 *Limitations on copyright.* — As mentioned earlier, the author may dispose freely of his work provided his rights are not subject to restriction under the Law. Such restrictions exist in the case of works which have already been disclosed, especially in the sense that their performance in “private circles” is generally permitted. According to the definition in Article 28, paragraph 2, of the Draft, the term “private circles” is conceived very narrowly: for practical purposes, the only persons it includes are relatives and friends.

A question which has become very relevant in recent years is that of the *lawfulness of photocopies* and similar reproductions. Such reproductions of a disclosed work are permitted without any real restriction, provided they are intended for the private use of the person making them (Article 29). For photocopies made in connection with a business activity, the principles proposed appear realistic: photocopies are lawful when the firm has lawfully acquired ownership of a copy of the work and when the photocopy itself is used for the personal information and instruction of employees of the firm. In such cases, therefore, the author cannot claim compensation under the Draft. Further restrictions to copyright are to be found in connection with the right of quotation (Article 31) and with radio and television reporting (Articles 37 to 39). Finally, copyright restrictions in accor-

dance with practical needs exist also in connection with commissioned portraits (Article 40), architectural works (Article 41), works on or in public places (Article 33), etc.

3.9 The Draft contains a special chapter on *cinematographic works* (Articles 45 *et seq.*) in which primarily the legal relationships of the persons involved are dealt with in the light of new international provisions (Stockholm text of the Berne Convention). The system introduced seems to strike a balance between the interests of the author and those of the film producer, who bears the material burden; one thing which particularly favors the film producer in dealings with third parties is the presumption of exclusive entitlement to exploit the work. Here, as in Article 11, there are signs of the consolidating effect of company-law concepts.

3.10 The term of copyright protection is fifty years following the death of the author or (in the case of anonymous or pseudonymous works) following the date of disclosure of the work. The protection of cinematographic works ends fifty years after their release or — if they are not released during the specified period — after their making.

3.11 As far as *legal proceedings* are concerned, the Draft remains in the well-trodden paths of the legal protection hitherto applicable to intellectual property rights, but it amplifies the latter to include cases of infringement without fault. Besides action for damages, restraint or suppression, there is the possibility of action for the surrender of gains from the illicit use of a protected work, as well as for the payment of the royalties which would normally have been due had the license to exploit the work in question been granted by contract. In neither case is there a prerequisite of fault on the part of the defendant (Article 54, paragraph 1(b) and (c)).

This new action fills a gap in existing legislation which time has been making more and more noticeable. Under the provisions on unlawful enrichment the injured party must not only have been deprived of enrichment: damages are often awarded only within the limits of the amount of the infringer's enrichment (Code of Obligations, Articles 62 and 64). Moreover, the provisions on unauthorized management of affairs offer only incomplete protection, because the injured party has to prove that, and to what extent, the

infringer has profited by his action (Code of Obligations, Article 423). And then it has always been an open question whether or not a fault on the part of the infringer is a prerequisite under this provision. The Committee of Experts went into this important question very thoroughly, and their proposed solution of the problem is a worthy contribution to the *development of contract law*, which may well have a beneficial effect outside the field of copyright.

Finally, the injured party also has, as before, a right to redress for moral injury (Article 55).

The rules on *provisional measures* have been taken from the Patent Law with some improvements where necessary. They are paralleled by the protection afforded to copyright under *criminal law*. On petition by the injured party imprisonment for up to a year or a fine of up to 40,000 Frs may be imposed. There is also the possibility of combining the two kinds of sanction (Article 64 of the Draft, in conjunction with Article 48, paragraph 1, of the Penal Code). As in the existing Law, the new draft provisions make the failure to indicate the source, as prescribed by law, a sanctionable offense (Article 65 of the Draft, in conjunction with Article 106 of the Penal Code; when the Penal Code is applied, account should always be taken of the revision which entered into force on July 1, 1971).

Finally, there is also the possibility of unlawfully produced or exploited copies of the work being seized by the court in order that they may be destroyed or made unusable. This naturally does not apply to architectural works (Article 71 of the Draft).

4. The new Draft Copyright Law seems to achieve a harmonious balance between theoretical principles and practical realities. Not only does it bring about long-awaited clarification of various questions which have hitherto been left in doubt, but it also provides a comprehensible and manageable re-codification of all problems arising in connection with the protection of copyright, which will be greatly appreciated by authors, many of whom are not particularly versed in legal matters. In this respect it will no doubt also be of interest to foreign legislators.

Mario M. PEDRAZZINI
Professor at the School
of Higher Economic and Social Studies,
St. Gallen

CALENDAR

WIPO Meetings

- April 6 and 7, 1972 (Geneva) — Patent Cooperation Treaty (PCT) — Standing Subcommittee of the Interim Committee for Technical Cooperation**
Members: Austria, Germany (Fed. Rep.), Japan, Netherlands, Soviet Union, Sweden, United Kingdom, United States of America, International Patent Institute — *Observer:* Brazil
- April 10 to 14, 1972 (Geneva) — ICIREPAT — Technical Committee for Standardization**
- April 17 to 21, 1972 (Geneva) — ICIREPAT — Technical Committee for Shared Systems**
- April 17 to 21, 1972 (Geneva) — ICIREPAT — Advisory Board for Cooperative Systems**
- April 24 to 26, 1972 (Geneva) — ICIREPAT — Subcommittee on Organic Chemistry**
- May 2 to 8, 1972 (Geneva) — Committee of Experts on the International Registration of Marks**
Object: Preparation of draft texts for the Vienna Diplomatic Conference in 1973 (see below) — *Invitations:* Member countries of the Paris Union; organizations concerned
- May 9 to 17, 1972 (Paris) — Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Raised by Transmission Via Space Satellites**
Object: Study of the problems — *Invitations:* Member countries of the Berne Union, Member countries of the Paris Union and Member States of the United Nations or of a Specialized Agency — *Observers:* Intergovernmental and non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco
- May 16 to 18, 1972 (Geneva) — Mechanization of Trademark Anticipation Searches — Working Group**
Invitations: Australia, Austria, Belgium, Colombia, France, Germany (Fed. Rep.), Ireland, Japan, Luxembourg, Netherlands, Soviet Union, Spain, Sweden, United Kingdom, United States of America
- May 29 to June 2, 1972 (The Hague) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee**
- June 5 to 9, 1972 (The Hague) — International Patent Classification (IPC) — Joint ad hoc Committee**
- June 26 to July 7, 1972 (The Hague) — International Patent Classification (IPC) — Working Group I of the Joint ad hoc Committee**
- July 5 to 7, 1972 (Geneva) — ICIREPAT — Technical Coordination Committee**
- July 10 to 14, 1972 (The Hague) — International Patent Classification (IPC) — Working Group III of the Joint ad hoc Committee**
- September 4 to 8, 1972 (London) — International Patent Classification (IPC) — Working Group II of the Joint ad hoc Committee**
- September 11 to 15, 1972 (London) — International Patent Classification (IPC) — Working Group V of the Joint ad hoc Committee**
- September 20 to 22, 1972 (Geneva) — ICIREPAT — Plenary Committee**
- September 25 to 29, 1972 (Berne) — International Patent Classification (IPC) — Working Group IV of the Joint ad hoc Committee**
- September 25 to 30, 1972 (Geneva) — Coordination Committee of WIPO; Executive Committees of the Paris and Berne Unions, Assemblies of the Madrid, Lisbon and Locarno Unions**
- October 2 to 6, 1972 (Geneva) — Patent Cooperation Treaty (PCT) — Interim Committees and Standing Subcommittee of the Interim Committee for Technical Cooperation**
Members of the Interim Committees: Signatory States of the PCT — *Observers:* Intergovernmental organizations and international non-governmental organizations concerned; *Members of the Standing Subcommittee:* Austria, Germany (Fed. Rep.), Japan, Netherlands, Soviet Union, Sweden, United Kingdom, United States of America, International Patent Institute — *Observer:* Brazil
- October 9 to 13, 1972 (Geneva) — Committee of Experts on a Model Law for Developing Countries on Appellations of Origin**
Object: To study a Draft Model Law — *Invitations:* Developing countries members of the United Nations — *Observers:* Intergovernmental and international non-governmental organizations concerned
- October 9 to 13, 1972 (Geneva) — ICIREPAT — Technical Committee for Standardization**
- October 16 to 20, 1972 (Nairobi) — African Seminar on Intellectual Property**
- October 16 to 20, 1972 (Geneva) — ICIREPAT — Technical Committee for Computerization**
- October 23 to 27, 1972 (Geneva) — ICIREPAT — Technical Committee for Shared Systems**
- October 23 to 27, 1972 (Geneva) — ICIREPAT — Advisory Board for Cooperative Systems**
- November 20 to 24, 1972 (Geneva) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee**
- November 27 to December 1, 1972 (Geneva) — International Patent Classification (IPC) — Joint ad hoc Committee**
- December 13 to 15, 1972 (Geneva) — ICIREPAT — Technical Coordination Committee**
- May 7 to June 2, 1973 (Vienna) — Diplomatic Conference on: (a) the International Registration of Marks, (b) the International Classification of the Figurative Elements of Marks, (c) the Protection of Type Faces**
- September 24 to October 2, 1973 (Geneva) — Administrative Bodies of WIPO (General Assembly, Conference, Coordination Committee) and of the Paris, Berne, Nice and Lisbon Unions (Assemblies, Conferences of Representatives, Executive Committees)**

UPOV Meetings

- April 13 and 14, 1972 (Geneva) — Consultative Working Committees
- May 23 and 24, 1972 (Cambridge) — Technical Working Party for Cross-fertilized Agricultural Crops
- May 25 and 26, 1972 (Antibes) — Technical Working Party for Ornamental Plants
- September 13 and 14, 1972 (Geneva) — Working Group for Variety Denominations
- November 7 and 10, 1972 (Geneva) — Diplomatic Conference
Object: Amendment of the Convention
- November 8 and 9, 1972 (Geneva) — Council
- July 2 to 6, 1973 (London/Cambridge) — Symposium on Plant Breeders' Rights

Meetings of Other International Organizations concerned with Intellectual Property

- April 24 to 28, 1972 (Cannes) — International Association for the Protection of Industrial Property — Council of Presidents
- April 26 to 28, 1972 (Helsinki) — International Writers Guild — Executive Council
- May 15 to 19, 1972 (Paris) — International Publishers Association — Congress
- May 21 to 25, 1972 (Geneva) — International League Against Unfair Competition — Congress
- July 3 to 7, 1972 (Paris) — International Literary and Artistic Association — Working Session
- July 4 to 6, 1972 (The Hague) — International Patent Institute — Administrative Council
- October 16 to 21, 1972 (Mexico) — International Confederation of Societies of Authors and Composers — Congress
- October 23 to 26, 1972 (The Hague) — International Patent Institute — Administrative Council
- November 12 to 18, 1972 (Mexico) — International Association for the Protection of Industrial Property — Congress
- December 11 to 15, 1972 (The Hague) — International Patent Institute — Administrative Council
- May 20 to 26, 1973 (Rio de Janeiro) — International Chamber of Commerce — Congress
- Intergovernmental Conference for the Setting Up of a European System for the Grant of Patents (Luxembourg):**
- April 24 to 28, 1972 — Working Party II
- April 24 to 28, 1972 — Working Party III
- May 15 to 19, 1972 — Coordination Committee
- June 19 to 30, 1972 — Intergovernmental Conference
-