Published monthly
Annual subscription:
Sw.fr. 100.—
Each monthly issue:
Sw.fr. 10.—

Copyright

14th year - No. 5
May 1978

Monthly Review of the
World Intellectual Property Organization (WIPO)

Contents

World Intellectual Property Organization

WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights

Permanent Committee

Second Session

(Geneva, March 16 to 20, 1978)

Note *

The WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (hereinafter referred to as the Permanent Committee) held its second session in Geneva from March 16 to 20, 1978. The list of participants appears at the end of this Note.

The session was opened by Mr. Ndéné Ndiaye (Senegal), the outgoing Chairman, who expressed satisfaction at the considerable amount of work done since the last meeting; he specifically referred to the importance of the training program realized by the International Bureau of WIPO and to the sizeable increase in the number of fellowships being awarded.

Mr. G.S. Edwin (India) was unanimously elected Chairman of the session and Mr. M.B. Keelson (Ghana) and Mrs. M. Reinsma (Netherlands) as Vice-Chairmen.

The following questions, which were on the agenda of the Permanent Committee, were examined on the basis of documents prepared by the International Bureau.

Membership of the Permanent Committee

At the time of its second session the Permanent Committee had 42 member States: Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, Congo, Czechoslovakia, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Hungary, India, Israel, Italy, Ivory Coast, Kenya, Mali, Mauritius, Mexico, Morocco, Netherlands, Niger, Norway, Pakistan, Poland, Portugal, Romania, Senegal, Spain, Sudan, Surinam, Sweden, Switzerland, United Kingdom, United States of America, Upper Volta.

* This Note has been prepared by the International Bureau.

State of Accessions to and Ratifications of the Conventions on Copyright and Neighboring Rights

The Permanent Committee noted that, as on the date of its meeting, 71 States (more than half of these are developing countries) were party to the Berne Convention, the Central African Empire and Costa Rica having acceded to its Paris Act since the last meeting of the Committee. Niger had since made a declaration that it would avail itself of the special provisions in favor of developing countries contained in the Appendix to the said Act.

The Permanent Committee noted that a number of countries such as Czechoslovakia, Ecuador, India, Israel, Italy and Portugal were considering acceding to the Paris Act of the Berne Convention in its entirety, and that in some countries amending legislations were already under way for the purpose. The Permanent Committee also noted with particular interest that the Soviet Union would apply very shortly the special provisions contained in the 1971 text of the Universal Copyright Convention in favor of developing countries; these provisions are almost identical with the Appendix of the Paris Act of the Berne Convention.

As regards the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), the Permanent Committee noted that 20 States were party to the Convention, Uruguay having recently acceded thereto. Of these more than half are developing countries.

The Committee noted that Norway was about to accede to the Rome Convention; and that some other countries, such as India and Israel, are considering accession to it, the necessary amendment of their legislation for the purpose being processed.

The Committee also noted that in Iraq a national committee was examining a number of Conventions administered by WIPO, and that such interest would be reflected in the recommendations which the said committee would adopt.

As for the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention), the Permanent Committee noted with satisfaction its increasing membership, and that 28 States were party to this Convention of whom almost half are developing countries. It also noted that Norway would soon be ratifying the Phonograms Convention, and that other countries, such as Portugal, are planning legislation against unauthorized duplication of phonograms.

Finally, in regard to the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention), the Permanent Committee noted the current acceptance by four States of this Convention which has not yet entered into force. It noted, however, that Germany (Federal Republic of) and India were considering accession to this Convention; the fifth adherence would bring the Convention into force.

Certain Aspects of Development Cooperation

The Permanent Committee discussed, inter alia, problems of advice and assistance in legislation and in establishing or strengthening the national or regional institutions concerning copyright and neighboring rights, as also practical problems related to copyright and neighboring rights in securing access to and national publication and dissemination of works of foreign origin, especially for educational, instructional or scientific purposes, and the question of support of national authors and performers through effective copyright and neighboring rights protection.

The Permanent Committee noted that a number of delegations, both from developing and developed countries, had stressed the importance of the need to examine the question of facilitating access to protected works, including implementation of the specific provisions in favor of developing countries as contained in the Paris 1971 texts of the Copyright Conventions; it urged that the joint WIPO/Unesco questionnaire envisaged for the purpose at the last session of the Copyright Committees in Paris in November/December 1977 should be issued as soon as possible in order to elicit not only the legal but also the practical difficulties in the implementation of the 1971 texts; early issuance of the joint questionnaire would enable Governments to communicate their reactions well in time for an overall in-depth study by the proposed joint WIPO/Unesco working group scheduled for December 1978.

The Permanent Committee took note of the information given by a certain number of delegations concerning several measures taken in their countries in order to promote national creativity through effective implementation of protection offered by copyright and neighboring rights regulations, and creation of appropriate infrastructure at the national level for support and assistance to authors and performers.

The Permanent Committee noted the progress of the studies being undertaken by the International Bureau concerning support of national authors and performers. Some delegations asked for extension of time for collecting and furnishing detailed data in response to an inquiry in this connection.

The Secretariat declared that all the proposals submitted have been noted and, regarding a study to be undertaken concerning the administrative structures relating to copyright, this will be included as far as possible in the next triennial program of WIPO.

During the discussion regarding translation of the copyright model law, certain delegations expressed satisfaction at the publication of the copyright model law in Portuguese.

As for the recently published WIPO Guide to the Berne Convention, most of the delegations expressed their satisfaction with this very useful publication established by Mr. Claude Masouyé, Director of the Copyright and Public Information Department; they felt that the Guide would prove to be a useful means of assistance to developing countries and was also suitable for the teaching of copyright. Certain delegations, noting WIPO's presently envisaged program of publishing the Guide in English, French, Spanish and Arabic, offered their help in translating and establishing a Portuguese version of the Guide, while the delegation of the Federal Republic of Germany inquired regarding the translation rights in respect of the Guide. It was clarified that, while WIPO had copyright in this publication, the International Bureau would be pleased to cooperate with interested Governments in the establishing of translations of the said Guide.

Training in Copyright and Neighboring Rights (Fellowships)

Most of the delegations expressed their appreciation of the efforts of the International Bureau in organizing the fellowships program, including more particularly the notable increase in the number of fellowships granted each year, and thanked the countries which had given a special contribution to that program.

The Permanent Committee took note of the suggestions and the different training possibilities offered by various delegations and observers and approved the measures proposed by the Secretariat with a view to improving the administration of the program.

Concerning WIPO's general introductory training courses, the delegation of Hungary offered to organize such a course in Budapest in cooperation with WIPO in the fall of 1979 and possibly also regularly

thereafter every two or three years. The delegation of Sweden informed the Committee that the Swedish International Development Authority (SIDA) was now considering how best it could contribute to the WIPO training program in the future. The Director General of WIPO thanked these delegations and declared the International Bureau's readiness to discuss details of these proposals.

A number of delegations emphasized the need in developing countries for lawyers specializing in copyright law and the importance of teaching copyright at universities. Several delegations requested the assistance of WIPO to the universities in their countries in this matter, and also stressed the necessity of helping to organize teaching of copyright by their own university professors. The delegation of India expressed its thanks to WIPO for having already organized a study program for an Indian professor at different universities and copyright institutions; the delegation of the Federal Republic of Germany informed the Committee that the Max Planck Institute in Munich offered fellowships for research professors.

The Secretariat expressed its gratitude to all countries which had accepted to receive WIPO trainees during 1977, as also to the non-governmental organizations which had participated in the symposium and in the organization of the training. It further assured the delegations that the International Bureau shall continue to consider award of fellowships to all candidates within the limits set by budgetary possibilities, also taking into consideration the new contributions offered by more than one delegation. Besides, it would endeavor to provide, commencing with the current year, assistance to all countries that have requested for it.

Regional Meetings and Seminars

Several delegations and observers expressed satisfaction that the Secretariats of WIPO, ILO and Unesco have jointly held Seminars also concerning the rights of performers, producers of phonograms and broadcasting organizations covered by the Rome Convention; they emphasized the importance of holding regional seminars also from the point of view of their mobilizing effect. The observer from the Arab Educational, Cultural and Scientific Organization (ALECSO) informed the Permanent Committee that his Organization had decided to convene regional copyright meetings in 1978 and 1979 and invited WIPO and Unesco to cooperate in these meetings.

The Secretariat took note of suggestions by different delegates that written reports and other documentation relating to the work at regional seminars should be circulated also to countries which might not have been able to participate in the Seminar; and that radio networks in developing countries might be utilized to broadcast, at a specified time, the gist of deliberations at such seminars or to hold discussions with a view to making copyright conventions better known.

Cooperation among Developing Countries

Several delegations emphasized the importance of exchanging experiences and of mutual assistance among the developing countries themselves and suggested maintaining such an item on the agenda of the Permanent Committee. Such forms of regional cooperation amongst developing countries would be more effective and economical. The Permanent Committee noted the offers of the delegations of Senegal and India to receive trainees from other developing countries, as well as the suggestions of several delegates regarding establishment of regional information systems according to language areas.

The Director General of WIPO welcomed the encouraging new ideas concerning this aspect of development cooperation and confirmed that WIPO would continue developing this part of the Permanent Program in close cooperation, as in the past, with regional organizations. Progress in this field would be regularly reviewed by maintaining this item as a regular feature on the agenda. He thanked Mexico which had received trainees the last two years, and also those countries which offered to do so.

Glossary of Terms of the Law of Copyright and Neighboring Rights

Concerning the preliminary draft of the Glossary submitted to the Permanent Committee, the Director General of WIPO referred to the decisions made at the meeting of the Permanent Committee for Development Cooperation Related to Industrial Property regarding a similar item and assured the Committee that these decisions shall apply to the Glossary of terms of copyright and neighboring rights accordingly. The Glossary would become richer, both as far as the terms explained, and the references to legislative texts are concerned.

The Permanent Committee noted a number of suggestions concerning the scope of the Glossary, editorial aspects thereof and the method of explanation of the terms selected. It noted with approval the intention of the International Bureau to expand and improve the existing draft, taking into account the comments by various delegations.

List of Participants

I. Member States

Austria: R. Dittrich. **Brazil:** A. G. Bahadian. **Canada:** B. Gillies. **Chile:** P. Oyarce. **Czechoslovakia:** J. Kanka; A. Bujňak; M. Jelinek. **Denmark:** B. V. Linstow. **Finland:** R. Salmi. **France:** A. Kerever; J. Buffin. **German Democratic Republic:**

K. Götz; C. Micheel. **Germany (Federal Republic of):** E. Steup. **Ghana:** M. B. Keelson; E. B. Odoi Anim. **Hungary:** M. Ficsor; A. Benárd. **India:** G. S. Edwin. **Israel:** M. Gabay. **Italy:** G. Fonzi; G. Catalini. **Ivory Coast:** L. Ouattara; A. Ouattara. **Mali:** B. Touré; N. Traore. **Mexico:** J. M. Terán Contreras; I. Otero Muñoz; M. F. Ize de Charrín. **Morocco:** A. Kandil. **Netherlands:** J. Verhoeve; M. Reinsma; F. P. R. Van Nouhuys. **Norway:** T. Saebø. **Pakistan:** A. A. Hashmi. **Poland:** E. M. Szelchauz. **Portugal:** A. M. Pereira. **Senegal:** N. Ndiaye. **Spain:** I. Rey-Stolle; M. Corral Beltrán. **Sudan:** A. El Tom Mansour. **Surinam:** P. J. Boerleider. **Sweden:** H. Olsson. **Switzerland:** J.-L. Marro; J.-M. Salamolard. **United Kingdom:** A. J. Needs; A. Holt. **United States of America:** H. J. Winter; J. Baumgarten; J. M. Lightman. **Upper Volta:** M. Kafando.

II. Observer States

Algeria: A. Bencheneb. **Argentina:** J. F. Gomensoro. **Ecuador:** E. Avellán Ferres. **Holy See:** O. Roullet. **Iran:** M. H. Karimi; S.-F. Abbas. **Iraq:** G. I. Ayoub; Y. M. Al-Khanaty; A. S. Ali. **Libyan Arab Jamahiriya:** A. Embark. **Nicaragua:** G. Cajina. **Republic of Korea:** S. C. Cho. **Thailand:** B. Bunnag. **Togo:** N. Agblemagnon. **Tunisia:** M. Naboultane. **Uganda:** J. H. Ntabgoba; B. O. Odoch-Jato. **Soviet Union:** E. Gavrilov. **Venezuela:** G. Perozo Pinango; J. S. García Segura; J. Gómez Saenz.

III. Intergovernmental Organizations

International Labour Organisation (ILO): S. C. Cornwell. **United Nations Educational, Scientific and Cultural Organization (UNESCO):** A. Amri. **Arab Educational, Cultural and Scientific Organization (ALECSO):** A. F. Sorour.

IV. International Non-Governmental Organizations

European Broadcasting Union (EBU): M. Cazé. **Inter-American Copyright Institute (IIDA):** P. Paes. **International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM):** J.-A. Ziegler. **International Confederation of Societies of Authors and Composers (CISAC):** J.-A. Ziegler. **International Copyright Society (INTERGU):** G. Halla. **International Federation for Documentation (FID):** H. Arntz. **International Federation of Actors (FIA):** R. Leuzinger. **International Federation of Associations of Film Distributors (FIAD):** G. Grégoire. **International Federation of Musicians (FIM):** R. Leuzinger; S. Piraccini. **International Federation of Newspaper Publishers (FIEJ):** G. E. Kellens. **International Federation of Producers of Phonograms and Videograms (IFPI):** G. Davies; E. Thompson. **International Literary and Artistic Association (ALAI):** J. A. Koutchoumow. **International Publishers Association (IPA):** J. A. Koutchoumow.

V. Officers

Chairman: G. S. Edwin (India). *Vice-Chairmen:* M. B. Keelson (Ghana); M. Reinsma (Netherlands). *Secretary:* S. Alikhan (WIPO).

VI. International Bureau of WIPO

A. Bogsch *(Director General)*; K.-L. Liguer-Laubhouet *(Deputy Director General)*; C. Masouyé *(Director, Copyright and Public Information Department)*; S. Alikhan *(Director, Copyright Division)*; G. Boytha *(Head, Section for Copyright Development Cooperation Projects)*.

Conventions Administered by WIPO

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

NORWAY

Accession to the Convention

The Secretary-General of the United Nations, in a letter dated April 26, 1978, informed the Director General of the World Intellectual Property Organization that the Government of the Kingdom of Norway deposited, on April 10, 1978, its instrument of accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961.

The instrument of accession contains the following reservations:

(a) Pursuant to Article 16, paragraph 1, item *(a)*(ii), reservation is made to the effect that Article 12 shall not apply in respect of use other than for the purpose of economic gain.

(b) Pursuant to Article 16, paragraph 1, item *(a)*(iii), reservation is made to the effect that Article 12 shall not be applicable if the producer is not a national of another Contracting State.

(c) Pursuant to Article 16, paragraph 1, item *(a)*(iv), reservation is made to the effect that the extent and duration of the protection provided for under Article 12 for phonograms which are produced by a national in another Contracting State shall not be more comprehensive than the protection granted by that State to phonograms first produced by a Norwegian national.

(d) Pursuant to Article 6, paragraph 2, reservation is made to the effect that broadcasts are only protected if the headquarters of the broadcasting organisation is situated in another Contracting State, and the broadcast is transmitted from a transmitter in the same Contracting State.

Upon depositing the instrument of accession, the Government of Norway made the following declaration:

The Norwegian Act of 14 December 1956 concerning a Levy on the Public Presentation of Recordings of Artists' Performances, etc., establishes rules for the disbursement of that levy to producers and performers of phonograms.

A portion of the annual revenue from this levy devolves, as of rights, to producers of phonograms as a group, without distinction as to nationality, in remuneration for the public use of phonograms.

Under the terms of the Act, contributions from the levy may be made to Norwegian performing artists and their survivors on the basis of individual needs. This benevolent arrangement falls entirely outside the scope of the Convention.

The regime established by the said Act, being fully consistent with the requirements of the Convention, will be maintained.

The Convention will enter into force, for Norway, three months after the date of deposit of the instrument of accession, that is, on July 10, 1978.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

NORWAY

Ratification of the Convention

The Director General of the World Intellectual Property Organization (WIPO) has informed the Governments of the States invited to the Diplomatic Conference on the Protection of Phonograms * that, according to the notification received from the Secretary-General of the United Nations, the Government of the Kingdom of Norway deposited, on April 10, 1978, its instrument of ratification of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

The Convention will enter into force, with respect to Norway, three months after the date of the notification given by the Director General of WIPO, that is, on August 1, 1978.

* Phonograms Notification No. 34, of May 1, 1978.

General Studies

Some Aspects of the Avoidance of the Double Taxation of Copyright Royalties

Péter GYERTYÁNFY *

1. The Problems to be Solved

1.1 In the international utilization of creative works, the tax sovereignty of States often leads to the double taxation of royalties, just as it does when other income is remitted from one country to another. The copyright royalty, as income, is subject to income tax at source (by virtue of the territorial scope of tax sovereignty, usually as a *pro rata* of the gross amount of the royalty), and also in the State of residence of the beneficiary living in another country (by virtue of the personal scope of tax sovereignty, where the royalty is usually taxed together with the other income of the beneficiary, in accordance with a graduated tax schedule).

Since the State of residence frequently disregards tax already paid at source, a double tax assessment results. This is clearly an unjustified increase in the tax burden, which is contrary to the universal principles of any taxation system.[1]

The double taxation of authors and their successors obviously obstructs the international utilization of the works concerned, their dissemination and hence the cultural exchanges which are of fundamental importance to the progress of mankind. It is equally obvious that the unsettled condition of cultural relations between two countries directly affects their economic relations also.[2]

Owing to their retarded social development, generally caused by the earlier colonial status, and often because of the different ways in which their national culture has developed, developing countries are in a one-sided position as importers of literary and scientific works in relation to the other countries of the world. This represents the other, special problem of the international taxation of copyright royalties: in essence, the income flows in one direction, from the developing countries to the developed countries.[3] Consequently, the avoidance of double taxation in such a way that the right of taxation was reserved entirely to the source country or entirely to the residence country, would result in a one-sided situation in terms of the tax revenue collected on copyright royalties: either the developing countries or the developed countries that transferred their copyrights there would be left entirely without such revenue. It has to be added that a number of developing countries take the attitude that, owing to their financial position, it would be unacceptable for them to renounce even a small part of the tax revenue they derived from royalties, because the outflow of dividends, interest and royalties already represents a serious burden on their balance of payments. However, the existing international practice of avoidance of double taxation of royalties represents exactly the opposite extreme, which is the exclusive or almost exclusive right of taxation by the residence country.

1.2 The present practice of avoidance of the double taxation of copyright royalties is the result of a development that spans approximately 80 years.[4] The practice has evolved out of several hundred international agreements of a comprehensive nature, but it is not limited by the latter, since States have also taken unilateral steps to reduce the double tax burden, and have also concluded special reciprocal agreements in respect of certain titles. However, of these several hundred agreements, only a few contain special preferential provisions concerning copyright royalties,[5] which are generally regulated by the reciprocal agreements together with the other, industrial royalties. In contemporary practice, these reciprocal agreements referring to a single title tend sooner or later to be followed by comprehensive

* Dr., Counsellor, Ministry of Finance, Budapest.

1 György Takács, "*Adótani problémák,*" *Az adózás alapkérdései cimü kötetben* ["Problems of Taxation," *The Basic Questions of Taxation*], Budapest, 1959, p. 136.

2 Peter B. Maggs, "New Directions in US-USSR Copyright Relations," *American Journal of Law*, 1974, Vol. 68, No. 3, p. 392.

3 C. R. Irish, "International Double Taxation Agreements and Developing Countries," *International and Comparative Law Quarterly*, April 1974, Vol. 23, Part 2, p. 297.

4 The first treaty of this kind in the world was concluded between Austria-Hungary and Prussia in 1899.

5 One of the first examples of this can be found in the Mexico model convention of the League of Nations (1943). According to this draft, royalties derived from industrial property may be taxed by the source country, while copyright royalties are taxable only by the country of residence of the recipient. As the Commentary on the Preliminary Draft Double Taxation Convention on Copyright Royalties of WIPO and Unesco (hereinafter referred to as "the Draft") puts it, there are only about 20 such contractual rules in force at present (document UNESCO/WIPO/DT/II/4, p. 5).

double taxation agreements.[6] It is also felt that this dense network of agreements hardly touches on the utilization of copyright by developing countries, since the latter are party to only very few such agreements or conventions.[7]

It has for decades been a characteristic of this field of law that the principal features of the agreements are laid down in model draft conventions. At the same time, these recommendations have also influenced practice in the conclusion of agreements. The draft conventions worked out by the League of Nations (1928, 1943, 1946) and the recommendations of the Financial Commission of the Organization for Economic Co-operation and Development (OECD) (1963, 1974, 1977) have also had many adherents, and not only among member countries. The OECD models of 1974 and 1977, which deal with copyright royalties together with other royalties, are a good reflection of the existing situation with respect to the double taxation of royalties.[8] The right of taxation belongs fundamentally to the country of residence of the recipient of royalties, except if the beneficiary has a permanent establishment or fixed base in the other contracting State, and the royalty is attributable to the latter. The rent paid for films and for scientific and industrial equipment is also considered a royalty.

1.3 But as Professor Robert Plaisant wrote, " the very specific nature of income derived from literary and artistic property, and the importance that the use of works protected by copyright has for the cultural and technological development of all countries, " was also a reason for recommending the conclusion of a separate worldwide convention for the solution of the taxation problems of income of this nature.[9] In the course of this, in view of the particular interests, mutual concessions can much rather be expected from those professing opposite views than in the case of an agreement covering all titles. In the case of comprehensive agreements, and especially in the case of industrial royalties, budgetary and balance of payments interests are too important for interested States to pay special attention to the interests of the authors in the reconciliation of the two contrary viewpoints (full taxation according to " residence " or " source " respectively). On such occasions a compromise is more likely to be reached in the context of the whole agreement.

We believe that, in addition to the general aspects mentioned, separate regulation is also justified by the differing attributes of copyright royalties as compared with industrial royalties (patents, know-how, etc.).[10] Thus, while the generally large amounts of industrial royalties are the result of transfers which occur only once, the utilization of copyrights is often continuous and occurs over a longer period, in several ways at the same time (translation, adaptation for the stage, etc.), and parallel in several countries.[11] The royalty may consist of smaller amounts received from several countries and, what is perhaps the most important, the beneficiary — today already contrary to the case of industrial royalties — is an individual, working independently, or at least the work of a certain author can easily be defined and distinguished in a common performance. Today, international contractual practice disregards this particularity, and the regulation of " royalties " usually contains also provisions which are foreign to copyright practice. These include, for instance, detailed definitions of comprehensive agreements concerning permanent establishment, income derived from charges for container transport, associated enterprises, etc.

1.4 The meeting of governmental experts which, pursuant to the resolution of the 18th session (1974) of the General Conference of Unesco, was convened by Unesco and the World Intellectual Property Organization in Paris in November 1975 and December 1976, dealt exclusively with the international tax problems of copyright royalties (Committees of Governmental Experts on the Double Taxation of Copyright Royalties Remitted from One Country to Another).[12] The main question examined by the experts at the meetings was the possibility of regulation through a multilateral international convention, the scope of such a convention, and above all the principles according to which, and the manner in which, the State entitled to tax should be determined.

There was agreement on the necessity of eliminating double taxation, and that this could effectively be achieved by means of a multilateral international instrument. The resolution of the second Committee recommended the combination of the multilateral convention and a model bilateral agreement complementing the convention, the agreement also providing

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6 The Agreement on royalties between the Ministries of Finance of Hungary and the Federal Republic of Germany of 1972 and 1973, for instance, has been replaced by the comprehensive double taxation convention between the two countries signed on July 18, 1977.

7 J. de Azaola, " The Double Taxation of Copyright Royalties," *Unesco Chronicle*, 1977, Vol. XXIII, No. 3-4, p. 67; and Swiss remarks on the Draft, document UNESCO/WIPO/DT/II/5 (Annex), p. 5.

8 Irish, *op. cit.*, p. 294.

9 R. Plaisant, " Report on the advisability of preparing an international agreement for the purpose of avoiding the double taxation of copyright royalties remitted from one country to another and on the possible scope of such an instrument," document LA/ICIC/DT/I/3, October 1975, p. 2.

10 De Azaola, *op. cit.*, p. 66.

11 Plaisant, *op. cit.*, p. 3.

12 Concerning participants, main points of discussion, and the resolutions adopted by the Committees of Governmental Experts, see *Copyright*, 1977, p. 42.

alternatives for questions of detail as necessary.[13] In the course of the debate several participants expressed the opinion that the right of taxation had to be divided between the two States concerned, while the written draft proposal and many other countries recommended the establishment of exclusive taxation in the State of residence as a basic rule. According to the majority opinion, the convention should contain separate provisions for the benefit of developing countries.

The main achievement of the meeting of experts was that the problems in the area of law concerned were clearly outlined and the fundamental questions that had inevitably to be settled prior to the conclusion of a multilateral convention were formulated. Opinions on those questions also became known. On the basis of the material of the committees, the following must be considered the main questions at issue [14]:

(a) Is regulation by multilateral convention desirable and possible?
(b) What royalties should be covered by the convention?
(c) Which tax categories should the convention cover?
(d) Personal scope.
(e) Where and to what extent should copyright royalties be taxable?
(f) The method of avoidance of double taxation in the country of residence.
(g) Do not the declarations and reservations concerning the convention negate its multilateral nature?
(h) Relations between the multilateral convention and bilateral agreements between States party to it.

2. Principles for the Solution

2.1 In order to be able to provide our own answers to these questions, we must formulate the principles which must, in the last resort, be asserted in all questions of detail, and which may serve as guidelines for deciding on those questions of detail.

On such principle is the balance between the interests of the author and of society in the dissemination of works. For the author this represents the realization of his personality and also the source of his livelihood, while for the community it is a prerequisite of its intellectual and material progress. If this is so, the various countries are also unanimously interested in the continuous further growth of cultural assets. Taking into consideration the fact that — as has been rightly pointed out in the course of the preparatory work [15] — the financial recognition of authors tends nowadays not to be proportionate to the importance of the work created by them, the self-interest of the various countries and of mankind dictates that double taxation of copyright royalties should be avoided, primarily in consideration of the interests of the authors. This makes the utilization of the works easier also, since the double tax burden may lead indirectly to the inflation of royalties. It has to be considered that, at the current level of the division of labor, the work is transmitted to its audience through a complex organization comprising many units (publishers, printers, authors' organizations and societies, etc.), all of which have their own contribution to make. The protection of the interests of the authors is unimaginable without the protection of the interests of these organizations. In the case of the latter it is necessary to separate, as far as possible, the rights connected with contracts concluded for the utilization and enforcement of copyrights (collection of fees and royalties, etc.) from the purely industrial and commercial interests not requiring special protection (trade in works).[16]

2.2 It is well recognized that, in addition to its particular material (property) nature, copyright law also has a personal nature. Creative work is an individual action, and consequently the royalty received for permitting the utilization of the work, the royalty received for the " sale " of the work, has the same attributes as the compensation for other personal actions, service work (commission, contract for work, employment). It follows that, in taxing copyright royalties, it is necessary to apply much more the principles customary in respect of wages or fees than the principles of the taxation of entrepreneurial (business) profits or capital gains. Therefore, it is necessary, for instance, to take into consideration as far as possible personal circumstances, other income, and also expenses. It is consequently desirable to apply the method of adequate graduated taxation, taking the entire income of the taxpayer into account, rather than the *pro rata* taxation characteristic of the profit taxation of gross income.

2.3 For authors and users the simplest method of avoiding double taxation would be if they had to pay tax — both technically and in fact — in one place

[13] The Second Committee of Governmental Experts " believes, in the light of its discussions, that the solution of the problems in question may be found in the adoption of a multilateral instrument restricted to general principles and accompanied for its implementation by a model bilateral agreement, certain provisions of which might be drawn up in several alternative versions, so as to govern the measures taken to give practical effect to the principles contained in the said instrument, in the relations between Contracting States." (document UNESCO/WIPO/DT/II/9, Annex A)

[14] Commentary on the Preliminary Draft Double Taxation Convention on Copyright Royalties, document UNESCO/WIPO/DT/II/4, paragraphs 25-36; also Swiss comments, document UNESCO/WIPO/DT/II/5; and Report, document UNESCO/WIPO/DT/II/9.

[15] Commentary on the Draft, p. 6.

[16] Charter of the Author's Right, Hamburg, 1956, I. 3.

only. In principle, this place should be the State in which the beneficiary has his residence. To support this condition, we refer here only to what we have already said concerning the primacy of personal scope and the principle of residence. Nevertheless, owing to the one-way flow of income between developed and developing countries, mentioned earlier, and the consequences in practice of that one-way flow, the taxation right of the source country should also be maintained in the relations between such States.[17]

2.4 The territorial character arising from the circumstances of the evolution of copyright law has undergone a change of essence as a result of the comprehensive international agreements which cover almost the entire globe. This internationalization of the protection of copyright has been achieved by the application of the principle of formal reciprocity. (Here formal reciprocity means the application of the law of the place of the legal remedy, or *régime national*.) In order to equalize the levels of protection, international copyright law has taken substantial steps towards the application of the even fuller principle of material reciprocity with the introduction of the rule regarding the period of time of protection, during which application of the direct rules of the Berne and Universal Conventions is obligatory for the country which is the user of the rights.[18] Since it is recognized that this area of double taxation is considerably influenced by the special aspects of copyright law, we believe that in the course of the international utilization of copyrights the principle of reciprocity must be a fundamental but not absolute principle in the avoidance of double taxation also. Although, on account of the principles of taxation law, formal reciprocity is here realized primarily by making the law of the State of residence the guiding rule, there are examples of this in international copyright law.[19] It is desirable that the law on the international double taxation of copyright royalties involve material reciprocity also: when the right of taxation is divided, the direct provisions of the agreement should at least determine the maximum rate of tax that may be levied in the source country. Where taxation at source is allowed in relations between two countries, this possibility should also be given and the rate should be the same, whichever of the two found itself in the "source-country position." As may be seen, we consider material reciprocity the main rule, and its absence — since it cannot be derived either from copyright law or from the existing principles of international tax law — only an exception in that it is not made obligatory but recommended in the agreement, in view of the assistance to be offered to developing countries.[20]

2.5 The preparatory work on the multilateral agreement has already exposed the problems of the field of law under consideration, and the contradictions, which in certain places are profound. What is needed as a solution now is a compromise, a bringing of views nearer to each other. The fundamental contradictions of the multilateral conventions appear here too, of course: the extension of their scope to the widest possible range of interests (intended to further authors' interests and cultural exchanges) endangers their efficacy. If the number of subject areas that may be judged in a different way is increased, the chances of widespread ratification of the agreement may be reduced. We have kept this in mind when writing this study: it is our intention that views and proposals should stay within the limits of the widest possible scope and acceptability for many States, limits which in fact overlap.

3. Attempts at a Solution

3.1 We find sufficient justification in the foregoing and in the preparatory work mentioned for the argument that the avoidance of double taxation in the field of copyrights requires separate examination, and then separate international regulation. As far as the manner of regulation is concerned, views are far from uniform. Whereas Unesco in 1973 demanded the elaboration and adoption of a multilateral international convention,[21] today some countries deny even the possibility of bringing about such a convention, and instead consider the only possible course to be the conclusion of bilateral agreements, or at most the preparation of a model bilateral agreement on copyright royalties.[22] It is also a fact that, for instance, the attempt by EFTA countries to bring about a

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[17] In this connection, we would mention the experiments in granting special allowances to developing countries by a certain reduction in the international protection of copyright (compulsory license system for translation and reproduction). The more such compulsory licenses exist, the less the authors can themselves choose the place (country) of the utilization of their works, and consequently the more importance the fact and rate of taxation at source in developing countries will have for them.

[18] György Boytha, "Reciprocity in International Copyright Law," *Questions of International Law*, Budapest, 1968, p. 51.

[19] This is the basic principle of the Montevideo Convention of January 11, 1899. Hungary is party to this Convention.

[20] The opinion of the Working Group of the First Committee of Governmental Experts and the text of the Draft for the Second Committee is contrary to this (document LA/ICIC/DT/I/6, p. 6, and Articles V 1. and 2. and XVI 1.(b) respectively).

[21] Meeting of Officials of Regional or National Copyright Information Centres, Publishing Associations or Agencies and Organizations Representing Authors, May 1973, Recommendation 14 (document LA/MD/I).

[22] For instance, Brazil and Sweden (document UNESCO/WIPO/DT/II/5 Add.) and Austria (document UNESCO/WIPO/DT/II/9, paragraph 165).

multilateral taxation agreement failed (1965, 1969).[23] On the other hand, promising preparations are now in progress with a view to the conclusion of such agreements, for instance between the Scandinavian countries, and there are also such regional agreements that have already been signed and have entered into force, for instance the agreement of the CMEA countries on the avoidance of the double taxation of individuals and the so-called Cartagena Agreement.[24] The opponents of multilateral agreements most often argue that the tax systems of individual countries differ to such an extent that common rules cannot be formulated, and further, that in certain principal questions, such as the selection of the State entitled to tax, views exist today that are diametrically opposed.[25] For instance, according to a Swiss view, the model bilateral agreement would be more advantageous, because it could have a uniform structure without reservations and its rules could be complete, and questions that are generally contested could be left open, to be completed by the two parties.[26]

As may be seen from the resolution of the second Paris meeting, referred to earlier, the majority of the participants nevertheless considered it worthwhile and justified to make an attempt at bringing about a multilateral convention. A number of arguments were voiced in support of this view [27]: it was pointed out, for instance, that the universal character of the multilateral convention would further the dissemination of works, and the uniformization of the method of taxation of royalties would be directly beneficial to authors.[28] We believe that the main argument in favor of a multilateral convention as opposed to a network of bilateral agreements is nevertheless that the former is able to regulate successive royalty remittances, which are a very typical attribute of copyright royalties.[29] Another similar argument is the one put forward by the European Broadcasting Union (EBU): the present system makes the payment of royalties to the authors of international programs, television and radio transmissions very complicated, since for each country a different amount of tax must be deducted when the royalty is remitted.[30] Neither is it insignificant that developing countries, given their present personal and material negotiation capacity, would take many years, if not decades, if they undertook to raise the quality and quantity of their international contractual tax connections to a level similar to that of the developed countries by concluding bilateral agreements.

We may add to what has been said that the regulation of the double taxation of copyright royalties by a multilateral agreement is necessarily the next step in the development of this legal subject area. The high degree of regulation of copyright law by multilateral international agreements [31] makes this easier, and even justifies the introduction of multilateral international provisions in this precise area of international tax law, namely the international utilization of literary, artistic and scientific works. In addition to confirming and consolidating existing rules and also making new rules,[32] such provisions would also greatly contribute to the unification of national laws, which — like the multilateral copyright conventions [33] — would unequivocally serve the interests of authors, and thereby the international dissemination of works.

The very real difficulties of preparing a multilateral agreement cannot of course be ignored. In the course of the preparatory work it has already become obvious [34] that the multilateral convention may only contain principles and the most important rules, the implementation of which may make supplementary agreements necessary. We agree that the drafting of such a model bilateral agreement is also necessary, but that is not where the main questions should be ruled upon, as this could endanger the above-mentioned advantages of the multilateral convention. We

23 The first example of a multilateral agreement of this kind may have been the so-called Rome Convention concluded in 1921, but it never entered into force. Party to the Convention were: Austria, Hungary, Italy, Poland, Romania and Yugoslavia. See Sándor Kneppo, "A kétszeres adóztatás elkerülésének kérdése a Népszövetség elött," *Adó és Illetékügyi Szemle*, ["The question of the avoidance of double taxation before the League of Nations," *Tax and Duty Review*], Budapest, 1929, issue 2-3, p. 41.

24 The Convention was referred to by one of its members, Ecuador, at the Paris meeting (document UNESCO/WIPO/DT/II/9, paragraph 167).

25 For instance, document LA/ICIC/DT/I/6, p. 3.

26 Document UNESCO/WIPO/DT/II/5.

27 Professor Plaisant, for instance, hints at the circumstance that authors do not have sufficient knowledge of taxation matters, which would be necessary owing to the existence nowadays of many different tax conventions, to cope with the double taxation problems of copyright royalty payments arriving in some cases from several different countries and in small amounts (*op. cit.*, p. 3). Others point out that the advantage of a multilateral convention, even if it were supplemented by several different bilateral implementation agreements, would be in the fact that it would offer a common denominator and a certain degree of homogeneity (document LA/ICIC/DT/I/6, p. 10).

28 Document LA/ICIC/DT/I/6, p. 3.

29 Commentary on the Draft, p. 29.

30 Document UNESCO/WIPO/DT/II/6 Add. 2, p. 1.

31 For instance, the definition of several notions is widely accepted and can thus be adopted in a convention. In our case, literary and artistic works, the ways of utilization of copyright, etc.

32 M. Lachs, *A többoldalu nemzetközi szerzódések* [Multilateral International Treaties], Budapest, 1962, p. 256.

33 The new Hungarian Copyright Law (No. III, of 1969) was passed after the Stockholm revision of the Berne Convention, and the Stockholm text was taken into account to a great extent. The Soviet Union has changed its copyrights laws as a consequence of its accession in 1973 to the Universal Copyright Convention; for instance, it granted the right of translation to authors and raised the period of protection to 25 years *post mortem auctoris. A szerzói jog kézikönyve [Manual of Copyright Law]*. Edited by Aurél Benárd and István Timár, Budapest, 1973, p. 404. Maggs, *op. cit.*, p. 391.

34 See, for instance, apart from the already mentioned resolution of the Second Committee, the Report on the work of the Second Committee (document UNESCO/WIPO/DT/II/9, paragraph 107).

shall hereafter discuss only those questions that in our opinion have to be decided within the scope of the multilateral convention.

3.2 Perhaps the first question to be decided in connection with the content of the convention is that of the royalties it should cover, in other words, what are to be considered copyright royalties: it appears that, as far as the essence of this question is concerned, the majority of experts agree. Accordingly, the definitions of " copyrights, " " literary, artistic or scientific work " and " utilization of copyrights " might be determined by references to the Berne and Universal Conventions or use of their texts. We agree, since the texts in question lay down a rule which is internationally accepted today, and through application of the direct rules of the Berne and Universal Conventions a contribution is also made to the further unification of this field of law.

On questions of detail, including mainly the rents and other fees paid for the material base of the works (e. g., films), views already differ considerably. Modern international taxation practice treats for instance the rent of the material for the films together with the royalties, which — as we know — have so far also included the copyright royalties in the international tax agreements.[35] At the same time there is almost full agreement that these rents and other things should be judged differently, in theory.[36] It is pointed out that the royalty for films, for instance, is due on the one hand for the right to use the copyright in the work, and, on the other hand for the use of the thing (the film material) through which the work materializes. The latter, which is rather difficult to separate in practice, has strong industrial royalty or industrial profit attributes, and is not the result of the " creative activity of the author. " It is quite true that in terms of principles these rents should be treated differently from copyright royalties. But very different views exist as to how this should be achieved. In view of the difficulties of implementation, the present practice should be continued; in other words all royalties associated with films should be included within the scope of the convention.[37] We believe this to be the correct view because — even if at the expense of a conceding principle — this indirectly furthers the interests of the authors and thereby the universal interest represented by the broad dissemination of the works.

Certain performances involving the utilization of the work (performances which are not of an expressly creative nature, not even creating second-hand works) are also protected by many national legislations within the framework of copyright law or by analogy with it. This area, called related or neighboring rights, is rather mixed, since it includes the protection of rights arising out of the achievements of the performer, the producer of phonograms, the broadcasting organizations, possibly also the publisher of the scientific selection or *editio princeps*, the concert organizer, etc. This individual achievement is sometimes linked primarily to the personality (performer),[38] while on other occasions it is of an entrepreneurial nature (producer of phonograms, broadcasting organization); on some occasions it refers to works protected by copyright (for instance, the production of phonograms of protected works), on others it has even less to do with copyright (for instance, the maintenance of unprotected works of the fine arts, making them available to others for scientific purposes or for illustration — so-called *droit de garde*).[39] Correspondingly, the legislations of the various countries differ in that some regulate certain questions within the framework of copyright law, others refer to the rules governing unfair competition, and still others use the rules of civil law protecting the human personality.

Since a multilateral international agreement was signed in Rome in 1961 on the international protection of performers, producers of phonograms and broadcasting organizations, the consultations dealing with the preparation of the avoidance of the double taxation of copyright royalties also investigated whether the desired preferential tax treatment should extend also to these fields of protection.[40]

It is beyond doubt that the individual achievements of a personal character performed in respect of the works (the " meditation " on the work of art), and even some types of achievement in relation to unprotected works (for instance the activity protected by the *droit de garde*) indirectly serve the act of making the artistic work available to the public, and consequently their protection furthers universal scientific and cultural progress. It is also incontestable that certain related or neighboring achievements may also be very similar to the actual creative work, as in the case of directors.

Nevertheless, we do not recommend that the scope of a convention on copyright royalties should be extended to fees paid for these achievements, because the area of law concerned is so heterogeneous and is regulated in so many different ways —

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[35] See, for instance, Art. 12 of the OECD models.

[36] Plaisant, *op. cit.*, p. 6. Documents LA/ICIC/DT/I/6, p. 7, and UNESCO/WIPO/DT/II/4, paragraphs 50-52.

[37] There were several interventions in favor of this view. See, for instance, documents LA/ICIC/DT/I/6, p. 10 and UNESCO/WIPO/DT/II/6 Add., p. 3.

[38] E. Nizsalovszky, " The Protection of Performing Artists," *Acta Juridica Academiae Scientiarum Hungaricae*, 1964, pp. 301-333.

[39] From the ample specialized literature, see, for instance, H. H. Schmieder, " Die verwandten Schutzrechte — ein Torso? ", *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, Berlin, 1975, Vol. 73/1975, p. 65.

[40] Documents LA/ICIC/DT/I/6, p. 8; UNESCO/WIPO/DT/II/4, paragraph 34; and UNESCO/WIPO/DT/II/9, paragraph 135.

or in certain cases not at all — that this would mean the inclusion of entrepreneurial fees and profits within the scope of the convention, which would be unacceptable to many parties. We believe that this negative attitude is not opposed to the intention of providing international protection for these rights in the area of taxation also. However, in accordance with the present copyright situation, this should rather be done in separate agreements, for instance in the bilateral intergovernmental implementation agreements supplementing the multilateral convention.

3.3 One of the questions concerning the multilateral convention that should also be considered is what kind of taxes should be covered: it has already been recommended that, in order to further the dissemination of works, the agreement should cover all taxes on copyrights, including indirect (purchase or sale, i. e. turnover) taxes. A wording has also been devised that admits of at least an attempt at such an extension of scope.[41] Other experts have opposed this, partly for technical reasons (it is difficult to imagine that income tax could be credited against sales tax), and partly also on principle: the residence concept of the double taxation agreements, which determines the State entitled to tax, can be well applied in the case of direct taxes imposed on individuals, but is not valid in the case of indirect taxes.[42]

We believe the latter expert view to be correct. It does not usually happen in practice at all that a double sales tax is levied on royalties remitted from one country to another, since here the tax object is the transaction, the tax is technically tied to this transaction, and the transaction occurs in either one country or the other. In the course of this a domestic seller that is owned by an alien is of course a subject of taxation just as other nationals are, unless a statutory exemption from tax exists, which for instance is the case in Hungary.[43] Since export sales are exempt from sales tax as an export incentive, there is in most countries an import purchase tax which is collected with a price-equalizing aim, the subject of this being the importer, in other words the buyer.[44] Double sales or purchase taxation may occur in exceptional cases if in addition to the importing country the exporting country also levies turnover tax on the transaction.[45]

In ordinary trade the buyer mostly passes on the import purchase tax to the seller, and this applies also to trade in intellectual property. This will undoubtedly represent an indirect burden on the authors, reducing their royalties. The effect is limited, however, since the transfer of copyrights is often exempt from sales tax,[46] and elsewhere only the part of the royalties accruing to legal entities (publishing houses, etc.) is liable to tax (for instance in France). The complete elimination of this effect may only occur through a unilateral measure, since it does not involve any international double taxation. Naturally, we can imagine that countries would assume a multilateral obligation to limit the objective scope of their turnover taxation in a multilateral double taxation convention. It would be justified to do this at first only in respect of copyright royalties.

3.4 The definition of the personal scope of the multilateral convention also gives rise to several questions. Therefore the double taxation agreements following the model agreements of the OECD, for instance, cover those persons who are considered liable to tax by one of the contracting States according to various criteria, for instance domicile, residence, place of management, etc. In principle this entails the danger that one contracting State may extend the personal scope of the agreement independently of the other contracting State, which may have disadvantageous consequences for the latter. However, these supposed disadvantages — exemption from tax has to be granted to persons who would not in general be considered resident in the other contracting State — may occur less in proportion to the greater number of States having a similar agreement in force, and in the case of a widely accepted multilateral convention they would be minimal. Instead of the hitherto customary solution, it would be difficult, in the specific case of a multilateral convention, to give a definition restricted to a single criterion (for instance " domicile, " which would be defined more clearly by the convention).[47]

As far as personal scope is concerned, in the international taxation of copyright royalties the applicability of the concepts of " beneficial owner " and of " ultimate recipient " is especially important. The later model agreements departed in this respect

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41 Documents UNESCO/WIPO/DT/II/3; UNESCO/WIPO/DT/II/4 paragraph 46; UNESCO/WIPO/DT/II/8 (US proposal); and UNESCO/WIPO/DT/II/9, paragraphs 28 and 59.

42 Egyptian, French, Swedish and Swiss opinions (documents UNESCO/WIPO//DT/II/5; UNESCO/WIPO/DT/II/5 Add.; and UNESCO/WIPO/DT/II/9, paragraphs 26, 116).

43 Decree of the Minister of Finance, 38/1973. (XII. 19.) PM sz. r.

44 The foreign seller is usually not subject to turnover tax in the other country. An example of the opposite: recently, the French tax authority made foreign persons (publishers, authors' societies) realizing copyright royalties in France subject to turnover tax. It makes French authors' societies which collaborate in the collection of the royalties withhold the tax and pay it to the tax authority.

45 A. Atchabahian, " Some Aspects of International Double Taxation between Developed and Developing Countries," *Bulletin for International Fiscal Documentation,* 1971, Vol. XXV, No. 12, p. 458.

46 For instance, the Hungarian turnover tax decree (38/1973 (XII.24.) PM) of the Minister of Finance does not cover it either.

47 Some experts suggested even the broadening of the present criteria to " nationality " and " place of incorporation " at the discussions on the double taxation of copyright royalties (document UNESCO/WIPO/DT/II/9, p. 6).

also from the 1963 model agreement of the OECD, in which such concepts did not figure, only those of " resident " and " recipient, " and the draft agreement made for the international copyright meetings mentioned followed the essence of this modification.

According to the OECD recommendation of 1974, only royalties paid to the beneficial owner may be regarded as falling under the scope of the agreement. The purpose of this is that the intermediary, remitter, agent, etc., who is not the proper recipient, should not receive preferential tax treatment.

This regulation was obviously made in consideration of industrial royalties, and in respect of them it may also be justified. However, the role and importance of those participating in the legal relationships associated with the utilization of literary, artistic and scientific works demand a different appraisal. In the Committees of Experts dealing with the international taxation of copyright royalties there has so far been almost complete agreement [48] that the role of the authors' societies, copyright offices, publishers, etc., is essential to the wide dissemination of works, and consequently the exclusion of these persons from tax abatement would be to the detriment of the authors' interests and of the cultural interest generally. The double taxation of the collectors of royalties and of publishers might immediately and directly reduce the royalty paid to the author.[49]

In accordance with the above argument, a written recommendation has been made for the avoidance of the double taxation of copyright royalties which qualifies such intermediaries and publishers who effect the collection of copyright royalties and the enforcement of copyright, who are exhaustively listed as " beneficial owners " also, to the extent of the part of the royalty which they are entitled to deduct and keep for themselves.[50] Consequently, the agreement would not automatically apply to the part of the royalty which is remitted further.

In practice, however, it is generally not possible to know to whom the recipients of the paid royalty remit it further, and what part of it is remitted. We therefore believe that it would be difficult to apply this system in practice. The payer would in every case have to ask for certificates or declarations from the recipients as to where they lived and what their share was, since this would decide how much tax had to be withheld for the taxation authority of the source country. This could mean the suspension and delay of the payment, and might also involve costs. In our opinion, it would be preferable to judge the whole royalty according to the first recipient of the remittance and apply the agreement to him. In that case, if the recipient — residing in a third country — of part of the royalty should fare worse, it would still be simpler, as an exception, to ask for a reimbursement of taxes by presenting a special certificate. Such solutions are also being applied in the implementation of comprehensive double taxation agreements.[51] It cannot be denied that, besides its simplicity, the recommended solution also has certain dangers: persons from contracting States which are not developing countries may also receive preferential tax treatment in the source country, as may persons whose State is not even a " contracting State " (danger of tax evasion). The first case does not seem practical, for if an author, in order to avoid taxation at source, had his royalties collected from a " developing " country by another " developing " country, he would expose himself again to a tax assessment in the second developing country at the time of the remittance from there. In the second case, the result would indeed be that the national of the non-contracting State would also share in the benefits of the convention. We do not consider this unacceptable in principle in the area of the legal relations associated with the utilization of a literary, artistic or scientific work, since there are examples for this in the field of international copyright law as well.[52] Moreover, as far as the loss of taxes is concerned, which cannot be calculated in advance, this will be smaller in proportion to the greater density of the already extensive network of double taxation agreements and to the greater number of States covered by the multilateral convention in question.

It also follows from the proposal that in this way the use of the concepts of " beneficial owner " and " ultimate recipient " would become unnecessary in the multilateral convention. It would be sufficient if — as in the 1963 OECD draft agreement — only copyright royalties " paid to a resident of the other contracting State " were spoken of. This must simply be completed with such an exhaustive definition of the recipient as covers the intermediaries mentioned earlier who proceed lawfully and are entitled to deduct part of the royalty. Such complementary definitions have already been made.[53]

3.5 It is perhaps obvious from what was said in the introduction that the most important aspect of our subject is determining which State should have the right to tax the copyright royalties in the case of overlapping or collision of the tax sovereignty of two States.

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[48] There were divergent opinions, too (document UNESCO/WIPO/DT/II/5 Add., p. 3 (Egyptian expertise)).

[49] See, for instance, document UNESCO/WIPO/DT/II/4, paragraph 69.

[50] Draft, Art. IV 1 and 3.

[51] Austro-Hungarian Convention for the avoidance of double taxation with respect to taxes on income and on capital, February 25, 1975.

[52] Berne Convention (Paris Act), Article 5(4)*(a)* and *(b)*.

[53] The Draft (document UNESCO/WIPO/DT/II/3, Art. IV(3) and its Commentary (*op. cit.* paragraph 72), respectively.

The main contradiction exists between contemporary international practice, based on the adoption of the residence principle for royalties, as a consequence of the priority of personal scope, in other words the attachment of the taxpayer to the territory of his State, and the demands of developing countries, caused by their particular situation.

In seeking a solution specifically for copyright royalties, numerous arguments have been put forward for both possibilities, namely, taxation according to the residence of the recipient and according to the source of income. In addition to the theoretical arguments already mentioned it has been said, for instance, that taxation according to residence is justified by the cost of the " development " of the literary, artistic or scientific work,[54] and that exemption from tax at source would make it possible, for instance, for publishers in developing countries to increase the number of their contracts with publishers in developed countries. The increasing turnover would indemnify the treasury of the source country too, through the increase in the turnover tax.[55] The weightiest practical argument for the application of the residence principle is perhaps that this State alone can take into consideration all the personal and income circumstances of the person liable for tax,[56] and it is here that the State measures — often outside the purview of taxation, but also influencing the standard of living — can be asserted.[57] This is especially important for the beneficiaries of small amounts of copyright royalties — for instance composers, on account of the " petits droits, " painters and sculptors, and especially photographers, graphic artists, etc. — since they usually pay tax at a low rate of progressive tax, beginning under 10 percent " at home, " but in the source country a small royalty would immediately fall under the uniform tax rate, which is usually around 20 percent.

We believe that the taxation right of the source country in the taxation of copyright royalties is not justified by any principles of tax law. Here the object of tax bears in no close economic relation to the source country, which would be the condition for the territorial scope of tax sovereignty. In the case of industrial royalties the situation is different: a considerable part of that royalty — outside the cost element — may be qualified as being of a profit nature, which can be linked more closely to the economy producing it, and this in principle would justify taxation at source.[58] The copyright royalty has no such element; here we may speak, besides the costs, rather of a wage-like element, which according to the general principles may be taxed in the State in which the author of the work is resident.

In general, in the case of royalties, the taxation rights of developing countries, when in the position of a source State, are justified rather by weighty practical aspects, which must be considered. The most frequently-voiced argument here, namely the deficit of the international balance of payments, does not strike us as being entirely convincing in the specific case of copyright royalties. Practice shows here too that when developing countries argue for the full control and taxation of royalties on account of the balance of payments, or take such measures, they are aiming at industrial royalties.[59] In comparison to the heavy currency expenditure caused by the public debts of developing countries, the proportion of royalties transferred abroad would obviously be negligible. We consider the reference to the need of developing countries for revenues for their budget much more justified than the foreign currency arguments (balance of payment and budget have an obvious connection, but they are not the same, after all). It is a fact that for developing countries the organization of education, its supply with means and the development of culture involve considerable budgetary burdens. Although these taxes would also obviously form but a small part of the budgetary revenues, the limited taxation of the royalties at source may nevertheless provide a useful contribution to the carrying out by these States of their fundamental tasks, which should also be furthered by developed countries.

It follows from our argument that — even if owing to somewhat different considerations — we agree with the majority opinion of the preparatory conferences.[60] Accordingly, it is right, for practical

[54] Communication of the Commission of European Communities (document LA/ICIC/DT/I/5, Annex A). However, it could be mentioned that the utilization and staging of certain works, for instance musical works and operas (where the high fees of the performers may also play a role), is often a losing enterprise, and is made possible only by budgetary or State support in some cases.

[55] Observations of the International Publishers Association (IPA) (document LA/ICIC/DT/I/5, Annex B).

[56] This is also underlined, for instance, by the Report of the Commission of Taxation, International Chamber of Commerce, document 180 (122, 2. IV. 1970), *Bulletin for International Fiscal Documentation,* 1970, Vol. XXIV, No. 10, p. 449.

[57] As is mentioned in the study of the revenue statistics of OECD member countries, 1968-1970 (OECD, Paris 1972, p. 8), the structure of tax abatments and exemptions plays the same role in certain countries as some parts of public expenditure in others. That is why it is not advisable to separate the two systems from each other.

[58] A. Nooteboom, " International Tax Treatment of Royalties," *Bulletin for International Fiscal Documentation,* 1976, Vol. XXX, No. 2, p. 74.

[59] *Guidelines for Tax Treaties between Developed and Developing Countries,* UNO, New York, 1974, ST/ESA/14, pp. 54-55. B. Sepulveda-Amor, " A Mexican View of Foreign Investment," American Society of International Law, Proceedings of the 68th Annual Meeting, Washington, 1974, p. 59. " The New Order Set Up, The Law Regarding the Registration of Transfer of Technology and Trademarks and Patents," 1973. A. C. Hoagland, Jr., " Recent Mexican Legislation Regarding Foreign Investment and the Transfer of Technology," *ibid.,* p. 63.

[60] Documents LA/ICIC/DT/I/6, p. 4; UNESCO/WIPO/DT/II/9, p. 7.

reasons, in the relationship between the developed and the developing countries, for the contracting parties to share the right of taxation of copyright royalties between the State of residence and the source State. Between States on an equal economic and cultural level of development, the exclusive application of the residence principle is correct and practical.

It follows from the foregoing that if, in the case of a given remittance, the developing country is in the position of the State of residence, the developed country, and more specifically its budget, profits from the application of the rule of taxation at source. This is justified not only by the reciprocity discussed in the context of basic principles, but also by practical considerations: this will obviously be an exception between developed and developing countries, since the preponderance of royalties flowing from the developing to the developed has been one of the assumptions on which we have based our considerations. Some of the signatories of the multilateral convention may of course make a declaration renouncing this reciprocity. Such a declaration will unequivocally count as assistance given to developing countries.

Incidentally, as far as declarations and reservations are concerned, it is our view that the convention on copyright royalties must provide an opportunity for reservations of predetermined substance. It should, on the other hand, be examined whether it would not be possible to exclude the making of other reservations in the convention, the reason being that these may lead to the destruction of the multilateral nature of the agreement.

Concerning the extent of taxation permissible in the source States, views are rather divergent.[61] Several experts from developing countries recommend a source tax amounting to up to 25 percent of the amount of the copyright royalties,[62] which cannot be called a compromise at all, since it exceeds the income tax imposed at source in most countries. Depending on the method set down in the residence State for the avoidance of double taxation, this may not leave any tax income for the State of residence, or may substantively result in the maintenance of double taxation.

Since it would be difficult to specify in the multilateral convention the costs connected with the creative work and its sale, owing to the differences existing in different countries, we too recommend that in the source country the tax should be levied on the gross amount of the royalty.[63] The unilateral authorization of the deduction of costs would of course remain. Owing to the collection fee being fixed or laid down in a statute in certain cases, it should be possible to agree in the bilateral implementation agreements on the deduction of the certified costs from the basis of assessment, staying within the percentage limits specified in the multilateral convention.[64] If the criterion of the gross amount of the copyright royalties were to be used, it should suffice to prescribe in the multilateral convention 15 percent as the limit for taxation at source, because this too would provide adequate revenue for the budget without leading to the dangers which were described above. The actual extent of the right of taxation at source is of course influenced also by other provisions of the convention. These may include, for instance, the narrower or broader definition of the concept of " permanent establishment. "

3.6 As for the method for avoidance of double taxation to be applied by the country of residence, the rule pertaining to this method first appeared in the post-World War II agreements. Earlier agreements had referred every situation to the taxation authority of one party or the other, even if this constituted express renunciation of the personal scope of tax sovereignty within a certain circle (for instance, income from landed property, permanent employment, etc.). As we have already mentioned, where such cases arise today, in other words when taxation occurs at source, it is more usual to make a declaration permitting also taxation by the other State, and the same result is achieved by proceeding according to the " double taxation " Article. If the right of taxation is divided in respect of a title, it is of course also necessary to apply this method, that is, an undertaking on the part of the State of residence that, when the other country may also levy a tax according to the agreement, the tax levied there will be credited against its own tax to a certain extent, or that it will exempt such income from tax in some way. Consequently, if in the avoidance of the double taxation of copyright royalties taxation at source is also made possible,[65] the best method for exemption or crediting must also be chosen.

In specialized literature — and of course in practice too — numerous alternatives to the methods

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[61] Even the opinion was voiced that, beside the reservation of the right of taxation of the residence country, no limit should be set on the rate of taxation at source (document UNESCO/WIPO/DT/II/9, paragraph 54). However, this would either reduce to nothing the right of taxation of the residence country or maintain the double taxation as a consequence of the " credit " or " exemption " method to be applied.

[62] For instance, the proposal of Egypt (document UNESCO/WIPO/DT/II/5 Add., p. 3).

[63] This position was also taken by the experts of the United States of America (document UNESCO/WIPO/DT/II/8).

[64] Detailed information on the results of the foregoing debates on the deduction of expenses can be found in documents UNESCO/WIPO/DT/II/4, paragraphs 92-95 and UNESCO/WIPO/DT/II/5 Add., pp. 3 and 9.

[65] In our opinion, the Article on the " methods for elimination of double taxation " should refer to all rules enabling the " source country " to tax. In this respect, the Draft is not consistent, as the Article in question does not mention Articles VI (permanent establishment) and XVI (source taxation on the basis of reciprocity).

which served the avoidance of double taxation are known. These have been investigated thoroughly in the course of the preparatory work concerning the international taxation of copyright royalties. The selection of the method decides such important questions as: if one of the contracting States entitled to tax does not make use of its right, can the other State levy a tax instead? Can the tax paid in the other country, or the income received from there, be fully credited or exempted, or only to a certain extent, and on certain conditions? Can only the tax actually paid be credited? Etc.

It is not easy to choose the best method in the area of copyright royalties either, because the interests affected often differ.

For instance, budgetary interests in the States of residence (which in the case of the international regulations recommended in respect of copyright royalties means mainly the budgets of developed countries) demand that, owing to the foreign income of their tax subjects, the revenue due on their domestic income should not diminish — consequently the so-called " full credit " is not satisfactory for them. It is also understandable that they do not wish to renounce more tax revenue than is inevitably necessary to avoid double taxation, in other words the amount of tax actually levied by the other State. For this reason, " exemption " and in certain cases even " matching credit " can also be disadvantageous for them.

The interests of developing countries, which are mostly in the position of source State, demand here that the tax concessions granted by them to authors (and their successors and others) should not " overflow " into the budget of the state of residence. Consequently, the methods considering only the source taxes actually paid (" full credit, " " ordinary credit ") are not desirable for developing countries.[66]

It is the primary interest of taxpayers (authors and those cooperating in the dissemination of their works) that double taxation should not subsist even to a small extent, in respect of part of their income. For this, ordinary credit and progressive exemption do not provide sufficient protection, owing to the different rates of taxation. Since the authors and their organizations and other bodies cannot be thoroughly conversant with the taxation methods involved, it is equally important that a simple method free of administration should be applied to incomes. Consequently, methods demanding the production of certificates and their presentation to the tax authority of the State of residence, for instance progressive exemption, full and ordinary credit and the " tax-sparing " method, are disadvantageous for taxpayers.

In our view, the solution must be sought — in accordance with the principle already explained — once the interests of the author have been placed before the interests of the treasury. This makes for easy practical application and leads also to a satifsfactory result, namely " matching credit. " According to this principle, the State of residence deducts, from the amount of the tax which it should collect under its own domestic laws, a lump sum, which is usually defined in accordance with the tax rate applicable in the source country as a certain percentage of the income. This is exercised without any regard to whether or not the income has been taxed in the source State, or to the tax rate that has been applied, or to any abatements from which the taxpayer has or has not benefited.[67] This corresponds to the enumerated interests of the author and, if the source country actually levies a lower tax than the lump sum credited in the residence country, the author profits from this directly. In this way the concessions granted by developing countries in fact assist authors. This method is also recommended for instance by the Commission of Taxation of the International Chamber of Commerce.[68]

For the State of residence (the developed country) also, the only drawback is the discrimination which may thus occur between the taxpayers of the residence State and their kinds of income. The State of residence does not forego a higher tax revenue than is necessary. The concessions, if any, granted by the source State in relation to what is stipulated in the convention, should be regarded as a contribution to universal cultural interests.

If, during the practical formulation of the convention, the participants cannot agree to adopt the provision on " matching credit," [69] a solution can also be imagined where the State of residence accepts under the convention only the obligation in principle to avoid double taxation provided that it will pay attention to the above-mentioned interests of the taxpayers/authors.[70] However, such an incomplete rule would also create a certain degree of legal insecurity.

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66 This is a universal view (for instance, document UNESCO/WIPO/DT/II/4, paragraph 86; and *Guidelines for Tax Treaties between Developed and Developing Countries*, pp. 3 and 12). In spite of this fact, certain developing countries supported these methods (document UNESCO/WIPO/DT/II/5 Add., p. 3, Egyptian expertise).

67 For instance, the double taxation agreement of the Federal Republic of Germany with Tunisia of December 23, 1975, applies to this rule. For detailed information see D. Paukia, " Das Deutsch-Tunesische Doppelbesteuerungsabkommen," *Recht der internationalen Wirtschaft*, November 1976, No. 11, pp. 620-627.

68 See the above-mentioned Report of the Commission of Taxation, p. 448.

69 Some reservations have already been mentioned on behalf of developed countries: Sweden considers the " matching credit " method acceptable only if there is a limitation on the time during which the incentive is given (document UNESCO/WIPO/DT/II/5 Add., p. 9).

70 A similar, but in its conditions somewhat looser proposal has already been made: Soviet expertise: December 13, 1976 (documents UNESCO/WIPO/DT/II/DR. 4 and UNESCO/WIPO/DT/II/9, paragraph 71).

3.7 In the course of the preparation of the international taxation agreement concerning copyright royalties, there has also been a lively debate on the relationship of the convention to prior or subsequent bilateral agreements of similar content concluded between contracting parties (it is unequivocal that the multilateral convention can have no effect on contracts between subjects that are not party to it, consequently it cannot affect the agreements made by contracting parties with such " third persons " either; this provision of Article 103 of the United Nations Charter must be considered an exception which is due to the extraordinary importance of that source of law). Views differ rather widely concerning the relation to both prior and the subsequent agreements. According to some international lawyers, the subsequent agreement may not contradict the prior international norm valid for its signatory, because obligations that mutually excluded each other would discredit international law.[71] Alfred Verdross drew the conclusion as follows: if the cogent rule of the multilateral agreement is violated by the parties in such a way, their subsequent bilateral agreement is null and void.[72] We may also say that such a subsequent modification represents a *venire contra factum proprium*, or in other words is in bad faith. It follows from this view that, if the two signatories of the prior multilateral agreement wish to agree differently between each other, they must withdraw from the multilateral agreement.

We are of the opinion that these views are exaggeratedly one-sided and cannot be fully applied to our case. The multilateral convention concerning the international taxation of copyright royalties represents a compromise attributable to interests that differ in many respects, and in certain places is pragmatic. By reconciling these interests, it endeavors to achieve the optimum solutions, which today are possible, from the point of view of the common cultural interest of authors and States, but this does not represent the best possible regulation in principle. It is therefore quite possible for a prior or subsequent bilateral agreement to meet better the interests of two countries and their authors. This does not mean a discrediting of international law, however, since by their action the parties do not change their earlier view, which considered the substance of the multilateral agreement appropriate and applicable as a multilateral solution.

Consequently, the parties cannot be prevented from modifying their earlier agreements on the same subject — together with the other party concerned — through subsequent bilateral or multilateral legal declarations. This can be done in express terms or tacitly. It follows from the principle of *lex posterior derogat priori* that, through the conclusion of a new agreement, this happens tacitly too, that is, if the parties do not expressly maintain the validity of the earlier bilateral or multilateral rule of conflicting substance, which guides their relationship, in their relations between each other the later agreement becomes the guiding one.[73] It would be desirable for the parties not to agree on conditions more disadvantageous to authors bilaterally than multilaterally, but this possibility, unfortunately, cannot be excluded with respect to the sovereignty of the subjects of international law.

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[71] Lachs, *op. cit.*, p. 228 and note No. 17.

[72] A. Verdross, *Völkerrecht*, Vienna, 1955, p. 130.

[73] The so-called Vienna Convention on the Law of International Treaties provides for the same solution in its Article 30, paragraphs 3 and 4.

Calendar

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible changes.)

1978

Jnne 12 to 16 (Geneva) — Development Cooperation (Industrial Property) — Working Group on tbe Model Law for Developing Countries on Marks and Trade Names

June 19 to 30 (Paris) — Berne Union — Committee of Governmental Experts on Double Taxation of Copyright Royalties (convened jointly with Unesco)

June 19 to 23 (Geneva) — Revision of tbe Paris Convention — Working Group on Qnestions of Special Interest to Developing Countries

June 19 to 23 (Geneva) — Revision of the Paris Convention — Working Group on Inventors' Certificates

June 26 to 30 (Geneva) — Revision of the Paris Convention — Preparatory Intergovernmental Committee

Jnne 26 to July 7 (Tokyo) — International Patent Classification (IPC) — Steering Committee

Jnly 3 to 11 (Geneva) — Berne Union, Universal Convention and Rome Convention — Snbcommittees of the Intergovernmental Committees on Cable Television (convened jointly with ILO and Unesco)

July 19 to 21 (Geneva) — Development Cooperation (Industrial Property) — Working Gronp on Promotion of Domestic Inventive and Innovative Capacity

September 4 to 8 (Geneva) — International Patent Classification (IPC) — Committee of Experts

September 13 to 15 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Planning

September 13 to 22 (Paris) — Berne Union, Universal Convention and Rome Convention — Subcommittees of the Intergovernmental Committees on Videocassettes (convened jointly with ILO and Unesco)

September 18 and 19 (Geneva) — ICIREPAT — Plenary Committee

September 19 to 22 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Tecbnical Cooperation

September 25 to October 3 (Geneva) — Governing Bodies (WIPO Coordination Committee, Execntive Committees of tbe Paris and Berne Unions, Assembly and Conference of Representatives of the Hague Union and Assembly of the International Union PCT)

September 27 to 29 (Geneva) — International Patent Classification (IPC) — Ad Hoc Working Group on the Revision of tbe Guide

October 2 to 6 (Geneva) — International Patent Classification (IPC) — Working Group I

October 23 to 27 (Hull, Canada) — ICIREPAT — Technical Committee for Standardization (TCST)

October 23 to 27 (Geneva) — Nice Union — Preparatory Working Group on International Classification

October 23 to 27 (Geneva) — International Patent Classification (IPC) — Working Group IV

November 13 to 17 (Geneva) — International Patent Classification (IPC) — Working Group II

December 4 to 8 (Geneva) — Development Cooperation (Industrial Property) — Working Gronp on the Model Law for Developing Countries on Marks and Trade Names

December 4 to 8 (Geneva) — International Patent Classification (IPC) — Working Gronp III

December 4 to 8 (Paris) — Berne Union and Universal Convention — Working Group on questions concerning access to protected works for developing countries, including tbe implementation of the 1971 revised texts of tbe Berne Convention and of the Universal Convention (tentative title) (convened jointly with Unesco)

December 17 to 22 (New Delhi) — Development Cooperation (Copyright) — Copyright Seminar (convened jointly with Unesco)

1979

January 8 to 12 (Geneva) — International Patent Classification (IPC) — Committee of Experts

January 29 to February 2 (Geneva) — Rome Convention — Snbcommittee of the Intergovernmental Committee on the Administration of Rights under the Rome Convention (convened jointly with ILO and Unesco)

September 24 to October 2 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT and Berne Unions; Conferences of Representatives of tbe Paris, Hague, Nice and Berne Unions; Execntive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

UPOV Meetings

1978

Jnne 6 to 8 (Hanover) — Technical Working Party for Vegetables

June 20 to 22 (Paris) — Technical Working Party for Ornamental Plants

September 5 to 7 (Florence) — Technical Working Party for Fruit Crops

September 11 to 15 (Geneva) — Ad Hoc Committee on the Revision of the UPOV Convention

September 19 to 21 (Melle, Belgium) — Technical Working Party for Forest Trees

October 9 to 23 (Geneva) — Diplomatic Conference on the Revision of the UPOV Convention

November 13 to 15 (Geneva) — Technical Committee

November 16 and 17 (Geneva) — Administrative and Legal Committee

December 5 and 8 (Geneva) — Consultative Committee

December 6 to 8 (Geneva) — Council

Other Meetings in the Field of Copyright and/or Neighboring Rights

1978

Non-Governmental Organizations

International Confederation of Societies of Authors and Composers (CISAC)
Legal and Legislation Committee — June 28 and 29 (Copenhagen)
Congress — September 25 to 29 (Toronto and Montreal)

International Federation of Actors (FIA)
Executive Committee — September 27 to 29 (Iceland)

International Writers Guild (IWG)
Congress — October 10 to 13 (Mannheim)

1979

International Federation of Musicians (FIM)
Symposium on the International Protection of Performers and of their Rights — January 10 to 12 (Geneva)