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# Copyright

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## World Intellectual Property Organization

### TANZANIA

#### Accession to the WIPO Convention

The Government of the United Republic of Tanzania deposited, on September 30, 1983, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO).

The Convention Establishing the World Intellectual Property Organization will enter into force, with

respect to the United Republic of Tanzania, three months after the date of deposit of its instrument of accession, that is, on December 30, 1983.

WIPO Notification No. 125, of September 30, 1983.

## Conventions Administered by WIPO

### Consultation Meeting on the Implementation of the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties and the Additional Protocol to that Convention

(Paris, September 14 to 16, 1983)

#### Report

##### Introduction

1. In pursuance of paragraph 5013 of the Work Plan relating to Resolution 5/01 adopted by the General Conference of Unesco at its twenty-first session (Belgrade, September-October 1980) and of the decision taken by the Governing Bodies of WIPO at their November 1981 sessions, the Directors General of Unesco and WIPO organized a Consultation Meeting of the international non-governmental organizations which had been invited to send representatives to the Madrid Conference (1979) which adopted the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties (hereinafter referred to as "the Convention") and its Additional Protocol. The purpose of this meeting, which was held at Unesco House, Paris, from September 14 to 16, 1983, was to invite those organi-

zations to express their views on the specific problems likely to arise in the course of implementing these international instruments.

2. The representatives of nine international non-governmental organizations participated in the meeting.

3. The list of participants is annexed to the present report.

##### Opening of the Meeting

4. On behalf of the Directors General of Unesco and WIPO, Ms Marie-Claude Dock, Director, Copyright Division of Unesco, and Mr. Claude Masouyé, Director, Public Information and Copyright Department of WIPO, welcomed the participants.

### **Election of the Chairman**

5. At the proposal of the representative of the International Confederation of Societies of Authors and Composers (CISAC), seconded by the representative of the International Federation of Phonogram and Videogram Producers (IFPI), Professor André Françon, Secretary-General of the International Literary and Artistic Association (ALAI), was unanimously elected Chairman of the meeting.

### **General Discussion**

6. Several participants congratulated the Secretariats on the quality of the documents prepared for the meeting; dealing comprehensively with various aspects of the question under study, these constituted an excellent working basis for discussions.

7. The participants unanimously emphasized the fact that, despite the measures taken by Unesco and WIPO and by the international non-governmental organizations concerned to alert member States to the value of acceding to the Convention, only four countries (Czechoslovakia, Egypt, India and Iraq) had to date deposited their instruments of accession or ratification, and one of them (Czechoslovakia) had ratified the Protocol. Several participants stressed that the elimination of double taxation could be achieved only if there was a broad consensus among States in that regard. They then endeavored to elucidate the reasons for which the Convention had not, to date, received wider acceptance.

8. For some, the major cause lay in the fact that the Convention constituted a compromise between two extreme positions, namely, taxation by the State of residence of the beneficiary, and taxation by the State of source of the royalty. This might give rise to an interpretation whereby the Convention institutionalized double taxation instead of diminishing it.

9. Several participants referred to the existence of a large number of bilateral agreements in the field of double taxation, and recalled that a number of States considered this to be an adequate state of affairs and regarded their accession to a multilateral instrument as superfluous.

10. Other participants emphasized that, in the final analysis, the Convention itself encouraged States to settle their respective problems by means of bilateral agreements, for which it offered an optional model.

11. One participant was of the opinion that the measures designed to enable double taxation to be avoided would be effective only if States accepted to tax royalties only in the State of residence of the beneficiary.

12. Another participant highlighted the interest of attempting to harmonize the content of the bilateral agreements.

13. The Secretariats indicated that the elaboration of the Convention had been intended to dissociate copyright royalties from other taxable revenues, albeit without seeking to do away with bilateral agreements.

14. In this regard, several participants urged that the attention of the competent authorities in the States be drawn to the fact that copyright should benefit from a preferential system. In the course of the discussion, several reasons were put forward in support of such a system: the particular legal nature of the system of copyright and neighboring rights, the immaterial nature of creative activity, the irregularity of the economic return on royalties, the limited scope of the tax base in relation to total taxable income, the place that literary and artistic production occupied in cultural exchanges among States.

15. Several participants also wondered if it would not be useful to take steps at the international level to collect information on the content and operation of existing bilateral agreements in the field of double taxation.

16. The Secretariats informed the meeting that, subject to the approval of their respective Governing Bodies, the publication of a booklet aimed at arousing the interest of the States in the Convention would be undertaken jointly by Unesco and WIPO during the 1984-1985 biennium. A survey might also be conducted among the States during the next biennium with a view to gaining a better knowledge of how the bilateral agreements operated.

### **Article-by-Article Examination**

#### **I. Convention**

17. The general debate was followed by a detailed article-by-article examination of the provisions of the Convention and of the "Points for Discussion" presented to the meeting by the Secretariats in document UNESCO/WIPO/DT/CM/2.

#### *Article 1: Copyright Royalties*

18. Having recalled that the examination of the Convention which they were about to undertake should not in any circumstance be understood as an interpretation thereof, since only the States were empowered to make such interpretation, the participants presented many observations with a view to formulating an explanatory commentary on the notion of copyright royalties as defined in Article 1 of the Convention.

19. In a general manner, it was considered that Article 1 should be interpreted broadly, the only exceptions to be taken into account being those explicitly provided for in the text itself. Consequently, apart from the cases mentioned in paragraphs 2, 3 and 4 of the said article, all the payments deriving from the exercise of copyright should be covered by the Convention. In this regard, the Secretariats were requested to draw up an exhaustive list of all payments received for the use of, or the right to use, a copyright in a literary, artistic or scientific work.

20. Two specific cases were in particular mentioned: that of commissioned works and that of public lending right. It was considered that, in the latter case, of the total sum paid by the user, only the part due to the authors in accordance with national law was covered by Article 1. As for commissioned works, it was pointed out that in several countries payments were assimilated to a wage and therefore considered as ordinary income and not as copyright royalties.

21. The attention of participants was drawn to the case where payments made in the State of source were not transferred to the State of residence of the beneficiary. It was therefore important to know if transfer constituted a condition *sine qua non* for the application of the Convention.

22. The participants were unanimous in considering that the provisions of the Convention were applicable whether or not the royalty was transferred. It was emphasized that cases where the royalty was not transferred to the country of residence were in any case limited, being those in which the beneficiary chose either to leave the royalty in the State of source or to deposit it in a State other than the State of source or of residence, or being situations where the royalties were blocked in the State of source in consequence of exchange control regulations or, finally, situations in which payments were settled in the form of compensation.

23. On the question as to whether a possible interpretive declaration of the definition of copyright royalties (Article 8, paragraph 3) could be made only at the time of deposit of the instruments of ratification, acceptance or accession, or could be made at any later time, the opinion was expressed that the necessary security in legal relations between States, as well as the spirit of the Vienna Convention on the Law of Treaties, would tend to suggest that such a declaration should be made at the time of deposit of the instrument. It was, however, pointed out that Article 8, paragraph 3, referred to cases where the Contracting State adopted domestic measures, and that it was not impossible that such adoption might occur at a date subsequent to acceptance of the Convention.

#### *Article 2: Beneficiary of Copyright Royalties*

24. The problem here was to determine whether the definition of the "actual beneficiary" contained in this article should be taken in a broad sense of the term and not be limited to the conventional definition of the author.

25. Several participants considered that the term should be considered to include all authors, whether individuals or legal entities, as well as their heirs and successors in title.

26. Moreover, it was acknowledged that the term could also include societies of authors and bodies responsible for collecting royalties, but excluded literary or theatrical agents, who did not act as assigns of the author but as persons exercising a promotional activity of a commercial nature and being remunerated in that capacity.

27. With regard in particular to societies of authors, it was observed that their situation in this respect depended on the legal relationship between them and their members, which might result in the case of certain bilateral agreements in their being considered, for purposes of taxation, as being the beneficiaries of the royalties.

#### *Article 3: State of Residence of the Beneficiary*

28. It was pointed out that this article relating to the State of residence of the beneficiary provided a broad definition of the resident, with the result that its application might well lead, in certain cases, to a person being deemed to be a resident in several States.

29. Certain participants noted that according to tax legislation a resident of a State was any natural person or legal entity liable to tax in that State. Consequently, criteria should be decided upon to enable the place of actual residence of the beneficiary to be specified. For that purpose, it was unanimously recommended that recourse be had to the criteria set forth in Article IV of the optional model bilateral agreement attached to the Convention.

#### *Article 4: State of Source of Royalty*

30. As regards this article, participants pointed out that the criterion adopted to designate the State of source referred to the place of establishment of the debtor responsible for the royalties but failed to define the "permanent establishment" and the "fixed base" through which that debtor carried on his activity.

31. It was pointed out by some participants that the reference to commercial concepts was liable to bring these provisions even closer to ordinary tax law; this hardly served to bring out the specific nature of copyright or to argue in favor of its receiving special treatment.

32. Other participants suggested abiding by the conventional terms and drawing the attention of Contracting States to the importance of clarifying the concepts of "permanent establishment" and "fixed base" within the framework of bilateral agreements to be concluded between them.

*Article 5: Fiscal Sovereignty and Equality of Rights of States*

33. As to the question of whether the provisions contained in this article, relating to respect for the fiscal sovereignty of the State of source and of the State of residence and to the equality of the taxation rights of the two States, can be reconciled with the undertaking to be made under Article 8 of the Convention, it was considered that in reality the States undertook only to make every effort to avoid, eliminate or reduce the effects of double taxation without infringing one another's fiscal sovereignty.

34. One participant having remarked that the notion of the equality of the two States' right to tax was introduced into the Convention on the proposal of delegations of developing countries for the purpose of re-establishing a certain balance between the State of residence which benefited from the taxation of copyright royalties and the State of source to which that right was not always granted, it was urged that particular attention be given to such recognition at the time of negotiating bilateral agreements in the event of the State of source being a developing country.

*Article 6: Fiscal Non-Discrimination*

35. One participant having observed that there existed a contradiction between this article and certain practices of tax discrimination based on sex in some States, it was felt that optimal application of this provision of the Convention would serve to abolish or at least to minimize such discrimination.

*Article 7: Exchange of Information*

36. With regard to this article it was pointed out that, since the competent authorities responsible for undertaking exchanges of information had not been defined, as it was provided that they should be in the bilateral agreement, it would be for the fiscal administration of each State to specify them.

37. As regards the nature of the exchanges of information and their content it was urged that these be limited to information which would, for example, make it possible to establish documentation on tax legislation relating to copyright, and exclude all information of a confidential nature on the situation of the taxpayer.

*Article 8: Means of Implementation*

38. This article defines the scope of the undertaking made by the States under the Convention. That

undertaking was considered by the participants to constitute an obligation in respect of methods and not an obligation in respect of results. It was a kind of declaration of good intentions, the sole consequence of which was the pledge by the Contracting State to endeavor to avoid double taxation and, should it subsist, to eliminate it or to reduce its effect.

39. Regarding the question of whether the bilateral agreements concluded previously by Contracting States and that were not in conformity with the provisions of the Convention should be compulsorily revised, some participants invoked the principle of acquired rights in order to rule out such revision. Others, on the contrary, expressed the view that revision of these agreements would appear to be desirable, above all if it was done in the interest of authors. Yet others, finally, mindful of the complications which might arise when one of the contracting States was not a party to the Convention, considered it preferable to leave it to the parties concerned to settle the matter by bilateral negotiations.

*Article 9: Members of Diplomatic or Consular Missions*

40. This article did not give rise to any questions as to its application.

*Article 10: Information*

41. As to the question of whether the expression "information of a normative nature" concerning taxation of copyright royalties should be considered as relating only to information on tax legislation in the field of copyright or also to economic and financial information that was not confidential, the participants favored the first solution, preferring to abide by the letter of the text of the Convention.

*Article 11: Ratification, Acceptance, Accession*

42. This article did not give rise to discussion.

*Article 12: Reservations*

43. It was noted that, irrespective of the reservations explicitly provided for in this article, the General Report of the Madrid Conference raised the possibility of interpretive declarations on the part of the States with regard to each of the articles of the Convention. The participants, who examined this question at length with reference to Article 1, considered it preferable that such interpretive declarations be made at the time of ratification, acceptance or accession.

44. As concerns the reservations provided for in the Convention, the Secretariats indicated that the Czechoslovak Socialist Republic notified at the time of ratifying the Convention that it "does not consider itself bound by the provisions of Article 17, paragraph 1." For its part, the Government of India

notified at the time of its accession that it “does not consider itself bound by Articles 1 to 4 and 17 of the Convention.”

#### *Articles 13 to 17*

45. Articles 13 to 17 relating to the entry into force, denunciation and revision of the Convention and to the languages of the Convention and notifications, and the interpretation and settlement of disputes, did not give rise to discussion, being customary formal provisions.

## **II. Additional Protocol**

### *1. Principal Categories of Beneficiaries*

46. It was noted that the Additional Protocol to the Convention concerned alike performers, producers of phonograms and broadcasting organizations, and that no provision of the Protocol allowed for the possibility of limiting its application to one or other of the three categories. Consequently, it was considered that its acceptance should apply to the three categories of beneficiaries together.

47. As concerns their definition, it was recalled that, since the provisions of the Convention became applicable to these beneficiaries by the fact of accepting the Protocol, the criterion to be adopted was the reference to the domestic legislation of the Contracting State in which the royalties were originally due. However, the view was expressed that, in order to define the said beneficiaries, legal regulations should be guided by the relevant international instruments, as for example the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961), the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention, 1971) and the Recommendation Concerning the Status of the Artist (1980).

48. Moreover, it was recalled that it was not necessary for a State to be party to the Rome Convention in order to accede to the Protocol.

### *2. Application of Article 1, Paragraph 3, of the Convention*

49. It was considered that, as in the case of copyright, payments made for the purchase, rental or loan of a material base did not constitute royalties for the purposes of the Protocol.

### *3. Definition of the Beneficiaries of the Protocol on the Fiscal Level*

50. It was considered that the definition for tax purposes of performers, producers of phonograms and broadcasting organizations should not be different

from that deriving from national legislations governing intellectual property and the applicable international instruments.

51. Moreover, it was observed that the remarks contained in paragraphs 26 and 27 in connection with bodies responsible for collecting copyright royalties could also apply to the field of “neighboring” rights, notably as concerns performers.

### *4. Nature of Activities Pursued by the Beneficiaries of the Protocol*

52. Having noted that such activities, like the payments resulting therefrom, could be varied in their nature, it was considered that the activities covered by the Protocol should be limited to those that give rise to royalties by virtue of so-called neighboring rights.

### *5. Degree of Application under the Protocol of Certain Provisions of the Convention*

53. It was emphasized that the aim of the Protocol was to extend the application of the Convention to the holders of so-called neighboring rights, and that in consequence all the provisions of the Convention applied *mutatis mutandis*. However, it was noted that Article 9 concerning the fiscal privileges of the members of diplomatic or consular missions could apply only, it would appear, to the category of performers.

## **Recommendations**

54. The participants were unanimous in their wish that every effort be made to avoid double taxation of copyright royalties and, should it subsist, to eliminate it or to reduce its effect. Irrespective of the results that had been or might be obtained through domestic measures or bilateral agreements, the Convention represented in this regard a particularly useful means of action. Accordingly, it was considered advisable to seek to promote a better understanding of this instrument on the part of the competent authorities of the States. A list of the arguments in favor of a tax system specifically relating to copyright royalties should be established, and the explanatory pamphlet provided for in the respective draft programs and budgets of Unesco and WIPO should be disseminated as widely as possible. Moreover, a survey on the operation of existing bilateral agreements in this field would be useful.

55. The participants were unanimous that the preceding considerations were equally valid for the three categories of beneficiaries mentioned in the Additional Protocol, and urged that any measure or activity likely to promote acceptance of the Convention should also be aimed at securing acceptance of the Additional Protocol.

### Adoption of the Report and Closing of the Meeting

56. The meeting unanimously adopted the present report. After the customary expressions of thanks, the Chairman declared the meeting closed.

### List of Participants

#### I. International Non-Governmental Organizations

**European Broadcasting Union (EBU):** R. Laurent; R. Contrepas. **International Association of Art (IAA):** C. Bleyne. **International Confederation of Societies of Authors and Composers (CISAC):** N. Ndiaye; D. R. Miglio; L. L. Devis; J. Juranek; J. A. Azula; B. Revuelta; M. J. Freegard. **International Copyright Society (INTERGU):** G. Halla. **International Federation of Phonogram and Videogram Producers (IFPI):** E. Thompson; C. Frew. **International Group of Scientific, Technical and Medical Publishers (STM):** P. Nijhoff Asser. **International Literary and Artistic Association (ALAI):** A. Françon; M. J. Freegard. **International Publishers Association (IPA):** J.-A. Koutchoumow. **International Theatre Institute (ITI):** J. Sito.

#### II. Secretariat

**United Nations Educational, Scientific and Cultural Organization (UNESCO)**

M.-C. Dock (*Director, Copyright Division*); A. Amri (*Copyright Division*).

**World Intellectual Property Organization (WIPO)**

C. Masouyé (*Director, Public Information and Copyright Department*).

## Nairobi Treaty on the Protection of the Olympic Symbol

### INDIA

#### Ratification

The Government of the Republic of India deposited, on September 19, 1983, its instrument of ratification of the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty entered into force, with respect to India, on October 19, 1983.

Nairobi Notification No. 14, of September 22, 1983.

### UGANDA

#### Accession

The Government of the Republic of Uganda deposited, on September 21, 1983, its instrument of accession to the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty entered into force, with respect to Uganda, on October 21, 1983.

Nairobi Notification No. 15, of September 22, 1983.

## National Legislation

### Decree of the Minister for Culture supplementing Decree No. 9 of December 29, 1969, implementing the Copyright Act No. III of 1969

(No. 15, of July 12, 1983) \*

#### Article 1

The enumeration contained in Article 1(1) of Decree No. 9 of December 29, 1969,<sup>1</sup> as amended by Decrees No. 4 of December 7, 1978,<sup>2</sup> and No. 15 of November 20, 1982,<sup>3</sup> implementing the Copyright Act (hereinafter referred to as "the Implementing Decree") shall be supplemented as follows:

[artistic photographs,]

"computer programs and the related documentation (hereinafter referred to as 'software')."

#### Article 2

Article 12(1) of the Implementing Decree shall be replaced by the following provision:

"*Article 12. (1) If the employer enters into a contract for use of the work with a third party during the validity of his right of use, under Article 14 of the Copyright Act, 60 to 80 percent or, in the case of software, 10 to 30 percent of the amount of royalties — according to the decision of the employer — shall accrue to the author, the employer being bound to pay the respective sum within eight days following the receipt by him of the royalties. In the case of software, the employer may, in the employment contract or in any other manner, lay down a different due day or subject it to conditions. If the conclusion of the contract with a third party for the use of the work lies within the sphere of the activities of the employer, the latter may also set the share of the author, in view of the costs incurred in the creation of the work, at a level lower than 60 percent or, in the case of software, 10 percent of the amount of royalties.*"

\* Published in *Magyar Közlöny*, of July 12, 1983. English translation provided by the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS) and revised by WIPO.

<sup>1</sup> See *Copyright*, 1972, p. 201.

<sup>2</sup> *Ibid.*, 1979, p. 111.

<sup>3</sup> *Ibid.*, 1983, p. 166.

#### Article 3

The enumeration contained in Article 20(2) of the Implementing Decree shall be supplemented as follows:

[The contracts referred to in paragraph (1) may be concluded through the intermediary of]

— the foreign trade enterprise entitled thereto or the commercial organization vested with the right to carry on foreign trade activity for the sale of software;"

[— construction bureaux for works of architecture.]

#### Article 4

Article 37 of the Implementing Decree shall be replaced by the following provision:

"*Article 37. (1) The fine adjudged by the court shall be paid — except in the case of paragraph (2) — to the Ministry of Culture. The Minister for Culture shall use the amounts thus paid for the promotion of culture and the welfare of authors.*

(2) In the case of unauthorized use of software, the fine adjudged by the court shall be paid to the Central Statistical Office. The amounts thus paid shall be used for the purposes of software development."

#### Article 5

Article 39(2) of the Implementing Decree introduced by Decree No. 15 of November 20, 1982, shall be replaced by the following provision:

"(2) The fee due to the author for the public performance and for the reproduction by means of equipment designed for mechanical performance (e.g. sound recording, radio and television broadcasts, fixation of film and video background



music) of musical works already made available to the public, for the sound recording of literary works already made available to the public, for the public performance of dramatic works, and for the use of software, provided the fees under a contract for the use of software are due to other than legal persons and excepting the cases governed by Article 12(1), shall be paid to the Bureau for the Protection of Authors' Rights."

#### Article 6

(1) This Decree shall come into effect on the day of its promulgation. However, the provisions on software remuneration in Article 2 shall also apply to contracts for which the whole amount of the remuneration has not yet been paid.

(2) The second sentence of Article 38(3) of the Implementing Decree shall cease to have effect.

## General Studies

### Protection of Industrial Designs Between Copyright and Design Laws: A Comparative Study

Herman COHEN JEHORAM \*

#### 1. *More or Less Exclusive Design Protection, or More or Less Cumulative Protection by Design and Copyright Law*

Industrial designs can, in theory, be protected by at least two kinds of laws: as indeed industrial designs by specific design laws, and as applied art by copyright laws. This potentially double protection exists in all the law systems which will be compared in this study: the systems of the Benelux countries (reports Wibbens and Van Sautbrink), Canada (report Nelson Landry), France (report Pérot-Morel), the Federal Republic of Germany (report Krüger and articles of Reimer<sup>1</sup> and Katzenberger<sup>2</sup>), Italy (report Fabiani), the Nordic countries (report Levin), Switzerland (report Troller) and the United Kingdom (report Cornish). But here the uniformity stops. There is indeed a wide variety in degrees of overlap between the two main kinds of protection for industrial design, design and copyright law. (In this context I will not deal with the further occasional protection by the laws on patents, trademarks or unfair

competition.) On the one hand there are the countries which only grant a more or less *exclusive* design protection like Canada, the Federal Republic of Germany, Italy, the Nordic countries, Switzerland and the United Kingdom till 1968. In the systems of these countries design protection rests more or less exclusively on the specific design protection. Copyright protection is only reserved for very exceptional artistic designs. A more or less *cumulative* protection by design and copyright laws is to be found in the Benelux countries, France, the United Kingdom since 1968, and Ireland.

#### 2. *Practical Implications of the Two Systems*

Before I come to the description of the national systems which differ more widely than maybe on any other subject of intellectual property, it may be useful to mention the practical implications of the choice a country makes, either for an exclusive or a cumulative system of design protection.

For a good understanding of these differences it has to be kept in mind that copyright protection for industrial design as applied art of course shows all the peculiarities of copyright law. Specific design laws on the other hand form part of that second main branch of intellectual property rights: the field which is commonly known as industrial property. This

\* Professor at the University of Amsterdam.

General Report for the ALAI Aegean Sea Congress, April 13 to 20, 1983.

<sup>1</sup> GRUR Int. 1971, 342-352.

<sup>2</sup> Cohen Jehoram, *Design Protection*, Leyden, 1976, pp. 91-115.

means that at least the more modern design laws show all the peculiarities of industrial property law. A slight complication here is caused by the fact that older design laws, of for instance Germany and France, in fact show some features of a more hybrid character, a copyright approach of what essentially is an industrial property law. For all practical purposes however there remains a sound distinction: specific design protection belongs to the industrial property world and copyright protection of designs is the field of copyright lawyers. This accounts for differences of an objective as well as of a subjective nature. As the former English Assistant Comptroller at the Board of Trade, William Wallace, said on the Amsterdam symposium on design protection in 1975<sup>3</sup>:

The intellectual property world is divided into patent men and copyright men ... Copyright men know little about patents and do not mind. They are content to let patent men get on with it so long as they don't interfere with copyright. Patent men, on the other hand, know a little about copyright, and of what they do know, they disapprove.

This might in the end also characterize some differences in outcome between the present simultaneous study of the same problem of design protection in ALAI and in its sister organization for industrial property, the AIPPI.

The objective differences between copyright and a more specific design protection could be listed in terms of "advantages" of the one over the other system. For both copyright and specific design right such lists could be made.

#### A. Advantages of Copyright Protection

1. Protection can be obtained without any formality, deposit, payment or publication whatsoever. This at least is true for all the countries compared, which are all members of the Berne Union; according to the Berne Convention the enjoyment and the exercise of copyright shall not be subject to any formality. Design laws on the other hand in general follow the rule of nearly all industrial property laws; they do prescribe formalities, like deposit, payment of dues, publication and sometimes even search and novelty tests (Nordic countries). The bother of these formalities and the sometimes rather substantial costs involved are indeed very often prohibitive, with the result that only a dwindling percentage of all new industrial designs is deposited and consequently protected by design law. (Compare the remarks of Mrs. Levin on fashion oriented businesses.) The non-deposited designs, maybe 99 % of all new designs, can then only rely on copyright protection, in countries with a system of cumulative protection. In countries which normally exclude copyright protection for

designs, those 99 % of new designs in general can freely be copied.

2. Another advantage of copyright protection of designs is that only the requirement of originality exists, the personal stamp of the designer. In other words, copyright does not operate with the design law notion of objective novelty, which in practice so often results in industry committing suicide by first marketing a new product and only in the case of commercial success seeking the costly design protection, which by then has become impossible because the design was already on the market and not new anymore. In countries with a double protection industry can then still rely on copyright, but in the exclusive design protection countries the innovative industry is again outlawed.

3. A third advantage of copyright protection is provided by the much wider scope of this protection of the form *in abstracto* as compared to design protection which is only limited to a strict application of the registered design to a particular object. To borrow an example of the Explanatory Note to the Benelux Design Law: if a certain new Scottish plaid is registered as a new fashionable surface of a refrigerator, the design right on this plaid can only be invoked against competing refrigerator manufacturers, who might try to bring refrigerators on the market with the same pattern. However, this design right cannot be invoked against a textile manufacturer who might bring a jacket on the market with exactly the same Scottish plaid design. Copyright protection of the Scottish plaid however exists for every application of the design, that is in countries with double protection. In exclusive design protection countries our refrigerator manufacturer is powerless outside his own branch. And even within this same branch, the design protection is often strictly limited to a very particular and precise application of the registered design. Mr. Wibbens has given us the example of a Netherlands decision<sup>4</sup> where design protection for a registered couch was denied because the registration only covered leather couches, whereas the defendant had marketed exactly the same couch with a textile cover. Mr. Wibbens is of the opinion that this is in conformity with the circumstances and needs within the industrial circles, where design protection originated: there would be no competition here because industries with textile-covered and those with leather-covered couches simply cater to different groups of consumers. Even without knowing the particulars of the case one could already ask: why then did the leather couch manufacturer sue the other one at all? Not, one would presume, in order to enrich us with judicial examples of the nar-

<sup>3</sup> *Ibid.*, p. 39.

<sup>4</sup> Pres. District Court Arnhem, March 4, 1976, BIE 1977, 235.

row scope of his design rights and so to lose his case? I might add here about this Dutch case, that in reality the decision shows that the plaintiff in question did not only manufacture leather couches, but textile-covered couches as well, but, to save money, he had only registered the leather-covered couch, with the disastrous result mentioned. If the couch had also been "original," which was denied by the judge in this case, copyright protection, with its wider scope which covers all adaptations, would still have saved our plaintiff. In exclusive design law countries no such saving wide scope copyright law is available.

4. Another important advantage of copyright law is its duration: 50 years *post mortem auctoris*, which for all practical purposes could even result in protection for a century, whereas design laws (with the exception of France) restrict themselves to a maximum of 15 years. In a cumulative system country again the difference is not felt, but in an exclusive design law country the manufacturers of products with a so-called evergreen design, as can be the case with furniture (Thonet chairs) and even sometimes cars (Citroën models), the design protection can stop long before the design has lost its commercial life.

Curiously enough many industries claim that the shorter period for design protection is in fact a desirable feature of design law. The copyright protection would be much too long for industrial products, the designs of which generally are short-lived. I have two rather rhetorical questions here. If a design is short-lived, say five years, what harm is then caused by the surviving copyright protection? My second question maybe answers the first one. Does the harm of a longer copyright protection not precisely lie in the obstacle it represents for the large majority of manufacturers who would rather copy the evergreens of a few competitors?

5. A last advantage of copyright law is that it provides for several procedural means, which normally are unknown in design law. Copyright infringement can lead to criminal proceedings and copyright infringement can lead to very far-reaching measures of seizure, which are unknown in design law. In Dutch law for instance copyright confers the power to seize infringing objects and to claim ownership of them or to demand that they be destroyed. In exclusive design law countries no such immediate remedies are available.

The advantages of design laws over copyright laws play a minor role in the context of this study. Not because these advantages could not be important in themselves but because they do not make a difference between countries with exclusive or cumulative systems. These advantages are generally being enjoyed in all the national systems compared here, simply because design protection is the minimal protection they all have in common.

## B. Advantages of Design Protection

1. A feature common to most design laws is the registration and often publication of the designs to be protected, which gives industry the opportunity to check which designs are already claimed, by what competitors and on what date. The register also provides the opportunity of filing the names of licensees, who thereby get a standing in court against third-party infringers to claim their own damages. It must be said, however, that these advantages diminish or vanish completely with the lack of central registers or sufficient publication, like in the Federal Republic of Germany and in France. In Germany, there are, according to Reimer, 783 registers to be found (with District Courts), and the publication is restricted to mere indication of products without illustrations. In France, the deposit is not even a prerequisite for the existence of the design right, it only provides a certain presumption of authorship, and the deposit can be kept secret for 25 years.<sup>5</sup> Apart from these already deadly blows to the registration and publicity of designs, in countries with a cumulative system it should not be forgotten that the majority of claims, the much heavier copyright claims, are not to be found in any register.

2. Another advantage of design protection is that, in most law systems (though not in France), an objective novelty is required for design protection, instead of the subjective originality of copyright protection. Many industrialists do not want to depend for their protection on what — in their view — is a more or less subjective judicial appraisal of the originality, the personal stamp, of their products. They feel safer with an objective criterion: has this particular design ever existed before, or, as in the Benelux law, has this design been known during the last 50 years within the relevant circles of industry and commerce in the Benelux?

This (relative) objective novelty requirement indeed stems from industrial property laws. It is a feature of the so-called patent approach of design laws. Closely related to this novelty requirement is the barring effect of a design right (except in Germany). The design right generally does not merely protect against imitation, like copyright. The design right supplies the owner, like a patent, with a real *monopoly*. He can invoke his right even against an industry designer who quite independently made a similar design and who, in a law suit, can prove that he had not even known the plaintiff's design. In literature this point has been much stressed. In my view this last difference is of a highly theoretical character because design is — unlike inventions — essentially

<sup>5</sup> Pérot-Morel, *Les principes de protection des dessins et modèles dans les pays du Marché Commun*, La Haye, 1968, pp. 269 et seq., and Greffe-Greffe, *Traité des dessins et modèles*, Paris, 1974, pp. 303 et seq.

and in all stages a product of human imagination, notwithstanding all the technical conditions imposed by the destination of the product. Identical but independently developed designs are just as improbable as other identical not copied works, subject matter of copyright. I do admit that recurrence can never completely be excluded — the very reason why the theory of the statistical uniqueness of copyrighted objects of the Swiss Kummer, and followed by Troller, is unacceptable to me — but the whole problem is very rare and esoteric.

The related relative novelty requirement of designs, on the other hand, is much more important than literature often recognizes. For instance, the deposit in the Benelux of a design which has been very successful in the United States, but has remained unknown in the relevant circles of industry and commerce in the Benelux, can indeed confer a new design right on the firm which makes a filing with the Benelux authorities and which might have no relation whatsoever with the original American designer or rights owner. Such a design right of a simple depositor of a merely nationally or regionally unknown design has been upheld by the Dutch courts and also by the European Court of Justice in the recent Nancy Kean case, where the Benelux depositor of a ladies handbag which had already gone out of fashion in the United States could make use of his new Benelux monopoly to restrict the free movement of products within the Common Market, notwithstanding the fact that he was neither the designer of the handbag nor a licensee of the American rights' owner. His mere filing of the design of the handbag, which he imported from Taiwan, was enough to grant him a new monopoly which could be enforced in law against a competitor who had also imported the bag from Taiwan.<sup>6</sup>

This advantage of design protection with its mere relative novelty requirement over copyright protection with its stricter originality requirement is very real indeed; but is it also justified?

### 3. The National Systems: Their Choice for the Exclusive or Cumulative Approach

As already mentioned before, the whole preceding paragraph on advantages of the copyright protection over specific design protection and vice versa is mainly relevant for those countries which really draw a more or less sharp dividing line between the two kinds of protection, i.e. which exclude designs in general from copyright protection: the exclusive systems. Countries with a more or less cumulative system, on the other hand, only cumulate the advantages of both kinds of protection for designs.

A very exclusive system used to exist in the United Kingdom until 1968. Here copyright protection for designs was excluded for designs of products manufactured in more than 50 copies; a nicely clear-cut and arbitrary system, which of course provided a maximum of certainty.<sup>7</sup> The same law system is described by Nelson Landry for Canada. He also reports on a recent working document of Professor Magnusson on changes of the law, where a certain horror is expressed of some British decisions in the current UK system of total cumulative protection, and where also the Benelux and German systems are rejected.

Another example of an extremely exclusive system is to be found in Italy, where copyright protection is only granted to a design if it can conceptually be separated from the industrial product. In this way the form of clothing, shoes, furniture, cars, typefaces, or typewriters (famous Italian designs there!) can never be protected by copyright, only by design rights. One could ask what then really is left for copyright protection of applied art. In literature examples are then given of the candlestick and the saltcellar of Benvenuto Cellini or posters of Toulouse-Lautrec: one would not be able to refuse those objects the protection of copyright.<sup>8</sup> According to Fabiani, the criterion of "separability" in reality boils down to the idea of "artistic value," which according to Benussi is an illusory distinction.<sup>9</sup> But even then, if I understand the system well, there can be no question of cumulative protection.<sup>10</sup> Those "very artistic designs" enjoy maybe copyright but they are then denied design protection which I can understand with the examples of Cellini and Toulouse-Lautrec, where we are completely outside the realm of industrial design.

The Federal Republic of Germany has, in theory, a system of cumulative protection of design by copyright and by design law. In reality the mere existence of the specific design protection has reduced the application of copyright law to a considerable extent. If the German system is not to be deemed to be as absolutely exclusive as the Italian one, it does go a far way in the same direction.<sup>11</sup>

German case law imposes a specific condition for the copyright protection of applied art: "art" must have been applied, and whether "art" exists will be decided by "the average judgment of those fellow citizens (*Volksgenossen*) who are receptive to art and somewhat familiar with artistic things, as these citi-

<sup>7</sup> Cf. Pérot-Morel, *ibid.*, pp. 141 *et seq.*

<sup>8</sup> Cf. Pérot-Morel, *ibid.*, pp. 89 *et seq.*

<sup>9</sup> GRUR Int. 1980, 406.

<sup>10</sup> Pérot-Morel, *ibid.*, p. 97.

<sup>11</sup> Reimer (p. 351) still gives a few examples of copyright protection of industrial design: the tube chairs of Stam and Stüttgen (BGH 27.2.1961, GRUR 1961, 635) and a chair in the form of a bag of Verner Pantan (OLG Düsseldorf 28.10.1969, UFITA 58, 321(1970)).

<sup>6</sup> European Court of Justice, September 14., 1982, case 144/81 BIE 1983, 9.

zens can be found in most classes of the nation.”<sup>12</sup> As Katzenberger said on the Amsterdam Design Symposium of 1975<sup>13</sup>:

... there is a clear tendency — especially in the later decisions of the *Reichsgericht* and in the decisions of the Federal Supreme Court — not to set the borderline between copyright protection and design protection at too low a level.

Only few authors have reproached the courts for having

... based the right to distinguish only on the existence of two statutes; another justification for this distinction between the subjects to be protected would not exist.<sup>14</sup>

The same line of reasoning I detect with Troller, who, for Switzerland, writes: the existence of two different laws on works of the mind with concurring functions compels us to search for the reason of this diverse legislative treatment, and: when statutes, court decisions and literature have so long worked from the principle of a dividing line (between works of art and designs) then this must also exist in the meta-judicial reality and be observed by the legislators. First he acknowledges that the current trend in theory and court decisions in the Federal Republic of Germany and Switzerland is to look for a more or less distinctive aesthetic quality of the design, which in reality leads to subjective appraisals. In 1949, Troller drew the conclusion (in a GRUR article) that a distinction between applied art and industrial design cannot be made: a conclusion of our great master of the “*Immaterialgüterrecht*” which to me is more appealing than his present opposite stand, that the difference between the two is to be found in the distinction between mere originality (for designs) and Kummer’s “statistical uniqueness” (for applied art). This whole “statistical uniqueness” of Kummer as a requirement for copyright protection of works in general I cannot but regard as a potentially dangerous chimera.

An example of a mildly exclusive law system is to be found in the Nordic countries, since the uniform Nordic laws of the years 1970-1973.<sup>15</sup> Before the new Swedish Law of 1970, there hardly existed an effective specific design protection in Sweden and the courts were then rather more inclined to grant copyright protection to industrial designs, than afterwards. This change was in conformity with the purpose of the new law: the Parliamentary Committee Report even went so far as to specify three examples where the Swedish Supreme Court had in the past granted a copyright protection which in future should be denied. Those sorts of design were in future to be

protected exclusively by the design law, with all its registration requirements. Under a certain transitional provision of the new law, such products would only enjoy copyright protection until 1980, and there are some other examples of designs which were to fall under this transitional rule. Finally, some exceptional designs would remain which could still be protected cumulatively by both copyright and design protection. According to Mrs. Levin, those exceptional designs must display such an individual character that it is highly unlikely that anyone else could have independently created the same result. She mentions the fact that the Swedish Design Committee has since 1980 decided approximately 40 cases, and that copyright protection was found to exist in only four of these cases. This is still a percentage of 10, certainly a better score than is to be found in Italy, but indeed significantly different from the 75 % positive Swedish decisions before 1970. Mrs. Levin is of the opinion that applied art is to a large extent unprotected by the current intellectual and industrial property legislation and therefore free for anyone to imitate, and:

... one could claim that applied art is accepted within copyright law only with a certain degree of reluctance, and that the criteria generally posed by a copyright analysis are not all in accord with the conditions relevant to applied art.

After these descriptions of the more or less exclusive systems of design protection, I now turn to three important examples of cumulative systems.

In the first place I want to mention the Benelux, because the uniform design laws in Belgium the Netherlands and Luxembourg *seem* so much to resemble the Nordic model, just described. Article 21 of the Uniform Benelux Design Law in fact provides that designs which display “no markedly artistic character” are *excluded* from copyright protection. They will have to rely on the specific design protection with its clear patent approach.

This badly worded provision can only be understood though if one keeps in mind the historical background of this regional uniform law, which in 1975 succeeded three different national law systems. The Netherlands had had no specific design law at all before 1975. The lower courts originally often operated with notions as “aesthetically pleasing” before according copyright protection to designs, but in practice they were not at all miserly in feeling “pleased” and according protection.<sup>16</sup> Gradually even this terminology disappeared,<sup>17</sup> certainly after it became an established rule, by two Supreme Court decisions in the years 1961-1965, that the only requirement for copyright protection in general was originality, i.e. a work which as a result of creative

<sup>12</sup> 1940 GRUR, 59.

<sup>13</sup> See note 2, p. 100.

<sup>14</sup> Cohen Jehoram, IIC 1979, 775.

<sup>15</sup> Cf. Ljungman, in: Cohen Jehoram, *Design Protection*, Leyden, 1976, pp. 117-128.

<sup>16</sup> Cl. Limperg, *Bescherming van vormgeving tegen plagiaat*, Amsterdam/Brussels, 1971.

<sup>17</sup> Cohen Jehoram, in *Auteursrecht*, AMR 1982/5, pp. 119-121.

labor bears a separate or personal character.<sup>18</sup> Belgium on the other hand did possess a design protection before 1975. It was an extremely cumulative system, because this specific design regulation of a Royal Decree of 1935 simply referred to the Copyright Act with, as an only extra, an optional registration system. The Belgian courts seem to have protected designs without even applying any originality criterion: just everything was protected.

Now it appears from the Explanatory Note to the Uniform Benelux Design Law that the whole new Article 21 with its requirement of "markedly artistic character" for cumulative protection of designs was only aimed at abolishing the extreme former situation in Belgium. No change was intended for the old systems of the Netherlands and Luxembourg which had always applied the normal originality test for copyright protection of industrial design.<sup>19</sup>

Indeed, since 1975, the judicial decisions in the Netherlands concerning copying of designs do not suggest at all that copyright protection has been losing ground. If protection was denied, it was on grounds which would always have been valid in copyright cases; the lack of originality of plaintiff's design. This was made plausible often by the fact that the defender could produce similarly designed objects, older than plaintiff's design.<sup>20</sup> On the other hand, copyright protection has been granted to objects designed after 1975, which hardly seem to fall too literally under the statutory indication: "markedly artistic," like — in one court — a spinning wheel,<sup>21</sup> a vegetable crate,<sup>22</sup> a viewer for slides,<sup>23</sup> the famous Rubik's cube,<sup>24</sup> and children's clothing.<sup>25</sup> The 's-Hertogenbosch Court of Appeal's decision on this last industrial product expressly stated that it had not been the intention of the makers of the new Design Law to affect the traditional copyright law system at all. The highest judicial authority, the Benelux Court

of Justice, has indeed not yet pronounced on this subject, but the present tendency of the courts leads us to the conclusion that the Benelux countries, notwithstanding a statute which would point in another direction, in reality have a system of cumulative design protection.

Another cumulative system country is of course the United Kingdom since its Design Copyright Act of 1968, under which especially spare parts of automobiles seem to be a favorite object of copyright protection by the courts.<sup>26</sup>

According to Cornish, the experiment in that country has been to apply artistic copyright in the sphere of mass production to a radical degree. Artistic copyright under United Kingdom law may already exist in an entirely technical drawing and give rights in three-dimensional reproductions of that drawing, whether those reproductions are direct from the drawing or indirect, by copying a three-dimensional copy of the drawing. We are being informed that also other common law countries have taken steps in the same direction or even further, like New Zealand, South Africa and, even, the courts in the Irish Republic.<sup>27</sup> There is however a certain tendency to go back somewhat on this extreme position (the recent Green Paper of the Government), and Cornish himself seems to share the unease the courts have begun to show at the use of design copyright to prevent competitors from making rival spare parts to fit a given machine. I completely agree with him that "some further quality" should be required for copyright protection. This "further quality" could — in my opinion — be called "originality." He writes:

The trouble with this attitude for the British (as indeed for our transatlantic cousins) is that we never have taken kindly to claims of moral superiority for copyright, and that of course is but part of a deeper unwillingness to romanticise or beautify the creative artist or to protect him from the hard facts of the market place. Copyright here has been a matter of economic rights in which the interests of publishers and other entrepreneurs have been as influential as those of others.

I must say, being a continental European myself, that this approach of copyright is thoroughly familiar to me: it is exactly what I teach my students. In my opinion the difficulty does not lie with the lack of that indeed widely spread 19<sup>th</sup> century kind of romanticism Cornish indicates. But I do suspect British courts to be embarrassed with the saving notion of "originality," not because it smacks of moral superiority but because it requires the effort to

<sup>18</sup> HR 27.1.1961, NJ 1962, 355 (Radioprogramdata II) and HR 25.6.1965, NJ 1966, 116 (Radioprogramdata IV).

<sup>19</sup> Cohen Jehoram, *Design Protection*, Leyden, 1976, pp. 21-37 and pp. 177-180.

<sup>20</sup> Cohen Jehoram, in *European Intellectual Property Review*, 1981, pp. 235-240, especially note 17.

<sup>21</sup> Court of Appeal Arnhem, December 19, 1977, BIE 1978, 99.

<sup>22</sup> Court of Appeal Amsterdam, June 29, 1979, BIE 1982, 83.

<sup>23</sup> District Court Almelo May 17, 1978, BIE 1981, 193. Compare however in a dispute between the owner of the same viewer and different defenders: President District Court Almelo December 5, 1979, BIE 1981, 329 who desired copyright protection and Court of Appeal Arnhem, Dec. 1, 1980, BIE 1981, 329, which left the question of copyrightability of plaintiff's viewer open because anyway the differences of defender's viewer were too great.

<sup>24</sup> Court of Appeal Amsterdam July 16, 1981, in *Auteursrecht* AMR 1982/1, 13. On this exceptional case: Cohen Jehoram, in *European Intellectual Property Review*, 1982, pp. 117-118.

<sup>25</sup> Court of Appeal 's-Hertogenbosch, February 6, 1980 and September 24, 1980, in *Auteursrecht* AMR 1982/2, p. 34.

<sup>26</sup> *Nichols Advanced Vehicle v. Rees* (1979) R.P.C. 127; *Gardner v. Sykes* (1981) F.S.R. 281. But of course also many other useful objects: see the notes of Cornish's paper.

Cornish in his note 18: "The Irish Republic has retained a regime equivalent to that under the British Act of 1911 and this has been held to confer full artistic copyright in functional designs."

<sup>27</sup> *Allibert v. O'Connor* (1981) F.S.R. 613.



overcome an honest vertigo for a certain amount of conceptualism.

The last and most famous example of a cumulative system is of course the French one, with its well-known principle of *l'unité de l'art* (the unity of art), which precludes any crumbling away of the copyright protection of applied art, as it is described by Mrs. Pérot-Morel. She raises some doubts though on the aesthetic conception of modern industrial design, which is subject to so many other, technical conditions which would be foreign to the personal expression of the author, the real subject matter of copyright. For my part, I think that modern design does not essentially differ from older designs, albeit our 19<sup>th</sup> century ancestors often had a keener eye for the mere ornamentation than for the bare form of industrial products, which meanwhile has always existed, and which has always been the essence of applied art. It is therefore that I am deeply attached to the French system according to which the absence of "artistic character" (those arty flowers on teacups) does not at all preclude copyright protection for the bare form of the teacup or, to mention a famous example of a French court case,<sup>28</sup> the unadorned plastic salad bowl.

Mrs. Pérot-Morel expresses fears that the isolated position of the French law will be an obstacle for any effort to harmonize the laws in the EEC on our subject, or to reach a community law system of design protection.

### Conclusion

If this comparative law survey I have given in my paper can serve one purpose, it is exactly to make us more aware of the fact that none of our law systems is really operating in splendid national isolation. In fact, internationally speaking, only two widely spread systems exist, the exclusive and the cumulative systems. In my paragraph on the advantages of copyright protection over design protection, and vice versa, everything points to the superiority of a cumu-

lation of both kinds of protection, which in fact means a combination of two series of advantages. This could also be an indication for the European Commission in Brussels, whenever they would really start with a project to harmonize the laws on our subject or create community law for the 10 countries of the Common Market, the majority of which already belong to the family of cumulative protection systems.

Another solution would be the one I put forward in my EIPR article of 1981, which has served as basis material for national reporters of ALAI, and which has found support from Mr. Krüger. My proposal was to have a uniform solution to our problem as I see it, and which would mean that both parties, industrial property specialists as well as copyright specialists, would have to add a little water to their respective wines.

The industrial property experts will simply have to recognize that industrial design is applied art and as such the subject matter of copyright protection. The copyright specialists will have to understand that the protection of industrial design is in the first place an affair of industry, and they will accordingly have to be guided by the wishes of industry with respect to protection on a number of important points, such as registration, publication and the shorter term of protection. This could lead to the repeal of the specific design laws in the countries of the European Communities, that is to say, to the introduction of a single form of legal protection, namely under the respective copyright laws, but then a form of copyright protection adapted to the wishes of the industry in question. In this vein one could think of introducing optional registration and publication of designs, and of a 25-year term of protection. The Berne Convention leaves room for this, and in its latest version, that of Paris 1971, also provides for a satisfactory connection with third countries which do have specific design protection, a provision which was previously lacking.<sup>29</sup>

<sup>28</sup> Cass. Crim. May 2, 1961, J.C.P., II, 12242.

<sup>29</sup> Article 2(7) of the Paris Act of the Berne Convention.

## Correspondence

### Letter from Hungary

Mihály FICSOR \*

The last "Letter from Hungary" was published in the December 1978 issue of this review. Since then a lot of important developments have taken place in Hungarian copyright law which may be interesting also for copyright lawyers of other countries. This time I do not intend to follow the usual structure of such "Letters" — that is, I shall not separate international matters, domestic legislation and case law — because, as we shall see, those different aspects have been closely interrelated in the most important fields on which I shall be giving information here. It seems to me better to take the different problems and deal with them in chronological order, showing how they have been solved by either jurisprudence or legislation or both.

#### *1. The Amendment of the Copyright Act as a Consequence of the Revision of the Civil Code: Stronger Sanctions for Moral Rights Infringements*

In my last "Letter"<sup>1</sup> I wrote about the amendment of Act IV of 1959 on the Civil Code of the Hungarian People's Republic by Act IV of 1977, which entered into force on March 1, 1978.

In fact that was more than mere amendment. It was quite a comprehensive revision required by changes in Hungarian economic and social policy, which put much more emphasis on market, commodity and value considerations and on material and moral stimulation of both corporate bodies and citizens. The new developments were not restricted to the chapters of civil law which were in obvious and close connection with the economy and with production, ownership and contractual relations. When the rigid centralized management system and some obsolete dogmas were abandoned, and the trend towards introducing new, more liberal and democratic elements in economic and social life could be more and more intensely felt, it necessarily affected many other fields too, including the field of personal-

ity rights and the protection of intellectual creations.

I reported in my 1978 "Letter" on the changes in the Civil Code concerning the protection of intellectual creations, and explained why the provisions on such protection were regarded as parts of civil law according to the broader conception of that branch of law, and how they were connected to the general principles of the Civil Code on the protection of personality rights (even though the detailed provisions on copyright and industrial property are contained in separate acts).

Here I have to revert to just one amendment in greater detail, namely the new sanction introduced during the revision of the Civil Code regarding infringements of personality rights. This is the possibility of compensation for non-pecuniary losses.

The original 1959 version of the Civil Code was still based on the dogmatic thesis that if an unlawful act had not caused any strictly identifiable pecuniary losses, no compensation should be ordered. The philosophy underlying that thesis was that certain injuries — such as trauma, defamation, the deformation of the face or the body, etc. — could not be expressed in money, and it would not be correct to treat human values and feelings according to pecuniary categories (of course it was a different matter when the court ordered the person who had caused such injuries to pay damages if some material losses had also emerged, such as the cost of medical attention). That was also part of the fundamentally wrong conception according to which in a socialist legal system all elements associated with market, commodity and material value considerations should be restricted as much as possible.

The 1977 Act disposed of that rigid idea, and the new Article 354 of the Civil Code contains the following provision:

The infringer shall compensate the injured person for his non-pecuniary losses if the infringement has made durably or seriously more difficult his participation in social life or his life in general.

When submitting this provision to the National Assembly, the Minister for Justice made it clear that the new Act did not intend to restrict its scope to injuries to health and corporal integrity, but also

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<sup>1</sup> *Copyright*, 1978, pp. 456-469.



wanted it to cover cases of violation of other personality rights (rights of reputation, etc.).

The range of sanctions under the Copyright Act remained untouched even after the amended Civil Code had entered into force, thereby creating an obvious contradiction in the legal system.

The sanctions for infringement of author's rights were contained in Articles 52 and 53 of the Copyright Act, and they did not seem efficacious in cases of infringements of moral rights.

Under paragraph (1) of Article 52 (which is unchanged even now), the author may demand, depending on the circumstances of the case:

— the establishment by a court of the fact of the infringement;

— the discontinuance of the infringement and an injunction against the infringer so as to prevent further infringements;

— redress ensured by the infringer in the form of a statement or in some other appropriate manner, and, if necessary, publicity as befits such redress, ensured by the infringer at his own expense;

— the cessation of the injurious situation, reinstatement of the situation preceding the infringement by the infringer or at his expense, and

— the destruction of the object produced through infringement or the elimination of its injurious property.

Paragraph (2) of Article 52 provided for the possibility of material compensation, but under the old legal regime restricted it to cases of effective material loss. It read as follows:

If the violation of copyright has also caused pecuniary damage, compensation shall be paid according to the rules of civil law liability.

That provision was not in keeping with "the rules of civil law liability," or more specifically with the new Article 354 of the Civil Code after its entry into force on March 1, 1978.

Of course, the obligation to pay also remuneration in cases of infringement was another matter again. In order to avoid ambiguity, paragraph (1) of Article 53 provides that "in cases of unauthorized use of a work, the author has the right also to appropriate remuneration." Furthermore, paragraph (2) of the same Article provides as follows:

If infringement is attributable to the user, a fine in the amount of the author's remuneration shall be adjudged in addition to the remuneration due to the author and in addition to damages.

It means that the infringer has to pay twice the remuneration that would have been due in the case of lawful use. However, those special fines have to be paid to the account of the Ministry of Culture, which uses them for social, welfare purposes for the benefit of authors and for the promotion of culture.

The obligation to pay remuneration plus the same amount again as a fine plus damages if further pecuniary losses have been caused, seemed together to be an appropriate sanction system for infringements of pecuniary rights. A stronger sanction was badly needed, however, in cases of infringement of moral rights. And what was needed first of all was the possibility of compensation for non-pecuniary losses.

That was why the Bureau for the Protection of Authors' Rights (ARTISJUS) submitted a proposal to the Ministry of Culture and the Ministry of Justice immediately after the promulgation of the Civil Code amendment, asking for the removal of the contradiction between the Civil Code and the Copyright Act, and that of course by introducing non-pecuniary damages in the copyright sanction system also.

After that the preparatory work began; it resulted in the drafting of Decree-Law No. 27 of 1978 (of the Presidium of the Hungarian People's Republic) amending and completing the Copyright Act No. III of 1969. It was promulgated on December 7, 1978, and entered into force on January 1, 1979.<sup>2</sup> The Decree-Law amended paragraph (2) of Article 52 of the Copyright Act as follows:

In the case of infringement of copyright, damages shall be payable according to the relevant provisions on liability under civil law. Continuous or serious infringement of the rights attaching to the person of the author is also considered to afford entitlement to damages.

Since the new provision entered into force there has not been a legal dispute such as would have given an indication of how jurisprudence will interpret it, and what infringements will be judged "serious." Nevertheless, it is sure that the copyright law arsenal for defense against infringement has been enriched with an important, efficient weapon.

When it was established that the Copyright Act had to be amended in line with the revision of the Civil Code, the question arose whether it would not be opportune to amend or complete it in other respects too.

The need for further amendment was evident even then. Jurisprudence had developed in a very controversial way regarding co-authorship on the basis of the new provisions of the 1969 Copyright Act. There seemed to be only one solution, which was to amend those provisions.

Of course, the copyright protection organizations, namely the Bureau for the Protection of Authors' Rights (ARTISJUS) and the Art Fund, which deals with the protection of fine art creators, also wanted to make use of that opportunity, and they jointly proposed the introduction of the following "innovations": *droit de suite*, *domaine public payant* in the case of *droit de suite*, and a special payment on blank tapes, cassettes and recording equipment.

<sup>2</sup> *Ibid.*, 1979, p. 110.

The two Ministries accepted the proposal for the *droit de suite* and the *domaine public payant*, but, with regard to the suggested solution of the problems of home taping, they found it premature and were of the opinion that further study was needed. A similar delaying decision was taken on the proposal of the Federation of Art Workers' Unions (which represented the interests of performing artists) concerning new rights to be granted in respect of performances and accession to the Rome Convention.

Under the next three headings I shall deal with the further amendments contained in Decree-Law No. 27 of 1978, which I referred to earlier.

## 2. *The End of an Adventure with Aesthetic Evaluation: A New Provision on Co-Authorship*

The old Copyright Act (No. LIV of 1921), which was in force until January 1, 1970, provided for co-authorship as follows:

If the work has been created by more than one author and their parts are not separable, unless otherwise agreed, the consent of all the co-authors is necessary for the reproduction, publication and putting into circulation of the work.

On the basis of that provision, jurisprudence was unambiguous and definite about the joint authorship of dramatico-musical works: the composer on the one hand and the authors of the libretto and lyrics on the other had separate rights in their own parts. It followed from this that the terms of protection of music and text had to be calculated separately after the composer's and the author's death respectively. There was one exception, of course, namely when the composer had participated in the creation of the text, or vice versa.

There was no reason to think that the 1969 Copyright Act had effected any real innovation with its Article 5 on joint authorship. That Article read as follows:

(1) Concerning a work of joint authorship, provided that it cannot be separated into self-contained parts, copyright shall be vested jointly in the joint co-authors, and, in case of doubt, in equal proportions; however, any of the co-authors shall be entitled to take independent action for infringement of copyright.

(2) If the joint work can be separated into parts without prejudice to the work, the co-authors shall be entitled to independent copyright in such parts.

The Act used different words for co-authorship in the two cases defined above; however, they can only be translated into foreign languages by means of a somewhat complex periphrasis. Paragraph (1) defined "joint co-authorship" (in Hungarian "*szerzőtársaság*"), and paragraph (2) defined "simple co-authorship", (in Hungarian "*társszerzőség*").

Those two categories were important from the viewpoint of the calculation of the term of protection,

because Article 15(2) of the 1969 Act reads as follows:

The fifty-year term of protection shall be counted from the first day of the year following the author's death and, in the case of joint co-authors (Article 5(1)) from the first day of the year following the death of the co-author who died last.

As far as co-authorship is concerned the special provision of that paragraph covers only the case of "joint co-authorship." In the case of "simple co-authorship" (Article 5(2)), the general provision prevails, under which the term of protection has to be calculated independently author by author, and not from the death of the last of them.

The first law suits on co-authorship concerned precisely that question of the term of protection. I gave detailed information about those law suits (the "John the Hero" and "Sybill" cases) in my last "Letter." Here I will refer to them only to the extent necessary for the understanding of the reasons for the amendment of the provisions on co-authorship.

In the "John the Hero" case, the Supreme Court surprisingly departed from traditional juridical practice despite the fact that nothing in the new Copyright Act itself indicated the need for such a step. The judgment of the Supreme Court (Pf. III. 21.027/1974/4) was that the parts of the popular dramatico-musical work involved (music, libretto, lyrics) could not be separated without prejudice to the joint work itself, so the authors of those parts were "joint co-authors," with the result that the 50-year *post mortem auctoris* term of protection had to be counted for all the co-authors from the death of the last of them.

The representatives of copyright protection should theoretically have been glad of that fundamental change in jurisprudence, because it would have afforded some successors in title longer protection. In practice, however, their gladness was clouded by two factors.

The first was that, unfortunately, the judgment did not seem to be in keeping with the provisions of the Copyright Act. The second was even more important: the Supreme Court had come to its finding by adopting the method of aesthetic evaluation (which is one of the biggest menaces to the proper functioning of any copyright system).

In the "Sybill" case, the Bureau for the Protection of Authors' Rights (ARTISJUS) drew attention to the contradictions of the "John the Hero" decision, and especially to the dangers of aesthetic evaluation. Unfortunately it did so in vain. The judgment of the Supreme Court in that second case (Pf. III. 20.016/1978/5) further increased uncertainty by emphasizing still more that the separability of parts of dramatico-musical works had to be studied case by case, the answer depending not on the fact that the parts objectively could be separated and used, but on

the value of the parts and the way in which their combination within the joint work had influenced that value.

It was a typical example to illustrate the harmful effect of using aesthetic criteria as conditions for copyright protection or for the determination of its extent. After the new court decision the situation seemed quite hopeless. In the field of dramatico-musical works we might have known which version of co-authorship was involved and consequently how the term of protection was to be counted if a law suit had taken place in each case, where the court — maybe on the basis of an expert opinion or maybe precisely against it — had decided those aesthetic questions.

There seemed to be only one solution: prompt amendment of the Copyright Act, for which the opportunity was available. However, before any legislative step was taken, we also had to study how the Supreme Court came to adopt that strange and contradictory stand, and above all what basis it thought it had found in the Copyright Act itself.

From the reasoning of the two judgments it emerged that it was the wording of Article 5 and especially that of its paragraph (2) that seemed to be the main source of misunderstanding.

There was a close internal relation between paragraphs (1) and (2) of Article 5, because in the case of co-authorship there were only two possible categories. It necessarily meant that when paragraph (1) gave a definition of "joint co-authorship" it defined "simple co-authorship" at the same time, the same being true of paragraph (2), which gave a direct definition of "simple co-authorship" and an indirect one of "joint co-authorship."

In a way, it was a drafting error that caused two seemingly separate definitions to be worked out. What was more, the two paragraphs did not use the same wording for the criterion of demarcation. According to paragraph (1) joint co-authorship existed if the joint work was *not separable into self-contained parts*, and — conversely — simple co-authorship was involved if *such separation was possible*, while under paragraph (2) we could speak of joint co-authorship if the parts were *not separable without prejudice to the joint work*, and of simple co-authorship if *the separation of parts was possible without such prejudice*.

It was perfectly clear that no real contradiction was conceivable between the two provisions, because they drew *the same borderline between the same two categories*. So only one explanation was possible, namely that the two paragraphs formulated *the same criterion* from two different angles or at least in two different wordings. And all it meant was that if a work could be regarded as a whole composed of self-contained parts, it was also true that the work was

separable into parts without prejudice to the joint work.

And yet the Supreme Court interpreted the relation of the two criteria in just the opposite way. It found that, even if the music of the two dramatico-musical works on the one hand and their libretti and lyrics on the other were self-contained parts of the joint works, they did not conform to the other criterion (determined by paragraph (2) of Article 5), because they were not separable without prejudice to the whole work.

The main reason the Court gave for its surprising statement was that the parts of dramatico-musical works generally constituted — both quantitatively and qualitatively — a lesser value than the whole works, and that consequently their separation would cause a prejudice to the work. Thus it was held to be irrelevant whether the parts were self-contained, even if they could be used — published, performed, etc. — independently.

The first instance court had gone even farther in the "Sybill" case, when giving the reason for its judgment (and the Supreme Court agreed with that decision in every respect). It stated that the lyrics of the operetta were of so little aesthetic value that they did not deserve copyright protection in themselves; it was music that had made them eligible for protection. The court even quoted the text of one of the duets as a proof of its reasoning. The words of many hits of our day are no better than that. I think this is just enough to indicate where that jurisprudential tendency would have led if there had been no legislative intervention.

After it had become quite obvious that it was misinterpretation of the expression "prejudice to the joint work" that had caused the jurisprudential anomalies, it was necessary to get rid of the expression by amending paragraph (2) of Article 5 of the Copyright Act. At the same time it seemed advisable to concentrate more single-mindedly on the objective criteria of separability of parts (which are reflected first of all in the fact that the parts could also be used — published, performed, etc. — separately).

Thus Decree-Law No. 27 of 1978 amended paragraph (2) of Article 5 of the Copyright Act as follows:

(2) If the joint work can be separated into independent parts, the co-authors shall be entitled to independent copyright in such parts.

At the same time Decree No. 4 of the Minister for Culture of December 7, 1978,<sup>3</sup> completed his Decree No. 9 of December 29, 1969, concerning the implementation of the Copyright Act with the following interpreting provision:

<sup>3</sup> *Ibid.*, 1979, p. 111.

Article 3A. The joint work shall be regarded as divisible into independent parts if the parts can be separated from each other and also be used (produced, published, etc.) independently.

Thus the borderline questions of co-authorship have now been regulated according to clear, objective criteria.

However, anyone who thought that this unambiguous legislative step had put an end to the adventure of our jurisprudence with aesthetic evaluation would be mistaken.

One of the judges of the three-member chamber of the Supreme Court that handed down the judgments in the controversial "John the Hero" and "Sybill" cases published an article in which he declared nothing less than that the new provisions had not made any change necessary in the position adopted by the court in those cases, and that the separability of parts in dramatico-musical works should continue to be judged on the same basis.

Given that unexpected and virtually incomprehensible development, it was not surprising that a new "John the Hero" case started.

The Budapest Operetta Theater stopped paying royalties to the composer of "John the Hero" when the new provisions entered into force (on the grounds that the music was separable from the libretto and lyrics, and that the fact of the other parts being still protected therefore did not alter the fact that 50 years had elapsed from the composer's death, which meant that his contribution did not enjoy protection any longer).

The Budapest Municipal Court, as court of first instance, found for the composer's heirs, declaring once again that the parts of the popular operetta were not separable. The reasoning of the decision collided head-on with the new provisions, and contained the most blatant declaration in favor of aesthetic evaluation in the long series of court decisions on this subject: it said that it was not enough that the parts of the work could be used separately. According to the judgment, the question of separability did not depend on those objective facts but on aesthetic evaluation (*sic*) of the parts, and in the case of "John the Hero" the libretto and lyrics did not reach the minimum aesthetic level (*sic*) that would be needed to qualify for protection by copyright.

Fortunately the prediction of the Supreme Court judge quoted above has not proved correct. In its judgment, Pf III. 20.278/1980, the Supreme Court found that the reasons given by the court of first instance were completely wrong and handed down a decision in keeping with the new provisions. It stated that the music of the operetta on the one hand and its libretto and lyrics on the other were separable and could also be used independently (it had been proved that it was more than just a possibility: not only had the music of the operetta been performed many times

separately, its text had also been published!). It drew attention to the fact that in such cases no other criterion was necessary to determine the separability of parts, consequently the term of protection had to be counted separately from the death of the different co-authors.

I hope that with the above judgment aesthetic evaluation has been buried for ever in Hungarian juridical practice (however in doing so I fear that I am being perhaps somewhat overoptimistic).

### 3. *Sinking an Old Debt: Introduction of the Droit de Suite*

At the time of the elaboration of the 1969 Copyright Act, the idea of introducing the *droit de suite* in Hungarian copyright law was rejected. That rejection was based on two reasons. The first was a consideration of principle: it was thought that in a socialist system, where the State played an important role in supporting artistic activity, such a legal device was not necessary. The second argument referred to the practical problems of supervising the contracts to be covered by the *droit de suite*.

During the preparatory work on the 1978 Decree-Law the Hungarian copyright organizations succeeded in proving that those arguments had been wrong even then, and that they had become still more wrong with the fundamental changes in economic management and social policy. With market value and price considerations taking on more and more importance, and with the trend towards diminishing direct State intervention, copyright provisions simply cannot remain as they were under the overcentralized system of economic and social life. Precisely established rights of individuals — as authors' rights are — become even more necessary in such circumstances. And as far as the *droit de suite* is concerned it is really an indispensable element of the pecuniary rights of fine art creators, and the only way in which the justified interests of painters, sculptors, etc., in the material results of the social utilization of their works can be fully enforced.

The practical problems of implementing the *droit de suite* cannot be accepted as decisive obstacles if such a question of principle is involved. That is just another aspect, and legal provisions obviously have to be adapted to such practical considerations also.

Decree-Law No. 27 of 1978 completed the Copyright Act with the following Article 46A:

When the property rights in original works of fine art and applied art are transferred, an author's fee shall be paid in cases and to the extent specified by the Minister for Culture.

The Minister for Culture published the detailed provisions referred to in the Decree-Law simultaneously in the form of Decree No. 4 of December 7, 1978, already mentioned above.

According to Article 3 of the Decree, *droit de suite* covers the cases where property rights in paintings, drawings, reproduced pictorial graphic works and works of applied art, marked with serial numbers and the initials of the author, and works of sculpture or tapestries are transferred by the Commission Store Enterprise, the State Book Distribution Enterprise or the "Művelt Nép" Book Distribution Enterprise (hereafter referred to as "intermediary enterprises").

That was the practical solution to the problem of monitoring transfers of property rights qualifying for the *droit de suite*. Those intermediary enterprises effect the majority of such transfers, and they are obvious points both for monitoring and for the collection of fees. Thus the *droit de suite* does not cover private transfers of rights, which in any event are difficult to control, but it does prevail realistically in an important and wide circle.

The fee payable is 5% of the purchase price paid by the buyers. The intermediary enterprises are responsible for collecting the fees and for their transfer to the Art Fund. The Art Fund pays the fees to the author of the work or to his successors in title.

The Decree introduces an exception that restricts the rights of successors in title in certain well-defined cases. For instance, if the buyer is a museum or a museological public collection, it has to pay such a fee only if the author is alive.

#### 4. An Uncontroversial Application of a Controversial Legal Concept: The Introduction of *Domaine Public Payant*

The advantages and disadvantages of the *domaine public payant* have been discussed fairly widely recently, mainly in connection with the famous idea of a 50-year term of protection followed by 20 years of *domaine public payant*, as an alternative to the 70-year term of protection (which has been raised in the discussions on copyright harmonization possibilities in EEC countries). I personally am in full agreement with those who look on such an idea with suspicion and antipathy. Its adoption would promote the tendency of depersonalization and "socialization" of authors' rights (together with the application of "taxes" and "levies" in certain cases instead of real authors' fees), which is one of the most serious threats to the healthy development of copyright law.

However, the *domaine public payant* can be dangerous not only as an "alternative" to authors' individual rights, but in another way too, namely if the users have to pay for public domain works from the same restricted sources that they draw on to pay authors' fees. I do not wish to go into detail on these special "cake theory" considerations, but it is obvious that, for example in the case of musical performing right royalties when they are paid as lump sums for

practically the whole world repertoire, the possibility of those lump sums being increased proportionally everywhere is decidedly dubious. It might have a detrimental effect on real authors' royalties: they would even be reduced in certain cases. It is said that in connection with uses of *grands droits* (for instance in the case of theater performances), the *domaine public payant* could make contemporary works more competitive. Perhaps indeed that hope is not always unfounded, but there could be adverse side effects there too. For example, if a theater is subsidized and the subsidy is determined as a specific amount, the need to pay for classical works would indirectly decrease the funds available for contemporary work fees. And we could quote further examples.

It is understandable, therefore, that the Hungarian authors' organizations were cautious of this legal concept, and until 1978 had not taken any step towards its introduction.

The *droit de suite* seemed to be quite different, however. *Droit de suite* fees are paid by separate buyers of works of fine art and applied art. There is no real danger of payments for public domain works, if introduced, consuming the "cake" of contemporary artists, and here it really can create a more favorable competitive situation if the same percentage of the purchase price is collected in the case of non-protected works also.

So the new Decree-Law has introduced the *domaine public payant* by completing the Copyright Act with the following Article 15A:

After the expiration of the protection of the author's economic rights, a charge shall be paid in cases specified by statutory provisions.

Of course, as in the case of the *droit de suite*, this provision also needed the detailed provisions of Decree No. 4 of the Minister for Culture of December 7, 1978. Article 2 of that Decree inserted a new Article 13 A into Decree No. 9 of December 29, 1969, on the implementation of the Copyright Act, which provides that after the expiration of the term of protection, in the same cases of transfer of property rights in works of fine art and applied art as those concerned by the *droit de suite*, the same percentage of the purchase price (5%) has to be paid by the buyers. Such payments are collected by the Art Fund and have to be used for welfare and social purposes of all kinds of authors (the income from the *domaine public payant* has to be used not only for fine art and applied art creators, but also for writers, composers, etc.; this is because the Art Fund, besides being the copyright protection organization of creators of applied art, is also responsible for handling social and welfare matters on behalf of all authors).

Museums and museological collections enjoy complete exemption here. It is in keeping with the

exception introduced in their favor in the case of the *droit de suite* (see above), that they should not have to pay any fee for public domain works either.

##### 5. *A Cake, Hungarian Style: A Regretful "No" to New Rights for Performers and to the Rome Convention*

When, as I mentioned, the Government accepted the drafts which later became the new Decree-Law and the Decree of the Minister for Culture, dealt with above, it declared at the same time that the settlement of certain other copyright and neighboring rights problems would be premature and considered that further studies were needed. As far as the rights of performing artists were concerned, the Government took a formal decision in which it ordered the Ministry of Culture to set up a committee to study the possibilities for broadening those rights and the prospects for accession to the Rome Convention.

The 1969 Copyright Act provides for the rights of performers in its Articles 49 and 50.

Article 49 covers pecuniary rights. According to it the consent of the performer — of the conductors and the principal participants (soloists) in case of ensembles — is required for

— recording the performance for purposes of putting the recording into circulation or of public performance, or

— transmitting the performance, without recording it, to an audience not present.

However no consent is required in cases where the law does not require the author's consent for the use of works enjoying copyright protection.

If the performers are professional performing artists, a remuneration is due for any recording or transmission as mentioned above, unless otherwise agreed and except in cases of free use.

The Copyright Act does not specify any term of protection in the case of performers' rights. There are two schools of thought on this question. According to the restrictive interpretation a performer's rights are protected only during his lifetime, because the Act does not provide for any term of protection *post mortem*. There is another, more generous interpretation. It too concentrates on the fact that there is no special provision on the term of protection, but it concludes therefrom that the 50-year term provided for in the Act as a general rule is the one that applies.

Article 50 of the Copyright Act provides for the moral rights of performing artists in the following way:

The moral right to have the name indicated and to protection against distortion shall be vested in the performer (the leader and the principal participants of the ensemble) in the case of recording for purposes of putting the recording into circulation, or of public performance, and in the case of transmission.

In February 1979 the Ministry of Culture set up a special committee composed mainly of independent experts (university professors, judges, etc.) but representatives of the users on the one hand and of authors' and performers' organizations on the other also took part in its work.

It is obvious from the provisions quoted above that the Copyright Act gives performers pecuniary rights only when certain primary utilizations are involved. So the most important task of the committee was to study the possibility of providing for new rights in the case of secondary uses (first of all those covered by the famous Article 12 of the Rome Convention).

The committee submitted its findings and proposals to the Ministry of Culture in May 1980. The report contained three major conclusions.

The first was that it would be justified to give new rights to performing artists in the case of secondary uses too, because such uses are becoming more and more prevalent under the influence of galloping technological progress, and because without such new rights certain justified basic interests of artists might be endangered.

The second conclusion was that the introduction of such rights would represent a substantial new burden for certain users (such as radio and television). In a climate of increasing economic problems, they would be able to cover those new expenses only by cutting others, including the cost of copyright fees. However, the committee did not recommend the introduction of any new right if that should entail restriction of the practical value of other, existing ones. In that case there would be only one acceptable solution: a special subsidy from the central State budget.

Finally, the third conclusion was that, even if there were temporary economic obstacles to the introduction of new performers' rights the question should remain on the agenda and should be solved as soon as was practicable.

Of course, at a time of world economic recession, when the Hungarian Government is also faced with serious budget problems it is not surprising that the Government has not taken on the burden of separate subsidies for new performers' rights. However the question is definitely on the agenda of the competent bodies, and it will be studied again officially in detail, albeit not earlier than at the beginning of the next legislative period (starting in 1986).

Well, can we say that this is an example of adoption of the often criticized "cake theory?" It depends on what we understand by the theory of course. If the theory is that new performers' rights — or such rights in general — necessarily go together with the restriction of the practical value of the existing rights of authors, then it may perhaps be called a theory and it may be wrong as a generality (because in reality it



may be that way, but it may also be another way). However, if such statements are involved as those according to which "sometimes the introduction of performers' rights diminishes the resources available for authors' fees" or "in these cases it has emerged that new performers' rights would have had such results," we cannot speak of a "theory." Those are statements of fact and if the facts really exist, it is no use denying them on "theoretical" grounds.

In Hungary nobody has accepted the "theory" itself, but everybody has had to accept the facts mentioned above. Another question is that even if they had taken those facts as they were, the committee and the Government could have said: "If such new rights can be introduced only with simultaneous restriction of some existing ones, then let us introduce them, in that way." However, I think they were right not to do so: it is better to wait a little longer instead of having to withdraw or restrict something that has been correctly given and practised.

As far as the Rome Convention was concerned, the delaying of any final decision applied to it too. It has been found that accession would be possible even without any really substantial changes in the present provisions of the Copyright Act (of course, a special provision on the term of protection and some other additions would be needed). In that case, however, Hungary could accede to the Convention only at a very low level, availing itself of nearly all the possible reservations. That would be inelegant and in any case pointless (it would not even be good for the Convention if the proportion of such low-level members were to increase). There too it is better to wait a little.

#### 6. *A Theory-Free New Cake: Royalty on Blank Tapes and Cassettes*

The representative of the Bureau for the Protection of Authors' Rights (ARTISJUS) was also a member of the above-mentioned committee dealing with performers' rights. When it became clear that the cake could not be enlarged enough for at least the same portions to be given to the "regular customers" and for slices to be cut at the same time for the waiting new clients, the representative of ARTISJUS put forward a new idea: "Why not make a completely new cake from which performers as well as authors could have a slice? We should introduce a special levy on blank tapes and cassettes and if possible also on recording equipment to offset the losses caused by the ever-greater popularity of home taping."

At that time ARTISJUS was already in the process of preparing the cake in question. The trade union representing performers, backed by both the politically strong National Council of Trade Unions and the special government decision on the study on widening performers' rights, seemed to be an excel-

lent ally in the undertaking. With that alliance the chances of the project improved significantly.

ARTISJUS used the findings of the 1977 and 1978 Unesco-WIPO Working Group and Subcommittee meetings<sup>4</sup> as the basis on which to work out its proposals.

It is obvious that widespread home taping is contrary to the legitimate interests of authors and conflicts with the normal exploitation of protected works. Under paragraph (2) of Article 9 of the Berne Convention such use must not be permitted unconditionally by member States. It emerged from the meetings mentioned above that the only realistic way for member States to meet their obligations was for an indirect obligatory license for home recording to be introduced with a royalty (not a tax, not a levy, not any other fiscal imposition, but a real copyright royalty) on blank tapes and cassettes and/or recording equipment, to be paid by users and collected for copyright owners.

As far as the Hungarian Copyright Act is concerned, its relevant provision — paragraph (1) of Article 18 — is worded in a way that offers an appropriate basis for the type of solution suggested by the Unesco-WIPO meetings. It reads as follows:

Everybody shall be authorized to make copies of any published work provided that such copies are not intended for purposes of putting the work into circulation or producing receipts, and otherwise do not infringe upon the rightful interests of the author. This provision shall not apply to works of architecture or to technical works.

Of course, it is the expression "do not infringe upon the rightful interests of the author" that is important here, because it encompasses practically the same conditions as are contained in paragraph (2) of Article 9 of the Berne Convention.

Home taping is becoming a more and more widespread phenomenon also in Hungary and it is certainly common enough already to be considered a serious infringement of "the rightful interests of the author."

So, it would have been a violation of an express provision of law (and of the Berne Convention) if home taping had continued to be an instance of fair use.

In the opinion of ARTISJUS, not even amendment of the Copyright Act was absolutely necessary for a correct solution to be worked out, because the Act was unequivocal in that respect, and the necessary detailed provisions could be inserted into Decree No. 9 of the Minister for Culture, of December 29, 1969, on the implementation of the Copyright Act.

ARTISJUS put forward a proposal to the Ministry of Culture concerning an indirect *compulsory* license with a royalty to be paid by buyers of

<sup>4</sup> *Ibid.*, 1977, pp. 90-91; pp. 408-409.

both blank tapes and cassettes and equipment and to be distributed among authors, performers and phonogram producers. After the long preparatory consultations between the interested ministries and the representatives of copyright and neighboring rights organizations, we had a draft on an indirect *legal* license with a royalty payable only for blank tapes and cassettes.

The special royalty was introduced by Decree No. 15 of the Minister for Culture, of November 20, 1982, amending Decree No. 9 of December 29, 1969, on the implementation of the Copyright Act.<sup>5</sup> The new Decree entered into force on January 1, 1983. It completed the 1969 Decree with a new Article 14A.

According to the new provision, anybody who initially puts into circulation blank tapes or cassettes (blank "mediums" as the Decree puts it) which are suitable for making sound or visual reproductions is required to remit 8% of the returns on sales (in the case of domestic products the basis is the "cost" price; in the case of imported products, it is the wholesale price) to ARTISJUS. Transfer and accounts are due twice yearly two months after the end of the calendar half-year.

There are certain exceptions. The payment of such remuneration is not required in respect of:

- export items;
- blank tapes and cassettes fitting only devices (such as studio equipment and dictating machines) which, if properly used, are not suitable for reproducing works for private use.

Out of the royalties thus collected, after the deduction of costs:

- in the case of sound tapes and cassettes, 50% is due to the authors 30% to the performers and 20% to the phonogram producers;
- in the case of visual tapes and cassettes (sales of which are not yet significant in Hungary), 70% is due to the authors and other owners of copyright, and 30% to the performers.

As far as the authors' share is concerned it will be distributed among individual authors and other owners of rights (taking into account partly the structure of "mechanical" right royalties and partly that of royalties for broadcast "small right" works).

Under the new Decree the performers' share is transferred by ARTISJUS to the Federation of Art Workers' Unions. The Federation has to use the sum thus received for subsidy, welfare and collective purposes in respect of performers.

Hungary is not party to any multilateral or bilateral agreement which would make obligatory the transfer of any part of the phonogram producers' share to foreign producers (only private recording being involved here). So the share is transferred to

Hungarian producers according to their participation in national phonogram production.

In February 1981, I published an article on our draft concerning home taping royalties.<sup>6</sup> I finished it with the following words:

We would be glad if Hungary were to be the third in this field, after the Federal Republic of Germany and Austria. We would be even happier if it were the 25<sup>th</sup>, but within two years.

We have succeeded within that two-year limit, but it is a pity that our "placing" is so much better than 25<sup>th</sup>.

#### 7. *An Early Answer to Cable Television: An Open-Ended Solution*

During the elaboration of the home taping provisions, it became clear that a new problem had emerged for Hungarian copyright law that was also connected with technological progress: cable TV had found its way into the country. "Community antenna systems" have been established — mainly in the western part of Hungary — which use powerful aerials, amplifier installations and cable networks to permit the simultaneous reception not only of Hungarian programs but also of the programs of neighboring countries (Austria, Czechoslovakia, Yugoslavia, Romania and the Soviet Union). Some systems service 20,000 to 30,000 flats, but there are smaller ones too. As far as non-simultaneous relaying but original cable programs are concerned they are only in an experimental stage in certain towns. The cable networks are maintained generally by "town management companies" or by "electrical maintenance cooperatives," which collect a certain amount of money as a "maintenance fee."

Article 11<sup>bis</sup>(1) of the Berne Convention contains a very clear provision for such situations:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing . . . any communication to the public by wire . . . of the broadcast of the work, when this communication is made by an organization other than the original one.

Our "community antenna systems" constitute communication to the public of the programs of Hungarian and foreign broadcasting organizations, and that communication is made by organizations other than the original ones. So can there be any doubt that the authorization of such communications is an exclusive right of the owners of authors' rights? Of course, if we take the Berne Convention seriously — and we wish to do so — we are bound to answer that there can be no doubt regarding such a right.

As far as Hungarian copyright law is concerned, there are no detailed provisions in the Copyright Act

<sup>5</sup> *Ibid.*, 1983, pp. 166-167.

<sup>6</sup> *Ibid.*, 1981, pp. 59-64.



on specific exclusive rights of authors. The Act has adopted a more global solution, which seems to be better in view of the new uses of protected works constantly emerging in line with technological development. It provides as follows in paragraph (1) of Article 13:

Unless otherwise provided in this Act, the consent of the author shall be required for any use of his work...

And paragraph (3) of the same Article adds:

Unless otherwise provided in this Act, the author or his successor in title shall be entitled to remuneration for the use of the work.

There was thus no special provision on cable or "community antenna" systems in Hungarian copyright law. So it meant, under Article 13 of the Copyright Act, that it was the exclusive right of owners of authors' rights to authorize the retransmission of broadcasts of their works in the framework of such systems.

ARTISJUS wanted to make that legal situation clear during the recent copyright revision, at the same time as the question of home taping was settled.

It seemed obvious to us that work-by-work authorization would not be practical in this case. So we suggested that the problem should be solved by means of collective administration.

The theory of the "direct reception zone" or "service zone" is as international as the phenomenon of cable TV itself. It was no surprise when, on putting forward its proposals, ARTISJUS had to contend with the argument that in such zones cable retransmission should be free even if it was made by a "third" organization. Fortunately it succeeded in proving that neither the "direct reception zone" nor the "service zone" was relevant from the viewpoint of the Berne Convention, which — rightly enough — contains only one condition, namely that the communication to the public of the broadcast should be made by an organization "other than the original one." Any exception to the obligations of those "other" organizations would be inconsistent with Article 11<sup>bis</sup>(2), of the Berne Convention. However, there was not only that "legalistic" argument for proving that the same author's rights should exist everywhere regardless of direct reception or service zones. It was obvious too that cable distribution was a distinct act of public use, a separate source of income to cable distributors in every possible "zone," and it was not relevant at all that a program could perhaps also be received without cable facilities. What was important was the fact that a new use attached itself to protected works, and it went without saying that the authors had the right to authorize every individual use of their works.

Decree No. 15 of the Minister for Culture, of November 20, 1982 (mentioned above in connection with home taping) has added new paragraphs (4) and

(5) to Article 19 of Decree No. 9 of December 29, 1969, implementing the Copyright Act. The new paragraph (4) provides as follows:

Concerning the simultaneous communication to the public of works broadcast in radio or television programs by wire or in any other manner, made by an intermediary organization other than the original one, the author's consent and that of the radio or television organization shall be considered given if the organization communicating the work to the public has paid to the Bureau for the Protection of Authors' Rights the fee established with the approval of the Ministry of Culture. The performers shall also receive a share of the amounts thus remitted.

If we want to qualify this solution we may not find it too easy. However, as far as the present interpretation of the new provision and the practice based on it are concerned, the most correct qualification seems to be that it is a collective administration system with compulsory assignment of rights to an authors' society (ARTISJUS) rather than simple compulsory licensing. This is because the license is not given automatically, and it cannot be assumed that cable operators are given licenses in any circumstances. Cable distributors have the right to relay programs only if they have first paid a fee to ARTISJUS. It is evident that the real nature of this solution depends first of all on whether there is real negotiation between "community antenna" and cable networks and ARTISJUS, whereupon the approval of the Ministry is a quite automatic act, or just the opposite, namely where the Ministry takes the real decision and there is no room for negotiation. For the time being the first version prevails, which corresponds to correct interpretation of the new Decree. ARTISJUS negotiates directly with cable systems, and the Ministry gives its approval to the ready-made agreements. The first agreements have been concluded in this way, and the Ministry has agreed on the principle worked out in the negotiations with the representatives of cable operators, namely that the operators will pay 10% of any payments collected by them for the simultaneous relaying of Hungarian and foreign programs (regardless of the legal basis they specified for that fee; thus it also covers the so-called "technical maintenance fee"). The agreement is still pending with certain other cable systems that first want to establish, by means of a decision of the National Price Office, whether they will be able to collect a higher fee from the users of the systems on the grounds that authors' remuneration has emerged as a new "burden," or whether they will have to cover that cost themselves from the original amount of users' fees. According to ARTISJUS, the "transferring of burdens" to users is correct, but then of course the 10% author's remuneration will have to be paid on the basis of the new, higher fee.

According to the new Decree, after the deduction of costs, 50% of the fees paid to ARTISJUS is due

to the authors or other owners of copyright, 30 % to the performers and 20 % to the radio or television organization. The share due to the performers is to be transferred and used in the same way as with home taping royalties (see above). It is certain that the owners of copyright will receive their share individually, but the detailed distribution rules have yet to be made final. The same question is pending among the member societies of the International Confederation of Societies of Authors and Composers (CISAC) and will be dealt with by a working group established for just that purpose.

#### 8. *Accommodating a Bull in a China Shop: The Copyright Protection of Computer Software*

The protection of computer programs and the documentation relating to them (collectively known as software) is not a new question in Hungarian copyright law. I reported on a court decision of 1972 in my last "Letter from Hungary"<sup>7</sup> which found that the disputed computer program was "a new and independent scientific intellectual work eligible for copyright protection."

Unfortunately, even though the plaintiff appealed against that decision, the case did not go to the Supreme Court, because the parties later suspended the law suit by common consent and, on expiration of the maximum term of suspension, it was discontinued. A long time passed without any further software disputes before the courts, so that for a while it did not become clear whether or not that legal standpoint could be regarded as an established juridical practice.

The lack of new court decisions did not mean that legal theory on software protection was not developing in the meantime. It was as long ago as in 1977 that György Boytha published a very detailed study on this subject.<sup>8</sup> It described international developments in this field, thoroughly analyzed both copyright conventions and national legislation, and proved in a very convincing way that the best possible solution was copyright protection (for which only some "genre"-oriented detailed provisions were needed to make it absolutely safe and workable). His paper was followed by a series of articles<sup>9</sup> in different Hungarian journals and newspapers, and a great many discussions were held in the framework of juridical and computer organizations and associations.

<sup>7</sup> Judgment No. 25 P. 27.228/1972/21 of the Municipal Court of Budapest. See *Copyright*, 1978, p. 463.

<sup>8</sup> A revised version of that paper was also published in English in 1979, in Volume 21 of *Acta Juridica Academiae Scientiarum Hungaricae*, pp. 337-367.

<sup>9</sup> One more article is available in foreign languages. See Peter Gyertyanfy: "Software as a New Subject Matter of Copyright Law," *RIDA* 1982, Vol. 113, pp. 71-133.

As a result of that wide-ranging professional analysis, the attitude of Hungarian lawyers dealing with intellectual property matters has become fairly uniform on all the important questions. Without going into details (which would not be possible in a "Letter"), we could summarize that attitude in the following points.

— For there to be efficient protection of computer software, its creators have to enjoy exclusive rights.

— Of the existing international protection systems that guarantee such rights, patent protection either cannot be applied at all or can be applied only in exceptional cases (for instance under Hungarian patent law in cases where the program is an integral part of a technological process).

— The notion of work under copyright law covers computer programs also and the documentation belonging to them. Both international conventions and national laws (including Hungarian law) define that notion broadly, generally without any limitative list of types of works. Computer software is a scientific work, more specifically a scientific writing in the sense of applied science, so it should be protected by copyright law (a program may also contain real new scientific elements, but that is not a condition of eligibility for protection). Of course, to be protected the software has to be individual and original. However, in the great majority of cases the verification of individuality and originality does not cause any difficulty: in practical terms, where there is no plagiarism or infringement it can be ascertained that the program is individual, original and, as a written work of applied art, is under copyright protection.

— Copyright law protects computer programs against plagiarism and unlawful utilization (including any form of reproduction and adaptation). As far as the running of programs is concerned, if it is absolutely necessary to identify it with an existing type of use covered by copyright protection, that too is possible, because running is at least an ephemeral *reproduction* of the program in the machine. However, in Hungarian copyright law there is no need for such identification because, as we have seen above, there is a general provision there to the effect that all uses depend on the authorization of the author unless the law makes an exception to that rule. And, of course, no exception is made for the running of a program.

— There are particular provisions in force on certain specific "genres" and types of works. Such provisions seem to be necessary in the case of software also.

— It is conceivable that a *sui generis* software protection system will be worked out in the future. However, it is far from sure that such a system would offer a substantially better solution than copyright protection. The latter has another very important

advantage: it already exists. Even if it were found that copyright law was not ideal in every respect, it would be unwise not to make use of the possibilities it offers. If there really were a better option at some time in the future, the fact of copyright protection being already applied would not be an obstacle to its adoption. In that case copyright law would become a parallel, "standby" protection. Decree No. 9 of December 1969, of the Minister for Culture, on the Implementation of the Copyright Act, makes it clear in its Article 1(2) that

... copyright protection shall be independent of any protection existing on another ground and arising from specific provisions concerning the various creations (e.g. innovations, inventions, trademarks, industrial designs, etc.) and shall not affect the validity of the specific provisions relating thereto.

At the end of the 1970s and at the beginning of the 1980s a "boom" began in software production. It was closely connected with the fact that many more possibilities had been given to the different forms of private undertakings. Programmers seemed to be interested in those possibilities because they were to be formed in many such undertakings. They concluded contracts with companies and software houses, and the protection of their works became more and more important. They consulted ARTISJUS and asked for its participation in the conclusion of those contracts and in the collection and distribution of their fees. ARTISJUS has participated in nearly 500 contracts in recent years.

Another task of ARTISJUS is the representation of authors in legal disputes before the courts and other authorities. ARTISJUS undertook the representation of two program creators in 1980 and 1981, and initiated law suits on their behalf. Both legal disputes involved cases where programs were created by employee-authors and the employers questioned their eligibility for protection under copyright law, refusing to pay authors' fees when they sold the programs to third parties. The Municipal Court of Budapest delivered its judgments on January 27, 1982, and March 31, 1982, under numbers 2.P.26.859(1980)40 and 2.P.24.506(1981)18 respectively, and in both cases found in favor of the claims represented by ARTISJUS. The court declared that individual, original programs enjoyed copyright protection as works of applied science, and stated — on the basis of the opinions of the Committee of Copyright Experts — that the programs and documentation involved in the two cases corresponded to the criteria of individuality and originality, and that consequently the employers had infringed the rights of the programmers when they had not paid them authors' fees.

The defendants have appealed against the judgments and the cases are still pending before the Supreme Court. However, now there is no doubt as to what will be the decision on the merits — namely on

the question of the copyright protection of software — because in the meantime legislation itself has answered that question.

ARTISJUS had proposed an unequivocal declaration of copyright protection of computer programs and the elaboration of the necessary "genre"-oriented specific provisions in connection with the 1982 amendment of Decree No. 9 of the Minister for Culture, of December 29, 1969 (see above). However, the ministries concerned were unable to reach agreement on the most important specific provision, namely the special settlement of the employee-author's fees in the case of software. The decision therefore has been postponed because we did not want to delay home taping and cable TV solutions for the sake of software.

Fortunately, the preparatory work was speeded up at the beginning of 1983, and the new decree on the copyright protection of software was promulgated not much later than the previous amending decree. It is Decree No. 15 of the Minister for Culture, of July 12, 1983, on the amendment and completion of Decree No. 9 of December 29, 1969, implementing the Copyright Act.

Article 1 of the new Decree completes the non-exhaustive list of protected works contained in Article 1 of the 1969 implementing decree with "computer programs and the documentation belonging to them" (it mentions in brackets that it will call them collectively "software" in subsequent provisions).

Article 2 settles the problems of employee-programmers by amending Article 12 of the implementing decree. Before writing about these new provisions, however, I have to explain the underlying problems.

The Copyright Act of Hungary provides for employee-author's rights in its Article 14, which reads as follows:

If the creation of the work was the author's duty arising from his employment and the employer is authorized to make use of such work by virtue of the terms of employment, the handing over of the work shall qualify as consent to make it available to the public, and the right of use shall devolve upon the employer by the act of handing over. The employer shall acquire this right within the sphere defined by the terms of employment and shall exercise it only within the sphere of his activities. The author shall only be entitled to use his work, even outside that sphere, with the consent of his employer, but the employer shall not have the right to withhold his consent except for well-founded reasons.

The 1969 Decree on the implementation of the Copyright Act added some more detailed provisions to the above in its Articles 11 and 12. From the viewpoint of the present problem, Article 12 was the important one. It read as follows:

(1) If the employer enters into a contract for use of the work with a third party during the validity of his right of use under Article 14 of the Copyright Act, 60 to 80 percent

of the amount of royalties — according to the decision of the employer — shall accrue to the author, the employer being bound to pay the respective sum within eight days following the receipt by him of the royalties. If the conclusion of the contract with a third party for the use of the work lies within the sphere of the activities of the employer, the latter may also set the share of the author, in view of the costs incurred in the creation of the work, at a level lower than 60 percent of the amount of royalties.

(2) If the right to use the work created under an employment obligation is exercised by the author, with the consent of the employer or as a result of the termination of the latter's right of use, the total amount of royalties shall accrue to the author.

As we can see, the rules were flexible enough where the conclusion of contracts lay within the original sphere of activity of the employer (the share of the author had to be between 0 and 60%). In the other case, however, the 60-80% range was too rigid when a software contract was involved. A number of elements are included in the price of software besides the authors' contribution (among them many costs incurred by the employer, the proportion of which is much higher than with other protected works). It seemed right, therefore, to determine special percentage limits for software contracts.

The new Decree has amended paragraph (1) of Article 12 of the 1969 Decree by providing for 10-30% in the case of software instead of 60-80%, leaving it untouched with regard to other works. Moreover, it has given the employer the possibility of establishing a special order for paying authors' shares, likewise covering software only (instead of the general eight-day limit, the employer may stipulate a different time limit or may make the payment depend on some condition. With this special provision the Decree intends to allow special global incentive systems to be worked out at "software houses").

The other provisions of the new Decree are of an administrative nature.

So the bull eventually did come into our china shop and on passing through to its well-partitioned quarters in the storeroom at the back it did break something: that nice 60-80% share for employee-authors did not escape unscathed. We hope no other harm will be done. The bull now seems quite calm, and even grateful that we should have given it shelter. However, if ever it becomes more demanding or aggressive, we shall have to be very vigilant in the protection of valuable, fragile antiques.

## International Activities

### International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)

#### Assembly and Annual Meeting

(Munich, September 5 to 7, 1983)

#### Note \*

The International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) held its annual meeting and the third session<sup>1</sup> of its Assembly in Munich in September 1983.

WIPO provided the interpretation facilities and other financial support, including the travel expenses of some officers of the Executive Committee and members of the Association coming from developing

countries. The European Patent Organisation provided the conference room. Seventy professors and researchers from 25 countries participated in the meeting. WIPO was represented by Mr. Gust Ledakis, Legal Counsel, who is also a member of the Association.

The Assembly of the Association noted with approval the reports on the activities and on the accounts of the Association, presented by its President, Professor Friedrich-Karl Beier (Federal Republic of Germany). Reports were also presented by the chairmen of three working committees, on the work of their respective committees: by Professor E.D.

\* Prepared by WIPO.

<sup>1</sup> For a note on the second session of the Assembly, see *Copyright*, 1982, p. 376.

Aracama Zorraquín (Argentina), on the preparation of curriculum materials for teaching in developing countries; by Professor Alberto Bercovitz (Spain), on the protection of the results of academic research; by Professor Glen E. Weston (United States of America), on orientation and teacher exchange programs.

The Assembly also expressed its satisfaction that the membership, which had initially been 69 in July 1981 when the Association was founded, had increased to 187 by September 1982, and had further increased to 220 as of the beginning of the meeting (from 41 countries, including from 17 developing countries). The Assembly also approved proposals by the Executive Committee for the program and activities and the budget for 1984.

Working sessions, consisting of all the members who were in attendance, were held under the chairmanship of those professors hereafter mentioned, at which reports were presented by different members, on the following topics: problems of *teaching* intellectual property with particular emphasis on the needs of developing countries (Chairman: Professor E.D. Aracama Zorraquín (Argentina)), with reports by Professors Janusz Szewaja (Poland) Nébila Mezghani (Tunisia) and Stojan Pretnar (Yugoslavia); *copyright* problems of reprography in teaching and research (Chairman: Professor Gunnar Karnell (Sweden)), with reports by Professors Karnell, Victor Nabhan (Canada), André Françon (France) and Dr. Paul Katzenberger (Federal Republic of Germany); modern *research* methods in intellectual property (Chairman: Professor Gerhard Schricker (Federal Republic of Germany)), with reports by researchers Dieter Stauder (Federal Republic of Germany) and F. Henning-Bodewig (Federal Republic of Germany)); the *European Patent System* (Chairman: Professor Friedrich-Karl Beier (Federal Republic of Germany)), with reports by Dr. Kurt Haertel (Federal Republic of Germany) and Dr. Jenö Staehelin (European Patent Office). The last-mentioned working session was also attended by Dr. h.c. J.B. van Benthem (President, European Patent Office) who, in view of his research and publication activities and contribution to the development of industrial property law, was invited to become a member of the Association.

On the basis of proposals made by the Nominations Committee, elections also took place. The officers, all of whom also constitute the members of the Executive Committee, will be as follows for the next two-year period (starting on September 8, 1983): President: Professor E.D. Aracama Zorraquín (Argentina); President elect: Professor William R. Cornish (United Kingdom); Vice-Presidents: Professors Gunnar Karnell (Sweden), Nébila Mezghani (Tunisia), Janusz Szewaja (Poland), and Glen E. Weston (United States of America); Treasurer: Professor Alberto Bercovitz (Spain). Professor

Friedrich-Karl Beier (outgoing President) was designated an *ex officio* member.

The Association adopted a resolution, prepared by its Executive Committee, the text of which is reprinted below.

The Assembly agreed to hold its annual meeting in 1984, in Geneva, at the headquarters of WIPO.

### Resolution

The International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP),

Meeting in Munich on September 7, 1983,

#### I.

*Recognizing* that the protection of intellectual property by the law on patents and inventions, industrial designs, trademarks, unfair competition, plant varieties, copyright, transfer of technology and anti-trust plays a significant role in the economic, technological and cultural development of all nations including that of developing countries;

*Convinced* that the efficacious creation, administration, defense and the transfer of intellectual property rights presupposes, among other things, that the teaching and research in the field of intellectual property receive appropriate attention from universities and other educational institutions;

*Notes* with concern that the teaching of and research in intellectual property at university level, although varying from country to country, is generally not commensurate with the economic, technological and cultural role of intellectual property and that this problem is particularly felt in developing countries;

*Welcomes* with appreciation the existing efforts of international organizations, as well as national institutes and centers devoted to teaching and research in the field of intellectual property, in providing assistance and facilities for teachers and researchers in that field;

*Urges* that appropriate action should be taken by governments, universities and other competent authorities of all countries in order to ensure that the teaching of and the research in the law of intellectual property becomes an effective ingredient of the educational process satisfying the societal need to train qualified personnel capable of understanding and applying intellectual property concepts and instruments in governmental policy, and in scientific, technical, industrial and commercial practice in order to promote scientific, economic and cultural progress;

#### II.

*Recommends* that such action should comprise the following measures:

— Universities should offer within their law faculties teaching on the law of intellectual property. Such

teaching should be offered in the form of a general introduction in basic courses to all students and, additionally, in the form of special courses on industrial property and copyright law, including the law on patents and inventions, industrial designs, trademarks, unfair competition, plant varieties, copyright, transfer of technology and antitrust. These special courses should at least be offered as optional courses at the graduate or postgraduate level and they should be given appropriate recognition for obtaining law degrees and bar examinations;

— The teaching of the law of intellectual property should take due account of its international and regional aspects as well as of its economic, social and cultural implications;

— The teaching of the law of intellectual property should not be restricted to universities, in particular to law faculties, but should rather be extended to other faculties, in particular those dealing with economics and social science, and to technical schools where engineers and technical and scientific personnel are trained and to other schools where persons engaged in the creation of the different forms of intellectual property receive their professional education, such as academies of art, film academies and the like;

— Universities and other institutions engaged in teaching and researching intellectual property law should be assisted with necessary and sufficient teaching, learning and research materials;

— Contacts should be established and intensified between teaching and research institutions on the one hand and governmental and intergovernmental agencies and bodies responsible for the administration of intellectual property, such as patent and copyright offices, on the other hand, and between teaching and research institutions and practitioners of intellectual property and their organizations such as inventors, authors, artists, lawyers, patent agents and judges;

— Teachers and researchers should be enabled, in particular by fellowship programs, to study the experience and particular problems in other countries; due attention should be given to enable exchanges of views and experience of international congresses and meetings;

— National and international programs of development cooperation should be strengthened to provide greater support for promoting the exchange of teachers and researchers in intellectual property between developed and developing countries and for assisting teachers and researchers in developing countries with sufficient teaching and learning material.

## Book Reviews

**International Copyright and Neighbouring Rights**, by *Stephen M. Stewart*. One volume of XII-740 pages. Butterworths, London, 1983.

The range of literature on copyright and neighboring rights has been enlarged by the appearance of another important book. The author of this impressive publication has prepared it with a view to providing practitioners, advisers in industry, academics and students with a textbook or reference book on this complex subject matter.

Part 1, which deals with international law, presents the history, the philosophy and the general principles of international copyright and neighboring rights. Separate chapters are devoted to each of the worldwide multilateral conventions, and one chapter to two European regional agreements.

The chapter dealing with the Berne Convention comprises a historical survey of its coming into existence and the subsequent stages of its development, up to the 1971 Paris Act. It is followed by a concise but thorough analysis of the basic principles and the most important provisions of this latest Act. However, the special provisions for developing countries, including the so-called ten-year regime for translations, appear under the heading of the Universal Copyright Convention.

The essence of neighboring rights is dealt with in a separate chapter. The author makes a distinction between neighboring rights in the narrow sense (the rights of performers, producers of phonograms and broadcasting organizations) and such rights in a wider sense (such as the

rights in photographs in certain countries, the rights of film producers in certain countries, or the rights in first editions of books); the second category is referred to as "related rights." This chapter is followed by three other chapters devoted also to neighboring rights, each dealing with one of the three present multilateral conventions (Rome Convention, Phonograms Convention, Satellites Convention).

One of the most interesting chapters is the one in which the author discusses the future of international copyright. He analyzes separately three categories of challenges: (i) to international law, (ii) to national law and (iii) to the effectiveness of copyright. The first category has its origin in the political concepts opposed to copyright, in the needs of developing countries or in the economic approach of governments. In the latter case, the author considers that a government will be inclined to ratify an international copyright or neighboring rights convention if it is of the opinion that the national prestige attached to the export of works of national authors equals the difference between the country's total imports and exports of copyrights. The challenges to national law come from what the author calls "consumerism," from the difficulties of enforcement and from the cases where copyrights are "taken out of the copyright sphere." Lastly, among the challenges to the effectiveness of copyright the author examines the problems raised by home taping, reprography, computers, videograms, cable diffusion and satellites.

Part 2 presents "a synopsis of the world's most important jurisdictions." The authors of these synopses are eminent copyright experts, most of whom are well-known authorities



on the international scene. This of course considerably enhances the value of the book. The contributors to Part 2 are the following: Robert Ditrach (Austria), Pierre Chesnais (France), Eugen Ulmer (Federal Republic of Germany), Valerio De Sanctis and Vittorio De Sanctis (Italy), Agne Henry Olsson (Scandinavia), William Wallace (United Kingdom), Mark Bogulavsky (Soviet Union), Hans Hugo von Rauscher auf Weeg (EEC), Barbara Ringer (United States of America), Henry Jessen (Latin America), Krishnaswami Ponnuswami (India), Yoshio Nomura (Japan) and James Lahore (Australia).

Seven appendices contain the full texts of the conventions dealt with in Part 1.

An ambitious undertaking like this one naturally cannot be immune from criticism. A first remark could be made concerning the choice of the countries whose national laws are presented to the reader. While considerable space has been devoted to Western European countries, only the Soviet Union is mentioned of all the socialist countries of Eastern Europe. One or two summaries of the legislation of the latter countries, which differ from each other on certain specific questions in the field of copyright or neighboring rights, might have made for a more complete picture of the situation in Europe. It is also regrettable that none of the African countries — some of which have recently adopted modern and complete laws in this field — appear on the list.

Consultation of this work on a comparative basis is not always easy because of the individual approach adopted by the authors of each of the outlines of national laws. That seems to be unavoidable, however, in view of differences in basic notions of legislation and legislative structure in a particular country or group of countries. Be that as it may, the excellent index at the end of the book helps to overcome this minor difficulty. M.S.

**Satellite Television and Third-Party Rights**, by *Abdallah Chakroun*. One volume of 286 pages. ASBU, Tunis, 1981.

This work, the only such one in Arabic, is written by the Secretary General of the Arab States Broadcasting Union (ASBU), one of the specialized agencies of the League of Arab States. It contains a special chapter dealing with intellectual property (Chapter II, pages 117 to 142).

In that chapter Mr. Chakroun starts by defining what is meant by copyright, and then answers the question whether

national protection alone is sufficient. This is followed by an analysis, of the three neighboring rights conventions, namely the Rome, Geneva and Brussels Conventions.

In that connection he mentions that no Arab country is yet party to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

With regard to the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Mr. Chakroun stresses the importance of this Convention to Arab countries, more especially in view of the growth of cassette piracy and the existence of important phonogram industries in a number of Arab countries.

The author closes the chapter with an analysis of the state of copyright legislation in Arab countries and their membership in the two main international conventions (Berne and UCC), with a brief account of the Model Law for Developing Countries.

F.M.

**Public Lending Right**. Reports of an ALAI-Symposium and additional materials. One volume of 198 pages. Edited by H. Cohen Jehoram. Kluwer Law and Taxation Publishers, Deventer, The Netherlands, 1983.

This volume, which deals with a comparatively new category of authors' rights, consists of two parts. The first is a collection of updated reports submitted at the Symposium of the International Literary Artistic Association (ALAI), held in September 1977 in Antwerp, on the lending and hiring of copies of protected works. The second contains articles on the situation in those countries where some public lending right system exists, but which was not reported on at the said symposium.

The authors of the reports reproduced in the first part are: F. Gotzen (Belgium), W. Weincke (Denmark), A. Dietz (Federal Republic of Germany), P.-L. Aro (Finland), A. Françon (France), M. Fabiani (Italy), J.H. Spoor (Netherlands), H. Cohen Jehoram (Netherlands), G. Karnell (Sweden), D. de Freitas (United Kingdom), J. Corbet (Belgium).

The articles in the second part have been contributed by P. Banki (Australia), S.R. Pétursson (Iceland), A.L. Sijthoff-Stray (Norway), E.A. Seeman (United States of America), J.W. Sumsion (United Kingdom).

## Calendar

### WIPO Meetings

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

#### 1983

**December 5 to 7 (Geneva)** — Berne Union, Universal Copyright Convention and Rome Convention — Subcommittees of the Executive Committee of the Berne Union, of the Intergovernmental Copyright Committee and of the Intergovernmental Committee of the Rome Convention, on Cable Television (convened jointly with ILO and Unesco)

**December 8 and 9 (Geneva, ILO Headquarters)** — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

**December 12 to 16 (Geneva)** — Berne Union — Executive Committee — Extraordinary Session (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

**December 12 to 16 (Geneva)** — Madrid Union — Assembly

**1984**

- January 17 (Geneva) — Informal Meetings with International Non-Governmental Organizations Concerned with Industrial Property or Copyright and Neighboring Rights**
- January 30 to February 3 (Geneva) — International Patent Cooperation (PCT) Union — Assembly (Extraordinary Session)**
- February 27 to March 24 (Geneva) — Revision of the Paris Convention — Diplomatic Conference**
- March 5 to 9 (Geneva) — Joint International Unesco-WIPO Service for Facilitating the Access by Developing Countries to Works Protected by Copyright — Working Group on Model Contracts Concerning Co-Publishing and Commissioned Works (convened jointly with Unesco)**
- April 2 to 6 (Paris) — Committee of Experts on the Question of Copyright Ownership and its Consequences for the Relations between Employers and Employed or Salaried Authors (convened jointly with Unesco)**
- June 4 to 8 (Geneva) — Committee of Experts on Private Copying of Works Protected by Copyright (convened jointly with Unesco)**
- June 18 to 22 (Geneva) — Group of Consultants on Legislative Provisions for Publishing Contracts (convened jointly with Unesco)**
- September 24 to 27 (Geneva) — Ordinary Sessions of the WIPO Coordination Committee and the Executive Committees of the Paris and Berne Unions**
- October 22 to 26 (Geneva) — Sub-Committee of the Intergovernmental Committee of the Rome Convention on the Application of the Said Convention in the Light of New Communication Techniques (convened jointly with ILO and Unesco)**
- November 26 to 29 (Paris) — Committee of Experts on Copyright Problems Related to the Rental of Material Supports of Works (convened jointly with Unesco)**
- December 10 to 14 (Paris) — Committee of Experts on the Intellectual Property Aspects of the Protection of Folklore at the International Level (convened jointly with Unesco)**

**UPOV Meetings****1984**

- April 4 and 5 (Geneva) — Administrative and Legal Committee**
- April 6 (Geneva) — Consultative Committee**
- May 15 to 17 (La Minière) — Technical Working Party on Automation and Computer Programs**
- June 11 to 15 (Bet Dagan) — Technical Working Party for Vegetables**
- June 26 to 29 (Lund) — Technical Working Party for Agricultural Crops, and Subgroups**
- August 6 to 10 (Hanover) — Technical Working Party for Ornamental Plants and Forest Trees, and Subgroups**
- September 25 to 28 [or October 8 to 11] (Valencia) — Technical Working Party for Fruit Crops, and Subgroups**
- October 16 (Geneva) — Consultative Committee**
- October 17 to 19 (Geneva) — Council**
- November 6 and 7 (Geneva) — Technical Committee**
- November 8 and 9 (Geneva) — Administrative and Legal Committee**

**Other Meetings in the Field of Copyright and/or Neighboring Rights****Non-Governmental Organizations****1984**

- Council of the Professional Photographers of Europe (EUROPHOT)**  
Congress — March 17 to 21 (Darmstadt)
- International Confederation of Societies of Authors and Composers (CISAC)**  
Legal and Legislation Committee — May 8 to 12 (Corfu)  
Congress — November 12 to 17 (Tokyo)
- International Council on Archives (ICA)**  
Congress — September 17 to 21 (Bonn)
- International Publishers Association (IPA)**  
Congress — March 11 to 16 (Mexico)