WIPO/CNR/SEL/89/ INF.1 Rev.
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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
WIPO in cooperation with
the Government of the Republic of Korea

Seoul, September 4 to 11, 1989

PROGRAM

5551D/CPD/0363D

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS
Seoul, September 4 to 11, 1989

WIPO/CNR/SEL/89/INF.1 Rev.
Original: English
Date: August 15, 1989

PROGRAM

Monday, September 4

09.30	OPENING CEREMONY
10.30	GENERAL ASPECTS OF INTELLECTUAL PROPERTY LAW Mr. Byong-Kyun LEE, Dean, the International Intellectual Property Training Institute (IIPTI), Seoul
11.30	BASIC NOTIONS OF, AND INTERNATIONAL CONVENTIONS ON COPYRIGHT Mr. Carlos FERNANDEZ BALLESTEROS, Director, Developing Countries Division (Copyright), WIPO
15.00	COPYRIGHT AND NATIONAL DEVELOPMENT - THE KOREAN EXPERIENCE Mr. Park CHOON-HO, Professor of Law, Korea University, Seoul
16.30	BASIC NOTIONS OF, AND INTERNATIONAL CONVENTIONS ON THE SO-CALLED NEIGHBORING RIGHTS Mr. Jukka LIEDES, Special Adviser, Ministry of Education, Helsinki

Tuesday, September 5

9.30	THE COLLECTIVE ADMINISTRATION OF COPYRIGHT Mr. Walter DILLENZ, Director, Society of Authors, Composers and Musical Publishers (AKM), Vienna
11.00	THE COLLECTIVE ADMINISTRATION OF THE SO-CALLED NEIGHBORING RIGHTS Mr. Jukka LIEDES, Special Adviser, Ministry of Education, Helsinki

15.00	NEW COMMUNICATION TECHNOLOGIES AND COPYRIGHT Mr. Walter DILLENZ, Director, Society of Authors, Composers and Musical Publishers (AKM), Vienna
16.30	NEW REPRODUCTION TECHNOLOGIES AND COPYRIGHT Mr. Jukka LIEDES, Special Adviser, Ministry of Education, Helsinki

Wednesday, September 6

9.30	COMPUTERS AND COPYRIGHT Mr. Ashok BHOJWANI, Managing Director, TSG Consultants (P) Limited, New Delhi and Vice President, Manufacturers Association of Information Technology of India
11.00	THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: BASIC RULES AND SPECIAL RULES FOR DEVELOPING COUNTRIES Mr. Carlos FERNANDEZ BALLESTEROS, Director, Developing Countries Division (Copyright), WIPO
15.00	PUBLISHING CONTRACTS Mr. Young-Bin MIN, CEO of Si-Sa-YoungO-Sa, Seoul
16.00	THE GOVERNMENT'S ROLE IN THE PROTECTION OF COPYRIGHT Mr. Hee-Chang YOON, Director, Copyright Division, Ministry of Culture and Information, Seoul
17.00	COPYRIGHT IN THE LAST DECADE OF THE TWENTIETH CENTURY - ROUND TABLE DISCUSSION Moderator: Mr. Carlos FERNANDEZ BALLESTEROS, Director, Developing Countries Division (Copyright), WIPO Participants: Mr. Hee-Chang YOON, Director, Copyright Division, Ministry of Culture and Information, Seoul Mr. Ashok BHOJWANI, Managing Director, TSG Consultants (P) Limited, New Delhi and Vice President, Manufacturers Association of Information Technology of India Mr. Walter DILLENZ, Director, Society of Authors, Composers and Musical Publishers (AKM), Vienna Mr. Jukka LIEDES, Special Adviser, Ministry of Education, Helsinki Mr. GOH Phai Cheng, Deputy Parliamentary Counsel, Attorney-General's Chambers, Singapore

Thursday, September 7, 1989

9.30	THE PROTECTION OF FOLKLORE Mr. Carlos FERNANDEZ BALLESTEROS, Director, Developing Countries Division (Copyright), WIPO
11.00	Country reports
15.00	Visit to the Korean Broadcasting Organization or some other institution
16.30	Visit to Copyright Deliberation and Conciliation Committee

Friday, September 8

9.30	EFFECTIVE ENFORCEMENT OF COPYRIGHT Mr. GOH Phai Cheng, Deputy Parliamentary Counsel, Attorney-General's Chambers, Singapore or another speaker from the region
11.00	THE WORLD INTELLECTUAL PROPERTY ORGANIZATION AND ITS PROGRAM OF DEVELOPMENT COOPERATION Mr. Carlos FERNANDEZ BALLESTEROS, Director, Developing Countries Division (Copyright), WIPO
15.00	SEMINAR ON "COPYRIGHT PROTECTION IN THE FACE OF NEW TECHNIQUES OF REPRODUCTION"

Monday, September 11

9.30	Country Reports
11.30	CLOSING CEREMONY

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

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GENERAL INFORMATION

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING
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GENERAL INFORMATION

ARRIVAL

On arrival in Seoul, you should go straight from the Kimpo Airport to the Manhattan hotel by taxi ; it's fare is about W3,000.

ACCOMMODATION

A single room with bathroom, including continental breakfast, has been booked for you at the Hotel Manhattan, 13-3 Yoido-dong, Young dungpo-gu, Seoul (Tel ; 780-8001/15, FAX ; 784-2332).

PLACE OF THE TRAINING COURSE

The Training course will be held in the International Intellectull Property Training Institute(IIPTI). You are expected at IIPTI on Monday, September 4, at 9:30 a.m. in the 2nd Lecture Room, 8th Floor, KFSB Building, 16-20 Yoido-dong, Youngdungpo-gu, Seoul(Tel: 785-1365, 5). It takes 5 minutes from the Hotel Manhattan to the KFSB Building on foot.

MEALS

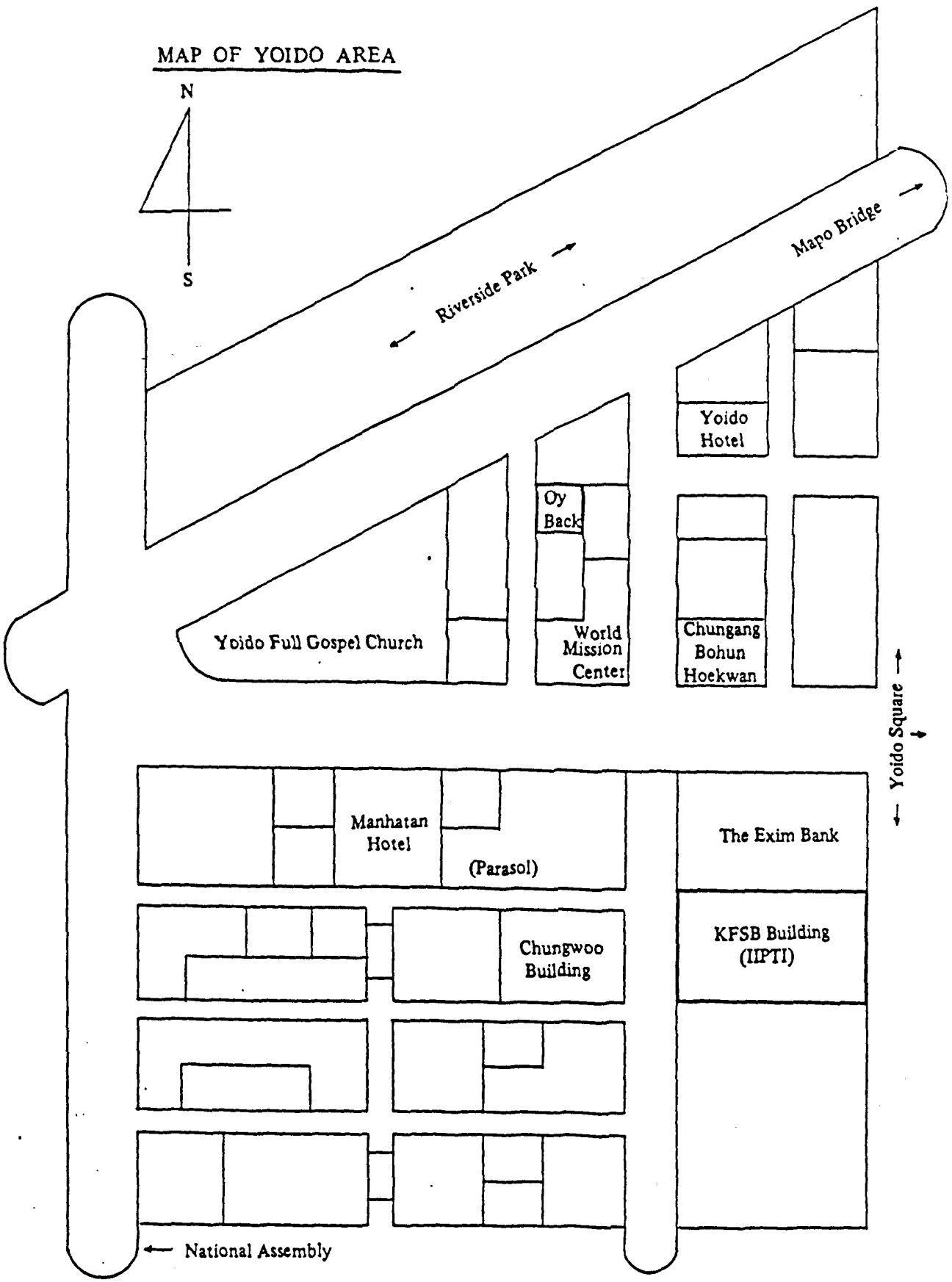
You may have meals in the hotel or any restaurant near the hotel and KFSB Building as you like. KFSB restaurant is located at the 10th floor of this Building. In a day this restaurant serves only 4 kinds of meals and the menu will be changed. The price is W1,500 for every meal.

Also, a few restaurants(Korean, Japanese, Chinese, and Western style) near IIPTI are available. The names of the restaurants are as follows.

RESTAURANT : Parasol (Korean, Western ; 784-9222)
Ye Sim (Japanese ; 782-5585)
Oy Back (Chinese ; 782-5393)
Country Life (Vegetable Buffet ;)

If you want to get to the above restaurants, please refer to "Map of the Yoido Ares" in the next page of this pamphlet.

For all other questions and requests, please contact Mr. Choi, Program Director(Tel ; 784-7182) or Mr.Yoon, Director in Copyright Division(Tel ; 720-3151)


MAP OF YOIDO AREA
N
S
Riverside Park
Mapo Bridge
Yoido Hotel
Oy Back
Yoido Full Gospel Church
World Mission Center
Chungang Bohun Hoekwan
Yoido Square
Manhatan Hotel
(Parasol)
The Exim Bank
Chungwoo Building
KFSB Building (IIPTI)
National Assembly

GUIDE TO SEOUL

POPULATION

Seoul is both the capital and the heart of the Republic of Korea, may be complex and crowded, containing 10 million of the nation's 43 million people.

CLIMATE

The climate in Seoul during the month of September is generally sunny, with pleasant temperatures(18°c (64.4°F)), however, nights may be a little chilly.

LANGUAGE

Koreans have an independent and distinctive language called Han-Gul, however, some of them understand English.

CURRENY AND EXCHANGE RATES

Korean currency is called Won. The basic exchange rate is about 670 Won to one U.S. dollar. There are 500, 1,000 , 5,000 and 10,000 Won notes and coins of 10, 50, 50, 100 and 500 Won.

TELEPHONE

Local calls can be made from red and gray colored phones.
Two W10 coins are needed to make a call. International calls can be made by international subscriber dialing(ISD) or with operator assistance.

MAIL

Postal services can be obtained at all post offices. Domestic postal rates are W80 for up to 50 grams of letter. International postal rates are less than U.S. one dollar.

EMERGENCY

Dial 112 for the police, and 119 for the fire department.
The hotel front desk or hotel manager can arrange for a doctor or ambulance. If you need a doctor on the street, ask someone or policemen for assistance. Police stations are on major streets.

BUSINESS HOURS

While weekday business hours in government offices run from 9 a.m. to 6 p.m. , foreign diplomatic missions are open from 9 a.m. to 5 p.m. On satu rday, government offices are open from 9 a.m. to 1 p.m. , however, foreign's are closed.
In the case of Banks, they open from 9:30 a.m. to 4:30 p.m. on weekdays and from 9:30 a.m. to 1:30 p.m. on saturday.

TRANSPORTATION

TAXIS : There are 2 types of taxis in Seoul. The regular taxi charges a basic fare of W700 for the first 2 km and W50 for each additional 350m.
Medium-Sized taxis charge a basic fare of W800 for the first 2 km and W100 for each additional 480m. However, a 20% surcharge is added from midnight to 4 a.m. in both taxis.

SUBWAY: Seoul have excellent subway systems, containing 4 lines.
Line 1 runs through the heart of the city
Line 2 traces a circular route
Line 3 across the city from NE to SW
Line 4 across the city from NE to SW

The subway fare system is divided into zone one(W200) and zone two (W300)

BUSES : The city's local buses are purple and white. Tokens cost W140(W150 in cash on the bus). The green and beige-colored buses are city express buses. The fare is W400.
Unfortunately, the airport bus doesn't run to Manhattan Hotel.

FOOD & RESTAURANTS

Restaurants in hotels are open seven days a week, but those outiside hotels close twice a month. Lunch is available from noon to 3 p.m. and dinner from 6 p.m. to 10 p.m. They usually accept credit cards such as VISA, American Express, Dinersclub, etc.
There are many different style restaurants in Seoul ; Korean, Western Chinese, Japanese and Pakistani. etc.

SHOPPING

Seouloffers a wide variety of shopping opportunities ; arcades, department stores, duty-free shops, specialized shopping districts, and out-door markets.

Major department stores are open from 10:30 a.m. to 7:30 p.m. daily.

INTERNATIONAL AIRLINES

- Airlines maintaing regular flight service in and out of Korea

Air France	753 - 2574
Cathay Pacific Airways	779 - 0321
Japan Air Lines	757 - 1711
Korean Air	752 - 2221
Malaysian Airlines System	777 - 7761
Singapore Air Lines	755 - 1226
Thai Airways International, Ltd	779 - 2621

- Other Airlines with resident offices

Air india	778 - 0064
American Air Lines	775 - 3314
British Airways	777 - 6871

FOREIGN MISSIONS AND BANKS

EMBASSIES :	India	798 - 4257
	Indonesia	782 - 9203
	Pakistan	739 - 4422
	Philippines	568 - 9131
	Thailand	795 - 3098
INTERNATIONAL ORGANIZATIONS :	UNDP	633 - 9451
	UNESCO	776 - 2661
FOREIGN BANKS :	American Express Int'l Banking Corp	753 - 2435
	Chase Manhattan Bank N.A.	777 - 2435
	European Asian Bank	754 - 3071
	Indian Overseas Bank	753 - 0741
	Int'l Bank of Singapore Ltd	778 - 3171
	Security Pacific National Bank	777 - 9571

PLACES OF WORSHIP

Chogyesa Temple ; Kyonji-dong, Chongno-gu, Seoul 735-5864, everyday 10 a.m. , 6 p.m. (Korean)

Korea Muslim Federation ; Hannam-dong, Yongsan-gu, Seoul 794-7307, Fri. 1 p.m. (Arabic)

Myongdong Cathedral ; Myong-dong, Chung-gu, Seoul 776-0813 Sun. every hour (Korean)

Yoido Full Gospel Church, Youido-dong, Seoul 782-5111, Sun. 9, 11 a.m. , 1 p.m. (English)

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LIST OF PARTICIPANTS

5760D/CPD/0363D

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING
COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS
Seoul, September 4 to 11, 1989

WIPO/CNR/SEL/89/INF.3
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BASIC NOTIONS OF, AND INTERNATIONAL CONVENTIONS ON COPYRIGHT

prepared by the International Bureau
of the World Intellectual Property Organization (WIPO)

5766D/CPD/0363D

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING
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BASIC NOTIONS OF, AND INTERNATIONAL CONVENTIONS ON COPYRIGHT

prepared by the International Bureau
of the World Intellectual Property Organization (WIPO)

What Is Intellectual Property?

1. The law on copyright and so-called neighboring rights is part of what is generally referred to as intellectual property. The content of this concept is explained in the following paragraphs.

2. Creations of the mind, like music or an idea for an invention, cannot, like physical objects, be protected against other persons' use by the mere possession of the object. Once the intellectual creation is made available to the public, its creator can no longer exercise control over the use made of the creation. This basic fact, i.e. the inability to protect something by the mere possession of an object, is underlying the whole concept of intellectual property law.

3. The law on intellectual property aims, generally speaking, at safeguarding creators and other producers of intellectual goods and services such as inventions, trademarks, trade names, designs and works of the mind.

4. Intellectual property law is traditionally divided into two main sectors, viz. industrial property law and copyright law.

5. Industrial property law embraces protection of inventions by means of patents, and other similar rights, protection of certain commercial interests by means of trademark law and law on trade names and also the law on protection of industrial designs. Close to industrial property rights of the kind now mentioned is the repression of unfair competition and the protection of certain other concepts, such as appellations of origin. Copyright law embraces the provisions on protection of authors' rights in literary and artistic works. These rights are in English generally referred to as "copyright" in the strict sense of the word. Copyright in a broader sense embraces, however, also the protection of performing artists, producers of phonograms and broadcasting organizations (the so-called neighboring rights). The following paragraphs up to paragraph 25 deal essentially with copyright in the strict sense of the word, but what is said there applies, to a certain extent, mutatis mutandis, also to the so-called neighboring rights.

6. The essence of copyright is that this branch of law grants authors and other creators of works of the mind (literature, music, art) certain rights to control, for a limited time, certain uses made of their works.

7. Copyright, in a given country, is regulated by laws. Laws are, however, generally concerned only with acts accomplished or committed in the country itself. Since this applies also in the field of copyright, protection provided by a national law on copyright is effective only in the country concerned. It has no effect in other countries.

8. Works of the mind are usually meant to be disseminated beyond national frontiers. In order to promote such international dissemination, on the one hand, and protection of these works, on the other, States had earlier concluded bilateral treaties but have later adhered to certain multilateral conventions leading to an international protection of copyright.

9. Copyright law protects the form which the author has given to his or her ideas, not the ideas themselves. The creativity protected by copyright law is the creativity involved in the choice and arrangement of words, musical notes, colors, shapes and so on. Copyright law protects the owner of rights in literary and artistic works against those who "copy," that is to say, those who take and use the form in which the original work was expressed by the author.

10. Because the protection under copyright law prevents only unauthorized use of the forms of expression of ideas, it does not consequently prevent another person from using the same ideas to create independently a work which is similar to the one existing previously. Therefore, the law can be (and in most countries is) purely declaratory, that is, the law can simply declare that the author of an original work has the right to prevent other persons from copying or using his work in certain other specific manners. Under such a law, a public register of works (like in the case of patents for inventions) protected by copyright is neither necessary nor desirable.

11. Effective copyright protection and ensuring payment to the authors are a necessary incentive for the creation of works and a sine qua non for encouraging local talent to devote its energies to furthering national intellectual creativity and are, in fact, one of the fundamental means for the support of national authors. Without copyright protection, authors will have no incentive to create. Those who assist in the dissemination of works (publishers, producers of cinematographic works, etc.) could not acquire the exclusivity needed for their activities in agreement with the author, a condition precedent to any investment in the process of making the work accessible to the public.

12. The development of modern media for the reproduction of works has brought forth new forms of expression which have considerably widened the field of literary and artistic production in the context of sound and vision and has provided authors with countless new means of conveying to the public their literary, philosophical or scientific message.

13. In some developing countries, radio, television and the cinema compete seriously with books for the attention of the public. Nonetheless, reading still remains the basis of every efficient teaching method, and books are an essential means of information, education and culture. Books, as well as films and soundtracks, are part of a country's national production and represent something that can be used in trade exchanges.

14. The work itself is the reflection of the author's personality, the message he wants to convey to his contemporaries or pass on to posterity. Quite another matter is the material support in which the work is embodied, for instance, the paper for a book or the canvas for the painting. Thus it is

very important to draw a distinction between the work itself, i.e. the intellectual creation which can be protected under copyright law, and the object embodying the work, for instance, a book or a record which can be subject to the legislative provisions on ownership, etc. under civil law.

Why Copyright Protection?

15. In any society--be it great or small, industrialized or developing--there are always some who possess, more than others, the natural gift of intellectual creation. These are the novelists, the poets, the dramatists, the composers, the painters, the architects, the sculptors, etc.

16. In most countries of the world, whatever their stage of development, it is accepted that the authors of such creative works must be protected and should, as a matter of natural justice, be allowed to benefit from the fruits of their labor.

17. Protection of authors will encourage them to create further works and thus enrich the country's store of literature, drama, music, etc. This applies to all types of works, including textbooks for school and university level. This aspect of copyright law as a stimulus for intellectual creativity is of fundamental importance. Creativity is the very basis for the social, economic and cultural development of nations.

18. In addition, the investment that is sometimes necessary for the creation of works (in the case of film-making, book-printing or architectural works, for instance) or for their exploitation (book publishing or record manufacturing, for instance) will be more easily obtained if effective protection exists, and such protection is in some cases indispensable to encourage such investments.

19. Furthermore, if copyright exists in a work, its author may be encouraged to make it public and disseminate it widely because he knows that he will not lose control of the work only because it is made known to others. Such a wide dissemination of works is generally of great benefit to the society as a whole.

20. Again, an author's work is the personal expression of his thoughts. He should consequently be the one who should have the right to respect for it or, in other words, be the first to decide whether, when and how his work may be reproduced or performed in public, and the right to object to any distortion or mutilation of the work when it is used.

21. Finally, the works of a country's authors enable its manners, customs and cultural heritage to be made better known. Any country wishing to stimulate and inspire its own authors in their creativity must necessarily provide for effective copyright protection.

Economic Importance of Copyright Law

22. In addition to the cultural and social arguments in favor of copyright protection, it is essential to note that copyright protection also has an important economic aspect. The economic importance of copyright varies, of course, depending on the stage of development and on a number of special national factors. A few examples could, however, be mentioned concerning the economic impact of copyright, based on studies carried out in certain countries.

23. In Sweden, which is an industrialized country in northern Europe, a study on the economic impact of copyright activities has been carried out by the Government. It was based on figures available for 1978. It showed that, in that year, 6.6% of the Gross National Product (GNP) in that country consisted of material to which copyright applied.

24. Similar studies have been made in 1985 in the United States and in the United Kingdom. These studies refer to the value of the output of the "copyright industries," a concept which is narrower than the concept "copyright activities" on which the Swedish study is based. Nevertheless, these studies also show surprisingly high figures for the copyright share of the national economy. In the United States study this share was 4.6% of the GNP and in the United Kingdom study 2.6% of the Gross Domestic Product (basically the GNP minus the value earned abroad).

25. The figures mentioned above are of course only estimates; besides, the situation changes rapidly. It is consequently difficult to establish with exactitude the economic impact of copyright; nevertheless, as indicated by the figures quoted in the various studies, it is clearly substantial in absolute terms. However, as stated earlier, the situation may vary from country to country and from region to region. Copyright protection has in any case an important economic aspect which is not to be neglected. The importance of this aspect in a country grows, for instance, with the level of industrialization. Furthermore, the importance of copyright grows in the world today with the increasing importance of information processing and of certain high-technology areas, such as the satellite and cable techniques and the use of computers, where copyright aspects come much into focus.

ELEMENTS OF COPYRIGHT AND SO-CALLED NEIGHBORING RIGHTS

Subject Matter for Protection

26. The basic approach of copyright law is that writers, composers, artists and other creators of works of the mind are granted certain time-limited exclusive rights in respect of the utilization of their works. Of fundamental importance is, in this context, to determine what the subject matter for copyright protection is.

27. Copyright aims at protecting the results of intellectual creativity. These results are usually referred to as "literary and artistic works."

28. As examples of works can be mentioned books and other writings (fiction or non-fiction), lectures and addresses, dramatic, musical, choreographic and cinematographic works, works of drawing or painting or of applied art, photographic works, etc. These are only examples. The basic idea is that works are protected regardless of the form of their expression and regardless of whether they have been published or not.

29. A condition for protection is that the work be "original" in the sense that it is the result of an individual creative effort. The determining criterion is not, as in patent law, novelty, but instead originality, which implies that two authors can engage separately in the creation of a similar work. If the results are independent of each other, so that one is not a copy of the other, both enjoy protection.

30. Because copyright protects the results of individual and original creative efforts, the protection applies to the form in which the author has expressed his ideas. The ideas as such are not protected, nor is the information as such which is contained in the work protected. The protection

does not extend to the manner or the techniques used. Furthermore, the purpose or the quality of the work has nothing to do with the availability of protection. Also, for instance, bad works of art or typically utilitarian works, such as computer programs, can enjoy copyright protection.

31. In most countries, protection is granted automatically without any formality. This is the case in the countries of the Berne Union (see below), because the Berne Convention does not permit formalities as a condition for protection, and also in most other countries. A number of countries, particularly the United States of America and certain countries in South America, have, however, a system of formalities, although usually for purposes other than as a condition for copyright protection (for instance, the "copyright notice," see below).

32. Copyright protection is granted not only to original works but also to so-called derivative works. Such works are, for instance, translations, adaptations and other transformations of original works, provided that the creative effort in the transformation process is such as to qualify the result as a work in itself. Other types of derivative works are compilations and collections, for instance anthologies, if by reason of the selection and arrangement of the contents they constitute intellectual creations. As regards the derivative works, the general rule is that the protection granted to them is without prejudice to the protection of the preexisting works from which they are derived.

33. Usually, national copyright laws provide for an exception from protection in respect of certain categories of works, such as laws and decisions of courts and administrative bodies, as well as, for instance, news of the day and political speeches.

The Bundle of Rights Contained in Copyright

34. Generally speaking, copyright consists of two categories of rights, usually referred to as the economic rights and the moral rights.

35. The economic rights comprise such rights which have a pecuniary value and which can usually be transferred and economically exploited.

36. The economic rights can be described in various ways. Basically, they fall, however, within one of the following categories:

- the right to reproduce the work;

- the right to communicate the work to the public by means of, for instance, public performance or broadcasting; and

- the right to make translations, adaptations, arrangements and other transformations of the work.

37. Reproduction of a work means that copies are made of it either directly (for instance photocopies) or indirectly (for instance, when a record is played in a broadcast program and recorded on a tape by the listener). An important example of the right to make transformations of a work is when motion pictures are made on the basis of a literary work.

38. The moral rights are recognized in statutory law in most countries and in case law in other countries. These rights are based on the personal ties which always exist between the author and his work; the author has usually put into his work his ideas and personal sentiments or knowledge and should, therefore, have some rights of a non-economic nature in that work.

39. Basically, the moral rights are of two kinds. One is called the "paternity right" and means that the author is entitled to claim authorship of his work (to have his name mentioned in connection with the work). Exception is usually made in cases when the work has been included incidentally or accidentally, for instance, in reporting of current events or on other occasions when the mention of the name would be impossible or would seem peculiar.

40. The other branch of the moral rights is the "right to respect." It means basically that the author is entitled to object to distortion, mutilation or other actions in relation to his work which would be prejudicial to his honor or reputation as an author.

Limitations to the Rights

41. The rights granted under copyright law are exclusive. It means that the owner of the right can prevent everybody else from undertaking an act which is covered by the right. It is, however, impossible to recognize such exclusive rights in all situations. Limitations have to be made to the rights with due regard to other interests. All copyright laws try to strike a balance between the interests of the copyright owners, on the one hand, and the interests of the users and of the society as a whole, on the other.

42. These limitations are of various kinds. The international copyright conventions give the national legislators a certain freedom in establishing such limitations. As an example it could be mentioned that the Berne Convention provides for limitations to the reproduction right "in certain special cases" if the reproduction allowed under such limitations does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. The Convention also provides for more specific limitations, such as use of works or parts of them for quotations, illustrations for teaching, reporting of current events, etc.

43. As examples of limitations which are provided for in national legislation can be mentioned:

- the possibility to make single copies of published works for private and personal purposes;

- quotations, if they are compatible with fair practice and are made only to an extent which is justified by the purpose;

- use of works as illustrations for teaching;

- use in the media of articles or broadcasts on current economic, political or religious topics;

- reporting of current events; and

- reproduction, under certain conditions, by public libraries.

44. Another kind of limitation which is frequently provided for in national laws is the right for broadcasters to make so-called ephemeral recordings. This expression means that if a broadcaster has acquired a right to broadcast a work, he has also the right to make, for the purpose of his own broadcasts and by means of his own facilities, one or more copies of the work. Such copies shall be destroyed after a certain time but may, under certain legislations, be preserved in official archives if they have an exceptional documentary character.

45. In addition to the limitations mentioned now, such developing countries which have expressed a wish to avail themselves of certain special provisions in the international copyright conventions as revised in 1971 may in their copyright laws provide for special compulsory licensing arrangements as regards the right of translation and the right of reproduction.

46. It is a general rule that when works are used under the provisions on limitation of rights, the author's moral rights shall also be respected.

47. As a final remark it should be mentioned that when works are used under the limitations provided for in various national laws, the author's moral rights have to be respected.

Duration of Copyright

48. One of the specific limitations which apply to copyright (like to most other intellectual property rights but as opposed to, for instance, the ownership of a physical thing) is that the right is usually limited in time. How long the term of protection should be is determined in national law. The copyright conventions provide for a certain minimum period comprising the lifetime of the author and an additional period after his death. This additional period is, in the case of the Berne Convention, 50 years. The period starts on January 1 of the year after the death of the author and expires on December 31 of the 50th year thereafter.

49. Most national copyright laws have adopted a 50-year term as provided for in the Berne Convention. Certain legislations have, however, longer periods of protection. In some cases the protection extends to 60 years, 70 years, 80 years or even 99 years.

50. In the case of joint authorship, the period is computed from the death of the last surviving author. For works published anonymously or under a pseudonym, where one does not know who the author is, the period of protection is usually the same as for other works, i.e. 50 or 25 years, but computed from the first lawful publication. For certain kinds of works where there are a large number of contributors, such as cinematographic works, the period is frequently 50 or 25 years from the making of the work or from the first communication of it to the public.

Ownership and Transfer of Copyright

51. The purpose of copyright is to protect intellectual creativity. It is consequently natural that, as a general rule, the protection which copyright law grants vests in the first instance in the creator of the work. This means that the owner of the bundle of economic and moral rights of which copyright consists is in the first instance the author or the authors who created the work. If they are co-authors in the sense that they have contributed to the work in such a way that the different contributions cannot be seen divided from each other, they are considered as co-owners of the rights.

52. Particular problems arise in the case of works created for private or public bodies in the course of an employment contract and in the case of works which have been commissioned from the author by others. The question of ownership of the rights is in such cases solved according to the prevailing legal tradition in the country concerned. According to a number of national laws, the copyright belongs, also in such cases, to the author, unless otherwise provided for in, or follows from, the employment contract or the

commission contract, respectively. Under other national laws the situation is, generally speaking, the opposite. The copyright in works thus created is deemed to be transferred to the employer or the person commissioning the work, at least to the extent necessary for his customary activities.

53. Other fields where special problems arise concern cinematographic works. Different systems apply in different countries. Under some national laws the copyright in such a work is considered to belong to the maker of the film. In other countries a rule of presumption applies in the sense that the copyright, wholly or in part, is, unless otherwise agreed, considered to belong to the maker or producer in order to facilitate the economic exploitation of the work. In still other countries, the copyright belongs in the first instance to the individual contributors, and the maker or producer has the rights only in so far as this follows from the contract with the contributors.

54. As regards transfer of copyright, the general rule in most national laws is that the economic rights are transferable wholly or in part. Rights can be transferred either by assignment or by license. "Assignment" means the transfer of the right to another person who is then the owner of that right, while "license" only means that the author grants another person the right to a certain use of the work, usually for a certain time, while he retains the copyright as such in the work. Generally speaking, the assignment of one of the rights, for instance the reproduction right, does not imply the assignment of any of the other rights (sometimes referred to as the "principle of specification"). Another basic principle is that the transfer of a physical object in which the work is embodied does not imply the transfer of the copyright in the work.

55. The moral rights are usually not transferable. Under some laws it is explicitly made clear that such rights are considered as inalienable. Usually the author can, however, declare that he will not invoke them and he can, under certain conditions, be bound by such a declaration. This is particularly important, for instance, in cases where a film is to be made on the basis of a novel. It is essential that the financial investments in the production of the film shall not be put at stake because the author of the novel may claim that the film version of his work violates his moral rights.

Infringements and Sanctions

56. National copyright laws usually provide for sanctions of various kinds for infringement of the rights under copyright law. Copyright is a branch of private law and the basic approach of most countries is, or has been, that the injured party himself (and not others, for instance public prosecutors) is entitled to claim sanctions for infringements of the rights. Consequently, the basic means available for an injured party would be to take civil action.

57. Recent years, however, have seen a change in the attitude in many countries. This is mainly due to the increase in piracy activities, i.e. the increase in unauthorized commercial copying, particularly of music cassettes and videograms. This kind of activity has developed into an industry of its own in many countries. Because of the negative consequences of this development (threat to national culture, links with organized crime, etc.), a number of countries have introduced heavy penal sanctions for at least certain kinds of infringement of copyright.

58. The main sanctions for such infringements are the following. The ultimate choice and the balance between the various options depend, of course, on legal traditions and other considerations:

- punishment (for wilful infringements and maybe also for infringements committed with, for instance, gross negligence) by fines or (generally or in certain cases) imprisonment (the term of which varies from country to country, such as six months, two years or, in some countries, five years or even more);

- liability to pay compensation for damages;

- court order to cease such infringements;

- seizure of infringing copies, of receipts arising from the infringing acts and even of devices (such as recording equipment) used for such acts.

59. As regards actions for criminal sanctions, there are differing possibilities under national laws. In some countries such actions may be taken only by the affected parties, while in other countries the public prosecutors are entitled to take such actions, either upon complaint by the affected party or on their own initiative.

Protection of Performers, Producers of Phonograms and Broadcasting Organizations

60. As mentioned above, copyright aims at protecting the results of authors' intellectual creativity. There are, however, also certain other categories of persons who make important contributions in this field but who are not authors of works in the copyright sense of the word. Examples of such categories are actors, musicians and other artists, and producers of music recordings and broadcasters.

61. These latter categories are in many countries granted protection under intellectual property law and there are also certain conventions which provide for an international protection of one or more of these categories. In some countries the protection, at least for some of these beneficiaries, is granted in the framework of copyright law (although usually not as "literary and artistic works"), while in other countries it is granted under the concept of "neighboring rights," that is, rights close to or neighboring on copyright, and in still other countries other concepts are used.

62. As regards first the performing artists (actors, musicians, singers and others who perform a literary or artistic work), they are in a number of national laws protected against other persons' unauthorized use of their performances. This protection can be given under, for instance, labor law, social law, penal law or the law on unfair competition. In many countries they are, however, granted rights under private law to authorize or prohibit certain uses of their performances.

63. The rights thus granted to performing artists vary from country to country. The basic elements are, however, to a large extent the same, i.a. depending on the unifying effect of the main international convention (the Rome Convention; see below) in this field. These rights are:

- the right to control the communication to the public of their live performances;

- the right to authorize or prohibit the recording of their performances;

- the right to authorize or prohibit the reproduction of recordings of their performances; and

- in certain countries, a right to remuneration when a sound recording is used in broadcasting or for other communication to the public.

64. As mentioned above, the framing of the rights varies very much from country to country. It should be stressed, however, that the basic rationale behind the protection of performing artists is similar to that invoked in respect of copyright. One aspect of this rationale is a wish to support and stimulate the considerable talent and skill which performers exercise and which form a significant part of the cultural environment of any country. Furthermore, this protection has an important social background. The performers have been particularly adversely affected by the new media technology which has, generally speaking, the effect of diminishing the need for live performances and, in addition, is to a large extent beneficial merely for the "stars" and not for the more ordinary artists. The development of the new media technology has thus to a considerable extent injured the artists' profession, and this effect was at the outset one of the reasons for the creation of the specific protection of performers.

65. It should be added that protection of performing artists has been adopted also by a number of developing countries. One of the reasons is that such a protection is considered useful in countries where the oral tradition is important and where consequently the artists' profession has a great practical significance.

66. Another category in this context is the producers of gramophone records, music cassettes and other phonograms. Under some national laws phonograms are, generally speaking, granted protection in the framework of copyright laws as subject matter other than literary and artistic works. In other countries phonogram producers are considered as users and recordings as such cannot be works under copyright law. A number of those countries have instead established protection for phonogram producers under the concept of "neighboring rights."

67. Whichever system is chosen for the protection of phonogram producers, the basic element is that the phonogram must not, without an authorization by the producer, be reproduced directly or indirectly. In addition, in certain countries the producer has also a right to control the public performance, for instance in broadcasting, of the recording, or a right to remuneration for such use (frequently together with the artists appearing in the recording).

68. The underlying reason for granting protection to phonogram producers is, in particular, the wish to support the skill and talent necessary for the production of phonograms, to safeguard the sometimes considerable investments made for such production and, in recent years, also the wish to facilitate for the producers to take action against piracy, something which is easier if they have a right of their own than if they have to rely on rights acquired from others.

69. The third category of producers which can be granted an independent form of protection is the broadcasters. In certain countries broadcasters enjoy a type of copyright in their broadcasts. In other countries they can well have a copyright in the works contained in a broadcast but not in the broadcast as such, i.e. the signals. Such protection can instead be granted under the concept of neighboring rights.

70. Also the protection of the broadcasters under the neighboring rights system varies from country to country. The common basic elements are, however, the following:

- a right to authorize or prohibit the rebroadcasting of the broadcasts by wire or by Hertzian waves;

- a right to authorize or prohibit the recording of their broadcasts; and

- a right to authorize or prohibit the reproduction of such recordings of their broadcasts.

71. The underlying rationale for granting broadcasting organizations a neighboring right is basically the same as those mentioned in respect of the phonogram producers.

72. The neighboring rights are, generally speaking, subject to the same limitations as copyright. The term of protection varies, however, much more than the period of protection under copyright law. The Rome Convention provides for a minimum term of 20 years, but many countries have a longer term of protection, for instance 25 years or, in an increasing number of cases, 50 years. The sanctions for infringement of neighboring rights are frequently the same as for copyright infringement.

THE INTERNATIONAL SYSTEM FOR PROTECTION OF COPYRIGHT AND NEIGHBORING RIGHTS

73. It is proposed now to present to you the international system of protection of copyright in very broad terms and to discuss the oldest international treaty in the field of copyright, viz. the Berne Convention for the Protection of Literary and Artistic Works, and the role of the latter in the promotion of cultural creativity and development.

74. As mentioned earlier, a national law on copyright is effective only in the country concerned, and its field of application is limited to the territory of the State which enacts it. But works of the mind are meant to be disseminated beyond national frontiers. In order to promote such international dissemination on the one hand and protection of these works on the other, States have concluded certain multilateral conventions leading to international protection of copyright.

National Laws and International Development of Copyright

75. From the beginning, protection began to be granted to the authors and creators of literary and artistic works in various national laws. Denmark recognized the rights of authors by an Ordinance of 1741. In 1790, the United States of America promulgated its first federal copyright statute. In France, before the Revolution, copyright was in fact the right of the publisher, and a privilege granted by the King. These privileges were abolished by the Revolution, and two decrees of 1791 and 1793 established the protection of literary and artistic property, corresponding to the country's own cultural traditions. The French law did not provide for formal conditions of the protection, and there developed in France also the moral right of the authors. In Germany, the country where printing first began, legal development took the course of recognition of the rights of publishers in the framework of rules regulating publishing agreements. Later, around the middle of the nineteenth century, the various German States of that period recognized the importance of protecting the author as the source of the work. These were followed by laws in Austria and Spain, also around the mid-nineteenth century.

76. This was not confined to Europe. National codification also took place in, for example, some of the Latin American countries, in Chile (1834), Peru (1849), Argentina (1869), Mexico (1871), and in Brazil somewhat later.

77. Copyright laws and regulations with dissimilarities in their genesis and development, were thus promulgated separately at the national level in each of the countries concerned.

78. By the last quarter of the nineteenth century, the protection granted by the various national laws had begun to get extended on the basis of reciprocity to nationals of foreign countries through bilateral treaties. This development initiated the creation of international copyright.

79. These bilateral agreements or arrangements between countries, mostly in Europe, provided for mutual recognition of rights, but these were neither comprehensive enough nor of a uniform pattern. The need for a uniform regime led to the formulation and adoption on September 9, 1886, of the Berne Convention for the Protection of Literary and Artistic Works by the Contracting States, which formed themselves into a Union in order to ensure protection of the rights of authors of such works in the countries of the Union. The Berne Convention is the oldest international treaty in the field of copyright. It is open to all States. Instruments of accession or ratification are deposited with the Director General of the World Intellectual Property Organization (WIPO).

80. It may be mentioned here that in the field of copyright protection at the international level, there is another multilateral treaty which is in force. This is the Universal Copyright Convention (UCC) which is administered by the United Nations Educational, Scientific and Cultural Organization (Unesco) and was adopted in Geneva in September 1952. This Convention, very briefly, was designed to enable treaty relationships between the countries of the Berne Union and those of the American continent; it provided for a system that allowed adherence by countries which made the protection of copyright dependent on certain formalities. Since the UCC is administered by Unesco, it is not further dealt with here.

The First International Copyright Treaty: The Berne Convention

81. The legal structure set up by the the Berne Convention of 1886 proved its worth throughout many decades in providing protection for authors' rights in their works. New problems arise, however, in the field of copyright law and these are largely generated by the continual technological advances in the field of communication, electronics, etc., such as videocassettes and audiovisual discs, cable television, computers, photocopying machines. These technological advances require constant adjustment in national copyright laws or in their interpretation.

82. The original text of the Convention has undergone revision several times in order to improve the international system of protection which the Convention provides. Changes have been effected in order to cope with the challenges of accelerating development of technologies in the field of utilization of authors' works in order to recognize new rights as also to allow for appropriate revisions of established ones. The first major revision took place in Berlin in 1908, twenty-two years after the initial formulation of the Berne Convention in 1886. This was followed by the revisions in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971.

83. In view of the increase in the number of developing countries in the aftermath of World War II, it was widely recognized that the system of international protection of copyright required adaptations or modifications to suit the new situation. The more recent revision conferences for revising the the Berne Convention were, therefore, concerned also with adapting the systems of international protection of literary and artistic works to the requirements of developing countries.

84. The Berne Convention which is administered by WIPO comprised at the outset 10 States has, on March, 1989, 82 member States. The Convention groups a great number of developing countries, all European market-economy countries, as well as Australia, Canada, Japan, United States of America, and a number of socialist countries of Eastern Europe.

85. The Convention grants protection to works which meet certain so-called points of attachment. These are, generally speaking:

- that the author is a national or has his habitual residence in a country which is bound by the Convention (this criterion for protection applies to all works, published or not);

- works by other authors, if the works are first published in a country party to the Convention, or are published in such a country within 30 days from publication outside the geographical area covered by the Convention.

86. If a work falls within one of the categories mentioned now, contracting States are obliged to grant it protection. The whole system under the Convention is based on the idea of giving protection to foreign works. Thus in the Berne Convention the protection applies outside what is called "the country of origin."

87. The subject matter which is protected under the Convention is "literary and artistic works." This means any original production in the literary and artistic domain, whatever may be the mode or form of its expression, such as novels, short stories and other writings, musical works, artistic works, motion pictures, etc.

88. If a work enjoys protection under the Convention certain general principles apply to the protection thus granted, viz. the following.

89. The principle of national treatment. This principle implies essentially that authors whose works are protected shall in all countries of the Convention other than the country of origin enjoy the same protection as nationals do under the national law. This principle is a fundamental element in the system, because it assimilates foreigners to nationals and is thus the very basis for the international protection. The principle implies that foreigners must not be discriminated in relation to nationals. It also implies that protection must not be based on reciprocity, i.e. the protection to foreign works must not be adapted to what that particular foreign country itself grants to foreigners. Only in one respect, viz. as regards the term of protection, is it allowed to restrict the protection to what the foreign country applies itself.

90. The principle of minimum protection. This principle means that the protection which contracting States are obliged to grant to works from other contracting States must not be below a certain level. Certain minimum rights must be provided for. These minimum rights are described in a fairly detailed way in the Convention. Minimum rights are for instance the specific economic rights (right of reproduction, right of communication to the public, etc.) and moral rights. Another minimum right relates to the period of protection, which is 50 years from the death of the author.

91. The principle of independence of protection. Essentially this principle means that the protection in one contracting State is independent of the existence and the scope of the protection in other countries, including the country of origin of the work.

92. Absence of formalities as a condition for protection. According to the Berne Convention copyright protection shall be automatic and granted without formalities.

The Specific International Protection for Performers, Producers of Phonograms and Broadcasting Organizations under the System of Neighboring Rights

93. In addition to the international system for protection of copyright, a specific system has also been established for the protection of performers, producers of phonograms and broadcasting organizations. This system is based on certain conventions which are somewhat more specialized than the copyright conventions. The conventions in this field are the following.

94. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) was established in 1961. This Convention had, on June 1, 1988, 32 contracting States, about half of them being developing countries.

95. The Convention is, like the copyright conventions, based on the principle of national treatment. In certain respects the Convention provides for a wider possibility for reciprocal treatment than is possible in the copyright field. The Convention covers, as its title indicates, all three categories of beneficiaries of neighboring rights and tries to establish a balance between the rights of the different categories. Furthermore, the Convention provides for minimum rights, which are basically those mentioned above in the description of the neighboring rights. The minimum term of protection under the Convention is 20 years.

96. The Convention is administered jointly by WIPO, Unesco and ILO (International Labour Office, a United Nations specialized agency, having its headquarters in Geneva).

97. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) was established in 1971. This Convention has, as of June 1, 1988, 41 contracting States. The Convention grants protection to phonogram producers against unauthorized reproduction of their phonograms as well as against importation of such reproductions for the purpose of distribution to the public and against the distribution of such reproductions to the public. The duration of this right shall be at least 20 years.

98. The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention) was established in 1974. The Convention is structured somewhat differently from the other conventions in that it does not confer rights to the beneficiaries of the Convention (the satellite operators). Instead it contains an undertaking for the contracting States to take adequate measures in order to prevent distribution on or from their territory of programme-carrying signals by any distributor for whom the signal is not intended. The Convention has, as of June 1, 1988, 11 contracting States. It does not apply to so-called direct broadcasting satellites (satellites where the signals can be received directly in individual households by means of fairly small antennas) but only to other types of satellites (so-called "fixed-satellite-services," where the signals go from the satellite to a receiving earth station from where they are distributed further). The obligations under the Convention can be met in various ways, such as by administrative law or penal law or by granting exclusive rights similar to copyright.

Some Final Observations

99. Copyright and the rights related to it have in common that they aim at stimulating and supporting the intellectual creativity and the talent and skill of the persons who work in the field of culture, information and entertainment.

100. This branch of law has to cover a very large field of activities of the most differing kinds and has, for that reason, been developed gradually in order to meet the needs of the world of today, a world which is certainly quite different from that in which the printing of books was the major field of operation for copyright law. Even if the system as described above might seem complex, the main structure is fairly simple. All the basic elements are common for the various national laws and they all form part of the worldwide international system for the protection in this field. The national laws as well as the international system serve one main and common purpose, viz. to contribute to the economic, social and cultural development. This is true for all nations, developing as well as industrialized, regardless of their economic system.

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THE COLLECTIVE ADMINISTRATION OF COPYRIGHT

Lecture prepared by Mr. Walter Dillenz, Director,
Society of Authors, Composers and Musical Publishers (AKM), Vienna

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THE COLLECTIVE ADMINISTRATION OF COPYRIGHT

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1. INTRODUCTION

This document deals with the practice of the collective exercise of copyright. Despite this direct reference to practice, I do not believe that the document should be limited to mere presentation of the working methods of an administration society, but should also throw light on the environment in which in works. Its environment, together with all the inherent stresses and the relationships established, in fact has a determining influence on the work carried out by the administration society.

As a second preliminary remark, I should like to point out that, while this document always concerns copyright, this does not in any way exclude neighboring rights.

I believe that many aspects of the collective administration of neighboring rights are similar to the ones concerning copyright. However, I will not elaborate on this point since my distinguished colleague Mr. Jukka Liedes (Finland) will report on "The Collective Administration of the so-called Neighboring Rights". It is, in my view, extremely useful to combine these two subjects and have one report follow the other as WIPO has been doing by arranging the program as it is. In real life, we see that owners of copyright and neighboring rights frequently cooperate in the collective administration of their rights. This gives them a stronger position vis-a-vis the users. It also puts the user in a more favourable position where he is faced not with innumerable claims, which he hardly can calculate, but with a concentration of claims of persons whoses copyright or neighboring right is required.

The origin of copyright is closely linked to the development of printing at the beginning of the sixteenth century. The fabrication of texts and pictures was radically modernized. The direct result of this technical revolution was to make the written word and the printed image mass phenomena and to give them unprecedented speed of distribution. The economic stage at which printed texts and pictures became negotiable mass products began, as did the need to protect them.

To do this, national authorities gave printers (not authors), protection against unauthorized reproduction of the works they had printed. These "privileges" therefore constituted protection of technical investment. This origin of copyright can still be seen today in the word "copyright" itself, which is used to designate this field of rights in the Anglo-American world, although a tendency in favor of the term "author's right" is also emerging.

The concept of copyright changed considerably during the second half of the eighteenth century, in the philosophic context of the "Aufklärung" (the Age of Enlightenment". What had mainly been a guarantee of the printer's investment in the face of competition then became the author's basic right as a function of his personality.

One of the great themes of the Age of Enlightenment had been emancipation. If this is generally taken to mean liberation in comparison with a state of domination and authority, authors can also be included among the beneficiaries of this emancipation.

The first copyright laws, that is to say laws devoted to copyright, were established during the French Revolution. It is necessary to bear in mind the period's life force and the unaccustomed revolutionary pathos when reading the text of the two French laws on copyright of October 13/19/1791 and July 19/24/1793, as well as the definition given by Le Chapelier, the rapporteur for the two laws, who said that copyright was "the most sacred, the most personal of all properties".

In order to understand the nature of copyright, it is necessary to be aware of its dual roots:

- the protection given to printers by the State against reproduction (reproduction privilege);

- the justification under natural law of the Age of Enlightenment and the French Revolution, according to which man has natural, inborn rights;

Justification of the institution of copyright itself also contains these roots. Paragraph 8 of Article 1 of the Constitution of the United States of America bases the protection of Intellectual Property on the following: "to promote the progress of science and useful arts". If one also takes into account Le Chapelier's definition mentioned above, it can be stated that copyright is based both on considerations of justice and usefulness.

By its conception, copyright is a personal right indissociable from the person of the author. An author can use his intellectual property in the same way as the owner of a corporeal property, that is to say he can use his work in any way he wishes and can prohibit third parties from using it. Practice has led to a number of possibilities for use that have been specifically given

to the author by law. The main forms of utilization are reproduction, performance and broadcasting. Copyright law therefore gives the author the specific right to determine who can use his work and under what conditions, namely, reproduction, performance or broadcasting. An author obviously wants his work to be used. He does not write a novel in order to put it away in a drawer, he does not compose a symphony so that it is never performed - he wants his works to be used and he would like to be paid for their use.

One of the principles used to fix the amount of such remuneration is that the author should be paid in relation to the degree of use of his work. This is a just requirement: the author of best sellers naturally earns more than the author of a book that is never read, a well-known composer receives more in royalties than an unsuccessful composer.

As far as the first beginnings of the collective administration of copyright is concerned, there are legends and anecdotes which I do not want to repeat here. What we find established in the history of copyright is the founding of the first body for administering copyright on a collective basis: the French society SACEM was founded in 1851. SACEM is a copyright organization dealing with copyright in music. Why is it that the collective administration of copyright started in the field of music?

In the case of printing a book or performing an opera, an author can relatively easily verify concrete use of his works. There are relatively few publishing companies and relatively few operas; an author can therefore fairly easily exercise his own rights. The case of rights for musical performance is quite different. Music is played in thousands of places at any time of the day or night and in all countries in the world. A composer would be over-worked just trying to verify performances in his own country, without mentioning performances abroad. Likewise--and this is a very important aspect of the question--the organizer of a musical performance cannot be expected to seek out all the authors, composers and song writers whose works are performed at a dance, for example. The need therefore arose to set up an organization to which, on the one hand, authors could entrust the administration of their rights, and which, on the other hand, could globally grant the relevant authorizations to music "consumers", together with the guarantee that no one else would make claims on them (protection against claims by third parties).

2. WHAT IS COLLECTIVE ADMINISTRATION?

The general manager of CASH, the Composers and Authors Society of Hong Kong, Mr. Willie Yeung presented the subject of collective administration of copyright at a copyright workshop held in Beijing in September 1988 as follows:

"Collective administration is a term used to describe a mechanism, or organization, normally in the form of a national authors' society whose principal function is to act as a central clearing house, where on the one hand, there are numerous users who would like to have the right to exploit copyright works, and, on the other, a group of copyright owners who have assigned their rights to this central body for administration.

This phenomenon is much of the product of the technological advance made in broadcasting, diffusion and public performance. No TV station nowadays can expect to trace and clear each and every copyright work they intend to use everyday. Likewise, no copyright owner can expect to patrol every night all the entertainment night spots whether his/her music has been performed. Collective administration provides the solution".

"Subsidiarity" is a principle that is at the very basis of administration societies. It means that they only act in fields in which the author cannot do so himself. They must always keep that principle in mind: their justification is to act in certain cases of large-scale use of works where the author himself cannot act for practical reasons. These considerations also prevent administration societies from seeing their activity as an end in itself.

The boundaries between individual administration and collective administration of rights are not fixed. They depend inter alia on the category of the work (several decades ago, collective administration of works of fine art would have been unthinkable, while today it has become quite commonplace in certain specific sectors), as well as on the forms of use (it is absolutely impossible to assert rights individually in cases of private copying) and, finally, on the way in which, in general, copyright is developing at the national and international levels. The trend today is towards collective administration of copyright. It is, however, necessary to be circumspect regarding any movement that strays too far from the roots of copyright; the subsidiary character of collective administration is a principle of great importance in this respect.

For certain categories of works, mainly musical works, collective administration of copyright already has a long tradition. Literary works are less subject to collective administration and fine art works probably even less so. Rights relating to cinematographic works are granted almost exclusively on an individual basis: the producer or distributor decides upon the film's worldwide exploitation according to his own criteria. As for computer programs, collective administration is only in the initial stages.

Copyright is suited to a greater or lesser degree to colletive administration, not only according to the category to which the work belongs, but also according to the nature of the use made thereof. Let us take as an example a category of works for which rights are mainly exercised individually, namely, cinematographic works. As mentioned above, while it is clear that the projection of films in cinemas, their broadcasting on television and the production of videotapes continue to concern individual exercise of rights, the case is completely different for two categories of use that have recently emerged: in the case of a private videotaped copy, it is

practically impossible to obtain the authorization of each owner of rights for each reproduction (whether made from a television broadcast or from another videotape). It is equally impossible in the field of cable television. A person exploiting a cable network that broadcasts television programs from a neighboring country cannot be asked to obtain one by one the rights concerning each film that appears in his programs.

Exactly for this reason an international organization for the collective administration of film rights was established. In December 1981, AGICOA, the Association for the International Collective Management of Audiovisual Works was founded. The main purpose of this organization is to licence the cable retransmission of audiovisual works. In the meantime, AGICOA has concluded contracts with cable operators in several European countries. The very existence of AGICOA and its activities prove, that even in a field where individual administration of rights is the rule, as in the case of films, there are areas where collective administration is necessary.

These examples show that, in order to evaluate whether collective administration is preferable to individual exercise of rights in particular fields, it is necessary to establish a system of coordinates with the following two variables:

- the category of work, and
- the form of use.

We have seen that action by administration societies is necessary when an author cannot exercise his right individually, more particularly in the case of large-scale use of works. Large-scale use does not, however, mean that it is not possible to determine the user or the works he is using. Organizations administering musical rights, for example, conclude individual contracts with each user and oblige the latter to supply them with a list of the works used, which then serves as the basis for distributing the amounts collected among those authors whose works have in fact been used. But there are fields in which it is difficult or impossible to verify which works have in fact been used and/or who has been using them. One typical example of such a situation is private copies: it is not known who makes the copy nor which works are reproduced. In order to solve the first problem (concerning the person of the user), legislation in a number of countries has advanced the stage at which remuneration must be paid and has imposed it on the producer or importer of the recording apparatus or the blank tapes. In order to solve the second problem (that of the works used), administration societies have established distribution models based on what serves as the source for the copy, namely, phonograms sold in the country or broadcast programs. In that way, both collection and distribution are assured.

Collective administration of copyright implies that remuneration is paid not only to authors in a particular country, but also to authors in all other countries whose works are used, and that such remuneration is distributed among all these authors. The result is that national users can not only use the national repertoire of works, but have an access to the worldwide

repertoire through their national administration society. The latter must therefore give national and foreign authors equal treatment, for example, it must not place lesser value on works by foreign authors than on works by national authors, either as regards collection or distribution. For "classic" administration societies this is well-rooted in the facts through contracts of reciprocity concluded among them. These contractual provisions agreed upon among administration societies embody a principle that is at the basis of international copyright: the principle of national treatment. The two main copyright conventions, namely, the Berne Convention and the Universal Copyright Convention, are governed by the principle which obliges a State to give foreigners the same rights as nationals.

3. PROBLEMS OF COLLECTIVE ADMINISTRATION

Neither the nature of copyright nor the type of activity offer compelling reasons for imposing collective administration of copyright through a private body or, on the contrary, through a public body. Both solutions are possible. According to each country's political and legal context, one of the two will be preferable. The trend seems to be towards duality: private organizations of authors under State control. This solution has the advantage of democratic self-management and supervision of the organization's activities by the authors themselves, together with State control so as to avoid any misuse.

The question of whether or not an administration society should have a monopoly cannot be answered from the ideological, political or legal points of view. The answer is primarily one of appropriateness. The justification for administration societies is to facilitate legal relations between authors and users. To use an image, it can be said that the flow of rights between authors and users is channelled by administration societies. This has advantages for authors and users: the author is no longer confronted with a multiplicity of (potential) users, neither is the user confronted with the multiplicity of authors; as far as copyright is concerned, the two groups only have to deal with one body, namely, the administration society. The question of monopoly has therefore been answered: the inherent advantage of this system is lost when rights are scattered among a multiplicity of administration societies.

What happens if only some authors assign their rights to the administration society, while others decide to exercise their rights themselves vis-à-vis the users? One possibility, namely, for the authors to establish another administration society, has already been dealt with when considering the question of monopoly: it is contrary to the very nature of the collective administration of copyright by administration societies. On the other hand, many legislations allow authors to exercise their rights either through a administration society or by themselves individually. This is in conformity with the nature of administration societies, which are voluntary groupings of authors and not organizations whose membership is compulsory. However, and this aspect must not be neglected, there is a contradiction between, on the one hand, the voluntary nature of membership of an administration society and, on the other hand, the advantage to the user of being able to acquire the

totality of rights by means of a contract concluded with the administration society. There are two solutions in this connection: either the assignment of rights between the administration society and the user also has effect with regard to third parties, or—a more serious disadvantage—a compulsory license is established for such cases. Despite the real problems that arise in theory, there is very little difficulty in practice.

The creation in 1851 in France of the first administration society, SACEM, shows that from the beginning publishers were represented alongside authors in administration societies. At first sight, this seems surprising. Surely publishers are users of copyright? On looking closer, it can be seen that this is not true in this particular field. It would be true if administration societies dealt with publishing rights and, for example, in the musical field, granted global licenses to print scores. Music publishers would then be users and it would be surprising to see them represented in administration societies. However, the societies only act in fields (for example, performance or broadcasting) in which the interests of authors and publishers coincide. The publisher acts as a marketing agent for the author; it is in his interest, as it is in the author's interest, for the works to be performed and broadcast. The fact that both groups are represented within the same administration society, therefore, does not only have an historical basis, but is also logical from the point of view of the interests at stake.

The situation is similar in the field of neighboring rights. Here again, performers and producers of phonograms are sometimes united within the same administration society. While in certain fields (the production and sale of records) they may appear as partners with different interests, in other fields (for example, public performance or broadcasting of phonograms) their interests are identical.

I am very interested in hearing the opinion of my distinguished colleague Jukka Liedes, if he can also see the parallel between creators and their marketing agents publishers being united in one administration society, with the situation in the field of neighboring rights. If we look at the documents of the Rome Convention, where rights of performers, producers of phonograms and broadcasting organizations were established on an international basis, we can see from Article 12, in connection with Article 16, that a certain relation between performing artists and producers of phonograms was recognized as far as the exercise of their rights vis-a-vis users is concerned.

To summarize, it can be stated that the heterogenous composition of administration societies does not give rise to problems when their activities are limited to fields in which the interests of the different groups involved are identical.

4. ACTIVITIES OF ADMINISTRATION SOCIETIES

An administration society does not carry out its activities in a vacuum; they are related to the legal situation in the country in which the society works. It might even be said that there are few other activities which depends so much on the legal framework as the activities of administration societies. Their activity is related to intellectual property and not to corporeal property. While the theft of material assets is more or less subject to the same rules all over the world, namely, it is prohibited,

regulations regarding the use of intellectual property are much more complex. In addition, intellectual property is far more subject to misuse: while material assets can be protected by barriers, gates and padlocks, intellectual property can initially be used by everybody and it is only after the event that use can be ascertained and can give rise to a demand for remuneration.

This difference in nature between intellectual property and material assets explains therefore the special importance of the legal framework for the activities of administration societies.

The first requirement is that, in the country where the administration society is carrying out its activity, there should be a law on copyright, that is to say that the concept of intellectual property is recognized. It matters little of course whether this is a specific law or whether the field is governed by the general provisions of the civil code.

While national protection of copyright governs the activities of an administration society, it does not suffice. As we saw above, both the administration society and the users want comprehensive, global assignment of rights. The international character of the repertoire used in discotheques or for dance music, for example, obligatorily makes it necessary to acquire the corresponding rights on an international scale. The necessary precondition is for the country concerned to be party to an international copyright convention, in particular, the Berne Convention or the Universal Copyright Convention.

If the two first conditions are met, namely, the existence of national copyright legislation and accession to an international copyright convention, administration societies must still fulfil a third and last condition: they must conclude reciprocal agreements with foreign administration societies working in the same field. Then they can "sell" the global repertoire in their country and can offer and sell their own national repertoire in other countries.

Bearing in mind the diversity of national situations, it is obvious that it is not possible to draw up a single organizational model for all administration societies. It is thus only possible to formulate general ideas on the subject.

The essential factor is to guarantee a right of participation to authors in the country in which the administration society exercises its activity. This has a number of advantages:

- Within the company, authors always keep control of the activity of the society's bodies, that is to say its structure, which inevitably takes form. Participating authors know better than anyone what they want and, as a result of their right of intervention, their wishes can have an influence on the administration society's activities.

- Outside the society, the author's participation has a legitimizing effect in respect of users. The latter see that it is not an anonymous structure which lays down incomprehensible requirements, but that it is the tool of its creators who wish to reap the fruits of their intellectual work. This legitimizing effect also extends to State services whose cooperation, or at least good will, is necessary to administration societies.

- Finally, as far as distribution is concerned, compensation of interests among participating authors must take place in a democratic way. Through the permanent participation of the interested parties, it is possible to avoid, or at least attenuate, conflicts in this field as well.

The second requirement to be fulfilled in the organization of an administration society is the availability of competent management and support staff. While it is important for participants to agree on the definition of orientations within the administration society it is equally important for business to be carried out in a professional manner by specialists. It is true that a particular author might be a competent businessman, but it is not the rule. A administration society must, however, deal with users or organizations of users working professionally, and it is therefore in its interests to be on the same level.

The combination of these two elements, namely, participation by authors and professional support, govern the effectiveness of the work carried out by an administration society, independantly of the concrete form of its organization.

Without getting too much involved in legal details (e.g., the difference between a compulsory licence and legal licence) there is as lack of two essential marketing elements in the case where no agreed tariff can be reached:

(a) agreement between buyer and seller to buy or to sell;

(b) agreement between buyer and seller on the price.

i) a compulsory licence substitutes the agreement between copyright owner and user to license certain uses of works. The perfect market in the field of copyright exists between the individual author of a novel or play and the publisher or the theatre. The author is completely free to license or not to license. He may decide to prohibit the use of his work for a certain time or for a certain territory as it was done by Pirandello. We must not forget however that, whenever a copyright organization is involved, the perfect market turns into an imperfect market. The copyright organization cannot refuse to issue a licence to one user and arbitrarily refuse it in the case of another user. The performing right organization would not be able to issue a licence to one bar owner and refuse the licence to a second, who is willing to accept the licence on the same conditions as the first bar owner. This case of a "willing buyer" demonstrates the imperfect market when collective administration of copyright is involved: every user is entitled to a licence under the same conditions.

ii) One of the essentials of marketing is pricing. Once pricing is taken out of the hands of buyer and seller, and prices are set by copyright tribunals, arbitration boards or by the authorities, an essential element of marketing is missing. Especially if this price setting body is politically motivated and/or does not take prices into consideration, agreed upon between right owners and users (be it domestic or foreign), the disturbance of the market becomes very obvious.

At a time when several national legislation consider such mechanisms for interesting new fields such as cable and satellite broadcasting, it is appropriate to ask if marketing ends then and there: zero marketing?

In my view it would be too hasty a decision to drop all marketing considerations in such a situation, and this for the following reasons:

- As indicated above, copyright organizations are not at liberty to refuse a licence arbitrarily. They are, on the practical and sometime even on the legal level, obliged to conclude a contract.

- Likewise, in the field of collective administration of copyright, the copyright organizations are not in the position of a monopolist who can set the prices and refuse to sell below the price set by him ("take it or leave it"). In reality these rights are available on the market and cannot effectively be withheld. Therefore, if no agreed price can be reached, the price will have to be set by an outside body. We must not forget, however, the essential difference between an independent court and a politically motivated arbitration body.

Experience has shown that even in a strict wartime economy with price fixing, rationing and all the rest, there are still market elements that appear regardless of the rigidity of the economic system. In the last few years these market elements have surfaced especially in centrally planned economies.

There is more to marketing than just pricing. Product policy, distribution policy, communication policy are merely some of the means left to influence a market or what is left of it. As far as product policy is concerned we can see the economic consequences quite clearly in today's transition period from centrally planned to market economies: there is price regulation for a certain type of bread, so what does the supplier do? He offers several other products that do not fall under this price regulation and asks market prices for them. He will only have to make these products more attractive than the price-regulated one.

As far as information policy is concerned one can easily imagine using means to influence politicians to take back or relax some of these non-market elements.

To sump up: compulsory licenses and price fixing might seem to exclude marketing policy. This is not so. Once copyright organizations resist the sweet temptation to sit back and accept compulsory licences and price fixing, they will realize the potential, left for marketing policies even with these market restrictions: zero marketing is no option.

The existence of receipts is determined by the effective use of works. The role of an administration society is therefore, in the first place, to verify the use of works and to invite the users thereof to pay remuneration. Following the principle of profitability, which also governs its activity, it will first of all deal with uses for which the cost/receipt ratio is the most favorable. For example, a society carrying out its activity within the field of performance and broadcasting rights will undoubtedly firstly establish contractual relations with broadcasting organizations, because they are relatively few in number and make intensive use of works. In the field of performance rights, it will first of all devote its efforts to performances that are productive or easy to verify. It is normal that in this field administration societies should seek to cover a number of similar cases through a global contract concluded with an organization grouping several users. This is in accordance with the principle of profitability (reduce costs to the maximum) and to the principle of concentration of rights (negotiate with groups of utilizers).

The amount of remmeration paid to an administration society for use of works is determined by the society's rates. These can be established in different ways:

- contractually between the administration society and the user or organization of users;
- by arbitral tribunals or other arbitral bodies;
- by the courts;
- by the State.

These different methods can also be combined: for example, a rate contained in a contract negotiated among the parties may require approval from a State administration.

Experience shows that the rates of administration societies in an appropriate manner when the society and the users participate in their elaboration. The ideal way is for the society and the users or organization of users to reach a contractual agreement on a rate. Other mechanisms should only be resorted to if the parties cannot reach agreement on a contract. Nevertheless, even in such cases it may be better to seek a compromise which direct negotiations had not achieved. Without wanting to generalize, it can be stated that the price of copyright that can be achieved on the free market is generally preferable to the price fixed by any authorities. In some legislations we find the acknowledgement of this fact. They provide for a sort of a "fictional market" when establishing the rates for the use of copyright works. (e.g., Article 13, paragraph 3 of the law covering the collective administration of copyright ("Urheberrechtswahrnehmungsgesetz") in the Federal Republic of Germany.

Finally, distribution is the justificaton for the activity of an administration society. It is not the amount of remuneration collected, but the amount of remuneration distributed that makes a good administration society. However, there is necessarily a relation between these two aspects of its activity.

The key role played by distribution is clearly shown if one formulates the relations between the administration society—or debtor and the authors or creditors—in legal terms. By distributing the remuneration, the company pays its debt. The effective amount of the society's debt towards each individual author is determined by the amounts it collects and by its internal regulations, which fix the scale of distribution, that is to say the way in which the society allocates the amounts collected to authors in proportion to the various uses. The amount of the remuneration collected has been referred to above and only the question of the distribution criteria will be dealt with here. At first sight, it might be asked why regulations are necessary in this respect. Surely payments are automatically the result of the amount of remuneration collected and the frequency of use? The problems lie in the following points:

- some uses give rise to payment, but there is no indication what works have been used;
- with a view to efficiency and profitability, some types of use are grouped together and global payments are made;
- works can be of different nature and importance;
- the nature and frequency of use of different works is variable;
- laws might provide for promotion of some categories of works;
- certain categories of works can involve greater or lesser costs for the administration society.

All these factors, together with others, make it necessary to establish regulations for the distribution of remuneration related to use. These regulations alone allow the exact determination of the amount of the administration society's debt to each author. A good administration society will be one that applies equitable regulations.

Administration societies base their activities on copyright. But, like any sector of the law, copyright is undergoing an evolution. The causes are principally national legislation, international conventions, jurisprudence and the transformation of social and economic relations. In this connection, administration societies—over and above their basic task of collecting and distributing royalties—should exert influence on the development of the law to the benefit of authors. As a general rule, the user is better placed from the economic point of view than an individual author. It is the responsibility of administration societies to compensate for this economic disequilibrium when they are fixing the rate of remuneration for use. In this respect, it is said that administration societies have a trade union type of function. The same disequilibrium is to be found in the field of the development of legislation. What author would decide to take a case right up to the highest courts if he had to pay all the expenses from his own pocket? How can an author inform the political forces in his country of his wishes or concerns unless it is through the intermediary of professional organizations?

In the context of the activities of administration societies, an important place should also be given to their function as a catalyst for the development of copyright.

5. ECONOMIC IMPORTANCE OF COPYRIGHT

In contrast to those aspects of artistic creation that depend on social and cultural policy and which are often the subject of public debate, the economic importance of this activity has, up until now, attracted relatively little attention. The overall economic conditions and the economic consequences of artistic creation have to date only been the subject of a few studies. Such studies have only been carried out in a few countries, namely, Canada, United States of America, Sweden, United Kingdom and the Netherlands. Recently, studies have also been carried out in Australia (1987) Austria and Finland (1988) and the Federal Republic of Germany (1989).

The results of these surveys are surprisingly consistent. In Austria it shows that the copyright industries create a share of 2,053% of the gross domestic product. The press has the biggest individual share. TV and radio (0,346%) and the stage including festivals (0,285%) provide unusually high contributions. Music, including the stage and the activities of the nonmusical theatre, has a share of 0,475%. A total of 74.800 persons are employed in the copyright industries. The Finnish study shows a percentage of 3,98 of the copyright industries' contribution to the GNP. It has to be considered, however, that areas such as computer programs, architecture and advertising are included in this figure. This explains the much higher percentage as compared to other studies. Of the total labour force in Finland, approximately 3,36% were working in the copyright industry. This amounts to 81.900 persons.

The German study arrives at a percentage of 2,9 for the values created by the copyright industries in relation to the gross national product. This does not include computer software. If computer software were to be included, the percentage would rise to 3,3%. There are about 799.000 persons employed in the copyright industry in Germany. The German study adds, that the development of the copyright industries has been more dynamic than in the other areas of industry in the period from 1980 to 1986. The study estimates that this trend will continue in following years.

These studies underline the economic dimensions of artistic creation. Vis-à-vis the politicians who tempted to consider arts and culture as a luxury, or even a bottomless pit for subsidies, these results underline the fact that this sector of the national economy is in fact a large producer of wealth. Recognition of this fact should also lead to development of the infrastructure that this sector of activities requires, in the first place, copyright itself.

It is now necessary to consider whether all that has been said previously on the collective exercise of copyright by administration societies also applies to developing countries which, it is true, frequently face very different situations. In most cases, the difference lies in the fact that, in the first place, it is necessary to fulfil the fundamental needs of the population, for example, food, housing and training. Other sectors, which often include copyright, will only be tackled when these primary needs are assured. This very understandable attitude often gives rise .o a certain scepticism with regard to copyright, considered as "a luxury".

To the foregoing must be added economic considerations mainly related to the international balance of payments of these countries. Governments in developing countries often wonder why they should spend some of their hard currency assets to pay royalties, whether for books, music or plays. It is true that in a number of such countries- particularly in large urban centers—foreign music is played, foreign literature is read and foreign films and television series are imported. It would therefore seem logical not to establish copyright in order not to have to pay for these imported foreign intellectual assets as well.

However, this would be a very short-sighted policy.

Experience shows that this importing stage is only temporary. In the beginning, publishers and producers of phonograms in the developing country concerned will be more or less agents of foreign companies, administration societies in such a country will transfer more abroad than they will receive from foreign countries. However, little by little a national infrastructure is set up composed of national publishers, producers of phonograms, recording studios, cinema studios, administration societies, organizations of users, etc. which will also be of benefit to national authors, artists and record producers. They can only benefit from this if they receive remuneration for their creations. The instrument of such remuneration is copyright.

Finally, two factors are determinant for developing countries:

- recognition of the fact that this first stage of foreign domination is only temporary and is a phase that can be overcome;

- confidence in potential national creators and their ability to benefit from the cultural infrastructure set up.

To resume, it can be stated that, for developing countries as well, the situation is the same with regard to the interests at stake, leaving aside the temporary stage of foreign domination. In such countries as well, the flowering of national cultural creation also needs copyright and partly collective administration of the corresponding rights.

6. CRITICISM OF COLLECTIVE ADMINISTRATION OF COPYRIGHT

This report would be incomplete without mentioning some criticism raised in regard to the collective administration of copyright. So, in order to be complete and sincere, I would like to discuss some of the criticism. Conveniently enough, most of this criticism is contained in a Report on Certain Practices in the Collective Licencing of Public Performance and Broadcasting Rights in Sound Recordings presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty in December 1988 ("Collective Licencing", Report of the Monopolies and Mergers Commission, London 1988). This report examines the collective licencing of sound recordings for broadcasting and public performances insofar as it is done by the Phonographic Performance Limited (PPL). The inquiry concerned two conflicting interests: on the one hand, those of the owners of copyright and sound recordings, who enjoy a monopoly with statutory protection, and on the other hand, radio stations and promoters of public performances who are dependant on the ready availability of copyright sound recordings.

It has been argued that copyright itself and especially the collective administration of copyright limits production, markets or technical development to the prejudice of consumers and directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions on the user.

The report came to the following conclusion:

"Against these considerations we examined the merits of collective licensing. The principal functions of collective licensing bodies are to license the use of the copyrights they manage; to monitor that use in order to enforce the conditions upon which the licence has been granted; and to collect and distribute the royalties payable as the result of licensed use. The licensing function includes the negotiation of appropriate rates of royalty with the prospective user, and is inevitably contentious because it is concerned with how much the user should pay for the copyright material. Collective licensing should provide a mechanism so that payment of the required royalty:

(a) guarantees users immediate access to the licensor's repertoire;

(b) keeps to a minimum the administrative costs incurred by users and owners;

(c) provides for the use of copyright of recordings that have yet to be made (and hence are of unknown value); and

(d) meets the needs of owners and users whatever the scale of their business.

7. INTERNATIONAL IMPORTANCE.

The World Intellectual Property Organization convened an international forum on the collective administration of copyright and neighboring rights from May 12 to 14, 1986, in Geneva.

In a declaration that was adopted unanimously, the 160 participants emphasized the importance of this type of exercise of rights and emphasized in particular, that it should be promoted in developing countries.

The declaration adopted by this important international forum highlights the importance that collective administration of copyright has today acquired.

I understand that WIPO gives this subject high priority and will continue to deal with it in the near future.

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
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NEW COMMUNICATION TECHNOLOGIES AND COPYRIGHT

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While the germs of copyright existed throughout ancient times and the middle ages - literary plagiarism was objectionable even then - such notions remained relatively episodic. Roman case law, in particular, never took up the issue. Thus, copyright as we know it is a child of modern times.

The emergence of copyright is closely connected to the early sixteenth century invention of the art of printing. Only when texts ceased to be duplicated by slaves in ancient times or by medieval monastic copying manufactories did an author lose economic control over the written work. With the radical modernization of printing and communication, the written word and the pictoral image have become capable of mass distribution at blinding speed. The economic phase of printed texts and images as marketable mass products was introduced, and with it arose the need to protect the economic interests it created.

Printers initially sought protection against the unauthorized reproduction of their published printed material from the governing authority of the day. One of the first printing privileges to be granted came from the Republic of Venice, a state renowned for its businessmindedness.

A more thourough description of these printing privileges will be omitted here. Suffice it to say, that the primary interest sought to be protected was the printer's technical investment. Traces of this important root of modern copyright are found in the Anglo-American sphere both in its appellation for the concept, "copyright", and in the basic structure of its copyright system. Relative to other copyright systems, the Anglo-American is clearly based on a system of privileges. In contrast, the French system is influenced more by a system of personal rights.

The preeminent change in how copyright was conceptionally

viewed came in the second half of the eighteenth century, a manfifestation of the age of intellectual Enlightenment. What had hitherto been essentially an insurance policy for printers against their competitors was transformed into a right of the author, inextricably linked to his or her personality.

In order fully to appreciate this conceptual transformation, it is necessary to examine the predicament of artists before the mid-eighteen century. Certainly, it cannot be doubted that authors, composers, painters, sculptors and architects had been appreciated by their contemporaries in earlier times, even before the advent of copyright. Historical clues abound which attest to the fact that creative people were respected, valued and rewarded in their day. The difference, however, lies in how this esteem was expressed.

The methods by which artists were fostered varies with the era in which the artist lived. Some enjoyed a special status, often exempted from other work or assigned to academic posts. Public commissions or other financial support was not uncommon during some periods. In exeptional cases, an artist may have even been endowed with ecclestical or other distinctive honors. The attention and benefits artists received depended primarily upon the whims of the rich and powerful of their time.

But then there appeared "a new and miraculous engine" through which society recognized its people of creativity by granting material security directly. That engine was copyright. Consistent with a theme born forth from the Enlightenment's movement toward self-determination, creators, in a sense, joined slaves, Jews, peasants, and women as a beneficiary of the wave of emancipation. The feeling toward life during the revolutionary period, described by Hannah Arendt as a revolutionary pathos, marked the thinking and institutions of the time. Members of the revolutionary people's societies expressed this sentiment by signing their petitions to delegates or to the National Assembly as a whole with the notation "your equal". Further, the subsequent enactment of the French copyright laws of 1791 and 1793 came to be in the name of the "République une et indivisible." LeChaplier, the rapporteur of the two French laws,

felt so strongly as to call copyright "property of the most sacred and most personal kind." When viewed in light of the prevailing revolutionary pathos, copyright originated as an individual, exclusive right rooted in natural law and arising out of the personality of the artist.

But what is the ultimate justification for the copyright institution? The argument in favour of copyright is one of both justice and utility. The justice argument obviously derives from concepts of natural law. Clearly, a milestone for the intellectual development of mankind was erected by the Enlightenment's ability to break away from the mentalities characteristic of medieval feudalism and of the archaic slave-owning state. Heralded by the American and French revolutions, as well as by the Enlightenment, the "novus ordo saeclorum" postulated that men are vested with innate rights. Copyright arises from, not royal privilege, but rather the nature of man itself.

The utility argument has particular relevance to the American origination of copyright. The United States Constitution deems protection of intellectual property a worthy proposition in order "To promote the Progress of Science and useful Arts." This rationale is also justified by the nature of the New World's political structure. Dating back to the Mayflower Compact, this structure postulates an exchange of justice between an individual's contributions to and his or her demands from society. Should an individual contribute to society, society will reward him. Alexis de Toqueville noted, "We see that every addition to science, every fresh truth and every new idea became a germ of power placed within the reach of the people."

Making its appearance in these circumstances, the first copyright legislation incorporated these ideals. Today, almost two hundred years later, it is appropriate to inquire to what extent copyright has met its historical aspirations and how it could cope with the development of new communication technologies.

The final technological developments credited with creating the major means for exploiting creative works date from the turn

of this century. As one might expect, the history of copyright mirrors those developments. In 1928, for example, the Rome Revision Conference of the Berne Convention made provision for broadcasting rights in the international context. Other major technological advances, such as the making of audio and visual recordings, have existed for some time. In this respect, there have been no major technological advances within the last eighty years. Nevertheless, there continues to be a kind of development having far reaching consequences for copyright.

Technological developments itself has little direct impact on copyright. The replacement of black and white television by color, for instance, - a tremendous technological break-through - had no effect whatsoever on copyright.

Changes in copyright were necessary, however, where technical innovation opened up new means of communication between a work's creator and its consumer, where, as a result of the innovation, the nature of the consumption changed. To illustrate, one familiar with the processes of a conventional record pressing factory with its smelly presses and noisy machinery could readily distinguish the process by which a homeowner rerecords with the touch of a button an album cleanly and silently with a tapedeck. Conceptually, the processes are identical - a copy is produced. Yet, taking account of practical consideration, there is a world of difference between the two.

The following discussion will selectivly respond to those technological developments which impact on the more practical considerations of copyright. It is cautioned, however, that these developments should not be considered in isolation. Rather, these developments are typically interrelated. Consider the following chain: a broadcaster transfers a film onto videotape to facilitate its broadcast. As the movie is broadcast, it is simultaneously fed into a cable system. In turn, a cable channel subscriber records the movie on her VCR.

The Right of Reproduction

The right of reproduction can be traced to the roots of

copyright. In the same manner that the invention of the art of printing opened the floodgates for the dissemination of graphic works, the more recent methods of electronic reproduction of images and sound led to their own series of related problems and possibilties. This section discusses the issues araising from the development of electronic reproduction in relation to private reproduction, reprography and piracy.

Private Reproduction

Modern electronics has enabled the private individual to make visual and sound recordings both effortlessly and cheaply. The development of copying methods from the noisy record pressing factory to the private individual's living room is described typically as the shift of reproduction from the commercial to the private sphere.

This so-called "miniaturization" of reproduction processes has led to a partial substitution of commercial reproduction through the replacement of purchased records with self-recorded cassetts and to new ways in which the user receives the product. For the example, in the 1960s, it was taken for granted, that one had to go to the cinema in order to see a film. Today, the individual may reproduce the film privately with a video recorder merely by pressing the recording switch when the film is shown on television. The result: theatrical display, and its inherent controls available to the copyright owner, is being displaced.

In the meantime, a distinct trend has emerged. This trend is best evidenced by the French copyright law of 1985 and the 1985 amendment to German copyright law, both of which introduced the requirement of a royalty on blank cassettes into national copyright legislation. These solutions may be viewed as proof that copyright is capable of rising to the challenge of such new media. Although this development is rather encouraging, with Spain being the latest addition to a growing number of countries who establish claims for private reproduction, the situation is far from satisfactory.

To explain this we only have compare some relevant figures: the

Commission of the European Communities estimates that 1,5 billion ECU (= US dollars 1,71 billion) annually are lost to authors in the Common Market countries just through the substitution effect of home taping (Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, Commission of the European Communities 1988, 126). The annual remuneration for home taping in the EEC countries amounts to roughly 100 million dollars. This means that only about 5,8% of the losses which right owners suffer through home taping are being offset by means of the home taping royalty - a truly alarming figure.

Reprography

A trend very similar to that in private reproduction has developed in the case of graphic reproduction through the decentralization and miniaturization of the reproduction process. Just as the owners of video recorders have become their own film producers, the owners of photographying machines have become their own printers.

The similarity in the problems of private reproduction and graphic reprography justifies like solutions. For visual and sound reproduction, there can be no question, for practical purposes, of the connection between unauthorized reproduction and the reproduction processes themselves. A solution like the one adopted by the 1985 German copyright amendment appears to be appropriate in this regard. An entitlement to remuneration is granted from the manufacturer or importer of a photocopying appliance and from commercial operators and operators in schools, universities and other educational institutions.

Piracy

It is obvious that modern reproduction methods make piracy easier in some media, but not in all. For instance, the unauthorized production of vinyl records is not easily accomplished becaused such activity can only take place in a factory. The unauthorized production of video cassetts, however, is easy because only a home video recorder is required.

Broadcasting

As soon as the technological phenomenon of wireless broadcasting was used for broadcasting protected works - first by radio and then by television - individual countries began the inclusion of this new phenomenon into their copyright laws through case law and legislation. The broadcasting right was first introduced at the 1928 Rome Conference for the revision of the Berne Convention, and was extended at the 1948 Brussels Revision Convention. In fact, there were hardly any countries that had not granted copyright protection to broadcasts during the 1930s.

After decades of stability in copyright protection for broadcasting, however, problems arose in both the context of cable television in the early 1970s and the context of satellite television in the early 1980s.

Cable

That cable television had its origins in the communal aerial remains a "birth scar" with respect to the copyright considerations of this new technical process. As its name suggests, a "communal aerial reception installation" is designed to improve the reception of broadcast signals. Thus, the popular view was that such equipment should only be considered a reception mechanism and not a part of the author's broadcasting right.

However, this view appears to be contrary to Article 11bis(I)(ii) of the Berne Concvention. "Authors of literary and artistic works shall enjoy the exclusive right of authorizing ... any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one ..." Therefore, it was soon necessary to develop limits based essentially on these two criteria. If the cable transmission took place within a direct reception zone, the area in which the original broadcast could already be received directly, or if there were fewer than a given number of subscribers to the cable system, such systems would be considered to be on the reception side and would not be subject to Article 11bis of the revised Berne Convention.

Recent legal developments appear to depart from the concept of the direct reception zone. With respect to the limitation based upon the number of subscribers to the cable system, it will certainly be possible to find a permissible limit under the Berne Convention toward the lower end under "small reservations" (e.g., communal aerial installation for a building). Moreover, due to the clear wording of the Berne Convention, the act of transmission via cable systems has been recognized in almost every country as a broadcasting process and has been designated as such in law.

Direct Broadcasting Satellites

The discussion of the problems relating to satellites may be limited to the case of direct broadcasting satellites because, in all cases where satellite programs are distributed via cable systems, the discussion above regarding cable television would apply.

Direct broadcasting satellites will became operational in Europe in 1988 and 1989 with the successful launching of the French TDF and the German TV-SAT satellites. They enable the inhabitants of various European countries to receive programs directly, without an intermediary cable system. In this regard, the propriety of applying the "classical" concept of broadcasting rights is subject to question. My own views on the matter have already been published. My conclusions may be summarized as follows. The "classsical" concept of the breoadcasting right is based on a particular technical situation, namely, that the country of emission is also the country of intended reception. Marginal phenomena, such as spillover into the border regions of a neighboring country and specific short wave broadcasts for overseas services, are insignificant. However, with the use of satellites, the original identity is lost. The place of emission becomes arbitrary - whole continents, or parts thereof, become places of reception. The consequence is that an up-to-date concept of the broadcasting right must embrace a complete broadcast; i.e., the broadcast is to be seen as a whole. In concrete terms, the copyright laws of the receiving countries are to be applied. Accordingly, the rights for each receiving country must be acquired. The lex lata does not admit any other

interpretation if there is to be a correct understanding of copyright and the international conventions.

Known internationally as the "Bogsch theory", an up-to-date interpretation of the broadcasting right with respect to direct broadcasting satellites is gaining more and more followers.

Outlook

The answer to the question "Does copyright have a future in this age of rapid technological development?" is, in my view, yes. The reason for this optimism lies in the following considerations.

At the basis of copyright lies a technical invention, namely printing. In the course of this century, copyright has become emancipated from this technical invention. The end of the "Gutenberg galaxy" does not mean the end of copyright. Just as printing was the first stage of the copyright rocket, the electronic media will be the second stage. The courage to fire this stage is imperative.

The story of copyright is one of success. From limited origins in a few western European states, copyright began its triumphal march around the world in the nineteenth century. Today one can almost speak of a universal validity of copyright. The signs bode well for its continues international expansion.

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GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

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COMPUTERS AND COPYRIGHT

Lecture prepared by Mr. Ashok Bhojwani, Managing Director, TSG Consultants (P) Limited, and Vice President, Manufacturers Association of Information Technology of India, New Delhi

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1. Introduction

1.1. A computer consists of hardware and software. The hardware design is protected under patent law. Many countries have protected computer software under their copyright laws, while a few have developed legislation specially designed for software.

1.2. Computer software has a nature which is different from that of other products, services and intellectual property. Existing laws relating to intellectual property protect some of the facets of software, but not all. There is a need to understand the nature of software so that new laws can be designed. These laws should take an integrated view of computer software. If possible, the design of these laws should take into account the fast and furious developments taking place in the field of information technology, so that the laws are not obsolete even before they are implemented.

1.3. This paper describes some aspects of the nature of software. It discusses what needs protection and where the real value of software lies. A balance is also suggested between protection of the creative work of software developers and their liability, responsibility and accountability.

1.4. The use of computers has led to extremely powerful and innovative applications which have an impact on intellectual property rights(IPR's). Some of these applications include Information Data Bases and Bulletin Boards which serve as repositories of information which may be accessed, adapted and used by anyone who has the communication facilities and the wherewithal to subscribe to these services.

1.5. Some important issues in the laws of intellectual property are examined in the context of protecting the really valuable aspects of software and information data bases.

2. The Nature of Software

The word *software* means different things to different people. The scope of the word, in all its inflections, is important. It defines the frame of reference, which colours our thinking and the images that we conjure up when we encounter the word. The image can be that of intellectual property(e.g. a book), a service activity(e.g. writing of programs), goods(e.g retailing of a software package) and, perhaps, other analogies. Most analogies tend to be imperfect or limited.

One way to appreciate the nature of software is to understand its life cycle, the major elements of which are described in the following sections.

2.1. Functional Capability

This is the creative part of the life cycle and defines what the software will do. It serves to fulfill a need. An idea is easily replicated. There is, apparently, no legal protection for ideas. One cannot, for example, copyright the idea of a software package intended for word processing.

2.2. Look and Feel

Visualization of *look and feel* is an extremely creative process. Frequently, this is the factor which makes the difference between success and failure in the market. Taken together, the *idea* and the *look and feel* constitute the *architecture* of the software, much as they would for a building. This includes, for example, the style of interaction with the software using the keyboard and the mouse, the actual layout of the screen images, etc. A successful software package has an architecture which combines elegance, esthetics and functionality.

The architecture is easy to copy. In keeping with the cliche that imitation is the best form of flattery, there is much flattery in the world of software. The architecture cannot be protected by mechanical or electronic methods. It is there for everyone to see. In fact most software packages produced in the recent past have significant architectural similarities. Recently some standards have emerged, for example IBM's Systems Applications Architecture, which, inter alia, defines the *look* and *feel* of software for a broad range of IBM systems.

2.3. Design and Programming.

The final product may take the form of the software package that the consumer acquires in the market. Behind it lies a series of steps. There is the software design which defines how the software will meet the architectural specifications. This is followed by the actual programming in a programming language like C, Ada, Pascal, Cobol, etc.

2.4. Reusable Code

Usually the programs are written by human programmers. Often such programs include sections of prewritten programs which may have been written by others. To pursue the analogy of a building, such programs are like the standard fittings that one would use while constructing a house. *Reusable code* makes the job of the programmer much easier. As much as 70% of a software package may consist of reusable code. This would be termed as plagiarism in the world of book publishing! Whereas in the software universe this is just another case of not having to *reinvent the wheel.* Many software packages also use standard libraries of programs which are licensed by the software developer from other software developers. This has important ramifications on the laws of copyright.

2.5. Non Unique Literary Expression

The programs written by the programmer in a *source* language like Cobol have often to be *compiled* into *object* code which is readable by the machine. It is important and useful to note that different compilers produce different object codes from the same source program. Each of these object programs will perform the same function. It is also possible to *decompile* an object program. The source program so produced will appear to the lay person and to the expert as being totally different from the original source program. Therefore, it is feasible to alter the basic form and literary expression of a computer program using automated software tools such as compilers and decompilers. While the basic form and expression change, the functionality does not. This, perhaps, implies that a software package is not unique due to its literary representation but rather in terms of its look and feel and its functional capabilities. This makes computer programs quite different from most other forms of literary and artistic expression.

2.6. Automatic Program Generators

Recent advances in software technologies are making automated programming a reality. These new technologies allow automated generation of software and are known by names such as *Automatic Program Generators*. These program generators produce computer programs from the functional specifications provided by the user. Therefore, the final literary expression of the software is produced in a fashion quite remote from the person who visualised the functional capability and the *look and feel* of the software.

2.7. Multi-author, Multi-national Programming

Generally books have authors who are easily identifiable. This may not be the case with computer software. Computer Programs are often written by groups of programmers. For large software projects, involving many hundreds or thousands of person-years of work, the computer software may be authored by teams of programmers, working in different countries. The individual programs are then integrated together into a software package. The final package may contain significant portions of *reusable code*. Therefore, the final literary expression may have multiple authors residing in different countries and governed by different laws protecting the software.

2.8. Making the Invisible Visible

The design and program are made visible in the form of user and system manuals. Without such documentation, the software would be totally invisible. Even these will be less and less visible as time goes on because much of the documentation will be produced in machine readable form. Paperless documentation, if you will. With the introduction of *hypertext* and *hypermedia* and the use of *expert* systems these *documents* will also take on a rather nebulous and transitory form.

2.9. Production/Manufacturing

Manufacturing of a software package means its duplication from one floppy diskette to another. Other media and technologies could also be used, such as magnetic tapes, compact disks and ROM (Read Only Memory) chips. Software may also be *down-loaded* using data communication facilities. Unlike many other manufacturing processes, there is no significant investment in work-in-process inventory, which consists primarily of floppy disks or other media. The valuable portion is the invisible software. In this sense software production is similar to the process of duplicating audio and video tapes.

2.10. Copy Protection

During this process of duplication, the software manufacturer may introduce some means of copyright protection. This may take the form of using *locking* mechanisms which do not permit copying of the software. For example, specially designed floppy diskettes may be used which cannot be copied using the standard software provided with the computer. I have yet to find a *lock* for which human ingenuity has not discovered a key! Some of the best selling software packages for the IBM PC are those which *unlock* various copy protection mechanisms.

It has been found that, for PC software, copy protection provokes consumer resistance. Therefore, most widely marketed PC packages are now available without copy protection.

2.11. Licensing

Title does not pass to the customer. The customer does not buy the software. Software is normally licensed. The license gives the licensee the right to do certain things such as make copies for backup purposes or permit a specified number of users to use that copy of the software. For low-cost software packages, like for Personal Computers, the license, typically, consists of a printed License Agreement which is packed in a sealed plastic pouch along with the floppy diskettes. This Agreement, visible through the clear plastic, warns the customer that opening the pouch means acceptance of the Agreement. Often the pouch also contains a Registration Card which may be sent to the licenser by the licensee. For expensive software the license agreement may need to be signed in advance by the licensee. The license may even be withdrawn by the licenser under certain conditions.

2.12. Distribution

Once the software product is ready it is marketed through a variety of distribution channels. This requires advertising, comparisons with competing products, appropriate packaging, pricing and distribution through retail or other outlets.

Some software is *sold* across the counter in retail shops. Other software packages have to be licensed directly from the producer of the software. Sometimes, software packages are *bundled* with other equipment. For example, a printer, may be sold with a free copy of software to allow fancy printing. The fact that the copy is free does not change the fact that it is licensed to the buyer of the printer. A recent trend has been to distribute software via data communication links - which may cross national and state boundaries. Software has also been distributed over the airwaves, for example by the BBC, as part of its educational efforts.

2.13. Use of software

This is the utilitarian step of the process. Unlike many other intellectual properties, computer software is used for various purposes. Using computers means using the computer software. The user may use software which resides in the same location or a different place. In fact, over computer networks, the user may not even be aware of where the software is physically located. Recent developments are making it possible for different portions of the software to reside in different computers, which may be physically located in different countries and connected together in a *network*. As a result, the concept of software has become even more vague.

It is difficult to find an analogy for this kind of situation. It is as if you are listening to a live concert by a symphony orchestra whose string section is located in Vienna, the percussion instruments in Lagos and the wind section in New Orleans!

2.14. Redistribution/Resale

A computer centre could install a software package and permit many users to use the same copy of the package over data communication channels. In some ways this is analogous to the concept of cable television, except that the users could be located in different countries.

When a used computer is sold, the software usually goes with it. Most computer users do not understand the copyright implications of reselling the software.

2.15. Support

After the customer licenses the software, there may be a need for support. Such support may include training, problem reporting and error correction services as well as access to updated versions of the software. Normally, support is provided only to those who have registered as licensees of the software.

Software goes through a continuing process of development. Usually, a new *version* or *release* of software is issued by the software supplier every six to twelve months. Some of these new editions are offered free to customers, while others are made available at a charge.

Again it is difficult to find an analogy in other intellectual properties. Some say that software is like the music in an audio cassette. This is true to a certain extent. But have you ever heard of continuing updates to your music cassette? How about training and a manual to understand how to listen to each piece of music? Other facets of software and music may also be compared.

2.16. Life Cycle

Typical life cycles for computer software are up to 4 years for PC software and up to 10 years for software for larger computers. Software becomes commercially non viable as newer and more attractive architectures replace it. New software products are better able to exploit the latest hardware technologies which offer better capabilities in terms of speed, cost, function, reliability and miniaturization. The product life cycles of computers are now varying between 2 and 4 years. This time frame needs to be considered when designing laws to protect the commercial and intellectual rights of owners of computer software.

It is useful to compare the software life cycle with that of the life cycle of other products, services, technologies or intellectual properties. We like to listen to old musical works, we enjoy poetry and books some of which have a magic that goes on and on over decades and even centuries. One cannot say this about software, which is a relatively *perishable commodity*.

Visualise software and you visualise nothing. It is like a dream. It is sometimes easier to define intangibles in terms of what they are not. Software is not manufactured. It is invisible, cannot be touched or felt. It cannot be constrained within national boundaries. It is neither a literary work nor an art form. Esthetics is not its goal.

Software has a metaphysical existence. This leads to difficulties in explaining it to lay persons. This is also the reason why those who understand and control software could wind up being the priests of the Information Age!

Software has been in existence for less than 50 years. Perhaps we still need time to understand and comprehend its scope and variety. Perhaps this is the reason why we have chosen to protect it under copyright laws. However, as we better understand the nature of software we should realize that the needs for protection are different.

3. Information Repositories

There are a number of different types of information repositories. They all share the characteristic that they may be accessed by people who subscribe to them or are otherwise permitted to access the information through a computer terminal. There may be an annual subscription fee plus a usage charge for the use of an information repository. A user may be given the right to only read information from specified portions of the repository. He may also be given the right to enter

information or even to delete it. Thus, the contents of such repositories may change continuously. It is also important to appreciate that the user may *download* the information into his own PC or other computer.
This then gives the user the ability to further use the information for commercial or other use. He may even transform the information into a different *literary expression* in a way that would require considerable sophistication to relate such a transformation back to its original source.

3.1. Bulletin Boards

Research scientists working in the field of research on nuclear fusion, can access a network called BITNET. This network has bulletin boards for different subjects. Users of Bitnet can not only see the information in the bulletin boards but may also enter their own contributions into the bulletin board. There are hundreds of bulletin board services available in different parts of the world. Thus a bulletin board serves as a forum for exchanging ideas, discussing problems and building a synergy amongst users from all over the world.

3.2. Online Information Services

The responsibility for creating and updating of information in an online information service is normally that of the *Information Provider*. The information could be on a diverse range of topics like Medical, Stocks and Bonds, Anthropology, Zoology, Corporate Profiles, etc.

4. Reasons for Protection

4.1. Enlightened Self Interest

At a WIPO Seminar held in New Delhi in 1987, officials of the Government of India stated that respect for laws on intellectual property was extremely important for India because of major research and production thrusts in the areas of software development, design of LSI/VLSI/ASIC components and biotechnology. For example India has plans to export computer software worth US$ 1000 million in 1995. It is in the enlightened self interest of India to protect intellectual properties. Software companies also see the need to protect computer software. On the other hand some users and countries may not feel the compulsions of such enlightened self interest. This has special relevance when the cost of software is perceived as being inconsistent with the rest of the economic standards in a country.

4.2. Encourage Creators

One belief is that unless there is a commercial benefit, creative people may not come forth to produce software in sufficiently large numbers. There is a counter view. Most authors continue to write books and many artists continue to create paintings not for commercial benefit but for the fulfillment of their inner drive and passion. I think both beliefs have validity because in some respects software is similar to a book, and in others to a work of art. Yet it is fundamentally different in its other facets.

I can tell you from experience that it requires a creative passion to develop the idea of a new software package. I also feel that, at least in the area of personal computing, a new age of renaissance has dawned. People are writing extremely creative software with commercial profit being a secondary motive in many cases.

Creators of information repositories may have a commercial or social motive and in the case of

bulletin boards a strong desire for cooperative problem solving and solution sharing.

4.3. Protection of Commercial Interests

The protection of commercial interests for software extends beyond the individual. Corporate interests are involved in many cases. Unlike the book trade, in the software business I would guess that the bulk of the royalties flow to corporations and not to individuals. We have the Lotuses and the Microsofts but not the Michael Jacksons and Agatha Christies. The authors of software are, typically, quite anonymous. In fact most software packages are developed at enormous cost by groups of programmers. The costs of marketing run into the tens of millions of dollars. Furthermore, the software needs protection in multiple countries.

It has been recognised that information is a resource, which is as important as the traditionally accepted resources of land, capital, machines and people. A great deal of profit arises out of the processing and analysis of information. In order to process large volumes of information we must use software. Effective use of good software gives a strong competitive advantage. Banks, airlines and manufacturing companies have used information systems for strategic advantage.

Similarly the use of accurate and current information from an information repository provides people with tremendous benefits.

Estimates of the losses to US companies, due to software piracy in 1985, range from US$ 20 billion to US$ 60 billion (I believe that the bulk of the piracy also occurs in the United States). This is equivalent to a loss of tens of thousands of jobs in the US market. Therefore, software protection, in addition to being a matter of intellectual property is an important trade issue. Software piracy concerns have already led to some unpleasant trade consequences in international relations. I have not come across any estimates of the losses caused by abuse of the intellectual property rights of owners of information repositories.

5. The Why of Piracy

There are certain perceptions and attitudes which prevent the acceptance and enforcement of intellectual property laws.

5.1. High License fees

On some computers you have to pay more for the software than for the hardware. It is expected that in the near future IBM will realize greater revenue and profit from software than from hardware. The invisible and intangible will cost more than the visible and the tangible.

Unlike audio and video tapes, there is a wide variability in price of software packages. On PC's a Word Processing package may cost only $100, while specialised software for computer aided design may cost $5,000, and software for treatment planning of cancer may cost as much as $40,000. This, I believe, creates a problem in terms of consumer perceptions.

The consumer perceives a cost of the package in terms of the visible, i.e. the floppy disk, the manual and the packaging. The invisible part is not given a high value. An immediate and inevitable comparison is made between the cost of a typical prerecorded audio or video tape. Within this framework, the cost of most software packages is perceived as being unreasonably high.

5.2. Price and Piracy

High price is one of the factors which encourages software piracy. The buyers must perceive the price as being *reasonable* and *legitimate*. These words can and do arouse emotions. It is as if the pirate is calling the legitimate owner a plunderer or neo-colonialist or other such phrase in vogue.

Will a fair value reduce piracy? I believe that it will. Book publishers have low cost Asian Editions of books for students. Can we have a similar concept for software? This will not reduce piracy in the developed countries. However, it will allow consumers in the poorer countries to afford the software.

5.3. Cost/Benefit Perception

Real productivity in using information technology comes from software. The pricing of software is generally based on what the market can bear in the developed countries. Recently there has been a welcome trend to distribute software based on the cost of production. Software companies tend to charge the same price in the developing countries as they do in the developed ones. Cost/Benefit justification becomes more difficult in the developing countries because the value of the gains in productivity are smaller in absolute terms.

The question arises as to what is the fair value? This value is related to the economy of each country. Thus, one may be willing to spend $500 on a software package to improve the productivity of a financial planner earning a salary of $5000 per month. But what would one be willing to pay to obtain a similar percentage improvement in the productivity of a planner earning $500 per month? Clearly it becomes difficult to argue that a price considered fair in USA is also fair in all other countries.

This is one of the problems that software companies and consumers need to address before governments get into the act of regulation and control of software prices. It really boils down to the difference between a necessity and a luxury. It is perceived as yet another example of denial of opportunity to poorer segments of society.

5.4. Balance of Payments

Purchase of legal software imposes balance of payments problems for the developing countries because the United States dominates the field of software, controlling, I would estimate, in excess of 70% of the world trade in this field. I am sure it is tempting for some countries to turn a blind eye to software piracy. One of the rationalizations trotted out is that the benefits of information technology should flow to everyone.

6. Some Legal Issues

Lawyers and software people must learn to understand each others language if innovations are to be brought about in legislation dealing with software.

Many countries have protected computer software under their copyright laws. A few have designed special laws for this purpose. Others have placed the issue on the *back burner* until greater understanding develops on the subject. WIPO had suggested model laws for the protection of computer software.

There is a need for a new set of intellectual property laws intrinsically suited to the protection of computer software. Many countries appear to have protected computer software under their Copyright Laws just because this happened to be the most convenient legislation around. However, with the almost universal use and application of computer software I am sure that there is much better understanding of the nature of the beast.

6.1. What needs protection?

6.1.1. There is a commercial value to much of the software development life cycle. Different groups of people may perform different parts of the software development activity, even at geographically separate locations. For example, the idea of the package could be developed and documented in San Francisco, the design could be performed in Tokyo, the programming and draft documentation prepared in New Delhi, the customer-ready manuals printed in Singapore and the marketing and support provided in USA and Western Europe.

6.1.2. Most software developers will agree that given the idea and a definition of the *look and feel* of a software package, it is not too difficult to write computer programs to realize that concept. None of these *expressions* would infringe on each others' copyright because they would have been written independently of each other. This kind of *reverse engineering* of computer software is fairly simple. This is the reason that successful packages breed imitations. In the software business, the idea and the *look and feel* of software under development, are normally kept secret until the package is released in the market. A major portion of the value of a software package is in the idea and the look and feel of the package.

6.1.3. Copyright laws provide protection to the final expression of each stage, that is, the concept document, the design documentation, the actual sequence of program instructions (computer programs) and the supporting manuals are protected. However, as we have already discussed, different compilers produce different object code and the process of decompiling-compiling can totally alter the physical expression of the package. Therefore, protection is provided to the non-unique portion of software, and that too to a single literary representation.

6.1.4. The idea and the *look and feel* of software are not protected under the copyright laws of most countries. There is little doubt in my mind that these are commercially valuable. Perhaps we do not know how to protect such high level intellectual activities. It is possible to take a view that such intellectual activities should be in the public domain much like the great ideas in philosophy, economics, sociology and the natural sciences. We do not, for instance, allow Copyright or Patent protection to the Theory of Relativity. However, this view creates a problem because we seem to be unable to protect that which is valuable and able to protect only the trivial aspects of software through the copyright laws.

6.1.5. Information repositories needs protection. It is not at all clear how this should be done. At present protection seems to be provided only by the license agreement entered into between the owner of the repository and the subscriber to it.

6.2. Cross National & Team Production

The fact that software may be produced by teams of people, from different countries, creates interesting problems with regard to the protection of software. Copyright laws do not appear to be designed to protect corporate creations. Most software packages use program fragments from earlier software, the authors of which could be different. Multi- country efforts can further complicate this issue. There is a need to address these problems. For example, under which country's laws is the software protected if the authors have written the software in different countries?

A significant portion of the software package may consist of reusable code, *plagiarised* from earlier works, without even knowing who the author was and usually without giving credit or commercial benefit to such authors. Corporations normally insist on employment contracts in which the copyrights are automatically assigned to the corporation. I believe that this practice can raise some rather interesting legal issues

6.3. Multiple Users of Software

Data communications links have made it possible for several users to use software located in a remote computer centre. Such users could be in the same country as the computer centre but need not be. Should the commercial rights of the author be protected by imposing an additional license fee for each user of the software? This is analogous in some ways to cable/satellite distribution of video and television programs. There is a need to study the implications of this because it involves multi-country usage. There need not be a general broadcast as in the case of satellite television, only discretionary use of the software installed in the computer. This also raises the issue of how a user in a country, using computers located in other countries, can be sure that the intellectual property rights of the concerned parties are indeed being protected and that the relevant laws in this respect are not being violated?

6.4. Distributed Computing

This is an emerging concept. In this the user does not even know where the software resides in a network of computers located at different places, perhaps in different countries. Multiple copies of the software could exist in the network. The network software would decide which copy gets used at that time based on factors such as computer load and tariffs. To complicate matters further, bits and pieces of the software itself could be scattered in different computers located in different nations. I find it difficult to find an analogy for this in other intellectual properties.

6.5. Ongoing Adaptation

The fact that software requires continuing modifications, means that there is no *final* published work. The software developer gives *version numbers* to the software at some convenient point of time. For example, the initial issue of the software could be called Version 1.0. A few months later, this could be replaced by a corrected Version 1.1. A subsequent enhanced version could be referred to as Version 2.0. and so on. This is similar to editions of textbooks. Therefore, each version has to be copyrighted. However, some authors prefer to keep sending corrected copies of the software as time goes on. This is clumsy in theory and practice. I can well imagine the practical problems of proving copyright violations because the author would have to keep meticulous records and copies of every version supplied to others.

6.6. Utilitarian Nature of Software

In the copyright laws of some countries, software has been classified along with literary works. However, literary works have a stronger cultural aspect to them than software - which seems to have more of a commercial motivation. Software has a utilitarian nature, it is not like a work of art in that it elevates the spirit or is designed primarily to be attractive and esthetic. It is the use of software that is commercially beneficial, not merely the act of copying it. Fragments of program code are unlikely to achieve the fame and value of a painting by Picasso or the writings of Gandhi or Lincoln.

Perhaps due to the utilitarian nature of software, most of the commercial benefits in terms of royalties and prestige go to corporations rather than individuals.

6.7. Litigation Life and the Software Life Cycle

There is a need for rapid settlement of litigation relating to software, rapid enough to be consistent with the short product life cycles. Otherwise the product is obsolete by the time the legal issues are settled. Injunctive relief does not seem to provide a fair and adequate solution. Furthermore, the decades of protection given to literary works appear to be unnecessary for the short lived software life cycles.

6.8. Classification of Software

There is considerable confusion in the policies and laws relating to computer software for purposes of commercial classification, statistical monitoring, protection and tariffs.

I know of one country in which the software license value on imported software is taxed under the income tax laws, the software is considered to be *goods* for purposes of import duty, as a literary work in the copyright laws while software development is classified as an industry. In this case the government in question has taxed different facets of software under different laws. Perhaps the administrator of each law believes that he has taxed its essential aspect. This is a good example of the confusion that arises when the nature of software is not understood. Therefore, considerable thought is needed to understand the fundamental nature of software.

When is a computer not a computer? If a hospital buys a computer along with software for treatment planning of cancer, has it bought a computer or has it bought a piece of medical equipment? The same computer could take on the nature of an accounting machine, a point-of-sale terminal, a process controller or what have you, depending on the software used on it. The nature of the machine, thus, gets determined by the software used on it. This trend is accelerating as more and more machines and appliances become *microprocessor* based.

Therefore it is not only the nature of software which defies classification under traditional categories, the classification of machines is also becoming more difficult as time goes on. This has an impact on the classification of equipment for purposes of laws, tariffs and certification. For example, Country X does not permit the import of PC's for various reasons. However, it does permit the import of Desk Top Publishing(DTP) Systems. Consumers, therefore, may import the latter which is nothing but a PC with specialised DTP software and a laser printer.

6.9. Information Repositories

There is a need to understand the distinction between software and information repositories. This is important in the context of new knowledge based software products and on-line information services. Should large data bases be protected as intellectual property? They change continuously as information is fed into them from all over the world. They are certainly intellectual property but they are not static in nature. Therefore, under existing laws, it is not clear what would be protected. We are bound to see tighter coupling between software, expert systems and information bases.

Even the design of Integrated Circuits, for the protection of which so much heat is generated, boils down to a design data base, design rules and computer programs which assist the designer.

Conceptually, except for the current trade related emphasis and the direct skills required, the technology for the design of integrated circuits is not significantly different from that needed for the design of carpets, automobiles and other products.

6.10. Derivative Product

There is a need to appreciate that software produces derivatives such as output reports, data bases, other software, even poetry, music and literature. It can be argued that almost all software is derived software because it is produced using the facilities provided by operating systems and language compilers. Emerging software technologies are expected to produce most software programs automatically. If that view prevails, what will we really copyright? What should be the status of such derivatives in law? Whom will we protect?

6.11. Resale of Software

If the owner of a computer sells the computer, what should be the status of the software? Should the new owner enter into a new relationship with the owner of the software copyright or license?

I understand that even books are not supposed to be resold without the consent of the publisher. However, since software is utilitarian and very closely linked to the hardware, the problem takes on a different dimension.

6.12. Try before you Buy

We hear music over the radio and then decide to buy an audio cassette or compact disc. How can the potential user of a software package decide whether the package will meet his needs? Should rental of software be permitted? Since software is easy to copy this can increase piracy. On the other hand there is a genuine need to try it before you buy it. This issue has to be considered in the context of a software bank (dealer/library, etc.) accessible by users from all over the world using data communication links including satellite channels.

6.13. Collective Royalty

In some countries(e.g. France) they levy a tax on the sale of blank audio and video cassettes on the grounds that a certain percentage of them will be used for unauthorised copying. Based on market surveys they determine the expected loss of royalty. The amount so collected is distributed to performers. It is interesting to speculate whether such a concept would work for software also.

6.14. Validity of License Agreements

Under some laws affecting computer software, a license agreement is valid only after the licensee signs it. This raises a question regarding the validity of printed agreements which are visible through *bubble* packaging.

Suppose the buyer of the software opens the package and throws away the agreement. Can he claim that the agreement is not binding since he has not signed it? While this does not appear to allow him to abuse the Copyright on the software, it seems to create an opportunity by which license terms can be violated with impunity.

One solution to the problem would be to amend the laws to permit such unsigned license agreements for computer software. However, that could tend to make the agreements quite one sided, in favour of the licenser.

Another concept might be to provide software with automatic protection, under the law, which is reasonable for both licenser and licensee. Even this latter approach would face difficulties because it is not feasible to foresee all possible current and future uses of the software. Consumers have a need to make copies for legitimate purposes, such as to use the software in ways that were not thought of by the software producers. In a purely technical sense, such use may violate the terms of the software license agreement. The uses are limited only by the limits of human creativity and, ultimately, *machine creativity*.

There is, I believe, an even greater need to examine whether software can be sold outright, like a book, rather than being licensed. I think it would be useful to examine the proposition that piracy may be a result more of license terms and conditions than copyright conditions.

Reference works such as dictionaries, popular quotations and thesauri are now available in the form of computer readable floppy disks and compact disks. Purchase of these involves a license agreement, whereas purchase of the equivalent book does not. I feel that, given the will, it should be possible to eliminate software licensing for the end user.

There may be alternatives to licensing. However, at present most software developers license their software and do not sell it outright like a book. It may be possible to sell software like a book, at least to individual customers. I believe that it is useful to explore this possibility because it would simplify commercial relationships for the overwhelming majority of software buyers. This would also eliminate the complications introduced into intellectual property laws by the fact that software is licensed. I believe that the market is too large and fragmented to monitor and enforce compliance with license terms. This in itself is probably a good reason to try and find alternatives to the system of licensing.

6.15. Product Liability for Software and Information

Protection is only one side of the coin. Since software is utilitarian, should the other side of the coin relate to product liability in order to create a sense of responsibility and accountability? Like other literary works, should software have the fundamental right to be wrong? Should it be provided a constitutional equivalent of *freedom of speech*?

There is a need to appreciate the integrated way in which hardware and software operate. A synergy in which the whole system is greater than the sum of its parts and absolutely useless without either. Almost every modern machine has a computer controlling it. This is in the shape of a tiny chip called a microprocessor. The real control, however, is provided by the software. The hardware fails due to mechanical failures, thermal stresses, wear and tear, etc. Software is impervious to such failures. Software fails due to unexpected input, trivial overflows and the presence of other *bugs* in the program.

Failure in the software can cripple a machine as effectively as failure in the hardware. *Bugs* in the software may make the machine behave differently from the way it was supposed to behave, leading to unpredictable and, possibly, disastrous consequences. A software package may produce faulty results leading to business losses. Moreover, as noted above, the reasons for failure of software are fundamentally different from those of hardware. They say that you can make mistakes when you calculate by hand, but to really commit a blunder you need to use a computer. In the computer, hardware failures rarely lead to disaster. It is the software failures which need to be watched. Even without the linkage with hardware, a piece of software may produce faulty results

leading to business loss.

Most software license agreements absolve the software supplier of any liability due errors in the software. Should software suppliers be made liable for the consequences of malfunctions in software? There is no way, at the current state of the art, to be one hundred percent sure that a software package will work correctly under all the conditions it is going to encounter.

This could be a technological limitation. We currently do not know how to *engineer* software to the same level of reliability as hardware. It could also be a philosophical limitation. Software, having its basis in an intellectual and creative activity, may not be ratable for reliability or correctness of behavior in a way comparable to hardware. To use another imperfect analogy, the leather binding, printing and overall design of a book may be rated as near perfect - but how would you obtain a consensus on the correctness and the quality of the ideas in the book?

Even well engineered hardware products fail. There are precedents, in some countries, with regard to the liability of products such as airplanes, cars, tires, etc. Software has now become critical enough for society to demand higher levels of reliability from it. Therefore, the question arises whether along with the protection of software we need to develop international standards on the liability relating to computer software - and by extension, other intellectual properties which have high potential of contributing to disasters. The resolution of this issue can have a major impact on the economic structure of the software business.

6.16. Future Developments

Software is the common factor in many emerging technologies. Artificial intelligence, bio-chips, automatic language translation and hypermedia are just a few of the technologies which are likely to give us further food for thought in respect of laws relating to the protection of computer software. It is important to try and anticipate some of these trends. However, it is difficult to do this. he crystal ball is not as clear as one would like it to be. Laws seem to be doomed to follow developments in software technology. Is it always going to be a case of too little and too late?

7. Conclusion

The nature of software is largely intangible. It is difficult to understand this nature, in a complete sense, by analogy with the nature of other well understood products, services and intellectual properties. The emerging concepts of expert systems coupled with information repositories make the situation even more complex. There is a need to arrive at a uniform understanding on the nature of software. This understanding should lead to the development of new, internationally consistent legislation specifically designed for the nature of computer software.

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
WIPO in cooperation with
the Government of the Republic of Korea

Seoul, September 4 to 11, 1989

THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: BASIC RULES AND SPECIAL RULES FOR DEVELOPING COUNTRIES

Lecture prepared by the International Bureau
of the World Intellectual Property Organization (WIPO)

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Introduction and Background

1. Legal protection of authors' rights is relatively young. It got its fillip in the aftermath of the industrial revolution. Copyright is thus not an ancient concept. The first copyright statute dates back only to less than three hundred years. Copyright laws provide for the right of the author in the work that he produces.

2. The post-industrial revolution period, however, made it increasingly evident that with the gradual progress of technological development in the future, control over unauthorized publication and dissemination of works would become difficult without effective steps to provide the necessary protection. Also, since an author's work is often his main source of income, unless his interests were suitably and adequately protected, there could be no incentive for national intellectual creativity nor could the intellectual progress of a country be nourished or sustained without adequate encouragement for those who create literary, artistic, musical, dramatic, scientific or other works. At the international level, however, while unconditional access to foreign works and their all too easy availability could hamper national creativity, publishers of works of foreign origin would find, for instance, that lack of protection of works coming from abroad could result in confusion. Books they set out to print could appear suddenly on the market published by some other printer and due to unlimited competition, considerable investment would remain uncovered.

3. The need to protect the interests of authors, the interests of the State to protect creators of literary and artistic works in order to develop its own national cultural heritage, were among some of the impelling reasons contributing to the development of national, and through bilateral and multilateral treaties, the development of international copyright protection.

4. In view of the fact, however, that intellectual works have a more universal character and can be easily disseminated by ever-increasing technological means, and the news media such as the cinema, radio, television, phonograms, cassettes, videotapes, etc., the recognition of copyright would be incomplete if limited to national frontiers. This is so since no country has the monopoly of intellectual works. On the contrary each country has, through the creative activity of its nationals, something to offer humanity. Thus it was felt important that a system of international protection should be established to safeguard the interests of authors in foreign countries.

5. The Berne Convention was concluded as a culmination of the work of three diplomatic conferences held for the purpose between 1884 and 1886; it was actually formulated and adopted on September 9, 1886.

The First International Copyright Treaty: the Berne Convention

6. Copyright protection on the international level began by about the middle of the nineteenth century on the basis of bilateral treaties. A number of such treaties providing for mutual recognition of rights were concluded but they were neither comprehensive enough nor of a uniform pattern.

7. The need for a uniform régime led to the formulation and adoption on September 9, 1886, of the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention is the oldest international treaty in the field of copyright. It is open to all States. Instruments of accession or ratification are deposited with the Director General of the World Intellectual Property Organization (WIPO).

8. The original text of the Convention has undergone revision since. The Berne Convention has been revised several times in order to improve the international system of protection which the Convention provides. Changes have been effected in order to cope with the challenges of accelerating development of technologies in the field of utilization of authors' works; in order to recognize new rights as also to allow for appropriate revisions of established ones. The first major revision took place in Berlin in 1908, twenty two years after the initial formulation of the Berne Convention in 1886. This was followed by the revisions in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris in 1971.

9. The purpose of the Stockholm revision was to cater for the rapid technological developments as well as the needs of several newly independent developing countries, and to introduce administrative and structural changes. As for the preferential provisions for developing countries worked out in Stockholm, these were further taken up at the Paris Revision Conference in 1971, where new compromises were worked out. The substantive provisions of the Stockholm Act which had also never entered into force were, however, adopted by the Paris Revision Conference in fact as they had been worked out and included in the Stockholm Act.

10. In examining the Berne Convention we shall deal mainly with its latest Act of 1971 as revised in Paris.

Purpose of the Convention

11. The aim of the Berne Convention as indicated in its preamble is 'to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works'. Article 1 lays down that the countries to which the Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

Basic Principles

12. The Convention relies on three basic principles:

Firstly, that of "national treatment" according to which works originating in one of the member States are to be given the same protection in each of the member States as the latter grant to works of their own nationals; secondly, that of automatic protection, according to which such national treatment is not dependent on any formality; in other words protection is granted automatically and is not subject to the formality of registration, deposit, or the like; and thirdly, that of independence of protection, according to which enjoyment and exercise of the rights granted is independent of the existence of protection in the country of origin of the work.

Works Protected

13. Article 2 contains a non-limitative (illustrative and not exhaustive) list of such works, which include any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression. Derivative works, that is those based on other pre-existing works, such as translations, adaptations, arrangements of music and other alterations of a literary or artistic work, receive the same protection as original works (Article 2(3)). The protection of some categories of works is optional; thus every State party to the Berne Convention may decide to what extent it wishes to protect and official texts of a legislative, administrative and legal nature (Article 2(4)), works of applied art (Article 2(7)), lectures, addresses and other oral works (Article 2bis(2)) and works of folklore (Article 15(4)). Furthermore, Article 2(2) provides for the possibility of making the protection of works or any specified categories thereof subject to their being fixed in some material form. For instance, protection of choreographic works may be dependent on their being fixed in some form.

14. One of the important provisions is the one that covers works or expressions of what is called "folklore". Without mentioning the word, the Convention provides that any member country may give protection to unpublished works where the identity of the author is unknown, but where there is every ground to presume that the author is a national of that country, by designating, through the national legislation, the competent authority which should represent the author of unknown identity and protect and enforce his rights in the countries party to the Convention. By providing for the bringing of actions by authorities designated by the State, the Berne Convention offers to countries whose folklore is a part of their heritage, a possibility of protecting it.

Owners of Rights

15. Article 2(6) lays down that protection under the Convention is to operate for the benefit of the author and his successors in title. For some categories of works, however, such as cinematographic works (Article 14bis), ownership of copyright is a matter for legislation in the country where protection is claimed.

Persons Protected

16. Authors of works are protected, in respect of both their unpublished or published works if, according to Article 3, they are nationals or residents of a member country; alternatively, if, not being nationals or residents of a member country, they first publish their works in a member country or simultaneously in a non-member and a member country.

Minimum Standards of Protection

17. Certain minimum standards of protection have been prescribed relating to the rights of authors and the duration of protection.

Rights Protected

18. The exclusive rights granted to authors under the Convention include the right of translation (Article 8), the right of reproduction in any manner or form (which includes any sound or visual recording) (Article 9), the right to perform dramatic, dramatico-musical and musical works (Article 11), the right to broadcasting and communicating to the public by wire, by broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work (Article 11bis), the right of public recitation (Article 11ter), the right of making adaptations, arrangements or other alterations of a work (Article 12) and the right of making the cinematographic adaptation and reproduction of a work (Article 14). The so-called "droit de suite" provided for in Article 14ter (concerning original works of art and original manuscripts) is optional and applicable only if legislation in the country to which the author belongs so permits.

19. Independently of the author's economic rights, Article 6bis provides for the right of the author to claim authorship of his work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his honor or reputation ("moral rights").

Limitations

20. As a sort of counterbalance to the minimum standards of protection there are also other provisions in the Berne Convention limiting the strict application of the rules regarding exclusive right. It provides for the possibility of using protected works in particular cases without having to obtain the authorization of the owner of the copyright and without having to pay any remuneration for such use. Such exceptions which are commonly

referred to as free use of protected works are included in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10bis (reproduction of newspaper or similar articles and use or works for the purpose of reporting current events), 11bis(3) (ephemeral recordings).

21. There are two cases where the Berne Convention provides the possibility of compulsory licenses: in Articles 11bis(2) (for the right of broadcasting and communication to the public by wire by rebroadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work) and 13(1) (for the right of recording musical works).

22. In so far as the exclusive right of translation is concerned, the Berne Convention offers a choice, in that a developing country may, when ratifying or acceding to the Convention, make a reservation under the so-called "ten-year rule" (Article 30(2)(b)). This provides for the possibility of reducing the term of protection in respect of the exclusive right of translation; this right, according to the said rule, ceases to exist if the author has not availed himself of it within 10 years from the date of first publication of the original work, by publishing or causing to be published, in one of the member countries, a translation in the language for which protection is claimed.

Duration of Protection

23. The minimum standards of protection provided for in the Berne Convention also relate to the duration of protection. Article 7 lays down a minimum term of protection. According to this, the term shall be the life of the author and 50 years after his death.

24. There are, however, exceptions to this basic rule for certain categories of works. For cinematographic works, the term is 50 years after the work has been made available to the public, or, if not made available, then 50 years after the making of such a work. For photographic works and works of applied art, the minimum term of protection is 25 years from the making of the work (Article 7(4)).

25. A majority of countries in the world have legislated for life plus a 50-year term of protection since it is felt fair and right that the lifetime of the author and the lifetime of his children should be covered; this could also provide the incentive necessary to stimulate creativity, and constitute a fair balance between the interests of the authors and the needs of society.

26. The term of protection, insofar as moral rights are concerned, extends at least until the expiry of the economic rights.

Latest (Paris) Act of the Convention

27. The Berne Convention was developed initially according to the standards and requirements of the industrialized countries in Europe. Later, when the system of the Berne Convention extended to other areas of the globe, it started acquiring new dimensions. Particularly in the wake of the Second World War, when the political map of the world changed considerably, the Berne

Convention also had to face new problems of development. Several territories previously having colonial or similar status, and in that capacity being bound by the provisions of the Berne Convention, progressively became independent and other States were newly created. These countries had to face the question of possible accession to the international system of copyright protection as contained in the Convention. They were free to join or not to join it or, where they were already members, to withdraw from the Convention.

28. While it was almost universally recognized that authors and other creators should be afforded the necessary protection for their intellectual creations, there was also a consciousness that the newly independent developing countries had genuine problems in gaining greater and easier access to works protected by copyright, particularly for their technological and educational needs, from the developed countries, both in respect of formal as well as non-formal educational programs. Solutions had to be found for meeting the immense and urgent needs of educational material in developing countries. The necessity for setting up of an international arrangement for permitting developing countries a greater degree of access to protected works while respecting the rights of authors, seemed to gather momentum. Meanwhile, the advance of technology made the extension of the geographical scope of the international conventions and multilateral agreements to an increasingly larger number of countries, more attractive.

29. In view of these new facts and circumstances, it was felt by many that the systems of international protection of copyright required adaptation or modification to suit the new concepts and the new needs. Deliberations at the more recent revision conferences were, therefore, directed to adapting the systems of international protection of literary and artistic works to the needs of these newly independent countries.

30. The question of incorporating into the Convention special provisions for the newly independent developing countries was initially mooted at an African Copyright Meeting in Brazzaville in 1963. This matter was pursued at the Conference called in Stockholm in 1967 for revision of the Berne Convention where a "protocol regarding developing countries" known as the Stockholm Protocol was added to the Convention.

31. However, it soon became clear that the solution (the Stockholm Protocol) proposed was unlikely to gain much acceptance among Union countries, particularly those whose works were likely to be made use of under the provisions of the Protocol. If the needs of the developing countries were to be met without too much delay, it seemed necessary to take a second look at conditions under which translation and reproduction of the works of other countries might be made for purposes of education and scientific research.

32. The Revision Conference convened in Paris in 1971 was predominantly concerned with finding solutions in order to support the universal effect of the Convention and to establish an appropriate basis for its operation, particularly in relation to the increasing number of newly independent States which had to face serious problems in the nascent stage of their economic, social and cultural development as independent nations. After the Second World War, with the break-up of colonial structures, the lurking question was whether it was fair and workable to ask these newly developing countries to take on obligations under the Convention that were agreed upon by developed

countries, without taking into consideration the special situations in the developing ones. There was certainly a challenge then posed to international copyright itself and this was, in a manner, sorted out through the give and take that culminated in the special provisions concerning developing countries that were incorporated in an Appendix which now forms an integral part of the Convention.

33. The Appendix to the Paris (1971) Act of the Berne Convention provides for special faculties open to developing countries concerning translation and reproduction of works of foreign origin. The Appendix augments the Convention's existing exceptions to the author's exclusive rights including those of reproduction and translation (Articles 2bis, 9(2), 10(2), 10bis) and the ten-year rule (Article 30(2)(b)).

34. According to this Appendix, countries which are regarded as developing countries in conformity with the established practice of the General Asembly of the United Nations may, under certain conditions, depart from the minimum standards of protection provided for in the Convention. This exceptional régime concerns two rights: the right of translation and the right of reproduction.

35. The Berne Convention provides, in respect of developing countries, for the possibility of granting non-exclusive and non-transferable compulsory licenses in respect of (i) translation for the purpose of teaching, scholarship or research, and (ii) reproduction for use in connection with systematic instructional activities, of works protected under the Convention; the term systematic instructional activities including systematic out-of-school or non-formal education. These licenses could be granted under certain conditions to any national of a developing country which has duly availed itself of one or both of the faculties provided for in the Appendix for grant of such compulsory licenses in respect of translation and/or reproduction of works of foreign origin.

36. These licenses may be granted, after the expiry of certain time limits and after compliance with certain procedural steps, by the competent authority of the developing country concerned. They have to be applied for from the authority designated in the developing country as being competent to grant such licenses. They must provide for just compensation in favor of the owner of the right. In other words, the payment to be made by the compulsory licensee must be consistent with standards of royalties normally operating in respect of licenses freely negotiated between persons in the two countries concerned.

37. Provision has also to be made in the legislation to ensure a correct translation or an accurate reproduction of the work, as the case may be, and to indicate the name of the author on all copies of such translations or reproductions. Copies of translations or reproductions made and publication under such licenses are not, however, allowed to be exported. In other words, such copies may be distributed only in the country in which the compulsory license was granted.

38. Since the license is non-exclusive, the copyright owner is entitled to bring out and place on the market his own equivalent copies upon which the power of the licensee to continue making copies under the license would cease. However, in that event, the compulsory licensee's stock can be disposed of.

39. Compulsory license for translations can be granted for languages generally spoken in the developing country concerned. There is a distinction between languages in general use also in one or more developed countries (particularly English, French and Spanish) and those not in general use there (largely local languages of developing countries). In the case of a language in general use in one or more developed countries, a period of three years, starting on the date of the first publication of the work, has to elapse before a license can be applied for, whereas for a language not in general use in a developed country, the period is one year.

40. In respect of reproduction, the period after which compulsory licenses may be obtained may vary according to the nature of the work to be reproduced. Generally, it is five years from the first publication. However, for works connected with the natural and physical sciences and with technology (and this includes mathematical works), the period is three years; and for works of fiction, poetry and drama, the period is seven years.

41. The possibility that the Appendix provides of granting a compulsory license, if authorization is desired, may favorably influence negotiation and may lead to increased scope for voluntary licensing.

Administrative Provisions--Tasks

42. The provisions of the Berne Convention fall into two categories viz. those of substance covering the material law and the administrative and final clauses covering matters of administration and structure. In the latest text of the Convention as revised at Paris in 1971, Articles 1 to 21 and the Appendix contain the substantive provisions and Articles 22 to 38 the administrative and final clauses.

43. Secretariat: The Berne Convention is administered by the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations with its Headquarters in Geneva; the Convention groups together the member States which form the Union; the Director General of WIPO is the Chief Executive of the Union.

44. Administration: The administrative tasks performed by WIPO include assembling and publishing information concerning the protection of copyright. Each member country communicates to WIPO all new copyright laws and the concerned official texts. WIPO publishes a monthly periodical entitled "Copyright"; it conducts studies and provides services designed to facilitate protection of copyright; as the Secretariat, it participates in all meetings of the Assembly, the Executive Committee or any other Committee of Experts or Working Groups; in accordance with the directions of the Assembly and in cooperation with the Executive Committee, it shall also, when required, make the preparations for the conferences of revision of the Convention.

45. Assembly and Executive Committee: The administrative provisions provide for an Assembly in which the Government of each member State shall be represented by one delegate. The Assembly determines the program, adopts the budget and controls the finances of the Union. It also elects members of the Executive Committee of the Assembly. One fourth of the number of member countries are to be elected to the Executive Committee. The Executive Committee meets once every year in ordinary session and generally once in two years in extraordinary session.

46. Annual contributions: The contributions payable by member States are based on a system of classes. There are seven classes (I to VII). Each State is free to choose the class in which it wishes to be placed. The rights of each State are the same, irrespective of the contribution class chosen. However, the amount of the contribution varies according to the class. The annual contribution for the lowest Class VII, for instance, is around 13,800 Swiss francs in 1989.

The class to which a State wishes to belong for the purposes of determining the amount of its annual contribution must be indicated in its instrument of accession or in a separate communication addressed to the Director General of WIPO at the time of the deposit of the said instrument of accession.

47. International Court of Justice: Any country which does not wish to be bound by the provisions of Article 33(1) concerning the competence of the International Court of Justice in respect of the interpretation or application of the Berne Convention may, at the time it deposits its instrument of accession, make a declaration to that effect.

Some Other Aspects of the Convention

48. There are some other aspects of the Paris Act of the Convention to which attention needs to be drawn. The 1971 Paris Texts of the Berne Convention and of the Universal Copyright Convention, which latter was revised at the same time and place and contains similar provisions in respect of developing countries, have entered into force. The entry into force of the Paris Act of the Berne Convention was as per Article 28(2)(a), subject to ratification or accession not only by five countries of the Union, but also until France, Spain, the UK and the USA became bound by the Universal Copyright Convention as revised at Paris. This provided a link between the two Conventions and it was for the first time that entry into force of the text of the Convention was made dependent on certain specified States becoming bound by another international instrument.

49. Another feature of the Berne Convention is that international copyright relations could exist between countries bound by its different Acts. Since it would not be realistic to expect all countries to be bound on a specific date by a revised Act, Article 32 provides for a system which recognizes this fact. The relations between any two countries party to the Convention, are regulated by the latest Act of the Convention that has been accepted by both. Should there be no common Act of the Berne Convention accepted by both of the countries concerned, each of them is expected to apply the latest Act to which it has become party within the Union. Thus for example between Australia which has adhered to the Paris Act, and the Philippines which have so far accepted the previous Brussels Act, the latter would apply since as to substance this is the latest text accepted by both. Likewise between Zaire which has adhered to the Paris Act and Madagascar which has accepted the Brussels Act, the latter would apply.

50. One other point about the Berne Convention. Article 34 of the latest Paris Act provides that once its substantive provisions enter into force, accession by a non-member country to an earlier Act is foreclosed. Even member countries cannot, after October 10, 1974, accede to any act other than the latest one. A country, for example, which is still bound by the Rome Act of 1928, cannot any more accede, for instance, to the Brussels Act of 1948. Its options are either to remain bound by the Rome Act or to accede to the latest Paris Act.

Accession to the Berne Convention and Membership in the Berne Union

51. The 1971 Paris Act of the Berne Convention entered into force, as mentioned earlier, with effect from October 10, 1974.

52. Procedure for becoming party to the Berne Convention: An instrument of accession has to be deposited with the Director General of WIPO (Article 29(1)). Accession to the Berne Convention and membership of the Berne Union becomes effective three months after the date on which the Director General of WIPO has notified the deposit of the above-mentioned instrument of accession (Article 29(2)(a)). In accordance with Article I of the Appendix, a developing country has to specifically declare, at the time of its ratification of or accession to the Paris Act, that it will avail itself of the provisions in the Appendix concerning the compulsory licenses for translation and/or reproduction.

53. States party to the Convention: So far on September 1, 1989, a total of 83 States have acceded to or ratified the Berne Convention, of whom more than half are considered as developing countries: from Africa (20), Arab States (6), Latin America and the Caribbean (13), Asia (6) and others (2). The universality of the Berne Convention is evident from the fact that its membership extends to States in all the continents. States party to the Convention include those in Europe (31), in Africa (26), in America (15), and in Asia and the Pacific (11).

Advantages of acceding to the Berne Convention

54. The advantages for a country, and more particularly a developing country, of joining the Berne Convention may be briefly summarized as follows:

54.1 Works of national authors obtain protection in all countries party to the Convention.

54.2 A corollary to protection of national authors whose works are used abroad would, of course, be protection of foreign authors for their works used in the country concerned. The fact that the number of foreign works protected in the country would probably be larger than the number of national works protected abroad is not a situation peculiar to developing countries. The same situation exists in most developed countries. It should be borne in mind, however, that the share of royalty payments in the total foreign exchange expenditures of a country, or in its total investment in education, is generally extremely modest.

54.3 Another important aspect is the competitive position of national creators. As long as foreign works are not protected in the country, indigenous authors are placed in a very unfavorable position, since preference might be given to works of foreign authors available under more favorable financial conditions. The inevitable result is dependence on foreign works.

54.4 Translations and adaptations of foreign works which are published in the country enjoy protection in other countries similar to that for original works.

54.5 Most of what is said under paragraphs 42.1 and 42.2 is equally valid for domestic translators or adaptors. It might be added that the role of translators in the cultural development of a country is very important; the provision of adequate protection for translators is therefore necessary, especially where the language in general use in a country is that used on a regional basis.

54.6 In addition to the interests of authors, translators and adaptors, those of domestic publishers are also safeguarded.

54.7 In the absence of protection of foreign works, there would probably be strong competition among domestic publishers to publish the same--namely, the most interesting or successful--works from abroad. However, owing precisely to such a situation, none of the editions could possibly be viable by itself. In the absence of essential guarantees ensuring that his commercial investment could be recovered over a predetermined period, no publisher would wish to risk his capital or open up a field where someone else could come along at a later date and undercut him. A possible result would be failure to publish those works which could and should have been published in the national interest.

54.8 Another danger inherent in the absence of protection is that pirated (cheap) editions of foreign works may flow in from any country abroad and thereby adversely affect local publishing. Also, because he does not have access to information from the foreign publisher, an indigenous publisher who undertakes to reproduce or translate a foreign work may be wasting his time and effort on a work which is already out of date or which is soon to be superseded by a later edition. Commercial considerations might then induce the indigenous publisher to keep the obsolete work on the market until the edition is exhausted, which, of course, could again be contrary to the national interest.

54.9 The absence of adequate copyright protection at the international level is likely to induce the domestic authors of a country outside the Berne Convention to publish their works in a country party to the Convention, since protection under the Convention is also given to authors who are not nationals of one of the countries party to the Convention but whose works are first published in one of those countries. Such a practice might dangerously limit the basis for building up domestic publishing and printing enterprises since authors might then prefer to publish their works abroad.

54.10 The situation of domestic film producers and record manufacturers is similar, mutatis mutandis, to that of publishers. This is particularly true in countries where national legislation gives them the original copyright in their films or records.

54.11 Other users of literary and artistic works, such as the national broadcasting organizations, may also benefit from the protection granted to such works both within the country and abroad.

54.12 Protection under the Berne Convention is "automatic": it is not conditional upon compliance with any formality (such as deposit, registration, copyright notice, etc.). In order to benefit from the provisions of the Berne Convention, an author is thus not obliged to undertake administrative formalities, pay taxes, spend money and time in getting his work registered. The author can thus enjoy all the rights provided for in the Berne Convention completely automatically.

54.13 The Berne Convention contains a number of detailed provisions which have harmonized copyright laws over a considerable part of the world. As a result, protection of literary and artistic works in countries party to the Berne Convention is governed not only by the principle of national treatment, but also by the detailed provisions (see above under "Minimum Standards of Protection"). These allow for a comprehensive protection of the rights involved.

54.14 In becoming party to the Berne Convention, the State concerned becomes a member of the Berne Union. It would therefore be entitled:

(i) to full membership (right to vote) in the Berne Union Assembly (Article 22(3)(a));

(ii) to the right to vote in elections of or to be elected to the Executive Committee of the Berne Union (Article 23(2)(a));

(iii) to automatic membership in the WIPO Coordination Committee during the period of its membership in the Executive Committee of the Berne Union (Convention establishing WIPO, Article 8(1)(a)).

Conclusion

55. A developing country could thus play an active role in future developments in the field of international copyright. Besides, being party to the Convention offers the necessary conditions for international protection particularly in view of the comprehensiveness of its minimum standards of protection. Further, being a member of the Berne Union indicates that the State is satisfied, from experience, that while a copyright law is in the national interest, protection in other countries of the rights of national authors and copyright owners is also in the national interests.

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
WIPO in cooperation with
the Government of the Republic of Korea

Seoul, September 4 to 11, 1989

PROTECTION OF EXPRESSIONS OF FOLKLORE

Lecture prepared by the International Bureau
of the World Intellectual Property Organization (WIPO)

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I.

ATTEMPTS TO PROTECT EXPRESSIONS OF FOLKORE BY MEANS OF COPYRIGHT AND NEIGHBORING RIGHTS

1. The need for legal protection of expressions of folklore emerged for the first time in the developing countries. Folklore is a significant element in the cultural heritage of every nation. However, it is of particular importance to developing countries, which increasingly recognize folklore as a means of self-expression and social identity of their peoples. All the more so, since in those countries folklore is truly a living and still developing tradition, rather than just a memory of the past.

2. Improper exploitation of folklore was also possible in the past. However, the spectacular development of technology, the newer and newer ways of using both literary and artistic works and expressions of folklore (audiovisual productions, phonograms, their mass reproduction, broadcasting, cable television and so on) have multiplied abuses. Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. And in order to better adapt it to the needs of the "market," it is often distorted or mutilated. At the same time no share of the returns from its exploitation is conceded to the communities who have developed and maintained it.

3. The developing countries, which made the first attempt at regulating the use of folklore creations, tried to provide protection in the framework of their copyright laws (Tunisia, 1967; Bolivia, 1968 (musical folklore only); Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Congo, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Zaire, 1986). All those laws consider "works" of folklore to be part of the cultural heritage of the

nation, except the Chilean law which uses the expression "cultural public domain." The Tunis Model Law on Copyright for Developing Countries (1976) and the 1977 Bangui text of the Convention concerning the African Intellectual Property Organization (the "OAPI Convention") also contain such provisions.

4. An important copyright-type element in the definitions given by those laws (except the Law of Tunisia that contains no definition) is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country concerned. The OAPI Convention mentions creation by "communities" rather than authors, which distinguishes creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore by using both of these alternatives, and considers it as meaning creations "by authors presumed to be nationals of the country concerned, or by ethnic communities."

5. Under the Law of Morocco, folklore comprises all unpublished works of that kind, whereas the Laws of Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Law of Senegal explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Convention and the Tunis Model Law provide that folklore comprises scientific works too. Most of the statutes in question recognize "works inspired by folklore" as a distinct category of works whose use for commercial purposes requires the approval of a competent body.

6. The above-mentioned national laws provide protection for the "works" of folklore against unauthorized fixation for profit-making purposes. The Law of Senegal also requires prior authorization for public performance if it is done with gainful intent. The Tunis Model Law suggests the same kind of protection as works usually enjoy under copyright.

7. The 1967 Diplomatic Conference of Stockholm for the revision of the Berne Convention made an attempt to introduce copyright protection for folklore also at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union." This article of the Berne Convention, according to the intentions of the revision conference, implies the possibility of also requesting, in certain cases, protection for expressions of folklore.

8. However, the protection of folklore by copyright conventions does not appear effective or expedient. It seems that the measures taken so far in the field of copyright are not sufficient to control the commercial use of folklore, and the impression is gained that copyright law is, after all, not the right kind of means for protecting expressions of folklore. This is so because whereas an expression of folklore is the result of an impersonal,

continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a decisive mark of individual originality. Traditional creations of a community, such as the so-called folk tales, songs, music, dances, designs or patterns, are generally much older than the duration of copyright so that, for this reason alone, a copyright-type protection, limited to the life of the author and a relatively short period thereafter, does not offer folklore a long enough term of protection.

9. Another existing legal means which may be used for the protection of expressions of folklore is protection under the so-called neighboring rights. Protecting performers as regards their performances or producers of phonograms or broadcasting organizations as far as their fixations or broadcasts are concerned means--where such performances, fixations or broadcasts are performances, fixations or broadcasts of expressions of folklore--the indirect protection of the expressions of folklore themselves. That possibility of protecting folklore can be made use of by adopting laws protecting the rights of performers, producers of phonograms and broadcasting organizations. Accession to the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and to the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms offers international protection too. In order to avoid any misunderstanding as regards the protection of performers who perform expressions of folklore, it is advisable to make it clear by means of an explicit provision in any law protecting performers of literary or artistic works that the performance of expressions of folklore shall be regarded equivalent to the performance of a work.

10. Neighboring rights cannot, however, fully satisfy the need for legal protection against improper use of creations of folklore since they cannot prevent the copying of expressions of folklore which are not performed, broadcast or contained in phonograms.

11. Because the existing means of copyright and neighboring rights protection were not adequate for the protection of folklore, attention turned to the possibilities of a sui generis solution.

II.

WIPO/UNESCO MODEL PROVISIONS FOR NATIONAL LAWS ON SUI GENERIS PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

12. At the meeting of WIPO's Governing Bodies in 1978 it was felt that despite concern among developing countries as to the need to protect folklore, few concrete steps were being taken to formulate legal standards. Following that meeting, the International Bureau of WIPO prepared a first draft of sui generis model provisions for intellectual-property-type national protection of folklore against certain unauthorized uses and against distortion.

13. At their sessions in February 1979, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention noted that the International Bureau had prepared a first draft of model provisions for intellectual-property-type protection of folklore at the national level and discussed and approved the proposal made by WIPO that

special efforts should be made to find solutions to this aspect of the problem, notwithstanding the global interdisciplinary study of the questions of identification, material conservation, preservation and reactivation of folklore, which has been undertaken by Unesco since 1973, following the request it received from the Government of Bolivia to examine the desirability of drafting an international instrument on the protection of folklore.

14. In accordance with the decisions of their respective Governing Bodies, WIPO and Unesco convened a Working Group in Geneva in 1980, then a second one in Paris in 1981, to study the draft of Model Provisions intended for national legislation prepared by WIPO, as well as international measures for the protection of works of folklore. The outcome of these meetings was submitted a year later to a Committee of Governmental Experts, convened by WIPO and Unesco at WIPO headquarters in Geneva in 1982, which adopted what are called "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (hereinafter referred to as "the Model Provisions").

15. The Model Provisions were submitted to the joint meeting of the Executive Committee of the Berne Convention and the Intergovernmental Copyright Committee of the Universal Copyright Convention in Geneva in December 1983. The Committees welcomed the development of the Model Provisions as a first step in establishing a sui generis system of intellectual-property-type protection for expressions of folklore; they found them a proper guidance for national legislation.

Basic Principles Taken Into Account for the Elaboration of the Model Provisions

16. The Committee of Governmental Experts which worked out the Model Provisions did not lose sight of the necessity of maintaining a proper balance between protection against abuses of expressions of folklore, on the one hand, and the freedom and encouragement of their further development, dissemination and also adaptation for creating original authors' works inspired by folklore, on the other. A major part of the expressions of folklore form a living body of human culture which should not be stifled by too rigid a protection. It should also be kept in mind that protection should be practicable and effective, rather than remaining a system of imaginative requirements unworkable in reality.

17. It was emphasized at the meeting of the Committee of Governmental Experts that, although the Model Provisions are provisions for a law, they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code and do not have to be a statute passed by the legislative body, but may be a decree, for example. The Model Provisions were designed with the intention of leaving enough room for national laws to adopt the system of protection best corresponding to the conditions existing in a given country.

The Expressions of Folklore to be Protected

18. The Model Provisions do not offer any definition of folklore. However, for the purposes of the Model Provisions, Section 2 defines the term "expression of folklore" in line with the findings of the Committee of Governmental Experts on the Safeguarding of Folklore, convened by Unesco in Paris in February 1982, and provides that "expressions of folklore" are

understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

19. The definition in the Model Provisions embraces the results of both collective and individual development of the traditional artistic heritage, since the generally applied criterion of "impersonal" creativity does not always correspond to reality in the evolution of folklore. The personality of the artist is often an important factor in folklore expression and individual contributions to the development and maintenance of such expressions may represent a creative source of enrichment of inherited folklore if they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations.

20. The Model Provisions use the words "expressions" and "productions" rather than "works" to underline the fact that the provisions are sui generis, rather than part of copyright, since "works" are the subject matter of copyright. It is another matter that the expressions of folklore may, and often do, have the same artistic form as "works."

21. Only "artistic" heritage is covered by the Model Provisions. It means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of "expressions of folklore." On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, which would qualify as literature if created individually by an author, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

22. The Model Provisions also offer an illustrative enumeration of the most typical kinds of expression of folklore. They are subdivided into four groups depending on the form of the "expression," namely expressions by words ("verbal"), expressions by musical sounds ("musical"), expressions "by action" (of the human body) and expressions incorporated in a material object ("tangible expressions"). Each must consist of characteristic elements taken from the totality of the traditional artistic heritage. The first three kinds of expression need not be "reduced to material form," that is to say, the words need not be written down, the music need not exist in the form of musical notation and the bodily action--for example, dance--need not exist in a written choreographic notation. On the other hand, tangible expressions must be incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Provisions also give examples of each of the four forms of expression. They are, in the first case, "folk tales, folk poetry and riddles," in the second, "folk songs and instrumental music," in the third, "folk dances, plays and artistic forms of rituals," and in the fourth, "drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms."

23. The words "architectural forms" appear in the Model Provisions in square brackets to show the hesitation which accompanied its inclusion, and to leave it up to each country to decide whether or not to include it in the realm of protected expressions of folklore.

Acts Against Which Expressions of Folklore Should be Protected

24. There are two main categories of acts against which expressions of folklore should be protected. They are "illicit exploitation" and "other prejudicial actions" (Section 1).

25. "Illicit exploitation" of an expression of folklore is understood in the Model Provisions (Section 3) as any utilization made both with gainful intent and outside the traditional or customary context of the folklore without authorization by a competent authority or the community concerned itself. This means that an utilization--even with gainful intent--within the traditional or customary context should not be subject to authorization. On the other hand, an utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside that context and with gainful intent.

26. An expression of folklore is used in its "traditional context" if it remains in its proper artistic framework based on continuous usage by the community. For instance, to use a ritual dance in its traditional context means to perform it in the actual framework of the respective rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as for instance usual ways of selling copies of tangible expressions of folklore by local craftsmen. A customary context may develop and change more rapidly than a traditional one.

27. Section 1 of the Model Provisions specifies the acts of utilization which require authorization where such circumstances exist. In doing so, it distinguishes between the case in which copies of the expressions are involved and the case in which copies of such expressions are not necessarily involved. In the first case, the acts requiring authorization are publication (in the broadest sense of the word, so as to cover any form of making available to the public an expression of folklore embodied in any material form, including recordings), reproduction and distribution; in the second case, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and "any other form of communication to the public."

28. Indigenous communities should not be prevented from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation or performance of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange, reproduce, recitate or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be enforced in societies in which folklore is a part of everyday life. Thus, the Model Provisions allow any member of a community of the country to freely reproduce or perform expressions of the folklore of his own community in their traditional or customary context, irrespective of whether he does it with or without gainful intent.

29. The Model Provisions do not hinder uses of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research or for archives is not hampered by the Model Provisions at all.

30. Section 4 of the Model Provisions determines four special cases regarding the acts restricted under Section 3. In those cases there is no need to obtain authorization, even if the utilization of the expression of folklore is made against payment and outside its traditional or customary context. The first of these exceptions is utilization for purposes of education. The second case is when the utilization is made "by way of illustration" in any original work of an author, provided that such utilization is compatible with fair practice as understood in the country concerned. The third case in which utilization requires no authorization is that in which expressions of folklore are "borrowed" for creating an original work of an author. This important exception serves the purpose of allowing the free development of individual creativity inspired by folklore. The Model Provisions do not want to hinder in any way the birth of original works based on expressions of folklore. The fourth case in which no authorization is required is that of "incidental utilization." In order to elucidate the meaning of "incidental utilization," paragraph 2 mentions in particular (not in an exhaustive manner) the most typical cases considered as incidental utilizations: utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

31. The Committee of Governmental Experts was of the opinion that a general reference to copyright to the effect that, in all cases where the latter allows free use of works, the use of expressions of folklore should also be free, would not be of much help since many cases of free use in respect of works protected by copyright are irrelevant to the proposed sui generis protection of expressions of folklore (for example, reproduction in the press or communication to the public of any political speech or speech delivered during legal proceedings; or reproduction for personal or private use, an act, which is not covered at all by the notion of the utilization of expressions of folklore subject to authorization, and needs no exception from the rule laid down in Section 3 of the Model Provisions).

32. "Other prejudicial actions" detrimental to interests related to the use of expressions of folklore are to be found, according to the Model Provisions, in four distinct offenses, subject to penal sanctions (Section 6).

33. Firstly, the Model Provisions provide for the protection of the "appellation of origin" of the expression of folklore. Section 5 requires that in all printed publications, and in connection with any communication to the public, of any identifiable expression of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilized has been derived. In Section 6, non-compliance with the requirement of acknowledgment of the source is made a punishable offense.

34. Secondly, any unauthorized utilization of an expression of folklore where authorization is required constitutes an offense. It is understood that the offense of using an expression without authorization is also constituted by uses going beyond the limits or that are contrary to the conditions of an authorization obtained.

35. Thirdly, deception of the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case is likewise punishable. It consists essentially in "passing off."

36. The fourth type of offense may be constituted by any kind of public utilization distorting the expression of folklore in any direct or indirect manner "prejudicial to the cultural interests of the community concerned." The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore.

37. All four actions qualify as offenses only if they are committed willfully. However, as regards non-compliance with the requirement of acknowledgement of source and the need to obtain authorization to use the expression of folklore, the Model Provisions also allow (in square brackets) for punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties involved in proving willfulness in cases of omission.

The Authorization of Utilizations of Expressions of Folklore

38. When the Model Provisions determine the entity entitled to authorize the utilization of expressions of folklore, they alternatively refer to "competent authority" and "community concerned," avoiding the term "owner." They do not deal with questions of ownership of expressions of folklore since this aspect of the problem may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation, in other countries, a sense of ownership of the traditional artistic heritage may have developed in the communities concerned themselves. Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, such uses may be subject to authorization by the community itself, which would grant permission to prospective users in a manner similar to authorization given by authors, as a rule, at their own full discretion. In other countries, where the traditional artistic heritage of a community is basically considered a part of the cultural heritage of the nation, or where the communities concerned are not prepared to adequately administer the use of their expressions of folklore themselves, "competent authorities" may be designated to give the necessary authorizations in form of decisions under public law.

39. Section 9 of the Model Provisions provides for the designation of the competent authority, where that alternative has been preferred by the legislator. The same Section also provides, in a second paragraph in square brackets, for designation of a "supervisory authority," if this should become necessary owing to the adoption of certain subsequent alternative provisions as regards activities to be carried out by such an authority. "Authority" is to be understood as any person or body entitled to carry out functions specified in the Model Provisions. It is conceivable that more than one competent or supervisory authority may be designated, corresponding to different kinds of expression of folklore or utilization thereof. Authorities may be already existing institutions or newly established ones.

40. The tasks of the competent authority are (provided such an authority has been designated) to grant authorizations for certain kinds of utilization of expressions of folklore (Section 3), to receive applications for authorization of such utilizations, to decide on them and, where authorization is granted, to fix and collect a fee--where required by law--(Section 10, paragraphs 1 and 2). The Model Provisions also provide that any decision by the competent authority is appealable (Section 10, paragraph 3, and Section 11, paragraph 1).

41. The Model Provisions offer the possibility (in square brackets, that is to say, optionally) of providing in the law that the supervisory authority shall establish a tariff of the fees payable for authorizations of utilizations or shall approve such tariff (without indication in the Model Provisions as to who will, in such case, propose the tariff, although it was understood by the experts adopting the Model Provisions that the competent authority would propose the tariff)(Section 10), and that the supervisory authority's decision may be appealed from before a court (Section 11, paragraph 1).

42. Where the community as such is entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the Committee of Governmental Experts was of the opinion that if it was not the community as such, but a designated representative body thereof which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

43. As regards the process of authorization it follows from Section 10, paragraph 1, of the Model Provisions that an authorization must be preceded by an "application" submitted to the competent authority. The Model Provisions allow oral applications too, by placing the words "in writing" within square brackets. They also imply that the authorization to be applied for may be "individual" or "blanket," the first meaning an ad hoc authorization, the second intended for customary utilizers such as cultural institutions, theatres, ballet groups and broadcasting organizations. In this latter context, national legislators may also consider the applicability of systems of non-voluntary licensing possibly existing in the country for utilization of works protected by copyright, with special regard to certain kinds of uses by broadcasting organizations and cable systems.

44. As far as the conditions of the applications are concerned, it is advisable to require the following data, indispensable to enable the competent authority to make its decision: (i) information concerning the prospective user of the expression of folklore, in particular his name, professional activity and address; (ii) information concerning the expression to be used, properly identifying it by mentioning also its source; (iii) information as regards the intended utilization, which should comprise, in the case of intended reproduction, the proposed number of copies and territory of distribution of the reproduced copies; as regards recitals, performances and other communications to the public, the nature and number of them, as well as the territory to be covered by the authorization. Naturally, it will be easier to comply with such requirements if applications are required to be submitted in writing.

45. The Model Provisions (Section 10, paragraph 2) allow, but do not make mandatory, the collecting of fees for authorizations. Presumably, where a fee is fixed, the authorization will be effective only on condition of payment. Authorizations may be granted free of the obligation to pay a fee. Even in such cases, the system of authorization is justified since it may prevent such utilizations as would distort the expressions of folklore or otherwise be unworthy of their dignity.

46. The Model Provisions also determine the purpose for which the collected fees must be used. They offer a choice between the promoting or safeguarding of national culture or of national folklore. Naturally, national folklore is part of national culture, but national culture concerns a greater number of potential beneficiaries than national folklore. Where there is no competent authority designated and both authorization and collection of relevant fees is carried out directly by the community as such, it seems obvious that the employment of the collected fees should also be decided by the community.

47. Section 10, paragraph 3, provides that any decision of the competent authority is appealable. It specifies that the appeal may be made by the applicant (typically, where the authorization is denied) and by "the representative of the interested community" (typically, where the authorization is granted). This paragraph is put in square brackets since it does not apply where the authorization is granted directly by the community concerned as such.

Sanctions

48. Sanctions should be determined for each type of offense established by the Model Provisions in accordance with the penal law of each country concerned. The two main types of possible punishments appear to be fines and imprisonment. Which of these sanctions should apply, what other kinds of punishment could be provided for and whether the sanctions should be applicable separately or in conjunction, depends on the nature of the offense, the importance of the interests to be protected and the solutions already adopted in a given country for similar offenses. Consequently, the Model Provisions do not suggest any specific punishment, they are confined to the requirement of penal remedy, leaving it up to national legislation to specify its form and measure.

49. As regards seizure and other actions, the Model Provisions are somewhat more explicit . Section 7 applies, in the case of any violation of the law, to both objects and receipts. Object is understood as meaning "any object which was made in violation of this [law]," while the receipts are "receipts of the person violating it [that is to say, violating the law]"; typical examples are the receipts of the seller of any infringing object and the receipts of the organizer of an infringing public performance.

50. It should be noted that seizure and other similar actions are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may be provided as well in other branches of the law, including the law on civil procedure. Seizure should take place in accordance with the legislation of each country.

III.

INTERNATIONAL PROTECTION OF EXPRESSIONS OF FOLKLORE

51. The Model Provisions were adopted with the intention of paving the way for subregional, regional and international protection. It is of paramount importance to protect expressions of folklore against illicit commercialization and distortion beyond the frontiers of the country in which they originate. National legislation on the protection of expressions of folklore

could also provide an appropriate basis for protecting the expressions of folklore of communities belonging to foreign countries. By extension of their applicability under the principle of national treatment, national provisions might provide the substance of regional or international protection.

52. In order to further such a process, the Model Provisions provide for their application as regards expressions of folklore of foreign origin either subject to reciprocity or on the basis of international treaties (Section 14). Actual reciprocity in the relations of two or more countries already protecting their national folklore may sometimes be established and declared more easily than mutual protection by means of concluding and ratifying international treaties. However, a number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned.

53. WIPO and Unesco followed such suggstions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property which met at Unesco Headquarters in Paris from December 10 to 14, 1984. Under its terms of reference, the group of experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft.

54. The participants had at their disposal a draft treaty which had been based, practically, on the Model Provisions and had outlined a similar protection system at the international level, applying the principle of "national treatment."

55. The discussion at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the community in which they originate.

56. However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular concerning the implementation of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

57. Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of the expressions of folklore which can be found not only in one country, but in several countries of a region.

58. It is quite obvious that no State could enter into an obligation under an international convention for the protection of foreign expressions of folklore if it did not know what expressions of folklore of other member States should really be protected. Unfortunately, it is just in many developing countries that inventories or other appropriate sources for the identification of national folklore are not available.

59. The problem of "regional folklore" raises even more complex questions. To the competent authority of which country would a user of a Member State have to turn if he wanted to utilize a certain expression of folklore which belonged to the national heritage of several Member States? What would the situation be if only one of those countries which share certain elements of folklore acceded to the convention? How could the question of common expressions of folklore be settled among the countries of the regions concerned? Appropriate answers should be given to those and similar questions at the regional level; and in all the important regions.

60. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their last joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a convention for the protection of the expression of folklore would be premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

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WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

GOVERNMENT OF THE REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
WIPO in cooperation with
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Seoul, September 4 to 11, 1989

EFFECTIVE ENFORCEMENT OF COPYRIGHT

Lecture prepared by Mr. GOH Phai Cheng, Deputy Parliamentary Counsel, Attorney-General's Chambers, Singapore

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Introduction

In the last ten years, many countries including several countries in the Pacific Rim Region have revised their copyright legislation to give more adequate protection to copyright owners in order to combat piracy of copyright works or other materials. The term "piracy" is used to refer to the making of unauthorised copies of a copyright work or other materials for sale, hire and distribution. In the early 1980s, the piracy of phonograms and films was rampant in many parts of the world.[1] Video tapes of the film "E.T." by Stephen Spielberg were sold and distributed in the United Kingdom although it had never been legitimately released in video form. The Times of London reported that E.T. was voted "Top Video of the Year" in 1984.[2] The film titles which were found in the United Kingdom video market in pirated form included "Ghandhi" "Raiders of the Lost Ark" "Octopussy" and "Superman 3" and the loss to the film industry caused by film piracy was estimated to be in the region of £100 million in 1987.[3] Video piracy was also rampant in Singapore, India, Japan and many other countries.[4] In less than 10 days after the video release of TOP GUN in the United States, thousands of

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copies of videotapes of this film flooded Japanese video stores, some six months before the legitimate release in Japan of TOP GUN in pre-recorded video cassette form.[5] In this paper, I shall examine the measures which can be taken by copyright owners to combat piracy of copyright works and other materials and to enforce their copyright in their creative works.

All copyright legislation provides the copyright owner with civil remedies against any infringement of his copyright work and at the same time make certain copyright infringements punishable as a crime with imprisonment or a fine or both.

Criminal Liability for Copyright Infringements

Many countries create offences for the making, selling, hiring, trading in or importing infringing copies of copyright works without the licence of the copyright owner, including the possession of infringing copies for the purposes of trade. The penalties for such offences must be sufficiently severe in order to act as an effective deterrent. Unauthorised commercial exploitation of copyright works can bring in huge profits for the pirates who incur very low overheads for their operations. The cost of developing a computer software or the production of a motion picture is very high. For example, a piece of word-processing software for a micro-computer may cost

hundreds of thousands of dollars to develop. The creator of a new software also runs the risk that his product may not be a success in the market place. A pirate who incurs no development cost will simply reproduce a successful software package for sale and distribution for a handsome profit. It cost 20th Century Fox, the makers of the film, ALIEN, more than US$100 million to produce, distribute and market the film.[6] It cost the pirates very little to make unauthorised copies of that film on video tapes for sale and distribution.[7] The pirates can sell an infringing copy of a software or a video-tape of a film at a fraction of the cost of the authorised copy and yet make a huge profit. They have no studio costs, they pay no royalties or fees to authors, performers and technicians. They take no commercial risks. They only reproduce works which become successful.

In Singapore, the offences of making, selling, hiring, trading in or importing infringing copies of works, and possessing infringing copies for the purposes of trade, carry penalties of up to S$10,000 per infringing copy or a total of S$100,000 or imprisonment up to 5 years or both.[8] The distribution for the purposes of trade of infringing copies of a work is an offence punishable with a fine up to S$50,000 or imprisonment up to 3 years or both.[9] Possession of a plate or similar contrivance for making infringing copies of sound recordings or audio-visual

productions is an offence punishable with a fine up to S$20,000 per plate or contrivance or with imprisonment up to 2 years or both.[10] A person who causes a copyright work to be performed in public for profit is guilty of an offence punishable with a fine up to S$20,000 or imprisonment up to 2 years or both.[11]

In January 1989, a man was jailed for 2½ years in Singapore when he failed to pay a total fine of S$126,000 for having 6,163 pirated video tapes and 26 recorders in his possession.[12] The recorders were used for making the pirated video tapes. The man was charged under the Singapore Copyright Act of 1987 and was fined a total of S$100,000 for having the pirated video tapes, the maximum penalty permitted under the new law. The remaining $26,000 was a fine of S$1,000 for each of the 26 video recorders found in his possession. The tapes and equipment were seized as a result of the efforts made by Golden Crown Video Pte Ltd, an authorised distributor of Hongkong serials, in tracking down unauthorised reproductions and sale of film productions made in Hongkong.

In March 1989, a Malaysian man, who used a Singapore post office box to sell pirated computer manuals and diskettes brought in from Malaysia, was convicted by a Singapore Court of the offence of selling pirated software by mail order and he was fined a total of S$14,000 after he

pleaded guilty to two private summonses of importing pirated copies of the works of two American companies.[13] He brought in IBM's PC Storyboard manual and five diskettes which were pirated copies between January 7th and 22nd, 1989. In June 1988 he was caught by the police for having in his possession eight pirated copies of Microsoft manuals. He was fined S$1,000 for each offending article.

In the Republic of Korea, the offence of copyright infringement by means of reproduction, public performance, broadcast or public display carries a penalty of imprisonment up to 3 years or a fine of up to three million Won.[14]

The Canadian Copyright Act, as amended in 1988, provides that a person who sells, distributes, exhibits or imports for sale any infringing copy of a work commits an offence and is liable on conviction to a maximum fine of CA$25,000 or to imprisonment for a term of 5 years, or both.[15]

Some countries provide minimum punishments for offences of copyright infringement. Under the Indian Copyright Act, an infringement of the copyright

in a work carries a penalty of a minimum term of imprisonment for six months which may extend to three years plus a fine of a minimum 50,000 rupees which may extend to two lakh rupees. For second and subsequent offences, the minimum penalty is imprisonment for a term of not less than one year and a fine of not less than one lakh rupees. [16]

In order to obtain a conviction for an offence relating to copyright infringement, the prosecution must prove the following elements:

(a) that copyright subsists in a work;
(b) that the accused knew that he was dealing in an infringing copy of a work; and
(c) that the copies were infringing copies of a work made without the licence of the copyright owner.

Presumptions should be introduced in a copyright legislation to facilitate proof of subsistence and ownership of copyright and of the accused's knowledge that he was dealing with infringing copies of a work. Otherwise the lawyers for the accused will insist on the subsistence and ownership of copyright being proved by direct evidence with corroboration. In the case of an American film which has been illegally transferred onto videotapes and sold in a country such as Singapore, the lawyer defending the accused can insist on the prosecution bringing witnesses from abroad

to prove that copyright subsists in the film and that the copyright is owned by someone.

In the case of Musa v La Maitre reported in The Times of 11 December 1986, the defendant was charged and convicted an offence under section 21(4A) of the /United Kingdom Copyright Act of 1956 (as amended in 1982) for having in his possession by way trade infringing copies of an American film and an Indian film. Defence counsel argued that in proving an offence under that section, it was necessary for the prosecution to call the actual owners of the copyright to establish the existence of copyright. The English Divisional Court held that the prosecution was required to prove that copyright subsisted, that first authorised publication took place in a country to which the section extended and that the copies were infringing copies. The Court further held that it was sufficient for the prosecution to establish those elements through the evidence of witnesses other than the makers or the owners of the copyright.

In Singapore an affidavit sworn by or on behalf of the owner of a copyright work asserting subsistence of copyright in the work, giving the name of the owner of the copyright and stating that a copy of the work annexed to the affidavit is a true copy of the work is admissible as evidence in any criminal proceedings and is prima facie proof of the matters stated therein until the contrary is proved, and the Court

before which such affidavit is produced shall presume that the affidavit was made by or on behalf of the owner of the copyright.[17] The Singapore Copyright Act also gives the Court a discretion to permit such affidavit to be used without having to call the maker of the affidavit to appear before the Court to be cross-examined on the affidavit.[18] In civil proceedings under the Singapore Copyright Act subsistence and ownership of copyright is presumed if the defendant does not challenge them and, if he without good faith challenges them, the Court may order the defendant to pay the costs of providing subsistence and ownership of copyright.[19]

In a prosecution for a copyright offence under the Singapore Copyright Act, any person who has in his possession five or more infringing copies of a work is presumed, unless the contrary is proved, to possess those copies otherwise than for private and domestic use, or the purpose of sale.[20]

Under the Hong Kong Copyright Ordinance, an affidavit which states that at the relevant time copyright subsisted in a particular work, that the person making the affidavit is the owner of the copyright and the copy of the work appended to the affidavit is a true copy of the work, is admissible without further proof of what is alleged in any proceedings, civil or criminal, under the United Kingdom

Copyright Act or the Hong Kong Copyright Ordinance.[21] The presumption of the truth of the statement made and the authencity of the affidavit applies until the contrary is proved.

The knowledge element for offences of copyright infringement should be that an accused person "knows or ought reasonably to know" that he was dealing with infringing copies of a copyright work. If the prosecution has to prove that an accused person had actual knowledge that he was dealing with a pirated work then it will be very difficult or almost impossible for the prosecution to succeed in establishing its case against an accused person. An accused person can simply dispute all matters in any criminal proceedings in order to frustrate and improperly defeat the copyright owner.

Section 136(1) of the Singapore Copyright Act provides that a person who makes, sells or hires any article which "he knows or ought reasonably to know" to be an infringing copy of a work is guilty of an offence. A similar knowledge element is found in other sections of the Singapore Copyright Act dealing with infringement of the copyright in a work or other materials.[22]

Powers of arrest and seizure of infringing copies

In order to deal with piracy effectively, the law enforcement agency must be given adequate powers to arrest

offenders and to seize infringing copies and the machinery used for making infringing copies. Persons engaged in illegal reproduction of infringing copies will not hesitate to destroy the infringing copies of a copyright work or shift their operations quickly from place to place in order to destroy incriminating evidence or to avoid detection. The copyright legislation should give the law enforcement agency adequate enforcement powers.

In Singapore there is no separate law enforcement agency specifically dealing with protection of intellectual property rights. The police is given wide powers of search and seizure to deal with offences committed under the Copyright Act. Any police officer may arrest without warrant any person who, in any street or public place, -

(a) sells or exposes or offers for sale; or

(b) has, or is reasonably suspected of having, in his possession for the purpose of selling or letting for hire,

any infringing copy of any copyright work.[23] Any police officer in Singapore may stop and search and forcibly board any vehicle which he reasonably suspects that there is an infringing copy of any copyright work and seize, remove or detain such infringing copy and anything that appears to be or to contain, or likely to be or to contain, evidence of an offence under the Copyright Act.[24]

The Singapore Copyright Act also empowers a Magistrate to issue a warrant authorising a police officer named in the warrant to enter and search any premises, vessel or other place when information is given on oath to the Magistrate which satisfies him that there are reasonable grounds for believing that an offence under the Copyright Act has been committed.[25] A police officer acting under the authority of such a search warrant may also seize any infringing copy of a copyright work and any plate or contrivance used or intended to be used for making infringing copies.

Industry Self-help

In many countries the police are overworked and have manpower problems. It is therefore not surprising that the police are reluctant to deal with copyright infringements and such matters are not accorded priority. Not many countries have a special enforcment agency specifically dealing with the protection of intellectual property rights. Where copyright infringements are rampant in a particular industry, for example, the music, record or film industry, the industry concerned should form a representative body to undertake the work to carry out investigations into the manufacture, sale or distribution of infringing copies of their members' copyright works or materials. Such a body can give invaluable assistance to the law enforcement agency in obtaining evidence for successful prosecutions.

In the United Kingdom, the Federation Against Copyright Theft (FACT) was formed in 1982 by the major film, video and television companies in the United Kingdom to combat piracy of films. In 1982 it was estimated that pirates penetrated 65 per cent of the video tape market. FACT found civil litigation to be very expensive, contentious, time consuming and extremely slow with disappointing results. FACT therefore acted predominantly under the criminal provisions of the United Kingdom copyright legislation. It carries out the work necessary to see that there is no copyright infringement and investigates into copyright infringements with a view to identifying the culprits and assisting the police in executing search warrants. When infringing copies of works are seized by the police, FACT carries out all the work necessary for the prosecution of the offenders including the examination of the infringing copies, the storage of all exhibits and paying the legal costs of prosecution.[26]

In 1986 the Japan Federation Against Copyright Theft (JFACT) was formed by copyright interests in Japan to combat video and film piracy with a view to eliminating piracy activities in Japan. JFACT has a team of full-time investigators to carry out investigations with a view to detecting video, film and music priacy and to prosecute the pirates with the help of the police. Video piracy was rampant in Japan right up to 1987. In 1987, industry

sources estimate that there were some 12,000 video stores in Japan and at least some 5,000 of these stores were engaged either fully or partially in piracy.[27]

In 1986, JFACT investigated 1245 video stores in Japan and from January 1987 till July 1987, JFACT investigated 1374 video stores. JFACT found 691 stores definitely dealing in illegal video cassettes.[28]

In Singapore, the International Federation of Phonogram and Videogram Producers (IFPI) has a Singapore branch office which has been actively carrying out investigations into piracy of phonograms and videotapes. The Singapore branch has a director in charge of anti-piracy operations and a team of private investigators and raiding officers. The task of the raiding officers is to accompany the police on raids on suspected offenders in order to identify the articles seized by the police as infringing copies of copyright work. Between 1982 and 1986 the IFPI was responsible for or has helped in bringing more than 1000 cases of copyright infringements to the Singapore Courts. IFPI carries out investigations into piracy of phonograms and videotapes and calls upon the police for assistance in obtaining and executing search warrants.[29] Prior to the introduction of the new copyright legislation in Singapore, the recording industry regularly instituted prosecutions by way of private summonses against persons alleged to have

infringing phonograms or sound recordings. With the enhanced penalties under the new law, the recording industry has to obtain the fiat of the Attorney General to enable lawyers appointed by the recording industry to conduct prosecutions on behalf of the State and these applications are usually granted when the facts of the case warrant a prosecution.

In the first nine months of 1988, a total of 34 raids were conducted by IFPI. 50 convictions were secured with fines amounting to S$97,480. Two of the defendants could not pay their fines and had to serve prison terms of 8 months and three months respectively.[30]

A total of 182 pirated cassettes worth about S$1,300 were seized in raids on three shops in a single day in April 1989. Earlier investigations by the Singapore branch of IFPI established that one of the shops was used to store pirated tapes which were being sold at a nearby music cassette shop. The tip-off that led to the raid came from the public after a reward of $50/= was offered for the return of each pirated sound recording and information on the retailer. The raids were carried out by the police and a team of IFPI officials.[31]

Since the new Singapore Copyright Act came into force on 10 April 1987, other copyright owners have been actively

carrying out their own investigations with a view of combatting piracy of coyright works and this has led to a demand for increase in the services of lawyers and private investigation agencies in Singapore.

In July 1989, about $3 million worth of fake computer products and software, including new releases still unavailable in Singapore, were seized from two shops in Singapore. About 3000 fake computer manuals of releases of Microsoft Word and Lotus 1-2-3 which were launched only about a month ago in the United States were among the goods seized from the two shops. The raids were carried out by the police and private investigators hired by the Business Software Association (BSA). BSA is US-based group formed in 1988 to present five major personal computer software companies - Aldus Corpn, Autodesk Inc., Lotus Development Corporation, Microsoft Corporation and WordPerfect Corporation. Investigations were carried out by investigators hired by the BSA into the sale of pirated software into Singapore and the help of the police in obtaining and executing search warrants.[32]

A multi-million dollar mail order operation dealing in pirated computer software was uncovered in Singapore in April 1989. The network was exposed following raids carried out on three retail outlets selling pirated software. More than S$200,000 worth of computers diskettes, manuals and

other products were seized in raids carried out by the police and private investigators hired by the Business Software Association (BSA).

In January 1989, more than 30,000 imitation music pamphlets and piano grade tests were seized in a raid on a music firm in Singapore. Private investigators were employed by the Associated Board of Royal Schools of Music (ABRSM) to check on such music pamphlets and piano grade tests. The faked materials cost about $30,000 to print. Several "trap purchases" of the forged materials were made by investigators employed by ABRSM before a search warrant was obtained from the Court.[33]

Big video distributors in Singapore - CEL Video, Cinestar, Kwang Sia Pte Ltd, STY Entertainment, United Vision Entertainment, Video Board and Warner Video had formed an association to tackle piracy of video tapes in Singapore and they hope to work closely with video distributors of Chinese serials from Hongkong and the Motion Picture Association of America Inc.(MPAA) and the Motion Picture Export Association of America Inc. (MPEAA).[34]

In March 1989, Golden Crown Video Pte Ltd of Singapore, the authorised distributor of Hongkong Television Broadcast

drama serials video tapes in Singapore, with the help of the police and the services of private investigators hired by them, managed to seize 14 video recorders and about 800 video tapes of unauthorised copies of popular Hongkong movies.[35] Accordingly to a spokesman of Golden Crown Video, his company conducted 30 such raids in 1988 and seized 500 video recorders and 30,000 video tapes as a result of the introduction of the new copyright laws in Singapore.

Golden Crown Video Pte Ltd had offered rewards to members of the public for tip-offs that will lead to the seizure of pirated version of the unauthorised reproduction of TV Broadcast Ltd video tapes from Hongkong. The rewards range from $100 to S$2,000/= depending on the number of video cassette tapes seized.[36]

Civil Remedies Available to Copyright Owner

Apart from making copyright infringements punishable with imprisonment and fines, the copyright legislation of many countries also give a copyright owner the right to sue the infringer for any copyright infringement. The civil remedies usually available to a copyright owner are:

(a) an injunction to restrain the continuation of the infringement;

(b) the award of damages to the copyright owner to compensate him for any economic loss suffered by him as a result of the infringement; and

(c) the delivery up of the infringement copies to the copyright owner.

Some countries have introduced statutory damages for the aggrieved copyright owners which is in effect a new form of remedy.

Section 119(4) of the Singapore Copyright Act gives the court the power to award additional damages over and above normal damages for flagrant infringement, but only if the court considers it appropriate in the circumstances.

Section 97 (3) of the United Kingdom Copyright, Designs and Patents Act 1988 (c.48) empowers the court to award "additional damages as the justice of the case may require" for flagrant infringements.

A new remedy has been granted for the first time in the United Kingdom Copyright, Designs and Patents Act 1988 (c.48). Section 100 of that Act gives a copyright owner the right to seize and detain infringing copies of a work which is found exposed or otherwise immediately available for sale or hire.

Anton Piller Orders and Mareva Injunctions

In order to assist the plaintiff in civil proceedings to overcome the difficulty of establishing copyright infringements, courts in several Commonwealth jurisdictions have developed the preliminary remedies popularly known as the Anton Piller order and the Mareva injunction. The Anton Piller order, named after the case in which the English Court of Appeal sanctioned its use, is an order granted ex parte by the court before any writ is issued to allow the plaintiff to obtain evidence which is necessary for a plaintiff to establish his case. That evidence may not be in existence at the time when the courts makes an order for discovery of documents. The order is granted ex parte, that is, on the application of the copyright owner, without prior notice being given to the defendant. The

essence of the order is that it takes the defendant by surprise, and precludes the defendant from destroying or removing vital evidence. Secondly, the terms on which the order is granted enable the copyright owner to inspect the premises of the defendant, and all documents (including business information, such as bills, invoices, sources of supply and customer lists) realting to the alleged infringement. By virtue of these terms, the copyright owner is given the means whereby he may be able to establish the source of supply of pirated works, and the extent of sales which have taken place, which will in turn assist in establishing the amount of damages to which he may be entitled. Thirdly, the order for inspection will often be accompanied by an injunction restraining the defendant from altering or removing in any way articles or documents referred to in the order for inspection.

In the case of Columbia Picture Industries and Others v Robinson and Others [37] Scott J made the following remarks about Anton Pillar orders:

> "There is, accordingly, no doubt at all but that Anton Piller orders have become established as part of the tools of the administration of justice in civil cases. It may be thought, as, I think, Lord Denning MR thought, that they play a part not unlike that played by search warrants in the area of crime and suspected crime. But the legitimate purposes of Anton Piller orders are clearly identified by the leading cases which have established the legitimacy of

their use. One, and perhaps the most usual purpose, is to preserve evidence necessary for the plaintiffs' case. Anton Piller orders are used to prevent a defendant, when warned of impending litigation, from destroying all documentary evidence in his possession which might, were it available, support the plaintiffs' cause of action. Secondly, Anton Piller orders are often used in order to track to its source and obtain the possession of the master tape or master plate or blueprint by means of which reproductions in breach of copyright are being made. This purpose is, perhaps, no more than a subdivision of the first.

It is implicit in the nature of Anton Piller orders that they should be applied for ex parte and dealt with by the courts in secrecy. In the Queen's Bench Division applications for Anton Piller orders are heard in chambers. Secrecy is ensured. In this division applications are heard in court but it is customary for the court to sit in camera. Otherwise there is a risk that the defendant may become aware of the litigation and the whole purpose of the Anton Piller procedure will be frustrated.

Anton Piller orders and procedure have, therefore, these characteristics: no notice to the defendant of what is afoot, and secrecy. A third and, perhaps, the most significant feature of Anton Piller orders is that they are mandatory in form and are designed for immediate execution. The respondent to the order is required by the order to permit his premises to be entered and searched and under most if not all orders, to permit the plaintiffs' solicitors to remove into the solicitors' custody articles covered by the order.".

The Mareva injunction was developed by the Courts in the United Kingdom to allow a plaintiff to restrain a defendant from transferring his assets out of jurisdiction and thus frustrate the plaintiff's claim.[38] Now the injunction is granted even when the court is satisfied that the defendant may sell or dispose of the subject matter of

the litigation in order to defeat the ends of justice. Anton Pillar orders are invariably accompanied by Mareva injunctions freezing the bank accounts of the respondents and restraining them from making any disposition of their assets. Anton Pillar orders and Mareva injunctions granted ex parte always reserve liberty for the respondent to apply on short notice for them to be discharged. This provides a reasonable safeguard in the case of Mareva injunctions. They can be lifted on very short notice. Harm may already have been done but can be expected to be a limited nature. The Mareva injunction coupled with an Anton Piller order provide a plaintiff with a prompt and effective weapon in his battle against copyright piracy.

Preventing the Importation of Infringing Copies

In order to help the copyright owner enforce his rights in his work, a national copyright legislation should have a provision for preventing the importation of infringing copies of a work into a country.

Section 142 of the Singapore Copyright Act allows the owner of the copyright in a work to give notice in writing to the Trade Development Board stating that he is the owner of the copyright of the copies of the work and that he objects to the importation into Singapore during a period specified in the notice, of copies of the work made outside

Singapore, the making of which was carried out without the consent of the owner of the copyright in the work. (The underlining has been made for the purpose of emphasis). Where a notice has been given as aforesaid the importation of such copies of the work into Singapore for the purpose of sale, hire or distribution for the purposes of trade is prohibited and any such copies, if imported into Singapore, may be seized and forfeited to the Government.

In Singapore, the copyright in a work is infringed by a person who, without the licence of the owner of the copyright, imports an article into Singapore the purpose of trade where "he knows or ought reasonably to know that the making of the article was carried out without the consent of the owner of the copyright.".[39] The underlined words made it clear that the Singapore legislation does not prohibit the importation into Singapore of copyright articles made outside Singapore under the licence of the copyright owner even though the copyright owner may have imposed restrictions on the distribution of copyright articles made in the country of manufacture to other countries.

Although the Singapore copyright legislation was modelled on the Australian legislation, the relevant provision in the Australian legislation is significantly different. The Australia Copyright Act states that it is an infringement of copyright where a person without the licence

of the owner of the copyright imports an article into Australia for the purpose of trade "where, to his knowledge, the making of the article would, if the article had been made in Australia by the importer, have constituted an infringement of the copyright".[40] (The underling has been made for the purpose of emphasis). Such a provision has the effect of prohibiting the importation into Australia for the purposes of trade of articles which are not pirated and were purchased legally outside Australia.

Under section 5(2) of the United Kingdom Copyright Act, 1956, it was an infringement of copyright in a work to import an article which was, or if made in the United Kingdom would have been, an infringing article. In CBS UK Ltd v Charmdale Records,[41] this provision was interpreted as referring to goods which if made in the United Kingdom by the copyright owner would have been infringing articles. Hence where a US record manufacturer gave a United Kingdom company an exclusive licence to manufacture his records in the United Kingdom, it was open to the defendants to import the American version despite the protests of the UK licensee. After all, if the American version of the records were made in the UK by the copyright owner, those records would not have infringed the copyright although the making of the records would have been prohibited by the contractual agreement made between the US manufacturer and the UK licensee. The position in England is now reversed with the

enactment of the Copyright, Design and Patents Act 1988. ("the 1988 Act"). Section 27 of the 1988 Act provides that if an article is imported into the United Kingdom, it is an infringing article if its making in the United Kingdom would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work. An exclusive licensee of a copyright work can now prohibit the importation of parallel imports into the United Kingdom.

Under the United Kingdom 1988 Act, the owner of the copyright in a work may request the Commissioners of Customs and Excise to treat as prohibited goods infringing copies of the work.[42]

Societies of Authors, Composers, and Performers

An adequate national copyright law is not, in itself, enough to guarantee that authors, composers, musicians and performers get their due reward. Without a national society to act on behalf of creative interests, the promise of adequate ecoomic reward can rarely be properly realised. The absence of this collective entity in many Asian countries is the major problem in the effective enforcement of copyright. For example, authors acting individually are rarely in a strong bargaining position. Without a society acting on their behalf, authors often find themselves quite

badly exploited. Contracts are forced on them. Very often composers have no choice but to assign their copyright to users for a lump sum payment, which is a tiny fraction of the work's real commercial worth. Authors find their works, which have been commissioned for one specific purpose, freely exploited by the licensee in other non-related areas and without any attempt to compensate him further. Authors, composers and musicians are not in a financial position to seek redress in a court of law against a large organisation with hugh financial resources.

A strong national authors' society is also of paramount importance in defending the legal and moral rights of authors against the inroads which are constantly being made by new technologies. For example, the additional exploitation of authors' works in consequence of the introduction of the video cassette is enormous. Yet very few countries have amended their laws to compensate authors for this vastly increased use. This will only come about if national authors' societies make representations to governments to change their laws.

Before I leave this topic , let me tell you a story of a Singapore author who complained to the local press that booksellers made much more money than he did out of the sale of his book. According to the author, he earned S$3/- royalties on his work while the book distributor earned

three times the amount. The retail price of his book, a 230-page hard-back was S$22/-. The actual production cost of his book was S$6.50 only. The main distributor was offered copies of his book on consignment at S$12 (i.e. at a 50 per cent discount). Believing that he could do better by publishing his next book, he turned author-cum-publisher with a 200-page hardback, his next book. The book cost S$5.50 a copy to produce and retailed for S$16. However he had to allow the distributor to sell copies of his books on consignment at S$8.50 per copy which amounted to a 45 per cent commission for the distributor. Theoretically he made marginally more on his second book but he had to wait a long time for payment for his distributor. He therefore wrote to the local newspapers complaining about the exorbitant commissions charged by book distributors.

Reprography, Sound and Audio-Visual Recordings

Advances in the field of techology have created problems for copyright owners in the sense that the ease with which audio-visual or sound recordings could be reproduced and the availability of cheap photocopying machines have made inroads into the sales of the original works.[44] Today, many countries, offices, schools or libraries have photocopiers and the number of copies of literary, dramatic, musical and artistic material reproduced by the photocopier around the world is quite astronomical.

Although most copyright legislation permits the reproduction of an insubstantial portion of a work and states in no uncertain terms that the reproduction of an entire work without the licence of the copyright owner is an infringement of copyright, very little can be done to stop the reproduction of an entire work in the office or home or other premises with such equipment or even in commercial photocopying centres. The same comment can be made with regard to the reproduction of musical works and video programmes.

The problem created by photocopying machines has been the subject of extensive studies and different countries have adopted different solutions. I do not propose to examine the various blanket licensing systems and compulsory levies which are adopted by various countries to deal with reproduction by photocopying machines. A brief reference to them will suffice. In a number of the Scandinavian countries, a blanket licensing system, with statutory backing, extends to all copyright works, including foreign works, with a provision for arbitration machinery to deal with disputes arising between the organisation administering the blanket licences and the educational establishments covered by them.

The Federal Republic of Germany has a comprehensive system of statutory payments together with

blanket licensing. The statutory payments of varying amounts are made by the manufacturers and importers of photocopying equipment depending on the speed of operation of the equipment. In addition, this photocopying equipment is used in educational establishments, public libraries or other institutions. Royalties must be paid to collecting societies under blanket licences.

In the United Kingdom, the new copyright legislation has given statutory backing to blanket licensing schemes for photocopying of materials for the purposes of education in schools. The principal feature of the Government's approach to photocopying is that it should be regulated by a system of voluntary - i.e. non-statutory - blanket licensing arrangements, subject however to some measure of statutory control and regulation. Copyright owners can set up licensing schemes similar to that operated by the Performing Rights Society. To ensure the right balance of interest between copyright owners and users of copyright materials, disputes between the operator of a scheme and a person requiring a licence may be referred to the Copyright Tribunal for determination. At present, authors and publishers have formed the Copyright Licensing Agency to establish licensing schemes in respect of photocopying in schools, colleges and other institutions where extensive photocopying occurs.

The availability of recording equipment, at prices within reach of the general public, producing home-made recordings of sound and audio-visual material have copyright implications similar to the copying of literary and other material by photocopying machines. Much copyright legislations was enacted at the time when few people had the facility to make recordings in their homes.

Under much existing copyright legislation the owners of copyright in sound recordings, audio-visual recordings and television broadcasts have the right to control reproduction of the copyright materials. That means home taping of these recordings and broadcasts is illegal since there are copyrights in most broadcasts and recordings and the owners of those copyrights have not consented to the home taping.

In CBS Songs Ltd v Amstrad Consumer Electronics PLc.,[45] Amstrad was the manufacturer of recording equipment which has "high-speed doubling effects" enabling an operator of the equipment to make duplicate recordings from one cassette to another, and record from any source and then make a copy. Amstrad had advertised about the capability of their equipment to make copies of music cassettes. It was alleged by CBS that the sale of such machines incited or facilitated the copying of pre-recorded and other cassettes containing copyright sound recordings and musical works and that Amstrad's advertisement was an

encouragement to break the law. An injunction was sought by CBS to restrain Amstrad from selling its machines without taking such steps as are necessary to ensure that copyright was not infringed by the use of such machines. CBS claimed that Amstrad authorised copyright infringement, and the company jointly infringed with any person who used their machines for making infringing copies of any material in any work in which copyright existed. The House of Lords held that although by selling the machines, Amstrad might facilitate copying in breach of copyright but they did not authorise it. Amstrad had not authorised the unlawful copying of records. The House of Lords did not grant the injunction sought by CBS.

Since the rights of copyright owners are unenforceable, copyright interests have lobbied for the introduction of a levy on recording equipment and/or blank recording tape. There is now wide acceptance by governments that measures are needed to ensure that the authors and other persons whose material is so extensively used by the home audio and video user should receive some appropriate remuneration for this extensive use of their works. A number of countries have enacted legislation to deal with the matter. They include Australia, Austria, Congo, Denmark, Finland, France, Federal Republic of Germany, Hungary, Iceland, Norway, Portugal and Sweden. The general approach is that a levy is collected in respect of each unit of recording equipment or blank tape, of a kind likely to be used for home recording.

Under the United Kingdom copyright legislation of 1988, the making for private and domestic use of a recording of a broadcast or cable programme solely for the purpose of viewing it at a more convenient time is not an infringement of the copyright in the broadcast or cable programme or in any work included in it.[46] Under the Singapore Copyright Act, the making for private and domestic use of a recording of a sound or television broadcast or cable programme is not an infringement of the copyright in the broadcast or cable programme or any work included in it.[47]

[Footnotes follow]

FOOTNOTES

1. See Nick Garnett "Piracy: The Experience of the Recording Industry" IP Asia May 27, 1988; Gillian Davies "Piracy of Phonograms" published by ESC Publishing Ltd, Oxford for the Commission of the European Communities, 1981; Statement of Mr David Gibbons, Director of Anti-Piracy Operations London, International Federation of Producers of Phonograms and Videograms (IFPI) made at the WIPO Worldwide Forum on the Piracy of Sound and Audio Visual Recordings held in Geneva, March 1981.

2. The Times, London 10th March 1985.

3. See Address given by Mr Peter Duffy, Director General of Federation Against Copyright Theft, United Kingdom, at the Video Piracy Seminar held in Tokyo, 25 Sept to 4 Oct 1987 under the sponsorship of the 1987 Tokyo International Film Festival.

4. See Nick Garnett "Piracy: The Experience of the Recording Industry"; A Viren Luther "Copyright Problems in Relation to Audiovisual Works and Phonograms - The Indian Experience" 1988 Copyright 145, Shimpei Matsuoka "Copyright and Neighbouring Rights Protection in the Japanese Record Rental Industry" 1989 Copyright 152.

5. See Address given by Jack Valenti, President and Chief Executive Officer of Motion Picture Association of American at the Video Piracy Seminar held in Tokyo, 25 Sept to 4 Oct 1987 under the sponsorship of the 1987 Tokyo International Film Festival.

6. Catriona Hughes, Policy Advisor, Australian Film Commission on Practical Measures of Countering Audio and Video Piracy in the Papers and Country Reports of WIPO - Australia Copyright Program for Asia and the Pacific, 2 - 13 November 1987 published by the Australian Government Publishing Service, Canberra.

7. For a description of the operations of film piracy in the United Kingdom. Columbia Pictures Inc. & Others v Robinson and Others. [1986] 3 ALL ER 338.

8. Section 136(1) and (2) of the Singapore Copyright Act published as Chapter 68, 1988 Edition of the Singapore Statutes.

[Footnotes cont.]

9. Section 136(3), Singapore Copyright Act.

10. Section 136(4), Singapore Copyright Act.

11. Section 136(6), Singapore Copyright Act.

12. Straits Times, Singapore, 25 January 1989.

13. Straits Times, Singapore, 9 March 1989.

14. Article 98, Copyright Act of the Republic of Korea promulgated as Law No. 432, of Jan 28th, 1957 and amended by Law No. 3916 of Dec 31st, 1986.

15. Section 25 of the Canadian Copyright Act RSC 1970c. C-30, as amended by S.C. 1988c.15

16. Section 63, Indian Copyright Act of 1957 (No. 14 of 1957) as amended by Act No. 23 of 1983 and Act No. 65 of 1984.

17. Section 137(1), Singapore Copyright Act.

18. Section 137(2), Singapore Copyright Act.

19. Section 130, Singapore Copyright Act.

20. Section 136(7), Singapore Copyright Act.

21. Section 9, Hongkong's Copyright Ordinance (Cap. 35).

22. See sections 31, 32 and 33 of the Singapore Copyright Act which deals with infringement of copyright in works and sections 103, 104 and 105 which deal with infringement of copyright in subject matter.

[Footnotes cont.]

23. Section 138(1), Singapore Copyright Act.

24. Section 138(2), Singapore Copyright Act.

25. Section 136(9), Singapore Copyright Act.

26. The information on the activities of FACT were obtained from the address delivered by Mr Peter Duffy, Director General of Federatiion Against Copyright Theft (FACT) at the Video Piracy Seminar held in Tokyo, 25 Sept to 3 Oct 1987 under the sponsorship of the 1987 Tokyo International Film Festival.

27. White Paper on Video Piracy in Japan published by Japan Video Association and Japan Federation Against Copyright Theft (JFACT), September 1987.

28. See footnote 27.

29. Nick Garnett, Piracy: The Experience of the Recording Industry, IP Asia, 27 May 1988.

30. The information was supplied by the Singapore Branch of IFPI.

31. Straits Times, Singapore, 22 April 1989.

32. Straits Times, Singapore, 21 July 1989.

33, Straits Times, Singapore, 18 January 1989.

34. Straits Times, Singapore, 6 January 1989.

35. The Newpaper, Singapore, 28 March 1989.

36. Straits Times, Singapore, 1 January 1989.

37. [1986] 3 All ER 338 at p. 367.

38. See Mavera Compania Naviera SA v International Bulk Carriers S A [1980] All ER 213; Third Chandris Corpn v Unimarine SA [1979] QB 645

39. See Section 32, Singapore Copyright Act and Television Broadcasts Ltd & Qrs v Golden Line Video & Marketing Pte Ltd [1989] 1 MLJ 201.

40. Section 37, Australian Copyright Act 1968.

41. [1980] 2 All ER 806.

42. Sections 111 and 44 of the United Kingdom Copyright, Designs and Patent Act 1988.

43. Straits Times, Singapore, 19 September 1988.

44. For an account of inroads made to the sale of original copyright materials in the United Kingdom by reprography and home recording: see the 1976 Whitford Report on Copyright and Designs Law (Cmnd 6732), the 1981 Green Paper on Reform of the Law relating to Copyright, Designs and Performers' Protection (Cmnd 8302), the 1985 Green Paper on The Recording and Rental of Audio and Video Copyright Material (Cmnd 9445) and the 1986 White Paper on Intellectual Property and Innovation (Cmnd 9712).

45. [1988] 2 All ER 484

46. Section 70 of the Copyright, Designs and Patents Act, 1988.

47. Section 114, Singapore Copyright Act.

[End of footnotes and of document]

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WORLD INTELLECTUAL
PROPERTY ORGANIZATION
(WIPO)

GOVERNMENT OF THE
REPUBLIC OF KOREA

WIPO/REPUBLIC OF KOREA REGIONAL TRAINING COURSE ON COPYRIGHT AND NEIGHBORING RIGHTS

organized by
WIPO in cooperation with
the Government of the Republic of Korea

Seoul, September 4 to 11, 1989

WIPO AND ITS PROGRAM OF DEVELOPMENT COOPERATION IN THE FIELD OF COPYRIGHT AND NEIGHBORING RIGHTS

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Introduction

1. This paper is intended to inform you briefly about the activities undertaken by WIPO as part of its development cooperation program related to copyright and neighboring rights for development of copyright and neighboring rights in developing countries. These activities include organization of training programs, providing advice and assistance to the competent authorities and institutions in developing countries in establishing, modernizing and strengthening of copyright and neighboring rights legislation and the relevant national or regional institutions and administrative structures in these fields.

2. Before we consider the development cooperation program, however, some information will be given about WIPO, its background, structure and functions.

WIPO

3. The World Intellectual Property Organization (WIPO for short in English, OMPI in French and Spanish) is relatively a new entrant into the United Nations system and yet has been one of the oldest of intergovernmental organizations. It is the successor of an intergovernmental organization which started in 1883 long before not only the United Nations but also the League of Nations were conceived. It became a specialized agency of the United Nations in December 1974 and is one of the 16 such specialized agencies[1].

4. These are known as specialized agencies since each of them has specialized expertise and has accumulated vast international experience in a particular field of activity of importance to the international community. Thus the ILO specializes in labor; Unesco in education, science and culture; WHO in health; FAO in food and agriculture and WIPO in intellectual property.

5. An intergovernmental organization becomes a specialized agency of the United Nations pursuant to an agreement between the General Assembly of the United Nations and the General Assembly of the Organization concerned. Thus, the WIPO General Assembly having approved the text of an agreement at the end

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1 The other specialized agencies are: the International Labour Organisation (ILO), the United Nations Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (Unesco), the International Civil Aviation Organization (ICAO), the World Health Organization (WHO), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF), the Universal Postal Union (UPU), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the International Finance Corporation (IFC), the Inter-Governmental Maritime Organization (IMO), the International Development Association (IDA), the International Fund for Agricultural Development (IFAD), the United Nations Industrial Development Organization (UNIDO).

of September 1974, the approval of the General Assembly of the UN was obtained in December of that year, and an agreement signed between the Secretary-General of the UN and the Director General of WIPO made WIPO a specialized agency of the UN.

6. By this, the United Nations recognized WIPO as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, mainly in two specific directions, (i) for promoting creative intellectual activity and (ii) for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development.

7. A specialized agency, although it belongs to the family of United Nations organizations, retains its independence. Each specialized agency has its own membership. All Member States of the United Nations are entitled to become members of all the specialized agencies, but in fact not all Member States of the United Nations are members of all the specialized agencies. Each State decides for itself whether it wants, or does not want, to become a member of any particular specialized agency. Nearly all States are members of the United Nations. A great majority of those States are also members of most of the specialized agencies. Each specialized agency has its own constitution, its own governing bodies, its own elected executive head, its own income, its own budget, its own staff, its own programs and activities. Machinery exists for coordinating the activities of all the specialized agencies, among themselves and with the United Nations, but, basically, each agency remains the master of its own destiny, responsible, under its own constitution, to its own governing bodies which consist, of course, of States Members of the organization.

8. WIPO had come a long way since its origins which date back to 1883, when the Paris Convention for the Protection of Industrial Property was signed, and to 1886 when the Berne Convention for the Protection of Literary and Artistic Works was established. Both Conventions provided for the establishment of an "International Bureau" or secretariat and these were united in 1893. They functioned as the United International Bureaux for the Protection of Intellectual Property, known as BIRPI, the French acronym for that name. BIRPI still has a legal existence for the purpose of those countries which are party to the Berne or Paris Conventions but have not yet joined WIPO, but in practice is indistinguishable from WIPO. In so far as their administration was concerned, both these multilateral treaties were under the supervision of the Swiss Federal Government and the headquarters of the few officials who were needed to carry out the administration of the two treaties were in Berne, Switzerland.

9. WIPO today is an intergovernmental organization with its Secretariat (called the International Bureau) that is directed by the Director General, assisted by three Deputy Directors General and a staff of more than 300 from about 50 different countries. WIPO revenues (approximately Swiss francs 50 million per annum) come from contributions from Member States, from fees paid by applicants for the international registration of trademarks and appellations of origin and the deposit of industrial designs, as also from sales of publications. The membership of WIPO is presently 123; in addition there are some States which are members only of one of the Unions without being members of WIPO as such.

10. The objectives of WIPO are to promote the protection of intellectual property thoughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization; also

to ensure administrative cooperation between intergovernmental Unions created by certain multilateral treaties dealing with various subjects of intellectual property.

11. The Constitution, the "basic instrument" of WIPO is the Convention signed at Stockholm in 1967. Before we consider the structure and functions of WIPO and find what the Unions administered by WIPO are, what WIPO does and how it is governed and managed, it might interest you to know, in general terms, as to why an intergovernmental organization is needed in the field of intellectual property.

12. Very broadly, intellectual property means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. The main examples are industrial property (viz. patents, inventions, trademarks and industrial designs) and copyright and neighboring rights (chiefly in literary, musical and artistic works, in films, records, broadcasts, etc.). Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development. Intellectual property rights are limited territorially; they exist and can be exercised only within the jurisdiction of the country or countries under whose laws they are granted. But works of the mind cross frontiers with ease, and, in a world of interdependent nations, should be encouraged to do so. Therefore Governments have negotiated and adopted multilateral treaties in the various fields of intellectual property, each of which establishes a "Union" of countries which agree to grant to nationals of other countries of the Union the same protection as they grant to their own nationals.

13. What are the Unions? The Unions administered by WIPO are founded on treaties, conventions and agreements, most taking their names from the places where their first texts were adopted. A Union consists of all States that are party to a particular treaty; each of the Unions has a governing body. The structure of WIPO may appear complex. This is due to the fact that WIPO administers over a dozen treaties or agreements, and instead of having a unitary structure, the organization has a structure that is conditioned by the establishment of conventions and treaties concluded in the field. The WIPO Convention enables a more uniform management and administration.

14. The Convention, drawn up at Stockholm in 1967, establishing the World Intellectual Property Organization, has a twofold objective: first, to provide administrative cooperation between the Unions established by the Paris and Berne Conventions and by the other treaties administered by the Organization and, secondly, and above all, to promote the protection of intellectual property throughout the world. This dual function is reflected in the structure of the Organization, which consists of three organs.

15. The General Assembly now meets in ordinary session every two years; only States that are members of at least one of the Unions--and, obviously, that have also accepted the Convention establishing WIPO by ratification or accession--can be represented. A completely separate body is the Conference in which WIPO Member States that are not yet members of at least one of the Unions may also participate. Finally, there is a Coordination Committee, comprising the States parties to the said Convention which are members of the Executive Committee of the Paris Union, the Executive Committee of the Berne Union, or both, which provides for liaison, so to speak, between WIPO and the

Unions or between the Unions themselves. This Coordination Committee, a real administrative council, is called upon to play an essential role in the operation of the Organization owing to the fact that it gives advice to the organs of the Unions, to the WIPO General Assembly, to the Conference and to the Director General, on all administrative and financial matters and all other matters of common interest.

16. As to which States are members of WIPO, the Convention establishing WIPO mentions that membership of WIPO is open to any State which is a member of any of the Unions, or to a State which is a member of the United Nations or one of its specialized agencies, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice, or has been invited by the General Assembly to become a member. At present 123 States are members of WIPO. Most of them, are also members of, at least, the Paris Union or the Berne Union, that is, they are party to the Paris Convention for the Protection of Industrial Property or the Berne Convention for the Protection of Literary and Artistic Works. Many States are, of course, also party to one or more of the 15 other multilateral treaties administered by WIPO that are in force.

17. It should be noted, however, that States that are members of at least one of the Unions do not pay contributions to WIPO as such; there is no double payment; their contributory share concerns only the Union of which they form part, while the various Unions finance the budget of the expenses common to WIPO, the amount of this financing being fixed by the Assembly of each Union. Certain Unions viz. the Unions of Madrid (international registration of marks), The Hague (the international deposit of industrial designs) and Lisbon (international registration of appellations of origin), have other sources of income of not inconsiderable importance; these are the fees charged for international registrations. In addition is the income from sales of the Organization's publications. The number and volume of these publications have increased in recent years, which bears witness to a constant concern to provide information.

18. The activities of WIPO are basically of three types: registration activities; the administration of a number of international agreements and conventions, and substantive or program activities.

18.1 The registration activities of WIPO involve direct services to applicants for, or owners of, industrial property rights. These activities concern the receiving and processing of international applications under the Patent Cooperation Treaty or for the international registration of marks or deposit of industrial designs. Such activities are financed normally from the fees paid by the applicants, which account for more than one third of the budget of WIPO. It should also be mentioned that a Diplomatic Conference adopted, in April 1989, a Treaty on the International Registration of Audiovisual Works which establishes, under the aegis of WIPO, an international register of such works. That Treaty has not yet entered into force.

18.2 Administration of the conventions, in practice, involves a number of tasks. While the international treaty makes provision for organs (executive committees, assemblies), as is the case with the majority of the conventions and special agreements relating to intellectual property, it falls to the Secretariat (viz. the WIPO's International Bureau) to prepare and convene their periodical meetings and to assist the delegations of Member States to reach conclusions in their discussions or to make decisions which will be either included in reports or expressed in resolutions, etc. Administration also consists in compiling and publishing information concerning the legal or economic fields covered by a particular international agreement.

18.3 In addition to the administrative-type functions, there exist others of a more specifically legal nature. Every international agreement requires revision from time to time, either to improve its scope, to extend its geographical application, or to adapt it to the evolution of the modern world. If it does not itself contain the seeds of its own revision, the latter has to be initiated. This is then a job for working parties, commissions and committees of experts to seek solutions that would meet with the greatest degree of acceptance, to draft new provisions and thus to prepare the way for the diplomatic conferences which will adopt a revised text marking a new stage in the history of the agreement concerned. Throughout this process, the Secretariat has the role of coordinating the work and provides administrative and other assistance. The Secretariat also has to arrange committees of governmental experts or organize meetings of expert groups to consider current problems in accordance with the program or as directed by the competent organs of the Organization.

18.4 The substantive or program activities of WIPO which constitute the major part of its activities, include organizing and participating in development cooperation, promoting the wider acceptance of existing treaties, updating--where necessary--such treaties through their revision, concluding new treaties, and promoting close, practical intergovernmental cooperation in the administration of intellectual property.

19. In order to promote the widest possible acceptance of treaties, it is important to provide the States with full information on the aims of a particular convention and on the legal, economic and social advantages of being party to it. To this end, the Secretariat maintains close contact both with the national authorities and with the duly accredited diplomatic representatives (the missions or permanent delegations in Geneva) and gives them any explanations that may be required. This may also assume the form of consultations on the compatibility of national legislations with the international agreement to which accession is contemplated, consultations embarked upon at the request of the State concerned, or advice on the nature of the formalities to be complied with in order to become bound by a particular convention.

Development Cooperation

20. A very important sphere of WIPO's activities concerns assistance in the development of developing countries. "Development cooperation" is the expression now used in the United Nations system to describe what used to be called "aid" or "assistance to developing countries" or "legal-technical assistance" so far as WIPO is concerned. What is WIPO's principal aim in this field? It is to promote respect for intellectual property inside each developing country and in the international relations of that country, because experience shows that national creativity in the literary and artistic field is considerably enhanced and, in fact, is really only possible if it is accompanied by the protection of the authors of literary or artistic works.

21. The main aim of the development cooperation program is to make a special contribution to the development process within the developing countries in the field of intellectual property, thereby calling for a whole range of multiple activities. There are indeed enormous differences between the various developing countries as regards their degree of industrialization and their productivity in the fields of technical inventiveness and literary and artistic creativity. Many of them lack specialists in the field of

intellectual property. Many of them also have a need for national laws better suited to their development objectives. Those that have not as yet passed new legislation since their independence still apply provisions which are not suited to their real needs and are outmoded. Finally, a large number of them have need of a national infrastructure enabling the laws to be administered more efficiently and permitting greater exploitation of the possibilities that improved laws and improved infrastructures could offer them for their industrialization as well as their cultural expansion.

22. In order to carry out activities to fulfil these aims, WIPO has set up permanent programs specifically designed to organize technical assistance to developing countries. The relevant program that concerns us is the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights. The objectives of the Permanent Program are:

(i) the encouragement in developing countries of intellectual creation in the literary, scientific and artistic domain,

(ii) the dissemination, within the competence of WIPO as defined in the WIPO Convention, in developing countries, under fair and reasonable conditions, of intellectual creations in the literary, scientific and artistic domain protected by the rights of authors (copyright) and by the rights of performing artists, producers of phonograms and broadcasting organizations (neighboring rights),

(iii) the development of legislation and institutions in the fields of copyright and neighboring rights in developing countries.

23. The Permanent Program is directed by a Permanent Committee that reviews the program to be proposed to the Member States for the following year or years and reports on the execution of the projects under the previously adopted program. The Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights meets every two years.

24. This Permanent Committee consists of all States members of WIPO which have informed the Director General of their desire to be members of this Committee. The said Permanent Committee presently consists of 84 States.

25. WIPO has within the framework of its Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights, and at the request of governments of developing countries and regional organizations, been undertaking the training of specialists, been providing advice and assistance to national authorities in connection with preparation of legislation or updating of legislative texts, and the establishment or strengthening of national or regional institutions concerning copyright and neighboring rights.

26. It is generally accepted that without the necessary laws, the necessary infrastructure to implement them and, most importantly, the necessary knowledge and skills, it is not possible for a newly developing country to stimulate its scholarship, research or cultural development. Without the establishment and strengthening of the necessary infrastructure in developing countries, the cultural exchange and mutual protection of intellectual values between them and the developed countries can also not be enhanced. Laws cannot be implemented and institutions cannot exist without skilled personnel and, therefore, WIPO has been giving its training programs the priority they deserve.

27. The activities carried out under the Permanent Program are the following: training courses, information meetings and seminars, drafting of model laws specially designed for the developing countries concerning copyright and neighboring rights, assistance in the setting up and modernization of institutions responsible for administering copyright and neighboring rights, publication of guides, manuals and glossaries.

28. Training under the WIPO training program is designed to instruct and inform officials from developing countries in the field of copyright and neighboring rights, with the main purpose of assisting those countries in having specialized staff necessary for the efficient functioning of the national copyright and neighboring rights administration. The training program comprises (a) training afforded to officials who are or would be responsible for the administration of copyright; this is more in the nature of refresher or specialization courses; and (b) a general introductory course to afford basic training.

29. The copyright fellowship program has been considerably augmented; four fellowships were awarded in 1975, nine in 1976, 12 in 1977, 27 in 1978, 38 in 1979, 48 in 1980, 37 in 1981, 38 in 1982, 52 in 1983, and 56 in 1984, 60 in 1985, 81 in 1986, 83 in 1987 and 50 in 1988.

30. Each year, around early November, the International Bureau of WIPO invites the competent authorities of developing countries to submit applications for fellowships under the program adopted the preceding September by the Governing Bodies of WIPO. At the same time, the national and regional offices or the institutions of developed countries and of certain developing countries are invited to state whether and under what circumstances they will be able to accept trainees. Applications are generally received up to the end of January, following which the candidates are selected for the respective courses viz. the General Introductory Courses or the more specialized courses such as this one.

31. An evaluation of the Training Program is proposed in order to ascertain whether the officials who have undergone training have in fact continued to be active in the copyright field or, if any have not, as to what the extent of the wasted potential has been; and whether the training has really benefited the recipient, and to what extent it has been put into practice in the organization of copyright protection.

Teaching of Intellectual Property Law

32. It is desirable that the teaching of intellectual property law should be developed in a number of universities in developing countries. The International Bureau has already awarded fellowships for this purpose to university teachers from developing countries to enable such personnel to examine the course and curriculum content in order to introduce or strengthen teaching at the university level.

Information Activities

(A) Meetings, Seminars, Regional Courses

33. The primary purpose of these meetings is to provide participants with information concerning different aspects of the protection of copyright and neighboring rights, with special regard to the actual needs to be complied

with as well as the development of relevant legislation and its implementation in the countries concerned. They are of a very varied nature and deal with differing subjects:

- some concern subjects related to the WIPO program of activities,

- others are general information meetings and seminars on copyright and/or neighboring rights.

In the first decade of its development cooperation activities in the field of copyright and neighboring rights, and up to end of 1988, more than 65 courses and regional, subregional or national meetings have been organized, primarily designed to increase the awareness of copyright and neighboring rights, their role in development, the impact of new technologies and the desirability of increased multilateral cooperation in these areas. The above-mentioned courses and meetings have been attended by more than 3,000 participants from nearly 100 developing countries.

(B) Publications

34. The International Bureau publishes surveys, guides, glossaries and/or manuals to facilitate the understanding of intellectual property, and of its Conventions. Mention in this connection may be made of the following:

- a Guide to the Berne Convention and a Guide to the Rome and Phonograms Conventions were published in several languages; they are now mostly out of print and in the program and budget for 1990-1991 it is proposed that, instead, handbooks will be published describing those conventions;

- a Glossary of terms used in copyright and neighboring rights legislation was published in 1980 in three languages (English/French/Spanish) and subsequently in English/French/Arabic; English/French/Russian; English/French/Portuguese; and English/French/Japanese; that Glossary is under revision.

- a collection of texts of copyright and neighboring rights laws and regulations is being kept by the International Bureau.

Legal and Technical Assistance

35. Legal assistance is provided by the International Bureau in two forms: the drafting of model laws and assistance in the drafting of national legislation. The International Bureau has already drawn up a number of model laws for the use of the developing countries. These texts are prepared by meetings of experts from developing countries and developed countries, working on the basis of drafts prepared by the International Bureau and, in all cases, submitted for their comments to the States and subsequently adopted by meetings of governmental experts.

36. In the field of copyright and neighboring rights at the moment there exists the Model Law on Neighboring Rights (Rome Convention), published in 1974. Furthermore, it should be mentioned that one of the present activities of WIPO is the establishment of "Model Provisions for Legislation in the Field of Copyright." Drafts of a set of such provisions are presently under discussion by a Committee of Experts and will probably be finalized and published in 1990.

37. The following have also been discussed and finalized:

- model provisions for the implementation of the Satellites Convention;

- guiding principles covering the problems posed by the practical implementation of the licensing procedures for translation and reproduction under the copyright conventions;

- model provisions for the protection of expressions of folklore, as a result of the work of a Committee of Governmental Experts.

These are prepared jointly with Unesco. In addition, WIPO has made a draft of model provisions to help developing countries in drafting their neighboring rights legislation.

38. As part of this legal assistance, meetings are held in Geneva or in the country-concerned between officials responsible for drafting national legislation and officials of WIPO. In addition, WIPO provides comments on draft laws submitted to it by countries before these are finalized.

New legislation has been or is being prepared with the assistance or the advice of the International Bureau in the following countries: Angola, Bangladesh, Barbados, Benin, Bolivia, Botswana, Burundi, Cameroon, Central African Republic, Costa Rica, Chile, China, Colombia, Congo, El Salvador, Ethiopia, Gabon, Gambia, Ghana, Guinea, Haiti, Honduras, Indonesia, Jamaica, Jordan, Kuwait, Lesotho, Liberia, Madagascar, Malawi, Malaysia, Mali, Mauritius, Mozambique, Niger, Nigeria, Pakistan, Papua New Guinea, Qatar, Rwanda, Saudi Arabia, Singapore, Sri Lanka, Sudan, Suriname, Syria, Tanzania, Togo, Tonga, Trinidad and Tobago, United Republic of Tanzania, Uruguay, Zaire and Zambia.

39. WIPO also provides technical assistance for all developing countries members of the United Nations in the setting up or reorganization of their administrative structures for copyright.

40. The cornerstone of a copyright system is a well-established and widely respected copyright organization which undertakes safeguarding of the rights and interests of authors, the collection and distribution of their royalties, and which can contribute also to the promotion of education and culture, as well as assist in the participation in international cultural exchange.

41. In 1986, WIPO organized an International Forum on the Collective Administration of Copyrights and Neighboring Rights in Geneva, from May 12 to 14, 1986, which allowed a very useful exchange of information and views within the framework of the Berne Convention, particularly between representatives of governments, intergovernmental and non-governmental organizations. Among the latter were leading federations and other organizations representing authors, performers, publishers, film makers, television and radio broadcasters and phonogram producers. The participants at the Forum considered it desirable, inter alia, that WIPO continue to pay particular attention to rendering assistance in the setting up or strengthening of collective administration systems in developing countries.

42. The International Bureau of WIPO is presently preparing a report on the collective administration of rights protected by and revenues derived from copyright and neighboring rights. This report should increase awareness of the advantages of, and questions to be solved for, an effective collective administration.

Joint International Service for Access by Developing Countries to Works Protected by Copyright

43. A service called the "Joint International Unesco-WIPO Service for Access by Developing Countries to Works Protected by Copyright" has been created and is available to publishers in developing countries. States and publishers in developing countries have been notified of this, and their attention has been drawn to the assistance that would be available from the Joint International Service.

44. The principal aim of the Joint Service is to be at the disposal of governments and publishers of developing countries wishing to reproduce, translate or otherwise use works the copyright in which is owned by foreigners and experiencing difficulties in identifying such owners or in obtaining reasonable terms from them for permission to reproduce, translate or otherwise use such works. The Joint Service will assist in solving such difficulties and in giving general advice on the clearance of copyright owned by foreigners.

45. We hope to be able to provide through this Service the possible assistance for developing countries in obtaining easier and quicker access to works protected by copyright.

46. In all these activities under the Development Cooperation Program it is kept in mind that the newly independent developing countries face the challenge of economic development with limited economic resources. Likewise the priorities given to education, the shortage of trained personnel and resources required on the one hand, and during an interim period, easier access to works of foreign origin, in particular in the scientific and technological fields, and on the other, in the long term the need to develop indigenous creativity and authorship, are essential for improvement of educational standards which are the very basis of the developmental process. So is the need for an effective copyright system to nurture national intellectual creativity in order to sustain the developmental process itself. Again in order to assist in the developmental process in developing countries, national laws on copyright, established by independent national governments, in step with the character of the people, and the national, social, economic and political structure, are essential for encouraging intellectual creativity.

47. To sum this up, it is necessary to recount that in planning and carrying out activities under the Permanent Program, WIPO seeks to respond, as fully as possible, to the needs of developing countries for assistance in establishing, strengthening and modernizing, and promoting more effective use of, their copyright systems, and to their requests for increased cooperation with WIPO in meeting such needs. Developing countries are increasingly aware of the benefits that can be derived from a modern, efficient, cost effective copyright system and, more particularly, of the contribution that such a system can make towards the attainment of social and economic goals established within the framework of integrated national strategies for development.

Program and Budget for 1990-1991

48. The basic types of activities under the WIPO development cooperation program consist of three main elements. These are:

i) development of human resources, mainly training of officials from developing countries,

ii) development of national and regional legislation,

iii) institution building in developing countries, particularly the creation or strengthening of copyright offices or organizations for the practical administration of copyright and neighboring rights.

49. The objectives of the development cooperation program will remain the same for the 1990-1991 program period. Also the type of activities for the implementation of the program will, to a large extent, remain the same, since the nature of the cooperation in which the developing countries are expected to wish to participate is not likely to change. In line with the trend in recent years, more emphasis may, however, be given to certain features of the program.

50. Generally, the following elements would be particularly stressed in the development cooperation program in 1990-1991:

i) as regards the assistance for a given country, that assistance should, as far as possible, be planned over a number of years and cover, in a comprehensive program, the establishment or updating of the law, the establishment of the necessary infrastructure and the training of officials in the national and international aspects of the law and its implementation, as well as creating a general awareness about the law,

ii) as regards training, the number of specialized courses on specific subjects to be increased taking into account also, in particular, the impact of emerging technologies on the law of copyright and neighboring rights,

iii) an increasing number of lecturers and consultants to be chosen from developing countries, with a view to promoting the cooperation between developing countries,

iv) increased emphasis to be given to the encouragement of local creativity in developing countries, for instance through the setting up of authors' organizations or associations,

v) increased attention to be given to activities aiming at creating awareness of the law on copyright and neighboring rights, and the benefits to be derived from it, among concerned officials, the judiciary, other persons engaged in enforcing the law, authors, performers, the media and the general public,

vi) assistance to be provided upon request, as regards the development of legislation for the protection of expressions of folklore,

vii) encouragement to be given to and international cooperation to be promoted concerning the teaching of the law of copyright and neighboring rights at university level.

51. In conclusion it may be stated that we in WIPO look forward to the cooperation of developing countries in programs designed for their benefit and hope to see them participate increasingly in the implementation as well as further strengthening and consolidation of these programs.

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