

Copyright

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WORLD INTELLECTUAL PROPERTY ORGANIZATION

SWEDEN

Ratification of the WIPO Convention

*Notification of the Director of BIRPI to the Governments
of the countries invited to the Stockholm Conference*

The Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI) presents his compliments to the Minister for Foreign Affairs of and, in accordance with the provisions of the above Convention, has the honor to notify him that the Government of the Kingdom of Sweden deposited on August 12, 1969, its instrument of ratification dated June 27, 1969, of the Convention Establishing the World Intellectual Property Organization (WIPO).

The Kingdom of Sweden has fulfilled the condition set forth in Article 14(2) of the Convention by concurrently ratifying

- the Stockholm Act of the Paris Convention with the limitation provided for in Article 20(1)(b)(i) of the said Act

to the effect that the ratification shall not apply to Articles 1 to 12,

- and the Stockholm Act of the Berne Convention with the exception of Articles 1 to 20 and with a declaration admitting the application of the Protocol Regarding Developing Countries to works of which it is the country of origin.

A separate notification will be made of the entry into force of the Convention Establishing the World Intellectual Property Organization (WIPO), when the required number of ratifications or accessions is reached.

Geneva, September 8, 1969.

WIPO Notification No. 13

INTERNATIONAL UNION

SWEDEN

Ratification of the Stockholm Act of the Berne Convention (with the exception of Articles 1 to 20 and with a declaration concerning the Protocol Regarding Developing Countries)

Notification of the Director of BIRPI to the Governments of Union Countries

The Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI) presents his compliments to the Minister for Foreign Affairs of and, in accordance with the provisions of the Stockholm Act of the above Convention, has the honor to notify him that the Government of the Kingdom of Sweden deposited on August 12, 1969, its instrument of ratification dated June 27, 1969, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Stockholm on July 14, 1967, with the exception of Articles 1 to 20 and with the declaration provided for in Article 5(1)(b) of the

Protocol Regarding Developing Countries to the effect that Sweden admits the application of the provisions of the said Protocol to works of which it is the country of origin by countries which, on becoming bound by Articles 1 to 21 of the Stockholm Act of the said Convention and by the Protocol, or on making a declaration of application of the Protocol by virtue of the provision of its Article 5(1)(a), have made reservations permitted under the Protocol.

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

Geneva, September 8, 1969.

Berne Notification No. 10

CORRESPONDENCE

Letter from the United States

I. Legislative Developments

*The Present Status of U. S. Copyright Law Revision.*¹ — Despite strenuous efforts on the part of the Copyright Office, the copyright bar, and all other interested groups to have the overall Copyright Revision Bill enacted during 1968, the 90th Congress adjourned without having taken final action with regard thereto. H. R. 2512, after having been passed by the House in April 1967,² was sent to the Senate Judiciary Subcommittee, which held seventeen days of hearings without enacting the new legislation.³ The main stumbling block remained the community antenna (CATV) issue, which was not decided by the Supreme Court until June 1968.⁴ In addition, upon the initiative of Senator McClellan, the Senate passed S. 2216,⁵ establishing the National Commission on New Technological Uses of Copyrighted Works.⁶ This bill as passed by

the Senate was then submitted to the House Judiciary Committee in October 1967 but the House has taken no action on the bill to date. It thus became necessary for the Congress, for the third time, to pass a Copyright Extension Bill, Joint Resolution No. 172 of May 22, 1968, under which the term of those copyrights in which the renewal term subsisted at the date of approval of the resolution as the result of the two previous congressional extensions, was further extended until December 31, 1969.⁷ In submitting the resolution to the Congress, Senator McClellan said, *inter alia*: "The objective of this resolution, as well as the preceding interim extensions, is to temporarily continue the renewal term of copyright pending the enactment by the Congress of a general revision of the copyright law, including a proposed increase in the length of the copyright term."⁸

With the commencement of the 91st Congress it became apparent that the initiative for enacting a complete revision bill would rest with the Senate, rather than the House, and in accordance with a previously stated commitment, Senator McClellan, in January 1969, introduced S. 543, for the general revision of the copyright law, which is largely identical with S. 597 of the 90th Congress.⁹ This time, however, the Senator combined with Title I the General Revision Bill of S. 543 a Title II, which would establish the National Commission on New Technological Uses of Copyrighted Works, as previously proposed in S. 2216. In introducing S. 543 in this form, the Senator said: "I have previously stated that the subcommittee will undertake to report a copyright revision bill at the earliest feasible date in this session. The public hearings on this legislation were concluded during the 90th Congress. Any comments or proposed amendments not previously communicated to the subcommittee should be submitted at the earliest possible time."¹⁰ It may be expected, therefore, as of the time of this writing, that the Senate Subcommittee will report a copyright revision bill in the near future.

It may be added that, when it became apparent in the Spring of 1968 that enactment of the overall copyright revision bill during the last few months of the 90th Congress was unlikely, the Copyright Office proposed the enactment of a so-called "barebones" or "skeleton" bill consisting of the bill as originally proposed with the exception of those sec-

Protection for Computer Software: Implications for the Industry, 12 *IDEA* 1109 (Winter 1968-1969); Manley, The Computer Utility: Competition or Regulation, 76 *Yale L. J.* 1299 (June 1967); Miller, Computers and Copyright Law, 46 *Mich. State Bar J.* 11 (April 1967); Greenbaum, Computers, Copyrights and the Law Prior to Revision, 15 *Bulletin Copyright Society* 164, Item 112 (February 1968).

⁷ Public L. 90-416, 90th Cong., 2nd Sess., July 23, 1968, extending term as previously extended under Public L. 90-141, Public L. 89-142 and Public L. 87-668.

⁸ McClellan, Remarks, 114 Cong. Rec. No. 88, S. 6127, May 22, 1968.

⁹ 91st Cong., 1st Sess., introduced January 22, 1969.

¹⁰ McClellan, Remarks, 115 Cong. Rec. No. 14, S. 664, January 22, 1969.

¹ For a rather complete review of developments during fiscal 1967 and 1968, see The Annual Report of the Register of Copyrights, pp. 5-7, Washington 1968, and same, pp. 6-17, Washington 1969; see also Ringer, Copyright Law Revision: History and Prospects, A Symposium of the American University, pp. 2-3, 114 Cong. Rec. No. 102, June 11-14, 1968. The symposium as printed includes introductory remarks by Chairman Kastenmeier of the House Judiciary Committee's subcommittee which considered and reported the revision bill passed by the House, H. R. 2512, note 2 *infra*. For another symposium on the controversial issues obstructing enactment of the revision bill, see Copyright Law Revision, 53 *Iowa L. Rev.* 805-890 (February 1968); also Symposium on Copyright and Patent Law, especially, Henn, Copyright Law Revision: Paragon or Paradox? 44 *N. Y. U. L. Rev.* 447 (May 1969).

² 90th Cong., 1st Sess. (1967).

³ For a combined subject and name index of Senate hearings of the 89th and 90th Congresses through April 28, 1967, see Oler, Copyright Law Revision: Index of Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Washington, U. S. Govt. Print. Off. 1968.

⁴ *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U. S. 390, 84 Sup. Ct. 2084 (1968), discussed *infra* at Point II, "Judicial Developments."

⁵ 90th Cong., 1st Sess., introduced August 2, 1967, see McClellan, Remarks, 113 Cong. Rec. S. 10565, August 2, 1967.

⁶ Of the voluminous literature which has become available on this subject during the past year, the following may be mentioned: (On reprography) Nimmer, New Technology and the Law of Copyright: Reprography and Computers, Two Copyright Crises, 15 *U. C. L. A. L. Rev.* 931-1030 (April 1968); Symposium, Marke, Schulman, Kaplan, Clapp, Goldman and Frost, Can Copyright Law Respond to the New Technology? 61 *Law Library J.* 387-408 (November 1968); Sopbar and Heilprin, ed., *Status Report*, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, Washington, Office of Education (1967); Crossland, The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media, 20 *So. Carolina L. Rev.* 153-242 (1968); Copyright Law Revision: Its Impact on Classroom Copying and Information Storage and Retrieval Systems, 52 *Iowa L. Rev.* 1141-1169 (June 1967); Schuster and Bloch, Mechanical Copying, Copyright Law and the Teacher, 17 *Cleveland-Marshall L. Rev.* 299-323 (May 1968); Surrency, The New Copyright Act — Its Implications for Law Libraries, 61 *Law Library J.* 16-19 (February 1968); and Clapp, Copyright — A Librarian's View, Washington, Association of Research Libraries (August 1968). (Computers) Nimmer, in Symposium of the American University, on Automated Information Systems and Copyright Law, *supra* note 1, 114 Cong. Rec. No. 102, June 11-14, 1968; Fletcher and Smith, Computers, The Copyright Law and Revision, XX *U. of Fla. L. Rev.* 386 (1968); Computer Retrieval of the Law: A Challenge to the Concept of Unauthorized Practice? 116 *U. of Pa. L. Rev.* 1261 (May 1968); Adequate Legal Protection for Computer Programs, 1968 *Utah L. Rev.* 369-394 (September 1968); Koller and Moshman, Patent

tions dealing with the exclusive rights of the copyright owner and limitations on those rights. According to the Register of Copyrights, enactment of such "barebones" legislation appeared to be "the only hope for general revision within the next twenty years or more."¹¹ However, the Register's approach was rejected by the Senate Subcommittee,¹² which, instead, introduced the previously mentioned copyright extension bill.¹³

No other significant federal copyright legislation was enacted during 1968, but it may be mentioned that at least two states enacted legislation affecting the rights of copyright owners. In New York, the General Business Law was amended by repealing Article 12-D as previously enacted in 1966 and passing a revised version of legislation seeking to protect purchasers of art against fakes, frauds and forgeries.¹⁴ In California, a new Section 653(h) was added to the Penal Code, dealing with various forms of record piracy; it should be noted, however, that persons engaged in radio and television broadcasting are exempted from these criminal provisions.¹⁵

II. Judicial Developments¹⁶

*The Community Antenna (CATV) and Copyright:*¹⁷ *The Fortnightly Case.* — By far the most important judicial de-

¹¹ The Register's "barebones" proposal would have included term of copyright (life plus 50 years), and a uniform federal system for published and unpublished works, issues on which substantial agreement has been reached.

¹² Letter from Senator McClellan to the Register, April 17, 1968.

¹³ See note 7, *supra*.

¹⁴ Ch. 454, effective September 1, 1968, printed at 16 *Bulletin Copyright Society* 28, Item 6 (October 1968). For a comment by the counsel for the Art Dealers of America, cf. Colin, Legal Problems Involved in Art Forgery, 3 *Lex et Scientia* 73 (April-June 1968).

¹⁵ Assembly Bill No. 83, January 11, 1968, printed at 16 *Bulletin Copyright Society* 27, Item 5 (October 1968).

¹⁶ Among recent hooks, cf. Wittenberg, *The Protection of Literary Property*, Boston (1968); Patterson, *Copyright in Historical Perspective*, Nashville (1968); *ASCAP Copyright Law Symposium Number Sixteen*, containing five 1966 prize-winning Nathan Burkan Memorial essays (the 28th annual competition), including Goldstein, Copyrighting the New Music; Lihott, Round the Prickly Pear: The Idea-Expression Fallacy in a Mass Communications World; Puckett, The Limits of Copyright and Patent Protection for Computer Programs; Lloyd, "Disk-Television": Recurring Problems in the Performance of Motion Pictures; and Gold, Television Broadcasting and Copyright Law: The Community Antenna Television Controversy. A new edition of the valuable *Pilpel-Goldberg Copyright Guide*, New York (R. R. Bowker Company 1969) has also been published.

Among law review articles, cf. Crossland, The Rise and Fall of Fair Use: The Protection of Literary Materials Against Copyright Infringement by New and Developing Media, 20 *So. Carolina L. Rev.* 152 (1968); Reed, The Role of the Register of Copyrights in the Registration Process: A Critical Appraisal of Certain Exclusionary Regulations, 116 *U. of Pa. L. Rev.* 1380 (June 1968), reprinted 16 *Bulletin Copyright Society* 65, Item 68 (December 1968); Dannay, A Guide to the Drafting and Negotiating of Book Publication Contracts, 15 *Bulletin Copyright Society* 295, Item 317 (June 1968); Simon, Trends in the International Development of Television, 15 *Bulletin Copyright Society* 119, Item 88 (December 1967); Stewart, Unlicensed Broadcasting from Ships on the High Seas: A Challenge to Copyright Obligations, 15 *Bulletin Copyright Society* 108, Item 87 (December 1967); Smith, Pirate Broadcasting, 41 *So. California L. Rev.* 769 (Summer 1968).

¹⁷ Of the enormous legal literature on CATV, the following may be mentioned: Wesley, Copyright Liability for Communication Satellites: A Bridge from CATV, 12 *IDEA* 1161 (Winter 1968-1969); Hinds, Federal, State and Local Regulation of CATV—After You, Alphonse, 29 *U. of Pittsburgh L. Rev.* 109 (October 1967); Hunke, Community Antenna Television Operations as a "Performance"; An Application of the Principles of Semantic Extension to the Federal Copyright Act, 44 *No. Dakota L. Rev.* 17 (Fall 1967); Meyer, The Nine Myths of CATV, 27 *Federal Bar Journal* 431 (Fall 1967); Warner, The Regulatory and the Copyright Problems of the CATV Industry, *Beverly Hills Bar Journal* 15 (October-November 1967); Smith, CATV—A Tainted Virgin, 27 *Federal Bar*

development in 1968 was, of course, the United States Supreme Court's six-to-one decision in the community antenna litigation, *Fortnightly Corporation v. United Artists Television, Inc.*¹⁸ The Supreme Court, somewhat to the surprise of the copyright bar, had granted certiorari and had decided to hear oral argument despite a Memorandum by the Department of Justice urging the Court not to hear the case at the proposed time but to await legislative action on community antenna television broadcasting. On June 17, 1968, a majority of the Court held, rather unexpectedly, in an opinion by Justice Stewart, that the activities of the CATV systems do not come within the statutory definition of "public performance" on the ground that CATV operations do not constitute a "performance" at all under Section 1(c) of the Copyright Act of 1909. In distinguishing this case from the Court's landmark decision in *Buck v. Jewell-La Salle Realty Co.*,¹⁹ which had involved infringement of copyrighted music as a result of reception on a master radio set and the broadcasting thereof to all public and private rooms of a hotel, the Court emphasized that the activity of a CATV operator was more closely related to that of a viewer of television, rather than a broadcaster. Said the Court:

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary telephone sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.²⁰

It was then held that CATV systems do not actually broadcast or re-broadcast but simply carry without adding whatever programs they receive. In a strong dissenting opinion, Justice Fortas suggested that the doctrine of the *La Salle* case should have been applied and that the majority opinion "removes from the copyright law an interpretation which, though perhaps not altogether satisfactory as an analytical matter, has at least been settled for nearly 40 years; and it substitutes for that discarded interpretation a rule which I do not believe is an intelligible guide for the construction of the Copyright Act."²¹

Journal 451 (Fall 1967); FCC Jurisdiction over CATV: A Need for Reins? 56 *The Georgetown L. J.* 597 (January 1968); The Federal Communications Commission and Regulation of CATV, 43 *N. Y. U. L. Rev.* 117 (March 1968); Carson and Dowell, Copyright—CATV Copyright Liability, 36 *The George Washington L. Rev.* 672 (March 1968); Gold, *supra* note 16; Copyright—Telecommunication—CATV Carriage of Copyrighted Material Does Not Constitute Infringement, 21 *Vanderbilt L. Rev.* 854 (October 1968); and most recently, Lipper, The Congress, The Court, and the Commissioners: A Legacy of Fortnightly, 44 *N. Y. U. L. Rev.* 521 (May 1969).

¹⁸ 392 U. S. 390, 88 Sup. Ct. 2084 (June 17, 1968).

¹⁹ 283 U. S. 191 (1931).

²⁰ 88 Sup. Ct. 2084, 2089.

²¹ *Ibid.* 2092.

On the same day, the Court also decided the *Southwestern Cable Co.* case,²² in which it was held that the Federal Communications Commission has jurisdiction to regulate the activities of CATV operators. In the exercise of this authority, the Commission has recently proposed rules regarding CATV which would, in effect, compel CATV operators to secure licenses for each program from the originating stations, thereby indirectly putting CATV back under a program-by-program clearance from the distant copyright owners.²³ As of the time of this writing, Senator McClellan has sent a letter to the Chairman of the FCC²⁴ seeking an explanation of the copyright implications of the proposed new rules before the Senate Judiciary Subcommittee will submit its own version of a complete copyright revision bill, including provisions with regard to CATV activity, to the full Judiciary Committee and, eventually, to the Senate itself.

Copyrightability: Architectural Works. — In *Scholz Homes, Inc. v. Maddox*,²⁵ the district court had granted summary judgment in favor of the defendant on the ground that defendant's use of plaintiff's architectural plans constituted neither infringement nor unfair competition. Plaintiff had shown its plans for split level houses (known as "Southern Shore" models) at various builders' conventions and had also widely distributed a copyrighted booklet with regard thereto. Defendant had apparently seen the booklet and a rough sketch and had had plans prepared by a competitor for the construction of similar buildings. The district court had based its decision on the famous case of *Baker v. Selden*²⁶ and on the well-known *Triborough Bridge* case.²⁷ It was argued, before the Court of Appeals for the Sixth Circuit, that even if the owner of copyrighted architectural plans could not prevent others from building according to those plans, he still retained the exclusive right to their duplication under Section 1 of the Copyright Act.²⁸ The Court of Appeals, however, affirmed²⁹ the district court's opinion on the ground that there had been a failure of proof of direct or implied access to the plaintiff's copyrighted plans and on the further ground that the reduction to practice of the system or idea in plaintiff's copyrighted book clearly fell within the scope of *Baker v. Selden*.

A totally different course was taken by the Supreme Court of Utah in a split opinion in *Asheworth v. Glover*.³⁰ The court held that an architect, who had designed a drive-in restaurant, retained a common law copyright in the plans even after the construction of the building and even against the person who had commissioned him to prepare the plans (which, under the American Institute of Architects' agreement, were to remain the architect's property). The court expressly held that there was no publication of the plans as

a result of filing them with the city, relying in this respect on one California and one Massachusetts precedent.³¹ The court held, however, that there was no room for punitive damages and that actual damages, to be determined by the lower court, should not exceed an amount of \$ 2,033.

In *Tennessee Fabricating Co. v. Moultrie Manufacturing Co.*,³² plaintiff had registered a claim to copyright with regard to an architectural casting entitled "Nature." Apart from defects in the copyright notice, the court found that the architectural unit itself did not possess the minimum degree of creativity required of a work of art and that, for that reason alone, plaintiff's action should be dismissed; the copyright notice was held defective and defendant's "fair use" defense in connection with advertising the allegedly copyrighted units was sustained.³³

In *Blumcraft of Pittsburgh v. Newman Bros., Inc.*,³⁴ which came before the district court on remand from a court of appeals reversal of summary judgment for defendant, plaintiff was successful (although judgment was withheld pending determination of damages) in enjoining defendant from copying an ornamental metal design, a new handrail system for architectural use, illustrations of which had been published in plaintiff's catalog, and had subsequently been copied in defendant's catalog. The court refused to go along with defendant's attempt to sever the various elements of plaintiff's illustrations and the categorizing of them as "old hat," on the ground that it was the ensemble that made the difference and that no large measure of novelty was required under the Copyright Act to satisfy the test of originality. The court also rejected defendant's allegation that its illustrations were merely representations of its own product, saying: "[O]ne cannot copy the copyrighted illustration of another's product, even though it may precisely illustrate one's own product."³⁵ In view of defendant's long standing excellent reputation, the court added, however: "[W]e do not pin the badge of any moral wrongdoing on [defendant] or its president, or any other officer or employee, or its artist . . . As psychiatry teaches, the subconscious mind is a forceful directing agent — unknown to the conscious."³⁶

*Copyrightability: Forms, Systems and Ideas.*³⁷ — In *First Financial Marketing Services Group, Inc. v. Field Promotions, Inc.*,³⁸ plaintiff sought a declaratory judgment to the effect that certain copyrighted forms described as "do-it-yourself loan applications" did not infringe defendant's "Zip" form for the same purpose. The court, while indicating in dictum that copyright protection may extend to business forms as an expression of an idea, refused to pass on the issue of copyrightability on the ground that plaintiff's assignor or licensor

²² *United States v. Southwestern Cable Co.*, 392 U. S. 157, 88 Sup. Ct. 1994 (1968).

²³ For a comment on National Cable Television Association's reaction to the rules, see *Variety* 39, February 5, 1969.

²⁴ *Ibid.*

²⁵ 379 F. 2d 84 (6th Cir. 1967).

²⁶ 101 U. S. 99 (1879).

²⁷ *Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S. D. N. Y. 1942).

²⁸ 17 U. S. C. § 1 (1964).

²⁹ 379 F. 2d 84 (6th Cir. 1967).

³⁰ 433 P. 2d 315 (Utah 1967).

³¹ *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P. 2d 546 (1959); *Edgar H. Wood Associates, Inc. v. Skene*, 347 Mass. 351, 197 N. E. 2d 886 (1964).

³² 159 U. S. P. Q. 363 (M. D. Ga. 1968).

³³ For law review articles, see Gisla, Copyright Protection in Architectural Structures, 11 *U. of San Francisco L. Rev.* 320 (April 1968); Voorhees, Protecting Architectural Plans and Structures with Design Patents and Copyrights, 17 *Drake L. Rev.* 79 (December 1967).

³⁴ 159 U. S. P. Q. 166 (D. Ohio 1968). For the earlier decision see 373 F. 2d 905 (6th Cir. 1967).

³⁵ *Ibid.* 172.

³⁶ *Ibid.* 174.

³⁷ See Libott, *Copyright Symposium No. 16*, *supra* note 16.

³⁸ 286 F. Supp. 295 (S. D. N. Y. 1968).

should have been joined as a party plaintiff, or, if unwilling to be so joined, as a party defendant.³⁹

*Copyrightability: Industrial and Ornamental Designs.*⁴⁰ — A manufacturer of fabric designs was successful on two different occasions in enjoining infringement of its copyrighted designs. In the earlier of these two cases, *United Merchants and Manufacturers, Inc. v. Sutton*,⁴¹ the defendant was enjoined from using plaintiff's design on fabric bags manufactured in Japan and sold to various department stores in the United States. Of the copyrights involved in that litigation, only three enjoyed statutory protection, and with regard to these an injunction issued despite defendant's allegation that the production of the infringing product had been discontinued. However, no protection was granted, on a theory of unfair competition, with respect to the uncopyrighted design which had also been duplicated by defendant. In the second litigation, *United Merchants and Manufacturers, Inc. v. Sarne Company, Inc.*,⁴² the same plaintiff succeeded in enjoining preliminarily a defendant who had placed plaintiff's copyrighted design on fabric bags.⁴³

*Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*⁴⁴ involved statutory copyright in artificial corsages. It was held that the corsages consisted merely of arrangements of flowers which were "common and traditional" in the flower industry at the time of plaintiff's claim of copyright: "The arrangements in the corsages were old styles, lacking in both creativity and originality, and plaintiff's president had been aware of the existence of such arrangements in natural and cloth corsages prior to the time of its claimed copyright."⁴⁵ The court, after finding that registration of the copyright constituted prima facie evidence, held that defendant had produced sufficient evidence to overcome such presumption of validity. The court said:

The standard for determining that degree of creativity necessary to constitute a work of art is not high. But though the boundaries may be generous, there are, nevertheless, limits beyond which courts cannot accord objects the status of work of art... Plaintiff has conceded that its claims are limited to the *arrangements* of the flowers in the corsages. No claim is made that the component parts thereof are covered.⁴⁶

³⁹ In *Pantone Inc. v. A. I. Friedman, Inc.*, 160 U.S.P.Q. 530 (S.D. N.Y. 1968), the court held a color matching system embodied in a booklet to be capable of copyright and to have been infringed by the defendant. Indeed, the court granted a preliminary injunction on the ground that the minimum requirements of originality were met by plaintiff's work and that there was no doubt about defendant's access to and copying from plaintiff's material.

⁴⁰ See, for articles on this subject, Schoonmaker, *Hiatns in Justice: The Problems in Applying Copyright Protection to Fabric Designs*, 4 *Wake Forest Intramural L. Rev.* 271 (May 1968); Design Protection — Time to Replace the Design Patent, 51 *Minn. L. Rev.* 942 (April 1967); and Myers, Section 113 of the Proposed Copyright Law Revision — A Proposed Amendment to Protect the Utilitarian Aspects of Useful Articles, 72 *Dickinson L. Rev.* 307 (Winter 1968).

⁴¹ 282 F. Supp. 588 (S.D. N.Y. 1967).

⁴² 278 F. Supp. 162 (S.D. N.Y. 1967).

⁴³ In *American Fabrics Co. v. Lace Art, Inc.*, 291 F. Supp. 589 (S.D. N.Y. 1968), a motion for preliminary judgment was denied on the ground that serious doubt existed whether plaintiff had complied with the notice requirements in connection with a fabric design. The court indicated that use of the notice merely on samples was not sufficient, notwithstanding the Second Circuit's decision in the case of *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F. 2d 487 (2nd Cir. 1960). In addition it was held that plaintiff had failed to make a satisfactory showing of irreparable injury in view of the fact that he had delayed the bringing of the motion for summary judgment for several months.

⁴⁴ 280 F. Supp. 776 (S.D. N.Y. 1968).

The fact that plaintiff had added certain practical features to the component parts of the flower arrangements which facilitated their assembly was insufficient to overcome the absence of creativity inherent in the arrangement. Consequently, the plaintiff's registered corsages were held not only to lack creativity but also to have failed to satisfy the minimum requirements of "originality."

Contributions to Periodicals. — There appears to have been a flock of recent cases involving proprietorship in periodical contributions and, more specifically, the effect of the lack of a separate copyright notice with regard thereto.⁴⁷

The *Best Medium* case⁴⁸ involved the question whether a magazine which had acquired publication rights for six articles secured thereby a license only for one publication, or whether it secured "all publication rights" so that it could in turn sue another competing magazine which subsequently published these articles. Both the district court and the Court of Appeals for the Seventh Circuit held that, since the contract between the magazine and the authors was silent on this point, the publisher acquired all publication rights, in view of an alleged prevailing trade practice to that effect.⁴⁹

On the other hand, it was held by a district court, in *Kinelow Publishing Co. v. Photography in Business, Inc.*,⁵⁰ that Western Electric, in permitting publication of an article written by two of its employees in a trade magazine, had not intended to relinquish its copyright. Therefore, the magazine proprietor could not sue a third party for infringement. In this case the court stated:

It long has been recognized that a general or "blanket" copyright in a periodical does not protect rights in a specific article contained therein unless copyright privileges or a proprietary right have been previously assigned to the publishers.⁵¹

In other words, it was held that the magazine publisher bore the burden of proving that he held title to the articles; and he had failed to prove an assignment either by express agreement or by contract implied in law. The court also indicated that the two author-employees had acted as employees for hire, so that the copyright inured to the benefit of their employer.⁵²

A very technical point of view was recently adopted by a district court in *Goodis v. United Artists Television, Inc.*⁵³ In that case, summary judgment was granted for defendant on the ground, *inter alia*, that the work "Dark Passage," on

⁴⁵ 280 F. Supp. 776, 780.

⁴⁶ 280 F. Supp. 781.

⁴⁷ On this subject, see the case *Brattleboro Publishing Co. v. Win Mill Publishing Corp.*, discussed in the last "Letter from the United States" (Copyright, 1967, p. 101).

⁴⁸ *Best Medium Publishing Co. v. National Insider, Inc.*, 385 F. 2d 384 (7th Cir.) affirming 259 F. Supp. 433 (N.D. Ill. 1967).

⁴⁹ The unsuccessful defendant was denied certiorari by the U.S. Supreme Court, 36 U.S.L.W. 3346 (U.S. March 4, 1968).

⁵⁰ 270 F. Supp. 851 (S.D. N.Y. 1967).

⁵¹ *Id.* at 853.

⁵² With regard to the effect of alleged employment for hire on a number of renewals of copyrights in music, see *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 253 F. Supp. 841 (S.D. N.Y. 1965), reversed 375 F. 2d 639 (2nd Cir. 1967) on the ground that, in the absence of a strict employment relationship including direction and supervision of the writer, the writer should be considered an independent contractor, rather than an employee, even though he had been occasionally referred to as such in a contract not signed by him but signed by his agent in fact. The U.S. Supreme Court recently denied certiorari, 36 U.S.L.W. 3286 (U.S. January 15, 1968).

⁵³ 278 F. Supp. 122 (S.D. N.Y. 1968).

which the motion picture and television series entitled "The Fugitive" had been based, had fallen into the public domain because it had been originally published in serial form in *The Saturday Evening Post* without bearing a separate copyright notice. Since only a license had been granted to the magazine, it was held that lack of such separate notice threw the work into the public domain despite the fact that the publisher's overall copyright notice appeared in each issue.

Does a Grant of Motion Picture Rights Include Television Rights? — In the recent case of *Bartsch v. Metro-Goldwyn-Mayer, Inc.*⁵⁴ this question was answered in the affirmative by both the district court and the appellate court with regard to the motion picture "Maytime." Both courts were influenced primarily by the fact that the motion picture grant expressly authorized reproduction of the play "by the art of cinematography or any process analogous thereto."⁵⁵ This latter phrase was held to be broad enough to include television rights. The defendant was, however, denied attorney's fees on the ground that plaintiff's claim was not "clearly unreasonable" and that the litigation was not "vexatious or unduly burdensome."

*Common Law Copyright in Conversations, Interviews and Lectures.*⁵⁶ — In the now famous "Papa Hemingway" litigation, the widow of Ernest Hemingway, having alleged a common law copyright infringement, had been denied a preliminary injunction against the use of certain conversations which her husband had had with the author of a biography of Hemingway.⁵⁷ In March 1967, defendant's motion for summary judgment with regard to common law copyright and unfair competition claims was granted.⁵⁸ The court held that the material involved was "so clearly within the area of fair use as to leave no triable issue of fact." The court said:

Particularly where one undertakes a biographical study of a famed writer, a rule which prohibited all quotations of the subject's prior writings would render effective biography impossible.⁵⁹

The court also reaffirmed the rule that there is no common law copyright in mere conversations, as contrasted with lectures or speeches, regardless of whether the conversations have been reduced to tape or not. The court's decision was recently affirmed by the highest court of the State of New York.⁶⁰ Judge Fuld, speaking for a unanimous court, observed that no common law copyright could be recognized in interviews, "conversational speech or the distinctive behaviour of man." Even though admitting that speech may nowadays be easily captured by electronic devices and may not be altogether excluded from protection, the denial of common law

copyright protection in this particular case was based on the realization that the late author had never suggested to the interviewer or to anyone else that he regarded his conversational remarks as "literary creations." The court found that, as a result of the continuing practice on the part of the interviewer to write articles about Hemingway based largely on the latter's conversation, with the approval of the late author, authority to publish this material must be implied, "thus negating the reservation of any common law copyright." Having come to this conclusion, the court had little difficulty in dismissing a separate count based on alleged misappropriation and unfair competition, as well as a third cause of action founded on breach of a confidential and fiduciary relationship. Nor did the court find any merit in a fourth cause of action based on an alleged invasion of the widow's right of privacy.

Copyrightability: Photographs. — In *Time Incorporated v. Bernard Geis Associates*,⁶¹ involving photographs taken at the time of the assassination of President John F. Kennedy and subsequently purchased by *Life Magazine*, the defendants, among numerous other defenses, raised the rather unusual defense that the photographs involved had no value as works of art but were "simply records of what took place" without any elements personal to the photographer. In other words, it was argued that the photographs were merely "news" and could therefore not be the subject of copyright. In rejecting this defense, the court emphasized that *Life Magazine* claimed no copyright in the news element as such, but only in the particular form or record made by the photographer. The argument that the pictures were uncopyrightable because of "lack of creativity" was rejected by the court on the ground that the pictures reflected numerous elements of creativity, including the selection of the kind of camera, kind of film, the spot on which the camera would be operated, and others. Defendant's further argument that "oligopoly of the facts of the assassination of President Kennedy," under the doctrine of the recent *Morrissey* decision of the First Circuit,⁶² prevented copyrighting of the pictures was likewise rejected. The court said:

Life claims no copyright in the events at Dallas. They can be freely set forth in speech, in books, in pictures, in music, and in every other form of expression. All that *Life* claims is a copyright in the particular form of expression of the Zapruder film. If this be "oligopoly," it is specifically conferred by the Copyright Act and for any relief address must be to the Congress and not to this Court. *Life* has a valid copyright in the Zapruder film.⁶³

What Constitutes "Publication"? — In the previously mentioned *Gardenia* case,⁶⁴ the further question arose whether the bringing of samples of the author's corsages to the United States from Italy and the showing of these samples bearing a defective notice constituted an act of "publication" in the

⁵⁴ 270 F. Supp. 896 (S.D. N.Y. 1967), affirmed 155 U.S.P.Q. 577 (S.D. N.Y. 1967). With regard to attorney's fees, see Judge Mansfield's decision in *Breffort v. I Had a Ball Co.*, 271 F. Supp. 623 (S.D. N.Y. 1967).

⁵⁵ 270 F. Supp. at 897 (emphasis added). Cf. Low, *The Ownership of Unforeseen Rights*, *Pennsylvania State University Studies*, No. 16 (December 1964), and Copyright—Interpretation of License Agreement—Right to Make Motion Picture Includes Right to Televisé, 54 *Iowa L. Rev.* 160 (August 1968).

⁵⁶ See Selsky, *Biography and the Copyright Law*, 22 *N.Y.U. Intral. Rev.* 208 (1967).

⁵⁷ *Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 268 N.Y.S. 2d 531 (Sup. Ct. 1966).

⁵⁸ 53 Misc. 2d 462, 279 N.Y.S. 2d 51 (Sup. Ct. 1967).

⁵⁹ *Id.* at 467, 279 N.Y.S. 2d at 57.

⁶⁰ 296 N.Y.S. 2d 771 (Ct. App. 1968).

⁶¹ 293 F. Supp. 130 (S.D. N.Y. 1968).

⁶² *Morrissey v. The Procter & Gamble Co.*, 379 F. 2d 675 (1st Cir. 1967).

⁶³ 293 F. Supp. 130, 143-144. See also discussion of this case *infra*, under "Copyright Infringement: The 'Fair Use' Defense." Law review articles include Sussman, *Copyright Publication, The Motion Picture Distributor and the Copyright Revision Bill*, 15 *Bulletin Copyright Society* 373 (August 1968); Nolan, *Copyright Protection for Motion Pictures: Limited or Perpetual*, 12 *IDEA* 1135 (Winter 1968-1969).

⁶⁴ *Supra*, note 44.

United States when these samples were shown to customers who, in turn, placed substantial orders for future delivery. As a matter of fact, the court found that a sizable customer order was accepted by plaintiff two days before the date of publication mentioned in the certificates of copyright registration. It was held that the sale from samples did not constitute a "limited" publication since the customers whose orders were accepted were not subject to any limitations with regard to the distribution and sale of the corsages. The court said: "Plaintiff's publication of the corsages in the manner described amounted to a dedication to the public."⁶⁵

In a New York State case,⁶⁶ the court observed that an author's right in an unpublished manuscript is limited to the particular statement or compilation and "does not extend to the plan adopted for imparting information"; nor does it "prevent another person from making an independent collection of the same facts or information and using it as his own." In denying plaintiff's allegation of common law copyright infringement, despite a number of similarities and "idea snatching," it was found that both plaintiff and defendant had obtained much information from common sources, and that even the sources to which plaintiff had called the court's attention were traceable to common third-party material. Consequently, plaintiff's action failed, despite the fact that defendant had had access to plaintiff's manuscript and may have copied some minor parts thereof.

An unusually interesting recent California case of first impression, which clearly distinguishes the right in a college professor's lectures from that in taped interviews, should be mentioned. In *Williams v. Weisser*,⁶⁷ a California state court held that a college professor enjoys common law copyright in his lectures and may recover damages for the unauthorized reproduction and sale thereof. It appeared that an optometrist, who was selling class notes on courses at the University of California at Los Angeles, had employed auditors to take lecture notes and then had advertised them for sale in the college paper. Each set was sold for five dollars, stamped "Copyright 1965, Class Notes" ("Class Notes" being the name under which defendant was doing business). The University's administration required that authorization be obtained from each instructor prior to taking of notes for such purposes, but plaintiff, a professor of anthropology, charged that the notes had been taken in his classes without his permission. In granting a permanent injunction and damages (\$1,000 compensatory and several thousand dollars in punitive damages), the court ruled that the professor, rather than the university, owned the common law copyright in the lecture notes and that the defendant's argument to the effect that the university as employer-for-hire, rather than plaintiff, owned the reproduction rights must fail. As of the time of this writing, the appellate California court has just affirmed the lower court's decision in all respects.^{68, 69} In rejecting

defendant's contention that the university, rather than the teacher, owned the common law copyright, the appellate tribunal made the following interesting observation:

Indeed the undesirable consequences which would follow from a holding that a university owns the copyright to the lectures of its professors are such as to compel a holding that it does not. Professors are a peripatetic lot, moving from campus to campus. The courses they teach begin to take shape at one institution and are developed and embellished at other. That, as a matter of fact, was the case here. Plaintiff testified that the notes on which his lectures were based were derived from a similar course which he had given at another university. If defendant is correct, there must be some rights of that school which were infringed at UCLA. Further, should plaintiff leave UCLA and give a substantially similar course at his next post, UCLA would be able to enjoin him from using the material which, according to defendant, it owns.

The court also rejected the defense that the offering of the lectures constituted a "divestive publication," depriving plaintiff of his common law rights. Said the court:

[T]he oral delivery of the lectures did not divest plaintiff of his common law copyright to his lectures. Nothing tangible was delivered to the students and every case that has considered the problem of divestment from the limited versus general publication point of view has reached the conclusion that the giving of a lecture is not a general publication.

It is understood that the losing defendant has now petitioned the California Supreme Court for certiorari.

What Constitutes a "Government Publication"? — A rather unique case involved the copyright in a statue called "The Ultimate Weapon," which was designed and constructed by the plaintiffs, two ex-servicemen. They sued a defendant who had used a picture of the statue in connection with the production and distribution of books of matches.⁷⁰ When sued for infringement, the United States intervened on behalf of defendant since the statue had been made primarily under Army direction and at the Army's expense. On defendant's motion for summary judgment it was held, *inter alia*, that the statue was not a "publication" of the United States Government, even if the copyright were owned by the Army, since the concept of "publication" in Section 7 of the Act of 1909 did not encompass a statue. The court then held, however, that the statue was not entitled to any statutory copyright since the two plaintiffs had not placed the copyright notice in a location which would sufficiently apprise anyone seeking to copy the article of the existence of the copyright, and that, as a result, the statue had fallen into the public domain after having been generally exhibited at a place open to the public without any restriction on copying or photographing whatsoever. In addition, the court observed that, even if the copyright notice were valid, the copyright would have inured to the benefit of the Government, rather than plaintiffs, because the latter had produced the work "within the scope of their employment." The court said:

Under the plaintiffs' interpretation, any employee could circumvent the "works for hire" rule by expending a comparatively small amount of his own time and/or money on a project arising out of and performed within the scope of his employment.^{71, 72}

⁷⁰ *Scherr v. Universal Match Corporation*, 160 U.S.P.Q. 216 (S.D. N.Y. 1967).

⁷¹ 160 U.S.P.Q. 216, at 221.

⁷² Cf. Jeffery, Copyrights — Pursuant to the "Works for Hire" Doctrine, Copyrights Vest in the Employer in an Employer-Independent Con-

⁶⁵ 280 F. Supp. 784.

⁶⁶ *Turner v. Century House Publishing Co., Inc.*, 290 N.Y.S. 2d 637 (Sup. Ct. Schuyler Co. 1968).

⁶⁷ Manuscript decision, No. 875193 (Cal. Super. Ct. April 3, 1967).

⁶⁸ *Williams v. Weisser*, 273 A.C.A. 807, 78 Cal. Rptr. 542, 1969, rehearing denied.

⁶⁹ Questions of right of privacy and right of publicity will not be discussed in this letter.

Paperback Rights. — In *Dolch v. Garrard Publishing Company*,⁷³ the question arose whether a grant of the “exclusive right of publication” was restricted to the publishing of hard cover editions and did not include paperback rights. In this matter of first impression, it was held that under the facts of this case, and considering the circumstances that during the negotiations paperback publication was not even discussed, the exclusive publication right was not limited to hard cover editions but included publication in paperback form.

Rights in Cartoons and Characters. — Among the many interesting questions raised by the recent “Dr. Seuss” litigation⁷⁴ was the problem to what extent, if any, an outright assignment of a bundle of copyrights in cartoon-illustrated essays to the now defunct *Liberty* magazine included the right to manufacture and sell dolls in three-dimensional form under the “Dr. Seuss” name. It was held by Judge Herlands, *inter alia*, that the famous cartoonist, Theodore Seuss Geisel, had no absolute monopoly in the name “Dr. Seuss” under which his work appeared, but that the use of his name, without more, on three-dimensional dolls which had not been manufactured under his supervision might create a false impression with the public. The court after trial ruled that the outright transfer of the copyright included the right to make three-dimensional toys and that defendant’s reference to the name “Dr. Seuss” accompanied by the phrase “based on” or “derived from” was unobjectionable.

Copyright Renewal. — In *In re Williams*,⁷⁵ a state court proceeding, it was held that an illegitimate child was not the heir entitled to copyright renewal under Section 24 of the Copyright Act if the child had been adopted by others. The court was motivated by the fact that the adopting parents had chosen not to pursue any action with regard to the copyright renewal and that the United States Supreme Court’s decision in the *De Sylva* case⁷⁶ precluded inclusion of “any heir other than the ward of this Court [the heir of Hank Williams]” as having any renewal rights.

In another (New York) state court proceeding,⁷⁷ it was held that a pre-*De Sylva* renewal agreement by a mother, which included her children, was valid and binding upon the children after the mother’s death. It was here decided that prior to 1956 a widow held the sole inchoate renewal right, exclusive of her children, and thereafter had the sole right to assign the same. The referee then said:

[T]he children’s signatures were affixed not as necessities, but rather to be sure that if Mrs. Faust predeceased, as she did, they too would execute any instruments necessary to complete the assignment, and they understood that Universal was, in any event, to be the ultimate assignee of all renewal rights. No special instrument of assignment from the children was needed in 1951-1952 because they had, in fact, as the law then appeared to be, nothing to assign.

tractor Relationship, 18 *Syracuse L. Rev.* 873 (Summer 1967), a note on *Brattleboro Publishing Co. v. Win Mill Publishing Corp.*, 369 F. 2d 565 (2nd Cir. 1966), see *supra* note 47.

⁷³ 159 U.S.P.Q. 480 (S.D. N.Y. 1968).

⁷⁴ *Geisel v. Poynter Products, Inc.*, 160 U.S.P.Q. 590 (S.D. N.Y. 1968); on motion for preliminary injunction, 158 U.S.P.Q. 450 (S.D. N.Y. 1968).

⁷⁵ 156 U.S.P.Q. 704 (Ala. Cir. Ct., Montgomery Co. 1968).

⁷⁶ *De Sylva v. Ballentine*, 351 U.S. 570 (1956).

⁷⁷ *Easton v. Universal Pictures Co.*, 288 N.Y.S. 2d 776 (Sup. Ct. N.Y. Co. 1968).

Copyright Infringement. (a) The Defense of Defective Notice. — Despite an effort on the part of many courts to apply more liberal standards with regard to the technicalities of copyright notice, there are still numerous precedents in which defects of notice are held to be a ground for holding invalidity of statutory copyright. Thus, it was held in the case of *Tennessee Fabricating Company v. Moultrie Manufacturing Company*⁷⁸ that the fact that an article was published with an “obscure or indiscernible notice of copyright” constituted a defense to copyright infringement claims; in the same case it was ruled that the notation “TFC CO” with the © symbol was inadequate since “TFC CO” was not the plaintiff’s name nor the name by which plaintiff was known in the industry. It appeared that plaintiff’s full name did not appear elsewhere on the work involved. Similarly, it was held in the previously mentioned *Gardenia* case⁷⁹ that copyright notices on removable paper tags slipped into the stems of the samples of the corsages were insufficient to prevent dedication of the corsages to the public.

On the other hand, Judge Mansfield ruled in one of the *United Merchants and Manufacturers, Inc.* cases⁸⁰ that the omission of the notice from some of plaintiff’s fabric did not result in an abandonment of the design to the public domain, but had been an inadvertent omission of the notice which came within the exception of Section 21 of the Copyright Act of 1909. In other words, it was held that the omissions were limited to a very small percentage of plaintiff’s fabric and constituted “an omission by accident or mistake” under the quoted section. The court further said:

Section 21, however, does not grant an absolute immunity to innocent infringers. It merely provides an immunity from damage claims “against an innocent infringer who has been misled by the omission of the notice.” . . . Plaintiffs’ printing of the copyright notice on all but a very small percentage of more than 325,000 yards of the fabric constituted notice entitling it to seek relief against the defendant, which has had actual notice of the copyright since the institution of this action.⁸¹

The same judge denied a defendant’s motion for summary judgment in *Alart Associates, Inc. v. Aptaker*,⁸² which was based on the allegation that plaintiff’s certificate of copyright registration was issued to a nonexistent corporation. This, in the court’s opinion, constituted only an inadvertent error, for which a certificate of correction was subsequently filed. The court said:

The name on the copyright notice gives sufficient notice to the public of the name of the owner of the composition upon which copyright is claimed, and the date when this right was obtained. That is all that the statute requires.

In *Florence Art Company, Inc. v. Quartite Creative Corporation*,⁸³ a copyright notice on a three-dimensional sculpture and rubber molds made therefrom was sustained despite the fact that the notice was found on the inside wall of the rubber mold. It appeared that the copyright legend on the finished copies of plaintiff’s lamp was always noticeable, al-

⁷⁸ 159 U.S.P.Q. 363 (M.D. Ga. 1968).

⁷⁹ Discussed more fully in text at note 44, and under “What Constitutes ‘Publication’.”

⁸⁰ *United Merchants and Manufacturers, Inc. v. Sarne Company*, 278 F. Supp. 162 (S.D. N.Y. 1967); see also *supra*, text at note 42.

⁸¹ 278 F. Supp. 162, 166.

⁸² 279 F. Supp. 268 (S.D. N.Y. 1968).

⁸³ 158 U.S.P.Q. 382 (N.D. Ill. 1968).

though in some cases partially unclear. The court observed, however, that even in the latter cases the symbol C in a circle could be discerned.

(b) *Certificate of Registration as a Prerequisite for Filing of Lawsuit.* — In *Loomskill, Inc. v. Rubin Levine & Co., Inc.*,⁸⁴ a motion for a preliminary injunction was filed after plaintiff had deposited two copies of the copyrighted work with the Copyright Office but before plaintiff had received the certificate of registration. It was held that, under the present statute, the copyright infringement complaint, to which the certificate of registration was not attached, was subject to dismissal and that the court under such circumstances retained no pendant jurisdiction over a claim of unfair competition under state law.

(c) *Failure to Comply with Ad Interim Requirement.* — In a case of first impression,⁸⁵ which reached the United States Supreme Court on petition for certiorari, it was argued on behalf of the authors of the book *Candy*, who were American citizens and had written the book in England but had first published it abroad without complying with the ad interim provision of Sections 22 and 23 of the Copyright Act, that such failure had not forfeited their right to copyright protection in the United States and that the refusal of the Copyright Office to register, based on the ground that compliance with the ad interim provisions was a mandatory condition of copyright under Rule 202.4(b) of the Copyright Office Regulations, was erroneous. In a mandamus action against the Register of Copyright, it was alleged that the only statutory requirement for claiming copyright in the United States was "publication with notice" under Section 10 of the Act of 1909, and that the ad interim requirements were permissive rather than mandatory. Moreover, it was argued that first publication abroad could not affect the right to secure copyright in this country since our law could not be interpreted to have extraterritorial effect. However, the Court of Appeals for the District of Columbia, in a per curiam decision, affirmed the grant of summary judgment in favor of the Register. It was held that the Copyright Regulation, 37 C. F. R. Section 202.4(b), was presumptively valid and, in the court's opinion, accurately reflected the intention of Congress to make ad interim registration a prerequisite for the filing of claims to copyright by American citizens in books in the English language when first published abroad.⁸⁶

Copyright Infringement. The "Fair Use" Defense. — By far the most interesting application of the fair use doctrine occurred in the previously mentioned *Life Magazine* case,⁸⁷ involving a series of motion pictures taken at the moment of the assassination of President Kennedy. Having rejected all other defenses, including that of lack of copyrightability, the court, toward the end of its decision, rather surprisingly reached the conclusion that, even though the photographs were obtained by the defendant surreptitiously and even

though the so-called sketches in the published book were, in fact, copies of the copyrighted film, the use of the pictures constituted a "fair use" because of "public interest in the information." Said the court:

There is a public interest in having the fullest information available on the murder of President Kennedy. Thompson did serious work on the subject and has a theory entitled to public consideration. While doubtless the theory could be explained with sketches of the type used at page 87 of the Book and in *The Saturday Evening Post*, the explanation actually made in the Book with copies is easier to understand. The Book is not bought because it contained the Zapruder pictures; the Book is bought because of the theory of Thompson and its explanation, supported by Zapruder pictures.⁸⁸

The court further observed that it was difficult to find any injury to the plaintiff magazine and that, if anything, the book might "enhance the value of the copyrighted work."⁸⁹

Copyright Infringement. Section 43(a) of the Trademark Act in Copyright Litigation. — Section 43(a), dealing with false descriptions or misrepresentations, played a role in at least two copyright litigations. In *Yameta Co., Ltd. v. Capitol Records, Inc.*,⁹⁰ a preliminary injunction was granted in an action for unfair competition, based on the ground that the singer-guitarist Jimi Hendrix was falsely represented to be the principal performer in a record album when, in fact, he had merely been an accompanist. The court also noted that the album carried the picture of Hendrix alone looking as though he was singing.⁹¹

In the previously mentioned "Dr. Seuss" case,⁹² a preliminary injunction had been granted, enjoining the copyright owner from using the name "Dr. Seuss" on three-dimensional toys on the ground that Section 43(a) was not limited to false designations of geographical origin but encompassed false representations of personal authorization or approval as well. However, after trial, the court concluded that the copyright owner's absolute ownership "must include some right to use the name 'Dr. Seuss'" and that even in the light of Section 43(a) no false representation of sponsorship or misrepresentation occurred, provided the defendant would use language such as "based on" or "derived from" or some similar phraseology.⁹³

*Copyright Infringement. The Impact of the Sears, Roebuck⁹⁴ and Compco⁹⁵ Cases on Recent Copyright Litigation.*⁹⁶ — In a rather unique Maryland state court case,⁹⁷ the

⁸⁸ 159 U.S.P.Q. 663, 675.

⁸⁹ For a case in which plaintiff was unsuccessful as a result of a finding of a "de minimus" copying on the part of defendant, see *G. R. Leonard & Co. v. Stack*, 156 U.S.P.Q. 161 (7th Cir. 1967).

⁹⁰ 279 F. Supp. 582 (S.D. N.Y. 1968); the award of a preliminary injunction was reversed without opinion by the Second Circuit, 393 F.2d 91 (S.D. N.Y. 1968), and remanded for immediate trial because of "exceptional and meritorious reasons."

⁹¹ Relief under Section 43(a) was also granted in the previously mentioned case of *Pantone Inc. v. A.I. Friedman, Inc.*, 160 U.S.P.Q. 530, *supra* note 39.

⁹² See note 74 *supra*.

⁹³ The defendant had actually started to refer to the name "Dr. Seuss" in this form after a preliminary injunction, based on false representation of personal authorization by the plaintiff, had been granted.

⁹⁴ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

⁹⁵ *Compco Corp. v. Day-Brite Lighting Inc.*, 376 U.S. 234 (1964).

⁹⁶ For recent discussions of these cases, see Derenberg, *The Twentieth Year of Administration of the Lanham Trademark Act of 1946*, 154 U.S.P.Q. 41, Pt. II, September 11, 1967; Gilson, *Recent Developments in Trademark and Unfair Competition Law*, 1967 *Patent Law Annual* 227

⁸⁴ 158 U.S.P.Q. 676 (S.D. N.Y. 1968).

⁸⁵ *Hoffenberg v. Kaminstein*, 396 F.2d 684 (D.C. Cir. 1968).

⁸⁶ Certiorari denied 37 U.S.L. Week 3151 (October 21, 1968). For another case in which the question of publication with notice arose, see text *supra* at note 71.

⁸⁷ *Time Incorporated v. Bernard Geis Associates*, 159 U.S.P.Q. 663 (S.D. N.Y. 1968). See also text *supra* at note 61 and *infra* at note 98.

validity of a statute was involved which made it a misdemeanor for anyone other than specified state agencies to reproduce for profit certain maps produced and sold by the Maryland Department of Taxation and Assessment. This statute was held to be in conflict with the federal copyright law and invalid under the *Sears* and *Compco* preemption doctrine. The court mentioned, however, that the state was free to seek relief against unfair competition, if it could have been shown that, in addition to reproducing the maps, the defendant had been guilty of removing the state's legend or had otherwise indicated that the maps were a product of its own efforts.

The *Sears* and *Compco* cases were also referred to by the court in the previously mentioned *Time Incorporated v. Bernard Geis Associates* case,⁹⁸ where the court observed that, under the doctrine of *Sears* and *Compco*, it would be improper to consider converting a "fair use" copying into an actionable form of unfair competition.

Damages and Profits. — In *Smith v. Little, Brown & Company*,⁹⁹ the Second Circuit held, after much previous litigation, that it was not erroneous for the lower court to refuse an award of punitive damages which the courts are reluctant to grant "especially in copyright cases."¹⁰⁰ Similarly,

(5th Annual Institute on Patent Law); The Stiffel Doctrine and the Law of Trade Secrets, 62 *Northwestern U. L. Rev.* 956 (January-February 1968); Ahrens, The Misappropriation Doctrine After *Sears-Compco*, 11 *U. of San Francisco L. Rev.* 292 (April 1968); and Note, Unfair Competition After *Sears and Compco*, 22 *Vanderbilt L. Rev.* 129 (December 1968).

⁹⁷ *State's Attorney for Prince George's County v. Sekuler*, 158 U. S. P. Q. 231 (Md. Ct. App. 1968).

⁹⁸ *Time Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130 (S. D. N. Y. 1968); see text at notes 61 and 87 *supra*.

⁹⁹ 396 F. 2d 150 (2nd Cir. 1968).

¹⁰⁰ For the lower court's opinion, see *Smith v. Little Brown & Company*, 273 F. Supp. 870 (S. D. N. Y. 1967). The district court observed that only one case had been found in which an award of punitive damages had been approved in a copyright infringement case, *Press Pub. Co. v. Monroe*, 73 Fed. 196 (2nd Cir. 1968), appeal dismissed, 164 U. S. 105 (1968).

in *Morser v. Bengor Products Co., Inc.*,¹⁰¹ an award of punitive damages was denied in the absence of intentional infringement; the court here awarded minimum statutory damages of \$250 "in view of the inexpensive product involved."

On the other hand, exemplary damages were awarded in *Turner v. Century House Publishing Co., Inc.*,¹⁰² where the defendant, who was otherwise found not guilty of copyright infringement, had re-used material in a chapter of a book which had been previously held to constitute copyright infringement.

Attorney's Fees. — In *Breffort v. I Had a Ball Company*,¹⁰³ the court awarded the plaintiff attorney fees in view of the complexity of the issues and the level of skill required, but did not award the prevailing defendants any such fees on the ground that plaintiff's lawsuit, to the extent that he was successful, had not been unreasonable or brought in bad faith.

Personal Liability of Corporate Officer. — In *Chappell & Co. v. Frankel*,¹⁰⁴ it was held that a director and president of two corporations, who was also a major stockholder, was personally liable for failure of the corporation to secure mechanical reproduction licenses, on the ground that, according to the court, he "caused the whole process of infringement."¹⁰⁵ Similarly, it was held in *Pickwick Music Corporation v. Record Productions, Inc.*¹⁰⁶ that certain individual defendants were personally liable even though they may not have known that they were guilty of copyright infringement, since "lack of knowledge of infringement is not a defense."¹⁰⁷

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¹⁰¹ 283 F. Supp. 926 (S. D. N. Y. 1968).

¹⁰² 290 N. Y. S. 2d 637 (Sup. Ct. Schuyler Co. 1968).

¹⁰³ 271 F. Supp. 623 (S. D. N. Y. 1967).

¹⁰⁴ 285 F. Supp. 798 (S. D. N. Y. 1968).

¹⁰⁵ *Ibid.* at 801.

¹⁰⁶ 292 F. Supp. 39 (S. D. N. Y. 1968).

¹⁰⁷ *Ibid.* at 41.

INTERNATIONAL ACTIVITIES

Sub-Committee of the Intergovernmental Copyright Committee (Unesco)

(Paris, June 23 to 27, 1969)

Report

1. The Sub-Committee set up in accordance with Rule 16 of the Rules of Procedure of the Intergovernmental Copyright Committee to examine the issues raised by the proposals for the revision of Article XVII of the Universal Copyright Convention and its Appendix Declaration met at Unesco Headquarters in Paris from June 23 to 27, 1969.

2. The six States members of the Sub-Committee were represented, namely: France, Federal Republic of Germany, India, Kenya, Mexico, United States of America.

3. The Chairman of the Intergovernmental Copyright Committee, observers from Czechoslovakia, Tunisia and from two States members of the Permanent Committee of the Berne Union, namely, Denmark and Italy, and representatives of the United International Bureaux for the Protection of Intellectual Property (BIRPI) participated in the meeting.

4. A list of participants is annexed to the present report (Annex B).

5. Mr. Ribeiro, Chairman of the Intergovernmental Copyright Committee, opened the meeting of the Sub-Committee and expressed his most cordial wishes for the unqualified success of its work.

6. Mr. Saba, Assistant Director-General for International Standards and Legal Affairs, Unesco, on behalf of Mr. René Maheu, the Director-General, extended a warm welcome to the participants. He pointed out that the meeting of the Sub-Committee of the Intergovernmental Committee was part of the preparation of the revision conference to revise Article XVII of the Universal Copyright Convention and the Appendix Declaration relating thereto, a revision conference decided on in principle by the Intergovernmental Committee at the extraordinary session which it held in February 1969.

In conclusion, Mr. Saba remarked that the discussions which would take place in the Sub-Committee would reveal along what lines the governments of States parties to the Universal Convention wished that instrument to be revised.

I. Election of officers

7. The Sub-Committee elected its Chairman. On a proposal of the delegation of France, supported by the delegations of India, the United States of America and Mexico, Mr. Ribeiro, Chairman of the Intergovernmental Copyright Committee, was unanimously elected Chairman of the Sub-Committee.

8. The drafting of the present report was entrusted to the Secretariat of the Sub-Committee, for which the United

Nations Educational, Scientific and Cultural Organization was responsible, in accordance with Rule 17 of the Rules of Procedure of the Intergovernmental Committee.

II. Adoption of the final Agenda

9. The Committee decided to discuss its business in the following order:

1. Preparation of the revision conference to revise Article XVII of the Universal Convention

(i) Beneficiaries of the suspension of the safeguard clause

(ii) Duration of suspension of the safeguard clause

(iii) Status of beneficiaries of the suspension of the safeguard clause: Assimilation or reciprocity

(iv) Link between the Universal Convention and the Berne Convention which might be substituted for the safeguard clause; possibility and advisability of establishing such a link

(v) Majority required for the adoption of the revised texts

2. Other questions relating to the preparation of the revision conference.

10. Before going on to examine these various questions, the delegation of the United States of America observed that the Rules of Procedure of the Intergovernmental Committee should apply *mutatis mutandis* to the Sub-Committee. Since, however, the Sub-Committee comprised six members, four States should constitute a quorum and decisions should be made with a simple majority of the votes cast.

III. Preparation of the conference to revise Article XVII of the Universal Convention

11. Before discussing the five questions included in this item of the Agenda, a number of delegations presented statements of a general nature concerning the revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto.

12. The representative of France stated that his delegation was convinced of the necessity to maintain two multi-lateral copyright conventions which far from being in competition with each other would be complementary. He stressed that the high level of protection guaranteed by the Berne Convention ought not to be altered and that the failure of the Stockholm Protocol had shown that, within the Berne Convention, the essential principles governing a high level of copyright protection and the needs of developing countries were incompatible. Those needs were covered by the level of

protection guaranteed by the Universal Convention, which ensured a minimum protection and at the same time allowed a wide distribution of works; further, its principle was adaptable to countries that had reached different levels of development. He noted that two levels of protection were thus offered to the international community and that each State could adopt one of them.

Consequently, he was of the view that developing countries should find a solution to their problems in the Universal Convention.

Starting from those basic principles, the French delegation considered that it was necessary to suspend the safeguard clause of the Berne Convention so that developing countries could, if they so desired, leave the Berne Union without losing the benefit of the protection offered by the Universal Convention. The revision of the Universal Convention ought to take place as soon as possible and remain independent of the work being carried out by the International Copyright Joint Study Group. Further, in order to give the developing countries the freedom to choose the system of international copyright protection to which they wished to accede, it would be advisable not to replace the safeguard clause by another sanction.

In conclusion, the French delegation wished to abide by the decisions adopted by the General Conference of Unesco at its fourteenth and fifteenth sessions, and by the Intergovernmental Copyright Committee at its extraordinary session held in February 1969, which decided to convene a conference for revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto.

13. The United States delegation endorsed the opinion that a revision of the Universal Convention ought to take place as soon as possible and considered that the amendment of the safeguard clause would be one of the main functions of the revision conference. It would be appropriate for the Sub-Committee to recommend a specific date for the convening of the conference under item 5 of its Agenda. Such a revision, however, required much prudence and it was important to set up new links between the Universal Convention and the Berne Convention, in order to avoid any breach affecting international copyright. Although this question of links is also on the Agenda of the Joint Study Group meeting to be held in Washington in September 1969, the subject must also be explored at length by the Sub-Committee in considering the consequences of removal of the safeguard clause.

14. Professor G. H. C. Bodenhausen, Director of BIRPI, drew the attention of the Committee to the extraordinary session of the Permanent Committee of the Berne Union which had just taken place in Geneva, from June 20 to 21, 1969. There were two reports from this meeting which he wished to place before the Sub-Committee. In light of the fact, however, that one of these reports — the Final Report of the Committee — had not yet been completed, he gave a general outline of the discussion which took place.

The majority view of the meeting, to which the Director of BIRPI also subscribed, was that a simple suspension of the safeguard clause would not provide a satisfactory solution to the problems of international copyright and the developing

countries. Rather, while recognizing that a revision conference of the Universal Convention should be convened by 1970-1971 — and the sooner the better — he felt it should be accompanied by a revision conference of the Berne Convention. Both revision conferences could take place together in Geneva, and subject to the approval of the appropriate committees of his Organization and of the Berne Union, he intended to extend an invitation to this effect.

The object of this joint conference for revision of the two Conventions would be as follows:

(a) for the Berne Union, to detach the Protocol from the Stockholm Act of the Berne Convention so as to allow the independent ratification and denunciation of the Stockholm Act and its Protocol respectively by Union countries. At the same time some provisions of the Protocol should be made more precise;

(b) for the Universal Convention, the limitation of a revision conference to the suspension of Article XVII and the Appendix Declaration would only have a slim chance of success because it was improbable that a majority of States of the Universal Convention could be obtained for such a limited revision and a majority of such States was even less likely for ratification. To be useful, therefore, a revision of the Universal Convention should include in the Convention some basic elements of copyright protection, including reproduction, public performance and broadcasting rights; in addition an improved version of the Stockholm Protocol should also be introduced in the Universal Convention. If the latter were achieved competition between the two Conventions would be eliminated and the régime for developing countries would be the same under both Conventions thus giving those countries a free choice as to which Convention they wished to join.

The representative of BIRPI also suggested that the preparations for such simultaneous conferences of revision of both Conventions should be made jointly by Unesco and BIRPI, and he saw no reason why this could not be accomplished and in a short period of time. For his part, he pledged the full co-operation of BIRPI for such an endeavour.

15. The representative of the Federal Republic of Germany pointed out that two bodies had been set up to deal with questions of international copyright: the present Sub-Committee of the Intergovernmental Copyright Committee and the International Copyright Joint Study Group. He recognized that the terms of reference of the Joint Study Group were wider than those of the Sub-Committee, since the said Joint Study Group would deal not only with the relationships between developed and developing countries but also with the general problems arising from the existence of two copyright conventions of universal bearing, yet he considered that the question of establishing new links between the two conventions belonged also to the terms of reference of the Sub-Committee. Therefore certain questions which did not exclusively affect the revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto, but which were connected with the question of new links, ought nevertheless to be discussed at the meeting.

16. The delegation from India stressed the urgency of the revision of Article XVII of the Universal Convention and

the Appendix Declaration relating thereto, in the case of developing countries, and stressed that question which did not closely affect the revision of Article XVII should not be considered here, particularly the statement made by the Director of BIRPI regarding the possibility of a revision conference of the Berne Convention.

17. After the general statements, the Sub-Committee proceeded to discuss the five questions which the Intergovernmental Copyright Committee had brought to its attention in Resolution No. 1 (XR) adopted at its extraordinary session held in February 1969.

1. Beneficiaries of the suspension of the safeguard clause

18. The representative of France was of the view that only developing countries ought to be able to benefit from the suspension of the safeguard clause, as it was understood that the definition of those countries would be based on the established practice of the General Assembly of the United Nations.

19. The United States delegation interpreted the results of the suspension of the safeguard clause as affecting only paragraph (a) of the Appendix Declaration relating to Article XVII of the Universal Convention and not paragraph (b). It shared the opinion of the French delegation that only developing countries should benefit from the suspension of the safeguard clause. As for the definition of developing countries, the United States delegation suggested that the criterion of "the established practice of the General Assembly of the United Nations" is subject to varying interpretations, and that an interpretation based solely on a monetary figure representing per capita income has serious disadvantages. Instead, it suggested that a system should be considered according to which the country concerned ought to be allowed to decide for itself whether it was developing or not. The country concerned, however, should renew at regular intervals (every ten years, for example) its request to benefit from the suspension of the safeguard clause, and attach thereto certain statistical data justifying its position as a developing country. For example, in addition to general economic statistics, the data might include figures on book production and trade, film and broadcasting penetration, education and literacy.

20. The representative of India considered that the reference to the established practice of the General Assembly of the United Nations constituted a clear and precise criterion.

21. The representative of Kenya agreed with the French delegation that only developing countries should benefit from the suspension of the safeguard clause. He considered that the suggestion of the United States delegation to ask the country concerned for certain statistics, would give rise to many complications and would prove inefficient in so far as nobody would be set up to examine those statistics and decide whether a country was or was not a developing country. Therefore the institution of such a body seems undesirable.

22. The representative of Mexico agreed with the delegation from India that the established practice of the General Assembly of the United Nations would constitute an acceptable criterion because, as specialized studies had shown, a

monetary figure representing per capita income reflected other social and economic factors.

23. The observer from Italy pointed out that Resolution No. 1 (XR) adopted by the Intergovernmental Copyright Committee at its extraordinary session in February 1969, did not in any way limit the revision of the safeguard clause to paragraph (a) of the Appendix Declaration relating to Article XVII of the Universal Convention. The Italian Government wished the Sub-Committee to consider the possibility of also suspending in favour of developing countries the provisions contained in paragraph (b) of the Appendix Declaration relating to Article XVII in order to prevent an exodus of developing countries that were members of the Berne Union, towards the Universal Convention.

24. The representative of Kenya pointed out that any amendment to paragraph (b) of the Appendix Declaration relating to Article XVII of the Universal Convention would result in chaos in international relationships concerning copyright.

25. The Sub-Committee decided to recommend to the Intergovernmental Committee that only the developing countries could benefit from the suspension of the safeguard clause, on condition that the definition of those countries would be based on the established practice of the General Assembly of the United Nations.

2. Duration of suspension of the safeguard clause

26. The United States delegation considered that to restrict the period of benefit from the suspension of the safeguard clause would be a mistake. It thought it advisable to provide for a system whereby that benefit would be granted for a fixed number of years (ten years for example) with automatic renewal at the discretion of the country concerned after notification to the Secretariat of Unesco.

27. The representative of France stressed that the question of the duration of the suspension of the safeguard clause would give rise to two problems. Firstly, that of knowing whether it was advisable to lay down a time-limit after which the country concerned could no longer take advantage of the said suspension. Secondly, that of knowing whether the suspension of the safeguard clause ought to be indefinite or restricted to a fixed period. The French delegation considered that all developing countries ought to be able to avail themselves of the suspension of the safeguard clause for as long as the country in question retained the status of a developing country, according to the officially established criterion.

28. The representative of Kenya thought that it would be logical to restrict the benefit from the suspension of the safeguard clause to the period of development. In view of the situation which would arise when a country was no longer considered a developing State, he wished to know: (a) from what date the benefit from the suspension of the safeguard clause would no longer be applicable to the country under consideration; (b) what works ought to be deprived after this date of the protection given by the Universal Convention: all the works by authors who were nationals of the country under consideration or only works published after the said country was no longer considered a developing country?

29. The representative of the Federal Republic of Germany expressed the view that it was not advisable to lay down a time-limit for the suspension of the safeguard clause. With regard to the expiration of the effect of the suspension of the safeguard clause once the country which had previously been regarded as "developing" was no longer considered as such, according to the established practice of the General Assembly of the United Nations, it would be the consequence of the expiration that, in order to avoid the sanctions provided for in Article XVII of the Universal Convention, the States in question would have to adhere once again to the Berne Union. A simpler solution would be that the States in question, instead of leaving the Berne Union, should only suspend their membership. However, such a solution could only be achieved by a revision of the Berne Convention.

30. The representative of Kenya considered that if the benefit derived from the suspension of the safeguard clause could no longer be granted to a State because it was considered a developed country, the sanctions provided for in Article XVII of the Universal Convention would once again become applicable.

31. The representative of France pointed out that, in the view of his delegation, at the expiration of the benefit from the suspension of the safeguard clause, the country which was previously a beneficiary ought either to renew its membership of the Berne Union or to submit to Article XVII of the Universal Convention.

3. *Status of beneficiaries of the safeguard clause: Assimilation or reciprocity*

32. The representative of Kenya considered that a developed country ought not to be in the position to adjust the level of protection which it granted to works originating from developing countries to that accepted in that country for foreign works. He thought, however, that the suppression of the safeguard clause could not be carried out without a counterpart. One solution would be to give the Universal Convention and the Berne Convention the same Protocol according to which the countries which were parties to one of the two Conventions would undertake to grant the countries which were parties to the other Convention national protection, resulting from their membership of the first Convention and vice versa. However, a country which adhered to only one of the two Conventions by protecting in accordance with the said Protocol the works of a country party to the other Convention, would be able to apply material reciprocity, in the sense that it would be entitled to protect the works of the other country only in so far as its own works would be protected in that country.

33. The representative of France stressed that the question of material reciprocity was very important and that in view of the relatively low level of protection guaranteed by the Universal Convention, the introduction into this Convention of a reciprocity provision would be advisable. He thought, however, that the question went beyond the limits of the revision of Article XVII of the Universal Convention and ought to be discussed by the International Copyright Joint Study

Group. He pointed out that in any case reciprocity ought not to apply to developing countries.

34. The representative of the Federal Republic of Germany acknowledged the usefulness of discussing the possibility of introducing into the Universal Convention the notion of material reciprocity but considered that the question came within the competence of the International Copyright Joint Study Group. He expressed the view that in the relationships between developed and developing countries, reciprocity as regards duration of protection, already provided for in the Universal Convention, was sufficient and that no additional reciprocity clause regarding these States should be established. As for the proposal of the representative of Kenya, he thought that there was a danger of developed countries members of both Conventions deserting the Universal Convention since exclusively those States which adhered to only one of the conventions would be permitted to apply material reciprocity.

35. The United States delegation considered that it would be advisable to make a careful examination of the possibility for a country which was a member of the Berne Union to apply material reciprocity, according to the Universal Convention, to works originating from countries which had benefited from the suspension of the safeguard clause. It asked for the views of the representatives of developing countries on the point, noting that reciprocity might have the effect of encouraging a country to increase its national protection, and of inducing more developed countries to ratify the revised text of the Universal Convention.

36. The observer from Tunisia pointed out that the introduction of reciprocity into the Universal Convention would be contrary to the principle "donner et retenir ne vaut" ("giving is not keeping"). He recalled the arguments of eminent experts at the time the Universal Convention was adopted, and particularly Mr. de Sanctis, who had suggested that the introduction of such a principle into a multilateral convention would mark a net setback to the development of copyright, and increase the obstacles to the free circulation of intellectual works — which is precisely a fundamental purpose of Unesco to facilitate.

37. The Indian delegation associated itself with the Tunisian view.

38. The Committee agreed to recommend to the Intergovernmental Copyright Committee not to apply the reciprocity rule to developing States.

4. *Link between the Universal Convention and the Berne Convention which might be substituted of the safeguard clause: Possibility of establishing such a link*

39. The Director of BIRPI expressed the view that to suspend the safeguard clause without establishing a substitute link would have dangers for the future of international copyright relations; suspension in such conditions would also be unlikely to be ratified by enough parties to make it of use to the developing countries. To avoid any competition between the two Conventions, he proposed:

- (i) that the treatment accorded to developing countries under the terms of both Conventions should be identical.

In that event, the two Conventions should be revised simultaneously: the Berne Convention, in order to disassociate from it the Stockholm Protocol, and to clarify certain provisions of that Protocol; and the Universal Convention, in order to introduce into it minimum rights with exceptions identical to those which would be allowed in the revised Stockholm Protocol;

- (ii) that a single secretariat should be responsible for administering the two Conventions.

40. The representative of France could not agree with the Director of BIRPI. The French delegation considered that the safeguard clause should not be replaced by another penalty which would be contrary to the principle that "giving is not keeping", and which would present a vexatious character to the developing countries, and which would be of little practical effect. Further, there was no need to replace the safeguard clause, which continued to hold good, since paragraph (a) remained in force as regards relations between developed States and paragraph (b) was not being amended. The solution which would consist in introducing minimum rights (right of reproduction, right of broadcasting, etc.) into the Universal Convention, provided that certain exceptions were recognized in favour of developing countries, did not constitute a link in the legal sense of the term, but was, rather, calculated to modify the content of the Universal Convention. The question of introducing minimum rights into the Universal Convention was a complex one which might be considered by the International Copyright Joint Study Group.

41. The representative of the Federal Republic of Germany wondered what would be the relations between developed and developing countries within the Universal Convention: in particular, would the principle of "effective protection" authorize the developing countries to accord protection identical to that provided by the Stockholm Protocol? Nobody could give a clear answer to that question. Therefore a definition of the notion of "effective protection" would be beneficial to the developing countries as well as to the developed countries. He suggested that "effective protection" should be recognized as covering in principle the protection of basic rights such as the rights of reproduction, broadcasting and public performance. Such rights should be qualified, for the benefit of the developing countries, by reservations based on those in the Stockholm Protocol, with adequate adjustments as regards Article 1(e) of the Protocol.

42. The delegation of the United States of America emphasized that the question of the links between the two Conventions was one of the most difficult and important before the Sub-Committee. While concurring in the French representative's view that no new penalties should be introduced into the Universal Copyright Convention, the delegation considered that to suspend the safeguard clause without establishing links in its place would endanger the future of international copyright. In that connexion, the delegation thought that the proposals made both by the delegation of the Federal Republic of Germany and by the delegation of Kenya deserved careful consideration.

43. The representative of the Director-General of Unesco, while recognizing that it was important to know what was

meant by "effective protection", emphasized that that was a general problem which had existed ever since the Universal Convention was adopted but was not directly connected with the suspension of the safeguard clause.

In reply to the suggestion by the Director of BIRPI that an identical system of protection should be set up in favour of developing countries in the Universal Convention and in the Berne Convention, he explained that, under the Universal Convention, no special treatment would be given to such countries, to which the Convention would apply in its entirety. The only purpose of suspending Article XVII and the Appendix Declaration relating to it would be to widen the scope of application of the Universal Convention.

As regards the establishment of a single secretariat to administer the two Conventions, he did not see how such a proposal would make it possible to establish links between the Universal Convention and the Berne Convention, i. e. to create contractual relations between the Berne Member States and the parties to the Geneva Convention.

44. On the question of the possible new links between the Universal Convention and the Berne Convention, the delegate of Kenya reminded the meeting of the proposal he had put forward during the discussion of the previous item.

45. The delegation of the United States of America referred to the very important practical and political consideration raised by the representative of Kenya; that is, if there is only a revision of Article XVII of the Universal Convention, the developed countries will wait until they see what further revision of the Universal Convention and Berne Convention will be undertaken. The delegation believed that any revision involving Article XVII alone would raise serious questions about approval of such revision not only in the United States but in many other developed countries. In other words we need practical and realistic solutions to international copyright problems which would be acceptable on a world-wide basis. The delegation recalled that the United States was committed to revising Article XVII of the Universal Convention, but was also committed to seeking new links in place of the safeguard clause without their constituting a penalty for any individual State. The delegation wished to reaffirm the desire of its government and of the United States' publishers to help developing States with their copyright problems.

46. The representative of the Federal Republic of Germany feared that the Kenyan delegate's proposal, if adopted, would in the long run lead to a situation in which developed countries would belong only to the Berne Union and developing countries only to the Universal Convention.

47. The delegation of the United States of America thought that the Kenyan proposal raised a certain number of questions:

- (i) Would the obligation of a country party to the proposed protocol be strictly one of national treatment, or would there be any obligations under the convention to which it belonged?
- (ii) Since a protocol attached to the Universal Convention would have no effect on Berne Union members, did the proposal contemplate a parallel protocol obligating Berne

Union members to protect Universal Copyright Convention works?

- (iii) Assuming that material reciprocity is an essential part of the proposal, is a "Universal Copyright Convention safeguard clause" contemplated to prevent developed States from withdrawing from the Universal Convention to obtain the advantage of material reciprocity?

48. The representative of France asked whether: (i) the contemplated protocol would be a separate one, or annexed to one only, or to both, of the Conventions; (ii) what body would be responsible for administering it.

49. The representative of the Director-General of Unesco pointed out that in public international law it was quite possible to draw up a Protocol open for signature by States parties to the Berne Convention and the Universal Convention without revising those two instruments, since the effect of such a Protocol would not be to change any prior obligations, but to create new obligations. Furthermore, he did not think that there would be any need for an organ to be responsible for administering the Protocol, observing that the latter would contain no dispositions instituting a committee to keep track of its observance. The only function which would need to be considered would be that of depositary which might be assigned either to an international organization (the United Nations or Unesco, for instance) or to the State on whose territory the diplomatic conference to adopt the Protocol was held.

50. The delegate of Kenya pointed out (i) that under the terms of the contemplated Protocol the countries parties to the Universal Convention would have to give national treatment to works originating in a State member of the Berne Union and vice versa; (ii) that a revision of the Universal Convention alone could not bind the countries in the Berne Union and it would be necessary to resort to the procedure envisaged in Article 32 of the Stockholm Act of the Berne Convention; (iii) that the introduction of a safeguard clause stipulating that any States which withdrew from the Universal Convention would waive the application of reciprocity would be likely to prevent States from denouncing that instrument; (iv) that the developing countries could be ready to accept material reciprocity in the treatment of their works by the countries of the Berne Union in order to benefit from the suspension of the safeguard clause.

51. The representative of the Federal Republic of Germany considered that the solution envisaged raised many difficulties. He associated himself with the observations of the delegation of the United States of America as regards the introduction of a safeguard clause into the Universal Convention and was of opinion that it was advisable to make a more detailed examination of the Kenyan delegate's proposal as a whole.

52. The First Deputy Director of BIRPI indicated that, as he saw it, the Protocol proposed by the delegate of Kenya would contain the following provisions: (i) Any State which is a party to the Universal Copyright Convention only must give national treatment to works originating in a State party only to the Berne Convention; (ii) any State which is a party to the Berne Convention only must give national treatment

to works originating in a State party only to the Universal Copyright Convention; (iii) in either situation, the national treatment may be cut back to the level of protection granted under the laws of the beneficiary State to works originating in that State, in other words, there may be "material reciprocity"; (iv) any State which is a party to only the Universal Copyright Convention or to only the Berne Convention may adhere to the Kenya Protocol. A State party to both Conventions may not adhere. A State which is a party to both Conventions today and which denounces the Berne Convention tomorrow will, by the fact of such denunciation, become bound by the Kenya Protocol.

The effects such a Protocol might have seemed to him to go beyond the objectives currently sought, which consisted only in solving the problems of the developing States. Furthermore, the Protocol envisaged would raise a number of difficulties and might issue in a "polarization" of the two Conventions instead of creating links between them. The representative of BIRPI considered that what was needed was a Protocol on the problems of the developing States common to the two Conventions.

53. The delegate of India shared the view that the solution envisaged by the delegate of Kenya was interesting and warranted detailed examination. In his opinion, however, the Sub-Committee should confine itself to examining those elements answering the purpose in view, viz., the liberalization of the Universal Convention. The matter of links between the Universal Convention and the Berne Convention could be studied later.

54. At this stage of the discussion, the delegations of Italy and the United States of America submitted working papers which gave rise to an exchange of views (documents IGC/SC/8 and IGC/SC/9 respectively).

55. The document submitted by the Italian delegation aims at allowing developing States either to leave the Berne Union, or to remain members of the Berne Union, "relations between countries which are members of the Berne Union and at the same time party to the Universal Convention not bound by the Stockholm Act of the Berne Union as regards Articles 1-22 and the Protocol which forms an integral part of the same Act, and the countries members of the Berne Union and also party to the Universal Convention considered as developing countries" being, in the second hypothesis, governed at the request of the developing country concerned and for the period during which the said country shall be so qualified, by the provisions of the Universal Convention instead of the provisions of the Berne Convention. In this case, however, any contracting State which is also a member of the Berne Union could reserve the right to apply, in its relations with the said developing country, instead of the principle of assimilation as between foreigners and nationals, the principle of material reciprocity.

56. The document presented by the delegation of the United States aims at leaving developed and developing countries both free to rely on either the Stockholm Protocol or the UCC in their relations with other countries, and without sanctions or penalties of any sort, either material reciprocity or withdrawal from one or both conventions. By envisaging

the severance of the Protocol from the body of the Convention, the proposal would also permit the Stockholm text of Berne to come into effect without foreclosing the possibility of adherence to the Convention by a country like the United States.

57. The Chairman pointed out that the documents submitted by the delegations mentioned, ranked only as working papers and that the Sub-Committee did not have to come to any decision or conclusion regarding them.

58. The delegate of Mexico associated himself with the Chairman's statement and requested that a line be drawn between the discussions which might take place in the Sub-Committee and the decisions which the latter was called upon to take regarding the five matters figuring on its Agenda.

59. The delegation of Italy specified:

- (i) That the draft Protocol for the amendment of the Universal Convention submitted by it was only a working paper, which could be examined by the Intergovernmental Committee and by the revision conference, but which did not call for any decision on the part of the Sub-Committee. Furthermore, that document was of interest only to the extent that it might be decided to replace the safeguard clause by some other link between the Universal Convention and the Berne Convention;
- (ii) that Article 2 of the draft provided a choice for the developing countries — either to withdraw from the Berne Union without incurring the sanctions mentioned in Article XVII, and thereby take advantage of the principle of assimilation, or to remain in the Berne Union, where "material reciprocity" could be applied only in that case in their relations with developed countries also members of the Berne Union, since the Italian delegation considers that the principle of assimilation must remain the fundamental principle of the Universal Convention.

60. The delegation of the United States of America expressed its deep concern that the Sub-Committee provide the Intergovernmental Copyright Committee with constructive help and a sense of direction. The purpose of its working paper was solely to assist this endeavour and to avoid loss of progress. The position of its government is: (i) in favour of a suspension of the safeguard clause to the extent that it permits developing countries to rely on the Universal Convention in their relations with developed countries that have not ratified the Stockholm Protocol; (ii) in favour of a revision conference to accomplish this suspension, to be held in September 1970; and (iii) opposed to any revision that does more than is necessary to benefit developing countries and that drives the two conventions further apart. The delegation emphasized that it would do nothing directly or indirectly to dishonour its commitment to the calling of a conference for revision of Article XVII, and that it supports the efforts of developing countries to suspend their obligations under the Berne Convention in favour of the Universal Convention. It indicated that it had found persuasive the arguments against material reciprocity in this context, and favoured a negative answer to the question on this point.

Noting that the basic issue involves an intricate and delicate relationship between the two conventions, the delegation

of the United States stated its view that the only satisfactory way to deal with the problem is by concurrent, co-ordinated revisions of both of them. It expressed the hope that the offer of the Director of BIRPI to co-operate in efforts toward a joint revision would be welcomed. On the issue of links between the conventions, the delegation found itself unconvinced by assurances that mere suspension of the safeguard clause would not upset the structure of international copyright. The Italian proposal, while most constructive, presents certain problems, including the difficulties in removing paragraph (b) of the Appendix Declaration, the fact that it does not meet the necessity to sever the Protocol from the main text of the Stockholm Act, and the problems raised by its effort to write minimum standards into the Universal Convention.

The delegation of the United States put forward, as a variation of the Italian proposal, a suggestion that, in addition to suspension of the safeguard clause, the Berne Convention be amended to give developing countries the opportunity to rely on the Stockholm Protocol with respect to countries that have ratified it, and, without withdrawing from the Berne Union, to rely on the Universal Convention with respect to other Berne countries. The proposal rejected any principle of material reciprocity, and involved the severance of the Stockholm Protocol from the main body of the Stockholm text.

61. The delegate of the Federal Republic of Germany thought that the papers submitted by the delegations of Italy and the United States of America were very constructive and were at one on certain points. He welcomed the possibility offered to the developing States of either leaving the Berne Union without incurring the sanctions stipulated by Article XVII of the Universal Convention or of remaining members of the Berne Union, with the proviso that the protection accorded by that instrument would apply only as regards those States which had ratified the Stockholm Act, and the relations of the developing States with the other States members of the Berne Union would be governed by the provisions of the Universal Convention. In any event, the German delegation considered that a solution on these lines implied a revision not only of the Universal Convention, but of the Berne Convention. The Federal Republic of Germany was not in favour of establishing a system of material reciprocity in the relations between developed and developing countries.

62. The observer from Czechoslovakia reserved his government's right to take a different position at the conference for revision of the Universal Convention but stated that his delegation was in favour of abrogating Article XVII of the Universal Convention and sub-paragraph (a) of the Appendix Declaration relating thereto, since their provisions ran counter to the principle of the sovereignty of States. He considered that the introduction of reciprocity in relations between developed and developing States would be unfortunate. He was of the opinion, moreover, that the suspension of the safeguard clause should not be subject to a time-limit. With regard to the new links that might be established between the Universal Convention and the Berne Convention, he preferred to reserve his government's position. In conclusion, the Czecho-

slovak observer made it known that his government did not consider that the Stockholm Protocol relating to developing States was, to date, a dead letter.

63. The observer from Denmark said that his government had consistently supported the developing countries by working actively for the acceptance of the Stockholm Protocol. It was under consideration to make the Protocol applicable to Danish works in accordance with its Article 5, but the claims for a rapid revision of the Universal Copyright Convention with the sole aim to suspend the safeguard clause had caused some anxiety in competent circles.

He did not believe that such a revision of the Convention would serve the interests of the developing countries.

It should be remembered that the Appendix Declaration has the character of "a common agreement" between the Berne Union countries, and that whatever the revision conference might decide with regard to the quorum necessary for revising Article XVII and the Declaration, the fact remained that each single Berne Union country would be perfectly free to decide if it wanted to ratify the new text or to stick to the old convention.

The suspension of the safeguard clause would be extremely dangerous without the establishment of links to replace it. Such links could be established for instance by following the suggestions made by the United States delegation. He found these suggestions very interesting and constructive, and he shared the view that it would be necessary to revise the Berne Convention concurrently with the revision of the Universal Copyright Convention. He also supported the idea to separate the Protocol from Articles 1-22 of the Stockholm text.

64. The observer from Tunisia recalled that the Sub-Committee had been set up to study the problems raised by the suspension of the safeguard clause of the Universal Convention in favour of developing countries. He was unable to concur entirely with the document submitted by Italy, which would lead to the annulment of the safeguard clause for the developed States also and would run the risk of not gaining the majority necessary for the revision and which in certain cases would give rise to a régime of material reciprocity in relations between developed and developing countries which developing countries would be unable to accept. In addition, he requested clarification of Article 4 of the Italian project, the exact significance of which did not seem to him to be clear. With regard to the document submitted by the United States delegation the observer from Tunisia acknowledged the constructive spirit shown therein but emphasized that the solutions proposed called for a revision of the Berne Convention, and as a result the revision of the Universal Convention would implicitly become subject to the rule of unanimity. Consequently, the Tunisian delegation could not accept the proposals set forth in that document. He recalled that it was the purpose of the Sub-Committee to give effect to resolution 5.122 of the General Conference of Unesco, and that all other issues were to be considered by the International Copyright Joint Study Group.

65. The delegate of Kenya considered that the document submitted by the Italian delegation could not wholly meet the needs of the developing countries. Firstly, it would entail the

complete abrogation of the Appendix Declaration relating to Article XVII of the Universal Convention, thereby implying that the developed countries would also be able to withdraw from the Berne Convention. Such a possibility, if considered, might give rise to major difficulties and fail to win the required majority at the revision conference. Secondly, material reciprocity involved certain difficulties, despite the fact that its application would be limited to relations among developed and developing countries that remained members of the Berne Union. Further, he endorsed the view of the Tunisian observer that clarification of Article 4 of the Italian project was required. He acknowledged that the working document submitted by the United States delegation was constructive but deplored the fact that the solutions put forward therein would call for a revision of the Berne Convention, and asked whether a simple revision of the Appendix Declaration relating to Article XVII of the Universal Convention might not in itself produce the same result.

66. The Indian delegation endorsed the statements of the Tunisian and Czechoslovak observers and recalled that the Sub-Committee's terms of reference were to prepare the conference for revision of Article XVII of the Universal Convention and that all other issues came within the province of the International Copyright Joint Study Group. It also held that as the draft resolution reads, the link between the Universal Copyright Convention and the Berne Convention exists. It further reiterated that the Stockholm Protocol is not a dead letter as somebody would like to describe. It is very much alive and India would try its utmost to persuade all concerned to ratify the same.

67. The representative of France recalled his government's position, namely, that there were no grounds for considering the establishment of new links between the Berne Convention and the Universal Convention, since those created by Article XVII of the Universal Convention still held. He noted that the working documents submitted to the Sub-Committee by the United States and the Italian delegations agreed with the position of the French delegation on the suspension of sub-paragraph (a) of the Appendix Declaration relating to Article XVII of the Universal Convention. In such circumstances, the French delegation questioned the need for a conference for revision of the Berne Convention, as it might hamper the revision of the Universal Convention, since any decision to revise the Berne Convention must be unanimous. The French delegation would, in any case, refrain from participating at that meeting in the discussion of the documents submitted by the different delegations.

68. The representative of Mexico pointed out that the purpose of the Sub-Committee's meeting was to discuss the problems raised by the revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto and that any other question went beyond its terms of reference. He agreed that the documents presented by the delegations of the United States and Italy were of considerable interest but thought that the examination of their content might well come within the competence of the International Copyright Joint Study Group.

69. The representative of the Director-General of Unesco pointed out that the documents presented by the delegations of the United States and Italy agreed on the essential elements, but the two delegations gave a different interpretation of the legal significance of the solutions contained therein. According to the United States delegation, it would be advisable in every case to consider a revision of the Berne Convention, whereas the Italian delegation did not consider that such a revision was indispensable. Further, the delegate of Kenya thought that a mere amendment of the Appendix Declaration to Article XVII of the Universal Convention could achieve the desired results. It might also be asked to what extent Article 20 of the Berne Convention would be applicable to the solutions in view. That Article would not in any case be applicable if it were a question of defining the relationship between States members of the Berne Union and States which were not members or which were no longer members of the Union. In those circumstances, the representative of the Director-General of Unesco thought that the matter deserved further consideration. He nevertheless pointed out to the Sub-Committee that a revision of the Berne Convention could, if it were made a condition of the revision of the Universal Convention and at the same time a "package deal", involve implicitly the application to the latter revision of the rule of unanimity which governed the revision of the Berne Convention. Such a situation had to be avoided, as the international authorities called upon to revise the Berne Convention were entirely different from those set up by the revision conference provided for in the Universal Convention; the two authorities should therefore remain independent of each other.

70. The Director of BIRPI considered that the suggestions contained in the documents presented by the delegations of the United States and Italy would imply a revision of the Berne Convention.

71. At that stage of the discussion, the observer from Tunisia presented document IGC/SC/10 which, although it took up once again a certain number of the suggestions contained in the documents presented by the delegations of the United States and Italy, would make possible the revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto, without entailing a parallel and simultaneous revision of the Berne Convention. This document in effect provides on the one hand for the suspension of the effects of the safeguard clause (sub-paragraph (a) of the Appendix Declaration relating to Article XVII of the Universal Convention), and on the other hand for an amendment of sub-paragraph (b) of the same Appendix Declaration, so as to enable any member country of the Berne Union which is considered as a developing country to have its relations with the member countries of the Berne Union who are not bound by the Protocol relating to developing countries, governed by the Universal Convention.

72. The observer from Italy expressed satisfaction that certain ideas contained in the working paper presented by the Italian delegation were taken up again in the document presented by the Tunisian delegation. Some of the suggestions presented by the Italian delegation did not, however, appear

in that document — in particular the question of material reciprocity for a determined transitory state — and the Italian delegation therefore considered that it should reserve its position. He pointed out, further, that in the opinion of the Italian delegation the solutions proposed in the Italian document did not require a revision of the Berne Convention, as the solutions in question did not clash with Article 20 of that instrument.

73. The representative of the United States considered that the suggestions in the document presented by the Tunisian delegation deserved a thorough discussion. His delegation was, nevertheless, of the opinion that the said suggestions would require a revision of the Berne Convention.

74. The Director of BIRPI also considered that the suggestions in question implied a revision of the Berne Convention.

75. The delegate of Mexico stressed that the document presented by the Tunisian delegation took up once again the suggestions presented by the delegations of the Federal Republic of Germany and Kenya concerning the country of origin of works protected within the period referred to in item 2 of the Agenda, and other viewpoints already discussed on which the delegates of the United States of America, Italy, etc. also spoke.

76. The Chairman stated that in his personal view, suppression of the safeguard clause was of considerable importance to the developing countries, both on the practical and on the psychological levels. He was of the opinion that the developing countries would not be in a position to co-operate adequately in the progress of international copyright so long as Article XVII of the Universal Convention and the Appendix Declaration relating thereto were not amended. He shared the opinion of the representative of the Director-General of Unesco on the effects which the revision of the Berne Convention could have on the revision of the Universal Convention, because of the rule of unanimity which applied to the revision of the first instrument.

77. The representative of France said he had been much struck by the Chairman's words. He thought in fact that the deletion of Article XVII of the Universal Convention and of sub-paragraph (a) of the Appendix Declaration relating thereto was a preliminary to any progress in copyright. In this regard, he wondered what the present position was. The Tunisian proposal was interesting but had it a chance of being accepted at any rate by members of those developed countries whose voice had been heard in Geneva and at the present meeting of the Sub-Committee? Further, was it possible for many developed countries to agree to apply the Universal Convention to members of the Berne Convention without a counterpart? The American proposition was certainly worthy of much consideration and appeared balanced, but it postulated a revision of the Berne Convention. Moreover, was it conceivable that the developing countries should accept it, while unanimity was essential and a single vote would be enough to paralyse everything. In either event, they reached a dead end; the representative of France thought therefore it important to reflect upon this problem before the International Copyright Joint Study Group met.

5. Majority required for the adoption of the revised texts

78. At the request of the delegate of Kenya, the Chairman recalled that the decisions of the Geneva Conference which had adopted the Universal Convention had been taken, in plenary, with a two-thirds majority of the delegations present and voting and, at the meetings of the Sub-Committees of the Conference, with a simple majority of the delegations present and voting.

79. The delegate of Mexico pointed out that the two-thirds majority corresponded to the principle laid down in international law, and to the practice followed by the different international organizations: Universal Postal Union, International Civil Aviation Organization, World Health Organization, Organization of American States, etc. unless the States decided by the same majority to apply a different rule. He considered that it was the responsibility of the Intergovernmental Copyright Committee and the revision conference to decide on the majority required for the adoption of the revised text.

80. The representative of the United States agreed with the statements of the Mexican delegate but expressed the view that, as it was a question of revising a clause which concerned the States members of the Berne Union, a two-thirds majority of the States members of the said Union might also be required.

81. The delegate of France stated that although Article XVII of the Universal Convention and the Appendix Declaration relating thereto concerned the relationship of States that were also parties to the Berne Convention, they were an integral part of the Universal Convention and, for that reason, ought to be governed by the Rules of Procedure applicable to the revision of that Convention, which would be determined by the revision conference. He considered that in view of the proposals put forward by the Vienna Conference on the Law of Treaties, the rule of unanimity was not applicable in the case in question.

82. The representative of the Federal Republic of Germany expressed the opinion that the two-thirds majority was an adequate majority, but that nevertheless the final decision concerning the required majority ought to be taken by the revision conference. From the legal point of view, it seemed to him that the Appendix Declaration relating to Article XVII of the Universal Convention was a contract concluded between the States members of the Berne Union and parties to the Universal Convention, and therefore there ought also to be a majority within those States. The German delegation expressed the opinion that the amendment of Article XVII and the Appendix Declaration thereto would require a majority of all the States attending the revision conference as well as of the States members of the Berne Union and parties to the Universal Convention.

83. The Director of BIRPI agreed with the statement of the representative of the Federal Republic of Germany.

84. The representative of the Director-General of Unesco observed that the Appendix Declaration relating to Article XVII had been adopted by all the States attending the Intergovernmental Copyright Conference without a separate vote by the Member States of the Berne Union being taken and

without a majority of those States being required. He did not see why a revision of this text should be subject to different rules of procedure from those which had governed its adoption.

85. The observer from Tunisia stressed that resolution 5.122 of the General Conference of Unesco which required the revision of Article XVII of the Universal Convention and the Appendix Declaration relating thereto, had been adopted unanimously by 125 States, i. e. by the entire international community. He recalled that the said revision, requested by the fourteenth session of the General Conference of Unesco, was also proposed at the fifteenth session of that Conference, and he hoped that the work of the present Sub-Committee would enable a satisfactory solution to be reached before the sixteenth session of the General Conference of Unesco. He pointed out that the States concerned in the proposed revision, namely the developing States, were not yet parties to the Universal Convention precisely because of the provisions contained in Article XVII and the Appendix Declaration relating thereto; consequently States would not participate in the Conference for the revision of that instrument. In those circumstances, he thought that the simple majority which had been seen to be legally possible ought to be retained.

86. The representatives of India and Czechoslovakia agreed with the statements of the observer from Tunisia.

87. The delegation of the United States considered that the two-thirds majority corresponded to a principle established in international law but was of the opinion that it was the responsibility of the revision conference to decide on the majority required.

88. The representative of France also expressed the view that it would be the duty of the revision conference to decide on the majority necessary for adopting revised texts. He was struck by the arguments put forth by the Tunisian delegate and stated that the French delegation would not oppose the retention of the simple majority by the revision conference.

89. As a result of its discussions, the Sub-Committee expressed the opinion: (i) that the adoption of the revised texts would in no circumstances be subject to the rule of unanimity; (ii) that as the Universal Convention had been adopted by a two-thirds majority, a higher majority could not be required for any revision of that instrument, including that of the Appendix Declaration relating to Article XVII; (iii) that the simple majority was legally possible, but that it was the responsibility of the revision conference to decide on the majority required.

IV. Other questions relating to the preparation of the revision conference

90. The Sub-Committee considered that the conference for the revision of the Universal Convention should be held from September 1 to 16, 1970.

V. Resolution concerning the five points submitted by the Intergovernmental Copyright Committee for consideration by the Sub-Committee

91. At the close of its discussions, the Sub-Committee adopted a resolution concerning the five points submitted

for its consideration by the Intergovernmental Copyright Committee (Resolution No. 1 (IGC/SC)). The text of this resolution is annexed to the present report (Annex A).

92. On the adoption of this resolution, the French delegation reaffirmed its opinion that there was no need to establish a link between the Berne Union and the Universal Convention for the excellent reason that the link of Article XVII remained. It requested that a note be made that France did not accept the text of point 4.

93. The delegation of the Federal Republic of Germany reserved its position with regard to paragraphe 5 on the question whether one or two majorities are required for the adoption of the revised text.

VI. Conclusion

94. At the time of adopting its report, the Sub-Committee, referring to paragraph 14, which reproduces the statement made by the Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI), did not interpret it as containing a formal invitation to hold two revision conferences in Geneva.

Certain delegates, including those of France, India, Kenya and the observer from Tunisia, pointed out that it was impossible at that stage to consider an invitation to hold two revision conferences without prejudicing the decisions of the Sub-Committee, which had not decided upon the advisability of establishing a new link between the two Conventions, the possible nature of such a link and whether it would involve a revision of the Berne Convention.

95. The representative of the United States of America spoke for all the participants when he complimented the Chairman of the Sub-Committee on his skill, authority and resource in conducting the discussions.

96. The representative of India associated himself with those words and congratulated the Secretariat whose co-operation had helped to ensure the smooth course of the proceedings.

97. The Chairman thanked the Sub-Committee for their confidence in him, and the Secretariat for their collaboration and valuable assistance.

98. The representative of the Director-General of Unesco thanked the participants for the work they had done and observed that its results augured well for the successful future of international copyright.

99. The Chairman then closed the proceedings.

ANNEX A

Resolution

Resolution No. 1 (IGC/SC)

The Sub-Committee of the Intergovernmental Copyright Committee, set up in conformity with Rule 16 of its Rules of Procedure to examine the issues raised by the proposals for the revision of Article XVII of the Universal Copyright Convention and its Appendix Declaration,

Having examined the five points set out in Resolution No. 1 (XR) adopted by the Intergovernmental Copyright Committee at its extraordinary session held in February 1969,

Considers

1. That the benefit of the suspension of Article XVII and of sub-paragraph (a) of the Appendix Declaration should be limited to developing countries, these countries being defined in accordance with the practice established by the General Assembly of the United Nations;
2. that the duration of such suspension should be a period of ten years, automatically renewable at the discretion of the country concerned. When a country shall cease to be considered as a developing country as defined above, it shall no longer be entitled to a renewal, notwithstanding the provisions of the preceding phrase. Once a country ceases to be developing, the effects of the suspension ceasing at the end of the ten-year period, or three years after the country ceasing to be developing whichever expires later;
3. that in no case should a developing country benefiting from the suspension of Article XVII and of sub-paragraph (a) of the Appendix Declaration be submitted to the rule of reciprocity;
4. that the suspension of paragraph (a) of the Appendix Declaration relating to Article XVII of the Universal Copyright Convention does not entail the cessation of the existing links between the Universal Convention and the Berne Convention, but that it is for further study, by the Intergovernmental Copyright Committee and for decision by the revision conference whether to establish new links or not, and, if so, to define their nature;
5. that the unanimous approval of the participants at the revision conference could in no case be required for the adoption of the revised terms; that, since the Universal Convention was adopted by a two-thirds majority of the delegations present and voting — which represents the established principle of international law save in cases where States decide, by the same majority, to apply a different rule — no greater majority could be required for any revision of that instrument, including the revision of the Appendix Declaration relating to Article XVII; that a simple majority would be legally possible, but that it is for the revision conference to decide upon the majority required.

The Sub-Committee also considers that the revision conference should meet from September 1 to 16, 1970.

ANNEX B

List of Participants

I. President of the Intergovernmental Copyright Committee

Mr. Jorge Carlos Ribeiro, Secretary of Embassy, Embassy of Brazil, Montevideo (Uruguay)

II. Members of the Committee

France

Exc. Mr. Pierre Charpentier, Ambassador
Mr. André Kerever, Maître des requêtes, Technical Advisor, Ministry of Cultural Affairs

Germany (Fed. Rep.)

Dr. Eugen Ulmer, Professor, University of Munich
Mrs. Elisabeth Steup, Director, Ministry of Justice, Bonn
Dr. Manfred Günther, Counsellor

India

Mr. Kanti Cbaudhuri, Joint Secretary to the Government of India and Youth Services, Ministry of Education
Mr. Dina N. Malhotra, President, Fédération of Publishers and Booksellers Associations in India

Kenya

- Mr. J. W. Ndisi, Chargé d'affaires of the Republic of Kenya in France, Permanent Delegate to Unesco
 Mr. J. J. Isige, Commercial Attaché, Kenya Embassy in Paris
 Mr. Georges Straschnov, Director of Legal Department of European Broadcasting Union (EBU)

Mexico

- Dr. Arturo González Cosío, Director General of Copyright, Ministry of Public Education

United States of America

- Mr. Abraham L. Kaminstein, Register of Copyrights, Copyright Office, Library of Congress
 Miss Barbara A. Ringer, Assistant Register of Copyrights, Copyright Office, Library of Congress
 Mr. Harvey J. Winter, Assistant Chief, Business Practices Division, Department of State
 Mr. Richard Nobbe, Secretary of Delegation, Office of the U. S. Representative to Unesco

III. Observers**(a) Representatives of other governments***Czechoslovakia*

- Dr. Jiří Kordač, Director, Legislative Department, Ministry of Culture

Denmark

- Mr. Willi Weincke, Chief of Division, Ministry of Cultural Affairs

Italy

- Mr. Gino Galtieri, Inspector-General, Head of the Literary, Artistic and Scientific Property Office, Presidency of the Council of Ministers
 Dr. Giuseppe Trotta, Judge at the Court of Appeal, Legal Advisor
 Mr. Valerio de Sanctis, Legal Advisor, Italian Society of Authors and Publishers, Member of Permanent Consultative Copyright Committee

Tunisia

- Mr. Rafik Saïd, Minister Plenipotentiary, Deputy Permanent Delegate to Unesco

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

- Professor G. H. C. Bodenhausen, Director
 Dr. Arpad Bogsch, First Deputy Director
 Mr. Vojtech Strnad, Counsellor, Head, Copyright Division
 Mr. Robert D. Hadl, Legal Assistant, Copyright Division

IV. Unesco

- Mr. H. Saba, Assistant Director-General for International Standards and Legal Affairs
 Miss M.-C. Dock, Head, Copyright Division

NEWS ITEMS

AUSTRALIA

Ratification of Protocols 1, 2 and 3 annexed to the Universal Copyright Convention (with effect from July 24, 1969)

In a letter of August 22, 1969, the Director-General of Unesco informed us that the instrument of ratification by Australia of Protocols 1, 2 and 3 annexed to the Universal Copyright Convention was deposited with that Organization on July 24, 1969.

The instrument of ratification by Australia of the Universal Copyright Convention had previously been deposited with that Organization on February 1, 1969¹.

In accordance with paragraph 2(b) of Protocols 1 and 2 and paragraph 6(b) of Protocol 3, these Protocols came into force, in respect of Australia, on the date of the deposit of the instrument of ratification.

¹ See *Copyright*, 1969, p. 127.

CALENDAR

BIRPI Meetings

October 6 to 10, 1969 (Vienna) — Expert Group Meeting on the Organization and Administration of Industrial Property Offices

Object: Discussion of various aspects of the organization and administration of Industrial Property Offices in developing countries — *Invitations:* All member countries of the United Nations or of the Paris Union — *Note:* Meeting convened jointly with the United Nations Industrial Development Organization (UNIDO)

October 21 to 24, 1969 (Munich) — Joint ad hoc Committee on the International Classification of Patents (2nd Session)

Object: Practical application of the Classification — *Invitations:* Czechoslovakia, France, Germany (Fed. Rep.), Japan, Netherlands, Soviet Union, Spain, Switzerland, United Kingdom, United States of America — *Observers:* International Patent Institute — *Note:* Meeting convened jointly with the Council of Europe

October 27 to 29, 1969 — Paris Union Committee for International Cooperation in Information Retrieval Among Patent Offices (ICIREPAT) — Technical Committee II (Technical Fields: Forward Planning) (2nd Session)

Note: The exact place of the session will be announced later

October 27 to 31, 1969 (Geneva) — Committee of Experts on a Model Law for Developing Countries on Industrial Designs

Object: To study a Draft Model Law — *Invitations:* Developing countries members of the United Nations — *Observers:* Intergovernmental and international non-governmental Organizations concerned

October 30 and 31, 1969 — ICIREPAT — Technical Committee III (Advanced Computer Techniques) (2nd Session)

Note: The exact place of the session will be announced later

November 3 and 4, 1969 (Geneva) — ICIREPAT — Technical Committee I (Retrieval Systems, Design and Testing) (2nd Session)

November 3 to 8, 1969 (Cairo) — Arab Seminar on Industrial Property

Object: Exchange of views on industrial property questions and on their importance for developing countries — *Invitations:* Algeria, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Republic of Yemen, Saudi Arabia, South Yemen People's Republic, Sudan, Syria, Tunisia, United Arab Republic; Sheikdoms of Abu Dhabi, Bahrain, Dubai, Qatar, and Sharjah — *Observers:* Intergovernmental and international non-governmental Organizations concerned

November 5 and 6, 1969 (Geneva) — ICIREPAT — Technical Committee VI (Systems Implementation) (2nd Session)

November 10 to 12, 1969 (Geneva) — ICIREPAT — Technical Committee IV (Microform) (2nd Session)

November 13 and 14, 1969 (Geneva) — ICIREPAT — Technical Committee V (Patent Format and Printing) (2nd Session)

December 10 to 12, 1969 (Paris) — Intergovernmental Committee Rome Convention (Neighboring Rights) (2nd Session)

Object: Consideration of various questions concerning neighboring rights — *Invitations:* Congo (Brazzaville), Czechoslovakia, Ecuador, Mexico, Sweden, United Kingdom — *Observers:* Brazil, Denmark, Germany (Fed. Rep.), Niger; Intergovernmental and international non-governmental Organizations concerned — *Note:* Meeting convened jointly by ILO, Unesco and BIRPI

December 15 to 19, 1969 (Paris) — Permanent Committee of the Berne Union (14th Ordinary Session)

Object: Consideration of various questions concerning copyright — *Invitations:* Belgium, Brazil, Denmark, France, Germany (Fed. Rep.), India, Italy, Portugal, Rumania, Spain, Switzerland, United Kingdom — *Observers:* All other member States of the Berne Union; Intergovernmental and international non-governmental Organizations concerned

January 19 to 23, 1970 (Geneva) — Committee of Directors of National Industrial Property Offices of the Madrid Union (Marks)

Object: Administrative questions — *Invitations:* All member States of the Madrid Agreement (Marks)

January 26 to 30, 1970 (Geneva) — Committee of Experts for the Revision of the Madrid Agreement (Marks)

March 9 to 20, 1970 (Geneva) — Preparatory Study Group on PCT Regulations

Object: Study of Draft PCT Regulations — *Invitations:* All member States of the Paris Union — *Observers:* Intergovernmental and international non-governmental Organizations concerned

May 25 to June 19, 1970 — Diplomatic Conference for the adoption of the Patent Cooperation Treaty (PCT)

Invitations: All member States of the Paris Union — *Observers:* Other States; Intergovernmental and international non-governmental Organizations concerned — *Note:* The exact place of the Conference will be announced later

Meetings of Other International Organizations Concerned with Intellectual Property

October 14 to 17, 1969 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents — Working Group

November 12 to 14, 1969 (Strasbourg) — Committee of Experts on Patents of the Council of Europe

November 18 to 20, 1969 (The Hague) — International Patent Institute (IIB) — 102nd Session of the Administrative Council

November 25 to 28, 1969 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents — Working Group

December 8 to 11, 1969 (The Hague) — International Association for the Protection of Industrial Property (IAPIP) — Council of Presidents

January 12 to 16, 1970 (Luxembourg) — Intergovernmental Conference for the setting up of a European system for the grant of patents

