Copyright

Review of the
WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

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

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

8th year - No. 4
APRIL 1972

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WORLD INTELLECTUAL PROPERTY ORGANIZATION

Committee of Experts for the Protection of Type Faces

Sixth Meeting

(Geneva, March 13 to 16, 1972)

Note *

On the invitation of the Director General of WIPO, a Committee of Experts for the Protection of Type Faces met in Geneva at the headquarters of WIPO from March 13 to 16, 1972.

All the member countries of the Paris Union had been invited as members of the Committee. Intergovernmental and international non-governmental organizations directly interested had been invited as observers. The invitation was accepted by fourteen countries, one intergovernmental organization and four non-governmental organizations. A list of participants appears at the end of this Note.

The Committee was chaired by Mr. W. M. J. C. Phaf (Netherlands). Mrs. G. Sellali (Algeria) and Mr. E. Dudeschek (Austria) were Vice-Chairmen.

The Committee based its discussions on three preliminary drafts prepared by the International Bureau, on written proposals submitted by the United Kingdom Office and by the Italian Delegation and on a proposal prepared by a small working group set up to study the scope of protection. The three documents prepared by the International Bureau were a Preliminary Draft Special Agreement for the Protection of Type Faces and their International Deposit, Preliminary Draft Regulations and a Preliminary Draft Table of Fees.

It was understood that the Committee's task was to express its views on the preliminary drafts mentioned above and submit observations and suggestions to the International Bureau, whereupon the latter would draw up documents on this basis to be submitted to the Diplomatic Conference.

In essence, the Committee approved the substance of the preliminary drafts submitted to it. It proposed a number of amendments to the articles of the Preliminary Draft Agreement, to the rules in the Preliminary Draft Regulations and to the related commentaries.

These proposals principally concerned the following points:

1. On the subject of Article 3 of the Preliminary Draft Agreement, which requires Contracting States to ensure the protection of type faces in favor of the creators and their successors in title, the Committee felt that the Agreement should specify that such protection covered both nationals of Contracting States and persons resident in one of those States. The Committee also expressed the opinion that such a provision would not prejudice the rights which nationals of other Paris Union countries — and residents in any of those countries — might claim under the national treatment principle provided for in Article 2 of the Paris Convention.

2. On the subject of Article 5, which defines the rights that Contracting States undertake to guarantee to owners of protected type faces, the Committee considered whether the Agreement should expressly exclude from protection certain type faces developed for use in data processing machines. Since it did not have the time to study all the consequences of such a provision, the Committee suggested that the problem should be studied — before the Diplomatic Conference scheduled for 1973, to which the Draft Agreement will be submitted — in each country in consultation with the interested circles.

3. On the subject of the international deposit of type faces, which under the Preliminary Draft will take place at the International Bureau (Articles 9 to 21), the Committee felt that it should be possible to combine a withdrawal or renunciation for some only of the type faces deposited with a withdrawal or renunciation for some only of the Contracting States (Article 17). For this purpose, the International Bureau should study the question of identifying the different characters deposited, for example by requiring each character to have a serial number (Rule 5).

List of Participants *

I. Members

Algeria: G. Sellali (Mrs.). Austria: E. Dudeschek. Cameroon: J. Ekedi-Samnik. Canada: A. A. Keyes; J. Corbeil. France: M. Bierry. Germany (Federal Republic): E. Ulmer; G. Kelbel; E. Born. Italy: G. Trolta; G. Pizzini (Mrs.); C. Ferro-Luzzi; G. Lo Cigno; G. Repetti. Netherlands: W. M. J. C. Phaf; E. van Weel; G. W. Ovink. Sweden: C. Uggla; G. Moore. Switzerland: F. Curchod; A. Hoffmann. United Kingdom: D. L. T. Cadman. United States of America: H. J. Winter.

II. Observers

1. States

Philippines: M. S. Aguillon. Poland: R. Tomaszewski.

* This Note has been prepared by the International Bureau on the basis of the documents of the meeting.

* A list containing the titles and functions of the participants may be obtained from the International Bureau upon request.

2. Intergovernmental Organization

Council of Europe: F. Hondius.

3. Non-Governmental Organizations

International Chamber of Commerce (ICC): D. A. Was; Ch.-L. Magnin; H. Aspden. International Federation of Patent Agents (FICPI): B. Pochon. International Literary and Artistic Association (ALAI): T. Limperg. International Typographic Association (A. TYP. I): J. Dreyfus; C. Peignot; M. Parker; W. P. Keegan.

III. WIPO

G. H. C. Bodenhausen *(Director General)*; J. Voyame *(Second Deputy Director General)*; K. Pfanner *(Senior Counsellor, Head of the Industrial Property Division)*; G. R. Wipf *(Counsellor, Head, General and Periodicals Section, Industrial Property Division)*; H. Warnier *(Legal Assistant, General and Periodicals Section, Industrial Property Division)*.

IV. Officers

Chairman: W. M. J. C. Phaf (Netherlands); *Vice-Chairmen:* G. Sellali (Mrs.) (Algeria); E. Dudeschek (Austria).

CONVENTIONS ADMINISTERED BY WIPO

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

FIJI

Accession to the Convention

The Secretary-General of the United Nations, by a letter dated March 21, 1972, informed the Director General of the World Intellectual Property Organization that the instrument of accession by the Government of Fiji to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961, was deposited on January 11, 1972, in accordance with Article 24(3).

The instrument of accession contains the following declarations:

(1) in respect of Article 5(1)*(b)* and in accordance with Article 5(3) of the Convention, Fiji will not apply, in respect of phonograms, the criterion of fixation;

(2) in respect of Article 6(1) and in accordance with Article 6(2) of the Convention, Fiji will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State;

(3) in respect of Article 12 and in accordance with Article 16(1) of the Convention,

(a) Fiji will not apply the provisions of Article 12 in respect of the following uses:

(i) the causing of a phonogram to be heard in public at any premises where persons reside or sleep, as part of the amenities provided exclusively or mainly for residents or inmates therein except where a special charge is made for admission to the part of the premises where the phonogram is to be heard,

(ii) the causing of a phonogram to be heard in public as part of the activities of, or for the benefit of, a club, society or other organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare, except where a charge is made for admission to the place where the phonogram is to be heard, and any of the proceeds of the charge are applied otherwise than for the purpose of the organization;

(b) as regards phonograms the producer of which is not a national of another Contracting State or as regards phonograms the producer of which is a national of a Contracting State which has made a declaration under Article 16(1)*(a)*(i) stating that it will not apply the provisions of Article 12, Fiji will not grant the protection provided for by Article 12, unless, in either event, the phonogram has been first published in a Contracting State which has made no such declaration.

Pursuant to Article 25(2), the Convention came into force for Fiji three months after the date of deposit of its instrument of accession, that is to say, on April 11, 1972.

GENERAL STUDIES

Video: A general survey *

by Franca KLAVER

Introduction

Video is much in the headlines at the present time. In the specialized periodicals and in the daily press, articles abound on this modern invention which would " revolutionize " our times and our communication media. Audio-visual techniques are gaining ground on the traditional processes — books, magazines, radio. Above all, audio-visual methods are being used in education to disseminate information much more rapidly and efficaciously. In the field of entertainment, the video-cassette is expected to offer to the general public a considerably wider choice of programs over radio and television.

On this threshold of a new era, the problems are piling up. Manufacturers of " hardware " are launching a variety of products; the customer is quite bewildered when it comes to deciding which piece of equipment to buy with a view to future use; and the manufacturers find it difficult to decide which is the most attractive " software " — to use computer terminology — that will persuade the customer to purchase the equipment. The problem is not easy to solve because the traditional producers of educational and entertainment material — film corporations, radio and television organizations, publishers — are also waiting to see how the situation develops before launching into a costly venture that might fail to yield all they hope for.

The role of the lawyer in all this, in particular the lawyer interested in problems of intellectual creation and authorship, should not be overlooked. The people concerned expect him to be able to answer the complex problems that arise in this hitherto unprospected domain. In this study, we shall try to contribute to the international discussion just commenced on the legal problems relating to this new invention [1].

We shall accordingly take as a starting-point for our examination the principal multilateral conventions in the field of copyright and the so-called neighboring rights: the Berne Convention, the Universal Copyright Convention and the Rome Convention on neighboring rights. These instruments afford a mutually agreed basis for many countries, and many provisions of domestic legislation have been inspired by them.

In close relation with these conventions, the legislation of several countries has been examined on certain points which seem essential. The picture is far from complete; one has to make a selection in order to highlight the wide range of possible solutions. Most of the legislation examined is from West European countries [2]. In the developing countries, the situation is very different and should be studied separately.

In the Netherlands, the legal problems relating to the " Video-Cassette-Recorder " (VCR) and other similar technical processes (EVR, " Selecta-Vision ", video disc, etc.) came under study on a priority basis in the autumn of 1971. There were two reasons for this. First, one of the principal hardware-producing firms, Philips (Eindhoven), has just brought out the " Video-Cassette-Recorder " (VCR); it was put on the market in early September 1971 and has attracted a great deal of attention from the general public, the press, future producers of software, and radio and television organizations. The second reason is that the work of revising the Netherlands Copyright Act, which was commenced in 1964, is nearing completion. The draft legislation has passed through all the preparatory stages and will be debated in Parliament this spring. It would be inconceivable to adopt a new version of the Act without taking account of new technical developments; some supplementary provisions have therefore been drawn up in order to settle this question in close relation with the other sound-recording or sound-and-image-recording processes (gramophone records, tape recorder, film, audio-visual recordings of all kinds).

In this study, we shall consider the various problems in the following order: the international conventions and the legislations of a number of countries will be examined from the three following aspects:

(a) the making of a video-program;
(b) the private use of a video-program;
(c) the public or semi-public use of a video-program.

At this juncture, it is necessary to explain how the term " video-program " has come to be used to designate this concept.

Terminology

The software intended for video-cassettes (and other similar products, such as video discs, cartridges, etc.), falls within the field of " audio-visual media ". This latter term is very broad: it covers any kind of fixation of sounds and images (mechanical, magnetic, electronic), in particular cinematograph films. The term " audio-visual fixation " [3] is there-

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* Memher of the Advisory Committee on Copyright (Ministry of Justice), The Hague.

1 G. Brugger, *Die neuen audio-visuellen Systeme* (Schriftenreihe der UFITA, Vol. 40, 1970); Seve Ljungman, " Copyright to the content of audio-visual cassettes ", speech made at the Audio-Visual Conference, Stockholm, Octoher 1970; Denis de Freitas, " Audio-visual systems ", in the periodical *Performing Right* (November 1970); Jean-Loup Tournier, " Authors' rights and claims in respect of videograms ", in *RIDA*, No. LXXI, January 1972, and K. Kawamura, " A report on the copyright prohlems of video packages in Japan ", in *EBU Review*, No. 127B, May 1971. See also the brief report on meelings held at Rome and Milan on prohlems relating to video-cassettes, published in the SIAE Bulletin of October 1970, and publications which appeared after the Cannes Conference on video-cassettes (April 19 to 23, 1971).

2 Because of the sources to which I had access.

3 This 1erm was introduced into the Berne Convention (Annex, Article III(7)*(b)*) and the Universal Copyright Convention (Article V[quater],

fore not appropriate for designating the new product that has just come onto the market. In order clearly to distinguish the software intended for video-cassettes and the like from other audio-visual media, tbe term " video-program " seems to me the most suitable. It implies that it covers a program of an (audio)-visual character and which is different from cinematograph films, on the one hand, and from radio or television programs, on the other hand [4].

The difference in relation to cinematograpb films lies in the fixation process, wbich is effected not onto film, but onto audio-visual tape or disc *(Bildplatte)* by means of an electronic process. The difference in relation to radio and television programs is that these need not be fixed — a great many programs are still transmitted " live ". On tbe other hand, video-programs are always recorded (which means that they can be used on several occasions). Radio and television programs pass through an organization that has been officially authorized to broadcast. Video-programs are autonomous — they are produced by independent firms and can be used by anyone.

According to present plans, the programs, recorded on video-cassette — or any like product — can be used as such by private persons, schools, undertakings, etc.; they can also be used on radio or television or by cable transmission. Particularly in countries having a cable network (whether country-wide or regional), one can expect the situation to develop to a point where the network will be fed witb the material contained in video-cassettes, etc., for transmission to the public [5].

Moreover, the tecbnical process used for recording sounds and images is not decisive for the legal problems to be solved [6]. The important thing, from tbe legal aspect, is that these are recorded programs, that is to say audio-visual material containing works that are protected by copyright [7] and have been fixed on a material which can be used (repeatedly) over television sets. As we shall see, this latter circumstance gives rise to important problems in the legal field, particularly as regards private use, reproduction for private use and the use of video-programs by educational establishments.

paragraph 3*(b)*) during the Paris revision (July 1971). It covers all processes for the fixation of sounds and images.

[4] G. Brugger, o*p. cit.*, p. 15, introduces the notion of " Kassettenfilm " or " Filmkassette ". Although one can agree with the " Film " part (see below under A.1) the " Kassette " part constitutes a limitation of the technical processes in question: it does not include either cartridges or video discs (or " Teldec "). The word " video " appears in most of the names of new processes (see Brugger, o*p. cit.*, pp. 17 to 21), and it is frequently used in the sector concerned.

[5] A cable network is already in operation, at national or regional level, in a number of countries (for example, the United Kingdom, Switzerland, the Federal Republic of Germany, Belgium, Canada, United States of America). In the Netherlands, it is expected that the network already existing, on an experimental basis, will be considerably extended in the near future, and that it will make intensive use of cassettes. With respect to the legal problems connected with cable transmission, see H. J. Stern, *Die Weiterverbreitung von Radio- und Fernsehsendungen* (Zurich 1970), and Franca Klaver, " Current developments in wire television ", in this review, 1969, pp. 56 *et seq.*

[6] G. Brugger, o*p. cit.* p. 29, arrives at the same conclusion. For this reason, the present article does not include any explanation about the various technical processes. Abundant material is available to the reader in the press and specialized periodicals.

[7] The draft international convention on satellites also uses the word " program " (for a definition of this term, see Article I(iv) of the draft).

A. The making of a video-program

The position of the author

1. Under the Berne Convention (revised at Stockholm, 1967)

The articles that can be applicable to video-programs are Articles 2, 9, 11, 11[bis], 14, 14[bis] and 15. From these provisions taken together, one can deduce certain principles that are internationally recognized (at least in the member countries of the Berne Union). The making of a video-program is permissible only with the consent of the authors or their successors in title (the likelihood being that the program comprises a number of " works " created by different persons — author of tbe texts, director, composer of tbe music, decorator, etc.). It also involves fixation, and the making of a number of copies of tbe fixation, in other words, a reproduction (Article 9).

These principles are also applicable in cases where the video-program is not made directly but is taken from a film (or some otber material — for example, a disc, book, periodical) already existing on video-cassette. Here the contract entered into as between the author and the producer of the film (or other material) is important: if the author or his representative (for example, an autbors' society) bas transferred his rigbt in respect of any technical process already in existence or yet to be invented, he bas no entitlement to claim anything whatever. If, on the other hand, the contract refers to specific technical processes (already in existence), then the author retains his right to authorize any reproduction on video-cassette.

What is less certain is the legal cbaracter of the end product resulting from the collaboration of tbe various authors concerned, and the authorship of tbat product. A reasonable interpretation, which already seems to have won recognition [8], leads to tbe conclusion that the video-program should be considered as a cinematographic work or, at least, as a work "expressed by a process analogous to cinematography " (Article 2). No doubt tbe fixation process and the manner of showing the video-program are often unlike those used in cinematograpby (tape — film; television set — projector), and the producers of video-programs (publisbers, phonogram producers, etc.) are not necessarily tbe same persons as the film producers. Nevertheless, in its audio-visual content the end product resembles a cinematographic work to such a point tbat the legal regime applicable to the latter (Articles 14 and 14[bis]) could well apply to video-programs also.

The Berne Convention, as revised at Stockholm, leaves full scope for this interpretation, " works expressed by a process analogous to cinematography " being assimilated to cinematographic works.

The Stockholm revision of the Berne Convention has clarified the protection of cinematographic works in many respects, but we cannot examine tbese in detail here. For the purposes of this study, we shall merely mention the new Article 14[bis] wbicb sets forth the principle that ownersbip of copyright in a cinematographic work is a matter for legislation in the country where protection is claimed (Article 14[bis](2)*(a)*). Tbus authorship of a video-program has to be

[8] Cf. G. Brugger, o*p. cit.*, and S. Ljungman, o*p. cit.*

defined, in principle, under domestic legislation. These definitions vary from one country to another (e.g. France, Italy, Federal Republic of Germany). Under the copyright legislation of some countries, authorship of a cinematographic work is determined on the basis of case law (Netherlands, Belgium). There is also the legislation which deems the producer to be the "author" of a cinematographic work (e.g. United Kingdom, Australia).

Article 14bis tries to simplify matters by providing an interpretative rule on contracts: normal exploitation of a cinematographic work is assured, in that, in the absence of any contrary or special stipulation, authors who have brought contributions to the making of the work are assumed to have given their consent. This provision does not apply, however, to the principal authors of the work (author of the scenario, the dialogue or the music) nor to the principal director — unless the national legislation provides to the contrary, so that most of the practical value of Article 14bis is lost. The article is in fact the result of a compromise that was arrived at with considerable difficulty at the Diplomatic Conference of Stockholm.

2. Under the Universal Copyright Convention

Under this Convention, the signatory countries are required to ensure "the adequate and effective protection" [9] of authors and other copyright proprietors in literary and artistic works (Article I). Cinematographic works are among the works cited by way of example. The Convention does not contain any definition of this term, nor does it contain the expression included in the Berne Convention: "works expressed by a process analogous to cinematography". Nevertheless, a reasonable interpretation leads to the conclusion that a video-program must be assimilated to a cinematographic work, having regard to the similarities between these two kinds of works.

If a video-program is thus eligible for protection in the same way as a cinematographic work, the content of such protection is much less certain than under the Berne Convention system. Article IVbis of the Universal Copyright Convention (as revised at Paris in 1971) mentions, *inter alia*, the right of reproduction, of public performance and of broadcasting; these are of importance throughout the audio-visual domain. Nevertheless, the definition of the precise scope and content of these rights is considered to be a matter for domestic legislation. In addition, paragraph 2 of Article IVbis allows any Contracting State to make exceptions to those rights such as "do not conflict with the spirit and provisions of this Convention". In any case, "a reasonable degree of effective protection" must be ensured [10].

[9] The Convention does not give a definition of what is meant hy this expression. According to the report on the 1952 Conference at which the Convention was adopted, these rights should include "those recognized in civilized countries" and extend, at least, to the right of reproduction, adaptation and puhlic performance (cf. A. Bogsch, *The law of copyright under the UCC*, p. 74). These rights, together with the right of hroadcasting, have been included in the Convention as revised at Paris (July 1971) in Article IVbis.

[10] The Report of the Conference for Revision of the Universal Copyright Convention (Paris, 1971) stales in this connection that the exceptions granted "must have a logical hasis and must not he applied arhitrarily, and thal the protection offered must he effectively enforced hy the laws of the Contracting State".

The Universal Copyright Convention does not give any definition of the author of a cinematographic work, so that this is left free for determination under domestic legislation.

Having regard to these provisions as a whole, we may conclude that, in the States party to the Universal Copyright Convention, the protection afforded to the authors of a video-program and to the program itself largely depends on the domestic legislation of the State where protection is claimed.

The position of the performer

3. Under the Rome Convention

It is well known that the protection afforded to performers is not comparable to that enjoyed by authors. Although under the Rome Convention (October 26, 1961) the performer enjoys a neighboring right, only a few countries have so far ratified that instrument (12). The "common ground" on which many countries reach agreement with respect to copyright is largely lacking where the rights of performers are concerned. All one can say is that a few countries, most of them European, have framed domestic legislation on neighboring rights, whether before or since the Rome Convention was signed (for example the Scandinavian countries, the Federal Republic of Germany, Austria, Italy), making provision for certain rights in favor of performers. In the United Kingdom, protection is afforded to the performer against any recording or broadcast without his consent, under an Act which provides penal sanctions for any infringement (Act of July 23, 1958, as amended by the Act of July 31, 1963). In some other countries (for example, France), case law has come to the rescue of the performer.

The principal question that arises here is the following: is it necessary to obtain the consent of the performer (or group of performers, for example an orchestra or a theater company) before putting together a video-program containing his (or their) performance? Under Article 7, paragraph 1*(b)*, of the Rome Convention, such consent is necessary: a "live" performance may not be fixed without the performer's consent. He is therefore protected against any unauthorized fixation of his performance; we must point out, however, that this protection exists in relatively few countries only.

This interpretation will not give rise to any serious difficulty from the practical aspect. In general, a video-program will be made in conditions specially created for that particular purpose. Just as in the production of a disc, special care must be taken in the making of a video-program; it will be effected in a studio or other suitable premises, the performer being requested to come there to make his contribution. The situation changes, however, if the producer of a video-program decides to include in his program a performance that has already been recorded on another material (e. g. disc or film). Is he entitled to do so without seeking the performer's consent?

The Rome Convention recognizes this right in principle, and indeed makes express provision for it in Article 7, paragraph 1*(c)*(ii). If there is any intention of reproducing on video-cassette a performance already recorded on another material, then clearly this is a case of a reproduction "made for

purposes different from those for which the performers gave their consent ". Yet Article 19 of the Convention provides an exception that largely invalidates the above-mentioned provision: once a performance has been incorporated — with the consent of the performer — in a visual or audio-visual fixation, Article 7 ceases to be applicable. If, for example, the performance has been included in a cinematograph film and is subsequently incorporated in a video-program, the performer will not be entitled to veto the operation. On the other hand, he is fully entitled to require that his consent be sought for any dubbing of a sound performance alone onto video-cassette, for example if a musical performance recorded on disc or tape is to be dubbed onto video-cassette [11].

It should nevertheless be borne in mind that the Rome Convention affords only a minimum level of protection (see Article 21), and more extensive rights may be provided under domestic legislation. Some countries that have legislation on " neighboring rights " afford greater protection to performers in this respect. It can be inferred from the Swedish Copyright Law, for instance (Article 45(2)), that a recorded performance may not be transferred from one instrument to another without the performer's consent within a period of twenty-five years from the year in which the first recording was made. The Austrian Copyright Law (Article 66(1)) recognizes a similar right.

There remains the possibility for performers to ensure protection to their rights by contractual means: if they make a contribution to a recording of any kind, they can stipulate in the contract that their contribution is valid solely for the technical process in question; in other words, the performance may not be re-recorded by any other process without their consent. Such a contractual provision is essential in all the countries that do not afford adequate protection to neighboring rights. As we have noted, however, it is not superfluous in the countries that have ratified the Rome Convention. As regards performances already recorded on film, Ampex, etc., any transfer of the performance onto video-cassette will then be made in accordance with the provisions of a contract or, failing any contract, in accordance with customary practice which, it seems to me, would involve the payment of an additional fee to the performer for this new use of his contribution.

The position of the producer of phonograms

4. *Under the Rome Convention*

The producer of phonograms (sound recordings) has no entitlement to author's rights either under the Berne Convention or under the Universal Copyright Convention. Nevertheless, in certain countries that are party to one or other, or both, of those Conventions, for example, the United Kingdom, Canada and Australia, and in countries whose legislation is based on that of the United Kingdom (for example, Ceylon, Cyprus, Ghana, India, Israel), the producer of phonograms holds a copyright; accordingly, in those countries he can object to any unauthorized use of his product.

The situation will not always be easy in the other countries [12]. Under the Rome Convention, the producer has the right to authorize or prohibit the direct or indirect reproduction of his phonogram (Article 10). When making a video-program, the producer thereof must therefore seek permission from the producer of any phonogram which he intends to include in it. In practice, the producer of phonograms and the producer of video-cassettes will often be one and the same person. Nevertheless, in view of the fact that the Rome Convention has been ratified by a limited number of countries and that only a few countries have legislation on neighboring rights affording protection to the producer of phonograms [13], the latter is not always protected against unauthorized copying [14]. He can sometimes find protection in the domestic legislation on unfair competition; but in view of the fact that the principles of such protection fall within the domain of industrial property, it would not be appropriate to examine them within the context of this article [15].

The position of the broadcasting organization

5. *Under the Rome Convention*

The legal position of the broadcasting organization is comparable, to some extent, to that of the producer of phonograms; it has no author's right, whether under the Rome Convention or the Universal Copyright Convention. Nevertheless in certain countries that are party to one or other, or both, of those instruments, the broadcasting organization is owner of a copyright; such is the case, for example, in the United Kingdom (Section 14) and Australia (Sections 91 and 99), and in these countries the broadcasting organization is entitled to object to any unauthorized fixation of its broadcast.

Under the Rome Convention, broadcasting organizations enjoy a neighboring right (Article 13); any fixation of their broadcasts is specifically subject to their authorization (Article 13, paragraph 1*(b)*). Their authorization must also be obtained for any reproduction of fixations, made without their consent, of their broadcasts (Article 13, paragraph 1*(c)*(i)).

Unfortunately, as we have already pointed out in connection with the rights of performers and of producers of phonograms, the Rome Convention has been ratified by only very few countries. That being so, the possibility for a broadcasting organization of being able to claim protection against unauthorized recording or reproduction of its broadcasts by producers of video-programs depends primarily on the

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[11] Article 19 may seem illogical. It was inserted in the Rome Convention for the benefit of the cinematographic industry. Cf. Records of the Diplomatic Conference, pp. 53 and 115.

[12] Except, of course, where the producer acts as the owner of a copyright derived from that of the author.

[13] For example, the Scandinavian countries, the Federal Republic of Germany, Italy, and Austria.

[14] There is no corresponding provision concerning producers of phonograms in Article 19 of the Rome Convention. This means that, where a producer of phonograms has given his consent for inclusion of his product in a film, his agreement is still necessary for any transfer onto video-cassette (unless otherwise stipulated in the contract).

[15] Cf. Article 10bis of the Paris Convention for the Protection of Industrial Property.

The new Convention for the Protection of Producers of Phonograms Against Unauthorized Reproduction of Their Phonograms (Geneva, October 29, 1971) provides protection for producers of phonograms by various means, *inter alia*, hy the legislation on unfair competition (Article 3). The Convention is not examined in this article, as it has not yet entered into force.

domestic legislation of the country concerned. Even in the absence of any provision to that effect, it would seem only fair for producers of video-programs to make some payment to the broadcasting organizations, having regard to the costs involved in the broadcast. In the event of any disagreement, broadcasting organizations could oppose any unauthorized use of their product, mostly on the basis of the copyright of their employee-authors.

6. Under the European Agreement on the Protection of Television Broadcasts

In connection with the rights of broadcasting organizations, it is relevant to mention — at least where Europe is concerned — the European Agreement on the Protection of Television Broadcasts, signed at Strasbourg on June 22, 1960. The Agreement provides for the protection of broadcasting organizations against any unauthorized fixation of broadcasts or reproduction of such fixation (Article 1, paragraph 1*(d)*). It thus affords effective protection against the unauthorized fixation of television broadcasts, but the protection is valid only in respect of a limited number of countries — members of the Council of Europe — which have ratified the Agreement (to date, 9 States). In these circumstances, domestic legislation or contractual relations will be of decisive significance as regards the protection available for broadcasting organizations.

The position of the film-maker

7. Under the Berne Convention

The film-maker and the producer of a video-program will often be one and the same person [16]. If such is not the case, the question arises whether the film-maker can object to a film being used in the making of a video-program. Under the Berne Convention, provision is made for protection against such unauthorized use: under Article 14[bis], a cinematographic work is protected as an original work, and the owner of copyright enjoys the same rights as the author of an original work. If the film-maker enjoys an author's right, or if he has obtained the right to use the work, or if he holds a copyright derived from the right of intellectual creators [17], he will be entitled to object to any unauthorized fixation of his film by a producer of video-programs.

8. Under the Universal Copyright Convention

Cinematographic works are expressly protected by the Universal Copyright Convention (Article I). As regards the content and scope of this protection, the reader may refer to what has already been stated above in connection with protection of the author (under A.2). Everything depends on the domestic legislation of the country in which protection is claimed.

[16] Several American film-makers (for example, 20[th] Century Fox) have already decided to put old hit films onto video-cassettes.

[17] The original copyright of the producer exists, for example, in the United States of America, Canada, the United Kingdom (Section 13), Australia (Section 90) and a number of other countries whose legislation is based on that of the United Kingdom (for example, New Zealand, India, Pakistan, Ceylon) and also in Poland (Article 13), etc.

In certain countries, e. g. Austria (Article 38), Italy (Article 45), the Federal Republic of Germany (Article 94), the producer enjoys the right of exploitation while being required to respect the rights of the artistic creators.

B. Private use of a video-program

1. The concept of " private " use

As we have already seen above, a video-program resembles a cinematograph film in several respects. In one particular aspect, however, it is likely to develop in a very different way from the cinematographic field — namely, where private use is concerned. A film is generally distributed by distributors, who are relatively few in each country and who make copies of the film available to the client against payment of an amount that is well below the cost of making a copy for private use. The situation is different for video-programs: it is simple and cheap to make a copy of a program with a " Video-Cassette-Recorder ", and therefore the general public is likely to make intensive use of this appliance. The question that arises is whether or not the copy, intended strictly for private use, is permissible.

The distinction between " private " or " personal " use, and " public " or " semi-public " use is important. The domestic legislation of most countries contains exceptions in respect of " private " or " personal " use, but in most cases fails to specify when such use occurs. From this legislation and case law taken as a whole, one can say that, as a general rule, a strict interpretation of the term is necessary. Whatever does not serve the personal use of a private person must be deemed to be " public ". The domestic legislation of some countries, however, provides exceptions for a special category that one could term " semi-public " (for an explanation of this term, see under C.1).

2. Under the Berne Convention

The Berne Convention (Stockholm and Paris texts) allows certain exceptions to the general rule that any reproduction of a protected work is permissible only with the author's consent (Article 9). The Convention is somewhat vague as regards the exceptions: it speaks of " certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the authors " (Article 9(2)). This wording leaves broad scope to domestic legislation. The Report on the Work of Main Committee I of the Stockholm Conference (paragraphs 78 to 86) contains an explanation on this subject, with a specific reference to private use. As the domestic legislation of most countries already provided an exception of this kind, the " post-Stockholm " situation did not change. What is new is the possibility for a decision of national legislators to leave this exception unimpaired with respect to reproduction of a video-program for private use, or alternatively to state that the exception would not be applicable in such case. Practical and economic considerations will have an influence on the decision.

Mention should be made here of the special provisions contained in the Copyright Act of the Federal Republic of Germany (Article 53(5)) concerning the remuneration payable to authors by the manufacturers of appliances for recording sounds or images. As protected works can be recorded and reproduced by means of these appliances, a fee — not to exceed five percent of the selling price — will be paid to the authors through the intermediary of the authors'

society (GEMA). To date, no solution of this kind has been introduced into the legislation of any other country. Nevertheless, it deserves full attention, because at any moment a "Video-Cassette-Recorder" (or similar appliance), with which recordings can be made for private use, is likely to appear on the market.

3. Under the Universal Copyright Convention

The Universal Copyright Convention, like the Berne Convention, does not contain any very specific provision regarding private use of a protected work. Article IV[bis], paragraph 2, contains a general clause: any Contracting State may, by its domestic legislation, make exceptions "that do not conflict with the spirit and provisions of this Convention", provided that it accords "a reasonable degree of effective protection"[18]. No doubt this clause allows an exception for private use to be made in domestic legislation.

As regards the implications of the provisions of domestic legislation regarding video-programs, the reader may refer to what has already been said above in connection with the Berne Convention (under B.2).

4. Under the Rome Convention and the European Agreement on the Protection of Television Broadcasts

These two instruments provide a specific exception in respect of private use[19]. Consequently, the protection that they afford to performers, producers of phonograms or broadcasting organizations may be limited by domestic legislation in the case of private use.

C. Public or semi-public use of a video-program

1. The concept of "public" or "semi-public" use

The problems referred to in this chapter are the most important ones, particularly from the practical aspect. The concept of "public use" can be sub-divided into three categories: 1. communication of a video-program to the public (a television set, installed in some public place — hotel, waiting-room, etc., — is fed by programs contained in a video-cassette); 2. television broadcast of a video-program (a broadcasting organization uses a video-program for its broadcasts); 3. transmission of a video-program by cable (a cable network uses video-cassettes for its programs).

By "semi-public use", I mean use for teaching purposes (school, university, post-university, etc.). I have chosen this term because use for teaching purposes constitutes a special category, which in the domestic legislation of some countries is dealt with separately from other forms of public use. In some international instruments too[20], special provisions are included to cover use for teaching purposes. This special treatment can clearly have an appreciable influence on the way in which the use of video-programs develops and even, in a more immediate future, on the attitude of the producers of such programs. Even now, the use of video-programs for teaching purposes is one of the most hotly-discussed topics in the circles concerned.

The position of the author

2. Under the Berne Convention

Under this Convention, the communication to the public of a video-program which — as we have seen above — is itself a protected work, is subject to the author's consent. If the video-program is to be treated as a cinematographic work or a work "expressed by a process analogous to cinematography" (Article 2), any public performance thereof is subject to the authorization of the author(s) or his (or their) successors in title, under the provisions of Articles 14 and 14[bis] of the Convention.

The televising of such a program is, in principle, also subject to the author's consent; nevertheless, provision may be made for compulsory licensing under domestic legislation (Article 11[bis]). The same rule applies to communication of a broadcast work by wire (cable) (Article 11[bis]). If the video-program is used directly by a cable network (without having first been broadcast by television), it would appear that Article 14 is applicable, and the compulsory licensing clause does not operate (Article 14(3)).

3. Reproduction. — If the legal regime provided by the Berne Convention in regard to public use seems relatively simple, it is less easy to draw conclusions regarding the semi-public use of video-programs. First of all, does private use — which we have just examined — also include reproduction by an educational establishment? Modern technical inventions will make it easy for such an establishment to hire video-programs and make the desired number of copies, all at little cost. The situation will be similar to the one we have today with respect to photocopying. If the same situation were to come about for video-cassettes, the software producer might find himself obliged to discontinue production of these programs, because the would be insufficiently remunerative. A new field, profitable for the author, would thus be lost.

The legislation of several countries contains fairly restrictive provisions regarding reproduction, sometimes even in the case of reproduction for private use. In the Scandinavian countries, for example, it is permissible to make a copy for private use, but not to use the copy for other purposes (see Article 11 of the Swedish Copyright Law). The French Law contains a similar provision (Article 42(2)). In the Federal Republic of Germany, according to the same principle, a copy may not be made by another person against payment in the case of a recording on a sound or (audio)-visual tape and of the copying of such a recording (Article 53(2)). These copies may not be distributed or used for public performances (Article 53(3)). Reference has already been made to the special rules concerning the remuneration payable to the authors by the manufacturers of sound and image recording equipment (Article 53(5)). The British Copyright Act contains some fairly restrictive and detailed provisions regarding (photo)co-

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[18] See note 10 above.

[19] Article 15 of the Rome Convention; Article 3, paragraph 1*(c)* of the Agreement.

[20] See, for example, the Universal Copyright Convention as revised at Paris (July 1971), Articles V*ter et seq.*, and the Annex to the Berne Convention as revised at Paris (July 1971), Articles II *et seq.* See also H. Wistrand, *Les exceptions apportées aux droits de l'auteur sur ses œuvres*, Paris 1968, pp. 242 *et seq.*

pies supplied by a library to persons using such copies for study or research purposes (Section 7). In the case of sound recordings or cinematograph films, copies may not be made, even for private purposes (Sections 12 and 13). The only exception allowed to this rule is in the case of the reproduction for private purposes of a program broadcast by radio or television. The Netherlands Bill (Article 16 *b*) does not allow copies to be made for private use by any third party. Copies made in connection with education or with an industrial undertaking must remain within reasonable limits and are subject to payment of an equitable remuneration (Article 17). All this legislation is based on the principle that a copy of this kind may not be made available to any third party, or used in any other way. These rules are fully consistent with the letter and the spirit of the Berne Convention as revised at Stockholm.

The legislation of some of these countries — for example the Scandinavian countries — nevertheless provides more favorable exceptions for educational establishments. The Swedish Copyright Law (Article 17) recognizes some possibility of recording or copying, by fixation of sounds, disseminated works in educational activities. The possibility is subject to certain restrictions: the copies may be made only for use within a limited period (three years), and commercial phonograms may not be copied except in the case of phonograms broadcast by radio or television. The copies thus made may not be used in any other manner. The question of copying a video-program for teaching purposes seems to be the subject of much discussion in the Scandinavian countries at the present time [21].

Under the Copyright Act of the Federal Republic of Germany (Article 47), recordings and copies (a limited number only) may be made of works broadcast in the context of a school broadcast. The tapes must be erased at the end of the school year; if not, the author is entitled to receive an equitable remuneration. According to the text of the article, this arrangement is applicable to sound recordings as well as audio-visual recordings.

The British Copyright Act (Section 41) also allows a recording or a copy to be made subject to certain conditions, the main one being that the recording is not made by a duplicating process, but by the teacher or the pupil himself. Of course, this wording excludes any recording on sound or audio-visual tape. The new Australian Copyright Act of 1968 (Section 200) contains a provision similar to that of the United Kingdom.

4. Performance. — One question closely linked with the above is the following: is it permissible to use a video-program within an educational establishment, without obtaining authorization from the author or his successors in title? In other words, should the use of a video-program in the context of teaching be deemed to be a " public performance ", or is a special arrangement applicable? The Berne Convention affords no clear reply to this question. In principle, authorization by the author is required for any public performance of a protected work (Articles 11 and 14, 14[bis]). Provision is nevertheless made in the legislation of some countries for " minor reservations "; this term was used by the Brussels Conference (1948) [22] and it includes, *inter alia*, " the requirements of education and popularization ". At the Stockholm Conference, it was decided not to touch these " minor reservations " as far as they concern the exceptions to copyright which are traditionally agreed upon [23].

Having regard to the use of video-programs in education, one may wonder whether it is appropriate today to speak of " minor reservations " in connection with a phenomenon as far-reaching as education. Here there are two conflicting opinions: the one considers education as being a public utility of prime importance which over-rides any other consideration — for example, the author's rights in books and other teaching media; the other contends that education, while being of prime interest for society, must not proceed at the author's expense, and that accordingly teaching manuals and audio-visual media intended for educational use do not enjoy any special status where author's rights are concerned [24].

Generally speaking, the domestic legislations cited above (in C.3) which provide certain possibilities for the recording or reproduction of published works by fixation of sounds or images also allow — within certain limits — the " performance " of such recordings for teaching purposes. They do not entirely coincide, however, as regards any performance of a film in the context of education. Under the British Copyright Act (Section 41(3)) a protected work may be performed in a school subject to certain restrictive conditions, and this possibility also applies to " performance " of a film (Section 41(5)). The Swedish Copyright Law, on the other hand, expressly stipulates that the possibility of using a work in the context of education does not extend to performance of a cinematographic work (Article 20(3)). The Copyright Act of the Federal Republic of Germany also contains a provision (Article 52(2)) stipulating that any public performance of a cinematographic work is subject to the author's consent. In the context of education, this means that in general " performance " of a film in a class-room will be allowed (not being " public " — cf. Article 15), but that it will be subject to the consent of the author (or his successor in title) in all other cases — for example, university courses or school festivities [25]. The exception provided in Article 47(2) already mentioned above will be applicable to the performance of a video-program broadcast in the context of a school broadcast.

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[21] Cf. S. Ljungman, *op. cit.*

[22] See Documents of the Brussels Conference, p. 100.

[23] See the Report on the Work of Main Committee I of the Stockholm Conference (paragraphs 209 and 210). See also H. Wistrand, *op. cit.*, pp. 57 *et seq.*

[24] See on this subject H. Wistrand, *op. cit.*, pp. 243 *et seq.* The developing countries are, of course, in an exceptional situation in this respect.

[25] G. Brugger, *op. cit.*, pp. 36 to 42, expresses the view that the use of a video-program by an educational establishment does not constitute either reproduction or " public " performance. This opinion, for which he refers back to von Gamm (*Urheberrechtsgesetz*, 1968, concerning Article 15, paragraph 3) seems to me open to question. It is difficult for me to imagine that the students in a university, for example, form a " closed circle " and are " linked together by personal relations ".

5. Under the Universal Copyright Convention

Under this Convention, the right to authorize reproduction and public performance of a protected work is among the basic rights of the author (Article IV^{bis}). However, any Contracting State may, by its domestic legislation, make exceptions " that do not conflict with the spirit and provisions of this Convention " (Article IV^{bis}, paragraph 2). " A reasonable degree of effective protection " must be accorded to each of the rights to which exception has been made (Article IV^{bis}, paragraph 2). Consequently, it is principally a matter for the domestic legislation of each State party to the Universal Copyright Convention to establish the level of protection to be accorded to video-programs.

On the occasion of the recent revision of the Universal Copyright Convention at Paris (July 1971), a special provision concerning " audio-visual fixations " was adopted for the benefit of developing countries. This provision (Article V^{quater}, paragraph 3*(b)*) allows, in certain conditions, audio-visual reproduction of " lawfully made audio-visual fixations " including any protected works incorporated therein, provided that the audio-visual fixations were prepared and published " for the sole purpose of being used in connection with systematic instructional activities ". For these countries — and these countries only — the Convention expressly allows reproduction, for example, of a video-program made for the sole purpose of being used in connection with instructional activities. The conditions attaching to such reproduction are enumerated in Articles V^{bis} and V^{quater}. Similar provisions were adopted by the Diplomatic Conference for the Revision of the Berne Convention (July 1971) [26]. That is an exceptional arrangement, however, in favor of the developing countries.

The position of the performer

6. Under the Rome Convention

As we have seen above (under A. 3), in a few countries the performer enjoys certain neighboring rights, and these can extend farther than the minimum rights provided under the Rome Convention. Under Article 19, the performer has no right to refuse his consent to the public use of a video-program containing his performance, if it was incorporated in the program with his consent. Nevertheless, there is nothing to prevent the inclusion in the contract between the video-program producer and the performer of certain clauses concerning the (public or semi-public) use of the program. In countries having legislation on neighboring rights, provision could be made for protection of the performer against such use. To our knowledge, there is no domestic legislation on neighboring rights which entitles the performer to give his authorization in such case. In the Federal Republic of Germany, where in principle an equitable remuneration is provided in the case of broadcast or public communication of a performance recorded on a sound or audio-visual recording (Article 76 and 77), such protection is specifically excluded in the case of a filmed performance recorded with the performer's consent (Article 92). The Swedish Copyright Law, on the other hand, does not give performers any rights in respect of secondary use in the event of a public (or semi-public) showing of their filmed performance (Article 47).

The position of the producer of phonograms

7. Under the Rome Convention

As in the case of performers, the producer of a phonogram which has been incorporated in a video-program with his consent may not oppose the public or semi-public use of that video-program. Article 12 of the Rome Convention grants him a right only in the case where his phonogram is communicated to the public or broadcast direct. Contractual relations can, of course, provide exceptions from that rule. Under national legislation which grants protection to producers of phonograms as a neighboring right, provision is made for equitable remuneration if the phonogram is broadcast or communicated to the public. Nevertheless, the Copyright Act of the Federal Republic of Germany grants this right only in the case of a phonogram containing an artistic contribution, the producer then having a right *(Anspruch)* as against the performer (Article 86). As the performer has no protection in respect of communication to the public of a performance that was filmed and recorded with his consent (see above, in C.6), the possibility does not apply in such case. The Swedish Copyright Law expressly states that the producer of phonograms has no entitlement by virtue of secondary use in the case of public (or semi-public) use of a sound-track film (Article 47).

On the other hand, in those countries which grant copyright protection to the producer of phonograms (see above, under A.4), he would, in principle, be entitled to object to any public or semi-public use of his phonogram incorporated in a video-program. Nevertheless, certain limits are set (cf. Sections 12, 40 and 41 of the British Copyright Act and Sections 97, 108, 109 and 200 of the Australian Copyright Act).

The position of the broadcasting organization

8. Under the Rome Convention

The position of a broadcasting organization whose broadcast has been incorporated in a video-program is governed by Article 13 of the Rome Convention. This article grants protection, subject to certain conditions, to broadcasting organizations in the event that their television broadcasts are communicated to the public (sub-paragraph *(d)*), but the text is not very clear as regards the question whether this provision is likewise applicable in the case of communication to the public of a video-program containing a television broadcast. The legislation of the Federal Republic of Germany (Article 87), and Sweden (Article 48), is not explicit on this point.

In those countries which grant copyright protection to broadcasting organizations (see above, A.5), a broadcasting organization can object to public or semi-public use of any of its television broadcasts which has been incorporated in a video-program, subject to the conditions prescribed by law (cf. Sections 14, 40 and 41 of the British Copyright Act, and Section 91 of the Australian Copyright Act).

[26] See Annex to this Convention, Articles I, III and IV.

9. Under the European Agreement on the Protection of Television Broadcasts

The Agreement makes provision for protection for the broadcasting organization against re-broadcasting, wire diffusion or public performance with the aid of fixations or reproductions, except where the organization owning the copyright has authorized the sale to the public of those fixations or reproductions (Article 1, paragraph 1*(e)*). Thus, the broadcasting organization is protected against any unauthorized use of video-programs containing televisions broadcasts. As we have seen above, however, this protection is valid only for a limited number of countries (9). Consequently, domestic legislation and contractual relations retain their full importance in this field.

The position of the film-maker

10. Under the Berne Convention and under the Universal Copyright Convention

In view of the fact that the film-maker has, in general, an original copyright, a right to exploit the film, or a copyright derived from the right of authors (cf. A.7 above), he is in fact protected — in the countries members of the Berne Union — against public or semi-public use of his film incorporated in a video-program. In countries which have not jointed the Berne Union but are party to the Universal Copyright Convention, the content and scope of the protection afforded to the film-maker mainly depends on the domestic legislation of the country in which protection is claimed (cf. A.8 above). And since the producer of video-programs is in a position similar to that of the film-maker, these conclusions also apply to producers of video-programs.

11. Some concluding remarks on protection of the producer of video-programs

One interesting aspect, particularly in connection with the semi-public use of a video-program, is the question whether or not the producer of such a program can exercise control over the market for his product. In general, the Berne Convention does not recognize any " right to distribute " a work; but Article 14 of the Convention concerning rights in cinematographic works, specifically, gives such a right to the authors of the work.

This fact is important: present expectations are that video-programs will mostly be rented (rather than sold) to the public and to educational institutions. The " right of distribution " means, in countries that are members of the Berne Union, that the manufacturer — subject, of course, to the conditions prescribed by the domestic legislation of the country concerned — may control the market and impose his conditions, and that in practice a " public lending right " could result therefrom. This situation differs considerably from that at present obtaining in respect of books; for these, a lending right is granted in only very few countries, and in such cases is frequently outside the context of the copyright legislation. By way of example, one may mention the Swedish legislation. The " right to control the work " is recognized, among the author's exclusive rights, in Article 2 of the Copyright Law. Yet Article 23 of the same Law recognizes full freedom to distribute or publicly exhibit the copies of a published literary or musical work, thereby denying the right of distribution or public lending right in respect of those works [27].

The Universal Copyright Convention does not recognize any right of distribution or public lending right.

12. Moral rights

The Berne Convention specifically gives moral rights to the author (Article 6^{bis}). This right includes the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, which would be prejudicial to his honor or reputation. The authors of works incorporated in a video-program, and likewise the owner of copyright in the program, can invoke these moral rights in the countries that are members of the Berne Union: the authors can invoke it vis-à-vis a video-program producer who wants to include a work with unauthorized modifications; and the producer can invoke it vis-à-vis a third party (for example a broadcaster) who uses his product in a manner prejudicial to his reputation (for example, deletion of essential passages, grossly inaccurate translation of texts; unauthorized insertion of publicity). The means of redress for safeguarding moral rights are governed by the legislation of the country where protection is claimed (Article $6^{bis}(3)$).

The Universal Copyright Convention recognizes limited moral rights to the author in the context of translation (Article V, paragraph 2*(d)*, and *(e)*). No moral rights are recognized by either the Rome Convention on neighboring rights or the European Agreement on the Protection of Television Broadcasts.

Nevertheless, having regard to the fact that these instruments provide only a minimum of protection, provision can be made in domestic legislation for more extensive rights in the field of moral rights also.

Conclusions

In conclusion, one can state that the international conventions in the field of copyright contain provisions that are sufficient to protect video-programs, their authors and their producers and — at least for the moment — there is no need for any revision for this purpose. The legal position of a video-program producer is comparable to that of a film-maker where protection is concerned; the rules applicable to cinematograph films can be applied to video-programs.

It is difficult, nevertheless, to state any precise opinion regarding protection as a whole in all countries, because of the fact that the international conventions — in particular the Universal Copyright Convention — leave considerable latitude to the domestic legislation of each country for defining the content and scope of protection. Even under the Berne Convention — the most comprehensive of the conventions — considerable leeway is left to domestic legislation and

[27] A public lending right is indeed recognized, under a Royal Decree of November 23, 1962, as subsequently modified by a Royal Decree of May 6, 1970. See also H. Wistrand, *op. cit.*, p. 66 *et seq.*

in regard to the " limits ", " exceptions ", " conditions " or " reservations " which may have been, or may be, prescribed therein with respect to the rights recognized by the Convention.

This is the case in particular in the field of education and teaching, where the video-program will be playing an important role in the near future. The concept of " private " use — which is to be found in all the multilateral conventions mentioned above — also leaves loopholes in the protection afforded. These two factors could be detrimental to video-program producers and to the intellectual creators whose works they use, and could impede rapid development of this new invention.

In the field of neighboring rights, the protection afforded to those who, while not having the status of " authors ", make contributions — sometimes major contributions — to video-programs (performers or broadcasting organizations) leaves a good deal to be desired. Because of the fact that the Rome Convention has been ratified by only a few countries, this protection is still governed by national legislation which, in most cases, has made no provision for it.

Generally speaking, it is therefore to be hoped that those responsible for framing domestic legislation will carefully study the new phenomenon of " video " and will take all appropriate measures to take account of all the interests concerned.

CORRESPONDENCE

Letter from Romania

Analysis of Copyright Case Law

by Ovidiu IONAŞCU *

In the August 1970 issue of this review, the fundamental principles of copyright [1] were published under the heading "Letter from Romania" and there was an exposé under the heading "General Studies" on cinematographic works and copyright in Romania [2].

We propose in this "Letter" to make an analysis of copyright case law in the Socialist Republic of Romania.

The Romanian Copyright Law promotes intellectual creation and ensures the proper utilization of authors' creative activity, the dissemination of their works, fair remuneration for their creative effort and the protection of their personal, non-pecuniary rights.

Decree No. 321/1956 — the basic legislative text on copyright — which was supplemented and amplified by "Standards for the Remuneration of Authors and the Establishment of Tariffs and Modes of Payment", approved by Council of Ministers Decision No. 632/1957, has given rise to much discussion in the course of 15 years of application as to the interpretation of some of its provisions. Differences of opinion have to a certain extent been settled by judicial and arbitral decisions during that period, although some provisions did not progress beyond the interpretative discussion stage and now provide *de lege ferenda* material for a future improvement of copyright legislation.

In this "Letter" we considered it necessary to look into Romanian court decisions in the copyright field, in other words the solutions found by the judiciary or by arbitral bodies to certain fundamental copyright problems, and to draw conclusions from the analysis of certain aspects of those solutions which might be conducive to new interest in the proper understanding of copyright law in Romania.

1. The concept and purpose of copyright; authorship and the inviolability and proper utilization of intellectual works

Copyright in an intellectual work — the result of the creative activity of an author — exists from the moment the work takes the form of a manuscript, sketch, plan, painting or other concrete form (Article 2 of Decree No. 321/1956). The person having created the intellectual work is deemed to be the author, even if that person has not concluded a copyright exploitation contract, in the same way as the conclusion of a contract in respect of the anticipated creation of an intellectual work does not give rise to copyright.

The determining factor in the concept of copyright is the "intellectual creation" of the work and the "originality of the intellectual work", which must reflect the personality of the author.

In its civil decision No. 3858/1967 — in a case which involved the problem of defining the owner of copyright — the Municipal Tribunal of Bucharest (College VI) ruled that the conclusion within a research institute, by a salaried employee of that institute, of a publishing contract relating to a work containing various studies carried out by other employees does not confer copyright on the first employee unless, in his capacity as chief editor, he has exercised a creative activity in the production of the work which is the subject of the contract.

In this instance the Tribunal was right in not admitting the authorship of the employee who entered into the publishing contract, in view of the fact that the chief editor of a work is responsible for its editing, and that his activity is confined to coordinating the work in such a way as to give it unity, but without thereby making a personal creative contribution to the production of the intellectual work itself.

Works which are not the subject of copyright are those which involve no intellectual creation (telephone directories, diaries, calendars, catalogs, prospectuses, timetables, market price lists, etc.) or resulting from the activity of certain persons such as a technical editor, the compiler of a book, or technicians in cinema, broadcasting and television studios and mechanical recording organizations.

In the case of the plastic arts, the subject of copyright is not only the artistic creation itself but also the physical object in which that creation is materialized; the author has in such case both copyright and the right of ownership. Assignment of reproduction, multiplication and distribution rights does not imply transfer of the right of ownership in the original of the work, in the same way as transfer of the right of ownership in the original does not at the same time constitute assignment of reproduction, multiplication and distribution rights, unless otherwise agreed (Article 22 of Decree No. 321/1956).

In subscribing to this view, the Municipal Tribunal of Bucharest stated that when the author of a work of sculpture donated to a friend of his the original statue conceived, executed and perfected by him, this meant that he had only transferred the right of ownership in the original — in other words the physical object in which the work is materialized — and not the right to exploit this work by reproduction, multiplication or distribution, in so far as it was beyond doubt

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[1] Aurelian Ionaşcu, "Copyright in Romania", in *Copyright*, 1970, pp. 131 to 135.

[2] Ovidiu Ionaşcu, "Cinematographic works and copyright in the Socialist Republic of Romania", *ibid.*, 1970, pp. 123 to 129.

that donor and donee had not entered into an agreement stipulating the contrary.

Where the donee has received certain sums of money as a result of the exploitation of the original work, he must refund them to the author, because the work donated is an original blend of a set of ideas, an individual conception made manifest in the work and in which only the creator of the original work can have copyright.

What should be emphasized is the fact that, by transferring the material object of his artistic creation, the artist transfers only the right of ownership in that object, and preserves the right to the inviolability of the work and its use in accordance with its nature, as well as the right of disposal in respect of its reproduction, multiplication and distribution (Article 3(4) and (5) of Decree No. 321/1956). These are prerogatives which belong only to the author and cannot be transferred, even in the event of the author's death. The solution in this case, that of obliging the donee who received the original work to refund to its author all monies received by him as a result of the exploitation of the work, is based on the principle according to which only the author has the right to derive economic benefit from the reproduction and multiplication of his work *(dominium utile)* a right which passes to his heirs on his death.

In its civil decision No. 815/1967, the Supreme Court stated that a work of plastic art which is unique may not undergo restoration without the consent of the artist who created it, and, with reference to the case before it, that when the condition of the work had deteriorated, but not to the state of complete defacement, the artist had the right to undertake restoration himself, thereby recreating the initial artistic identity of the work, for which partial artistic restoration he was entitled to appropriate remuneration. The intellectual work reflects the personality and original conceptions of its author, being the expression of his own artistic ideas.

Any modification, deformation, alteration or distortion of an original work would be an infringement of the right to inviolability of the work, and of the personality of the author himself (Article 3(4) of Decree No. 321/1956). The author is accorded the right to claim authorship of the work and to object to any distortion, mutilation or other modification of the work, or any other derogatory action in relation to the work, which would be prejudicial to his reputation. The respect of the moral rights of the author as far as the preservation of the authenticity of his work is concerned can only be achieved by restoration of the damaged work — such damage being due to weather, accident, disaster, etc. Restoration can only be carried out by the author of the work who, having an idea of his creation, is the only person able to recreate the work originally conceived by him. For this restoration the author receives remuneration according to the criteria established by the "Standards for the Remuneration of Authors".

What happens when a work of plastic art has deteriorated and cannot be restorated by its author, the latter having died in the meantime?

The authenticity of a work and its proper use after the author's death is vouched for by authors' unions or associations; this solution is derived from the principle according to which the personal, non-pecuniary rights of an author lapse on his death, yet continue to be protected thereafter (Article 56 of Decree No. 31/1965). In the event of defacement or deterioration of a work of plastic art after the death of its creator, the task of repairing the damage devolves on specialized artists and restorers who, in agreement with the Union of Authors of Works of Plastic Art of the Socialist Republic of Romania, have to restore the work to its original state, at the same time preserving its authenticity and originality.

The author's right to permit the use of his work by others is a personal, non-pecuniary right which belongs to him personally, and the work may not be used by third parties without the author's consent[3].

The author's consent is not required in the cases provided for in Articles 13 and 14 of Decree No. 321/1956, and also Article 16 which deals with intellectual works created by an employee in compliance with obligations under his employment contract[4].

In its civil decision No. 2931/1969, the Municipal Tribunal of Bucharest upheld civil decision No. 2129/1969 of the Justice of the Peace of Sector IV of Bucharest, who had accepted the suit of S.V.O., plaintiff, against the Special Office for the Publication and Distribution of Stamps in Bucharest, and obliged the latter to pay damages and refrain from printing postcards bearing reproductions of the artist's works of plastic art without his consent.

Works of plastic art may lawfully be photographed, copied or reproduced in any other manner without the consent of the author and without payment of any compensation in so far as such reproductions are not sold for value (Article 14*(j)* of Decree No. 321/1956). In the case referred to here, however, the work of plastic art had been so exploited, in that it had been reproduced on postcards sold by post offices and other postal distribution establishments.

We consider that the Justice of the Peace should have obliged the Special Office for the Publication and Distribution of Stamps to withdraw postcards already on the market bearing the reproduction of the work of plastic art, in accordance with Article 3(3) of Decree No. 321/1956, which gives the author the right to require that third parties discontinue the action taken without his consent.

In connection with plagiarism, the court must order the publication of its decision declaring usurpation of authorship or appropriation of the work of another, and order the offending party to refrain from publishing and distributing the work in question.

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[3] In this connection, see A. Ionaşcu, N. Comşa and M. Mureşan, *Dreptul de autor în Republica Socialistă România* [Copyright in the Socialist Republic of Romania], Ed. Academiei, Bucharest, 1969, p. 94; C. Statescu, "Prohleme în legătură cu contractele pentru valorificarea dreptului de autor" [Problems relating to copyright exploitation contracts], in *Revista română de drept*, No. 5/1968, pp. 29 and 30.

[4] See Ovidiu Ionaşcu "Particularităţile contractului de muncă în cazul operelor intelectuale create de salariat în cadrul obligaţiilor de serviciu" [Characteristics of the employment contract with respect to intellectual works created by the employee in connection with his service ohligations], in *Revista română de drept*, No. 9/1970, p. 33, and also "Copyright in works of the mind created under contract of employment in Rumania", in *Revue internationale du droit d'auteur*, No. LXIX, July 1971, pp. 2 to 42.

In cases of plagiarism, the person having claimed authorship of an intellectual work is not entitled to remuneration under any contract he may have entered into: any monies so received must be repaid.

2. Acceptance of the intellectual work

In its civil decision No. 18/1962, the Supreme Court stated that the authors of a literary scenario intended for the production of a cinematographic work were not entitled to remuneration under their contract until the management of the cinema studio had accepted the scenario as being satisfactory — taking into account the authors' observance of indications, instructions and recommendations which it had given them — the management alone being competent to assess the quality of the scenario and whether it met the requirements of the production. The Court pointed out that in such a situation an expert's report would not be conclusive, since only the cinema studio was in a position to decide whether the scenario was satisfactory.

In order to establish the criteria according to which a scenario may be considered satisfactory and, accordingly, suitable for acceptance by the cinema studio, some additional details are called for.

The scenario must contain a full description of the action, together with the dialogue and titles, and must constitute a finished work. Where there is a contract commissioning a scenario, it must specify a date for the delivery of the scenario based on a written draft, duly approved by the studio management. The latter may insert certain special clauses in the contract relating to the theme or length of the scenario, the number of special subjects to be filmed, the location of the action, a description of the characters, etc.

Refusal of the scenario is a step which may be taken only by the director of the cinema studio in his capacity as organ of the legal entity, exercising the rights vested in him by its statutes (however, the studio director may delegate his powers either to the assistant director or to the chief editor of the studio) [5].

As far as the quality of the work and the skill with which it has been executed are concerned, we are of the opinion that an expert's report cannot be refused if the author has carried out his task conscientiously, using all the means and resources at his disposal. The assessment should be made in relation to the personality of the author who was considered at the time of entering into the contract, the artistic level achieved by him, and his skill and experience. In the event of a dispute, this assessment should be made by the court after consulting the experts or their report.

We consider that if, after the author has made corrections and alterations to the scenario, the studio management finds that the result has a certain value with regard to material, research, dramatic conflict and characterization, but lacks sufficient cinematographic quality, and that the author has not the talent, skill and forcefulness required to bring the scenario up to the "optimum level", then the studio should have the possibility of enlisting the aid of a third party for the final completion of the scenario, subject to the agreement of the author.

When the work is refused and cannot be completed by a third party, the author has the right to keep any advances paid to him, except where refusal is due to a fault on his part (Article 20(2) of Decree No. 321/1956).

In its civil decision No. 1106/1955, the Municipal Tribunal of Bucharest, Section II, held that an agreement in terms of which a painter undertook to execute a painting was a contract of a special kind, according to which ownership of the painting was transferred on its being received and accepted. When acceptance of the painting is refused, the court to which the matter is referred must first establish the terms of the offer and its acceptance before deciding whether the painting corresponds to reality as agreed by the contracting parties, and also whether they agreed to restrict the personality of the artist during the execution of his creative work. The court maintained that the painter had to fulfil his obligation, in other words execute the painting, conscientiously, diligently and to the best of his artistic ability. Consequently, if the painter has executed a painting which meets the normal standard of his art, and if in his creative work there is no evidence of lack of diligence, conscience or artistic ability inferior to that usually demonstrated by him, the contract may not be terminated and the painter is entitled to the payment owed him for the finished work. If the agreement entered into by the parties contains a clause limiting the artist's freedom of artistic expression, his personal conception and his artistic vision, he is bound to respect that clause. If, however, there is no provision in the agreement between the parties which limits the painter's artistic expression, he enjoys complete freedom of creation within the limits of his artistic ability. The choice of method, the design, the interpretation of characters and the colors become a matter of artistic license, to be determined by the personality of the painter, who after all is not a mere photographer. In the case of an imposed subject, he is bound to treat it according to his own artistic conceptions, leaving on it the mark of his personality. These are elements which cannot be verified by experts, who themselves are artists with conceptions peculiar to their own artistic personalities, and the characteristic feature of any artist is to have a set of subjective values which differs from any other.

Bearing in mind the principle of the freedom of artistic conception and expression and the originality of intellectual creation — which cannot be restricted without the consent of the creator of the work — the decision mentioned above reflects a correct application of the fundamental principles governing the role of copyright in the promotion of intellectual creation.

3. Pecuniary rights of the author in the reproduction or performance of a work

Article 3(5) of Decree No. 321/1956 provides for the right of the author to derive economic benefits from the reproduction, distribution or performance of the work created by him, or from any other lawful method of using such a work. An exception to this principle is provided for in Article 14*(b)* of the same Decree No. 321/1956: it is allowed, without the con-

[5] In this connection, see Ovidiu Ionaşcu, "Cinematographic works and copyright in the Socialist Republic of Romania", in *Copyright*, 1970, p. 127.

sent of the author and without payment of any remuneration, but with due regard for all his other rights, to perform a work after the work has been made known to the public and if it is intended for certain specific purposes (such as use in connection with normal activities of schools and mass organizations, as well as cultural associations and cultural establishments, in the cases and under conditions specified in a Council of Ministers decision).

For the use of a literary or musical work with a view to its performance, the author is entitled to royalties, irrespective of whether the performance is direct or by means of recording or mechanical, electromagnetic or any other kind of transmission (Article 70 of the "Standards" mentioned earlier, approved by Council of Ministers decision No. 632/1957).

In addition, Article 77 of the "Standards" provides that, for music communicated to the public hy loudspeakers or hy other mechanical means, no performance fee is payahle unless the transmission is made for profit-making purposes and with the aid of special installations (radio relay stations or transmitters connected to a radio receiver). The same Article further states that music transmitted in puhlic places hy means of radio and phonographic equipment, without other transmission equipment, is not subject to any performance fee.

Finally, in Table No. 8, annexed to Chapter B, Section III of the "Standards", a tariff is estahlished for music transmitted for the profit-making purposes hy loudspeakers or other mechanical means. There is a note at the foot of the table stating that in the case of Romanian folk dances, cultural and artistic events in cultural establishments, schools and mass organizations, where entrance is free of charge, no performance fee is payable.

It follows from the above that, for the performance fee to be payahle in respect of music transmitted hy loudspeakers or other means, the following two conditions must he met: (1) transmission must be for profit-making purposes, and (2) it must he made by a radio relay station or hy loudspeakers connected to a radio receiver.

The State Arhitration of the Municipality of Bucharest endorsed this interpretation when it upheld the action hrought by the Union of Composers of the Socialist Repuhlic of Romania against certain firms dealing in foodstuffs and industrial products, and ordered the latter to pay royalties on music played in premises such as restaurants, shops, etc.

In such cases the music played does have a profit-making character in that its use, considering the purpose of the business activity concerned, is a means of attracting and retaining the puhlic hy creating a pleasant atmosphere conducive to the purchase of greater quantities of goods or to the good humor of restaurant patrons, thereby contrihuting to an improvement in takings and consequently profits also.

With regard to screen publicity in cinemas, the firm henefiting from the publicity pays fees to the cinema management and the latter projects the puhlicity material with musical accompaniment. The fact that this is done for profit-making purposes and involves the use of special equipment leads us to conclude that the playing of the music is subject to the payment of performance fees.

On the other hand, the Central State Arbitration has established that the playing of music for the benefit of the puhlic by radio relay stations as part of programs devised hy puhlic advice studios has no profit-making purpose in view of the fact that no entrance fee is charged: the programs form part of a system of mass cultural hroadcasting, for which the State Radio and Television Broadcasting Committee pays the appropriate royalties. This argument is further supported by the fact that the Post, Telegraph and Telephone establishments to which the radio relay stations belong are public service estahlishments, and the fees they charge for radio and television licenses represent payment for services rendered (installation of radio relay equipment, repairs, maintenance, etc.). In any case the principle of specialization would prevent them from undertaking other activities such as the organization of music programs and deriving any profit therefrom.

Still on the same line of interpretation, we consider that no royalties should he paid for music played in cinemas as accompaniment to trailers of forthcoming films, in view of the fact that in such cases the music is not played for profit-making purposes: the entrance fee is charged for the cinematographic performance considered as a whole. This absence of any profit-making purpose is the reason for which no royalties are payahle for the playing or retransmission of music during work in schools, institutions, firms, manufacturing estahlishments, factories and workshops, as well as in clubs and in theaters and cinemas before the performance or during intermissions.

In a dispute hetween the Union of Composers and the "Athénée Palace" Hotel and Restaurant Management Company in Bucharest, the Central State Arbitration ruled that, where music was used to accompany certain variety shows specially presented at the bar of the establishment, for a charge, royalties were to he paid at the rate of 8.5% of the gross income from the sale of tickets, not counting the fee payahle for the actual playing by the orchestra of the music at the restaurant. The principle which may he deduced from this decision is that the royalties payable for music are determined in relation to the type of work performed (stage shows, variety shows, hallet music, entertainment music performed live or using loudspeakers or any other mechanical means, for a profit-making purpose), irrespective of the place in which the performance takes place. When the entrance charge for these shows includes the price of a drink, the rate is applied only to the difference hetween the entrance charge and the price of the drink.

The Municipal Tribunal of Bucharest rules that for the photographic reproduction on picture postcards or on simple or folding greetings cards of certain works of plastic (decorative) art, the creator of the original work was entitled to royalties at 6% of the sale price of the cards, up to an amount not exceeding the sale price of the work of plastic (decorative) art on the hasis of which the reproduction was made (or the hasic remuneration received hy the creator of the original work, as the case may be).

Refusal to pay royalties constitutes infringement of the author's pecuniary rights as specified in Article 3(5) of Decree No. 321/1956, and of the author's right to derive

economic benefit from the reproduction, distribution or other lawful use of his work.

The term "photographic reproduction" means any mass reproduction, regardless of the process or form, since the law makes no distinction as to the processes used to obtain such a reproduction.

Any other interpretation would mean that the author of an original work of plastic (decorative) art which is reproduced would own copyright (and therefore be entitled to royalties) to an extent determined by the process used to make the reproduction, and this would be a blatant violation of the author's pecuniary rights.

In Article 6 of its decision No. 632/1957, the Council of Ministers approved the "Standards for the Remuneration of Authors of Intellectual Works and the Establishment of Tariffs and Modes of Payment"; the "Standards" entered into force on January 1, 1957. The courts are not competent to fix tariffs for the royalties payable to authors of intellectual works or to situate the works in relation to such tariffs. The application of the tariff — determined by the type of work, the quality and quantity of creative effort which it represents, and the manner and extent of its use — lies within the sole competence of the agency responsible for payment, which may, if necessary, consult committees of specialists set up for the purpose (Article 4 of the "Standards"). Because the placing of intellectual works within the tariff, and the fixing of royalties between the maximum and minimum rates indicated, is within the competence of the agency, it is beyond the control of the courts.

In its civil decision No. 123/1958, the Supreme Court ruled that, since it was a normative act (Council of Ministers decision No. 101/1958) which provided that the application of tariffs for designs for stamps and postal material and for works of graphic design and engravings was within the competence of the former Ministry of Education and Culture (which subsequently became the State Committee for Culture and the Arts and now has become the Council for Socialist Education and Culture), the courts might not substitute themselves for that body, which had sole authority with respect to tariffs. It was only when the user of the intellectual work refused to pay the royalties fixed by the normative act that the court was competent, in an action brought by the author, to oblige the user to pay royalties in accordance with the tariff as applied. In our opinion the court would also be competent to settle disputes arising from incorrect placing of the intellectual work within the tariff, in order words lower than is provided under the "Standards" or other normative acts which regulate certain rates for royalties, or where royalties have been paid on the basis of a wrong calculation.

When a literary, artistic or scientific work is exploited directly, the calculation of royalties is effected by agreement between the parties, not in accordance with the "Standards" mentioned earlier, which apply solely to contracts concluded by the author of the work with socialist organizations (Articles 18, 19 and 24 of Decree No. 321/1956).

In its civil decision No. 165/1965, the Supreme Court ruled that when an artist made a bust at the request of a client — a natural person — in respect of which they had agreed on a price for materials and labor, such price having been paid in full, the work handed over and no further claim formulated by the author of the work, the case was one of direct exploitation of copyright and was freely determined by the parties as far as the author's pecuniary rights were concerned. In such cases the direct exploitation of copyright may take the form of contracts under civil law.

Article 18 of Decree No. 321/1956 gives the author the right to exploit his work directly and by drawing upon his own resources; this situation comes up especially in connection with the plastic arts. When copyright is exploited under contracts entered into which socialist organizations, which have at their disposal sufficient resources for the publication, performance, recording, and the dissemination by film, radio and television of literary, artistic and scientific works, the royalties established by the normative provisions apply in all cases. Contractual relationships with socialist organizations concerned with copyright are established only by means of written contracts drawn up on the basis of certain standard contracts which exist for each type of creation (Articles 18 and 25 of Decree No. 321/1956).

4. Competence to settle certain disputes concerning copyright exploitation

In its decision No. 749/1958, the State Arbitration of the Capital, which had to decide a dispute in which the Union of Composers of the Socialist Republic of Romania claimed payment of royalities and the "C. Tănase Theater of Musical Satire" of Bucharest, as defendant, raised an objection on the grounds of the incompetence of the Arbitration to judge disputes over the payment of royalties to authors, ruled that authors' unions, whose statutory purpose was to represent and defend the copyright of their members, were competent to carry on legal proceedings and that, since the dispute was over pecuniary rights between two socialist organizations, its settlement lay within the competence of the State Arbitration.

We consider that the solution adopted by the State Arbitration is the only one which is in conformity with the law: Article 18(2) of Decree No. 321/1956 provides that authors' unions shall have the task of protecting and enforcing the right of performance of works by way of guarantee, and Article 40(2) of the same Decree provides that a criminal action for plagiarism is instituted not only by a complaint on the part of the author of the work, but also by action on the part of the respective authors' union or association [6]. Furthermore, for the application of these legal provisions, the statutes of the authors' unions provide that the respective union directly and obligatorily "represents and defends" its members in problems concerning their moral and pecuniary rights in that it protects those members' copyright [7]. Similarly, under Article 5 of Decree No. 321/1956, the task of protecting the authorship, inviolability and just use of an intellectual work after the death of its author, or one of its co-authors in

[6] In this connection, see Decree No. 1172/1968 amending Article 40 of Decree No. 321/1956 relating to copyright, *ibid.*, 1969, p. 121.

[7] See the Statutes of the Writers' Union (1969), the Statutes of the Union of Authors of Works of Plastic Art (1968 - Article 8) and the Statutes of the Composers' Union (1968 - Article 2*(k)*).

the case of a common work, devolves on the respective authors' union or association or, failing that, the competent State agency.

The reference to direct and obligatory representation and defense in the statutes of the authors' unions is in fact an indication of the unions' right to institute legal proceedings of all kinds and to file any petition in the interests of copyright protection [8]. Royalties are paid to the authors, by those obliged to pay them, through the services of the authors' unions, and the latter withhold a commission for their socio-cultural requirements, which provides further evidence of the pecuniary aspect of disputes involving the payment of royalties and the protection of the right to such payment.

5. Transfer of the pecuniary rights of authors

On the death of the author or one of the co-authors, the respective pecuniary rights pass on by succession in accordance with the Civil Code, but only for certain periods which vary as follows according to the capacity and relationhip of the heirs:

(a) the surviving spouse and all ascendants, for their lifetime;

(b) descendants, for a period of 50 years;

(c) other heirs, for a period of 15 years, provided that such heirs may not, in turn, pass on the rights by the same means.

In the case of minors in this last category, the period is extended by the amount of time they require to reach full capacity to exercise their rights or complete their higher education. The latter extension does not apply beyond the age of 25 years, however (Article 6 of Decree No. 321/1956) [9].

Under Article 4(2), subparagraph 1, of Decree No. 3165/1923 on Literary and Artistic Property, the surviving spouse enjoys the same rights as the legitimate children, notwithstanding the provisions of Articles 650 *et seq.* of the Civil Code concerning successions. Under Article 1 of Law No. 319/1944 amending the texts of the Civil Code, it is provided that the surviving spouse who inherits concurrently with the legitimate children or their descendants receives a quarter of the estate of the other spouse.

In its civil decision No. 1287/1969, the Supreme Court ruled that Law No. 319/1944 had not amended the provisions of Article 4(2), item 1 of Decree No. 3165/1923, which depart from the provisions of Articles 650 *et seq.* of the Civil Code, and that consequently the surviving spouse who inherits concurrently with the descendants of the author of the work, where the succession proceedings began prior to the entry into force of Decree No. 321/1956, enjoys the same rights as the descendant in that each inherits 50 % of the author's pecuniary rights.

As far as the transfer by inheritance of authors' pecuniary rights is concerned, Romanian legal writers [10] maintain that the descendants of the author of the intellectual work acquire his pecuniary rights on his death for a period of 50 years, such rights being further transferable by inheritance to the descendants' heirs until expiration of the period of 50 years. If a descendant dies before the period expires, his right passes on to his own heirs. In support of this contention it is argued that, since in the case of descendants there is no reservation — as in the case of collaterals when copyright does not pass on directly to the heirs of the latter — to the effect that there is no "new devolution by succession", it follows that copyright may be further transferred by inheritance to the successor's own heirs. Where the descendant of the author of the work acquires the latter's pecuniary rights for a period of 50 years, those rights pass on, in the event of his death prior to the expiration of the 50-year period, to his own heirs for the time remaining before such expiration, irrespective of the capacity of those heirs in so far as the pecuniary rights have become part of the estate of the descendant of the author of the work.

Moreover, the Municipal Tribunal of Bucharest disregarded the interpretation given by legal doctrine and established that the transfer by inheritance of copyright to descendants was permissible, but only between direct descendants: it might not pass to the surviving spouse or other heirs of the descendant. Thus, on the death of the son of the author of the intellectual work, the grandson would inherit, and, on the death of the latter, the great-grandson, all this within the limits of the period of 50 years after the death of the author; the author's pecuniary rights might not, on the death of the descendant, be transferred to other heirs of that descendant (surviving spouse, collaterals, etc.).

In stating its reasons, the Tribunal showed that its conclusion was all the more obvious since Article 6*(b)* of Decree No. 321/1956 provided that the transfer by inheritance to descendants of an author's pecuniary rights took place during a period of 50 years and therefore was limited to descendants alone; any extension of such transfer to other heirs of the descendant would be going beyond the purview of the law.

The prohibition of further transfer by inheritance of an author's pecuniary rights to other heirs (Article 6*(c)* of Decree No. 321/1956) — as an exceptional case expressly provided for — seems superfluous in the case of descendants in view of the precise working of the text of the Decree (Article 6*(b)* of Decree No. 321/1956).

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[8] In this connection, see Ovidiu Ionaşcu, "Consideraţii privind trăsăturile specifice unor organizaţii obşteşti cu caracter cultural-artistic" [Considerations on the specific features of certain social organizations of cultural-artistic character], in *Revista română de drept*, No. 4/1970, p. 44.

[9] In accordance with Article 7 of the Berne Convention for the Protection of Literary and Artistic Works, as revised at Stockholm on July 14, 1967, the term of copyright protection comprises the life of the author and fifty years after his death. This Act also contains a provision to the effect that countries of the Union hound hy the Rome Act of the Convention which grant, in their national legislation in force at the time of signature of the Act, shorter terms of protection than those provided for in the Convention shall have the right to maintain such terms when ratifying or acceding to the Stockholm Act (Article 7(7)). Romania hecame hound hy the Rome Act of 1928 on Augnst 6, 1936 (see *Le Droit d'Auteur*, 1936, p. 73; see also Law No. 1471 of May 28, 1935).

We would also mention that the Socialist Republic of Romania ratified the Stockholm Act of the Berne Convention hy Decree No. 549/1969. At the time of that ratification, Romania availed itself of the provisions of Article 7(7), declaring that it intended to maintain the provisions of its national legislation in force at the time of signature of the Convention and relating to the term of protection.

[10] In this connection, see A. Ionaşcu, N. Comşa and M. Mureşan, *op. cit.*, pp. 122 to 124; Stanciu D. Carpenaru, *Drept civil. Drepturile de creaţie intelectuală. Succesiunile* [Civil law. Rights of intellectual creation. Succession], Bucharest, Ed. Didactica şi Pedagogica, 1971, pp. 57 and 58.

CONVENTIONS NOT ADMINISTERED BY WIPO

FIJI

Notification concerning the application of the Universal Copyright Convention

In a letter dated February 17, 1972, the Director-General of Unesco informed us that he had received, on December 13, 1971, a communication from the Government of Fiji notifying him that it considered itself bound by the Universal Copyright Convention, the application of which had been extended to its territory before its independence (October 10, 1970).

BOOK REVIEWS

Cases and Materials on Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works, by *Melville B. Nimmer*. One volume of 828 pages, 20 × 26 cm. American Casebook Series, West Publishing Company, St. Paul, Minnesota, 1971.

The subject matter of this book is what is called "entertainment law" — a term which, although it is not considered by the author to be entirely satisfactory, seems to be increasingly accepted. It includes not only the publishing of books, magazines and newspapers, and the activities connected with the stage, motion pictures, radio and television, but also the fields of the musical and graphic arts.

The cases and materials reproduced in this collection are arranged by topics (the subject matter of copyright, publication, formalities, duration and renewal of copyright, the protection of ideas, etc.) and accompanied by very interesting and stimulating questions for students, some collateral references and, occasionally, the author's notes. One of these notes, appearing under the heading "Formalities", concerns, on the one hand, copyright protection within the United States for works of foreign origin and, on the other hand, copyright protection abroad for American works.

It is perhaps necessary to emphasize here that the author has avoided making "tightly digested extracts of opinions", which he considers pedagogically unsound. He thinks that it is a mistake for a work to attempt to be both a casebook and a treatise, because it is then unlikely to be satisfactory as either. And one could add that those who wish to read a treatise based on American legal thought and practice are almost automatically referred to *Nimmer on Copyright*, extensive portions of which reappear in this new work.

The Copyright Act and the Copyright Office Regulations of the United States are reproduced in the Appendix. An alphabetical index of topics and a table of cases facilitate consultation of this voluminous collection, the importance and usefulness of which are in most cases not limited to the American public.

M. S.

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Copyright: Evolution, theory and practice, by *R. F. Whale*. One volume of 217 pages, 14 × 22 cm. Longman Group Limited, London, 1971.

This is a popular treatise in the best sense of the word. It starts with an interesting historical introduction entitled "Evolution of copyright", which is followed by a "very brief incursion in the highly complex field of theory". The major part of the book is devoted to the provisions of the British Copyright Act of 1956. A separate chapter deals with each part of the Act.

International copyright is discussed in a special chapter, which contains a summary account of the main international conventions in the field of copyright and neighboring rights (Berne Convention, Universal Copyright Convention, Rome Convention, European Agreements). When speaking of the Berne Convention, the author notes that it does not provide for the "public lending right" which is found in the copyright legislation of a small number of countries. Another interesting point discussed in this section is the extension of the principle of nationality introdnced at the Stockholm Revision Conference in 1967. The author puts forward the opinion that this change does not mean that, for countries which accede to the Stockholm Act or a later Act, works which have lost protection in the countries of the Union because they were published in a non-Union country will regain protection if their authors are nationals of a Union country. This interpretation seems to give rise to serious doubts as far as the meaning of Article 18 is concerned. The brief account of the content of the Berne Convention ends with a pessimistic statement to the effect that in some of the countries members of the Union "protection is rather nominal than effective", their copyright legislation being not always compatible with the Convention.

It is regrettable that the book was published before the Paris Revision Conference and so does not take the results of that Conference into consideration.

In a postscript, the author mentions new developments in the field which are dne in particular to the recent technical achievements (computers, communication satellites, electronic video recordings), observing, in conclusion, that, besides the complexity of the questions themselves, there is the difficulty at the international level of securing as much agreement as possible among countries at differing stages of cnltural, economic, technical and political development.

A detailed alphabetical index can be found at the end of the book.

M. S.

CALENDAR

WIPO Meetings

May 2 to 8, 1972 (Geneva) — Committee of Experts on the International Registration of Marks

Object: Preparation of draft texts for the Vienna Diplomatic Conference in 1973 (see below) — *Invitations:* Member countries of the Paris Union; organizations concerned

May 9 to 17, 1972 (Paris) — Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Raised by Transmission Via Space Satellites

Object: Study of the problems — *Invitations:* Member countries of the Berne Union, Member countries of the Paris Union and Member States of the United Nations or of a Specialized Agency — *Observers:* Intergovernmental and non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

May 16 to 18, 1972 (Geneva) — Mechanization of Trademark Anticipation Searches — Working Group

Invitations: Australia, Austria, Belgium, Colombia, France, Germany (Fed. Rep.), Ireland, Japan, Luxembourg, Netherlands, Soviet Union, Spain, Sweden, United Kingdom, United States of America

May 29 to June 2, 1972 (The Hague) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee

June 5 to 9, 1972 (The Hague) — International Patent Classification (IPC) — Joint ad hoc Committee

June 26 to July 7, 1972 (The Hague) — International Patent Classification (IPC) — Working Group I of the Joint ad hoc Committee

July 5 to 7, 1972 (Geneva) — ICIREPAT — Technical Coordination Committee

July 10 to 14, 1972 (The Hague) — International Patent Classification (IPC) — Working Group III of the Joint ad hoc Committee

September 4 to 8, 1972 (London) — International Patent Classification (IPC) — Working Group II of the Joint ad hoc Committee

September 11 to 15, 1972 (London) — International Patent Classification (IPC) — Working Group V of the Joint ad hoc Committee

September 20 to 22, 1972 (Geneva) — ICIREPAT — Plenary Committee

September 21 and 22, 1972 (Geneva) — Intergovernmental Committee Established by the Rome Convention (Neighboring Rights) — Extraordinary Session

Object: Consideration of various questions concerning neighboring rights — *Invitations:* Brazil, Denmark, Germany (Fed. Rep.), Mexico, Niger, United Kingdom — *Observers:* Congo, Costa Rica, Czechoslovakia, Ecuador, Fiji, Paraguay, Sweden; intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with the International Labour Office and Unesco

September 25 to 29, 1972 (Berne) — International Patent Classification (IPC) — Working Group IV of the Joint ad hoc Committee

September 25 to 30, 1972 (Geneva) — Coordination Committee of WIPO, Executive Committees of the Paris and Berne Unions, Assemblies of the Madrid, Lisbon and Locarno Unions

October 2 to 9, 1972 (Geneva) — Patent Cooperation Treaty (PCT) — Interim Committees and Standing Subcommittee of the Interim Committee for Technical Cooperation

Members of the Interim Committees: Signatory States of the PCT — *Observers:* Intergovernmental organizations and international non-governmental organizations concerned; *Members of the Standing Subcommittee:* Austria, Germany (Fed. Rep.), Japan, Netherlands, Soviet Union, Sweden, United Kingdom, United States of America, International Patent Institute — *Observer:* Brazil

October 9 to 13, 1972 (Geneva) — Committee of Experts on a Model Law for Developing Countries on Appellations of Origin

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

October 9 to 13, 1972 (Geneva) — ICIREPAT — Technical Committee for Standardization

October 16 to 20, 1972 (Nairobi) — African Seminar on Intellectual Property

October 16 to 20, 1972 (Geneva) — ICIREPAT — Technical Committee for Computerization

October 23 to 27, 1972 (Geneva) — ICIREPAT — Technical Committee for Shared Systems

October 23 to 27, 1972 (Geneva) — ICIREPAT — Advisory Board for Cooperative Systems

October 30 to November 3, 1972 (Geneva) — Committee of Experts on a Patent Licensing Convention

November 20 to 24, 1972 (Geneva) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee

November 27 to December 1, 1972 (Geneva) — International Patent Classification (IPC) — Joint ad hoc Committee

December 13 to 15, 1972 (Geneva) — ICIREPAT — Technical Coordination Committee

May 7 to June 2, 1973 (Vienna) — Diplomatic Conference on: (a) the International Registration of Marks, (b) the International Classification of the Figurative Elements of Marks, (c) the Protection of Type Faces

September 24 to October 2, 1973 (Geneva) — Administrative Bodies of WIPO (General Assembly, Conference, Coordination Committee) and of the Paris, Berne, Nice and Lisbon Unions (Assemblies, Conferences of Representatives, Executive Committees)

UPOV Meetings

May 23 and 24, 1972 (Cambridge) — Technical Working Party for Cross-fertilized Agricultural Crops

May 25 and 26, 1972 (Antibes) — Technical Working Party for Ornamental Plants

November 7 and 10, 1972 (Geneva) — Diplomatic Conference
Object: **Amendment of the Convention**

November 8 and 9, 1972 (Geneva) — Council

July 2 to 6, 1973 (London/Cambridge) — Symposium on Plant Breeders' Rights

Meetings of Other International Organizations concerned with Intellectual Property

May 2 to 5, 1972 (New York) — UNIDO/Licensing Executives Society — Symposium on Licensing in Developing Countries

May 15 to 19, 1972 (Paris) — International Puhlishers Association — Congress

May 21 to 25, 1972 (Geneva) — International League Against Unfair Competition — Congress

June 9 and 10, 1972 (Copenhagen) — International Federation of Inventors Associations — Annual Assembly

July 3 to 7, 1972 (Paris) — International Literary and Artistic Association — Working Session

July 4 to 6, 1972 (The Hague) — International Patent Institute — Administrative Council

October 16 to 21, 1972 (Mexico) — International Confederation of Societies of Authors and Composers — Congress

Octoher 23 to 26, 1972 (The Hague) — International Patent Institute — Administrative Council

November 12 to 18, 1972 (Mexico) — International Association for the Protection of Industrial Property — Congress

December 11 to 15, 1972 (The Hague) — International Patent Institute — Administrative Council

May 20 to 26, 1973 (Rio de Janeiro) — International Chamher of Commerce — Congress

Intergovernmental Conference for the Setting Up of a European System for the Grant of Patents:

May 15 to 20, 1972 (Brussels) — Coordination Committee

June 19 to 30, 1972 (Lnxembourg) — Intergovernmental Conference

VACANCY IN WIPO

Applications are invited for the following post:

Competition No. 179

Technical Assistant

(Administrative Division / New Buildings Section)

Category and grade: P.1 / P.2 according to qnalifications and experience of the incnmbent.

Duties:

The incnmbent will be required to assist the Head of the New Bnildings Section, particularly in admiuistrative and technical work associated witb the construction of a new headquarters building (approximate volume 60,000 m³) in Geneva. In this connection, his main duties will be the following:

(a) Study of plans for building, installation and decoration, in order to ensnre their conformity with tbe instructions and needs of WIPO.

(b) Assessment of the prospective requirements of the various services with regard to offices and eqnipment, taking into account the implications of such requirements in relation to the building plans and installation projects; collaboration in the estimation of the corresponding costs.

(c) Contacts witb firms asked to submit tenders for equipment and services; comparative analysis of estimates and contract proposals; proposals for the attention of his snperiors.

(d) Correspondence relating to the various activities of tbe Section (to be signed by the incnmbent or by bis snperiors, as tbe case may be) and collaboration in the preparation of documents intended for tbe administrative bodies of the Organization.

(e) On-site examination of work progress and, where appropriate, of any alterations which may give rise to changes in tbe building program or increased costs; preparation of reports on the subject.

(f) Participation in the preparation of bndgetary provisions for the financing of the building program.

(g) In connection with the above-mentioned dnties, contacts with architects, contractors and the competent public services.

(h) Collaboration in tbe establishment of all files and internal documentation relating to tbe varions activities of the Section.

(It is anticipated tbat, after completion of tbe building, the duties of tbis post will relate to tecbnical and administrative matters concerning tbe maintenance, operation and equipping of tbe building.)

Qualifications required:

(a) University degree or advanced technical diploma in the field of construction; or professional training of equivalent standard. Good cnltnral background.

(b) Experience of technical and administrative work in the building industry (experience acquired with a firm of architects or in connection with duties — similar to tbose mentioned above — assumed in a private firm or an organization). Knowledge of prevailing building standards in Geneva would be an advantage.

(c) Very good knowledge of French and good knowledge of English. Ability to draft documents.

(d) Ability to maintain professional contacts and to submit proposals under limited snpervision.

Nationality:

Candidates must be nationals of one of the Member States of WIPO or of tbe Paris or Berne Unions. Qnalifications being equal, preference will be given to candidates who are nationals of States of which no national is on the staff of WIPO.

Age limit:

Candidates mnst be less tban 50 years of age at date of appointment.

Date of entry on duty:

To be agreed.

Applications:

Application forms and full information regarding the *conditions of employment* may be obtained from the Head of the Administrative Division, WIPO, 32, chemin des Colombettes, 1211 Geneva, Switzerland. Please refer to tbe number of tbe Competition.

Closing date: June 10, 1972