// 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. 75.—
Each monthly issue: Sw.fr. 9.—

9th year - No. 5
MAY 1973

Contents

WORLD INTELLECTUAL PROPERTY ORGANIZATION — Page

— Post of Director General . . . 87

BERNE UNION

— Austria. Ratification of the Stockholm Act of the Berne Convention (with the exception of Articles 1 to 21 and of the Protocol Regarding Developing Countries) 87

NATIONAL LEGISLATION

— Germany (Federal Republic of). I. Law amending the Copyright Act (of November 10, 1972) . . . 88

II. Law revising the Powers to charge Costs and Social Security and Other Provisions (of June 23, 1970) . . . 89

III. First Law for the Reform of Penal Law (of June 25, 1969) . . . 90

IV. Regulation amending the Regulation on the Register of Authors (of June 26, 1970) . . . 90

— United Kingdom. The Copyright (Hong Kong) Order 1972 (No. 1724, of November 14, 1972, coming into force on December 12, 1972) . . . 91

CORRESPONDENCE

— Letter from the Federal Republic of Germany (Adolf Dietz) . . . 93

CONVENTIONS NOT ADMINISTERED BY WIPO

— Universal Copyright Convention:

Soviet Union. Accession to the Convention of September 6, 1952 . . . 101

Cameroon. Accession to the Convention as revised at Paris on July 24, 1971 . . 101

CALENDAR

— WIPO Meetings . . . 102

— UPOV Meetings . . . 103

— Meetings of Other International Organizations concerned with Intellectual Property . . . 103

© WIPO 1973

Any reproduction of articles and translations of laws, published in this periodical, is authorized only with the prior consent of WIPO

WORLD INTELLECTUAL PROPERTY ORGANIZATION

Post of Director General of WIPO

In view of the retirement of the Director General of WIPO, Professor G. H. C. Bodenhausen, the General Assembly of WIPO is expected to appoint a new Director General when it meets in November 1973.

Governments of Member States of WIPO, the Paris Union or the Berne Union may present candidatures not later than July 31, 1973.

Copies of the relevant announcement to the Ministries of Foreign Affairs may be obtained from the Head, Administrative Division, WIPO, 32, chemin des Colombettes, Geneva, Switzerland.

BERNE UNION

AUSTRIA

Ratification of the Stockholm Act of the Berne Convention (with the exception of Articles 1 to 21 and of the Protocol Regarding Developing Countries)

The Director General of the World Intellectual Property Organization (WIPO) has notified the Governments of member countries of the Berne Union that the Government of the Republic of Austria deposited on May 11, 1973, its instrument of ratification dated April 13, 1973, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Stockholm on July 14, 1967, with the declaration provided for in Article 28(1)*(b)*(i) of the said Act to the effect that the ratification shall not apply to Articles 1 to 21 and to the Protocol Regarding Developing Countries.

Pursuant to the provisions of Article 28(2)*(c)* of the Stockhalm Act of the said Convention, Articles 22 to 38 will enter into force, with respect to the Republic of Austria, three months after the date of this notification, that is, on August 18, 1973.

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

Berne Notification No. 44, of May 18, 1973.

NATIONAL LEGISLATION

GERMANY (Federal Republic of)

I

Law amending the Copyright Act

(Of November 10, 1972) *

Article 1. — The Copyright Act of September 9, 1965 [1] (*Bundesgesetzblatt,* Part I, p. 1273), last amended by the Law revising the Powers to charge Costs, of June 23, 1970 [2] (*Bundesgesetzblatt,* Part I, p. 805), is hereby amended as follows:

1. — Article 26 is amended to read as follows:

" *Droit de suite*

Article 26. — (1) Should the original of an artistic work be resold and should such resale involve an art dealer or auctioneer as purchaser, vendor or agent, the vendor shall pay the author a participation at the rate of five percent of the sale price. There shall be no such obligation if the sale price is less than one hundred German marks.

(2) The author may not in advance waive his right to the participation. The expectancy thereof shall not be the subject of judicial execution; any disposition of the expectancy shall be without legal effect.

(3) The author may request information of an art dealer or auctioneer as to what originals of the author's works have been resold through the intermediary of the art dealer or auctioneer during the last calendar year having elapsed prior to the request for information.

(4) The author may, in so far as this is necessary for the carrying through of his claim on the seller, request from the art dealer or auctioneer information on the name and address of the said seller and the amount of the sale price. The art dealer or auctioneer may refuse information on the name and address of the seller if he pays the participation due to the author.

(5) The claims under paragraphs (3) and (4) may only be asserted through a collecting society.

(6) Where there exists reasonable doubt as to the accuracy or completeness of the information provided in accordance with paragraph (3) or (4), the collecting society may demand that access to the account books or to other documents be granted, at the choice of the party obliged to provide the information, either to the collecting society or to a chartered accountant or sworn auditor designated by the said party, to the extent that this is necessary to ascertain the accuracy or completeness of the information. Where the information is found to be inaccurate or incomplete, the party obliged to provide the information shall pay the cost of the examination.

(7) The claims of the author shall expire after ten years.

(8) The foregoing provisions shall not apply to architectural works and works of applied art."

2. — Article 27 is amended to read as follows:

"*The hiring and lending of copies*

Article 27. — (1) For the hiring and lending of copies of a work in respect of which further distribution is permitted under Article 17(2), an equitable remuneration shall be paid to the author if the hiring or lending is executed for the financial gain of the hirer or lender, or if the copies are hired or lent through an institution accessible to the public (bookstore, record library or collection of other copies). The claim for remuneration may ouly be asserted through a collecting society.

(2) The provisions of paragraph (1) shall not be applicable where the work is published exclusively for hiring or lending purposes, or if the copies are lent under a contract of service or a contract commissioning services, for use solely in the fulfilment of commitments arising in connection with the said service or commission."

3. — Article 46 is amended as follows:

(a) After paragraph (3), the following new paragraph (4) is added:

" (4) The author shall be paid an equitable remuneration for the reproduction and distribution."

(b) The former paragraph (4) becomes paragraph (5).

4. — In Article 62(4), third sentence, after the word " modification ", the words " and if in the notification of the modification his attention has been drawn to this legal consequence " are added.

---

* *Gesetz zur Änderung des Urheberrechtsgesetzes, vom 10. November 1972,* published in *Bundesgesetzblatt,* I, p. 2081, No. 120, of November 15, 1972. — WIPO translation.

[1] See *Copyright,* 1965, pp. 251 *et seq.*

[2] See below.

5. — After Article 135, the following provision is inserted as Article 135a:

"*Calculation of the term of protection*

Article 135a. — Where the duration of protection is shortened by the application of this Act to a right which came into being prior to the entry into force thereof, and where the event which under this Act determines the beginning of the term of protection occurred prior to the entry into force thereof, the said term shall be calculated as from the said entry into force, provided that protection shall lapse not later than on expiration of the term of protection under the earlier provisions."

Article 2. — Where, in the cases specified in Article 135a of the Copyright Act, a right is infringed prior to November 15, 1971, which right was still protected under the said provision at the time of its infringement, Article 101 of the Copyright Act shall apply, provided that the infringer shall not be authorized to indemnify the injured party in money when a redress in cash is not acceptable to such party.

Article 3. — In accordance with Article 13(1) of the Third Transitional Act, of January 4, 1952 (*Bundesgesetzblatt*, Part I, p. 1), this Law shall also apply in *Land* Berlin.

Article 4. — (1) Article 1(3) shall enter into force with effect from October 11, 1971, and Article 1(5) shall enter into force with effect from January 1, 1966.

(2) With respect to the remaining provisions, this Law shall enter into force on January 1, 1973.

II

Law revising the Powers to charge Costs and Social Security and Other Provisions (Law revising the Powers to charge Costs)

(Of June 23, 1970) *

. . . .

Copyright Provisions (Copyright Act, Act dealing with the Administration of Copyright and Related Rights)

Article 9. — (1) Paragraph (5) of Article 138 of the Act dealing with Copyright and Related Rights (Copyright Act) of September 9, 1965 [1] (*Bundesgesetzblatt*, Part I, p. 1273), is amended to read as follows:

"(5) The Federal Minister for Justice shall be authorized to issue by way of an ordinance

1. provisions on the form of the application and on the maintenance of the Register of Authors;
2. provisions for the imposition of charges (fees and expenses) to cover administrative costs relating to the entry, the issuing of a certificate of entry and the issuing of other extracts or their certification, as well as provisions concerning the party liable for costs, the time at which charges are due, the obligation of payment in advance, exemption from charges, limitation, the procedure for the fixing of charges, and legal remedies against the fixing of charges. The fee for registration shall not exceed 30 German marks."

(2) Paragraph (7) of Article 14 of the Act dealing with the Administration of Copyright and Related Rights of September 9, 1965 [2] (*Bundesgesetzblatt*, Part I, p. 1294), is amended to read as follows:

"(7) The Federal Minister for Justice shall have the power to determine by ordinance the procedure to be followed before the Arbitration Commission, and in particular

1. to issue detailed provisions on the remuneration of members of the Arbitration Commission for their activities;
2. to determine the charges (fees and expenses) to be imposed by the supervisory authority for proceedings before the Arbitration Commission, to cover administrative costs; the fee shall not exceed the sum of 300 German marks;
3. to issue provisions concerning the party liable for costs, the time at which charges are due, the obligation of payment in advance, exemption from charges, limitation, the procedure for the fixing of charges, and legal remedies against the fixing of charges."

. . . .

Entry into force

Article 34. — (1) This Law shall enter into force on the day following its promulgation, unless otherwise provided in paragraph (3) of this Article.

. . . .

* *Gesetz zur Änderung von Kostenermächtigungen, sozialversicherungsrechtlichen und anderen Vorschriften (Kostenermächtigungs-Änderungsgesetz), vom 23. Juni 1970*, published in *Bundesgesetzblatt*, I, pp. 808 *et seq.*, No. 58, of June 25, 1970. — WIPO translation.

[1] See *Copyright*, 1965, p. 251 *et seq.*

[2] *Ibid.*, p. 268 *et seq.*

III

First Law for the Reform of Penal Law

(Of June 25, 1969) *

. . . .

IV. Amendment of Laws in the Field of Civil Law and Penal Law

. . . .

Copyright Act

Article 56. — Article 111 of the Copyright Act of September 9, 1965 (*Bundesgesetzblatt,* Part I, p. 1273), is amended as follows:

(a) paragraph (2) is deleted;

(b) the former paragraph (3) becomes paragraph (2).

. . . .

X. Abrogation of Provisions

Article 85. — The following provisions are hereby abrogated:

. . . .

7. Paragraph (2) of Article 33 of the Act concerning Copyright in Works of Art and Photography, of January 9, 1907 (*Reichsgesetzblatt,* p. 7), last amended by the Copyright Act of September 9, 1965 (*Bundesgesetzblatt,* Part I, p. 1273);

. . . .

Final Clauses

. . . .

Entry into force

Article 105. — The following shall apply to the entry into force of this Law:

. . . .

2. the remaining provisions of this Law shall enter into force on April 1, 1970.

. . . .

* *Erstes Gesetz zur Reform des Strafrechts (1.StrRG), vom 25. Juni 1969,* published in *Bundesgesetzblatt,* I, No. 52, of June 30, 1969. — WIPO translation.

IV

Regulation amending the Regulation on the Register of Authors

(Of June 26, 1970) *

By virtue of Article 138(5) of the Copyright Act of September 9, 1965[1] (*Bundesgesetzblatt,* Part I, p. 1273), last amended by the Law revising the Powers to charge Costs, of June 23, 1970[2] (*Bundesgesetzblatt,* Part I, p. 805), it is hereby enacted:

Article 1. — Article 5 of the Regulation on the Register of Authors, of December 18, 1965[3] (*Bundesgesetzblatt,* Part I, p. 2105), which, under Article 3, Section II, No. 2, and Article 9(1), second sentence, of the Law revising the Powers to charge Costs and transferring the Provisions on Fees, of July 22, 1969 (*Bundesgesetzblatt,* Part I, p. 901), is abrogated as of July 1, 1970, is replaced by the following provision:

“ *Charges*

Article 5. — (1) The following fees shall be charged for the entry in the Register of Authors:

1. For one work — 20 German marks
2. For several works in respect of which the entry is applied for simultaneously,
   - *(a)* for the first work — 20 German marks
   - *(b)* for the second to the tenth work, per work — 10 German marks
   - *(c)* for the eleventh and all subsequent works, per work — 5 German marks

(2) The Regulation on Administrative Costs charged by the German Patent Office, of June 26, 1970 (*Bundesgesetzblatt,* Part I, p. 835), shall be applied accordingly to the collection of fees for the issuing of a certificate of entry and to the issuing of other extracts and their certification. The same is valid for the procedure when the fees under paragraph (1) are collected.

(3) The party liable for costs may appeal against a decision of the Patent Office under Article 9(2) of the Regulation on Administrative Costs charged by the German Patent Office by petitioning for a decision by the courts within two weeks following communication of the contested decision. The petition shall be filed with the Patent Office; the latter may assist in the drafting of the application. The court competent under Article 138(2), second sentence, of the Copyright Act shall rule on the petition.”

* *Verordnung zur Änderung der Verordnung über die Urheberrolle, vom 26. Juni 1970,* published in *Bundesgesetzblatt,* I, p. 839, No. 59, of June 26, 1970. — WIPO translation.

[1] See *Copyright,* 1965, p. 267.

[2] See above.

[3] See *Copyright,* 1967, p. 53.

Article 2. — In accordance with Article 14 of the Third Transitional Act, of January 4, 1952 (*Bundesgesetzblatt*, Part I, p. 1), in conjunction with Article 142 of the Copyright Act and Article 33 of the Law revising the Powers to charge Costs, this Regulation shall also apply in *Land* Berlin.

Article 3. — This Regulation shall enter into force on July 1, 1970.

UNITED KINGDOM

The Copyright (Hong Kong) Order 1972

(No. 1724, of November 14, 1972, coming into force on December 12, 1972)

1. — This Order may be cited as the Copyright (Hong Kong) Order 1972 and shall come into operation on 12th December 1972.

2. — The Interpretation Act 1889 shall apply to the interpretation of this Order as it applies to the interpretation of an Act of Parliament.

3. — The provisions of the Copyright Act 1956 specified in Part I of Schedule 1 hereto shall extend to Hong Kong subject to the modifications specified in Part II of that Schedule.

4. — The Copyright (International Organisations) Order 1957, as amended, the Copyright (Broadcasting Organisations) Order 1961, and the Copyright (International Conventions) Order 1972 (being Orders in Council made under Part V of the said Act) shall extend to Hong Kong subject, in the case of the last mentioned Order, to the modifications specified in Schedule 2 hereto.

SCHEDULE 1

PART I

Provisions of the Copyright Act 1956 extended to Hong Kong

All the provisions of the Act, as amended by the Performers' Protection Acts 1958 and 1963, the Films Act 1960 and the Design Copyright Act 1968, except sections 23 to 30, 32, 34, 35, 42 and 44 and Schedules 4, 5 and 9.

PART II

Modifications of the provisions extended

General Modifications

1. In sections 7, 8 (11) and 15 (4), for references to the Board of Trade there shall be substituted references to the Governor in Council.

2. In sections 8 (1) and 8 (10), 10 (2) and (3), 12 (6), 21 (1) and 21 (6), 22 (2) and 22 (3), 43, 48 (4) and 49 (2) and paragraph 46 of Schedule 7, for "the United Kingdom" there shall be substituted "Hong Kong".

Particular Modifications

3. The provisions mentioned in the first column in the following table shall be modified in the manner specified in the second column.

Provision	Modification
Section 8	In subsections (2) and (4), for " three-farthings " there shall be substituted " five cents " and in subsection (2), for " farthing " there shall be substituted " cent "; for subsection (3) there shall be substituted the following: — " (3) If at any time by an order made under this section in its operation in the law of the United Kingdom any different rate of, or minimum amount of, royalty is prescribed either generally or in relation to any one or more classes of records, the provisions of this section shall be construed subject to the provisions of any such order as is for the time being in force, provided that any reference in such an order to any sum of money shall be construed as a reference to the equivalent amount in the currency of legal tender in Hong Kong as provided by any law of Hong Kong."; in subsection (4)*(a)*, all the words after the first reference to works shall be omitted.
Section 10	For subsection (5) there shall be substituted the following:— " (5) For the purpose of this section a design shall be taken as being applied industrially if it is applied in the circumstances for the time being prescribed by rules made under this section and section 36 of the Registered Designs Act 1949 as extended by this section in the law of the United Kingdom.".
Section 13	For subsection (3) there shall be substituted the following:— " (3) Copyright subsisting in a cinematograph film by virtue of this section shall continue to subsist until the film is published and thereafter until the end of the period of fifty years from the end of the calendar year which includes the date of its first publication and shall then expire, or, if copyright subsists in the film by virtue only of the last preceding subsection, it shall continue to subsist as from the date of first publication until the end of the period of fifty years from the end of the calendar year which includes that date and shall then expire."; in subsection (8), for " any such film as is mentioned in paragraph *(a)* of subsection (1) of section 38 of the Films Act 1960 (which relates to newsreels) " there shall be substituted " any film consisting wholly or mainly of photographs which, at the time they were taken, were means of communicating news "; subsection (11) shall be omitted.

Provision	Modification
Section 17	Subsection (6) shall be omitted.
Section 18	In subsection (1), for the proviso there shall be substituted the following: — " Provided that if by virtue of section 5 of the Limitation Ordinance (Chapter 347) (which relates to limitation in cases of successive conversion and extinction of title of the owner of converted goods), the title of the owner of the copyright to such a copy or plate would (if he had then been the owner of the copy or plate) have been extinguished at the end of the period mentioned in that section, he shall not be entitled to any rights or remedies under this subsection in respect of any thing done in relation to that copy or plate after the end of that period."; subsection (4) shall be omitted.
Section 21	In subsections (7) and (8), for the words " forty shillings " and " fifty pounds " there shall be substituted respectively " five hundred dollars " and " fifty thousand dollars " and for the words " two months " there shall be substituted " twelve months "; subsection (10) shall be omitted.
Section 22	In subsection (1), for the " Commissioners of Customs and Excise (in this section referred to as " the Commissioners ") " there shall be substituted " the Director of Commerce and Industry " and, subject to the modifications to subsection (4) hereinafter provided, for subsequent references to the said Commissioners there shall be substituted references to the said Director; in subsection (4) for " the Commissioners " where those words first occur there shall be substituted " the Governor in Council " and for " the Commissioners consider " there shall be substituted " the Governor in Council considers "; subsection (6) shall be omitted; for subsection (7) there shall be substituted the following: — " (7) Where by virtue of this section the importation into Hong Kong of any copy of a work to which the section applies is prohibited, the importation into Hong Kong of such a copy shall, for the purposes only of the provisions of the Import and Export Ordinance (Chapter 60) providing for forfeiture, be deemed to be a contravention of that Ordinance,".
Section 31	Subsections (1) and (2) shall be omitted; in subsection (4), for " the United Kingdom " there shall be substituted " Hong Kong " and for " in a country " there shall be substituted " in the United Kingdom or in any country other than Hong Kong ".
Section 33	For subsection (1) there shall be substituted the following:— " (1) An organisation to which this section applies is one declared to be such by an Order in Council made under this section as part of the law of the United Kingdom which has been extended, in relation to that organisation, to Hong Kong ".
Section 37	Subsection (4) shall be omitted.
Section 39	In subsection (8), for " section three of the Crown Proceedings Act, 1947 " there shall be substituted " section 5 of the Crown Proceedings Ordinance (Chapter 300) ".
Section 40	Subsection (3) shall be omitted; in subsection (4), for " either of the two last preceding subsections " there shall be substituted " the last preceding subsection ", and " or the programme to be transmitted, as the case may be " shall be omitted; in subsection (5), the reference to a work shall be omitted.
Section 41	In subsection (7), for the definition of " school " there shall be substituted " ' school ' has the same meaning as in the Education Ordinance (Chapter 279) ".
Section 46	Subsection (1) shall be omitted; in subsection (2), " (including any enactment of the Parliament of Northern Ireland) " shall be omitted.
Section 47	The whole section except subsection (4) shall be omitted; in subsection (4), " or rules " shall be omitted.
Section 50	For subsection (2) there shall be substituted the following:— " (2) Subject to the transitional provisions the Copyright Act 1911 and the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act 1928 are hereby repealed.".
Section 51	For subsection (2) there shall be substituted the following:— " (2) *(a)* Any provision of this Act empowering the Governor in Council to make regulations shall come into operation on the commencement of the Order in Council extending that provision to Hong Kong. *(b)* All the other provisions of this Act shall come into operation on 1st January 1973."; subsection (3) shall be omitted.
Schedule 1	In paragraph 2, for " section seven of the Act of 1949 " there shall be substituted " section 2 of the United Kingdom Designs (Protection) Ordinance (Chapter 44) ".
Schedule 7	Paragraphs 25, 26, 40 and 41 shall be omitted.

SCHEDULE 2

Modifications of the Copyright (International Conventions) Order 1972:—

(i) Articles 4 (other than paragraph (2)*(b)*) and 8 to 11 together with Schedules 4 to 7 shall be omitted.

(ii) In Article 3, for " any part of the United Kingdom " there shall be substituted " Hong Kong ".

(iii) In Schedule 2 the following dates shall be inserted respectively in the second column in relation to the countries mentioned in the following tables —

Ghana	22nd August 1962
Kenya	7th September 1962
Malawi	26th October 1965
Mauritius	12th March 1968
Nigeria	14th February 1962
Zambia	1st June 1965

EXPLANATORY NOTE

(This Note is not part of the Order)

This Order extends the provisions of the Copyright Act 1956 with certain exceptions and modifications to form part of the law of Hong Kong.

The Order also extends three Orders in Council made under Part V of that Act. The extension of these Orders will

give protection in Hong Kong to works originating in countries party to International Copyright Conventions, to works produced by certain international organisations and to lawfully authorised broadcasts originating in other Commonwealth countries to which the 1956 Act has already been extended. Broadcasts by Hong Kong organisations will also have protection in Hong Kong and in those countries by virtue of this Order.

The copyright protection given by the law of Hong Kong will be similar to that by the law of the United Kingdom.

CORRESPONDENCE

Letter from the Federal Republic of Germany

By Adolf DIETZ *

(First Part)

A long time seems to have passed since the last " Letter from Germany " [1], in which Professor Ulmer gave an exhaustive account of the Copyright Act of September 9, 1965, and the events preceding it. Yet it took some years, after the entry into force of the Act on January 1, 1966, for a sufficiently wide range of court decisions to be rendered on the basis of the new legislation. Indeed, it was only in 1971 and 1972, considering the number and the significance of the decisions rendered during that period, that the first peak was reached in recent copyright developments in the Federal Republic of Germany.

This growth of case law pratically coincided with the enactment of the first Amendment of the 1965 Copyright Act, namely, the " Law amending the Copyright Act " of November 10, 1972 [2]. Thus the time seems right for a report of this kind.

The 1972 Amendment was also made necessary to some extent by decisions of the Federal Constitutional Court *(Bundesverfassungsgericht)* declaring certain provisions of the 1965 Copyright Act incompatible with the Constitution *(Grundgesetz)*. The constitutionality of other individual provisions of the 1965 Copyright Act which were amended in 1972 had been confirmed shortly beforehand. In view of this close dovetailing of several decisions of the Federal Constitutional Court, but also some decisions of the Federal Court of Justice *(Bundesgerichtshof)*, with the solutions embodied in the 1972 amendment, and in view of the special legal character of decisions of the Federal Constitution Court [3], it seems fitting to present these decisions in close relation to the 1972 Amendment. Then, in a second part of this " Letter ", there should be a report on other court decisions in the copyright field, with special reference to the many important decisions of the Federal Court of Justice.

I. Decisions of the Federal Constitutional Court

The copyright legislation in force in Germany prior to January 1, 1966, was based on the 1901 Copyright Act (Literary and Musical Works) and on the 1907 Copyright Act (Works of Art and Photography). This, therefore, to use the terminology of German constitutional law, was " pre-constitutional " law, under which any of the lower courts could examine and, where appropriate, deny compatibility with the 1949 Constitution. Under Article 93 of the Act establishing the Federal Constitutional Court, actions contesting the constitutionality of the old Copyright Acts could be made only up to April 1, 1952, and not later.

Thus, the examination of the copyright law by the Federal Constitutional Court was in practical terms not possible until a " post-constitutional " Copyright Act came into being, namely, the 1965 Copyright Act [4]. Owing to the period of one year for the filing of actions contesting the constitutionality of newly-enacted laws (Article 93(2) of the Act establishing the

* Dr. jur.; Staff member of the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition Law, Munich.

[1] *Copyright*, 1965, pp. 275 *et seq.*

[2] See above, pp. 88 and 89.

[3] A decision annulling a law on the basis of an unconstitutionality action has force of law (Article 31(2) of the Act establishing the Federal Constitutional Court, of March 12, 1951).

[4] Cf. also Ridder, «Gemeinsame Anmerkung zu den fünf Entscheidungen des Bundesverfassungsgerichts», in Schnlze, *Rechtsprechung zum Urheberrecht, Entscheidungssammlung*, Vol. IX, 1st-18th supplements, October 1972, under BVfG No. 12.

Federal Constitutional Court), action had to be taken quickly in 1966. The five copyright decisions rendered by the Federal Constitutional Court on July 7 and 8, 1971, which we shall deal with below, were the result of all the unconstitutionality actions filed at the time by the authors and artists affected [5]. That it should have taken until the summer of 1971 for the Federal Constitutional Court to render its decision is a sorry indication of the overburdening even of this Court.

The five decisions concerned the constitutionality of the following provisions of the 1965 Copyright Act: Articles 27(1), (exemption of public libraries from the payment of royalties), 46 (exemption from the payment of remuneration in the case of collections for religious, school and instructional use), 47 (no payment of remuneration for the recording of school broadcasts), 53(5) (obligation for manufacturers of tape recorders to pay remuneration), 135 (retroactive conversion of fictitious authors' rights granted to adapters into performers rights with a shorter protection period). The five decisions have a relationship between themselves which the Court itself intended and indeed created by means of references. Thus, a comprehensive and detailed discussion of the Copyright Act in relation to the Constitution, and especially the guarantee of ownership in the latter's Article 14, will be found in one of the five decisions, namely, that on Article 46 [6]. Express reference is then made to this discussion in the other decisions. Here too, therefore, we shall deal first and in greater detail with the decision on Article 46.

A. Unconstitutionality of the exemption from the payment of remuneration in the case of collections for religious, school and instructional use

In his 1965 " Letter " [7], Professor Ulmer said that resistance from textbook publishers and the educational authorities of the *Länder* had been such as to make it impossible, when the 1965 Copyright Act was adopted, to include the provision originally envisaged whereby equitable remuneration was to be paid for the inclusion, after their publication, of parts of works, literary and musical works of small extent, single artistic works or single photographs not otherwise requiring the author's consent, in a collection which assembles the works of a considerable number of authors and is intended by its nature, exclusively for religious, school and instructional use. Thus, the provision in Article 46 of the Copyright Act, without the obligation to pay remuneration, brought about the absurd result that, while publishers, printers and others profited by the textbook, the author went away empty-handed. Professor Ulmer had already pointed out that this flagrant violation of the basic principles of fairness was also constitutionally doubtful. The Federal Constitutional Court eventually declared the provision unconstitutional.

It seems significant at the outset — also for copyright theory — that the Federal Constitutional Court did not accept the argument put forward by Professor Ridder [8] in a report to the effect that copyright being " the artist's basic right to his work ", was an essential component of the comprehensive constitutional guarantee extended to art and science under Article 5(3) of the Constitution, and that the right to economic exploitation of the artistic work was inseparable from it. Ridder added that, since the basic right under Article 5(3) of the Constitution was unlimited, the right in the artistic work might be neither restricted nor removed. According to this view, therefore, all laws directed against the artist's rights of publication, distribution and performance are to be excluded.

On the other hand, the Federal Constitutional Court expressly leaves undecided — on the basis of the distinction indicated in the 1965 Copyright Act between the author's moral rights (Articles 12 to 14) and the exploitation rights (Articles 15 *et seq.*) — the question of the legal relationship of these two sectors of copyright to one another, and that of the basic legal principles which determine the intellectual and personal relationship of the author to his work. In the view of the Court, the examination as to constitutionality concerned only the property-law aspect of copyright; in that case, however, the constitutionality of the author's exploitation rights had, in principle, to be determined in relation to Article 14 of the Constitution (guarantee of ownership); in any event, the unbreakable bonds linking personal and intellectual creations to their economic usability should be given the consideration they deserve.

In defining the details of copyright in relation to Article 14 of the Constitution, the Federal Constitutional Court comes to the following conclusions: one of the constituent features of copyright as property in terms of the Constitution is the principle according to which the pecuniary result of creative activity belongs to its author, and the freedom of the latter to dispose of it on his own responsibility. *This is the fundamental, constitutionally protected element of copyright.*

The basic principle of granting the pecuniary element of copyright to the author for free disposal by him does not mean, however, that *every imaginable means of exploitation* is guaranteed by the Constitution. In particular, it is rather for the legislator to establish appropriate criteria, taking into account the characteristic features inherent in copyright, to ensure enjoyment and suitable exploitation of the right in keeping with its nature and social significance.

Thus, the Court reaches the stage at which the limitations on copyright, defined in Articles 45 *et seq.* and, in the case in point, Article 46 of the 1965 Copyright Act could, on the one hand, be justified in terms of principles but, on the other hand, be examined as to their compatibility with the Constitution. In this examination of the constitutionality of the individual limitations, it should be borne in mind that the legislator not only has to protect individual interests but also is obliged to set such limits to individual privileges and powers as are dictated by the common good. Constitutionality, therefore, depends on whether the concrete manifestation of the limitation is justified by the exigencies of the common good.

[5] Cf. Schulze, «Die Ersten Erfahrungen mit der neuen deutschen Urheberrechtsgesetzgebung», *GEMA-Nachrichten,* Heft 74 (May 1967), p. 3 *et seq.*

[6] Decision of July 7, 1971—1 BvR 765/66, BVerfGE, Vol. 31, p. 229 (official collection) = *GRUR* 1972, pp. 481 *et seq.* (for further sources cf. *GRUR,* Report No. 1813/72).

[7] *Op. cit.*, p. 279.

[8] Cf. also Ridder, *op. cit.*, pp. 17 *et seq.*

Finally, with regard to Article 46 of the 1965 Copyright Act, the Federal Constitutional Court comes to the conclusion, on the one hand, that there can be no objection to the denial of the author's right of reproduction and distribution in the case in point. Publication of a protected work not only places it at the disposal of the individual: at the same time, it comes into the social sphere and can thereby become an independent factor conditioning the cultural and intellectual picture of the time. In the opinion of the Federal Constitutional Court, it is very much in the interest of the general public that youth become familiar with intellectual creation within the framework of an up-to-date education.

On the other hand, however, this interest of the general public in unrestricted access to works protected by copyright is not sufficient to justify also exclusion of the right to remuneration. The arguments repeatedly put forward to justify exemption from the payment of remuneration are rejected by the Federal Constitutional Court, and especially the argument that the author " has a special debt of gratitude towards the general public ". In no comparable area of human activity, it maintains, is there a legal obligation to make the result of personal effort available free of charge for the purposes of public education. Neither the publisher, nor the editor, nor the printer of a school book has his rightful share in the proceeds of their common effort withheld in this way. Even the owner of patent or industrial design rights is not expected to forgo any of his prohibition rights or entitlement to royalties under a license if protected apparatus is used in connection with the teaching of the natural sciences.

This welcome decision of the Federal Constitutional Court, which as we mentioned is a sort of key decision for the whole set of five copyright decisions, forced the legislator to make a corresponding amendment to Article 46 of the Copyright Act, as will be shown in more detail below.

B. Constitutionality of the recording of school broadcasts without paying remuneration

Article 47 of the 1965 Copyright Act allows schools and institutions for teachers' training and advanced training to produce copies of single works which are included within a school broadcast by transferring the works to visual or sound records. The visual or sound records may be used only for instructional purposes, and must be destroyed not later than the end of the then current school year. If they are not destroyed, equitable remuneration must be paid to the author.

The Federal Constitutional Court [9] comes to the conclusion that this provision does not violate any of the author's basic rights. It was able to formulate its decision in relatively brief terms, as it could to a large extent refer to its deliberations on the comparable case — albeit with a different outcome — concerning Article 46.

The purpose of the provision, according to the decision of the Federal Constitutional Court, is to place the teacher in a position where he can introduce the school broadcast at the right point in the teaching. As the broadcast itself can only be made with the author's permission, the latter must take into account that it cannot be used for teaching in all the schools concerned at the time of its transmission. Under these circumstances, it may be expected that the author, in giving his permission for the broadcasting of his work on school radio, will also allow it to be transferred to visual or sound records, in order that it may be used according to its intended purpose.

The concern underlying the fruitless unconstitutionality action regarding Article 47 was not taken into account in the 1972 Amendment, although at the outset it featured in an additional " list of wants " presented by authors' unions and collecting societies, as well as some groups of publishers [10]. As Nordemann [11] explains, the intention was to avoid making realization of the amendment impossible by complying with too many wishes. Thus, school broadcasts which are destroyed at the end of the school year may still be recorded without permission or payment of remuneration in schools and the other educational establishments specified in Article 47.

C. Exemption of public libraries from the payment of royalties

Article 27 of the 1965 Copyright Act — unlike the previous legislation — granted a right to remuneration if copies of a work (books, periodicals, records and sheet music) were lent and the lending was executed for the financial gain of the lender. The effect of this wording was that public libraries of all kinds, because they pursued no profit-making ends, were not affected by the provision; this effect was consciously sought at the time of the enactment of the 1965 Copyright Act, even though the problem associated with it, that of the creation of a writers' fund, was already apparent [12]. The exemption of public libraries from library royalties under Article 27 of the 1965 Copyright Act was, in fact, the main area under attack in the copyright reform operation which — with reference to Scandinavian precedents — sought to achieve the aim of a social fund for writers by extending to public libraries the obligation to pay royalties. In this way, the unconstitutionality actions regarding Article 27 very soon became a sort of sideshow in the dispute, and we can therefore be relatively brief in dealing with them. Moreover, the Federal Constitutional Court came to the conclusion [13] that constitutionally there could be no objection to allowing the author to claim remuneration under Article 27(1) of the Copyright Act only when the lending was executed for the financial gain of the lender. This decision on the part of the Federal Constitutional Court made it all the more urgent, in the view of the authors concerned, for the legislator to intervene.

[9] Decision of July 7, 1971—1 BvR 276/71, BVerfGE, Vol. 31, p. 270 = *GRUR* 1972, pp. 487 *et seq.* (cf. *GRUR*, Report No. 1814/72).

[10] In this connection, cf. Dietz, «Die sozialen Bestrebungen der Schriftsteller und Künstler und das Urheberrecht», *GRUR* 1972, pp. 11 *et seq.* (p. 18); English version in *International Review of Industrial Property and Copyright Law (IIC)*, Vol. 3, No. 4/1972, pp. 451 *et seq.*; Nordemann, «Die erste Novelle zum Urheberrechtsgesetz», *GRUR* 1973, pp. 1 *et seq.*

[11] *Op. cit.*

[12] Cf. Regierungsentwurf des Urheberrechtsgesetzes 1962, Bundestagsdrucksache No. IV/270 (motivation for Article 27: p. 54).

[13] Decision of July 7, 1971—1 BvR 764/66, BVerfGE, Vol. 31, p. 48 = *GRUR* 1972, pp. 485 *et seq.* (cf. also *GRUR*, Report No. 1815/72).

From the standpoint of copyright theory, this decision seems significant in that the Federal Constitutional Court expressly endorsed the considerations set forth in Article 17(2) of the Copyright Act on the exhaustion of the right of distribution when the original work or copies thereof have been distributed by means of sale with the consent of the owner of the right. The economic interests of the author are generally satisfied when, with the first act of distribution, he has had the opportunity of making his consent conditional on the payment of remuneration. Furthermore, the view described above, according to which the ownership guarantee in the Constitution does not require that the author be accorded every imaginable possibility of economic exploitation, led the Court to the conclusion that the differentiation in Article 27 of the 1965 Copyright Act between profit-making lending libraries and public libraries was not contrary to the Constitution.

D. Partial unconstitutionality of the retroactive conversion of the fictitious author's rights granted to an adapter into performer's rights of shorter duration

Under Article 2(2) of the old 1901 Copyright Act (Literary and Musical Works), as amended by the 1910 Law, which was abrogated by the 1965 Copyright Act (Article 141), the transferring of works of literature and music on to sound records by personal performance was assimilated to an adaptation of the work, although by normal standards it was not an author's right but a performer's right [14]. In the provisions on the protection of performers (Articles 73 *et seq.*), the 1965 Copyright Act arrived at a solution which was dogmatically correct. However, the legal conversion of the fictitious author's right previously granted to the adapter into a performer's right resulted in the term of protection of 50 years *post mortem auctoris,* which formerly applied also to this fictitious author's right, being suddenly shortened to 25 years after the publication of the recording or, if it was not published within this period, after the performance (Article 82 of the 1965 Copyright Act). The legislator placed special emphasis on this consequence by providing in Article 135 of the 1965 Copyright Act that any person who at the time of the effective date of the Act would be considered, under prior legal provisions, to be the author of the sound recording of a work would be the owner of the new performer's right.

This combined effect of Articles 135 and 82 of the 1965 Copyright Act, which would have been disastrous for the artist who had become successful before 1966, led the affected performers and record manufacturers and the collecting societies which represented them to defend their interests by means of an unconstitutionality action.

In its decision on this action [15], the Federal Constitutional Court comes to the conclusion that, while the conversion of the author's rights previously granted to an adapter into performer's rights by virtue of Article 135 of the 1965 Copyright Act is constitutionally sound, Article 135 of the Copyright Act itself is unconstitutional to the extent that under it the recalculation of the beginning of the term of protection applies also to recordings made before January 1, 1966.

This decision of the Federal Constitutional Court likewise compelled the legislator to make a corresponding rectification. The actual significance of the decision for the future therefore lies not in its result, which in the meantime has become law, but in the fact that the Federal Constitutional Court has concerned itself with the organization of the rights of performers in their performances according to Articles 75 *et seq.* of the 1965 Copyright Act and, in particular, with their much shorter duration compared with copyright. It applies the principles developed in the other decisions to the performers' rights, with the especial result that such rights are also covered by the guarantee of ownership under Article 14 of the Constitution.

On the question of limitation in time, it maintains at the outset that the prerogatives provided for in the Copyright Act are by reason of their nature rights which are limited in time. Not only intellectual and creative, but also recreative work is so designed as to become freely accessible after a certain time. It then adds that there is no violation of the equality clause, as material ownership is an unlimited right. The legal structure and the function of material ownership as a form of distribution of goods are so substantially different from the ownership aspects of artistic reproduction as to rule out identical construction of the corresponding rights. The finding of the Federal Constitutional Court is also of great significance to copyright itself, as it diminishes the risk of incorrect analogies between material ownership and immaterial property rights. It shows with great clarity that the ownership concept under the Constitution is of much broader scope than the ownership concept under civil law. As a whole, this decision of the Federal Constitutional Court has gone beyond its immediate purpose and brought about an important clarification of the legal position of performers.

E. Constitutionality of the obligation for manufacturers of tape recorders to pay remuneration

The fifth decision of the Federal Constitutional Court [16], which we shall deal with now, differs from the ones already discussed first of all by reason of the aim which was to be achieved by means of the unconstitutionality actions on which it ruled. Whereas with the first four decisions the complainants were authors or performers, or groups closely associated with them, who opposed individual provisions of the 1965 Copyright Act as being unconstitutional restrictions of their rights, in this case it was the reverse; the question was whether a provision made for practical reasons in favor of the author did not impinge too much on the rights and the freedom of economic action of the party liable for royalties. The provision involved, Article 53, has a paragraph (1) which declares it permissible to make single copies of a work for personal use, and a paragraph (5) which, where broadcasts are fixed on visual or sound records or transferred from one

[14] Cf. Ulmer, *Urheber- und Verlagsrecht*, 2nd ed. 1960, pp. 430 *et seq.*, 435 *et seq.*

[15] Decision of July 8, 1971—1 BvR 766/66; BVerfGE, Vol. 31, p. 275 = *GRUR* 1972, pp. 491 *et seq.* (cf. also GRUR, Report No. 2440/72).

[16] Decision of July 7, 1971—I BvR 775/66, BVerfGE, Vol. 31, p. 255 = *GRUR* 1972, pp. 488 *et seq.* (cf. also *GRUR*, Report No. 1816/72).

visual or sound record to another for personal use, grants the author the right to claim remuneration from the manufacturer of equipment suitable for making such reproductions. At the time of the enactment of the 1965 Copyright Act — as Professor Ulmer pointed out in his last "Letter"[17] — Article 53(5) reflected the conclusions drawn by the legislator from earlier decisions of the Federal Court of Justice in favor of authors.

The decision of the Federal Constitutional Court to a certain extent reflects also the arguments put forward when the provision was first devised. The main question at issue was whether the legislator was violating the general equality clause in Article 3(2) of the Constitution when, of all the people involved (owner of the tape recorder, its manufacturer, manufacturer of the recording tape, retailer), he singled out the manufacturer of the equipment as being the party liable for remuneration. Relying, in particular, on the fact that the cost of remuneration is passed on to the purchasers of tape recorders — the Federal Constitutional Court looks on this procedure as a regular practice allowed by the legislator — the Court declares the decision eventually arrived at by the legislator to be constitutional. According to the Court's decision, the legislator could, in view of the complexity of the area to be controlled, overlook the fact that to a certain extent the obligation to pay remuneration is imposed also in respect of the equipment which is not used for the playing of protected works. There is, therefore, no objection to the fact of making the obligation to pay remuneration contingent on the mere possibility of reproductions being made using the equipment manufactured.

In connection with this provision, we should like to deal briefly with a special problem which was only of marginal significance in the decision of the Federal Constitutional Court, in that it involved the question whether the provision concerning the party entitled to receive royalties was not too vague, consequently having the character of a public tax, as was maintained by the complainants. Article 53(5) of the 1965 Copyright Act provides, in the fifth sentence, that the total claims of all copyright owners (author, performer, producer of phonograms, film maker — all have a share, by direct or corresponding application of the provision, in the sound recording royalty) must not exceed five per cent of the sale proceeds. Thus, the legislator has only set a maximum, and the actual amounts have to be fixed by negotiation between the parties. This somewhat unfelicitous solution was the underlying reason for the attempt to amend the provision when the Copyright Act was revised, by changing the maximum into a legally binding prescribed flat rate of five per cent[18]. Here, too, the project was ultimately abandoned, in order to avoid overloading and thus jeopardizing the Amendment as a whole — as mentioned earlier.

The special problem referred to above was, nevertheless, the subject of a legal dispute before the Federal Court of Justice[19], which for reasons deriving from anti-trust legislation led to the defeat of the complaining collecting societies. As is apparent from the substance of the decision of the Federal Court of Justice, the *Zentralstelle für private Überspielungsrechte* (ZPÜ — Central Office for Private Rerecording Rights), which was joined by the various collecting societies (GEMA, VG Wort, GVL) consulted for the filing of the claims under Article 53(5), had originally sought to lay down a uniform five per cent rate of remuneration. The corresponding negotiations eventually resulted in an agreement applicable from 1966 to 1968 with German tape recorder manufacturers grouped within the *Zentralverband der elektrotechnischen Industrie* (ZVEI — Central Association of Electrotechnical Industries), under which the ZVEI was to pay a lump sum of four million German marks a year, raising this amount from among its members. On conclusion of this flat-rate agreement, it was assumed that the annual sum agreed upon as a result of the negotiations would be somewhere in the region of five per cent of the manufacturers' receipts from the sale of new tape recorders. As a result of appreciable sales increases, however, the amount of the annual payment in fact represented less than three per cent of the proceeds.

As this flat-rate agreement applied only to domestic manufacturers, and as the legislator, in view of the difficulty of bringing in foreign manufacturers, made importers of tape recorders liable as well as manufacturers (Article 53(5), second sentence), it is understandable that the ZPÜ and the collecting societies behind it should have sought to secure at least five per cent calculated on the manufacturers' sale prices from the full rate of the importers. This attempt met with the opposition of the Federal Court of Justice because, in view of the collecting societies' dominant position in the market, it constituted discrimination against importers and in favor of domestic manufacturers which had no material justification in terms of Article 26(2) of the Law against Restrictive Practices and was therefore inadmissible. The collecting societies will not altogether be pleased with this decision of the Federal Court of Justice, as it treats them as market-dominating enterprises in terms of anti-trust legislation. In fact, we, like Ridder[20], consider an approach based more on labor legislation preferable, whereby the collecting societies are likened to trade unions and thus kept outside the purview of anti-trust legislation. Perhaps one day this question too will be finally settled by a Constitutional Court decision.

* * *

Having thus completed this account of the five decisions of the Federal Constitutional Court, with a brief digression into the field of anti-trust law, it is time for us to examine more closely the results of the 1972 Amendment of the Copyright Act.

II. The 1972 Amendment of the 1965 Copyright Act

The Law amending the Copyright Act, of November 10, 1972, contains four articles, one of which may be disregarded, namely, Article 3 (application in *Land* Berlin). The substantive amendments to the 1965 Copyright Act are contained in

[17] *Copyright*, 1965, p. 280.
[18] Cf. Dietz, *op. cit.*, pp. 18 *et seq.*
[19] BGH, 30. 1. 1970, *GRUR* 1970, pp. 200 *et seq.* (cf. also *GRUR*, Report No. 1822/72).
[20] *Op. cit.*, p. 20.

Article 1; Article 4 is a transitional article laying down different dates for the entry into force of individual provisions; like Article 4, Article 2 has substantive connections with the individual substantive amendments to the Copyright Act, and a mention of the connection is therefore made in the appropriate place.

A. Amendment of Article 26 of the 1965 Copyright Act: Droit de suite

Article 26 of the Copyright Act introduced for the first time in German copyright law the concept of the artist's right to a participation in the proceeds from the resale of original works *(droit de suite)*[21]. This original provision, affording a one per cent participation in the proceeds from sale through an art dealer or auctioneer, with a minimum price of five hundred German marks, soon proved to be almost impracticable, since the cooperation which the art dealers at first declared themselves willing to provide — in order to avoid the introduction of more stringent rules — was to a large extent not forthcoming, and the one per cent share did not even afford an adequate financial basis for the efficient operation of a collective system to guarantee the rights in question[22]. It became evident that the *droit de suite* could only be made effective if it were subject to a number of new conditions: higher participation; lower minimum price; guarantee of application in individual cases.

As a result of the large step forward taken by the Federal Court of Justice in its judgment of June 7, 1971[23], in which it granted the artist the right to demand information from the art dealer as to the sale price realized and the identity of the seller, at least in cases where the artist was able to establish the fact of sale, the legislator arrived at the following solution by redrafting Article 26: should the original of an artistic work be resold and should such resale involve an art dealer or an auctioneer as purchaser, vendor or agent, the vendor pays the author a participation at the rate of five per cent of the sale price. There is no such obligation if the sale price is less than one hundred German marks.

In addition to this substantial increase in the participation from the former one per cent to the present five per cent and the reduction of the minimum sale price from five hundred to one hundred German marks, which are contained in Article 26(1), it is also particularly significant that the legislator — going further here than the Federal Court of Justice — grants the author in paragraph (3) a general right to request information even on the fact of sale, and in paragraph (4), in accordance with the decision of the Federal Court of Justice, also the right to information on the name and address of the seller and the amount of the sale price. If the art dealer or auctioneer pays the five per cent share himself, he may refuse information on the name and address of the seller.

The special character of this right to information — in contrast to the individual *droit de suite* claims on which it is based — lies in the fact that it may only be asserted through a collecting society, which in practice could result in the underlying pecuniary claim also being realized by the collecting society. This procedure — which has a precedent in the sound recording royalty under Article 53(5) of the 1965 Copyright Act — will come up again later when we deal with the introduction of the new library royalty. As in the case of Article 53(5), it has at the outset a purely practical significance, as art dealers, who in any case were using their heaviest weapons to fight the reorganization of the *droit de suite* and were prophesying migration to other countries were, in fact, not flooded with individual requests for information.

On the other hand, the additional provision in paragraph (6), to the effect that the collecting society may, where it has justified doubts as to the accuracy of the information, demand that access to the account books be granted to itself or to a chartered accountant designated by the party obliged to provide the information, at the choice of the latter, is highly favorable to art dealers and has given Nordemann[24] cause to doubt the practicability of the new system also. In any event, the recently-founded collecting society *Verein Bildkunst* (Association of Fine Arts) has now been entrusted with an important task by the legislator. The fact remains, however, that considerable difficulties face the establishment in practice of the *droit de suite* exercised through this collecting society: it must first extend its membership to cover all genuinely " traded " artists, without whom the undertaking would be no more practicable than before, and the problem is further complicated by the fact that, according to the present conceptions of the *Verein Bildkunst*, all or most of the proceeds of the *droit de suite* should not be distributed individually but — as with the Writers' Fund — be paid into a pension fund for the benefit of artists[25].

B. Amendment of Article 27 of the Copyright Act: Library royalty

The second important change brought about by the 1972 Amendment involves Articles 27 of the 1965 Copyright Act, which in the original version granted a right to remuneration only where the lending of copies was executed for the financial gain of the lender. This provision was, as mentioned earlier, the subject of a decision of the Federal Constitutional Court in which the exemption of public libraries from the so-called library royalty was confirmed as being not contrary to the Constitution.

We have already mentioned that the way of the Federal Constitutional Court, by which the desired result was ultimately not arrived at, was only of secondary importance to the problem of the liability of public libraries to royalties. The main purpose of the reform effort in this respect was the amendment of the Copyright Act; indeed there is no doubt that, without the idea of the social fund for writers which lay

---

[21] Cf. Katzenberger, *Das Folgerecht im deutschen und ausländischen Urheberrecht*, Urheberrechtliche Abhandlnngen des Max-Planck-Instituts für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, Vol. 10, Munich 1970, S. V, pp. 22 *et seq.*

[22] Cf. Katzenberger, *op. cit.*, pp. 121 *et seq.*

[23] *GRUR* 1971, p. 519 (cf. also *GRUR*, Report No. 845/72); cf. this with Katzenberger, «Die Durchsetzung des Folgerechts», *GRUR* 1971, pp. 495 *et seq.*

[24] *Op. cit.*, p. 2.

[25] Cf. the reports on a press conference of the Verein Bildkunst, e. g., *Frankfurter Allgemeine Zeitung* of March 5, 1973, p. 2; *Süddeutsche Zeitung* of March 10/11, 1973, p. 12.

behind this reform drive and which was pursued with considerable political pressure [26], the Copyright Amendment would never have been enacted, or at least not in this form. It is all the more surprising, therefore, that the idea of a social fund, which in fact is one of its dominant features, is not directly expressed in the text of the Amendment, and hence not in the redrafted Copyright Act either.

In its new 1972 version, Article 27 has merely extended the obligation to pay royalties, on the one hand, to (charge-free) lending and, on the other, to public libraries or — in the more precise terms of the Law — to " an institution accessible to the public (library, record library, or collection of other copies) ". The real purpose, in terms of legal policy, of this extension of the obligation to pay royalties, namely, the creation of a writers' fund, is only indirectly stated by the fact that remuneration may only be claimed through a collecting society. This " collectivization " of the right to remuneration differs from the case provided for in Article 53(5) (sound recording royalty) in that it has the avowed intention not only of making processing easier, but also of ensuring the " collective " use of part of the incoming proceeds for the creation of a writers' fund. This procedure finds some support in Article 8 of the 1965 Law on Collecting Societies: it provides that collecting societies are to arrange welfare and assistance facilities for the owners of the rights or privileges administered by them. However, as with the *Verein Bildkunst*, still more than somewhat unsteady on its feet, and its plans for the setting up of a pension fund, certain difficulties must be expected here owing to the fact that the circle of potential claimants under the Law is far larger than that of the authors represented by *Wort*, the collecting society in question.

In order that the claims which could now be made under Article 27 might be processed quickly, the firm " Autorenversorgungswerk GmbH " was founded in Hamburg at the Second Writers' Congress in January 1973 [27]. About half the library royalties which will be received by *Wort*, amounting to an estimated minimum of ten million German marks [28] — calculated on the basis of a random sampling system — are to be transferred to this firm. On the debit side, it is admittedly not altogether clear for the moment who will ultimately provide the funds and to what extent, bearing in mind that various public-law library authorities and the cultural sovereignty of the *Länder* are involved. Even the *Bundestag* confined itself to a resolution [29] based on the consideration that claims for remuneration are paid in a lump sum by library operators, in a manner which does not lead to a reduction in the funds available for the acquisition of books or to a passing of the remuneration on to the users of the library. Moreover, the *Bundestag* is waiting for the Federation and the *Länder* to provide in time the necessary finances so that sufficient funds are available to the library operators for the payment of remuneration claims in this way.

The express extension of the right under Article 27 to (free) lending also puts an end to the long drawn-out controversy as to whether so-called staff libraries in firms, which lend books to staff members free of charge, are obliged to pay royalties. Shortly before the enactment of the Amendment, on March 10, 1972, the Federal Court of Justice had rendered a decision [30] in favor of the staff libraries. The legislator, on the other hand, has made it clear that lending to the staff members of a firm is also subject to the payment of royalties by providing, in Article 27(2) of the new text, that the obligation to pay royalties is not applicable where copies are lent under a contract of service or a contract commissioning services, for use *solely* in the fulfilment of commitments arising in connection with the service or commission. This, as Nordemann [31] points out, applies to collections in work or reference libraries within a firm. The other restriction in paragraph (2), namely, that works published exclusively for hiring or lending purposes (so-called " Leihromane ", but also copies of cinematograph films which are produced for lending to cinemas) are exempt from the obligation to pay royalties, corresponds to the original provision in Article 27(2).

In our opinion, there seems to have been an omission in that the lending of originals (c. g., paintings, drawings) has not been included with the lending of copies. In view of the growing practice of hiring art originals in so-called " art libraries ", but also in gallerics and department stores, such practices should have been covered, for in the absence of a sale they do not come under the artist's *droit de suite*.

Moreover, Peter [32] has already pointed out that the introduction of the library royalty might have an effect in the future on efforts to reform Articles 53 and 54 of the 1965 Copyright Act (reproduction for personal and other internal uses). Indeed, there is now a paradoxical situation — as described by Peter — whereby the author may claim an equitable remuneration every time his work is lent by a library, yet receives nothing when an interested party orders a photocopy of the same work from the library, for his personal or any other internal use.

On the whole, however, the strengthening of the *droit de suite* and the introduction of the library royalty also for public libraries represent an important success in the social endeavors of German writers and artists, which it remains only to put into practice.

C. Amendment of Article 46: Textbook royalty

The decision of the Federal Constitutional Court mentioned earlier, which declared unconstitutional the exemption from remuneration of collections for religious, school and instructional use, in effect only needed to be redrafted in legislative terms by the authors of the 1972 Amendment. This has now happened with the insertion of a new paragraph (4) in Article 46, providing that the author is to be paid an equi-

[26] Cf. Dietz, *op. cit.*, pp. 11 - 12 and 15 *et seq.*

[27] Cf. the report in the *Börsenblatt des Deutschen Buchhandels*, 1973, pp. 146 *et seq.*

[28] Tentative estimate, Nordemann, *op. cit.*, p. 3.

[29] Reproduced in the *Börsenblatt*, 1972, p. 1536.

[30] *GRUR* 1972, p. 617, with note by Kleine (cf. also *GRUR*, Report No. 534/73).

[31] *Op. cit.*, p. 3.

[32] On the amendment of the Copyright Act, *Börsenblatt*, 1972, pp. 2749 *et seq.* (p. 2751).

table remuneration for the reproduction and distribution of works or parts of works as listed in paragraph (1).

One point which remained unsettled until recently was the time of the (retroactive) entry into force of this provision. According to the original plans of the *Bundestag*, it was to have been January 1, 1966, the date of entry into force of the 1965 Copyright Act, but, after an objection on the part of the *Bundesrat*, was finally set at October 11, 1971, the date of publication of the decision of the Federal Constitutional Court[33].

It was to be expected that the new right to remuneration expressly accorded to the author by the new text of the Act would bring on to the scene not only the royalty-paying textbook publishers but also publishers affected in their capacity as owners of publishing rights. Negotiations, therefore, had to be initiated between the parties involved in order to establish not only what an "equitable remuneration" was in terms of the provision but also who nltimately enjoyed the benefit of that remuneration. The fact that the authors and their professional organizations, on the one hand, and their publishers, on the other, hold very divergent views on this subject creates further problems. Peter[34] rightly points out that the author-publisher relationship plays a fairly important part here, as the remuneration claims under Article 46, unlike those under Article 27 (library royalty), can be processed individually.

In connection with the introduction of the obligation to pay remuneration in respect of collections for religious, school or instructional use, there still remains the amendment to Article 62(4) of the 1965 Copyright Act, under which, in addition to the modifications permitted in connection with the free use of the work, such modifications of literary works are permissible as are necessary for religious, school and instructional use. While it is true that these modifications did previously require the consent of the author, such consent was regarded as granted if the author did not raise objection within a month of notification of the proposed modification. In the new text of Article 62(4), it has now been added, for the protection of the many authors not versed in law, that consent is presumed only if in the notification of the modification the author's attention has been drawn to this legal consequence.

D. Addition of Article 135a: Calculation of the shortened protection period for the author's rights granted to an adapter

In this case, too, the legislator had only to recast the decision of the Federal Constitutional Court, mentioned earlier, in legislative language, which he did by adding a new Article 135a. In accordance with the decision of the Federal Constitutional Court, the conversion of the previous fictitious author's rights of the adapter into performer's rights under the new legislation and the shortening of the protection period from the original 50 years *post mortem auctoris* to 25 years after publication or performance, as the case may be, was left untouched. As the Federal Constitutional Court declared inadmissible only the beginning of the protection period for "old recordings" under the new legislation, the new Article 135a provides that records produced before January 1, 1966, remain protected for 25 years as from January 1, 1966, unless their protection period would have expired earlier under the old law. In the latter case, the old protection period applies.

The following examples quoted by Nordemann[35] should make the foregoing clear:

Recordings with Wilhelm Furtwängler, who died in 1954, are still protected until December 31, 1990 (25 years after January 1, 1966), but no longer until December 31, 2004 (50 years after January 1, 1955, under the old legislation); recordings with Enrico Caruso, who died in 1921, were protected only until December 31, 1971 (50 years from January 1, 1922, under both the old and the new laws).

The transitional provision of the 1972 Amendment, Article 4, provides that the new Article 135a enters into force with retroactive effect as of January 1, 1966, which again is only the result of the decision of the Federal Constitutional Court. This principle was not applied in the other case, namely, Article 46 (textbook provision), which enters into force only with effect from October 11, 1971 (date of publication of the respective decision of the Federal Constitutional Court). Otherwise, the Amendment entered into force on January 1, 1973, pursuant to its Article 4.

In view of the fact that, during the period between the entry into force of the 1965 Copyright Act and the publication of the decision of the Federal Constitutional Court on November 15, 1971, records ostensibly in the public domain were found to have been unlawfully used by third parties, the legislator had to find a way of settling these cases also. Therefore, in Article 2 of the 1972 Amendment, provision is made for an appreciable mitigation of the normal sanctions for copyright infringements committed under such circumstances.

* * *

It is now for the courts, on the one hand, and for the negotiating skill of the parties concerned, on the other, to clarify the problems which were not removed by the 1972 Amendment and matters on which doubt still remains. The innumerable decisions which have already been rendered, and which we will deal with in the Second Part of this "Letter", show such clarifications are possible. Be this as it may, a big step forward has been taken on behalf of authors in the Federal Republic of Germany.

---

[33] The day of publication of a decision of the Federal Constitutional Court under Article 30 of the Act establishing the Federal Constitutional Court (October 11, 1971, in the case in point) is not the same as the day of pronouncement of the decision (July 7, 1971, in the case in point).

[34] *Op. cit.*, p. 2750.

[35] *Op. cit.*, p. 4.

Universal Copyright Convention

SOVIET UNION

Accession to the Convention of September 6, 1952

In a letter dated April 19, 1973, the United Nations Educational, Scientific and Cultural Organization (Unesco) informed us that the instrument of accession by the Union of Soviet Socialist Republics to the Universal Copyright Convention (1952) was deposited with that Organization on February 27, 1973.

In accordance with its Article IX(2), the Convention will come into force for the Union of Soviet Socialist Republics on May 27, 1973, that is, three months after the deposit of the instrument of accession.

The instrument of accession contains the following:

" In acceding to the Universal (Geneva) Copyright Convention of 1952, the Union of Soviet Socialist Republics declares that the provisions of Article XIII of the Convention are outdated and are contrary to the Declaration of the General Assembly of the United Nations on the granting of independence to colonial countries and peoples (resolution 1514 (XV), December 14, 1960), which proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations. "

CAMEROON

Accession to the Convention as revised at Paris on July 24, 1971

In a letter dated April 11, 1973, the United Nations Educational, Scientific and Cultural Organization (Unesco) informed us that the instrument of accession by Cameroon to the Universal Copyright Convention as revised at Paris on July 24, 1971, was deposited with that Organization on February 1, 1973.

Cameroon is thus the fifth State to deposit its instrument of ratification or acceptance of, or accession to, the Convention.

In accordance with the provisions of Article IX(1), the Convention will enter into force three months after the deposit of twelve instruments of ratification, acceptance or accession.

According to Article IX(3) of the Convention, the accession by Cameroon to the said Convention also constitutes accession to the Convention of September 6, 1952. In accordance with Article IX(2) of the Convention of 1952, this Convention came into force, for Cameroon, on May 1, 1973.

CALENDAR

WIPO Meetings

June 12 to 23, 1973 (Stockholm) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee

June 25 to 29, 1973 (Geneva) —ICIREPAT — Suhcommittee on Organic Chemistry (STC)

June 25 to 29, 1973 (Geneva) — WIPO Legal-Technical Program for the Acquisition by Developing Countries of Technology Related to Industrial Property — Provisional Committee

Object: To make proposals to the competent organs of WIPO — *Invitations:* Member States of WIPO or of the Paris or Berne Union — *Observers:* Other States memhers of the United Nations or of a Specialized Agency; intergovernmental and international non-governmental organizations concerned

June 26 to 30, 1973 (Stockholm) — International Patent Classification (IPC) — Joint ad hoc Committee

July 2 to 11, 1973 (Nairobi) — Committee of Governmental Experts on Prohlems in the Field of Copyright and of the Protection of Performers, Prodncers of Phonograms and Broadcasting Organizations Raised by Transmission Via Space Satellites

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

Jnly 4 to 6, 1973 (Geneva) — ICIREPAT — Technical Coordination Committee (TCC)

September 10 to 18, 1973 (Geneva) — Nice Union — Committee of Experts for the International Classification of Goods and Services for the Purposes of the Registration of Marks

Object: Amendments and additions to the International Classification — *Members:* States members of the Nice Union — *Observers:* States members of the Paris Union, not members of the Nice Union; Benelnx Trademark Office

September 17 to 21, 1973 (Geneva) — Committee of Experts on a Model Law on Neighhoring Rights

Object: To study a Draft Model Law — *Participants:* International non-governmental organizations concerned — *Note:* Meeting convened jointly with the International Labonr Organisation and Unesco

September 24 to 28, 1973 (Geneva) — Sub-Working Gronp for the Mechanization of Trademark Searches

Object: Examination of tests carried ont concerning mechanized trademark searches — *Members:* Belginm, Canada, France, Germany (Federal Repnblic of), Netherlands, Spain, United Kingdom, United States of America — *Observer:* Benelux Trademark Office

October 1 to 12, 1973 (Abidjan) — Committee of Governmental Experts on a Copyright Model Law for African States

Object: To study a Draft Model Law — *Invitations:* African States — *Observers:* Intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

October 8 to 19, 1973 (Geneva) — International Patent Classification (IPC) — Working Gronp IV of the Joint ad hoc Committee

Octoher 22 to 27, 1973 (Tokyo) — Patent Cooperation Treaty (PCT) — Interim Committees for Administrative Qnestions, for Technical Assistance and for Technical Cooperation, and Standing Subcommittee of the latter

October 30 to November 2, 1973 (Bangkok) — WIPO Industrial Property Seminar

November 5 to 9, 1973 (Geneva) — International Patent Classification (IPC) — Working Gronp V of the Joint ad hoc Committee

November 14 to 16, 1973 (Geneva) — ICIREPAT — Plenary Committee (PLC)

November 19 to 27, 1973 (Geneva) — Administrative Bodies of WIPO (General Assembly, Conference, Coordination Committee) and of the Paris, Berne, Madrid, Nice and Locarno Unions (Assemblies, Conferences of Representatives, Execntive Committees)

Invitations: States members of WIPO, or of the Paris or Berne Union — *Observers:* Other States members of the United Nations or of a Specialized Agency; intergovernmental and international non-governmental organizations concerned

November 26 and 27, 1973 (Geneva) — Lisbon Union — Council

Members: States members of the Lisbon Union — *Observers:* Other States memhers of the Paris Union

Novemher 28 to 30, 1973 (Geneva) — Working Group on Scientific Discoveries

December 3, 4 and 11, 1973 (Paris) — International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations — Intergovernmental Committee

Note: Meeting convened jointly with the International Lahonr Organisation and Unesco

Decemher 3 to 7, 1973 (Geneva) — International Patent Classification (IPC) — Working Gronp II of the Joint ad hoc Committee

December 3 to 7, 1973 (Geneva) — ICIREPAT — Technical Committee for Shared Systems (TCSS)

December 5 to 11, 1973 (Paris) — Execntive Committee of the Berne Union — Extraordinary Session

Note: Some meetings will he joint with the Intergovernmental Copyright Committee estahlished by the Universal Copyright Convention

December 10 to 14, 1973 (Paris) — ICIREPAT — Technical Committee for Standardization (TCST)

December 17 to 21, 1973 (Geneva) — Working Group for the Mechanization of Trademark Searches

Object: Report and recommendations to a Committee of Experts on mechanized trademark searches — *Invitations:* Anstralia, Anstria, Belgium, Canada, France, Germany (Federal Repnhlic of), Ireland, Japan, Luxembourg, Netherlands, Soviet Union, Spain, Sweden, United Kingdom, United States of America — *Observers:* Colombia, Benelux Trademark Office

UPOV Meetings

June 5 to 7, 1973 (Avignon) — Technical Working Party for Vegetables

June 13 and 14, 1973 (Lund) — Technical Working Party for Ornamental Plants

June 21 and 22, 1973 (Geneva) — Fee Harmonization Working Party

October 9, 1973 (Geneva) — Consultative Working Committee

October 10 to 12, 1973 (Geneva) — Council

Meetings of Other International Organizations concerned with Intellectual Property

June 25 to 27, 1973 (Rijswijk) — International Patent Institute — Administrative Council

June 26 to July 7, 1973 (Washington) — Organization of American States — Committee of Governmental Experts on Industrial Property and Technology Applied to Development

September 10 to 14, 1973 (Stockholm) — International Federation of Actors — Congress

September 10 to October 6, 1973 (Munich) — Munich Diplomatic Conference for the Setting Up of a European System for the Grant of Patents, 1973

September 24 to 28, 1973 (Budapest) — International Association for the Protection of Industrial Property — Symposium

October 28 to November 3, 1973 (Jerusalem) — International Writers Guild — Congress

December 10 to 14, 1973 (Brussels) — European Economic Community — " Community Patent " Working Party