

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. 6
JUNE 1973

Contents

	Page
WORLD INTELLECTUAL PROPERTY ORGANIZATION	
— Coordination Committee. Fourth Session (Extraordinary) (Geneva, May 2 to 4, 1973)	106
— Austria. Ratification of the WIPO Convention	108
BERNE UNION	
— Sweden. Ratification of the Paris Act (1971) of the Berne Convention	108
CONVENTIONS ADMINISTERED BY WIPO	
— Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms:	
— Fiji. Phonograms Notifications Nos. 2 and 7, <i>Corrigendum</i>	109
NATIONAL LEGISLATION	
— United Kingdom. The Copyright (International Conventions) Order 1973	
I. Amendment No. 2 (No. 772, of April 18, 1973, coming into force on May 21, 1973)	109
II. Amendment No. 3 (No. 963, of May 24, 1973, coming into force on May 27, 1973)	110
GENERAL STUDIES	
— The Geneva Convention for the Protection of Phonograms (Stephen M. Stewart)	110
INTERNATIONAL ACTIVITIES	
— International Federation of Musicians (FIM). 8 th Ordinary Congress (London, May 7 to 11, 1973)	117
CALENDAR	
— WIPO Meetings	118
— UPOV Meetings	119
— Meetings of Other International Organizations concerned with Intellectual Property	119
Vacancy in WIPO	120

© WIPO 1973

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

governmental bodies of WIPO for consideration or action; nevertheless, the WIPO bodies would retain their responsibility for deciding upon the program and budget of WIPO and the Unions; the structure of the financial contributions of governments would not be affected and no amendment of the Convention establishing WIPO or of the treaties administered by WIPO would be required.

(d) *Solutions other than a specialized agency relationship.* These may be divided into two groups: one includes the solutions adopted for organizations which form part of the United Nations system but which, for particular reasons, not applicable in the case of WIPO, either were created by and constitute organs of the General Assembly of the United Nations (UNCTAD and UNIDO) or have relations directly with the General Assembly rather than through the Economic and Social Council (IAEA); the other includes, or is expected to include, solutions adopted for organizations which will remain outside the United Nations system, such as INTERPOL and the projected World Tourism Organization; even in the latter case, the relations envisaged with the United Nations would not provide for some of the principal advantages referred to in subparagraph (a), above."

After a thorough discussion of the question, the Coordination Committee adopted the following resolution:

RESOLUTION

The Coordination Committee of the World Intellectual Property Organization (WIPO), meeting in Geneva from May 2 to 4, 1973,

Recalling the resolution adopted by the General Assembly and the Conference of WIPO on September 28, 1970, inviting the Director General of WIPO to examine the means of securing the most appropriate cooperation and coordination between WIPO on the one hand and the United Nations and the organizations of the United Nations system on the other hand, including the possibility and desirability of entering into an agreement under Articles 57 and 63 of the Charter of the United Nations, and to report to the next ordinary sessions of the General Assembly and Conference of WIPO,

Recalling also its resolution adopted on September 29, 1972, by which it declared that a relationship agreement under Articles 57 and 63 of the Charter of the United Nations appeared to be desirable,

Taking into account the report of the Director General of WIPO contained in document WO/CC/IV/2 and the discussions of and decisions arrived at in its present session (see document WO/CC/IV/8),

1. Concludes that the objectives of WIPO will be advanced and in particular the contribution which WIPO can make to international cooperation for economic and social progress will be enhanced if WIPO is brought into relationship with the United Nations as a specialized agency in accordance with Articles 57 and 63 of the Charter of the United Nations, and that the conclusion, at the earliest possible date, of an agreement to that effect is desirable;

2. Designates the representatives of Egypt, Indonesia, Mexico, Poland, Senegal, Sweden, the United Kingdom and the United States of America as negotiators on behalf of WIPO who, should the Economic and Social Council of the United Nations also appoint negotiators for this purpose, would negotiate the terms of the relationship agreement between WIPO and the United Nations under Articles 57 and 63 of the Charter of the United Nations;

3. Proposes the draft agreement attached to this resolution as the basis for negotiations with the United Nations;

4. Decides to include in the draft agendas of the November 1973 sessions of the Coordination Committee and the Conference of WIPO for advice and of the General Assembly of WIPO for decision the question of approval of a relationship agreement with the United Nations under Articles 57 and 63 of the Charter of the United Nations;

5. Invites the Director General to transmit this resolution to the Secretary-General of the United Nations in time for it to be brought to the attention of the Economic and Social Council of the United Nations at its fifty-fifth session.

The draft agreement referred to in paragraph 3 of the above quoted resolution follows very closely the pattern of the existing agreement between the United Nations and each of the twelve UN specialized agencies. Its basic articles are Articles 1 and 2, reading as follows:

1. Recognition

The United Nations recognizes the World Intellectual Property Organization (hereinafter called "the Organization") as a specialized agency and as being responsible for taking such action as may be appropriate under its basic instruments, including the conventions, agreements and treaties administered by it, for the accomplishment of the objectives and the exercise of the functions set forth therein, subject to the responsibilities of the United Nations and of other agencies already brought into relationship with the United Nations.

2. Co-ordination

In its relations with the United Nations, its organs, and the agencies within the United Nations system, the Organization recognizes the responsibilities for co-ordination of the General Assembly and of the Economic and Social Council under the Charter of the United Nations.

The other 17 Articles deal with the questions of reciprocal representation, proposals for agenda items, recommendations of the United Nations, information and documents, statistical services, assistance to the United Nations, non-self-governing territories, the International Court of Justice, WIPO's relations with international organizations other than the United Nations, administrative relationships, budgetary and financial matters, the UN *laissez-passer*, co-operation between the two Organizations, and the implementation, entry into force and revision of the agreement.

New Headquarters Building

On the question of the construction of an addition to the headquarters building of WIPO, the Coordination Committee considered a report on the progress which has been achieved since its last session and which consists mainly of two facts: that, thanks to loans authorized by the Swiss Federal Government, the financing of the construction appears, to be assured and that the actual construction is expected to start before the end of the spring of 1973.

These facts were noted with appreciation by the Coordination Committee.

List of Participants *

I. States Members of the Committee

1. Ordinary Members

Argentina: R. A. Ramayón. Australia: K. B. Petersson. Brazil: L. Villarinho Pedroso; F. Miragaia Perri. Cameroon: J. Ekedí Samnik. Canada: R. D. Auger. France: J. Fernand-Laurent; P. Faure; A. Kerever; R. Labry;

P. Fressonnet; J. Buffin. Germany (Federal Republic of): H. Mast; R. von Schleussner (Mrs.); S. Schumm; G. Rheker (Mrs.); G. Ullrich. Hungary: E. Tasnádi; J. Bobrovsky. Italy: G. Trotta; G. Pizzini Abate (Mrs.). Japan: K. Takami; Y. Kawashima. Pakistan: J. Khan; S. Ahmed. Senegal: A. Cisse; J. P. Crespin. Soviet Union: A. A. A. Moltchanov; A. S. Zailsev. Spain: C. Gonzalez Palacios; I. Fonseca-Ruiz (Miss). Sweden: G. Borggård; H. Danelius. Switzerland: W. Stamm; P. Braendli; F. Pictet. Tunisia: H. Ben Achour. United Kingdom: W. Wallace; I. J. G. Davis; T. A. Evans. United States of America: D. M. Searby; H. J. Winter; E. J. Lysterly.

2. Associate Members

India: G. Shankar. Mexico: G. E. Larrea Richerand. Poland: J. Szomański; B. Janicki; M. Paszkowski. Zaire: Y. Yoko.

II. Observer States

Algeria: M. Raouf Boudjakji; G. Sellali (Mrs.). Chile: V. Sanchez; E. Bucchi de Yopez (Mrs.). Cuba: J. M. Rodriguez Padilla; F. Ortiz Rodriguez. Czechoslovakia: J. Špringer. Egypt: H. Khallaf; S. A. Abou-Ali. German Democratic Republic: D. Schack; G. Schumann. Greece: G. Helmis; G. Pilavachi. Indonesia: N. P. Luhulima (Miss). Iran: M. Dabiri; K. Adib.

Ireland: J. W. Lennon. Ivory Coast: B. Nioupin. Lebanon: S. Chamma. Morocco: S. M. Rahhali. Netherlands: W. Neervoort; M. L. A. Labouchere (Miss). Norway: O. Graham. Portugal: L. Pazos Alonso. Syrian Arab Republic: A. Jouman-Agha. Thailand: S. Kouptaromya. Turkey: R. Arim. Uruguay: R. Rodriguez-Larreta de Pesaresi (Mrs.).

III. Intergovernmental Organizations

United Nations: P. Casson; T. S. Zoupanos. United Nations Conference on Trade and Development (UNCTAD): G. Krasnov. United Nations Educational, Scientific and Cultural Organization (Unesco): M. Arsov.

IV. International Bureau of WIPO

G. H. C. Bodenhausen (*Director General*); A. Bogsch (*First Deputy Director General*); J. Voyame (*Second Deputy Director General*); C. Masouyé (*Senior Counsellor, Head, External and Public Relations Division*); M. Hill (*Consultant*).

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

AUSTRIA

Ratification of the WIPO Convention

The Director General of the World Intellectual Property Organization (WIPO) has notified the Governments of the countries invited to the Stockholm Conference that the Government of the Republic of Austria deposited, on May 11, 1973, its instrument of ratification, dated April 13, 1973, of the Convention Establishing the World Intellectual Property Organization (WIPO).

The Republic of Austria has fulfilled the conditions set forth in Article 14(2) of the Convention by concurrently ratifying the Stockholm Act of the Paris Convention in its entire-

ty and the Stockholm Act of the Berne Convention 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 Article 15(2), the Convention Establishing the World Intellectual Property Organization (WIPO) will enter into force, in respect to the Republic of Austria, three months after the date of deposit of the instrument of ratification, that is, on August 11, 1973.

WIPO Notification No. 42, of May 18, 1973.

BERNE UNION

SWEDEN

Ratification of the Paris Act (1971) of the Berne Convention

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 Kingdom of Sweden deposited on June 14, 1973, its instrument of ratification dated May 25, 1973, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

Pursuant to the provisions of Article 28(3) of the Paris Act (1971) of the said Convention, Articles 22 to 38 will enter

into force, with respect to the Kingdom of Sweden, three months after the date of this notification, that is, on September 20, 1973.

A separate notification will be made on the entry into force of Articles 1 to 21 and the Appendix, when the conditions provided for in Article 28(2)(a) are fulfilled.

Berne Notification No. 45, of June 20, 1973.

CONVENTIONS ADMINISTERED BY WIPO

**Convention for the Protection of Producers of Phonograms
Against Unauthorized Duplication of Their Phonograms**

FIJI

As a result of a recent communication received from the Secretary-General of the United Nations, the depositary of the above Convention, the date of deposit of the instrument of accession of Fiji, given in Notifications Nos. 2 and 7 as June 12, 1972, should be June 15, 1972.

Phonograms Notifications Nos. 2 and 7:
Corrigendum of June 20, 1973.

NATIONAL LEGISLATION

UNITED KINGDOM

I

The Copyright (International Conventions) (Amendment No. 2) Order 1973

(No. 772, of April 18, 1973, coming into force on May 21, 1973)

1. — (1) This Order may be cited as the Copyright (International Conventions) (Amendment No. 2) Order 1973, and shall come into operation on 21st May 1973.

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

2. — The Copyright (International Conventions) Order 1972¹ (hereinafter referred to as "the principal Order"), as amended², shall be further amended as follows: —

- (a) in Schedule 1 (which names the countries of the Berne Copyright Union) there shall be included a reference to the German Democratic Republic (and Berlin (East));
- (b) in the said Schedule, in Schedule 3 (countries in whose case copyright in sound recordings includes the exclusive right of public performance and broadcasting), and in Schedules 4 and 5 (countries whose broadcasting orga-

nisations have copyright protection in relation to their sound and television broadcasts), in the references to the Federal Republic of Germany (and Land Berlin), for "(and Land Berlin)" shall be substituted "(and Berlin (West))".

3. — This Order except for Article 2(b) so far as it amends Schedules 4 and 5 to the principal Order shall extend to all the countries mentioned in Schedule 6 to the principal Order and to Hong Kong.

EXPLANATORY NOTE

(This Note is not part of the Order.)

This Order further amends the Copyright (International Conventions) Order 1972. The principal change is that the German Democratic Republic (and Berlin (East)) is now mentioned as a country of the Berne Copyright Union.

This Order extends, so far as is appropriate, to dependent countries of the Commonwealth to which the 1972 Order extends.

¹ See *Copyright*, 1972, p. 180.

² The amendment is not relevant to the subject matter of this Order.

II

The Copyright (International Conventions) (Amendment No. 3) Order 1973

(No. 963, of May 24, 1973, coming into force on May 27, 1973)

1. — (1) This Order may be cited as the Copyright (International Conventions) (Amendment No. 3) Order 1973, and shall come into operation on 27th May 1973.

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

2. — The Copyright (International Conventions) Order 1972¹ (hereinafter referred to as “the principal Order”), as amended², shall be further amended by including in Schedule 2 (which names the countries party to the Universal Copy-

¹ See *Copyright*, 1972, p. 180.

² The amendment is not relevant to the subject matter of this Order.

right Convention but not Members of the Berne Union) a reference to the Union of Soviet Socialist Republics and a related reference to 27th May 1973.

3. — This Order shall extend to all the countries mentioned in Schedule 6 to the principal Order and to Hong Kong.

EXPLANATORY NOTE

(This Note is not part of the Order.)

This Order further amends the Copyright (International Conventions) Order 1972. It takes account of the accession by the U. S. S. R. to the Universal Copyright Convention.

This Order extends to dependent countries of the Commonwealth to which the 1972 Order extends.


GENERAL STUDIES

The Geneva Convention for the Protection of Phonograms

By Stephen M. STEWART *

I. History of the Convention

The “Phonograms Convention” came into effect on April 18, 1973 (three months after deposit of the fifth instrument of ratification).¹ The problem giving rise to the Convention had first been raised in May 1970 during the meeting of the Ad Hoc Preparatory Committee for the revision of the Universal Copyright Convention.² As it was considered structurally difficult to deal with the problem in the framework of the Universal Copyright Convention, a Committee of Experts was convened in March 1971.³ Basing its work on a working paper drawn up by French, German, United Kingdom and United States experts, the Committee produced a Draft Convention, which was submitted to the Diplomatic Conference in Geneva and on October 29, 1971, 23 States signed the Convention.⁴ Thus less than 18 months had elapsed between the first appeal

to the intergovernmental agencies and the creation of an international instrument and less than three years between that appeal and the coming into force of the Convention. This must be considered record speed and will no doubt be cited in years to come as an example that the mills of international law can grind exceedingly fast. Although great credit is due to WIPO and Unesco, as is recognised in the preamble to the Convention, and particularly to the representatives of the above-named four Governments (Monsieur Kerever, Professor Ulmer and Mrs. Elisabeth Steup, Miss Barbara Ringer and Mr. William Wallace), who produced a draft for the meeting of experts, it is nonetheless worth exploring the underlying reasons why this speed was achieved.

II. Structure of the Convention⁵

I submit the reasons are these:

(i) The need for a convention arose out of an existing situation, a “mischief to be remedied” — as Bentham would

* LLD, Barrister-at-Law, Director General of the International Federation of the Phonographic Industry.

¹ Article 11(1), Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, 1971.

² See *Copyright*, 1970, pp. 160 *et seq.*

³ *Ibid.*, 1971, pp. 54 *et seq.*

⁴ *Ibid.*, 1971, pp. 240 *et seq.*

⁵ For a detailed study of the Convention see: Valerio De Sanctis, “Some general considerations on the recent Geneva Convention for the protection of phonograms”, *Copyright*, 1972, pp. 111 *et seq.*; Claude

have expressed it — which was causing serious damage both to those whose rights were being violated and to the fabric of intellectual property rights as a whole.

(ii) The “mischief” was widespread both in developed and developing countries. It was on the increase, and the urgency for a remedy was proved to the satisfaction of the governments represented.

(iii) The remedies for the “mischief” proposed by the Convention were both widely accepted and fairly simply expressed.⁶

1. The mischief

The mischief — sometimes called “record piracy”⁷ — is widespread both in developed and developing countries and consists of illicit duplication of phonograms. A phonogram is a mixture of the exercise of artistic and technical skills. In its creation there are three stages: (i) The “recording”. This is the choice of the work, or the adaptation of the work, the casting of the artists, the rehearsing in the studio and finally the artistic shaping of the performance including the fixing of that performance — unique, but until then ephemeral — on a material support. This is an artistic activity. (ii) The duplicating of this first recording. This requires some technical skill. (iii) The taking of the duplicates to the general public. This is a commercial operation.

The activity of the “pirate” consists of cutting out the first stage by stealing someone else’s recording, carrying out the second stage, sometimes technically very imperfectly, and then engaging in the third stage, taking an inflated commercial profit. The profit is very large because the pirate as a rule does not pay the authors (be they composers, writers, arrangers, etc.) or the performers or the artistic and technical staff engaged in the recording. Apart from paying no royalties, he needs no capital investment and has few overheads. He also takes no risk as only commercially highly successful recordings are pirated, whereas of all recordings made by the legitimate producers of phonograms only approximately one in ten recordings are commercially successful and in the field of classical music the percentage is much lower. The “pirate” deprives authors and performers of their just reward and

Masouyé, “A new international Convention on the protection of Phonograms”, *EBU Review*, Vol. XXIII, No. 1, p. 59; Eugen Ulmer, “The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms”, *International Review of Industrial Property and Copyright Law*, Vol. 3, No. 3/1972, p. 317. For a study with particular emphasis on the U.S. law see: Ernest Meyers, “Copyright for sound recordings, a milestone in the protection of intellectual property”, *Bulletin of the Copyright Society of the U.S.A.*, Vol. 19, No. 3 (February 1972). For a study with particular emphasis on the law of Switzerland see: Mario Pedrazzini, *Festschrift für Rudolf Reinhardt*.

⁶ If these criteria are valid they may explain why the recent efforts towards a Convention to protect “broadcasting via satellite” have run into difficulties in spite of two meetings of Committees of Experts already held and a third one in Nairobi to be held in July 1973.

⁷ The word “piracy” was — rightly, I submit — removed from the text of the Convention as being too emotional. “Piracy” was virtually the first crime recognised by the law of nations. It is robbery on the High Seas consisting of acts of depredation nearly always accompanied by violence and usually involving some attack on the authority of a private ship. This has recently been extended to aircraft (*vide* Geneva Convention on the High Seas, 1958). However, as early as 1869 (James V. C. in *Pike v. Nicholas* — 1869 L.R. 5 Ch. 251) described an infringement of copyright as “literary piracy”. The term “record piracy” is widely used in the United States and Europe to describe the new phenomenon.

threatens the very existence of the producers of phonograms. It was, therefore, not surprising that, apart from IFPI representing the producers of phonograms, the national and international organisations representing authors and performers (CISAC, FIM, FIA and others) supported the appeal for a remedy thereby helping to prove the case for urgency to the governments concerned.

The fabric of copyright was being undermined because of damage to the moral rights of authors and performers, as the phonograms illicitly issued under their names were often of very inferior quality, and to their financial rights, as in most countries the income from recording rights makes up a substantial part of the income of authors in the field of music.

2. The urgency

“Record piracy” was prevalent in the U. S. A. as well as in the Middle East and parts of Eastern Asia. In his letter of transmittal from the White House to the Senate of the United States recommending early ratification of the Convention (dated April 11, 1973) the President gave the estimated annual sales of pirated phonograms as \$ 100,000,000 p. a. in the United States alone. It is estimated that one of every four tapes sold in the United States is a pirated product.⁸ Piracy had also started to grow in some Western European countries and was increasing rapidly. Because of the comparatively easy way in which offending duplicates can be shunted from one country to another only an international convention could remedy the mischief.

3. The proposed remedies

The dilemma here is that a simple text often militates against wide acceptability and the efforts to make a text widely acceptable often tend to make it complicated.

In this case the essential ingredients of the Convention were present from the earliest stage. The illicit duplication of phonograms, the importation and the distribution of illicitly-made phonograms were to be proscribed and the choice of the legal means to achieve this objective were to be left to domestic law. At the end of the day this still is the essence of Articles 2 and 3 of the Convention, which are the main substantive articles. They are preceded by definitions of the first and third concept (no need to define importation) in Article 1. Thus simplicity was preserved.

However, several important concessions had to be made for the sake of general acceptability.

(i) Many would have preferred publication as an additional criterion of protection. Nonetheless nationality of the producer was accepted as the sole criterion because of simplicity, complemented by the principle of strict reciprocity (with the exception of those countries, mainly in Scandinavia, which had already adopted the criterion of fixation as the sole criterion when the Convention was signed⁹).

(ii) In most countries where legislation exists on the subject the producer has a specific right, be it a copyright or a

⁸ Statement of Congressman Emmanuel Celler, Chairman of the House Committee in the Copyright Law Revision Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Commission on the Judiciary, 90th Congress, 1st Session, ser. 7, at 5(1971).

⁹ See Article 7(4).

neighbouring right. Nonetheless, penal sanctions were added as a legal means on a proposal of Japan and the Law of Unfair Competition at the request of France. The merits of these two additions will be discussed later.

(iii) The category of phonograms to be protected was circumscribed to exclude phonograms made not for the purpose of distribution to the public. This would appear to enable broadcasting organisations to broadcast illicitly-made phonograms. It also enables them to copy phonograms without permission for the purpose of broadcasting and even to sell or exchange duplicates so made with other broadcasting organisations as they do not make them "for the purpose of distribution to the public". However, this may not be of major importance as in most cases such acts would violate national laws.

(iv) A general power to introduce limitations was given to national law to meet the wishes of those who held that the protection of phonograms should in no respect be wider than the protection given to the works of authors.¹⁰

(v) A system of compulsory licences was elaborated to meet the wishes of the developing countries. The system is not so very different from the system adopted in the revision of the copyright conventions, only much simplified. A compulsory licence can be granted for the duplication of phonograms within the territory of the member State for the purpose of teaching or scientific research and against a payment fixed by the competent authority of that member State.¹¹

(vi) The principle of non-retroactivity was introduced in a very drastic form¹² because some countries, notably the U. S. A., would otherwise have had difficulties in ratifying the Convention. This means that if a country where foreign phonograms are, so far, not protected ratifies the Convention, the whole existing foreign repertoire (fixed up to that date) may be in the public domain.

Have these concessions to various countries or interests weakened the Convention to such an extent that they may, in parts at least, reduce its effectiveness? I do not think so, although it could be objected that it may be too early to tell. In any event, just as politics have been described as the art of the possible so is Convention making.

III. The acts proscribed

(i) *Duplication*. The essence here is that no other acts need to be proved provided it can be shown that the duplicates were made for the purpose of distribution to the public. Thus, if a pressing plant is discovered making illicit duplicates, an action or a prosecution will lie even though not a single copy has yet been sold. Furthermore, the defence that the duplicates were being made only for export into a country where phonograms were not protected will not be available. The term "duplicate" was chosen instead of the term "copy" used in the Definition Article of the Rome Convention¹³ to avoid a misunderstanding which had arisen particularly in the United States out of the interpretation of the rule in the *Sears* and

Compco cases.¹⁴ The term "copying" can be used to describe the process of simulating an original work, e. g., "copying an old master" means sitting in front of the original in the gallery and painting a picture as near to the original as the copyist can make it. This involves great skill. The activity aimed at here is the appropriation of the recording itself and subjecting it to an electronic process producing identical articles called "duplicates". It was objected that, in the French version, this would not change anything, but even if that is so it is surely better to get it right at least in one language as the Convention does. In any event the French Courts are familiar with the distinction. They have on more than one occasion¹⁵ called the "duplicate" *un repiquage servile* which renders the meaning well enough.

(iii) *Importation*. It will be possible to proceed against the importer without proving anything other than that the phonograms in his possession are duplicates made without the consent of the producer. If the number of phonograms imported is substantial, it should not be difficult to convince the Court that its only purpose could be the distribution to the public. The defence that the making of the duplicates was not illegal in the country where they were made, because phonograms are not protected there, does not avail the defendant.

(iii) *Distribution*. This enables action to be taken against any wholesaler or retailer. If the phonograms are found in a store or shop the fact that they had not been offered for sale yet, let alone sold, will not be a defence; nor will it be a defence to say that the distributor did not know that the phonograms were unauthorised duplicates.

IV. The means of protection

Although the means of protecting phonograms are left to national legislation, the four possible means are enumerated in the Convention.¹⁶ Any government can choose any one of the four or a combination of them. They are: (i) a copyright, (ii) a specific right other than a copyright, (iii) the Law of Unfair Competition, (iv) penal sanctions.

(i) *Copyright* is the means usually chosen in the Anglo-Saxon legislations (e. g., United Kingdom Copyright Act 1956, Australian Copyright Act 1968, New Zealand Copyright Act 1962, Copyright Act of the Republic of Eire 1963, U. S. A. Public Law 92-140, 1971, amending the Copyright Act 1909). Phonograms figure among the list of "works" found usually at the beginning of the Act and then in a chapter or part of the Act dealing with derivative works. The rights of producers of phonograms are spelt out including the reproduction right.

(ii) "*Specific right*" is the term chosen by the Convention to describe a "neighbouring right" (e. g., laws of the Federal Republic of Germany 1965, Sweden 1960, Denmark 1961, Japan 1970). In the realm of the performing right in phonograms there may be a difference between a copyright and a neighbouring right in that a copyright usually gives the producer the right to allow or forbid the public performance

¹⁴ See *infra* U. S. A.

¹⁵ See e. g. *Sté Vogue Productions Internationales Phonographiques v. Sté French Music et autres*. Cour d'appel de Paris, May 5, 1969. *RIDA*, Vol. LXVI, p. 64.

¹⁶ Article 3.

¹⁰ Article 6, first sentence.

¹¹ Article 6, second sentence.

¹² Article 7(3).

¹³ Article 3(e).

of his phonograms usually subject to the corrective powers of a Tribunal, whereas a neighbouring right in accordance with the Rome Convention gives him only a right to be paid an equitable remuneration. However, in the realm of the reproduction right of the producer of phonograms, which is by nature an exclusive right, the difference between a copyright and a neighbouring right would appear to be one of nomenclature rather than one of substance.

There is little doubt that a specific right, be it described as a copyright or a neighbouring right, is the most satisfactory, if not the only satisfactory way of dealing with the problem, particularly if combined with penal sanctions, as is usually the case. The fact that some 50 countries¹⁷ have recognised a specific right of producers of phonograms is practical proof of this proposition.

(iii) *The Law of Unfair Competition.* It is not possible to say how many countries protect phonograms by the Law of Unfair Competition, as a positive answer in each country could only be given after a fair number of cases have been brought in the Courts and the Courts have held that duplicating of phonograms without permission of the producer of the original recording as well as importing or distributing such phonograms, constitute acts of unfair competition in all the actual circumstances in which "record piracy" is practised.

It is, however, submitted that the Law of Unfair Competition is not an effective means of protection for the following reasons:

(a) To make the protection effective it must include a remedy which is effective against a dealer (wholesaler or retailer) as well as against the manufacturer of illicit duplicates. Courts have held in the past that there is no competition between the plaintiff who is the producer of the original recording and the defendant who is a retailer or importer of the illicitly-made duplicate.

(b) To succeed in an action based on unfair competition it is usually necessary to prove that the duplicate is liable to mislead the public. If the "pirate" does not copy the original label but puts on it a skull and crossbones or a notice saying "No permission to reproduce this recording has been obtained from anyone and no royalties have been paid to anyone", as has occurred, the public is not being deceived.

(c) The result of a successful action based on the Law of Unfair Competition is an award of damages. Experience suggests that only in rare cases of this type in the field of illicit duplication of phonograms would the damages awarded be recoverable from the defendants by the time they are awarded.

(d) The essence of the remedy against illicit duplicators is speed and the most valuable procedural advantages such as an injunction or seizure and eventual destruction of the offending duplicates are often not available.

(e) The duration of the protection is uncertain. One can easily imagine a judge who is an opera lover holding that one of the first recordings of Caruso is still protected, although made 70 years ago, whereas another judge not well disposed towards modern music may hold that for such recordings five or ten years protection is enough. This may also produce inequality between countries which have ratified the Convention as reciprocity between a country which grants a specific right and a country which protects under the Law of Unfair Competition can hardly be strictly observed.

I would have come to the conclusion that one of the means suggested to national laws by the Convention is unsuitable for the purpose, only with great hesitation had it not been for the fact that several learned authors, who have written on the subject, have come to the same conclusion.¹⁸

(iv) *Penal sanctions* are, undoubtedly, most effective if combined with a specific right. On the other hand, I am not aware of a country which, at this moment, protects phonograms by penal sanctions only. However, one can imagine that a country, which has at present no legislation, protecting phonograms — particularly some developing countries — would find a short penal statute declaring each of the three acts set out in Article 2 of the Convention a criminal offence, or an amendment to their existing penal code to that effect, the simplest and quickest way of achieving the desired result and enabling such a country to ratify the Convention.

They would methodologically be on safe ground. Chief Justice Burger, the present Chief Justice of the United States, sitting as a circuit Judge in 1959, described record "piracy" as an activity that "might better be described by other terms connoting larceny".¹⁹

The history of legal development in three of the major countries which actively participated in the making of the Convention may serve to illustrate the divergence of national legislation and legal philosophy on the subject. It also illustrates, in my submission, the tendency towards a specific right.

1. France

To say that the producer of phonograms is protected in France "by means of the Law of Unfair Competition" is describing in a fairly loose way a kind of protection which undoubtedly exists. It is based on the famous Article 1382, Civil Code, which says:

Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.

The French Courts have used this Article in the field of neighbouring rights in several cases to protect both performers and record producers.

In the "Chaliapine case"²⁰ the Court found for the plaintiffs, the heirs of the famous singer against the defendant company, which had illicitly copied a recording of the *Volga Boatmen* made by His Master's Voice.

¹⁸ See Valerio De Sanctis, *op. cit.*; Eugen Ulmer, *op. cit.*; Mario Pedrazzini, *op. cit.*

¹⁹ *Shapiro Bernstein & Co v. Remington Records, Inc.*, 265F2d 263, 269 (21 Cir. 1959).

²⁰ *Consorts Chaliapine et Veuve Chaliapine v. Société Concerteum*, Tribunal Civil de la Seine, March 13, 1957. *RIDA*, Vol. XVII, p. 165.

¹⁷ Australia, Austria, Barbados, Brazil, Canada, Colombia, Congo, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Federal Republic of Germany, Fiji, Finland, Ghana, German Democratic Republic, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Malaysia, Malawi, Malta, Mauritius, Mexico, New Zealand, Niger, Nigeria, Norway, Pakistan, Paraguay, Philippines, Republic of China (1928 Law), Sierra Leone, Singapore, South Africa, Spain, Sri Lanka, Sweden, Tanzania, Trinidad, Uganda, United Kingdom, United States of America, Zambia.

In the second part of the Chaliapine case brought by the producer of the original recording, which had been illicitly used,²¹ the Court also found for the plaintiff and observed in its reasoning:

Attendu que l'enregistrement et la reproduction sonore de pièces musicales et de chansons constituent une œuvre originale protégée par les lois du 24 juillet 1793, la création d'une telle œuvre nécessitant pour son auteur, des connaissances techniques et professionnelles certaines, une habileté et une recherche de l'emploi des meilleurs procédés techniques destinés à assurer une reproduction fidèle de la musique ou de la voix enregistrée;

It is true that this case has been severely criticised by great copyright experts,²² but it has never been reversed and the Courts seem to have proceeded in subsequent judgments on similar reasoning.

In the "Furtwängler case"²³ the great conductor had given a performance which was broadcast and fixed on tape by the German State Broadcasting Corporation. It later came into the possession of the authorities of the German Democratic Republic, which sold the tapes to the defendants without the conductor's permission. The Court found for the plaintiff saying in its reasoning *inter alia*:

... l'artiste exécutant est fondé à interdire une utilisation de son exécution autre que celle qu'il avait autorisée; que ce motif, abstraction faite des autres motifs critiqués par le pourvoi qui doivent être leurs pour surabondants, suffit à caractériser une atteinte au droit de l'artiste sur l'œuvre que constitue son interprétation ...

In both cases the Court put great emphasis on the fact that the name of the famous artist had been used for publicity purposes without his permission. One cannot help observing that both Chaliapine and Furtwängler were dead by the time the judgment was given. These were both cases where the plaintiffs were performers, but there have been subsequent cases brought successfully by producers of phonograms for "piracy" of their phonograms. In one of them²⁴ the Court dealing with an illicitly-made duplicate makes a clear distinction between the reproduction right of the author and "la propriété du disque comme 'prestation technique' appartenant au fabricant". The expression *prestation technique* is fairly close to the German concept of *Leistungsschutz*. In a recent judgment,²⁵ still under appeal, the Court even found that performers have a performing right in the recordings they made when these are played by a broadcasting organisation. This is so, says the Court, because:

... sans qu'il soit besoin de parler de « droits voisins », il est de principe que l'interprétation d'un artiste ne peut recevoir d'autres utilisations que celle qu'il a autorisée.

There is thus a fair volume of decisions to indicate that — under whatever heading — the French Courts protect both

²¹ *The Gramophone Company Ltd. v. Société Concerteum*, Tribunal Civil de la Seine, March 13, 1957. *RIDA*, Vol. XVII, p. 162.

²² Tournier, "Le jugement du Tribunal civil de la Seine du 13 mars 1957," *RIDA*, Vol. XVII, pp. 3 *et seq.* Desbois, *Le droit d'auteur en France*, pp. 208 *et seq.* Paris, 2nd ed. (1966).

²³ *Urania Records et Thalia Disques v. Consorts Furtwängler*, Cour de cassation, January 4, 1964. *RIDA*, Vol. XXXV, p. 194.

²⁴ *Vogue Productions Internationales Phonographiques v. French Music et autres*, Cour d'appel de Paris, May 5, 1969. *RIDA*, Vol. LXVI, p. 64.

²⁵ *SPEDIDAME, Société de perception des droits des artistes musiciens exécutants v. ORTF*, Tribunal de grande instance de Paris, December 14, 1972.

producers of phonograms against the illicit duplication of their phonograms and performers against the illicit use of their performances. This protection is, however, subject to some of the shortcomings pointed out above.

There have been no cases since France ratified the Convention, but as the ratification is binding on the Courts one would assume that they would now hold any of the acts described in Article 3 of the Convention as constituting acts giving rise to damage under Article 1382 of the Civil Code, whether they are, in the strict sense of that term, acts of *concurrency déloyale* or not.

2. Japan

The Japanese Copyright Law²⁶ devotes a chapter to neighbouring rights.²⁷ It follows in general terms the pattern of the Rome Convention on the national level giving both a reproduction right and a performing right. Producers of phonograms have "the exclusive right to reproduce their phonograms". Against infringements of this right, the remedies of an injunction²⁸ and a suit for damages²⁹ are available as well as penal sanctions.³⁰ However the protection only extends to phonograms the producers of which are Japanese nationals or which were first fixed in Japan.³¹ Whereas the article dealing with the scope of application for works³² has a paragraph extending protection to works "to which Japan has the obligation to grant protection under an international treaty" the article dealing with the scope of protection for phonograms contains no such provision. The penal provisions — although they extend to neighbouring rights³³ — would also not appear to be sufficient for ratification. They contain a kind of manufacturing clause in that they only apply if a foreign producer of phonograms gives a licence to a Japanese manufacturer to make copies from his matrix and these copies are the victims of illicit duplication.³⁴ Thus, even if Japan would wish to protect foreign phonograms only by criminal sanctions whilst protecting Japanese phonograms by a neighbouring right as well as criminal sanctions, which has not been suggested, as far as I am aware, the Law would appear to need amendment to permit ratification. On the other hand, it is a most sophisticated, yet admirably simply expressed Law, which, after many years of study by eminent experts, fully accepts the concepts of the Rome Convention and of this Convention (although passed before this Convention was conceived) and would only need slight modification to enable Japan to ratify the Convention.

3. United States of America

The Federal Law of the United States did not until recently contain any protection of phonograms. This is not surprising as the Copyright Act in force dates from 1909. There had always been a certain amount of "piracy" in the

²⁶ Law No. 48 of 1970. See *Copyright*, 1971, pp. 71 *et seq.*

²⁷ Chapter IV.

²⁸ Article 112.

²⁹ Article 114.

³⁰ Article 119.

³¹ Article 8.

³² Article 6.

³³ Article 119.

³⁴ Article 121.

field of phonograms but the number of pirated phonograms began to increase sharply when "cassettes" and prerecorded tapes, which are much easier to duplicate than discs, became popular. The main problem on the Federal level was the question of whether Federal legislation would be against the Constitution. The Constitution³⁵ gives Congress power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The debate whether a sound recording is a "writing" under the Constitution ranged over very many years. Meanwhile several States legislatures³⁶ passed laws prohibiting the unauthorised duplication of phonograms. Under the general principles of the Law of Unfair Competition many cases were brought against record "pirates" — most of them successfully in that a judgment was obtained — but the remedies available proved quite inadequate. The decision of the Supreme Court in *Sears and Compco*³⁷ proved a further obstacle. This was a "product simulation" case, a category well recognised in the Law of Unfair Competition. The defendants made "substantially identical" or "very similar" copies of the plaintiff's light fixtures, which had been found to be "too slight an advance" as well as "too lacking in novelty" to be entitled to patent protection. The Court then held that a State could not interfere with free competition in articles which were unpatentable and not subject to copyright, as this would run counter to the Constitution and Federal Law limiting the rights of authors and inventors. This provided a new argument for those practising the unauthorised duplication of phonograms and greatly increased the length and volume of litigation. The argument, in a nutshell, was that *Sears and Compco* held that States were prevented from protecting articles such as sound recordings which would be constitutionally capable of copyright protection, but which Congress had chosen not to protect by Statute. This argument totally misjudges the nature of "record piracy", which is not unauthorised "copying" of an article but the total misappropriation of an article, the sound recording, by duplicating it.³⁸

Meanwhile piracy of phonograms had risen to an estimated one hundred and fifty million dollars. Congress then decided to act and acted quickly by amending Section 1 of Title 17 of the United States Code, granting a copyright in sound recordings and giving the owner of that copyright the exclusive right "to reproduce and distribute to the public . . . reproductions of the copyrighted work". Sound recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds". Unauthorised reproduction of sound recordings thus becomes subject to the same penalties as are provided for the infringement of copyright

³⁵ U. S. Constitution, Article I, Section 8.

³⁶ New York, California, Arkansas, Arizona, Tennessee, Texas, Florida, Washington, Pennsylvania.

³⁷ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U. S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964).

³⁸ For a detailed analysis of the *ratio decidendi* of *Sears and Compco* and the reasons why it is distinguishable in cases of unauthorised duplication of phonograms, see Sidney Diamond and Ernest Meyers in the *amicus curiae* Brief filed on behalf of RIAA (Recording Industry Association of America, Inc.) in the Supreme Court in *Goldstein v. State of California* (No. 71-1192, October 1971).

generally. In one of those delightful asides which legislators sometimes lovingly address to injured interests Congress referred to this measure (only two years short of the centenary of Edison's invention) as "overdue".

However, the Law is limited in two respects: (i) not being retrospective it only protects sound recordings fixed after February 15, 1972; (ii) the Law expires on January 1, 1975.

In a massive campaign to enforce the new Law scores of cases were brought in the 15 months which elapsed since the Law came into effect. The unauthorised duplicators, however, counterattacked on two fronts. They challenged the constitutionality of Public Law 92-140, alleging that the amendment of the Copyright Act violated the requirement of "creativity" or "authorship", which the Constitution requires.³⁹ In the United States District Court for the District of Columbia, three judges held that the activities of producers of phonograms "satisfy the requirements of authorship found in the copyright clause (of the Constitution)".

On the other front, the unauthorised duplicators challenged the constitutionality of the State Law of California, which gives a remedy against the unauthorised duplication of phonograms.⁴⁰ This is a test case as by implication the Statutes of the other States, which have passed similar legislation against unauthorised duplication of phonograms, would also be invalid. The Attorneys General of these States and the RIAA (Recording Industry Association of America, Inc.) have thus filed *amicus curiae* Briefs. If Goldstein succeeds, practically the whole world repertoire, both American and foreign, recorded before February 15, 1972, could be freely duplicated by anyone in the U. S. A.

The expiration date was fixed by Congress, because it was confidently expected that by 1975 the Bill revising the whole Copyright Law which has, in one shape or another, been before Congress for many years⁴¹ will have become law and the Public Law 92-140 will have been integrated into the general Copyright Law revision. This is, of course, highly desirable, but judging by past performance far from certain. Nonetheless having taken the decisive step forward in protecting phonograms as works, it seems inconceivable, particularly if, as is likely, the United States have meanwhile ratified the Convention, that the Law 92-140 should be allowed to lapse, if the Copyright Law Reform Bill should not have become law by January 1, 1975.

V. Relation of the Convention to the Rome Convention

There are distinctions between this Convention and the Rome Convention which are apparent on the face of it.

(i) Whereas the Rome Convention deals with the rights of performers and broadcasting organisations as well as with the rights of producers of phonograms, this Convention deals solely with the rights of producers of phonograms.

(ii) The rights accorded to the producers of phonograms are both narrower and wider than those under the Rome

³⁹ *Shaab v. Kleindienst*, Acting Attorney General 174 U. S. P. Q. 197 (D. D. C. 1972).

⁴⁰ *Goldstein v. State of California*, Supreme Court of the U. S. — No. 71-1192 (1971).

⁴¹ At present Bill S. 1361, 93rd Congress, 1st Session, introduced March 26, 1973.

Convention. They are narrower because the performing right in phonograms — or right in secondary uses, as it is sometimes called — dealt with in the Rome Convention⁴² is not dealt with in this Convention. They are wider because a distribution right and the right to stop the importation of illicitly-made phonograms is accorded to the producer, whereas under the Rome Convention⁴³ it is a simple reproduction right.

(iii) Whereas the Rome Convention is a “closed Convention”⁴⁴ open only to States which have ratified one of the two Copyright Conventions, this is an open Convention which can be ratified practically by any State.

(iv) Whereas the Rome Convention permits a considerable number and variety of reservations,⁴⁵ this Convention permits none.⁴⁶

However, apart from these obvious distinctions there is a vital point of difference. Whereas this Convention is a treaty to achieve a narrowly defined purpose i. e., to stop the illicit duplication of phonograms, the Rome Convention has, rightly, been called a “pioneer convention”.⁴⁷ It deals with conceptions and rights which, though they had already been accepted in many countries before, were new to many others at that time. Less than 13 years have passed since the essential shape of the Rome Convention first emerged in the so-called “Hague Draft” in 1960. In this period 50 countries have legislated in the copyright field and 41 of them have included “neighbouring rights” for at least one and in most cases two of the beneficiaries of the Rome Convention in their legislation.⁴⁸ These figures and the list of countries speak for themselves. They show that the influence of the Rome Convention has been both worldwide and profound.

⁴² Article 12.

⁴³ Article 10.

⁴⁴ Article 24.

⁴⁵ e. g. Article 16.

⁴⁶ Article 10.

⁴⁷ Valerio De Sanctis, *op. cit.*, p. 115.

⁴⁸ The following list is taken from a review by Dr. Hans Hugo von Rauscher (*Festschrift für Eugen Ulmer*) to whom I am indebted for giving me permission to reproduce the list prior to publication of the *Festschrift*: Australia (Copyright Act No. 63, effective 1 May 69), Brazil (Act No. 4944 of 6 Apr 66), Bulgaria (Act dated 28 Apr 1972), Federal Republic of Germany (URG of 9 Sep 65), Chile (Act No. 17.336 of 28 Aug 70), Costa Rica (Act of Accession to RC deposited on 9 Jun 71), German Democratic Republic (URG of 13 Sep 65), El Salvador (Act dated 6 Mar 63), Ghana (Act dated 8 Nov 61), Iraq (Act No. 3 on Copyright dated 12 Jan 71), Iran (12 Jun 70), Ireland (Act dated 8 Apr 63), Iceland (Copyright Act of 17 May 72), Japan (Act No. 48 of 6 May 70), Yugoslavia (Act dated 20 Jul 68), Canada (Act dated 23 Dec 71), Kenya (Copyright Act of 1 Mar 66), Korea (Acts No. 1944 of 30 Mar 67 & No. 2308 of 22 Jan 71), Libya (Act No. 9 of 16 Mar 68), Luxembourg (Act dated 29 Mar 72), Malawi (Copyright Act No. 38 of 14 May 65), Malaysia (Copyright Act put into force on 1 Aug 69), Malta (Copyright Act No. 992 of 3 Mar 67), Morocco (Dahir of 29 Jul 70), Mexico (Act dated 4 Nov 63), Nepal (Copyright Act of 13 Apr 66), New Zealand (Copyright Act of 1962), Niger (Act of Accession to RC deposited 5 Apr 63), Nigeria (Act put into force on 24 Dec 70), Austria (Amendment to URG of 20 Dec 72), Pakistan (Copyright Statute put into force on 27 Feb 67), Paraguay (Ratification of RC on 26 Nov 69), Peru (Act No. 13714 of 3 Nov 72), Portugal (Act No. 46980 of 2 May 66), Romania (Ordinance No. 321 in the version of Ordinance No. 174 of 30 Dec 68), Zambia (Copyright Act of 4 Feb 1965), Sierra Leone (Copyright Act No. 62 of 12 Aug 65), South African Republic (Copyright Act of 19 May 65), Tanzania (Copyright Act No. 61 of 1966), Czechoslovakia (Act dated 25 Mar 65), Tunisia (Act No. 6612 of 14 Feb 66 in the version of 4 Jan 67), Uganda (Copyright Act No. 12 of 1964), Hungary (Act dated 26 Apr 69 in conj. with Ordinance of 29 Dec 69), United States of America (Act dated 15 Oct 71), Venezuela (Act dated 29 Nov 62), Sweden (Law No. 729 of 30 Dec 60), Denmark (Law No. 158 of 1 May 61), Finland (Law No. 404 of 8 Jul 61).

It was thus sound that those Governments, who had already ratified the Rome Convention and others who were actively considering ratification, insisted on the fourth paragraph of the preamble saying that the new Convention should neither “impair in any way” the Rome Convention, nor “prejudice wider acceptance” of it. The question has been posed: Is this mere lip service? I do not think so for the following reasons:

(i) The conditions of Article 22 of the Rome Convention under which the contracting States reserve the right to enter into special agreements among themselves have been strictly complied with: (a) the new Convention grants the producers of phonograms in some respects “more extensive rights than those granted by the Rome Convention”; (b) its “other provisions” are “not contrary to” the Rome Convention.

Thus, if countries ratify both Conventions, (as Sweden, the United Kingdom and Fiji have already done) their relations with one another in respect of phonograms will be governed by the Rome Convention in all matters except those where the protection under the Geneva Convention is more extensive.

(ii) The new Convention in its definitions⁴⁹ follows the definitions of the Rome Convention⁵⁰ closely. Paragraphs (a) — the definition of “phonograms” — and (b) — the definition of “producer of phonograms” — are taken over *verbatim*. (c) The definition of “duplicate” is culled from Articles 3(e) and 10 of the Rome Convention adding that to be a “duplicate” the article must embody “all or a substantial part of the sounds” fixed in the original phonogram. This slight narrowing of the definition is more apparent than real in the light of the view expressed by the Conference,⁵¹ that in the words “substantial part” the adjective “substantial” expresses not only a quantitative but also qualitative evaluation and that, therefore, quite a small part may be substantial. It is thus very difficult to imagine a practical case of “piracy” which would not fall within this definition.

The definition of “distribution to the public” is new and was necessary because of the granting of the distribution right in Article 2, which does not figure in the Rome Convention.

(iii) Other essential parts have been drafted in conformity with the Rome Convention e. g., the minimum duration of 20 years,⁵² the maximum of formalities permissible.⁵³ This has been done at the expense of some slight illogicalities which were inevitable if conformity with the Rome Convention was to be preserved. The logical consequence of abandoning the criteria of publication and — except by special declaration — fixation would have been to require the nationality of the producer to be stated on the label notice instead of the year date of publication, but this would have meant putting a separate notice for the purpose of this Convention in addition to the notice for the purpose of the Rome Convention. The Rome Convention form of notice was, therefore, followed.

With regard to duration it seems to be widely accepted today (*vide* the United States Law of 1971⁵⁴ and the Austrian

⁴⁹ Article 1.

⁵⁰ Article 3.

⁵¹ Paragraph 41 of the Report.

⁵² Article 4.

⁵³ Article 5.

⁵⁴ Public Law 92-140.

Law of 1972,⁵⁵ which both give 56 years and 50 years protection) that 20 years is not enough. With the high quality of recordings and the young age of many performers they would by adherence to the minimum period of protection be forced into a position where in their 40s and 50s they have to compete with their own recordings made in their 20s and 30s which have fallen into the public domain. This point was, again, not pressed in order to keep in conformity with the Rome Convention.

Although the genuine intention of the Convention can thus not be in doubt, one could still ask: Will it nonetheless in fact have a damaging effect on the worldwide acceptance of the Rome Convention? I do not think so. The fact that 41 countries have granted Rome Convention rights in the last 13 years shows clearly what the trend is and once a country has the necessary legislation there is no reason to believe that it will not ratify both Conventions. It will wish to obtain protection on the international level for its performers and its broadcasting organisations as well as for its producers of phonograms.

In the previous study on this Convention published in these columns, Valerio De Sanctis⁵⁶ expresses anxiety because the Convention 'represents an abrupt change of direction in the main road' which international conventions in the field of copyright and neighbouring rights have travelled. I under-

⁵⁵ Urheberrechtsgesetz Novelle 1972.

⁵⁶ The author says with engaging modesty that he "took part" in the first International Congress of the Phonographic Industry in Rome in 1933. In fact he read a paper on that occasion which foreshadowed the development of "neighbouring rights" in the 40 years that have passed since with a degree of accuracy and foresight which is quite remarkable.

stand him to refer to the fact that the protection of producers of phonograms is dealt with separately and outside the Rome Convention and particularly in an "open" convention not tied to the Copyright Conventions. If I thought that this convention would result in a tendency to damage the Rome Convention or to circumvent the Copyright Conventions, I would completely share this anxiety, but I do not. I have tried to deal above with the remarkable influence the Rome Convention has already exerted and the likelihood of its wide ratification in the future. With regard to the "open" nature of this Convention the facts are, I feel, also reassuring. There are less than 50 countries out of the total membership of the United Nations of 132, who could ratify this Convention, although they have not ratified either of the Copyright Conventions and the great majority of them are developing countries for whom special provisions have been created in the 1971 Revision of the two Copyright Conventions. Is there a real danger that any of them would wish to protect their indigenous producers of phonograms, if there are any, but not wish to protect their authors? I doubt it. In any event it will be the task of those representing authors and publishers and those representing producers of phonograms to convince such Governments that their enlightened self-interest demands that they should do both and not one without the other. We may thus have strayed a little from the "main road" under the heavy pressure of adverse events but I hope that the foregoing study — incomplete though it is — may go some way towards reassuring those who, like Valerio De Sanctis, are anxious that the development of copyright and neighbouring rights should remain healthy and logical, that before long all roads will lead to Rome.

INTERNATIONAL ACTIVITIES

International Federation of Musicians (FIM)

(8th Ordinary Congress, London, May 7 to 11, 1973)

The International Federation of Musicians held its 8th Ordinary Congress from May 7 to 11, 1973, at the TUC Congress House in London.

Delegates representing member organizations from the 22 following countries participated in the work of the Congress: Austria, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic of), Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Netherlands, Norway, Poland, South Africa, Spain, Sweden, Switzerland, United Kingdom, Yugoslavia. The meeting was also attended by observers from the following countries: Austria, Bulgaria, Denmark, Germany (Federal

Republic of), Hungary, Israel, Italy, Japan, Soviet Union, Spain.

Several intergovernmental or international non-governmental organizations had sent observers, including Unesco, ILO, the International Music Council, the International Federation of Actors and the International Federation of the Phonographic Industry. WIPO was represented by Mr. Mihailo Stojanović, Counsellor, Copyright Division.

A report on the activity covering the period between the two Congresses (October 1969 to April 1973), as well as several motions, had been submitted of the participants. The agenda

included, among other questions of importance to the professional organizations of musicians, a number of problems in the field of copyright and performers' rights: the Rome Convention, the Convention for the Protection of Producers of Phonograms, the draft convention against the unauthorized distribution of program-carrying signals transmitted by satellites, the problems raised by the manufacturing and use of videograms, etc. With respect to this last question, the Congress instructed the Executive Committee:

- (1) to draft a model contract in which are included the conditions under which musicians may accept engagements for the production of videograms, and by which also the use, and the control of use, of videograms at national and international level is guaranteed;
- (2) to examine measures by which it can be achieved that every videogram which is intended for private use shall on sale be subjected to a tax that shall go to the appropriate musicians' unions or performers' societies to be

used for the benefit of the profession (maintenance of employment opportunities, creation of employment, scholarships, etc.);

- (3) to examine measures by which it can be achieved that on every instrument that serves for public presentation of videograms there shall be imposed an annual tax by which the disadvantages arising for the music profession from use of the audio-visual devices shall be alleviated.

At the end of the session, the Congress — having highly praised the outgoing President, Mr. Hardie Ratcliffe — proceeded to the election of the new Executive Committee. Mr. John Morton (United Kingdom) was elected President, and Mr. M. Ferares (Netherlands) and Mr. Y. Åkerberg (Sweden) Vice-Presidents. The six remaining seats on the Executive Committee were allocated to the musicians' organizations of the following countries: Austria, Germany (Federal Republic of), Hungary, Italy, Spain, Yugoslavia. Mr. R. Leuzinger was re-elected Secretary General of FIM.

CALENDAR

WIPO Meetings

July 2 to 11, 1973 (Nairobi) — 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:* States members of the Berne Union or of the Paris Union or of the United Nations or of a Specialized Agency — *Observers:* Intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

July 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; Benelux Trademark Office

September 17 to 21, 1973 (Geneva) — Non-Governmental Study Group to consider Draft Model Law concerning Neighboring Rights

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

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

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

October 8 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 by Unesco in cooperation with WIPO

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

October 22 to 27, 1973 (Tokyo) — Patent Cooperation Treaty (PCT) — Interim Committees for Administrative Questions, for Technical Assistance and for Technical Cooperation

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

Object: To discuss on the role of industrial property in the development of Asian countries — *Invitations:* Afghanistan, Bangladesh, Burma, India, Indonesia, Iran, Khmer Republic, Laos, Malaysia, Mongolia, Nepal, Pakistan, Philippines, Republic of Korea, Republic of Viet-Nam, Singapore, Sri Lanka, Thailand — *Observers:* Intergovernmental and international non-governmental organizations concerned

- November 5 to 9, 1973 (Geneva) — International Patent Classification (IPC) — Working Group 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, Executive 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 members of the Paris Union
- November 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
Object: Consideration of various questions concerning the Rome Convention — *Invitations:* Brazil, Denmark, Ecuador, Fiji, Germany (Federal Republic of), Mexico, Niger, Sweden, United Kingdom — *Observers:* Austria, Congo, Costa Rica, Czechoslovakia, Paraguay; intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with the International Labour Organisation and Unesco
- December 3 to 7, 1973 (Geneva) — ICIREPAT — Technical Committee for Shared Systems (TCSS)
- December 5 to 11, 1973 (Paris) — Executive Committee of the Berne Union — Extraordinary Session
Object: Consideration of various questions concerning copyright — *Invitations:* States members of the Committee — *Observers:* All other member countries of the Berne Union; intergovernmental and international non-governmental organizations concerned — *Note:* Some meetings will be joint with the Intergovernmental Copyright Committee established 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:* Australia, Austria, Belgium, Canada, France, Germany (Federal Republic of), Ireland, Japan, Luxembourg, Netherlands, Soviet Union, Spain, Sweden, United Kingdom, United States of America — *Observers:* Colombia, Benelux Trademark Office

UPOV Meetings

- October 9, 1973 (Geneva) — Consultative Working Committee
- October 10 to 12, 1973 (Geneva) — Council
- November 6 and 7, 1973 (Geneva) — Technical Steering Committee

Meetings of Other International Organizations concerned with Intellectual Property

- 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 2, 1973 (Tel Aviv) — International Writers Guild — Congress
- December 10 to 14, 1973 (Brussels) — European Economic Community — "Community Patent" Working Party
- February 24 to March 2, 1974 (Melbourne) — International Association for the Protection of Industrial Property — Executive Committee
- May 6 to 30, 1974 (Luxembourg) — Conference of the Member States of the European Communities concerning the Convention on the European Patent for the Common Market
- May 3 to 10, 1975 (San Francisco) — International Association for the Protection of Industrial Property — Congress

VACANCY IN WIPO

Competition No. 214

Head, International Trademarks Section (International Registrations Division)

Category and grade: P. 2/P. 3, according to qualifications and experience of the selected candidate.

Principal duties:

1. Organizing the Section and giving directions concerning the training of new staff members.
2. (a) General supervision of the work relating to the examination of applications for registration and requests for renewal as well as to the processing of requests for entry in the International Register of modifications affecting international trademark registrations.
(b) Written instructions on the interpretation of the relevant Agreements and on the day-to-day work of the Section. Drawing up or revising the forms used in the context of the Section. Giving directions concerning the establishment of indexes, annual tables and official statistics.
3. Preparation of working documents and reports concerning the work of the Committee of Experts responsible for the establishment and updating of the International Classification of Goods and Services for the Purposes of the Registration of Marks. The incumbent may also be asked to assist in the work relating to the International Classification for Industrial Designs.
4. Contacts with national administrations and individuals requesting information on the international registration of trademarks. Reception of delegates and officials of national administrations.
5. Drafting and/or signing correspondence within the Section's field of activity.
6. Participation in revision work relating to conventions in the field of trademarks.
7. On specific instructions from the Head of the Division, collaborating in particular tasks of a legal or administrative nature.

The duties mentioned above are performed under the general supervision of the Head of the Division.

Qualifications:*

1. University degree in a relevant field — preferably in law or commercial science — or qualifications equivalent to such a degree.
2. Very good knowledge of French (with ability to draft effortlessly) and a good knowledge of English. Knowledge of other languages (especially German and Spanish) would be a great advantage.
3. Sense of organization and ability to supervise a specialized service comprising a large staff.
4. Experience in the field of industrial property, especially trademarks. The incumbent must have, or be in a position to acquire quickly, a thorough knowledge of the relevant instruments (pertinent provisions of the Paris Convention; Madrid Agreement Concerning the International Registration of Marks, and its Regulations; Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks; Locarno Agreement Establishing an International Classification for Industrial Designs) as well as of the Classifications established by the last two Agreements.

Nationality:

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

Type of appointment:

Probationary period of two years, after satisfactory completion of which a permanent appointment will be offered.

Age limit:

Candidates must be under fifty at the 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 the number of the Competition.

Closing date: August 31, 1973.

* The full range of these qualifications corresponds to an appointment at the P. 3 level.