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Copyright

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World Intellectual Property Organization (WIPO)

Contents

Berne Union

The Berne Union and International Copyright and Neighboring Rights in 1978 *

I. Introduction

The main aim of the copyright and neighboring rights activities is to strengthen cooperation among States in the mutual protection of literary and artistic works, musical and other performances, phonograms and broadcasts. Such activities, apart from those concerned with development cooperation related to copyright and neighboring rights, are concerned with the study of particular problems arising in the fields of copyright and neighboring rights and in the servicing of international treaties and the improvement of national legislations.

II. Berne Union

A. Member States

Costa Rica deposited its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971) on March 3, 1978, and became a member on June 10, 1978, of the International (Berne) Union founded by the said Convention. By the end of 1978, the number of States members of the Berne Union was 71 (see Table of Member States in the January 1979 issue of this review).

B. Governing Bodies

The Berne Union Executive Committee held an ordinary session in September/October 1978, during the ninth series of meetings of the Governing Bodies of WIPO and the Unions administered by WIPO. The main items discussed and the principal decisions taken by the Governing Bodies, including the Berne Union Executive Committee, during their sessions in September/October 1978, are reported on in the March 1979 issue of this review. The Berne Union Executive Committee recommended also that the Director General convene the Committee in early 1979 to consider the draft of WIPO's triennial (1980 to 1982) program and budget in the fields of copyright and neighboring rights and in related fields, provided that the Director General of Unesco convened, at the same time and place, the Intergovernmental Committee established by the Universal Copyright Convention with a view to the holding of joint meetings by the two said Committees. The Berne Union Executive Committee also acted upon the question of considering the domestic law of certain countries contemplating the possibility of acceding to the Berne Convention (see below). In addition, the Berne Union Executive Committee took the necessary decisions concerning the convening, with Unesco, of an international conference of States for the purpose of adopting a multilateral convention on the avoidance of double taxation of copyright royalties (see below).

C. Paris Act (1971) of the Berne Convention

Acceptance. During 1978, Portugal deposited its instrument of accession in respect of the Paris Act (1971) of the Berne Convention in its entirety. Sri Lanka deposited its instrument of accession with a declaration to the effect that its accession did not apply to Articles 1 to 21 and the Appendix. The Paris Act (1971) of the Berne Convention entered into force in 1978 for Australia (March 1, 1978), Costa Rica (March 10, 1978), German Democratic Republic (February 18, 1978) and Sri Lanka (September 23, 1978, with the exception of Articles 1 to 21 and the Appendix) and entered into force in 1979 for Portugal (January 12, 1979).

Applicability of Articles 1 to 21 and the Appendix. At the end of 1978, 35 States were bound by Articles 1 to 21 and the Appendix of the Paris Act (1971) of the Berne Convention.

Applicability of Articles 22 to 38. At the end of 1978, 42 States were bound by Articles 22 to 38 (administrative provisions and final clauses) of the Paris Act (1971) of the Berne Convention. In addition, 15 States were bound by Articles 22 to 38 (administrative provisions and final clauses) of the Stockholm Act (1967) of the Berne Convention.

Notifications under Article I of the Appendix. The Niger deposited a notification on March 14, 1978, availing itself of the faculties provided for in Articles II and III of the Appendix of the Paris Act (1971) of the Berne Convention. Four States have so far deposited such a notification: Mexico, Niger, Surinam, Tunisia. These notifications will be effective

* This article covers the main activities of the Berne Union and in the fields of international copyright and neighboring rights. The activities of the World Intellectual Property Organization as such are covered in the March 1979 issues of *Copyright* and *Industrial Property*. The April 1979 issue of the latter covers the main activities of the Paris Union and industrial property in 1978.

until the expiration of ten years from the entry into force of Articles 1 to 21 and the Appendix of the Paris Act (1971) of the Berne Convention, that is, until October 10, 1984.

Declarations under Article VI of the Appendix. In 1978, no State made a declaration under Article VI of the Appendix of the Paris Act (1971) of the Berne Convention. So far, Germany (Federal Republic of), Norway and the United Kingdom have declared under Article VI(1)(ii) that they admit the application of the Appendix to works of which they are the country of origin by countries which have deposited a notification under Article I of the Appendix (see the preceding paragraph).

Text of the Paris Act (1971). A version in Russian of the Paris Act (1971) of the Berne Convention was published in brochure form in May 1978.

Contribution Class. When depositing its instrument of accession to the Paris Act (1971) (see above) the Government of Costa Rica chose Class VII for the purpose of establishing its contributions towards the budget of the Berne Union. When depositing its instrument of ratification (except for Articles 1 to 21 and the Appendix) of the Paris Act (1971) of the Berne Convention (see above), the Government of Sri Lanka chose Class VII (instead of Class VI) for the purpose of establishing its contributions towards the budget of the Berne Union; this change of class will take effect in respect of the year 1979 and the years thereafter.

D. Compatibility of the new United States Copyright Law with the Berne Convention

In implementation of the 1978 program which provided that a working group would meet in order to consider the domestic law of certain countries contemplating the possibility of acceding to the Berne Convention, the Director General convened a group of consultants in June 1978 to consider the new Copyright Law of the United States of America. The Group of Consultants consisted of experts, acting in their personal capacity, from Brazil, Canada, France, Germany (Federal Republic of), Hungary, India, Italy, Senegal, the United Kingdom and the United States of America. The Group of Consultants had before them a study on the question of the compatibility of the United States Copyright Law with the Berne Convention. The Group of Consultants was of the view that the principal, if not the only, obstacle to the accession of the United States of America to the Berne Convention seemed to be certain provisions on formalities contained in the United States Copyright Law. The Group of Consultants considered whether this obstacle could not be removed if, in a Protocol to the Berne Convention, it were to be agreed that any State which is not and never has been a member of the Berne Union but which, at the time it became a member of the Berne Union, is party to the Universal Copyright Convention, could apply, for a limited period, Article III of the Universal Copyright Convention to works originating in other countries of the Berne Union notwithstanding the prohibition of formalities contained in Article 5(2) of the Berne Convention.

Having been informed by the Government of the United States of America that it was interested in seeing the matter pursued, the Director General brought that interest and the report of the Group of Consultants to the attention of the Berne Union Executive Committee at its session in September/October 1978. The Berne Union Executive Committee decided that consideration of the question of a possible Protocol to the Berne Convention intended to enable the United States of America to accede to that Convention should take place at its next session (February 1979) and that that session should decide on the desirability of pursuing the matter and, if its decision were positive, on the procedure to be followed.

III. International Copyright

A. Development Cooperation Activities Related to Copyright and Neighboring Rights

The activities in 1978 of the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights are summarized in the March 1979 issue of this review (pp. 60 *et seq.*). They concern the following: the Permanent Committee (membership and second session); status of ratifications of or accessions to the conventions on copyright and neighboring rights; support of national authors and performers; access to and dissemination of protected works, including implementation of the specific provisions for the benefit of developing countries contained in the Paris text of the Berne Convention and the Universal Copyright Convention; the Model Law on Copyright for developing countries; a glossary of terms of the law on copyright; the protection of folklore; the training program in the fields of copyright and neighboring rights; the teaching of copyright law; regional meetings; assistance to certain developing countries and regional institutions of developing countries and cooperation among developing countries.

B. Audiovisual Cassettes and Discs

Three subcommittees, established, respectively, by the Berne Union Executive Committee, the Intergovernmental Committee of the Universal Copyright Convention and the Intergovernmental Committee of the Rome Convention, at the sessions of the said Committees held in November/December 1977, met in Paris in September 1978 to examine the legal problems arising from the use of videocassettes and audiovisual discs and to consider solutions which

might be offered to national legislators on the basis of legislative solutions adopted or planned in different countries, as well as on the basis of current practice in respect of contractual relationships between the different interests concerned.

Although the three subcommittees met at the same place and during the same period, the Subcommittees established by the Berne Union Executive Committee and the Intergovernmental Committee of the Universal Copyright Convention held joint sittings, whereas the Subcommittee established by the Intergovernmental Committee of the Rome Convention met separately; nevertheless, the participants, preparatory documents, the discussions which took place and the decisions which were taken were similar.

Representatives of the following States participated in the meetings of one or more of the Subcommittees: Belgium, Brazil, Canada, Colombia, Czechoslovakia, Denmark, Ecuador, France, Hungary, Israel, Italy, Japan, Luxembourg, Mexico, Morocco, Netherlands, Niger, Norway, Senegal, Sweden, Switzerland, Tunisia, United Kingdom, United States of America. In addition, two intergovernmental organizations and 13 international non-governmental organizations were represented at the said meetings by observers.

The Subcommittees had before them a report of a Working Group which had met on the subject in 1977 and the comments from States and organizations on that report, as well as an analysis, prepared by a consultant, of that report and those comments together with a summary of the questions for discussions also prepared by that consultant.

After a general discussion of the legal problems arising from the use of videocassettes and audiovisual discs, the Subcommittees confirmed the conclusions reflected in the report of the 1977 Working Group. The Subcommittees recalled, as did the Working Group, that this new dissemination technique did not call for a revision of, or that it would be inopportune under the present circumstances to revise, the existing international conventions on copyright and neighboring rights, that it did not necessitate the preparation of a new international instrument and that, as to contracts and collective agreements in the field of neighboring rights, these solutions were also likely to be inadequate. The Subcommittees decided that the most practical solution would be to provide protection in national legislation. To assist national legislators, the Subcommittees examined and adopted an inventory of problems arising in the fields of copyright and neighboring rights which sets forth a series of questions and considerations relating to the terminology to be employed, the public and private uses of videograms and the utilization of videograms for teaching or other educational purposes. The Subcommittees expressed the wish that their reports on the meetings be submitted to the 1979 sessions of the Berne Union Executive Committee, the Intergovernmental Committee of the Universal Copyright Convention and the Intergovernmental Committee of the Rome Convention, that they be circulated widely among States and organizations and that, after consideration by the said Committees, a full set of documents should be constituted and published.

C. Transmission of Television Programs by Cable

The Subcommittee of the Berne Union Executive Committee and the Subcommittee of the Intergovernmental Copyright Committee of the Universal Copyright Convention on the copyright problems raised by the transmission of television programmes by cable, sitting together, met at Geneva in July 1978. Eight States members of the Berne Union Executive Committee (Austria, Belgium, Canada, India, Ivory Coast, Mexico, Spain, Switzerland) and eight States members of the Intergovernmental Committee of the Universal Copyright Convention (France, Germany (Federal Republic of), India, Japan, Mexico, Netherlands, United Kingdom, United States of America) were represented as members at the meetings. One State member of the Intergovernmental Committee of the Rome Convention (Denmark) was represented in an observer capacity. Three intergovernmental organizations and 14 international non-governmental organizations were represented by observers.

The Subcommittees explored the solutions in respect of the copyright problems raised by the transmission of television programs by cable which might be offered to national legislators on the basis of legislative solutions adopted or planned in different countries, as well as current practice in respect of contractual relationships between the different interests concerned.

The Subcommittees generally endorsed the final conclusions of the Working Group on the Problems in the Field of Copyright and Neighboring Rights Raised by the Distribution of Television Programmes by Cable which had met in Paris in June 1977, namely, that a study of the legal problems raised by cable distribution had revealed the necessity and usefulness of identifiying the problems which should, if appropriate, be taken into account by legislators at the national level.

The Subcommittees confirmed the conclusion reached by the 1977 Working Group that the solution of the problems at issue did not call for revision of either the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention, since the provisions written into those instruments covered the various situations that could arise in the fields concerned. The Subcommit-

tees concluded also that, in view of the latitude left to national legislations by those provisions and the fact that every country had its own special legal concepts, it did not seem possible for a uniform solution to be worked out and proposed to legislators as a model. Under those circumstances, the Subcommittees considered that their role consisted in drawing up a list of the problems raised by cable distribution and that each State would have to settle those problems by legal provisions or judicial decisions. In doing so, the Subcommittees studied in greater depth the considerations presented by the 1977 Working Group and drew up a list of typical concrete situations with their legal implications. These situations consisted of original transmissions (those made by a cable system and those made by the broadcaster himself via cable) and retransmissions of captured transmissions (those made simultaneously with the original transmission and those not, and, in the case of the former, three factors being taken into account: whether the program-unit or the whole program had been transmitted with or without changes, the fact that the programs were national or foreign, and the fact that small or bigger cable systems were resorted to). The conclusions of the Subcommittees deal with these situations and their implications for authors and broadcasting organizations on the collective administration of rights system and non-voluntary licensing.

As far as the field of neighboring rights is concerned, see below.

D. Electronic Computers and Other Technological Equipment

Pursuant to the decisions taken by the Berne Union Executive Committee and the Intergovernmental Committee of the Universal Copyright Convention at their sessions in November/December 1977, the International Bureau of WIPO and the Secretariat of Unesco circulated in April 1978 to the States members of the Berne Union or party to the Universal Copyright Convention studies dealing with the copyright problems arising from the use of electronic computers, especially those arising from the storage and retrieval of works protected by copyright, and invited the said States to present their comments on those studies by September 15, 1978.

E. Double Taxation of Copyright Royalties

The Third Committee of Governmental Experts on the Double Taxation of Copyright Royalties Remitted from One Country to Another, organized by WIPO and Unesco, met in Paris in June 1978. Forty-eight States sent experts to the meeting. Observers from one State, three intergovernmental organizations and 11 international non-governmental organizations also attended the meeting.

The Committee had before it a preliminary draft multilateral agreement for the elimination of double taxation of copyright royalties and a preliminary draft protocol annexed to that agreement, a preliminary draft model bilateral convention on this subject, commentaries on these preliminary drafts and the observations formulated by governments and international non-governmental organizations. The preliminary drafts and the commentaries had been prepared by the International Bureau of WIPO and the Secretariat of Unesco with the assistance of a consultant.

An exchange of views took place in the Committee on whether the most suitable means of avoiding cases of double taxation of copyright royalties should be within the framework of bilateral tax treaties of general scope rather than by a multilateral convention specifically concerned with copyright royalties. Further, after a discussion of the question whether the Committee should prepare a draft multilateral convention or a recommendation on the subject of the double taxation of copyright royalties, the Committee decided by a roll-call vote of 27 in favor, eight against and four abstentions that it should prepare a draft multilateral convention.

Thereupon the Committee prepared, on the basis of the preliminary drafts presented to it by the two Secretariats and amendments thereto submitted by a number of delegations, a draft Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties and a draft Protocol Annexed to that Convention. The Committee invited the two Secretariats to prepare a draft commentary explaining the draft Convention, a draft model bilateral convention and a draft commentary explaining that draft model bilateral convention. Finally, the Committee recommended that an international conference of States be convened in 1979 by the Directors General of WIPO and Unesco for the purpose of adopting a multilateral convention on the avoidance of double taxation of copyright royalties and that, as part of the preparations for that conference, the texts of the draft convention, agreement and commentaries be circulated to governments and to interested intergovernmental and international non-governmental organizations for their comments.

The Berne Union Executive Committee at its session in September/October 1978 and the Executive Board of Unesco at its session in November 1978 decided to convene the said international conference of States. The said conference is scheduled to be held in Madrid (Spain) in November/December 1979.

F. Works Destined for Persons with Visual or Auditory Handicaps

Pursuant to the decisions taken by the Berne Union Executive Committee and the Intergovernmental Committee of the Universal Copyright Con-

vention at their sessions in November/December 1977, the International Bureau of WIPO and the Secretariat of Unesco invited the World Council for the Welfare of the Blind (WCWB) to prepare a preliminary study of the problems arising in making protected works more readily accessible to persons suffering from visual or auditory handicaps.

IV. Rome Convention

A. Member States

Norway deposited on April 10, 1978, its instrument of accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention). The Rome Convention entered into force in respect of Norway on July 10, 1978. By the end of 1978, the number of States party to the Rome Convention was 21 (See Table of Member States in the January 1979 issue of this review).

B. Administration of Rights under the Rome Convention

In April 1978, the International Bureau of WIPO, the International Labour Office and the Secretariat of Unesco invited the States members of the Berne Union or party to the Universal Copyright Convention or to the Rome Convention to provide by July 15, 1978, if they so wished, additional information to supplement their replies to an earlier inquiry on the subject of the administration of rights under the Rome Convention. The replies and the additional information were to be submitted to the members of the Intergovernmental Committee established under the Rome Convention, sitting as a subcommittee, at its session in early 1979.[1]

C. Audiovisual Cassettes and Discs

See above.

D. Transmission of Television Programs by Cable

The Subcommittee of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) on the problems raised by the transmission of television programmes by cable in regard to the protection of the interests of the beneficiaries of the Rome Convention met in Geneva in July 1978. Five State members of the Intergovernmental Committee (Austria, Denmark, Mexico, Sweden, United Kingdom) were represented as members at the meeting. Two States party to the Rome Convention (Germany (Federal Republic of), Luxembourg) and eight States members of the Subcommittees set up by the two Copyright Committees (see above) (Canada, France, India, Ivory Coast, Japan, Netherlands, Switzerland, United States of America) were represented in an observer capacity. One intergovernmental organization and 10 international non-governmental organizations were represented by observers.

The Subcommittee considered a number of suggestions for solutions at the international level to the problems raised by the distribution of television programs by cable, including possible revision of the Rome Convention and the conclusion by Contracting States of special agreements under Article 22 of that Convention, but concluded that neither of these solutions seemed appropriate at the present time. The Subcommittee deemed it advisable instead to draw up guidelines to be recommended to States for the settlement of the problems arising from the distribution of television programs by cable. To that end, it took over the list of possible solutions which had been drawn up by the Subcommittees of the two Copyright Committees (see above) and examined them in relation to Articles 7, 10, 12 and 13 of the Rome Convention. The Subcommittee formulated certain conclusions in respect of these situations.

V. Phonograms Convention

Member States

Acceptance. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) entered into force for Egypt on April 23, 1978, for Israel on May 1, 1978, for Japan on October 14, 1978, and for Norway on August 1, 1978. El Salvador and Paraguay deposited instruments of accession to the Phonograms Convention on November 9, 1978, and November 13, 1978, respectively. The Phonograms Convention entered into force for El Salvador on February 9, 1979, and for Paraguay on February 13, 1979. On that latter date, the number of States party to the Phonograms Convention was 31 (see Table of Member States in the January 1979 issue of this review).

Declarations under Article 7(4). During 1978, no State made a declaration under Article 7(4) of the Phonograms Convention. Three States (Finland, Italy, Sweden) have so far made a declaration under Article 7(4) of the Phonograms Convention to the effect that they will apply the criterion according to which they afford protection to producers of phonograms solely on the basis of the place of first fixation instead of the criterion of the nationality of the producer.

VI. Satellites Convention

A. Acceptance

During 1978, no State deposited an instrument of ratification of or accession to the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention). The Satellites Convention is not yet in force.

[1] See the report published hereafter in this issue.

B. Records of the Satellites Conference

The Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, 1974) were published jointly with Unesco in English and French in July 1978 and in Spanish in October 1978.

C. Working Group on the Implementation of the Satellites Convention

The Working Group on the Implementation of the Satellites Convention, convened by the Directors General of WIPO and Unesco, met in April 1978. The members of the Working Group consisted of the representatives of two intergovernmental organizations and 10 international non-governmental organizations.

The discussions of the Working Group were based on a document, prepared by the Secretariats of WIPO and Unesco with the assistance of a consultant, containing an analysis of the Satellites Convention in terms of measures for its implementation by national laws and proposing certain definitions and model provisions for inclusion in national legislation intended to give effect to the Satellites Convention.

The Working Group examined a number of preliminary questions, including whether programme-carrying signals transmitted via space satellites for the ultimate purpose of reception by the public constituted " broadcasting " within the meaning of Article 3 of the Rome Convention, and whether the model provisions should be restricted to transmissions by means of point-to-point satellites.

Having dealt with these preliminary questions, the Working Group concluded that a Contracting State which, under the Satellites Convention, was required to take adequate measures to prevent prohibited distributions had a choice between two legal systems. The first was to grant to the broadcasting organizations meeting the requirements of the definition of " originating organization " in Article 1 of the Satellites Convention the right to authorize or prohibit the distribution of their signals. The other legal system consisted in prohibiting, subject to sanctions, a distributor from distributing programme-carrying signals which the originating organization had not intended for him. As a result, the Working Group prepared the texts of two sets of model provisions, together with a commentary, reflecting each legal system.

VII. Vienna Agreement (Type Faces)

Acceptance

During 1978, no State deposited an instrument of ratification of or accession to the Vienna Agreement for the Protection of Type Faces and their International Deposit. The Vienna Agreement (Type Faces) is not yet in force.

VIII. Publications

A. " Copyright " and " Le Droit d'auteur "

The reviews *Copyright* and *Le Droit d'auteur* continued to appear every month. The review *La Propiedad Intelectual*, which includes information on copyright and neighboring rights matters, continued to appear every quarter in Spanish.

The reviews *Copyright* and *Le Droit d'auteur* are now available in the form of microfiches for the years 1965 to 1976 (English) and 1888 to 1976 (French). Any individual issue may be obtained on request.

B. Collections of Laws and Treaties on Copyright and Neighboring Rights

The collection relating to copyright is being kept up to date in cooperation with Unesco and the collection relating to neighboring rights in cooperation with the ILO and Unesco.

C. Copyright Law Survey

The International Bureau finished the work on the preparation of a survey of national legislations in the field of copyright. The survey was published in the reviews *Copyright* and *Le Droit d'auteur*.

D. Guide to the Berne Convention

The French original and the English version of the *Guide to the Berne Convention* were published at the beginning of 1978. At the end of 1978, the Spanish translation of the Guide was being printed, whereas Arabic and Portuguese translations of the Guide were being prepared. Additionally, arrangements have been made for the publication of the Guide in German, Japanese and Russian.

IX. Other Matters

Relations with States

See the report on WIPO and its activities in 1978 in the March 1979 issue of this review.

Relations with Intergovernmental Organizations

Relations with the United Nations Educational, Scientific and Cultural Organization (UNESCO). See above.

Consultations took place between the International Bureau and the Secretariat of Unesco in June 1978 to coordinate the planning and carrying out of the program activities of the two Organizations in the field of copyright and neighboring rights.

Relations with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organisation (ILO). See above.

Relations with International and National Non-Governmental Organizations

WIPO was represented at the following meetings of international and national non-governmental organizations having an interest in copyright and related matters at which questions of direct interest to WIPO were discussed: the Executive Committee in Paris in January 1978 and Centennial Congress of the International Literary and Artistic Association (ALAI) in Paris in May 1978, at the latter of which the Director General also delivered an address; the Copyright Society of the United States of America at Bucks Hill, Pennsylvania (USA) in April 1978; the Executive Committee of the International Federation of Musicians (FIM) in London in April 1978; the Congress of the International Copyright Society (INTERGU) in Athens in May 1978, at which a member of the staff of the International Bureau presented a paper; the Legal and Legislation Committee of the International Confederation of Societies of Authors and Composers (CISAC) in Copenhagen (Denmark) in June 1978 and the Congress of CISAC in Toronto and Montreal (Canada) in September 1978.

In addition, the Centenary Celebration of the Invention of Sound Recordings, which was organized by the International Federation of Producers of Phonograms and Videograms (IFPI), held its closing ceremony in Geneva in March 1978 under the auspices of WIPO. A display was set up and a press conference took place in the WIPO Headquarters Building.

Conventions Administered by WIPO

Subcommittee of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations on the Implementation of the Rome Convention

(Geneva, January 29 to February 2, 1979)

Report

prepared by the Secretariat and adopted by the Subcommittee

I. Introduction and Participation

1. The Subcommittee of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) on the implementation of the said Convention, hereinafter referred to as " the Subcommittee," met at Geneva from January 29 to February 2, 1979.

2. The meeting of the Subcommittee was convened pursuant to the decisions taken by the Intergovernmental Committee of the Rome Convention at its sixth ordinary session held at Geneva in December 1977, in order to study the replies on the inquiry on the implementation of the said Convention and to recommend further action to the seventh ordinary session of the Intergovernmental Committee.

3. Eight States members of the Intergovernmental Committee (Austria, Brazil, Czechoslovakia, Denmark, Mexico, Niger, Sweden, United Kingdom) were represented at the meeting. Three States party to the Rome Convention (Germany (Federal Republic of), Luxembourg, Norway) were represented in an observer capacity.

4. One intergovernmental organization and 10 international non-governmental organizations were represented by observers.

5. The list of participants is annexed to this report.

II. Opening of the Meeting

6. The meeting was opened by Mrs. K.-L. Liguer-Laubhouet, Deputy Director General of WIPO, who extended, on behalf of ILO, Unesco and WIPO constituting the Secretariat of the Intergovernmental Committee, a warm welcome to the delegates and observers.

III. Election of Chairman

7. On a proposal by the delegation of Austria, supported by the delegation of the United Kingdom, Mr. W. Weincke (Denmark) was elected Chairman.

IV. Adoption of the Agenda

8. The Subcommittee adopted its agenda as contained in the document ILO/UNESCO/WIPO/ICR/SC. 1/IMP/1.

V. Introduction of Documentation

9. The Secretariat introduced the document ILO/UNESCO/WIPO/ICR/SC. 1/IMP/2 containing its report on the joint inquiry on the implementation of the Rome Convention.

VI. General Debate

10. The Chairman indicated that the objective of the inquiry was to facilitate and promote adherence to the Convention by making information generally available on the experience in the various countries in the administration of rights under the Rome Convention and the solutions adopted to harmonize the interests of the beneficiaries of these rights which could contribute to the improved functioning of the Convention.

11. Several delegations and observers thanked the Secretariat for the detailed documentation provided, and also thanked the International Federation of Producers of Phonograms and Videograms (IFPI) for the elaborate factual information furnished in its reply, that was reflected in the document.

12. The delegation of Austria emphasized that, considering the impact the Rome Convention has so far had on national legislations where a large number of countries have legislated on neighboring rights since its adoption and as already 21 countries had adhered to it, this Convention could be stated to be a success.

13. The delegation of Sweden stated that the Rome Convention was a flexible instrument in that Article 16 provides for several options in respect of the rights granted to the beneficiaries of the Convention and that within the system of the Convention it is possible to combine for instance collective systems and systems based on individual rights.

14. The delegation of the Federal Republic of Germany, regretting that it was unable to participate throughout the detailed discussions at the meeting, made a statement at the outset covering the following main points. Referring to the collection and distribution of royalties provided for in Article 12 of the Rome Convention, the delegation was of the opinion that the entitlement to royalties is governed by the law of the country in which the phonogram is used for broadcasting or communication to the public; therefore those kinds of beneficiaries who are entitled under the law of the country of collection have the right to remuneration in that country, be they nationals or be they foreigners to whom national treatment is accorded. It stated that a collecting society in the country of collection can exercise the rights of the beneficiaries only if the individual beneficiaries have transferred their rights to the society or have authorized the society to collect the remuneration for them; if the beneficiaries are foreigners, the rights can be transferred or the authorization given either directly to the society or indirectly via a collection society in their country of origin. In case of an indirect transfer or authorization, it stated that the society in the country of origin of the foreign beneficiary, mentioned in the document as the country of distribution, has to inform the collecting society in the country of collection of the names of the individual right holders and has to give proof — at least if so asked for by the collecting society in the country of collection — of the transfer or authorization by the individual right holder with respect to his rights in the country of collection. Only if these conditions are fulfilled could the collecting society in the country of collection, in its opinion, be able to collect the remuneration and be entitled to transfer it to the collecting society in the country of distribution; it is also only under these conditions that the distribution could be left to the collecting society in the country of distribution and be governed by the rules of that society.

15. It also referred to the wish of the international organizations of the performing artists and of the producers of phonograms, who — in order to be able to conclude so-called needle-time arrangements — ask for the grant of an exclusive right to prohibit the use of the phonogram, over and above the right to remuneration provided for in the Convention. It further stated that, during the legislative procedure leading to the copyright law of 1965 in its country, this was amply discussed and thoroughly examined, but was not followed mainly because an exclusive right of performers can be used to the detriment of authors; the income of authors, whose works are recorded on phonograms, depends to a considerable extent on the broadcasting of the records, and their legitimate interest to have their recorded works broadcast would be violated if the performers by virtue of an exclusive right prohibit — totally or partially — the use of phonograms in broadcasting. It stated that under these circumstances the legislative bodies in its country considered that a right of the performer to remuneration only, which safeguards his financial interest and does not interfere with the financial interest of the author, constitutes an adequate balance of the interests of authors and performers.

16. The Subcommittee thereafter took up the discussion of the legal and practical requirements for the distribution of remuneration (arising from the application of Article 12) in international situations and reached the conclusions described below.

17. With reference to the statement by the delegation of the Federal Republic of Germany indicated in the latter half of paragraph 14 above, relating to the collection and distribution of royalties provided for in Article 12 of the Rome Convention, the observer from the International Federation of Musicians (FIM) mentioned that there are difficulties in identifying performers in some cases.

18. While discussing the effect of Article 12 rights on copyright royalties, most delegations and observers felt that no proof was forthcoming to support the argument that royalty accruing to authors would be eroded as a result of the remuneration paid to persons other than authors; they felt that the so-called " cake theory " cannot be established on the basis of the information available.

19. The observer from the International Confederation of Societies of Authors and Composers (CISAC) expressed the view that the drafting of the conclusions of the Secretariat's documentation concerning the effect of Article 12 rights on copyright royalties was very prudent. In his opinion, before the " cake theory " is rejected, all the figures and related factual elements should be presented and carefully examined. The observer from the European Broadcasting Union (EBU) shared this view and drew the attention of the Subcommittee to the need to take into account the ceiling of income in order to cover the relevant expenses of the broadcasting organization concerned.

20. The Chairman as a delegate of Denmark, and the delegations of Austria and Sweden, expressed the opinion that in their countries copyright royalties had not decreased as a result of the remuneration paid to performers and producers of phonograms for the secondary use of their performances and phonograms, respectively. In their view the " cake theory "

was not a reality in their countries and they believed was not in other countries as well. The delegation of Czechoslovakia also supported this view.

21. The observer from the International Federation of Producers of Phonograms and Videograms (IFPI), referring to Article 12 rights, in so far as these relate to the collection and distribution system particularly where difficulty is encountered when right owners are different, or where payment of monies due has to cross country frontiers, and to the principle on which this should take place, stated that, if the following three conditions were fulfilled, difficulties could be largely minimized. Firstly, there should be, in every country of the Rome Convention, collecting societies, preferably only one, representing both producers of phonograms and performers; this was actually so in most countries; besides, since Article 12 provided for a single remuneration, a single society was desirable; secondly, that the collecting society should have a valid mandate or assignment from the right owners in the country where the society is located; and thirdly, that these societies should enter into bilateral arrangements with each other for the transfer of remuneration. He mentioned that a number of such bilateral agreements had already been concluded and felt that more would follow.

22. The observer from the International Federation of Musicians (FIM), speaking also on behalf of the International Federation of Actors (FIA), felt that the principal object should be to publicize the Convention and to encourage its increased ratification. He referred briefly to the recent FIM/FIA Symposium held from January 10 to 12, with the assistance of the three intergovernmental organizations ILO, Unesco and WIPO, and to the declaration [1] that emerged therefrom. He stressed that performers attached considerable importance to Article 7 rights and felt that the national laws should ensure that remedies such as are available to performers are a real possibility, capable of being exercised and implemented. As for Article 12 rights, he felt these should be implemented in a manner that was equitable and practicable.

23. The observer from the European Broadcasting Union (EBU) was gratified that their views were duly reflected in the documentation. Concerning the question of whether a single or joint collecting society was preferable, he felt that, while from an administrative point of view it would be better and more practical to deal with one society, there could be no hard and fast rule. Referring to the agreement between IFPI, FIM and FIA for sharing of remuneration, he said that this was a matter of practical concern to the EBU in a country where the law provided for only one beneficiary; in that event payment should be confined to only the beneficiary protected under the law, and it was a matter of internal arrangement for such beneficiary to share the amount due to it alone with the other beneficiary not so protected by the law.

24. The observer from the International Federation of Musicians (FIM) said that in some countries the law making the producers the sole beneficiary remained unaltered because sharing arrangements existed. But for these arrangements, the performers, for example in the United Kingdom, might well have sought, and succeeded in obtaining, legislation making the performers a beneficiary also.

25. The delegation of Sweden, referring to the statement of the observer from IFPI about a joint collecting society being preferable, said that while this may be desirable it may not be the solution for all countries. The observer from the International Federation of Actors (FIA) also pointed out that in certain national circumstances single societies may well be more suitable.

26. The delegation of Mexico pointed out that the currently existing systems for managing the royalties of authors and those of performers and phonogram producers were separate. In view of the complexity resulting from such a situation and considering the fact that similarities existed between these various types of remuneration, the question arose whether it would not be advisable in the long term to examine the possibility of a joint management of all such royalties.

27. The delegation of Czechoslovakia stated that in its country there was a single collecting society for performers only. It also drew the Subcommittee's attention to the suggestion made by its delegation at the sixth ordinary session of the Intergovernmental Committee (December 1977) concerning the establishment of an international confederation of national organizations for the protection of performers' rights, which would work in cooperation with existing organizations such as the International Federation of Musicians and the International Federation of Actors. It further referred to a meeting planned between certain collecting societies on neighboring rights proposed to be held in Vienna in the second half of this year.

28. Some delegations, however, felt that it would be premature for the Subcommittee to discuss the suggestion in greater detail and that national societies should first exchange views on this matter.

29. Referring to the question of distribution and utilization of revenue allocated to each group of beneficiaries, the delegation of Austria suggested that the joint executive organ (instead of the separate subunits representing performers and producers respectively) of the society responsible for collecting the

[1] See *Copyright*, 1979, p. 42.

revenue should be empowered to decide on the rules of distribution. On the other hand, the delegation of Austria, referring to the arbitration clause inserted into the guidelines concerning bilateral agreements, mentioned that such a clause does not for the present appear in any such agreement in force.

30. In the context of promotion of adherence to the Convention, the delegations of Denmark, Luxembourg and the United Kingdom, referring to the suggestion at the sixth ordinary session of the Intergovernmental Committee (December 1977) that Mr. Masouyé should prepare a Guide to the Rome Convention, as he had done for the Berne Convention, felt that such a Guide would be extremely useful, and should be established.

31. In the same context of making the Convention better known particularly to developing countries and to secure increased adherence by States to the Rome Convention, the delegation of the Niger, referring to regional seminars held for the purpose in Latin America at Mexico in 1975, and in Asia at Bangkok in 1977, suggested that a similar seminar be arranged in Africa. On behalf of the Secretariat it was stated that, while this suggestion would certainly be kept in view, the final decision would depend on budget availability and approval by their respective governing bodies.

32. After the general debate, the Subcommittee examined item by item the conclusions and recommendations contained in Section VII of document ILO/UNESCO/WIPO/ICR/SC. 1/IMP/2, and thereafter decided to set up a small drafting committee to finalize, in the light of these discussions, the recommendations of the Subcommittee which are annexed to this Report. The drafting committee composed of the delegations of Austria, Czechoslovakia, Mexico, Sweden and the United Kingdom, worked under the chairmanship of Dr. Dittrich, Head of the delegation of Austria, with the participation, as observers, of the three international non-governmental organizations (FIA, FIM, IFPI) having helped the Secretariat in establishing the preparatory documentation, and in consultation with the European Broadcasting Union. The Chairman of the Subcommittee, Mr. Weincke, also participated in the work of the drafting committee on an *ex-officio* basis.

VII. Adoption of the Recommendations Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

33. The recommendations as established by the drafting committee were presented to the Subcommittee and adopted with certain modifications. The final text of the Subcommittee's recommendations, as adopted by it, is reproduced at the end of this Report.

34. Referring to the last line of paragraph 20 of the said recommendations, the delegation of Austria wished to reserve its position in this connection. It stated that in its country a preliminary draft amendment to the Copyright Law provides (contrary to the recommendations of the Subcommittee on videograms which met in September 1978) for a levy on the blank material support only (and not on the recording equipment and material support).

35. The delegation of Brazil wished to reserve its position with regard to paragraph 37 of the said recommendations.

VIII. Adoption of the Report and Closing of the Meeting

36. The Subcommittee adopted the draft report prepared by the Secretariat.

37. In conclusion, the Subcommittee suggested that this report, together with the recommendations annexed thereto, should be placed before the Intergovernmental Committee at its next (seventh) ordinary session. Meanwhile the Subcommittee noted that this report and the recommendations would be duly published in the official periodicals of the respective intergovernmental organizations that form part of the Secretariat. The Subcommittee also recommended that the Secretariat ask the Contracting States and organizations concerned if they had any rectifications or additions to suggest in respect of the information contained in document ILO/UNESCO/WIPO/ICR/SC. 1/IMP/2, and that, if necessary, an addendum to that document could be furnished at the said session.

38. After the usual thanks, the Chairman declared the meeting closed.

Recommendations

concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations [2]

Introduction

1. The Secretariat of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) undertook an inquiry during 1976 and 1977 on the implementation and practical application of the Convention. The results of this inquiry were summarized in the Report of the Secretariat on the Joint Inquiry on the Implementation of the Rome Convention (document ILO/UNESCO/WIPO/ICR/SC.1/IMP/2).

2. A Subcommittee, established by the sixth ordinary session (December 1977) of the Intergovernmental Committee of the Convention, examined the Report of the Secretariat during a meeting in January 1979. Based on the information provided in the Report and on its own discussions, the Subcommittee drew a number of conclusions and adopted a number of recommendations that are presented below in order to promote adherence to the Convention and to provide guidance to States on the implementation and practical application of the Convention.

3. In its discussions the Subcommittee also recalled that regional seminars on the protection of performers, producers of phonograms and broadcasting organizations were an effective means of promoting the Convention. Two such seminars have been held in the past — one for the Latin American and Caribbean region in 1975 and one for the Asian/Pacific region in 1977. The Subcommittee recommended that seminars be also held in other regions of the world.

4. The Rome Convention grants protection to three categories of beneficiaries, viz. performers, producers of phonograms and broadcasting organizations. The Convention was based from the outset on social objectives. The origins of the Convention in the 1920s and 1930s were based on a need recognized, not only by performers but also by certain governments, to protect performers' rights in the light of the increased use of recording devices. The decision to protect all three beneficiaries in a single convention was taken many years later. The extent of the protection provided for in the Convention and the balance of interests among the three beneficiaries reflected in the Convention were determined in the light of the technology existing and forseen in 1961. The Subcommittee recognized that technological development during the past two decades in the areas of concern to the beneficiaries has occurred at an unprecedented pace and has introduced new techniques (especially satellites, cable television, videograms) none of which could be foreseen at the time of the drafting of the Convention. The attention of national legislators is drawn (in later sections of this document) to the effects of these new developments on the protection of the rights of the three beneficiaries.

The Main Provisions of the Convention

5. *Performers* shall have the possibility of preventing (a) in principle, the broadcasting and the communication to the public of their performance, (b) the fixation of their unfixed performance, (c) in principle, the reproduction of a fixation of their performance (Art. 7).

6. *Producers of phonograms* shall have the right to authorize or prohibit the direct or indirect reproduction of their phonograms (Art. 10).

7. *Broadcasting organizations* shall have the right to authorize or prohibit (a) the rebroadcasting of their broadcasts, (b) the fixation of their broadcasts, (c), in principle, the reproduction of fixations of their broadcasts, and (d) in certain cases, the communication to the public of their TV broadcasts (Art. 13).

8. If a phonogram published for commercial purposes or a reproduction of it is used directly for broadcasting or for any communication to the public, a remuneration shall be paid by the user to the performers or the phonogram producers or to both (Art. 12).

9. The minimum term of protection under the Convention shall be 20 years (Art. 14).

10. Contracting States may provide for exceptions to the protection granted by the Convention for private use, use of short excerpts in connection with reporting of current events, so-called ephemeral recordings, use solely for the purposes of teaching or scientific research and, generally, the same kinds of limitations as in connection with copyright in literary or artistic works (Art. 15).

11. The Rome Convention is essentially based on the principle of national treatment. This means that Contracting States shall grant beneficiaries from other Contracting States the same protection as they grant to their own beneficiaries (Arts. 4, 5 and 6).

12. There is, however, in the Convention a strong element of reciprocity. This is particularly clear in connection with the right to remuneration under Article 12. States have a possibility to make extensive reservations as regards this Article. They can, for instance, declare that they will not apply it in respect of certain uses, or that they will, as regards phonogram producers who are nationals of another Contracting State, limit the extent of protection and its term to what that State itself provides for. In this latter aspect it is, however, important to note that the fact that a State does not grant protection to the same categories of beneficiaries as another State is not considered as a difference in protection giving the right to such a limitation as is just mentioned (Art. 16).

13. States may also declare that they will not apply Article 12 at all (Art. 16).

Flexibility of the Convention

14. The Rome Convention is a flexible instrument that permits a number of alternatives to States on the question of national treatment, on the points of attachment, on the choice of the beneficiary with regard to Article 12, and on individual distribution or collective use of remuneration arising from the implementation of Article 12. As regards the points of attachment, most States have chosen to give protection to the producers of phonograms according to the nationality of the beneficiary (criterion of nationality), whereas a few States afford protection according to the place where the first fixation of the sound was made (criterion of fixation) or to the place of first publication (criterion of publication). Some States that base protection on the criterion of fixation are considering basing protection on the criterion of nationality. This flexibility may be considered as

[2] Sections containing specific recommendations are marked with an asterisk.

an attribute of the Convention that could facilitate adherence by non-contracting States. Moreover, this flexibility enables States with differing practices (for example those advocating collective use and those advocating individual distribution) to reach practical agreements on reciprocity.

*** Success of the Convention**

15. Twenty-one States have adhered to the Convention. Moreover, a large number of States have legislated in matters related to the Convention; since the adoption of the Convention in 1961 over 50 States have so legislated, half of which have done this for the first time. Indeed, the Convention has had a great impact on national legislation. As of July 1978, 84 States had legislated to protect producers of phonograms, 66 to protect broadcasting organizations and 35 to protect performers. Eight States are currently in a position to adhere to the Convention without the need to adopt new legislation. At recent Intergovernmental Committee meetings on copyright and on the Rome Convention rights, four States have indicated that they are presently considering legislation that would enable them to adhere to the Rome Convention. In short the Convention can no longer be considered to suffer from its so-called " pioneer " aspects.

16. While a large number of States have legislated on matters related to the Rome Convention, more States have legislated to protect producers of phonograms than have legislated to protect performers and broadcasting organizations. The Subcommittee recommends that States, which have not already done so, should legislate to give protection to performers and broadcasting organizations. The enactment of such legislation would enable certain non-contracting States to be in a position to adhere to the Convention. In this connection, the attention of national legislators is drawn to the Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1974), which provides guidance for the drafting of national legislation.

*** Promotion of the Minimum Rights of the Three Beneficiairies**

17. Having recommended that States adhere to the Convention and noting that a large number of States would need to enact legislation to give protection to performers and broadcasting organizations in order to be in a position to do so, the Subcommittee decided to highlight a number of points that should be considered by national legislators so that they take due account of the minimum rights provided for in the Convention.

18. The three major provisions of Article 7, which provide protection to performers, were described in the Introduction. While all three of these provisions are of equal importance and essential to the protection of performers, the Subcommittee decided to draw particular attention to the possibility for performers to prevent the reproduction of a fixation of their performance. This provision was deemed to be of particular significance for two reasons. First, the increased and widespread use of new techniques now available to reproduce and disseminate fixations makes it essential today that national laws reflect this provision. These new techniques have made it possible, for example, for fixations to be incorporated by reproduction of commercial phonograms in television programs and for phonograms to be rerecorded and reproduced as background music or as music accompanying ballet performances. These practices are currently widespread. Second, the Subcommittee observed that protection provided for in the provisions has not always been clearly reflected in national laws. Consequently some guidance was considered desirable to ensure that protection is effectively provided for in national laws.

19. The provisions in the Model Law are adequately specific on this issue and provide a clarification on the extent of authorization that should be required from performers for reproduction of fixations. The relevant paragraphs in Section 2 of the Model Law are as follows:

Section 2

" (1) Without the authorization of the performers, no person shall do any of the following acts: . . .

(d) the reproduction of a fixation of their performance, in any of the following cases: . . .

(ii) where the reproduction is made for purposes different from those for which the performers gave their authorization; . . .

(2) In the absence of any contractual agreement to the contrary or of circumstances of employment from which the contrary would normally be inferred:

(a) the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance;

(b) the authorization to broadcast does not imply an authorization to fix the performance;

(c) the authorization to broadcast and fix the performance does not imply an authorization to reproduce the fixation;

(d) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast the performance from the fixation or any reproduction of such fixation. "

20. Although a large number of States have granted protection to producers of phonograms, the serious and growing problem of unauthorized reproduction of phonograms (so-called piracy), which also affects the interests of various rights holders, but especially those of performers and producers of phonograms, render it essential for States to enact national laws to reflect the protection of Article 10 of the Convention and to adopt more effective national measures to enforce the laws and to deter unauthorized duplication. Section 4 of the Model Law provides guidance on how legislation should be drafted to provide producers of phonograms with Article 10 rights. The attention of States is also drawn to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. States should also consider ways to ensure that compensation payments are made to right owners, especially to producers of phonograms and to performers in order to mitigate the economic consequences of private copying of fixations. In this last connection, the Subcommittee endorsed the recommendations of the Subcommittee on videograms which met in September 1978.

21. Concerning the protection of broadcasting organizations, national legislators should ensure that the protection provided for in Article 13 of the Convention is effectively provided for in national laws. Section 6 of the Model Law provides guidance on how this might be accomplished. The attention of States is also drawn to the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite as well as, to the extent applicable, to the European Agreement on the Protection of Television Broadcasts. The latter instrument provides for protection, *inter alia,* against cable distribution of television broadcasts.

*** Protection of the Rights of Performers, Producers of Phonograms and Broadcasting Organizations in the Light of New Developments**

22. The technological developments, referred to in the Introduction, make it necessary today for national laws to include not only the minimum rights provided for in Ar-

ticles 7, 10 and 13 but also to provide for the protection for the beneficiaries against uses made possible by the new media. Two new technological developments were of particular concern to the beneficiaries and to the Subcommittee — that of videograms and that of cable television.

23. Concerning videograms, the performers were at an unique and unintended disadvantage since the protection provided for in Article 7 is no longer applicable once the performer has consented to the incorporation of his performance in a visual or audiovisual fixation (Art. 19). This provision in the Convention was envisaged to relate only to cinema films and not to videograms which did not exist at the time the Convention was adopted. The Subcommittee recalled that the Subcommittee on videograms that met in September 1978 recommended that national legislators should seek to overcome the difficulties created for performers in the protection of their rights and the safeguarding of their professions if Article 19 is applied to the case of the performers' consent to the incorporation of a performance in a videogram.

24. The unauthorized use of broadcasts in videograms had equally serious economic effects on broadcasting organizations. National legislators should ensure that adequate protection be provided to broadcasting organizations on the use of this technique. Particular protection is required for the videorecording of television broadcasts, and national laws should strictly define and delimit private use and use for teaching purposes that are outlined in Article 15 of the Convention.

25. With regard to cable television, the Subcommittee noted that unless protection were granted to the three beneficiaries serious economic harm would be caused to their professions or industries. The Subcommittee supported the conclusion reached by the Subcommittee on this subject which met in July 1978. These conclusions were that domestic law should treat original cable transmissions as broadcasts, and that the three beneficiaries covered by the Rome Convention should be given, as a minimum, the same protection for these transmissions as for broadcasts. Furthermore, effective protection was particularly called for with regard to the widespread and rapidly expanding distribution by cable of national and especially foreign television broadcasts.

26. The rights of broadcasting organizations and performers are closely linked on this issue. By providing broadcasting organizations with rights over cable use, performers would have the possibility of obtaining protection through their contractual relations with such organizations.

The Effect of Article 12 Rights on Copyright Royalties

27. For many years, it has been said by non-governmental organizations representing authors and composers that the introduction of broadcasting and public performance rights for producers of phonograms and performers has had an adverse effect on the royalties of authors and composers deriving from the performing rights in their works (the so-called " cake theory ").

28. An invitation was issued to these non-governmental organizations by the Secretariat of the Intergovernmental Committee in a circular letter in May 1976, requesting figures to substantiate the allegation of adverse effects. No such evidence has been submitted. Several States members of the Subcommittee expressed the firm view that the evidence in their countries, and the evidence available to the Subcommitte, indicates conclusively that copyright royalties have not decreased as a result of the remuneration paid to performers and producers of phonograms. It is, therefore, clear that there is no evidence to support the proposition that authors' revenue has decreased as a result of neighboring rights. It has been argued further that the revenue of authors and composers would have increased even more than it has done if there had been no secondary use rights in phonograms. This proposition has never been proved and is, by its nature, impossible to disprove. The Subcommittee, therefore, concludes that the second argument cannot be sustained either. In addition, the Subcommittee believes that a possible adverse effect on authors' royalties would not in any event constitute a sufficient reason for opposing the rights provided for in the Rome Convention since justice demands that performers and producers of phonograms should be remunerated for secondary use of phonograms.

* Collection and Distribution of Remuneration

A. Introductions, alternative arrangements and practical considerations

29. Experience in 32 countries of administering rights of performers and producers of phonograms granted in accordance with Article 12 of the Rome Convention has shown that, by harmonizing the interests of the beneficiaries, satisfactory arrangements, both efficient and reasonably cheap, may be made for the purpose of collecting, distributing and applying remuneration due in respect of broadcasting and communication to the public of phonograms published for commercial purposes. Indeed such arrangements have been found not only to be economically feasible, but also to present fewer difficulties than appear at first sight. In fact, four such systems exist in countries with no legislation to this effect. The functioning of all of these systems refutes the argument that the Convention is difficult to apply in practice. According to the interpretation of the Convention, entitlement to remuneration shall in all cases be determined by the country of collection in accordance with private international law. Foreign beneficiaries are entitled to national treatment.

30. The arrangements required must deal with both national situations (collection, distribution and application of remuneration due to national performers and producers) and international situations (collection, distribution and application of remuneration due to foreign performers and producers). The former normally present few problems. The legal and practical requirements for solution of these problems at the international level can best be satisfied by setting up " collection/distribution societies " in all countries where national legislation establishes rights for performers or producers, or both, corresponding to those provided for in Article 12. These societies should represent performers and producers and there are certain advantages in having one society only, representing both. A prerequisite for the functioning of these societies is that they must have valid mandates or assignments of individual rights of those entitled to remuneration. The validity of these mandates or assignments is to be judged (in accordance with the principles of private international law) by the law of the country where the mandates or assignments are given. Practical guidance for the establishment and operation of such societies, and for bilateral agreements between them, are set out below.

31. The experience in various countries of administering Article 12 rights illustrates that there are several alternative arrangements that can be established to implement such rights. Different arrangements can include:

(a) Remuneration distributed to both nationals and foreigners according to the rules of the collecting society in the country of collection. The collecting society in the country of collection sends to the society in the country of distribution a list (names of performers and the sums they

are entitled to), without evidence of the user. In such cases the society in the country of distribution consequently has no possibility of changing the beneficiary or the amounts for distribution since it has no evidence of the extent of use. Only the balance of the total sum of traceable remuneration due to identifiable performers would be transmitted. If the principles of distribution of the society in the country of collection are felt to be inappropriate or inequitable by the distributing society, this society can change the distribution without having agreed to such a change in a bilateral agreement, provided it has valid mandates or assignments from those entitled to remuneration.

(b) Collection and distribution of remuneration based on a practice whereby the collection and distribution to nationals would be governed by the law of the country and the rules of the national society in the country of collection, whereas distribution of any remuneration transmitted to a second country would be governed by the rules of the national society of that country, provided these societies have valid mandates or assignments from those entitled to remuneration. In contrast to *(a)* above this arrangement is based on bilateral agreements. This arrangement is advocated by the international federations representing producers of phonograms and videograms (IFPI) and performers (FIM and FIA) and is reflected in the 4th London Principle agreed to by these organizations in 1978.

(c) Remuneration remaining in the country of collection and distributed according to the rules of the society in that country, provided the society has valid mandates or assignments from those entitled to remuneration. This arrangement calls for bilateral agreements with collection/distribution societies in other Contracting States. Reasons for the remuneration remaining in the country of collection may include national economic conditions, problems of currency regulation or incompatible methods for calculating the remuneration and the methods of distribution in two given countries.

(d) Remuneration due to one beneficiary remaining in the country of collection and used for collective purposes.

32. A number of practical considerations should be taken into account regardless of the choice made among any of the above arrangements. For example, the collection and distribution societies have, in some countries, found that the most effective way of collecting public performance revenue, as opposed to broadcasting revenue, is to ask the national authors' society to do it on behalf of the Article 12 beneficiaries on a commission basis. This is so because they collect from the same users in any event, and the additional cost incurred in the collection of Article 12 remuneration is marginal. The commission, which provides an additional income for the authors' societies, is a contribution towards meeting their own administrative expenses, thus increasing their cost effectiveness.

33. The experience of existing collecting societies has shown that practical difficulties in identifying the individual performers and producers, whether nationals or foreigners, entitled to broadcasting revenue are less than those involved in dealing with public performance revenue, in respect of which identification of every participating performer is not likely to prove possible. Similarly, it may not be possible to establish precisely the extent to which any particular phonogram is used. In such cases, however, the principle of benefiting performers can be observed by collective application of an appropriate proportion of the revenue received. When revenue is deemed undistributable, at present, it remains in the country in which it arises. Some bilateral agreements, based on the FIM/IFPI "London" Principles, 1969, expressly so provide.

34. Legislation in some countries provides that, in the absence of agreement between performers and producers of phonograms, the sharing of remuneration from performance rights should be 50/50. The Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations in Section 5(2) provides that "unless otherwise agreed between the performers and the producer, half of the amount received by the producers under paragraph (1) shall be paid by the producers to the performers." It is recalled that the "amount received by the producers" refers to the total sum due to both producers and performers. The Model Law as a whole has the support of FIM, FIA and IFPI and it is common ground between the three organizations that any country adhering to the Convention on the basis of the Model Law should apply this provision.

35. The Rome Convention leaves open the question whether remuneration due to performers should be distributed to individual performers or used for collective or social purposes, that is, for the benefit of the profession as a whole (see paragraph 688.1 of the Summary records of the proceedings of the Diplomatic Conference). Subject to the provisions of the national law, performers in a given country may control the use to which the remuneration to which they are entitled under Article 12 is put, by giving appropriate mandates or assignments of their rights to their national collection/distribution societies.

B. Guidelines for the establishment and operation of collecting societies for Article 12 rights

36. The following guidelines are presented to facilitate the practical application of Article 12 rights:

(1) In all countries where national legislation establishes rights for performers or producers of phonograms, or both, corresponding to those specified in Article 12 of the Rome Convention, societies should be set up for the purpose of collecting, distributing and applying revenue due in respect of broadcasting and communication to the public of phonograms published for commercial purposes. Such societies must have valid mandates or assignments of individual rights of those entitled to remuneration.

(2) Collecting societies representing performers and producers of phonograms may be established either as a single joint society or as separate societies. Both solutions have been adopted by Contracting States. Joint societies, as mentioned in paragraph 30 above, should be composed of performers and producers of phonograms who would be represented on an equal footing. Performers and producers should choose their own representatives, either directly or through representative organizations.

(3) Where broadcasting and/or public performance revenue is due either to producers or to performers, or to both, as a result of legal provisions, and, in the last case, in the absence of any legal provision relating to the division of the revenue between performers and producers, the rules of the society or societies referred to in paragraphs (1) and (2) above should specify that the revenue shall be divided equally between performers and producers.

(4) The society or societies referred to in paragraphs (1) and (2) above should work on a non-profit basis and wherever possible be established in accordance with the national legislation governing non-profit-making institutions or analogous organizations. Whatever the legal form adopted, such societies should have the legal personality required:

(i) to enter into binding contracts, both at the national and at the international level;

(ii) to exercise the mandates received from performers and producers.

(5) Membership of a performers' union or association or a producers' organization should not be made a condition of admittance to the society or societies referred to in paragraphs (1) and (2) above.

(6) Within a joint society, as envisaged in paragraph (2) above, the interests of performers and producers respectively may each be represented in one or more separate sub-units, provided that:

(i) there should be a joint executive organ, with equal representation of performers and producers;

(ii) the voting strength of performers and producers should remain equal in the joint executive organ or in any other joint organ, irrespective of the number of sub-units representing either performers or producers;

(iii) the joint executive organ should be responsible for all negotiations concerning the remuneration payable in respect of broadcasting and public performance of phonograms published for commercial purposes;

(iv) the distribution and application of the revenue allocated to each group of beneficiaries should be decided by separate sub-units representing performers and producers, respectively.

(7) Should the executive organ of a joint society so decide, it may be presided over by an independent person, appointed by agreement between the representatives of performers and producers.

(8) Wherever possible, decisions of a joint society should be adopted unanimously or by consensus, the rules governing voting being framed to this end. On occasions when this does not prove possible, and where there is an independent chairman, the latter may be given a vote.

(9) The question as to whether a representative or representatives of the public authorities should participate in meetings or be a member of the executive organ of a joint society should be decided in each case in the light of national practice.

(10) The rules of the society or societies referred to in paragraphs (1) and (2) above should provide, *inter alia*:

(i) that the administrative costs necessarily incurred in the efficient conduct of the business of the society should be a first charge on the revenue received;

(ii) that administrative costs and capital expenditure, including the acquisition or rental of real property, should be subject to effective scrutiny of the membership;

(iii) the conditions under which a proportion of the revenue received may be used, either directly by the society itself or otherwise (for example, through representative organizations of performers and producers) for the defense and promotion of the rights of performers and producers at both the national and international level; such uses should be without prejudice to the right of the sub-units representing performers and producers to make separate allocations for these purposes;

(iv) the establishment of an adequate reserve fund;

(v) the general objectives in pursuance of which the two groups of beneficiaries may distribute and apply the revenue allocated to each of them, and the procedures by which decisions regarding such uses shall be made, including the methods by which members of the society shall be informed of such decisions;

(vi) the manner in which indemnities arising from bilateral agreements should be fulfilled.

(11) A report on the activities of the society or societies referred to in paragraphs (1) and (2) above should be made available to members periodically (normally annually). This report should include:

(i) a detailed statement of accounts, duly certified by an independent auditor;

(ii) explanatory information concerning expenditure incurred by the society pursuant to paragraph (10) above;

(iii) explanatory information concerning any other expenditure incurred by the society or its sub-units.

(12) With particular regard to the collection of public performance revenue, every effort should be made to obtain the cooperation of existing collecting agencies such as authors' societies, provided that this can be done at reasonable cost.

C. International bilateral agreements

37. The following guidelines are presented in order to facilitate the establishment of bilateral agreements between collecting societies:

(1) Bilateral agreements between collection/distribution societies in different countries should be legally binding contracts.

(2) Such agreements should be made for a substantial period (not less than two years) and should be automatically renewed unless denounced by either party.

(3) Such agreements should contain provisions for the settlement of any dispute as to their interpretation and application. The suggested mechanism would be an international arbitration tribunal consisting of an equal number of representatives nominated by FIM and FIA on the one hand, and by IFPI on the other, with a chairman appointed by mutual agreement. The agreement should provide that either party may require arbitration and that both parties undertake to accept and apply the decision of the arbitration tribunal. The determination of who is to pay arbitration costs, if any, may be decided by the tribunal.

(4) Such agreements should be consistent with the arrangement and practice chosen to implement Article 12 rights.

(5) (i) Such agreements should clearly indicate where the responsibility for meeting claims, and costs properly incurred in relation thereto, should lie.

(ii) The two societies party to such an agreement should grant each other mutual indemnities against successful claims, and costs properly incurred in relation thereto, from performers and producers in their respective countries. Such indemnities should take effect to the extent that such claims cannot be met from revenue received by the defendant society in respect of performers or producers in the country whence the claim originates and retained by the defendant society because deemed not for distribution. For the purposes of this calculation, revenue received in respect of performers should not be brought into account in relation to claims by producers, nor vice versa.

List of Participants

I. Members of the Committee

Austria: R. Dittrich; S. von Friedberg. **Brazil:** C. F. Mathias de Souza; G. R. B. Arroio. **Czechoslovakia:** J. Matuš; M. Jelínek; J. Čížek. **Denmark:** W. Weincke. **Mexico:** J. M. Teran Contreras; N. Pizzaro; M. F. Ize de Charrin; V. Blanco Labra; J. Larequi Radilla. **Niger:** A. Mahaman Toumani; A. Bonkaney. **Sweden:** A. H. Olsson; M. Böttiger. **United Kingdom:** V. Tarnofsky; A. Holt.

II. Observer States

Germany (Federal Republic of): A. Muehlen. **Luxembourg:** E. Emringer; J. Jungers. **Norway:** S. Gramstad.

III. Intergovernmental Organizations (Observers)

Organization of American States (OAS): O. Godoy Arcaya; E. F. Hurtado de Mendoza.

IV. International Non-Governmental Organizations (Observers)

European Broadcasting Union (EBU): M. Cazé; W. Rumphorst. **International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM):** J.-A. Ziegler. **International Confederation of Societies of Authors and Composers (CISAC):** J.-A. Ziegler. **International Copyright Society (INTERGU):** G. Halla. **International Federation of Actors (FIA):** G. Croasdell. **International Federation of Film Producers Associations (FIAPF):** A. Brisson. **International Federation of Musicians (FIM):** J. Morton; R. Leuzinger. **International Federation of Producers of Phonograms and Videograms (IFPI):** S. M. Stewart; G. Davies; E. Thompson; H. H. von Rauscher auf Weeg; C. de Souza Amaral; H. Jessen. **International Literary and Artistic Association (ALAI):** P. Banki. **International Music Council (IMC):** J. Morton.

V. Secretariat

International Labour Office (ILO)

G. Bohère *(Chief, Salaried Employees and Professional Workers Branch, Sectoral Activities Department)*; S. C. Cornwell *(Salaried Employees and Professional Workers Branch, Sectoral Activities Department).*

United Nations Educational, Scientific and Cultural Organization (UNESCO)

M.-C. Dock *(Director, Copyright Division).*

World Intellectual Property Organization (WIPO)

K.-L. Liguer-Laubhouet *(Deputy Director General)*; C. Masouyé *(Director, Copyright and Public Information Department)*; S. Alikhan *(Director, Copyright Division)*; M. Stojanović *(Head, Legislation and Periodicals Section, Copyright Division).*

National Legislation

HUNGARY

I

Decree-Law of the Presidium of the Hungarian People's Republic

amending and completing the Copyright Act No. III of 1969

(No. 27 of 1978) *

1. Article 5(2) of the Copyright Act, No. III of 1969 [1] (hereinafter referred to as " the Copyright Act "), is replaced by the following provision:

" (2) If the joint work can be separated into independent parts, the co-authors shall be entitled to independent copyright in such parts. "

2. The following Article 15A is added to the Copyright Act:

" *Article 15A.* After the expiration of the protection of the author's economic rights, a charge shall be paid in cases specified by statutory provisions. "

3. The following Article 46A is added to the Copyright Act:

" *Article 46A.* When the property rights in original works of fine art and applied art are transferred, an author's fee shall be paid in cases and to the extent specified by the Minister of Culture. "

4. Article 52(2) of the Copyright Act is replaced by the following provision:

" (2) In the case of infringement of copyright damages shall be payable according to the relevant provisions on liability under civil law. Continuous or serious infringement of the rights attached to the person of the author is also considered to afford entitlement to damages. "

5. This Decree-Law shall enter into force on January 1, 1979.

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* Published in *Magyar Közlöny*, of December 7, 1978. English translation provided by the Hungarian Bureau for the Protection of Copyright (ARTISJUS) and revised by WIPO.

[1] See *Copyright*, 1969, p. 236.

II

Decree of the Minister of Culture

completing Decree No. 9, of December 29, 1969, concerning the implementation of the Copyright Act, No. III of 1969

(No. 4, of December 7, 1978) *

Article 1

[Article 5(2) of the Copyright Act]

The following Article 3A is added to Decree No. 9 of December 29, 1969,[1] concerning the implementation of the Copyright Act (hereinafter referred to as " the implementing Decree "):

" *Article 3A.* The joint work shall be regarded as divisible into independent parts if the parts can be separated from each other and also be used (produced, published, etc.) independently. "

Article 2

[Article 15A of the Copyright Act]

The following Article 13A is added to the implementing Decree:

" *Article 13A.* (1) When the property rights in paintings, drawings, reproduced pictorial graphic works and works of applied art marked with serial numbers and the initials of the author, works of sculpture or tapestries are transferred after the expiration of the protection of the author's economic rights, such transfer being effected through the antique shops of the Commission Store Enterprise, the State Book Distribution Enterprise or the " Müwelt Nép " Book Distribution Enterprise, as the case may be (hereinafter referred to as " an intermediary enterprise "), a charge shall be paid to the Art Fund of the Hungarian People's Republic (hereinafter referred to as " the Art Fund ").

(2) Museums and museological public collections (Article 4 of Decree-Law No. 9 of 1963) are exempted from the obligation to pay the charge.

(3) The amount of the charge shall be 5 percent of the purchase price to be paid by the buyer. The intermediary enterprise shall be responsible for collecting the charge and transferring it to the Art Fund.

(4) The charge transferred to the Art Fund shall be used by the Fund for the welfare and social purposes of writers and creative artists."

Article 3

[Article 46A of the Copyright Act]

The following Article 35A is added to the implementing Decree:

" *Article 35A.* (1) If the property rights in paintings, drawings, reproduced pictorial graphic works and works of applied art marked with serial numbers and the initials of the author, works of sculpture or tapestries are transferred by the intermediary enterprise, an author's fee shall be paid.

(2) If the property rights in a work mentioned in paragraph (1) are acquired by museums or museological public collections, an author's fee shall be paid by them only if the author is alive.

(3) The author's fee payable on the transfer of the property rights in works of fine art and applied art mentioned in paragraph (1) shall be 5 percent of the purchase price to be paid by the buyer. The intermediary enterprise shall be responsible for collecting the author's fee and for its transfer to the Art Fund.

(4) According to Council of Ministers Decree No. 24, of March 27, 1952, the author's fees received by the Art Fund shall be paid by it to the author of the work of fine art or to his successor in title. "

Article 4

This Decree shall enter into force on January 1, 1979.

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* Published in *Magyar Közlöny*, of December 7, 1978. English translation provided by the Hungarian Bureau for the Protection of Copyright (ARTISJUS) and revised by WIPO.

[1] See *Copyright*, 1972, p. 201.

General Studies

Employment and Copyright

Rolande CUVILLIER *

An author in paid employment is generally deprived of all or part of the rights normally accruing to an independent author. Is this justified? That is the question we shall examine here, from two points of view: the internal logic of copyright law, and social legislation today. Our examination will be based on the situation existing in a few industrialized countries.[1]

In the past, scant attention has been paid to the question of the rights of an author under employment contract [2] and, even nowadays, social legislation takes an interest in the matter only under pressure of passing urgency, for one or other particular professional category. But it is arousing growing interest among specialists [3] and on the part of legislators,[4] and can no longer be disregarded.

Numerous authors are today employed as salaried workers or in similar conditions. In the traditional creative professions (composer, writer, painter, sculptor, etc.), the proportion who are truly independent is tending to diminish. More and more of the persons concerned participate in the related or quasi-literary or quasi-artistic activities that derive from modern means of expression and communication media. They are engaged, whether sporadically or on a continuing basis, in overt or covert employment relations. Indeed, there are many creators who are employed as salaried workers, whether permanent or temporary, in new or expanding activities where there is a demand for their talents — advertising, journalism, design and applied arts in industry, stage arts, town planning, cinema, radio, television and, more generally, all the various media that are growing out of rapid technical evolution. Many works eligible for copyright protection are also made in the fields of education, research, and in highly specialized scientific, technical and cultural activities, where there are many salaried workers. In general, the State is playing an increasingly important role as employer of authors and utilizer of works. Given the magnitude of this trend, there is a risk that the structure of copyright law may be destroyed and also a risk that denial or restriction of the employee-author's rights may be seized upon as a convenient solution to try to contain the tendency toward such destruction.

Status of the employee-author

The major fundamental international texts on copyright — the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention — do not touch on the matter of the author working under an employment contract, and have not operated as unifying factors in this regard. As we shall see, however, a few provisions on this subject are included in the Tunis Model Law on Copyright for developing countries.[5]

General treatment

In a first group of countries, which follow the "Anglo-Saxon" legal tradition,[6] the legal author may be an individual or a legal entity who is not necessarily the creator of the work. The copyright legislation deems the employer to be the original author of a work made by an employee, in the absence of agreement to the contrary. The employee yields more or less automatically to the employer. This is the case in the United States,[7] Ireland,[8] the Netherlands,[9] the United Kingdom.[10] It is also the

* International Labour Office. The views expressed in this study are the responsability of the author alone.

1 The situation in regard to designs has not been examined in this context.

2 Even just before the adoption of the Universal Copyright Convention it was still considered to be a "non-priority issue of copyright." *Copyright Bulletin — Unesco,* 1949, Vol. II, no. 2-3, p. 50.

3 For a recent comparative international study, see R. Plaisant, "The Employee-Author and Literary and Artistic Property," in *Copyright*, 1977, pp. 274-280. This study contains many very useful references.

4 Regarding the international aspect, see A. Dietz, *Copyright Law in the European Community*. A comparative investigation of national copyright legislation, with special reference to the provisions of the Treaty establishing the European Economic Community. Produced at the request of the Commission of the European Communities. Sijthoff & Noordhoff, 1978, Alphen aan den Rijn, pp. 62-65. (European Aspects, Law Series No. 20)

5 *Tunis Model Law on Copyright for developing countries,* Section 10, Unesco-WIPO, 1976. (WIPO Publication No. 812(E)).

6 This classification is used consistently with usual practice, as in the case of the "Roman" legal tradition.

7 Copyright Law, 1976, § 201(b).

8 Copyright Act, 1963, Section 10(5).

9 Copyright Law as amended up to October 27, 1972, Article 7.

10 Copyright Act, 1956, Section 4(4).

case in Canada [11] although the underlying principle in that country is that he who creates a work owns the copyright in that work.[12] In the United States, any stipulations to the contrary must be agreed in a written instrument signed by the parties concerned.

The works concerned are those created by an employee in the context of his functions, in the course of his employment; in principle, therefore, he retains his copyright for all other works. But the reservation " unless otherwise agreed " is probably not sufficiently clear since the inference has been drawn by some people that it can also apply to this definition of the work. In one country, a handbook of policy recommendations on service agreements mentions this and suggests the inclusion in employment contracts of a clause to the effect that the copyright in all literary, dramatic or artistic works made by the employee during the subsistence of the agreement, whether or not so made during the course of his employment vests in the employer.[13] This amounts to taking over anything that the employee may do, even on his own initiative and in his spare time.

In the context of proposals for revising national legislation on copyright, no changes are suggested in provisions applying to employee-authors in Canada. In the United Kingdom, on the other hand, the Whitford Committee recommended that the employee should have a statutory right to an award if the employer exploits his work in a way that was not within the contemplation of the parties at the time of making the work; this provision, which would be subject to agreement to the contrary, would also apply to journalists. A minority of the Committee recommended that the same principle of compensation should apply to the author of a commissioned work where the only purpose of the commission is the creation of the copyright work.[14]

Adequate information is lacking regarding the situation of employee-authors from the standpoint of moral rights. Under the Berne Convention, these rights are retained even after the transfer of the economic rights and independently of them (Article $6^{bis}(1)$). An employee-author ought therefore to have the normal benefit of his moral rights in these countries, as in those of the second group. However, in countries with an Anglo-Saxon legal tradition, it is common law or the law of defamation that protect the author's natural right to object to any distortion, mutilation or other modification likely to prejudice his honor or reputation. The Whitford Committee mentions in its report that it would hardly be reasonable to insist on the name of each author being mentioned where there are several, for example, in the case of a design team which produces an article protected by copyright in the course of employment.[15]

In a second group of countries, where the " Roman " legal approach prevails, copyright vests initially in the natural creator of the work and, even if employed, he will be deemed to be the original author. The employer may exercise author's rights only in a secondary capacity, through the operation of various modalities for the assignment or transfer of rights of exploitation. The creator retains his moral rights.

In the Federal Republic of Germany, the provisions concerning copyright licenses also apply if the author has created the work pursuant to a contract of service or employment, unless anything to the contrary results from the object or nature of the service or employment.[16] Any transfer or licensing is interpreted in a restrictive sense and is limited to the modes of exploitation stipulated in the contract. A similar situation exists in Austria, where the law provides that the author may authorize other persons to use the work and may grant them the exclusive right to do so.[17] It does not contain any particular provisions concerning the employee in this context. A study recently carried out for the Federal Ministry of Social Administration underlines the need for appropriate legislation on the matter, mentioning in particular the lack of convincing case law.[18]

French legislation [19] firmly excludes any derogation from the enjoyment of authors' rights in the event of the existence or conclusion of a contract to make a work or an employment contract. Case law, however, confirms the presumption of transfer of rights to the employer, even though doctrine is not unanimous as to its being justified. A recent judgment — made, to be sure, under the 1952 Act concerning creations by the seasonal clothing and fashion industries — holds that transfers or reproduction authorizations are not to be presumed and must result from a commitment in writing.[20] Transfer of pecuniary rights to the employer takes place within the limits of the normal activity of the employer.

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[11] Copyright Act as amended up to December 23, 1971, Section 12(3).

[12] A. A. Keyes and C. Brunet, *Copyright in Canada.* Proposals for a Revision of the Law. Consumer and Corporate Affairs Canada, April 1977, p. 70.

[13] Trevor M. Aldridge, *Service Agreements.* Oyez Practice Notes, 3rd edition, OPN 52, London 1976, pp. 72-73.

[14] *Copyright and Designs Law.* Report of the Committee to consider the Law on Copyright and Designs. Chairman: the Honourable Mr Justice Whitford, March 1977, London, Cmnd 6732, pp. 146 and 154.

[15] *Op. cit.*, p. 17, paragraph 54.

[16] Copyright Act as amended up to March 2, 1974, Article 43.

[17] Copyright Act as amended up to December 16, 1972, Article 24.

[18] R. Dittrich, *Arbeitnehmer und Urheberrecht.* Manz, Wien 1978, p. 23. (Internationale Gesellschaft für Urheberrecht, Schriftenreihe, 55)

[19] Copyright Law, 1957, Article 1, third paragraph.

[20] Supreme Court of Appeals, Criminal Chamber, April 11, 1975, D. 1975, 759, note by Desbois.

Agreements can be made for renunciation of the paternity right. In Belgium, in the absence of any corresponding legal provision, case law has recognized the principle of transfer of author's rights to the employer. Such transfer must be explicit.[21] But a judgment dated 1971,[22] made on the occasion of complaints against counterfeit filed by fashion houses, accepts the principle of implicit transfer.[23] In Italy, likewise in the absence of any corresponding legal provision, case law seems to have firmly established the safeguard of copyright in favor of the creator, as an individual [24]; the employer would have the right to utilize the employee's work within the limits of the purposes of the contract.[25]

In Switzerland, the rights of an employee-author are covered by the Code of Obligations, in the context of the protection of industrial designs. The employer is allowed to utilize a work created by an employee in the exercise of his activity in the service of the employer and in accordance with the contractual obligations of the person concerned, to the extent that the purpose of the contract requires. The employee cannot oppose the exercise of that right by using arguments contrary to good faith.[26] Case law confirms the presumption of transfer of right to the employer, and it is for the judge to evaluate all the elements of the case, including the amount to be paid. The draft texts for revision of the Swiss copyright legislation [27] place on the same footing all works made under a contract, including a mandate or employment contract. Under those texts, and unless otherwise agreed, the other party would be authorized to utilize the author's work to the extent required by the purpose of the contract; that rule would apply to similar relations under public law.[28]

At the international level, as in the " copyright " countries, the principle according to which authors' right should vest originally in the creator seems to be gaining ground, but at the cost of exceptions in respect of the employee (and, more and more, the author of a commissioned work). The Tunis Model Law,[29] which is in these terms, tries to safeguard the situation of an employee. With respect to works created by an author for an individual or legal entity, private or public, under a contract of service (or a commission), it proposes two alternatives (Section 11(2)). Alternative A is designed to cater for the Roman legal approach: copyright vests originally in the author, unless otherwise stipulated in writing under the contract. Under Alternative B, which is designed to cater for the Anglo-Saxon legal approach, the economic rights (excluding any *droit de suite*, where applicable) are, unless otherwise stipulated in writing, deemed transferred to the employer (or to the person commissioning the work) to such extent as may be necessary to his customary activity at the time of the conclusion of the contract of employment (or the commissioning of the work, and subject to the person commissioning the work undertaking to pay the agreed amount for the creation of the work or the effective payment of this amount). Similarly, a study requested by the Commission of the European Communities with a view to harmonization of the legislation of its member countries concludes in favor of granting the original copyright to the creator. According to this study, this principle should be applied without any derogation in respect of an author under a contract of employment.[30]

A third group of countries — the East European countries — recognize that the employee-creator retains his authorship; the employer has the right of exploitation in the work, but the author is granted special compensation for utilization of his work. There is coexistence and interpenetration between the two legal relationships, one deriving from copyright law and the other from labor law.[31] The employer has the rights to exploit the work in pursuance of his own functions. When an employee hands over a work, he thus tacitly authorizes exploitation by the employer.

The employee retains the right to utilize the work for other purposes in conditions that vary from one country to another: without restriction, unless otherwise agreed, in the German Democratic Republic [32]; solely with the employer's consent in Hungary, but

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[21] Decision of the Brussels Appeals Court, December 9, 1969.

[22] Ghent Appeals Court, June 25, 1971.

[23] Regarding ensuing controversy, see J. Corbet, " Panorama of Belgian case law since 1970," in *Revue internationale du droit d'auteur* (RIDA), 1977, No. LXXXXII, pp. 74-128.

[24] Milan Court, February 13, 1940, *Il Diritto di Autore*, 1940, p. 447. Cited by M. Saporta in " Le droit d'auteur et les œuvres composées en vertu d'un contrat de louage d'ouvrage ou d'un contrat de louage de services," in *Le Droit d'Auteur*, 1952, pp. 79-83.

[25] It would seem, nevertheless, that these rights vest in the employer initially, and not by any transfer, unless otherwise stipulated in the contract.

[26] Titre dixième: Du contrat de travail, II. Dessins et modèles industriels, article 332a).

[27] Copyright Law, 1955, Article 26.

[28] *Avant-projet de loi fédérale sur le droit d'auteur.* Rapport explicatif présenté par la Commission d'experts, p. 15 (roneotyped document).

[29] *Op. cit.*, p. 14.

[30] A. Dietz, *op. cit.*, p. 65. The author believes that it would then be possible to generalize the French and German systems.

[31] See in particular on this subject O. Ionasco, " Copyright in works of the mind created under contract of employment in Rumania," in RIDA 1971, No. LXIX, pp. 2-42; unless otherwise indicated, the information mentioned is drawn from the comparative international analysis contained in that article.

[32] Copyright Act, 1965, Article 20.

the latter cannot withhold such consent except for well-founded reasons — after the expiry of a specified time-limit or, if the employer has not exercised his rights within the legal time-limit, the author becomes free to utilize his work [33]; subject to an exclusive right of exploitation in favor of the employer for two years in Romania [34]; after a five-year period, or even earlier if the work risks becoming outdated earlier, in Yugoslavia.[35]

In Romania and in Czechoslovakia, a strictly regulated right exists to object to utilization by the employer of a work made in the context of obligations resulting from an employment contract. Czechoslovakia [36] and the German Democratic Republic require the rights and obligations of the parties to be specified in the contract; in the USSR, there are compulsory model contracts.[37] In Romania and Yougoslavia,[38] the employer has the exploitation rights in works made outside service obligations under certain specified conditions, subject to special retribution, and taking into account in particular the means made available to the employee by the organization that employs him.

In the countries of this group, the remuneration of the author, who is generally an employee, is governed by detailed regulations, with specified rates of remuneration. These vary according to the type of the work and mode of utilization, combining a basic wage and proportional remuneration determined in accordance with various criteria. In the USSR, a minimum and a maximum are set for remuneration in respect of utilization.[39] A description of the system in force states that the remuneration is based on consent to social utilization of the work; by law, the author is guardian of his creation and the user pays a fee in exchange for using it.[40] In Romania, the remuneration for utilization may or may not be included in the author's salary, depending on whether the work is utilized by the employer or by another organization and according to the type of work and utilization. Special remuneration is paid in Bulgaria if the organization publishes the work.[41] In Czechoslovakia, unless an employment contract provides otherwise, the organization may request an adequate contribution from the fee received by the author to cover expenses incurred by the organization in the creation of the work.[42]

Special cases

Employee journalists enjoy a special régime in a number of countries. In the United Kingdom, the proprietor of a newspaper, magazine or similar periodical is entitled to the copyright in the work of his employee insofar as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published; in all other respects, the author retains any copyright subsisting in the work.[43] The proposals for revision of Canada's law go along these lines. At present, a salaried journalist has the right, in the absence of any agreement to the contrary, to restrain the publication of an article or other contribution by him to a newspaper, magazine, or similar periodical otherwise than as part of a newspaper, magazine or similar periodical.[44] In France, the employee journalist retains a separate right to exploit and reproduce his works published in a newspaper or periodical, in any form, provided it does not compete with the said newspaper or periodical.[45] In Italy, the author of an article who is on the editorial staff of a periodical or newspaper may dispose of his work after six months, if it has not been published by his employer, in order to reproduce it in the form of volume or pamphlet, in the case of a newspaper, and also in another periodical, in the case of a magazine.[46]

Civil servants and government employees are frequently in a special situation from two points of view. On the one hand, many of the works made by them are not protected by copyright because they are intended for large-scale distribution to the general public, free of charge. On the other hand, the authors may be deprived of author's rights on the basis of a legal situation which is not always clear, even where the creator of the work is ordinarily deemed by law to be the author thereof. In the United States, where works produced for the Government are not subject to copyright, a government official or employee may nevertheless secure copyright in a work written outside his duties and of his own volition, even though

[33] Copyright Act, 1969, Article 14(1) and (2).

[34] Decree 321/1956, as amended up to December 28, 1968, Article 16.

[35] Copyright Law, 1978, Article 22.

[36] Copyright Law, 1965, Section 17.

[37] See D. Reimer, "Remarks concerning comparative law on the freedom of copyright contracts," in RIDA 1977, No. LXXXXII, pp. 2-52.

[38] Copyright Law, 1978, Article 23.

[39] R. Gorelik, "General study: copyright in the USSR," in *Copyright Bulletin — Unesco,* 1969, Vol. III, No. 4, p. 33.

[40] A. Benárd and G. Boytha, "Socialist Copyright Law. A theoretical approach," in RIDA 1976, No. LXXXIX, p. 73.

[41] Copyright Law as amended up to April 28, 1972, Article 15*(b)*.

[42] Copyright Law, Section 17.

[43] Copyright Act, Section 4(2).

[44] Copyright Act, Section 12(3).

[45] Copyright Law, Article 36, third paragraph.

[46] Copyright Law as amended up to May 5, 1976, Article 39. Under the collective agreement concluded on December 16, 1972, between the "Federazione nazionale della stampa italiana" and the "Federazione italiana editori giornali," Article 9, the journalist can dispose of his unpublished article after six months in favor of other press organs.

the subject matter involves his government work or his professional field.[47]

No mention is made of the question of copyright in the texts governing professional status or in employment contracts in a number of occupations where it would seem nevertheless to arise in practice, and thus results in an ambiguous situation. This is the case for employee translators, and in particular the authors of scientific and technical translations. This problem has been raised at the international level under the auspices of Unesco.[48] It arises in the teaching profession too. Many teachers in higher education publish works and enjoy normal author's rights, even though they are employees and the problem can arise of the links between their published works and their normal teaching activities. At other levels of education, the problem arises in respect of educational material that a teacher can produce, without being obliged to, in order better to carry out his professional duties.[49] More generally, the same problem exists for all highly qualified employees who create works without being strictly required to do so, because it is in the nature of their functions to take various initiatives.

The cumulation of pecuniary rights and employee status seems to be frequent among creators employed by radio and television organizations, whether public or private, in many countries. In France, the collective agreements for the Paris theaters, theatrical tours, film production and the protocols of agreement signed by the *Office de Radiodiffusion-Télévision Française* already recognized directors and producers as employees for the material execution of their artistic ideas, without thereby depriving them of proportional remuneration in the capacity of creators of their staging and co-authors of films. A law of December 26, 1969, formally recognizes this dual status as employee and creator.

The Berne Convention builds a bridge between national situations in respect of intellectual creators who take part in making cinematographic works. The relevant provisions (Article 14bis) are framed so as to take account, very indirectly, of the problems that can result from the creator's type of contract. For certain artistic contributors, the Convention establishes a "presumption of legitimation" (not of assignment) under which the creators concerned may not object to certain specified forms of exploitation of the works to which they have contributed. Filmmakers are merely deemed to have acquired the permission necessary to exploit the film.[50] The categories concerned, recognized by some national legislation as being authors or co-authors, are in fact those where employee status is relatively frequent — assistant producers and directors, those responsible for décor, costumiers, cutters, to name a few. The presumption does not apply, unless the law provides otherwise, to the authors of scenarios, scripts or music, nor to the principal director. The latter may, however, be excluded from the benefit of such non-application, to cover the case of those countries "which treat the director as merely another employee of the film company."[51]

No doubt reflecting the majority of national situations, the draft model provisions on the protection of computer software recently drawn up at international level simply propose that the rights vest in the employer, unless otherwise agreed, where the software was created by an employee in the course of performing his duties as employee. Two possible alternatives were set aside that would have allowed the application, *mutatis mutandis*, of the legal provisions concerning inventions by employees and of the rules of copyright law concerning literary works made by employees.[52]

Basis for explanation

Various reasons are adduced to explain why the author's rights of an employee are denied or restricted. A first and very widespread consideration concerns the legitimate interest of the employer. Employers make investments, they provide opportunities for creative employment that would not exist otherwise, they organize the production of material supports for works, and arrange for their distribution and marketing. It is only natural that employers should be able freely to utilize the works made and developed thanks to them, and that they should expect a reasonable return from the risks they take. If they own the exploitation and utilization rights in a work, the creator of that work cannot prevent them

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[47] *Copyright Revision Act of 1976.* Law, Explanation, Committee Reports, Commerce Clearing House, Inc., Chicago 1976, pp. 77 and 143-144.

[48] Recommendation on the legal protection of translators and translations and the practical means to improve the status of translators, Unesco, Records of the General Conference, 19th Session, Nairobi, October 26 to November 30, 1976, Vol. 1, Resolutions, Annex 1, pp. 41-45.

[49] On these aspects see G. Lyon-Caen, "The publishing of the texts of professors' course of lectures," in RIDA 1967, No. LII, pp. 136-174. The author points out that a university professor takes on the obligation of giving verbal instruction, not of publishing any written material. Similarly, a secondary-school teacher is expected to give a certain number of hours of teaching, not any optional intellectual creations.

[50] In this connection, see *Guide to the Berne Convention* for the Protection of Literary and Artistic Works (Paris Act, 1971), Geneva 1978, pp. 85-89. (WIPO Publication No. 615(E))

[51] *Ibid.*, commentary on Article 14bis (3), pp. 88-89.

[52] *Model Provisions on the Protection of Computer Software.* Prepared by the International Bureau of WIPO, Geneva 1978, p. 13: proposals for Section 2(1). (WIPO Publication No. 814(E))

in an arbitrary way from harvesting the fruit of their efforts. Moreover, these rights encourage employers to take the necessary risks, by assuring them of varying degrees of monopoly. That reasoning fails to take account of another consideration which, in contrast, serves to justify maintenance of author's rights in favor of the employee, subject to certain obligations vis-à-vis the employer, in the East European countries — namely, the need to stimulate the creativity of an author under an employment contract, and to that end to give him appropriate recognition and reward.

The existence of an employment contract is the reason often given by way of explanation for the suppression or restriction of the author's rights in a work made in the course of his employment: it is held that tacit transfer is implicit in the conclusion of such a contract. In exchange for his salary, the employee is said to have implicitly made over the product of his work, or the rights in that product. Or again, it is held that the employer is quite naturally the owner of the patent, invention or copyright representing the work of his employee, because this is industrial information.[53] According to the socialist conception of copyright, on the other hand, the pecuniary rights are intended to remunerate the work of creation and to afford assistance to the closest members of the employee's family. They are not supposed to be the subject of any commercial transactions.

The existence of an employment contract is also invoked in support of the contention that an employee is not free to express his personality; he receives instructions as to what he must do, how, where and when. This concept of employment even sometimes conjures up the idea of production-line work, with employee-creators working mechanically " just as others move into new areas or make by hand products that are not yet wholly machine-made." [54] Taking into account that the employee is in a situation of subordination vis-à-vis the employer, the latter is held to participate in the creation of the work in his own way. He can therefore also be considered as the author. At best, the employee's work is only a work of co-authorship.

The fact that the author of a commissioned work generally enjoys comparatively more generous treatment can be explained by the assumption of greater relative freedom in the work of creation.[55] In a number of countries, copyright vests originally in the commissioning party only for certain specified categories of works (portraits, engravings, photographs, etc.), although in Canada and the United Kingdom it is recommended that this treatment be extended to all commissioned works. Above all, however, in many instances the transfer of exploitation rights in the work seems to be limited to the purposes for which the work was commissioned, so that the author retains his author's rights for any other purposes.

It may be difficult, nevertheless, to differentiate between a commissioned work and a work by an employee. In the United States, the law limits the cases and conditions in which a commissioned work can be converted into a " work made for hire." The ultimate criterion for " instructional texts " is their intended destination — whether the general public or systematic instructional activities. One may wonder whether the fact that texts intended for the second purpose are mainly produced by salaried teachers may have influenced the possibility of excluding them from the system applicable to commissioned works. One may refer to the remarks made in the Senate Committee Report regarding the increasingly numerous works created under U. S. Government contract or grant; since the law was not clear on this subject, it was presumed that the right to a private copyright could be withheld if the work had been commissioned merely as an alternative to its being made by a government agency employee.[56] Thus, one can end up with a vicious circle. If employee status deprives an author of normal author's rights and, furthermore, the work is ultimately treated on the basis of the fact that, in other circumstances, an employee would have done that kind of work, then the author of a commissioned work is inevitably carried along in the wake of the employee.

Another type of argument used to justify restrictive treatment of an employee-author is that his activity is frequently in the field of the minor or utilitarian arts, which do not require a high degree of originality. The idea that he can be only of secondary importance as a creator is strengthened by the notion that, often, an employee works in a team, so that his work can be rearranged, adapted — in short, drowned in a much larger aggregate. Only major authors should retain author's rights. The question arose in respect of cinematographic works, which require the participation of numerous creators and, for this very reason, according to some authorities, almost brought the whole system of copyright to the ground. It had been contended that regulations that make only the rights of " minor " authors subject to the presumption of transfer and thus underline the rights of major authors, are perfectly justified.[57] But here the danger emerges of another vicious circle: the fact of retaining

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53 G. Roberts and W. T. Major, *Commercial and Industrial Law*. 2nd edition, M and E Handbooks, p. 236.

54 R. Plaisant, *op. cit.*, p. 275.

55 On this subject, see *Copyright Bulletin — Unesco*, 1977, No. 2, pp. 16-17.

56 *Copyright Revision Act of 1976*. Senate Committee Report, p. 144.

57 E. Ulmer, " Retrospect," in RIDA 1967/1968, No LIV-LV, special issue devoted to the Stockholm Conference, pp. 33-35.

author's rights or not retaining them would be a criterion for determining whether or not a creator is an employee. Where his functions are truly creative, and even if the creator is deemed to be an employee for purposes of social and tax legislation, he would not really be an employee.

From the practical point of view, it is held by some people that employees have nothing much to lose by not having author's rights, because given the secondary character of their creations, they should not expect to derive any noteworthy profit from them. Moreover, it would be unduly costly to try to identify each author and evaluate the importance of his creative contribution; the expenditure involved would no doubt exceed the small or even non-existent pecuniary avantage that each author could hope for individually. Moreover, it might prove impossible in practice to identify each and every one if the team of creators is too numerous and changeable. If author's rights had to be recognized in respect of all participants in the creation of a work, it would often be impracticable to administer those rights and, in case it became necessary to initiate proceedings, a deadlock might result because of the impossibility of obtaining the consent of all parties concerned. All these disadvantages of a practical nature are cited for large organizations, be they administrative or industrial and commercial, and whether in the public sector or in the private sector.

For public administrations, however, the explanations vary. Of course the problem of pecuniary rights cannot arise in the same manner, since such institutions are non-profit-making. But some arguments attempt to transfer to the civil servant, in the form of an obligation of disinterestedness, the vocation of absence of profit-making objectives that is in fact incumbent on the employer. That is supposed to be a valid generic principle in respect of works that cannot be differentiated from the performance of service; personal originality would only fulfil the requirement of carrying out the work properly. According to another opinion,[58] it is rather on the basis of non-competition that the State should found its right freely to utilize the work of its employees, and not on the principle of denying the author's right of personal ownership in a work made in the course of employment. Vis-à-vis his employer the employee would be bound by an obligation of implicit non-competition under private law. The employer could protect himself against it without upsetting the principles that govern copyright.

A last series of explanations for the different treatment applied to authors under an employment contract concerns the attitude of those concerned. But there is no concordance as between the various views put forward and this ultimately seems to reflect the diversity of the extent to which the creative professions are organized professionally from one country to another.

In some cases, reference is made to a certain lack of interest or militancy as a result of which an employee-author's rights are not really or firmly claimed, although a certain trend seems to be developing in the opposite direction. In other cases, on the other hand, it is deemed preferable to grant copyright to the employer automatically, because if it were vested in the natural creator and everything else was left to be arranged by agreement between the parties the result might be a spate of agreements incorporating clauses that would prevent the employer from acquiring all the rights he needs.[59] The trade-union organizations, or at least some of them, would not seem to fear finding themselves in an unfair bargaining position if the latter simple solution were adopted; but the employers may well have reason to think that it would work, if anything, adversely to their interests.[60]

These arguments would have been to some extent different if there were wider recognition of the existence of a deep-rooted relation between the types of problems arising regarding the employee-author and regarding the employee-inventor. This fact is masked, however, by the difference between the systems of protection applicable to inventions and to literary and artistic creations, a difference that is not relevant here. When the question arose recently of protecting the creators of computer software, on the frontier between industrial property and copyright, the argument adduced was of the type mentioned above: because of the difficulty of identifying individual creators, the rights were attributed to the employer at the outset, in his capacity as the party who orders, commands or controls development of the program. Nevertheless, the Austrian study mentioned above bases its proposals regarding the employee-author on the principles applicable to the employee-inventor.[61]

Evaluation from the standpoint of copyright

As we have already mentioned, the two major basic international texts on copyright do not make any special reference to the author under employment contract. One can wonder, therefore, whether the treatment he receives under law or national practice is indeed consistent with the spirit of those texts.

In the United Kingdom, the Whitford Committee raised the question. Replying to the doubts expressed by some of its members on the initial vesting of copy-

[58] M. Gautreau, "A disputed principle: the pecuniary right of the salaried or civil-servant author," in RIDA 1975, No. LXXXIV, pp. 142-144.

[59] A. A. Keyes and C. Brunet, *op. cit.*, p. 71.

[60] *Copyright and Designs Law*, p. 141, paragraph 560.

[61] *Ibid.*, pp. 56-59.

right in persons other than the authors, as in the case of commissioned works or employees' works, the Committee noted that similar provisions existed elsewhere and it had never been suggested that they were in breach of the Convention obligations.[62] A little further on, it added nevertheless: " although, superficially, the repeal of particular provisions touching first ownership of employees' works and commissioned works is attractive and undoubtedly consistent with convention obligations," [63] thus taking a clearer stand on the question raised above. The Committee recommended, nevertheless, that the existing system be maintained, but on the basis of practical considerations, and in particular the fact that its abolition " would not establish the rights of interested persons with the degree of certainty and justice which is undoubtedly desirable." [64] In so doing, the Committee voiced a concern that is, basically, that of labor law. It subsequently defended its position, however, by using a system of explanation that is based in fact upon a copyright approach rather than on the principles of social legislation.

In actual fact, the Berne Convention does not define what an author is. It merely stipulates (Article 15(1)) that the author of a work is, in the absence of proof to the contrary, the person under whose name the work is disclosed. It is a matter for national legislation to determine the ownership of copyright. It is considered that this framework can accommodate both the Anglo-Saxon and the Roman approaches.[65] The spirit of copyright is in fact very flexible. In systems based on exploitation rights — copyright — there is naturally more latitude for denying copyright protection to the creator, even if he is independent. But, once it is accepted that the creator of the work is the initial owner of copyright, it would seem consistent with the logic of copyright that an employee-author ought not to be denied the protection it affords. The arguments adduced in support of such denial seem therefore to be based more on expediency than on substance.

In the first place, is it consistent with the very special immaterial character of property in literary or artistic work that it can be transferred commercially? And can the rights in such a work be transferred otherwise than by the free will of the creator, simply on the grounds that he is an employee? What kind of transfer can it be if, as we shall see, one has to exclude any presumption of tacit transfer based on the existence of a work contract? Indeed, by virtue of its very nature, an employment contract does not cover any exchange of goods, whether corporeal or incorporeal. To assume that it does is tantamount to transposing arbitrarily into labor law a way of reasoning, based on the concept of ownership,[66] that is totally alien to that field of law.

If an intellectual work can be dissociated from the material medium in which it is incorporated and made subject to a particular legal system, it would seem that, at best, the employer can only enjoy transfer of the rights to utilize or exploit the material medium, the work itself remaining indissociable from its creator, whatever the type of contract to which he may be a party. It would be normal, then, for the employee to have the benefit of the increasingly numerous restrictions imposed on the creator's possibilities for transferring his rights — those restrictions being established in the creator's own interest, and including the nullity of any global transfer in respect of future works. Even supposing that an employment contract could cover such transactions, would not the blank cheque that it is supposed to give to the employer create a problem if one really wants to abide by the spirit of copyright? The arguments adduced in support of the contrary hardly seem convincing.

A recent analysis,[67] based on the situation in France, draws the logical consequences from affirmation of the author's prerogatives, on the basis of personal rights, in respect of the pecuniary rights of an employee. The outcome is that a right to proportional remuneration could remain in three cases: if the work made for hire gives rise to receipts that can be individualized; if the undertaking is principally engaged in the production and dissemination of intellectual works (as, for example, when authors who are employees of broadcasting organizations receive a lump-sum fee, or salary, and in addition royalties through the intermediary of the authors' societies); and if the work is exploited outside the framework of the employing undertaking. Proportional remuneration would be replaced by lump-sum remuneration in all cases where the latter is envisaged for an independent work. It would then be the nature of the work and not the legal nature of the agreement, that would prevent full exercise of the author's pecuniary rights. The author of the study points out that the economic interests of users of the work can be safeguarded through neighboring rights or through more sophisticated contractual techniques.

An attempt has been made below to see how the same problem of the legitimate financial interests of the creator can be treated according to the completely different approach which is that of labor law. It has seemed possible thereby to arrive at similar

62 *Ibid.*, p. 138, paragraphs 548-549.
63 *Ibid.*, p. 144, paragraph 570.
64 *Ibid.*
65 *Guide to the Berne Convention*, p. 93.

66 To be sure some theorists do not recognize this basis for copyright; here, however, only the prevailing approach is considered.
67 M. Gautreau, *op. cit.*

results, but while avoiding situations that can seem absurd, simply because a way of thinking that is in itself perfectly coherent is transposed into a practical situation to which it is not suited. To take an extreme example, it seems equitable that an employee should receive some special reward if he has made a work that turns out to be particularly profitable for the employer. It would seem contrary to common sense, however, to contend that the salary paid covers only the commissioning of the work as such and that the employer should make an additional payment in order to acquire the right to utilize the work. In such a case, the conclusion to be drawn is perhaps that the problem is ill-posed from the outset.

Practical considerations are of great importance, as we have seen, for explaining the special treatment applicable to an employee. And it is a fact that application of the copyright provisions, the kind of determinations to be made in case of dispute, practical administration of rights — all these are of an unusual degree of complexity. The question here, however, is whether the difficulties cited in respect of employee-authors are specific to them alone.

One difficulty here is that a work made by employees is often the result of the combined efforts of several persons. Now, copyright law provides for such situations, and there are appropriate legal provisions to cover them: compilations, collective works, joint works.[68] As regards cinematographic works, which are the typical case of works involving numerous creative contributions, a special system has been elaborated in a number of countries and at the international level. There is no reason, therefore, to provide for different treatment for employees on these grounds. Moreover, not all employees are in this situation and, furthermore, even in a large organization, the authors form a small nucleus that can in most cases be identified, for example by functional classification as is the usual practice in East European countries. Lastly, arrangements for collective arrangement of copyright royalties have been made in favor of independent creators in order to remedy difficulties of this kind, and the latter are therefore not inextricable. Indeed, this is the approach which is being adopted to an increasing extent in order to overcome the growing difficulties that technological progress places in the way of individualizing the rights of independent authors.

Another argument invoked to justify restriction or elimination of the author's rights of employees is that their creations are generally of minor significance. Even if that statement were correct in all cases, surely one criticism frequently made of copyright is precisely that more and more it affords protection to the " small fry " of literary and artistic creation. Copyright is gradually extending to peripheral or marginal areas of creative activity — listings of streets and addresses, catalogues and other similar compilations, yearbooks, simple forms, tables, and so on. There is no reason to be more demanding about works by employees than about other works. It may even be that copyright law would be more faithfully carrying out its mission of protecting creative authors if it were more demanding in regard to the concept of creation, instead of denying protection to persons who are undoubtedly creators simply for the reason — which is in fact irrelevant — that they are bound by an employment contract.

Moreover, copyright as it stands today is not designed to take account of the intrinsic merit of works. Were it to do so, there are various formulae in existence to modulate protection according to the degree of originality — shorter term of protection, protection under the law for designs. However, a reason given to explain such formulae — the level of creative originality required of " works " is not fulfilled, but many of the products concerned represent a considerable amount of work — could serve to justify their extension to a large part of the labor force.

Lastly, it is debatable whether basically most employees do not have much to lose by not enjoying author's rights since their works, being of only secondary importance, would yield them little or no return. An independent creator may not be able to expect to earn much from his works, but that in no way affects the fact that he has an author's right. His pecuniary prerogatives exist even if only in theory. They even survive his exclusive right of exploitation when this is withdrawn from him because it is deemed impossible or inappropriate for him to control any large-scale utilization of his works and he is then entitled only to a fee in respect of such utilization. It should be noted, moreover, that the independent author then finds himself in the same situation as the employee as regards utilization of his works — he has no control over it. But his author's right is not denied on that account.

Evaluation from the point of view of social legislation

A certain effort of imagination is needed to attempt to evaluate, from the point of view of social legislation, the situation of the employee as a creator. Leaving aside a few examples such as those cited already or cases where labor law intervenes in favor of the employee-author, social legislation has mainly taken an interest, albeit timidly, in independent au-

[68] For reservations that have been expressed regarding this concept, whether or not as applied to employed status, see, for example, C. Colombet, " Propriété littéraire et artistique ", *Précis Dalloz*, 1976, pp. 97-99; H. Desbois, *Le droit d'auteur en France*, No. 174, pp. 186-188; A. Dietz, *op. cit.*, pp. 38-39.

thors.[69] Where employees are concerned, labor law has developed mainly in order to meet the most pressing needs of categories of workers whose work, consisting of pre-determined manual or mental activities, is not creative. Only little by little is it spreading into less traditional areas, and the problems of creativity are still more or less alien to it. To a great extent, labor law applying to intellectual work is something still to come.[70] True, the employees concerned do not always foster its development, because the organizations that represent them often remain preoccupied with claims considered — rightly or wrongly — as being more vital than the specific interests of intellectual activity, although a certain awareness in this respect is now developing in a number of countries. Even in its present state, however, labor law does not support some of the interferences that are made in its name for the purposes of copyright. In particular, there seems to be a misunderstanding on three points: the basis of labor law, the criterion of the employee's dependence on the employer, and the concept of remuneration.

In the first place, labor law is not based on property. Under his employment contract, the employee undertakes to furnish, in return for remuneration, his labor and nothing more: in other words it is his labor and not the product of his labor which is the object of the contract. There is no question of his transferring future works any more than present ones. The same remark would be valid for the author of a commissioned work if his situation were evaluated in the same spirit. An interesting case-law decision can be mentioned in this connection: a contract to paint a portrait was held to be a contract for the exercise of skill, and not a contract of sale of goods.[71]

That does not necessarily mean that the employer should not have any rights in the product of his employees' labor, but simply that labor law does not reason on that basis. It concerns itself with the creator by shifting the accent from the work to its author. For labor law, the creator is a worker who earns his living — or tries to do so — by engaging in a specific professional activity, namely, the creation of works. That law will try to protect him by remedying as far as possible, by legal provisions and appropriate institutional mechanisms, the inequality that usually exists between the person who has to work for a living and the person or persons on whom he is dependent in economic terms. The existence of a clause such as " unless otherwise agreed " in an employment contract implies an equality between the parties which is a fiction in the great majority of cases. It may even be so in the case of top talent artists who seem to be able to dictate their own terms. As has been noted, at key points, usually involving ownership rights and creative control, " company policy " is invoked as a barrier to individual negotiation.[72] The only way to restore equality may be, for example, for most important composers, to establish their own publishing company. But, as has already been noted on this point, that is not of much comfort to the young composer who is trying to break into television.[73]

Without basing protection of a creator on property rights, labor law must be able to concern itself with his moral and intellectual interests as well as his material ones. It is only common sense that, professionally, a creator has an interest in being known by name as being the author of his works, and that his works should not be altered or amended in any way prejudicial to his personal reputation. His career depends on it. The word " career " should be understood, of course, not as a sequence of promotions, but as the progressive improvement of his earning possibilities and his public image as a creator over the years. That in no way excludes a great diversity of ways in which creative professions can be exercised — free-lance arrangements, work on commission, employment (which may be permanent, temporary, or part-time . . .), complete independence, and so on. It seems to be fairly common for these various arrangements to be combined at any one time or to follow one another in the course of a single working life. In this context, employee status is only one particular case among others, and it may usefully be considered in the context of unifying principles that would be concerned with safeguarding the legitimate interests of all creators vis-à-vis the users of their works, from the point of view of social legislation. Has it not been stated that " the author is the automatic wage-earner, permanent and perpetual, of whoever uses his work "? [74]

In the second place, the existence of an employment contract does not allow any conclusion to be drawn as to the degree of freedom that the author actually enjoys in his work. It would be an exaggeratedly pessimistic approach to identify any employee with a worker on the assembly-line. One can readily see that the labor force includes employees who enjoy very great — and sometimes complete — autonomy in the exercise of their professional functions: persons

[69] Particularly in the field of social security.

[70] See R. Cuvillier, " Intellectual workers and their work in social theory and practice," in *International Labour Review*, 1974, Vol. 109, No. 4, pp. 291-317. (ILO, Geneva)

[71] *Robinson* v. *Graves* (1935), cited in *Commercial and Industrial Law*, p. 143.

[72] E. F. Burkey, " The Creative Artist's Problems," in *Broadcasting and Bargaining.* Labor relations in radio and television. Edited by Allen E. Koenig, The University of Wisconsin, Press Madison, Milwaukee, and London, 1970, p. 153. Quotation marks included in the original quotation.

[73] *Report of the Committee on the Future of Broadcasting.* Chairman: Lord Annan. March 1977, London, Home Office, Cmnd 6753, paragraph 12.53, p. 185.

[74] R. Fernay " Copyright, wages and right to strike," in RIDA 1963, No. XXXXI, p. 4.

in posts of high responsibility, researchers, university professors, doctors, highly qualified experts, to name a few. Such workers have a broad margin of initiative for attaining general objectives that they help to fix for themselves. Their employer does not necessarily intervene in their work; his activity is quite different, as is normal. No doubt, he places at their disposal the necessary facilities for their work, contrary to what happens in the case of a commission contract, but that is an area very different from the creation of works in the strict sense — the financing and material organization of creative work.

The criterion of directing the employee's work and his material subordination to the employer is still applied as a test of existence of an employment contract. It has even been applied to artists. One may recall the obligation of checking in and out with a timekeeper imposed on artists because they were on State relief under the New Deal in the United States,[75] no account being taken of the fact that one painter might find inspiration in wide open spaces and in the light of dawn or sunset, while another might find it on a Sunday rather than on a Wednesday. Today, however, it is recognized that such a criterion does not make much sense with respect to certain employees.

Anglo-Saxon law allows that supervision and control of the employee's work cannot be the decisive criterion as to the existence of a " contract of service," in the case of a person who is highly qualified or has special qualifications or abilities.[76] Belgian case law recognizes that senior employees in fact enjoy considerable independence; the employer's power of direction does not imply that he meddles in performance of the task assigned to his co-contractor.[77] In France, labor law contents itself with the mere " presumption " of employee status, without worrying about aspects such as freedom in work, ownership of material, contributions from assistants, mode or amount of remuneration, from the moment when it is deemed socially opportune to extend the protection of the law to a given professional category.[78]

In actual fact, the concept of " employment " or " employee " is becoming increasingly conventional and, accordingly, extensive. Some authorities go so far as to speak of a simple " work relation " of a general character. For copyright purposes, the Whitford Committee recommended the avoidance of expressions such as " contract of service," which, if they are intelligible at all, are intellibible only to lawyers; the important thing, in its view, is that the question of who owns copyright should be clear.[79] In the Federal Republic of Germany, self-employed authors who are economically dependent on a third party are assimilated to employees. Section 12(a) of the Act on collective agreements considers their associations (trade unions) as being capable of concluding collective agreements in terms of labor law. A study on the status of artists revealed the extension of " disguised employment relations " among authors considered independent. It appeared very difficult to determine the frontier between dependent and independent authors on the basis of well-defined criteria.[80]

Moreover, if one takes as a basis actual working conditions — in other words, if one does not content oneself with abstract deductions from the nature of the legal relation between the creator and the person who pays him — it is not necessarily the employee who will always seem to have less freedom. The stringency of certain publishing contracts is well known, as is the leonine character of certain exclusivity contracts, and there is no certainty that labor law would accept them if they were judged from the angle of the generally accepted principles of freedom of work. Furthermore, as already mentioned, technological progress is more and more depriving authors of one of the essential prerogatives that differentiates them from employees, namely, control of the utilization of their works. Nowadays, in order to make a living, members of the traditional creative professions increasingly must go into service to large bureaucracies, whether public or private. To a greater or lesser degree the bureaucrats control the use of their time, the content of their works, and the manner in which their works are disseminated.[81] But should employee status be misused to enhance that of the so-called independent creator? There has perhaps been a tendency to idealize the latter's freedom and to associate too hastily lack of constraint with creation of genius. In former times, immortal works were created by artists with a menial status that compares unfavorably with the present situation of many highly qualified employees. J. S. Bach was given instructions and reprimands about variations and changes of keys in a chorale. The contract signed with Perugino for the

[75] R. D. McKinzie, *The New Deal for Artists.* Princeton University Press, New Jersey 1973, pp. 114-117.

[76] *Cassidy* v. *Ministry of Health* (1951) and *Stevenson Jordan and Harrison, Ltd* v. *MacDonald and Evans* (1952). For a commentary on the application of these criteria for copyright purposes, see *Copinger and Skone James on Copyright,* 11th edition by E. P. Skone James, Sweet and Maxwell, London, 1971, pp. 144-147, paragraphs 324-328.

[77] Brussels Comm. Court, 9th Chamber, May 30, 1952, *Jur. comm. Brux.* p. 280. Cited in Antoine Colens, *Le contrat d'emploi,* 5th edition, Brussels 1973, p. 55.

[78] See G. H. Camerlynck and G. Lyon-Caen, *Droit du travail,* Dalloz, Paris 1975, pp. 304-318. The aforementioned Act of December 26, 1969, establishes this presumption in favor of any theatrical performer.

[79] *Copyright and Designs Law,* p. 143, paragraph 568.

[80] Deutscher Bundestag. 7. Wahlperiode, Unterrichtung durch die Bundesregierung, *Bericht der Bundesregierung über die wirtschaftliche und soziale Lage der künstlerischen Berufe (Künsterbericht),* Drucksache 7/3071, 13. 1. 75, Bonn.

[81] B. Ringer, " Copyright and the Future of Authorship," *Copyright,* 1976, p. 156.

Studiolo of Isabella d'Este includes a description of the subject down to the most minute details.

In the third place, the concept of salary seems to be associated, and wrongly so, with that of lump-sum remuneration, and the idea of lump-sum payment seems to play a part in numerous cases in assimilation of the commissioner with an employer. Now, salary comprises several components, in particular: *(a)* the base salary, proportional to the number of working hours and linked to qualifications and the characteristics of the job (including, in certain classifications, its innovative or creative character); and *(b)* salary by results, the latter being evaluated in various ways (productivity, profits).[82] The pecuniary rights of an author can be assimilated with this global conception of salary. Employees who are in a position to influence the employer's prosperity because of the nature of their functions are frequently covered by clauses giving them an interest in his profits; directors and some executives are in this situation. There is no reason why creators, whose contribution plays an essential role in the employer's business success, should not also have an interest in his profits, all the more so since participation based on economic results is spreading among more and more categories of the labor force.[83] True, an author's pecuniary rights are not generally based on profits, but on receipts, on the number of copies printed (and not the number of copies sold). They are not linked to management performance. But there lies perhaps the starting-point for differentiating between an employee-author and an independent author. The basis on which pecuniary rights are determined is a means of guaranteeing a basic minimum whereas, for the employee, that minimum is assured by means of the base salary.

Moreover, an author's pecuniary rights come close to the traditional concept of salary in various ways. There is an element of redistribution separate from profits in certain criteria for the apportionment of royalties. Remuneration of creative work is becoming increasingly socialized through two new trends that are not always within the purview of copyright law: on the one hand, the charging of special levies on the sale of recording or photocopying equipment or in the context of the *domaine public payant* and, on the other hand, the emergence of the concept of a " service rendered " by the author, independently of the commercial value of his works, in the case of the public lending right or the mere display of a work. The criterion of the social usefulness of a creative work then tends to override the concept of the commercial value of a work. The royalties collected in respect of the use of recordings,[84] for their part, are somewhat similar to those forms of remuneration based on economic results in which salary is dissociated from the idea of a service coinciding with a physical presence.

From this point of view of a salary that includes participation in economic results, it ought to be possible to apply the principle of proportional remuneration even for utilizations of the work in the context of the employer's normal activity, and not merely for other utilizations. Of course, the concept of " result " in economic terms may eventually cover the advantages derived from non-exploitation of the work. In this connection, certain rules regarding the employee-inventor could provide a useful model. It should be noted, furthermore, that if an employee-author receives some financial recompense for his works merely because of the fact that they bring in money, regardless of their artistic or cultural value, one comes back to the principle, which is fundamental in copyright law, of disregarding the intrinsic merit of the work.

Apart from the three major sources of misunderstanding mentioned above, it remains to determine the appropriate bases for protecting other components of copyright, from the point of view of labor law. Here there are two main elements: simple common sense, and what is considered the legitimate interest of the employee and the employer in the present state of social legislation.

The rights to utilize a work give rise to a first problem. Leaving aside the approach based on ownership rights, commercial law lays down the principle of non-competitition. What is the situation from the point of view of labor law? The obligation of non-competitition raises great problems, from the point of view of freedom to work after employment has ceased.[85] Throughout the duration of employment, on the basis of the prohibition of unfair competition under commercial law, it would seem possible to allow fair competition by the employee vis-à-vis his employer. Yet it also seems natural that an employee should not be able to utilize the works he has made in any way that would prevent the employer from carrying out in regard to him contractual commitments for which he can hold his employer responsible. The employer gives him work, owes him a salary, to an increasing extent social legislation

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82 See, in particular, ILO: *Les salaires aux résultats dans les sociétés industrialisées,* Informations sur les conditions générales de travail, No. 20, Doc. D. 3. 1972 (mimeographed), Geneva 1972.

83 A trend can be discerned toward joint management of shared profits based on results (in France, with the establishment of *Fonds communs interentreprises*) which is somewhat similar to the joint management of royalties.

84 From this point of view, and contrary to certain practices, they ought to be considered as a salary.

85 See R. Cuvillier, " No-competition and non-disclosure obligations: bond or bondage for the employee? " in *International Labour Review*, Vol. 115, No. 2, March-April 1977, pp. 193-209.

obliges the employer to safeguard the employment of his personnel to the maximum, except in the case of serious offense by an employee. By favoring competitors, an employee can place in jeopardy his own employment and the source of his earnings (although only partially if he does not receive an equitable share of the profits accruing from his work). This is not a matter of assuming that there is any common ground of economic interest as between the two parties to the employment contract; most industrial relations specialists reject any attempt to assign commercial objectives to such a contract. What is involved is rather the idea of what it is reasonable to expect from an employee in the performance of an implicit duty to cooperate in carrying out the contract. But there is a very delicate balance to be sought in the application of such a principle.

Which utilizations of a work would be in breach of an obligation of non-competition of this kind? Those that are outside the employer's customary field of activity ought not, in principle, to cause him any prejudice. They may even bring him profits. Without going into any apparently insoluble discussions on the " cake theory," it seems clear that, in certain cases, utilization of a work can boost its sales in other forms by revealing it to the general public.

To what extent should the employer be able to utilize or exploit himself a work made in an employment relationship only for his customary business purposes? Would it not suffice for him simply to pass on to the employee concerned a fair share of his profits? Must he only have the right to see the work first in respect of utilizations that are not within his customary field of activity? Must he also have the right of first refusal for works made by an employee outside his normal duties? Such creations can also compete with the employer. Moreover, it can be difficult to determine what is created " in the course of employment " or " outside normal duties " in the case of a creative process that, by its very nature, can often not be attributed to any particular time or place. Should a work made by an employee be treated automatically like a commissioned work, in line with the recommendation made by a Committee of experts on the rights of translators? [86] Indeed, does one not arrive at this conclusion, if one wants to reduce a work created " in the course of performing duties stipulated in the work contract "?

Labor law might provide some element of a reply in a case where the employer himself does not exploit a work created by his employee, but transfers it to another utilizer and receives fees in respect of the exploitation. In such a case, one could indeed consider that he is making his employee work for other employers without asking his consent and without a work contract; moreover if he does not pay back to the employee an equitable share of the profits thus received, it is as if he is receiving salary due to the employee. If this way of interpreting the situation were correct, such practices would virtually constitute a state of servitude that labor law condemns unequivocally. It would be useful to see what lessons can be drawn from the protection afforded to an employee-inventor on all the points raised above, including by application of the criterion of the aid provided by the employer, whether voluntarily or unvoluntarily, to the creator in production of the work.

As regards the moral and intellectual rights of the creator, labor law does not afford any well-defined conceptual framework or practices. A hint of interest for concerns of this kind may be found in respect of certain professions [87] or in the employee-inventor's right to be named, but this is a subject into which social legislation has not yet gone very deeply. Yet it would no doubt afford an appropriate framework for taking up delicate problems such as those of creative freedom. Copyright law disregards this aspect completely, and takes account of the creator only as from the moment when a work exists. Social legislation could attempt to deal with the conditions allowing a creator to pursue his vocation. On this point, however, it would nevertheless be important to include, among other elements to be drawn from copyright law, application of provisions designed to protect pecuniary rights in the form of autonomous systems of collection and apportionment which constitute, in principle, a source of financial independence that is essential for creators, whether employed or not.

Conclusions

The author under an employment contract finds himself in an uncomfortable situation between, on the one hand, copyright law that is threatened with crisis and is focussed primarily on independent creators and on the needs of the utilizers of works and, on the other hand, labor law that is still feeling its way as regards everything in the field of brain work or intellectual work. He would probably feel more in his right place under a " Charter for creators " covering all authors, whatever the contractual régime under which they work, and drawing the consequences of the fundamental unity of the material and spiritual problems that arise from their economic dependence.

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[86] Committee of Experts on Translators' Rights (Paris, September 23 to 27, 1968. *Copyright Bulletin — Unesco*, 1968, Vol. II, No. 4, p. 14. This recommendation was not maintained in the international instrument adopted subsequently.

[87] Right to the safeguard of professional reputation applying to journalists or artists, academic freedom of a teacher, conscience clauses in certain professions, provisions on the conditions for carrying out creative work in certain collective agreements for radio and television.

It might even be possible, perhaps, to accommodate in such a framework all the fields in which creative imagination is expressed — inventions, literary and artistic works, discoveries, and so on. It might then be conceivable to consider separately the interests of the utilizers of works; " copyright " would come back to the spirit of its forebears — printing privileges. A Charter for creators could synthesize in a harmonious manner whatever has been gained under copyright law and under social legislation, while going even further. If such a Charter could be prepared, it might not be necessary to sacrifice the interests of employee-authors in an attempt to safeguard what is left of the rights of those creators who may well, one of these days, wake up to find that they have lost the status of " self-employed."

Book Reviews

Copyright Law in the Soviet Union, by *Michael A. Newcity.* A volume of X-212 pages. Praeger Publishers, New York — London, 1978.

The author of this book — who is a member of tbe New York Bar and also a member of the Committees on Soviet Law, East-West Trade and Investment, and International Copyright Treaties and Laws of the American Bar Association — emphasizes, at the very beginning of his preface, tbe importance of the Soviet publishing industry. According to him, the publishing houses of tbe Soviet Union print and disseminate more books than tbe publishers of any other country of tbe world; they also publisb more works in translation tban any otber nation. The study of Soviet copyright law is therefore " no mere academic endeavor."

The book is divided into three parts. The first deals with the origins and development of copyright law in the Soviet Union, tbe second witb tbe legal protection of literary and artistic property in that country, and the third with " postaccession developments and controversies " (i. e., the developments after the Soviet Union's accession to the Universal Copyrigbt Convention). Two appendices contain tbe Fundamentals of Civil Legislation of the USSR (copyright provisions) and the relevant provisions of the Civil Code of tbe Russian Socialist Federal Soviet Republic (RSFSR). A selected bibliograpby and an index appear at the end of the volume.

Many readers will probably be suprised to learn tbat tbe first Russian copyright law dates back to 1828, and that treaties on bilateral copyrigbt protection were signed as early as in 1861 with France and in 1862 with Belgium. Ivan Turgenev, representing the Russian writers' circles, attended the International Literary Congress at Paris in 1878 which paved the way to tbe creation of tbe Berne Convention.

One of the peculiar features of the Soviet copyright legislation is the concept of " publication, " according to whicb a work is considered published when it is released to tbe public, performed in public, displayed in public, diffused by radio or television, or communicated in any other manner to an indeterminate group of persons (Civil Code of the RSFSR, Art. 476, and the corresponding provisions in civil codes of other Union Republics). The consequence of this is that an unpublished work of a foreign autbor, national of a Berne Union country, whicb was first performed in tbe Soviet Union and thus considered " published " in that country, may be protected under Soviet legislation wbile at the same time being protected under the Berne Convention in all member States of the Berne Union.

Another important characteristic of the system of copyrigbt protection in the Soviet Union is that tbe provisions of standard publishing contracts and otber standard contracts for the exploitation of works have the force and effect of law. Individual contracts may contain clauses which are not included in sucb standard contracts; however, if they are less favorable for the author than those established by law or by the standard contract, they are null and void and are replaced by tbe applicable provisions of the law or clauses of the standard contract.

Among the statutory limitations of the exclusive rigbts of the author, compulsory purchases are specifically mentioned. Since the right to publish, publicly perform or otherwise use a work may be compulsorily purchased by the State, the author concludes that the right to publisb an unpublished work may be overriden by tbe State's decision to purchase the rigbts therein.

A chapter of the book is devoted to the protection of Soviet autbors abroad. Prior to 1967 (the year when the first bilateral agreement was concluded by the Soviet Union), the works of Soviet authors were not eligible for copyright protection in most countries, the only major exception being France until 1964.

In the concluding chapters, the author analyzes tbe prospects for trade in literary property between the United States and the Soviet Union. According to him, they seem relatively good, " though somewhat uncertain. " In this connection, he expresses the opinion that, though the first year after Soviet accession to tbe Universal Copyright Convention was marked by distrust on the part of United States publishing and artistic circles, " it is a hopeful sign that the problems encountered are legal and/or commercial in nature rather than political." M. S.

Intellectual Property Law in Australia — Copyright, by *James Lahore*. One volume of XXXII-744 pages. Butterworths, Sydney, 1977.

In his preface to this book, the author draws the reader's attention to the interesting fact that, although the term " intellectual property " is now generally used to include copyright and industrial property, the practice in Australia has been to use the description " industrial property " to include also the law of copyright. The volume reviewed here deals with the law of copyright, while the subsequent volumes will deal with the law relating to industrial property.

Australian copyright law has been strongly influenced by the copyright law of the United Kingdom, although — according to the author himself — it has now, after the adoption of the Copyright Act of 1968, departed in many respects from the corresponding British legislation. It is therefore not surprising that, on the one hand, this book follows very closely the well-known pattern of the standard work on copyright by Copinger and Skone James and that, on the other hand, various subject matters are dealt with from the point of view of both the Australian Copyright Act and the British Copyright Act of 1911.

The main body of the book is divided into seven parts dealing, respectively, with the nature and development of copyright, subsistence of copyright, proprietary rights, the protection of copyright, the control of its exercise, international copyright, and the rights associated with copyright. It is preceded by a table of cases and a table of statutes. There are several appendices containing, *inter alia,* statutes and regulations, international conventions (including not only the two main copyright conventions, i. e., the Berne Convention and the Universal Copyright Convention, but also the three multilateral conventions dealing with neighboring rights) and a summary of recommendations concerning reprographic reproduction made by the Copyright Law Committee on Reprographic Reproduction (the Franki Committee). A detailed index makes this useful work of reference easier to consult.

Without entering into details on the particularities of Australian copyright law, it is interesting to note that, in Part 7, devoted to " rights associated with copyright," the author deals not only with neighboring rights, the public lending right, the protection of folklore and of type faces, and the *domaine public payant,* but also with " the doctrine of moral right " in the light of the Copyright Act 1968-1976. M. S.

Calendar

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible changes.)

1979

May 1 to 4 (Geneva) — WIPO Budget Committee

May 7 to 11 (Rijswijk) — Permanent Committee on Patent Information (PCPI) — Subgroup on IPC Class 23

May 28 to June 1 (Geneva) — Berne Union — Working Group on Problems Arising from the Use of Electronic Computers (convened jointly with Unesco)

June 11 to 15 (Paris) — Satellites Convention — Committee of Experts on Model Provisions for the Implementation of the Convention (convened jointly with Unesco)

June 11 to 15 (Geneva) — Nice Union — Preparatory Working Group

June 11 to 15 (Washington) — Permanent Committee on Patent Information (PCPI) — Subgroup on IPC Class A 01, etc.

June 18 to 29 (Geneva) — Revision of the Paris Convention — Working Group on Conflict Between an Appellation of Origin and a Trademark

June 25 to 29 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on General Information, and ICIREPAT Technical Committee for Standardization (TCST)

July 2 to 6 (Paris) — Berne Union and Universal Copyright Convention — Working Group on the overall problems posed for developing countries concerning access to works protected under copyright conventions (convened jointly with Unesco)

July 2 to 6 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information

July 9 to 12 (Geneva) — Paris Union — Meeting of Experts on Industrial Property Aspects of Consumer Protection

September 4 to 6 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Patent Information for Developing Countries

September 10 to 14 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Planning

September 24 to October 2 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

October 15 to 26 (Geneva) — Nice Union — Committee of Experts

October 18 and 19 (Geneva) — ICIREPAT — Plenary Committee

October 22 to 26 (Geneva) — Permanent Committee on Patent Information (PCPI), and PCT Committee for Technical Cooperation (PCT/CTC)

October 22, 23 and 30 (Paris) — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

October 24 to 26 and 31 (Paris) — Berne Union — Executive Committee (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

November 26 to December 13 (Madrid) — Diplomatic Conference on Double Taxation of Copyright Royalties (convened jointly with Unesco)

November 27 to 30 (Geneva) — Paris Union — Group of Experts on Computer Software

December 10 to 14 (Geneva) — International Patent Classification (IPC) — Committee of Experts

1980

February 4 to March 4 (Geneva) — Revision of the Paris Convention — Diplomatic Conference

UPOV Meetings

1979

May 21 to 23 (La Minière, France) — Technical Working Party for Agricultural Crops

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

July 17 to 19 (Hanover) — Technical Working Party for Ornamental Plants

September 18 and 19 (Geneva) — Administrative and Legal Committee

September 25 to 27 (Wageningen) — Technical Working Party for Forest Trees

October 16 and 19 (Geneva) — Consultative Committee

October 17 to 19 (Geneva) — Council

November 12 to 14 (Geneva) — Technical Committee

November 15 and 16 (Geneva) — Administrative and Legal Committee

Other Meetings in the Field of Copyright and/or Neighboring Rights

1979

Non-Governmental Organizations

European Broadcasting Union (EBU)
Legal Committee — September 25 to 28 (Bergen)

International Confederation of Societies of Authors and Composers (CISAC)
Legal and Legislation Committee — May 8 and 9 (Madrid)

International Federation of Actors (FIA)
Congress — September 25 to 29 (Budapest)

International Federation of Library Associations (IFLA)
Congress — August 27 to September 1 (Copenhagen)

International Federation of Producers of Phonograms and Videograms (IFPI)
Council — May 14 and 15 (Palma de Mallorca)

International Organization for Standardization (ISO)
General Assembly — September 17 to 21 (Geneva)

International Writers Guild (IWG)
Congress — June 21 to 25 (Helsinki)

1980

International Confederation of Societies of Authors and Composers (CISAC)
Congress — November (Dakar)

International Publishers Association (IPA)
Congress — May 18 to 22 (Stockholm)