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Contents

	Page
BERNE UNION	
— Working Group on the Overall Problems Posed for Developing Countries by Access to Works Protected under Copyright Conventions (Paris, July 2 to 6, 1979)	247
Italy. Ratification of the Paris Act (1971) of the Berne Convention	250
NATIONAL LEGISLATION	
— Australia. Broadcasting and Television Amendment Act 1977 (No. 160 of 1977)	251
— Poland. I. Ordinance of the Minister for Culture and the Arts relating to the rules for the conclusion of contracts and on model contracts concerning composition, first public performance, publication and disclosure of musical works (No. 58, of September 18, 1975)	252
II. Ordinance of the Council of Ministers relating to the rules for the conclusion of contracts with authors and to the rates of remuneration for literary works and translations commissioned or exploited by the radio and television organizations (No. 114, of September 1, 1978)	254
CONVENTIONS NOT ADMINISTERED BY WIPO	
— Universal Copyright Convention	
Denmark. Ratification of the Convention as revised in 1971	256
GENERAL STUDIES	
— Legal Problems Deriving from the Use of Videograms (G. Davies)	257
CALENDAR OF MEETINGS	264

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Berne Union

Working Group on the Overall Problems Posed for Developing Countries by Access to Works Protected under Copyright Conventions

(Paris, July 2 to 6, 1979)

Report

Introduction

1. In accordance with the decisions taken by the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the Intergovernmental Committee of the Universal Copyright Convention at their sessions in November/December 1977, the Secretariat of Unesco and the International Bureau of WIPO convened a Working Group composed of experts from 14 countries who participated in the meeting in their personal capacity. The meeting was also attended by representatives of six national copyright information centers and of 11 international non-governmental organizations as observers. The list of participants is annexed to this report.

2. The documentation available to the Working Group consisted of replies received from 25 States to a joint questionnaire sent by Unesco and WIPO on June 30, 1978, to all member States of the United Nations; as also an analysis of the said comments including a questionwise compilation of the replies received (documents UNESCO/WIPO/WG.1/CWA/2, Add. 1 and Add. 2, and UNESCO/WIPO/WG.1/CWA/3, with the annexes thereto).

Opening of the Meeting

3. The meeting was opened on behalf of the Director-General of Unesco by Miss Marie-Claude Dock, Director of the Copyright Division, and by Mrs. K.-L. Liguier-Laubhouet, Deputy Director General of WIPO, who welcomed the participants.

Election of Chairman

4. The Working Group unanimously elected Mr. Mihály Ficsor, Director General of the Hungarian Bureau for Copyright Protection, as its Chairman.

Problems Concerning Access to Works of Foreign Origin Protected by Copyright

5. In the course of the general debate, the Working Group noted that the problems posed by access to works of foreign origin protected by copyright were not merely confined to the legal aspects but extended to the practical aspects such as information dissemination, economic, financial and others. The Working Group considered measures for facilitating and promoting the licensing systems as provided for in the 1971 texts of the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention for the benefit of developing countries.

6. The general debate was followed by detailed discussions based on the analysis of comments received from the States (document UNESCO/WIPO/WG.1/CWA/3) and the Working Group has taken into account legal, economic and other related aspects of access by developing countries to works protected by the Copyright Conventions.

7. Following the debate a drafting committee consisting of S. Abada, A. Kerever, D. N. Misra, N. Ndiaye, J. M. Terán Contreras and the Chairman of the Working Group prepared a draft of recommendations.

8. After having examined this draft, the Working Group adopted the text of the following recommendations which will be submitted to the next meetings of the Copyright Committees scheduled to be held in Paris in October 1979.

Recommendations

After having examined the overall problems posed for developing countries by access to works protected under the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention (hereinafter referred to as the "Copyright Conventions") in all their legal, economic, and practical aspects, and having dealt with the implementation of the revised 1971 texts of the said Conventions as also with

practical arrangements which would assist such implementation, the Working Group recommends with a view to effective application of these texts in order to permit easier and quicker access to the international repertoire of protected works, and thus to encourage translation and reproduction of these works in the developing countries as a means of promotion of education, research and culture, that the following measures be taken, depending on each case and whenever appropriate, by the governmental authorities, the private or public organizations concerned, the Secretariat of Unesco and the International Bureau of WIPO, according to their respective competence:

1. Copyright legislation should be adopted in developing countries where it does not exist and should be updated as necessary where it does exist;
2. A larger number of countries should accede to the 1971 texts of the Copyright Conventions and if developing countries wish to avail themselves of the facilities provided for in these Conventions for developing countries they should deposit the required notification (Appendix to the Berne Convention and Articles V^{bis} to V^{quater} of the Universal Copyright Convention);
3. Assistance to the developing countries should be provided by the Secretariat of Unesco and the International Bureau of WIPO in:
 - (a) elaborating or updating their copyright legislation;
 - (b) training the concerned nationals in these countries in order to facilitate implementation of such legislation;
 - (c) creating or strengthening of infrastructure in these countries for the administration of copyright in order to permit easier, quicker and less costly access to protected works;
4. Guidelines covering the overall problems posed by the practical implementation of licensing procedures for translation and reproduction should be drawn up indicating, in particular, model procedures for obtaining easier and quicker access to protected works, and the steps that developing countries could take in locating and approaching right holders;
5. The guidelines should cover both cases of contractual agreements (voluntary licenses) as well as compulsory licenses. These guidelines should specify as to how the voluntary system could be used, whom a prospective user should approach, what should be contained in the request, and what conditions should be specified therein;
6. These guidelines should therefore include, *inter alia*, a model form of request for granting of rights which would contain the essential information to be provided in order to initiate the negotiations for obtaining the rights of translation and/or reproduction, such as the title of the book, the language in which it would be translated, the name of the author, the edition, the clientele for which the publication is intended, etc.;
7. The copyright owners of developed countries should as a general rule grant the rights of translation or reproduction to the applicants from developing countries and give them these rights at preferential rates fixed with due regard to the economic situation prevailing in the developing country concerned; the resort to compulsory licensing will only take place in accordance with the provisions of the 1971 texts of the Copyright Conventions (if the applicant could not have obtained authorization from the owner of the right or if, after due diligence on his part, he was unable to find him);
8. The guidelines should also deal with the aspects relating to information, as to how and in what form it may be provided, and how it can be used in order to obtain easy and quick access to protected works;
9. Such information should be made available through catalogues, bulletins and bibliographic data and furnished to publishers and concerned government offices in the developing countries on a periodical basis;
10. National bibliographies should be established where these do not exist. Publishers of developed and developing countries should be able to provide lists of their newly published titles which could be used for the purposes of teaching, scholarship or research, preferably with brief summaries of the contents, to publishers as also to the concerned governmental authorities in developing countries; exchange of national bibliographies could usefully be organized; the guidelines should also deal with the practical aspects of dissemination of such information;
11. The national copyright information centers set up or to be set up in developed countries should collect information from publishers in their respective countries as to published works which could be used for the purposes of teaching, scholarship or research and to the extent possible in regard to the terms of transfer of the rights in connection with these titles. They should communicate the information in respect of the latest titles published in the field mentioned above to the governmental authorities as also publishers in developing countries; such information could complement effectively the information already disseminated by the International Copyright Information Centre;
12. When requests for rights of translation and/or reproduction are addressed to the publishers, a copy of such requests should be furnished to the national copyright information center or the governmental authorities in the developed and developing countries concerned;
13. All newly published books should contain on the verso of the title page the name and full address of the publisher and also of the owner of the copyright, if the publisher is not the owner of that right;
14. Publishers, national copyright information centers, competent national authorities in developed countries should seek to assure accurate and up-to-date information concerning licenses and sub-

licenses of rights assigned by language or region be available so as to be able to provide such information to applicants for rights from developing countries in a prompt and complete manner.

15. With a view to facilitating negotiations concerning voluntary copyright licenses, the model contracts already established by Unesco concerning publication of a translation or reproduction of a work or licensing rights in a cinematographic work or in a work with respect to its sound recording could be widely used; if necessary, the Secretariat of Unesco and the International Bureau of WIPO should examine the possibility of elaborating other model contracts concerning fields not yet covered by the existing models;
16. The establishment or strengthening of national publishing industries in developing countries should be encouraged in order to enable publication and distribution of national works and to facilitate local production of copies of works belonging to the international repertoire;
17. It is desirable that close coordination should be maintained at the national, regional and international levels in respect of the activities of various interested organizations such as the copyright administrations, national libraries, centers for book promotion, authors' and publishers' associations, in order to facilitate the obtaining of information necessary for quick access to protected works;
18. Advantage should be taken of the International Book Fairs periodically organized in developed and developing countries to help publishers of developing countries in negotiating for rights of translation and/or reproduction of books needed in their countries in connection with their teaching, scholarship and research requirements;
19. Aid from public and private sources in developed countries to developing countries should be established in order to facilitate access by the latter to works protected by copyright through appropriate means especially of an economic nature (funds for the purpose of acquiring copyright, preferential treatment, programs of cooperation in publishing, etc.);
20. The Secretariat of Unesco and the International Bureau of WIPO shall proceed periodically to evaluate the implementation of these recommendations and will report to the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union, respectively.

Adoption of the Report and Closing of the Meeting

9. The Working Group adopted this report including the above recommendations under the Chairmanship of Mr. N. Ndiaye, unanimously elected ad hoc Chairman for the last part of the closing meeting, the Chairman of the Working Group having had to leave the meeting before its closing. After the usual thanks, the ad hoc Chairman declared the meeting closed.

List of Participants

I. Members of the Working Group

- M. Salah Abada
Directeur général, Office national du droit d'auteur, Alger
- M. Propicio M. Alves
Vice-président, Union internationale des éditeurs, Rio de Janeiro
- Mr. Esteban B. Bautista
Professor of Law
Acting Head, Division of Research and Law Reform, University of the Philippines Law Center (Diliman, Q. C.)
- Mr. El Sayed Mahmoud El-Sheniti
Former Deputy Minister of Culture, Cairo
- M. Mihály Ficsor
Directeur général, Bureau hongrois pour la protection des droits d'auteur, Budapest
- Mr. Lewis Flacks
Special Legal Assistant to the Register of Copyrights, Copyright Office, Washington, D. C.
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Special Legal Assistant to the Register of Copyrights, Copyright Office, Washington, D. C.
- M. André Kerever
Maître des requêtes au Conseil d'Etat, Paris
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Joint Educational Adviser, Department of Education, Ministry of Education and Culture, New Delhi
- M. Ndéné Ndiaye
Directeur général, Bureau sénégalais du droit d'auteur, Dakar
- Mr. Edmund Brandford Odoi Anim
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Copyright Administrator, Ministry of Information, Accra
- Mr. Victor Tarnofsky
Superintending Examiner, Industrial Property and Copyright Department, Department of Trade, London
- Sr. Juan Manuel Terán Contreras
Director General del Derecho de Autor, Secretaría de Educación Pública, México, D. F.
- Adviser*
Sra. Victoria Alicia Ramírez
Directora de Fomento, Dirección General del Derecho de Autor, Secretaría de Educación Pública, México, D. F.
- Mr. Nicolas Voschinin
Deputy Chairman, Copyright Agency of the USSR (VAAP), Moscow
- Mr. Anderson Ray Zikonda
Registrar of Patents, Trade Marks and Designs, Lusaka

II. Observers

(a) National Copyright Information Centers

France: A. Géranton. **German Democratic Republic:** B. Haid. **Italy:** I. Papini; G. Fonzi; M. Fabiani. **Mexico:** A. Cué Bolaños. **Spain:** E. Nolla López. **United Kingdom:** C. Bradley.

(b) International Non-Governmental Organizations

International Association for the Protection of Industrial Property (IAPIP): G. Gaultier. **International Bureau of 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 for Documentation (FID):** H. Arntz. **International Federation of Film Producers Associations (FIAPF):** A. Brisson. **International Federation of Producers of Phonograms and Videograms (IFPI):** P. Chesnais. **International Literary and Artistic Association (ALAI):** A. Françon. **International Music Council (IMC):** J. Masson-Forestier. **International Publishers Association (IPA):** J. A. Koutchoumow. **International Writers Guild (IWG):** E. Le Bris.

III. Secretariat**United Nations Educational, Scientific and Cultural Organization (UNESCO)**

M.-C. Dock (*Director, Copyright Division*); A. Amri (*Head, International Copyright Information Centre*); A. M. N. Alam (*Legal Officer, Copyright Division*); E. Guerassimov (*Legal Officer, Copyright Division*).

World Intellectual Property Organization (WIPO)

K.-L. Liguier-Laubhouet (*Deputy Director General*); C. Mousouyé (*Director, Copyright and Public Information Department*); S. Alikhan (*Director, Copyright Division*); G. Boytha (*Head, Section for Copyright Development Cooperation Projects, Copyright Division*).

ITALY

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

The Government of the Italian Republic deposited, on August 13, 1979, its instrument of ratification of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

The Paris Act (1971) of the said Convention will enter into force, with respect to the Italian Republic, three months after the date of this notification, that is, on November 14, 1979.

Berne Notification No. 95, of August 14, 1979.

National Legislation

AUSTRALIA

Broadcasting and Television Amendment Act 1977

An Act to amend the Broadcasting and Television Act 1942, and for related purposes

(No. 160 of 1977)

.....

*Amendments of Copyright Act
and Telecommunications Act*

31. The Acts specified in Schedule 2 are amended as set out in that Schedule.

.....

SCHEDULE 2 Section 31

Amendments of Copyright Act 1968

Section 10

(a) In the definition of "holder of a licence for a broadcasting station", after "commercial broadcasting station", insert "or a public broadcasting station".

(b) In the definition of "holder of a licence for a television station", after "commercial television station", insert "or a public television station".

(c) After the definition of "the royalty" insert —
"the Special Broadcasting Service" means the Special Broadcasting Service established by the *Broadcasting and Television Act 1942*;"

Section 91(a) and (b)

After sub-paragraph (i) insert —
“(ia) the Special Broadcasting Service;”.

Section 99

(a) Omit from paragraph (a) "and" (last occurring).

(b) After paragraph (a) insert —
“(aa) the Special Broadcasting Service is the owner of any copyright subsisting in a television broadcast or sound broadcast made by it; and”.

Section 152(1)

After paragraph (a) of the definition of "broadcaster", insert —
“(aa) the Special Broadcasting Service;”.

Section 184(1)(f)

After "Commission,", insert "by the Special Broadcasting Service,".

Section 199(7)(a) and (b)

After "Commission,", insert "by the Special Broadcasting Service, by any person with the use of facilities provided by that Service,".

POLAND

I

Ordinance of the Minister for Culture and the Arts**relating to the rules for the conclusion of contracts and on model contracts concerning composition, first public performance, publication and disclosure of musical works**

(No. 58, of September 18, 1975) *

Pursuant to Article 3(4) of Decree No. 136 of the Council of Ministers of July 10, 1975, on the remuneration of composers (*Monitor Polski*, No. 26, text No. 159), the following Ordinance is issued:

Article 1. There shall be established:

- (i) rules for the conclusion of contracts relating to the publication and disclosure of musical works, arrangements thereof and collections of chosen works, constituting Annex No. 1 to this Ordinance;
- (ii) a model contract on the composition and first public performance of a musical work, constituting Annex No. 2** to this Ordinance;
- (iii) a model contract on the publication and disclosure of a musical work, constituting Annex No. 3** to this Ordinance.

Article 2. This Ordinance shall enter into force on the date of its publication and shall be binding as from August 27, 1975.

Annex No. 1

Rules for the conclusion of contracts on the publication and disclosure of musical works, arrangements thereof and collection of chosen works

1. For the purposes of this Annex,
 - “composer” shall also mean the author of a creative arrangement of a musical work of which he is not the author;
 - “work” shall mean both an original musical work and a creative arrangement of an original musical work;
 - “Decree” shall mean Decree No. 136 of the Council of Ministers, of July 10, 1975, on the remuneration of composers (*Monitor Polski*, No. 26, text No. 159).
- 2.(1) Contracts relating to the publication of a work shall comply with the rules set out hereinafter and with the model contract (Annex No. 3).

* This Ordinance was published in *Dziennik Urzędowy MKiS*, No. 9, of September 19, 1975. It was amended by Ordinance No. 31, of September 29, 1977, published in *Dziennik Urzędowy MKiS*, No. 6/1977. — WIPO translation.

** Annexes Nos. 2 and 3 are not reproduced here.

- (2) Contracts relating to the publication of a work may contain provisions on matters not regulated in the model contract.
- (3) The parties may conclude a contract which excludes all the provisions regarding disclosure of the work abroad provided for in Articles 3(2)(d), 5(4), 9(1), (2) and (3), 10(2) and 21 (as from the words “with the limitation”) in the model contract (Annex No. 3).
- 3.(1) The composer’s remuneration agreed upon in contracts for the publication and disclosure of a musical work shall comprise payment for:
 - (i) the composition or arrangement of the work;
 - (ii) the transfer to the publisher of copyright within the limits set out in the contract;
 - (iii) remitting the manuscript of the work in a form suitable for reproduction;
 - (iv) making the author’s corrections to the material prepared for publication.
- (2) Where the performance of the work requires material additional to the manuscript, e. g., records or tapes, the composer shall be obliged to supply them in return for a single separate remuneration which shall be calculated on the basis of its fabrication cost.
- 4.(1) The amount of remuneration shall comply with the appropriate schedule of remuneration (Annex No. 2 to the Decree).
- (2) If the composer transfers to the publisher the right to sell and hire copies of a published work and provision of orchestral material (Article 3(2)(b) of the model contract) for certain countries only, rates amounting to between 50 to 75 percent of the rates provided for in the schedule of remuneration (Annex No. 2 to the Decree) shall be applied in determining the composer’s remuneration, according to the extent of territorial limitation.
- 5.(1) The remuneration agreed upon in the contract shall apply to the first basic printing of the first edition. Any number in excess of the

- basic printing shall be deemed to constitute the beginning of the following printing, for which appropriate remuneration shall be paid to the composer.
- (2) The remuneration for the second basic printing of original works shall be 80 percent of the remuneration referred to in paragraph (1), for the third basic printing it shall be 60 percent and for the fourth and subsequent basic printings it shall be 50 percent of such remuneration.
 - (3) The remuneration for the second basic printing of arrangements that are to be published shall be 50 percent of the remuneration referred to in paragraph (1), for the third basic printing it shall be 40 percent and for the fourth and subsequent basic printings it shall be 30 percent of such remuneration.
 - (4) The remuneration of the author of a collection of chosen works determined in accordance with the schedules contained in Annex No. 3 to the Decree shall be, for the second edition of a collection of chosen works, 50 percent of the remuneration for the first edition of that collection, 40 percent for the third edition and 30 percent of such remuneration for the fourth and subsequent editions.
- 6.(1) Each basic printing may be effected in a number of series on condition that printing of the last series may not be completed later than two years computed from the day on which the first series has been put on the market. The remuneration for the full basic printing shall be paid within 30 days computed from the date on which the first series of the basic printing was put on the market.
 - (2) Paragraph (1) shall not apply to the publication of works in respect of which a single printing has been agreed.
- 7.(1) Where a single printing has been agreed, the publisher shall determine the number of copies for a given edition. The composer shall be entitled to remuneration for each edition, irrespective of the number of copies, calculated in accordance with Rules 5(2), (3) and (4).
 - (2) Where a given type of work is not listed in the schedule for basic printings (Annex No. 4 to the Decree), the remuneration for a single printing shall be applied in respect of the publication of that work.
8. Editions with text drawn up in foreign languages shall be dealt with in the same way as subsequent separate editions.
 9. When calculating the composer's remuneration for a complete edition of his works, no account shall be taken of the number of basic printings of the individual works constituting the complete edition. One single printing shall be determined for complete editions. In the case of a second or of a subsequent complete edition, the progressively decreasing rates laid down in Rule 5(2) shall be applied.
- 10.(1) The composer's remuneration for the inclusion of a previously published work in a collection of chosen works shall be 50 percent of the appropriate rate applied in the case of a single printing.
In the case of an unpublished work included in a collection of chosen works, the remuneration shall be 100 percent of the appropriate rate for the first edition and shall be 50 percent of that rate for each subsequent edition of the collection.
 - (2) No account shall be taken of editions in a collection of chosen works when determining remuneration for successive basic printings of editions of the work.
- 11.(1) The composer's remuneration for the first basic printing of the first edition of a work in printed form shall be paid as follows:
 - (i) up to 25 percent of the remuneration laid down by the contract, within 15 days of the date on which the contract was signed;
 - (ii) up to 50 percent of the remuneration calculated on the basis of the accepted volume of the work, within 15 days from the date on which the work was accepted, less the advance paid in accordance with (i);
 - (iii) the balance of the remuneration within 30 days of the date on which the work was first put on the market.
 - (2) The publisher may pay the full remuneration for the first basic printing of the first edition within 15 days of the date on which the work was accepted if the remuneration does not exceed 10 000 zlotys.
 - (3) The remuneration for the second basic printing and for subsequent basic printings of the first edition shall be paid within 30 days of the date on which disclosure of the work began.
12. The remuneration for the second and subsequent editions of the work shall be paid in full within 30 days of the date on which disclosure of the work began.
- 13.(1) The number of copies of the work printed in each edition shall be determined by the publisher.

- (2) The publisher shall be required to notify the composer in writing, at the time printing is completed, of the number of copies made of the work.
 - (3) The number of copies and the time required for preparing and copying the materials essential to fully satisfy demands for the performance of the work shall be determined by the publisher in accordance with the needs of disclosure of the work.
- 14.(1) The final calculation of the remuneration shall be based on the volume of the printed text, expressed as units determined in the contract, and, where the work is not printed, on the volume accepted by the publisher.
 - (2) The remuneration for the work shall be calculated by adding the minute fee and the fee for the number of measures.
 - (3) The minute fee shall be calculated by multiplying the duration of the work by the rate for one minute. The rate for one minute shall be due for each minute begun.
 - (4) The remuneration for the number of measures shall be calculated by multiplying the number of measures in the work by the rate for one measure.
 - (5) The remuneration for music without measures shall be calculated by multiplying the minute fee by two.
 15. The publishing contract shall set out the time limit for supplying and accepting the work.
 16. The publisher shall be required to notify in writing to the composer whether the work is accepted or not. Where such notification is not sent within the time limit agreed upon in the contract for accepting the work, the work shall be deemed to have been accepted.
 - 17.(1) The time limit afforded to the publisher for acceptance of the work shall not exceed six months from the day on which the work was supplied.
 - (2) The time limit for accepting a modified work, after inclusion of modifications, shall not exceed one-half of the time limit laid down in the contract for accepting the work.
 - (3) The time limit for accepting the work shall start on the day the whole of the work was supplied to the publisher.

II

Ordinance of the Council of Ministers

relating to the rules for the conclusion of contracts with authors and to the rates of remuneration for literary works and translations commissioned or exploited by the radio and television organizations

No. 114, of September 1, 1978)*

Pursuant to Article 33(1) of the Law of July 10, 1952, on Copyright (Official Journal, 1952, No. 34, text No. 234, and 1975, No. 34, text No. 184), the following Ordinance is issued:

Article 1. This Ordinance shall apply to the conclusion of contracts concerning the writing, or for the exploitation by the radio and television organizations, of literary works and translations, and to the fixing of remuneration for such works.

Article 2. There shall be established:

- (i) general rules for the conclusion of contracts for the writing or for the exploitation of literary works and translations commissioned or exploited by the radio and television organizations (Annex No. 1 to this Ordinance);

- (ii) a schedule of remunerations for literary works and translations intended for radio (Annex No. 2** to this Ordinance);
- (iii) a schedule of author's remunerations for literary works and translations for television (Annex No. 3** to this Ordinance);
- (iv) the model contract for the writing and for the exploitation of a literary work or translation for radio and television (Annex No. 4** to this Ordinance);
- (v) the model contract for the exploitation of a literary work by adaptation (Annex No. 5** to this Ordinance).

Article 3. The President of the Committee for Radio and Television "Polskie Radio i Telewizja" is authorized:

- (i) to complete, in agreement with the Minister for Labor, Salaries and Social Affairs, the

* This Ordinance was published in *Dziennik Ustaw PRL*, No. 25, of October 17, 1978. — WIPO translation.

** Annexes Nos. 2, 3, 4 and 5 are not reproduced here.

schedules of remunerations by the inclusion of works that are not provided for in this Ordinance;

- (ii) to grant — in particular deserving individual cases — increased remuneration to the authors of original works of exceptional ideological or artistic value, provided that such remuneration does not exceed 50 percent of the minimum rates specified in the schedules of remunerations (Annexes Nos. 2 and 3 to this Ordinance).

Article 4. This Ordinance shall enter into force on the day of its publication.

Annex No. 1

General rules for the conclusion of contracts for the writing or exploitation of literary works and translations commissioned or exploited by the radio or television organizations

1. Contracts shall conform to the Ordinance and the model contract.

2. The parties shall be authorized to include additional provisions in the contract that are not at variance with Rule 1 above.

3. The author of a literary work or the translator shall assign to the commissioning party, by virtue of the contract, the exclusive right:

- (i) to fix a literary work or translation, including sounds and pictures, on a carrier, and to make copies of such fixations;
- (ii) to make a multiple, unlimited broadcast, by radio or television or by wire, either live or with the aid of a fixation on a carrier;
- (iii) to exchange the fixed literary work or translation with foreign radio and television organizations;
- (iv) to make multiple copies of texts for the internal use of the commissioning party;
- (v) to effect post-synchronization in languages chosen by the commissioning party;
- (vi) to use:
 - (a) the sound of the recording, either with the picture or separately, in whole or in part, in its original form or adapted, for the purpose of advertising the work, in other works intended for public education or having the character of chronicles, reviews or monographs;
 - (b) fragments that form an independent whole, within the limits specified under (i) to (v).

4. The author's remuneration shall comprise the fee for:

- (i) the writing or translation of the work;
- (ii) the assignment of the rights mentioned in Rule 3, subject to the exceptions specified in Rules 5 and 7.

5. For the second radio and television broadcast on the territory of the country, and for every subsequent broadcast of the works mentioned in Rule 6, the author of a literary work or the translator shall have the right to remuneration in the amount of 50 percent of the remuneration agreed upon in the contract if the work has not been published before the first radio or television broadcast, and with respect to a stage work even if it has been printed in one single issue of the periodical provided for the publication of works of this type, or in a single issue of *Wydawnictwa Radia i Telewizji* [Radio and Television Publications].

6. The provisions of Rule 5 shall apply to the following works:

- (i) original novels, short stories, serialized literary works, poetic works or radio or television programs;
- (ii) texts of monologues, dialogues or sketches and of television programs based on the elements of a literary or advertising work that is not a play or radio program;
- (iii) adaptations of novels or short stories in the form of radio or television programs;
- (iv) translations of novels, short stories or fragments thereof, radio or television programs, plays or poetic works.

7. The author of a literary work or translation shall retain the right to royalties for:

- (i) foreign radio and television broadcasts if they originate with the foreign organization that transmits by virtue of the provisions in force in the place of transmission;
- (ii) national radio and television broadcasts in the case of works not mentioned under Rule 6.

8. The amount of author's remuneration payable to the author of a literary work or to the translator shall be determined within the limits of the rates specified in the schedule of remunerations, due account being taken of ideological and artistic value and the amount of creative effort demanded by the work.

9. The amount of author's remuneration payable to the author of a literary work or the translator of an existing work exploited in the form of a scenario or adaptation for a television or radio program broadcast for the first time shall be:

- (i) 80 percent for the author of a literary work,
- (ii) 50 percent for the translator,

assuming as a basis for calculation the corresponding rates contained in the schedule of remunerations (Annex No. 2 or No. 3 to this Ordinance) and the duration of the actual transmission.

10. The author's remuneration payable to the author of a literary work written in a foreign language and intended for broadcasting in that lan-

guage may be increased by up to 50 percent if the work is written in a language other than the mother tongue of the author.

11. Remuneration for original works in the field of large composite forms and works in instalments, written on commission by two or more authors, may be increased by up to 50 percent.

12. The author's remuneration payable to the author of a literary work consisting of two or more instalments may be established in the form of a lump sum for the whole work; that sum shall not exceed the remuneration established pursuant to Annex No. 2 or No. 3 to this Ordinance.

13. In the case of entitlement under two or more provisions to an increase in remuneration (General Rules 11 and 12 and Article 3(ii) of the Ordinance), the contractual remuneration established according to Annex No. 2 or No. 3 to this Ordinance shall provide the basis for calculation of the increase.

14. The commissioning party may withdraw from the contract if:

- (i) the author of a literary work or the translator does not submit the text by the agreed time limit, or if he does not submit the amended or corrected text by the specified time limit;
- (ii) the work is not accepted.

Where the author of a literary work or the translator does not submit the text by the agreed time limit, he shall be obliged to repay the advance received. In other cases the advance shall not be repayable.

15. The contract shall contain stipulations to the effect that:

- (i) the commissioning party may incorporate in the literary work or translation alterations that are warranted by the requirements of the production and transmission of the radio or television program, except where the author or translator has well-founded reasons for opposing such alterations;
- (ii) Radio and Television Publications shall have a priority right to publish the literary work or translation concerned by the contract and also adaptations made by the author or translator and intended for publication in printed form.

Conventions Not Administered by WIPO

Universal Copyright Convention as revised in 1971

Ratification

DENMARK

The instrument of ratification by Denmark of the Universal Copyright Convention as revised at Paris on July 24, 1971, and annexed Protocols 1 and 2 was deposited with the Director-General of Unesco on April 11, 1979.

Under the terms of its Article IX, paragraph 2, the Convention came into force, in respect of Denmark, three months after the deposit of the instrument of ratification.

With regard to the Protocols, in conformity with their respective paragraphs 2(b), they entered into force, in respect of Denmark, on the same date as the Convention.

General Studies

Legal Problems Deriving from the Use of Videograms

Gillian DAVIES *

Introduction

What is a videogram? At a later stage we shall have to consider the legal concept of a videogram. But, first of all, let us establish a few ideas. These are the new audiovisual products which are distributed to the public in the form of videodiscs or videocassettes and which, used in conjunction with a television receiver, produce a programme of sound and images.

In the first place, it must be pointed out that the technology which has permitted the advent of the videogram is well ahead of legal doctrine and national and international legislation as regards copyright; as far as the writer knows there is no reference to the word "videogram" in any legislative text, although recent legislation in a few countries has taken account of the new audiovisual medium using varying terminology¹ and the Tunis Model Law on Copyright for developing countries, adopted in 1976, lists "audiovisual works" among the literary, artistic and scientific works to be protected.² For some years now, at intergovernmental level, the representatives of the member States of the Conventions dealing with copyright and neighbouring rights, together with the representatives of all those who consider themselves to be affected by the advent and use of the videogram, have been debating its legal nature and the problems resulting from its use. Those concerned

include authors, composers, performers, film producers, broadcasting organisations and, of course, producers of phonograms and videograms.

Terminology

The definition of a videogram has given rise to many problems, and, at the outset, it may be advisable to state the meaning the word has for the writer.

A "videogram" is a fixation of sequences (which may include only images, or images and sounds), which is capable of being reproduced on a material support such as the "videocassette," "videodisc" or any other kind of tape or film. In other words, it is an audiovisual recording incorporated in any material support. However, the view has been expressed that a videogram may be differentiated from a cinematograph film by reason of its intended use. A film is projected on to a screen, in most cases in the presence of an audience in a cinema. The videogram is used in private, in conjunction with an individual television receiver, by means of adapting equipment. The cinematograph film is also normally distributed to the public by hiring to film distributors, who show it to the public in cinemas, while it is assumed that the videogram will primarily be sold or hired to the public for domestic use, like a phonogram. In its social function, therefore, the videogram is very like the phonogram (discs and musicassettes).

Today there are a number of different systems for the recording and performance of audiovisual programmes. All are mutually incompatible (videocassette or cartridge systems, videodisc, etc.) in that none can be used on equipment other than that belonging to its own system.

In many ways, the videogram may be compared to the phonogram: the process of recording and fixing is similar, as is its purpose. According to the two international Conventions which protect phonograms (the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961, and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Reproduction of Their Phono-

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This study is based on a lecture delivered by the author to the *Bienal del Sonido* (Biennial Sound Exhibition), at Valladolid, Spain, on April 19, 1979.

¹ For example: *Japan* (Law No. 48, 1970, Article 2(3)): "Cinematographic work includes a work expressed by a process producing visual or audiovisual effects analogous to those of cinematography and fixed in some material form." *United States of America* (Public Law 94-553, 1976, Section 101): "Audiovisual works are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." *Philippines* (Decree No. 49 on the Protection of Intellectual Property, 1972, Section 2(m)): "... any process for making audiovisual recordings."

² Model Law adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis, in 1976, with the assistance of WIPO and Unesco.

grams, 1971), the phonogram is defined as "any exclusively aural fixation of sounds of a performance or other sounds." A videogram could be defined in a similar way, since it is a fixation of images or of images and sounds. However, there is one great difference between the videogram and the phonogram, the fact that the former contains images as well as sounds. International opinion shows a clear tendency to assimilate videograms to cinematographic works. The videogram is identical to the film, except as regards its ultimate use and presentation. It would take too much space to consider the national situations country by country in this study. The first part discusses some of the conclusions of the Governmental experts as regards the legal nature of the videogram and its international protection, and the second part concerns the practical problems raised by the advent of the videogram on the market.

The Difficulty of Reconciling French and Anglo-Saxon Views as regards the Definition of Videograms

Any determination of the legal nature of the videogram is complicated by the existence in the world of two concepts of authors' rights which differ very considerably but are both very important through their influence on doctrine. French doctrine recognizes only the intellectual content of the videogram as being eligible for protection. This intellectual content may be either an existing work (such as existing films) or a work specially designed to be fixed on a videogram. From the viewpoint of French doctrine the word "videogram" refers only to the vehicle, that is, the videocassette or videodisc, and not to the audiovisual programme reproduced thereon. According to this view, the fact of fixing the pre-existing work in no way alters its legal nature or status. This is called, according to French doctrine, "videocopy." In fact, there has been no new fixation — a cinematographic work is merely reproduced in the form of a videodisc or videocassette. The author is still the author of the pre-existing cinematographic work, and the manufacturer of the videodisc or cassette has no standing or protection in relation to that work. On this point, French and Anglo-Saxon opinion are *ad idem* but the latter would regard the new product as reproductions of a cinematographic work.

The French Copyright Law protects "cinematographic works and works made by processes analogous to cinematography"³ and, therefore, in the case of a work specially designed to be fixed on a videogram, French doctrine regards it as a cinematographic

work, but calls it a "videographic work"; the producer is protected to the extent that a film producer is protected.

The other concept is that which applies in countries of Anglo-Saxon tradition, according to which the actual first fixation of a sequence of images or of images and sounds is protected: there is, therefore, no distinction between the nature of the "videogram," "videocopy" and "videographic work." Protection is given to the *videogram*, in the sense understood by the writer, as mentioned above. The original fixation is protected and it is the producer who enjoys this protection, videograms being assimilated under Anglo-Saxon doctrine to cinematographic works. It must also be pointed out that, under Anglo-Saxon laws, the authors of any pre-existing works used in producing the videogram (author, composer, etc.) also enjoy very adequate protection and no producer of an original videogram may use a work without obtaining the necessary authorization of those who have contributed to its making. We shall come back to the very important matter of the consent of all those who contribute to the creation of a videogram.

In concluding the subject of terminology, it should be stressed that, at the intergovernmental level, the matter is still open to debate. In October of this year, the Executive Committee of the Berne Union for the Protection of Literary and Artistic Works and the Intergovernmental Committee of the Universal Copyright Convention, as well as the Intergovernmental Committee of the Rome Convention on neighbouring rights, will be examining the problems afresh. Subcommittees of these three bodies have agreed on the following terminology with a view to reaching an agreement satisfying both French and Anglo-Saxon doctrine. It is submitted that neither is satisfied and that the question would benefit from further consideration:

Videogram: both videodisc, videocassette or other analogous material support for any sequence of images with or without sounds and the actual fixation of the sequence.

Videocopy: reproduction of a pre-existing work.

Videographic work: work specially made for fixing on a videogram.

It is suggested that these definitions tend greatly to confusion. It would be infinitely preferable to define videogram in a similar manner to phonogram and the following is suggested:

"A videogram means any fixation of sequences of images with or without sounds capable of reproduction on films, videodisc, videocassette or any other material support."

This definition would do away with the need for the term "videographic work" and the term "videocopy" is superfluous because what is described as a videocopy is a copy of a pre-existing audiovisual programme and protected as a cinematographic work. Its

³ Law No. 57-298 on Literary and Artistic Property, Article 3.

reproduction on a new material support such as videodisc or videocassette in no way alters its status as we have seen above.⁴

The Legal Status of the Videogram

Leaving aside this doctrinal discussion, and adopting this suggested definition of a videogram, will facilitate development of the subject in the remainder of this study. What is the legal nature of this new phenomenon of videograms? Generally speaking, there may be said to be a very clear international tendency to assimilate the videogram to a cinematographic work in the majority of countries.

As regards international legislation, neither the Berne Convention for the Protection of Literary and Artistic Works nor the Universal Copyright Convention specifically mentions videograms. However, the Berne Convention includes (and this took farsighted account of future technical progress) in the list of protected works (Article 2): "cinematographic works to which are assimilated works expressed by a process analogous to cinematography." Contracting States are free to interpret this concept, and may be expected to interpret it as including videograms.

The Universal Copyright Convention contains no specific definition of cinematographic works, but it is considered that "Here too, however, reasonable interpretation leads to the conclusion that a videogram may be assimilated to a cinematographic work in view of the similarities existing between these two types of works."⁵

The Subcommittees of the two international copyright Conventions concluded that "this new dissemination technique," that is, the videogram, "did not call for a revision of the Berne Convention or of the Universal Copyright Convention" and likewise "did not necessitate the preparation of a new international instrument."⁶

Who is the Author of a Videogram ?

Let us consider, therefore, the videogram as being protected as a cinematographic work.⁷

⁴ Due to the diversity of national legislation, some fixations of sounds and images made automatically by recording machines without a director being in control of the recording will not benefit from protection under literary and artistic property legislation.

⁵ See F. Klaver: "The Legal Problems of Videocassettes and Audiovisual Discs," paragraph 23. The author is greatly indebted to Professor Klaver's work on this subject in preparing this study.

⁶ See the Report of the Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention on Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs (paragraph 13).

⁷ It should be noted that some legislations based on Anglo-Saxon law use the term "cinematograph film" rather than "cinematographic work," see, for example, the Copyright Laws of Australia, Ghana, India, Ireland, Kenya, Malawi, Malaysia, New Zealand, Nigeria, South Africa and the United Kingdom.

As to who the author of the videogram is, the same questions arise as those concerning the authorship of a cinematographic work. Article 14^{bis} of the Berne Convention provides that:

Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work . . .

The same article establishes the principle that ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed. Thus, the definition of the "author" of a videogram is to be left, in principle, to national law. These definitions vary from country to country.

Establishing who is the author of a cinematographic work is one of the most complicated problems in the field of copyright. In countries with laws based on the Anglo-Saxon system, there is in fact no problem, for their legislation or jurisprudence give the *producer* the status of "author" of a cinematographic work, without prejudicing the rights of the authors of existing works (this is the case, for instance, in the United States of America, the United Kingdom, Canada, Australia, as well as many others including a large number of developing countries). Others, and particularly the Latin countries, in principle grant the status of "author" to the intellectual creator(s) of the cinematographic work. By intellectual creators is meant the authors "who have brought contributions to the making of the work," i. e., the authors of existing works and all those who have brought contributions to the making of the cinematographic work, such as the author of the scenario, the dialogue, the adaptation, musical work created for the production of the cinematographic work, and finally the principal director.

To simplify matters and to ensure the efficient and peaceful exploitation of cinematographic works, many of the latter countries specify in their legislation that the producer of the cinematographic work has the right to exploit the film, the consent of the authors of creative contributions to the making of the work being *presumed*, save in the case of a specific provision or stipulation to the contrary. Other countries provide for a *cessio legis* of the rights of the co-authors to the producer. This principle of presumption is included in the Berne Convention, which lays down that:

. . . in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to

the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.⁸

Exploitation of Videograms

Thus the producer of videograms has the possibility, by virtue of a specific right or a legal presumption or *cessio legis*, to exploit his videogram. Internationally, on the basis of the two multinational copyright Conventions, it may be deduced that he is protected in the same way as the producers of cinematographic works, and is able to prohibit any reproduction or use of his videogram without his consent.

The next major practical problem which is worth investigating is the need, whatever the legal system in force, on the part of the videogram producer to ensure that all pre-existing rights have been assigned to him. In other words, the creation of a videogram will be permitted only with the consent of the authors of contributions to the making of the videogram or their successors in title since, as we have seen, various "works" created by different people are involved (author of the scenario, dialogue, musical works, etc). These principles also apply when the videogram is not created directly, but where an existing cinema or television film is reproduced in the form of a videocassette or videodisc. In this case, the manufacturer must satisfy himself that the producer of the film has all the necessary rights to assign or license to him. The contract between the author of the work used and the producer of the pre-existing film is decisive: it is a question of knowing whether the author has assigned his rights for any existing technical process or whether he has reserved certain rights. If nothing is stated in the contract, or in case of doubt as to its interpretation, the decision has to be made on the basis of precedent. In general, judges tend to interpret copyright contracts restrictively. All the rights which the author has not clearly assigned, or are not included in the intention of the two parties who made the contract, belong to the author.

It is also most important to point out that it is not only the authors of pre-existing works who have to be borne in mind. It is of equal importance to know whether the performers whose work is included in the pre-existing work have given their consent to the new use.

To sum up, the producer of a videogram, in the case of new works devised for this purpose, or the manufacturer who makes a new use of a pre-existing work on videocassette or disc, has to negotiate with and secure the consent of all those who have contributed to the creation of the videogram or pre-existing work, including the authors and composers,

producers of films, television and broadcasting organisations, producers of phonograms and performers.

It is assumed that the international federations representing these groups will in future be negotiating standard contracts to govern the use of their works and other contributions in videogram form. So far there has not been much activity on the part of these bodies, because of the uncertainty over the future of the videogram. Although the technology exists, in view of the number of incompatible systems the videogram market is still very small for the moment. Most videograms sold today contain educational and technical, and not recreational, programmes. This situation will undoubtedly change in the near future, as soon as one video system forges ahead of all the others.

In anticipation of this development, IFPI is beginning a highly specific and detailed study of all these problems.

The Position of Performers and Other Beneficiaries of Neighbouring Rights

Among those who may contribute to the creation of a videogram are performers, producers of phonograms and broadcasting organisations, the three categories of interests protected by the 1961 Rome Convention. Producers of phonograms and broadcasting organisations have the option of prohibiting reproduction of their phonograms and broadcasts under the Rome Convention and in accordance with a large number of national legislations. Performers, on the other hand, are well known to enjoy adequate protection only in a rather small number of countries. The Rome Convention grants the performer certain rights which, taken as a whole, are not enough to provide complete protection against the audiovisual use of his performance. A performer has some protection in the case of videograms, in that his consent is required for (1) the production of a videogram containing his previously unfixated performance, and (2), in principle, the reproduction of a videogram containing his performance (subject, however, to certain conditions).⁹

However, Article 19 of the Rome Convention contains a very important exception: once he gives his consent to the inclusion of his performance in a fixation of images, or images and sounds, he ceases to enjoy protection. So films or television programmes made originally with the performer's consent, and reproduced on a videogram, can in theory be used without his authorization. International opinion acknowledges that, in view of technical developments, this provision of the Rome Convention is outdated. It was included in the Convention at the request of the film industry in 1961, when nobody

⁸ Berne Convention, Article 14bis(2)(b).

⁹ See Article 7.1(c) of the Rome Convention.

anticipated the current progress in audiovisual technology. Countries are free to allow performers greater rights under their domestic laws than those granted by the Rome Convention, and it is to be hoped that they will do so. The use of films and television programmes on videograms will not only involve financial loss to the performers, who will not receive any residual fee, but will also have an adverse effect on their employment opportunities, since widespread use of existing old film and television material may hamper the development of the market for original video programmes.

Problems Arising from the Use of Videograms

The repercussions of the appearance of the videogram on the market and its use by the public give rise to a number of practical problems related to its protection.

Ease of Reproduction

Most problems of the videogram derive from its technical nature. In general, the videogram can be reproduced easily, although there is a difference, in technical terms, between videocassettes and videodiscs. Indeed, in the current state of technology, reproduction of the content of a videodisc would be very difficult for an individual with limited means (the equipment required being both rare and prohibitively expensive). On the other hand, reproduction via videocassette is much easier, and can be done, according to the type of appliance, from a television programme, or another videocassette. These possibilities of reproduction give rise to a series of problems, since the videogram is a highly mobile vehicle made available to the public without any possibility of controlling the use to which it is put.

The three major problems are:

- piracy
- private use
- use for teaching purposes.

Control of Piracy

As regards piracy, it may be expected that as soon as videograms appear on the market in large numbers, in view of the ease with which they can be copied, they will be reproduced without the producer's or authors' consent for commercial purposes. This is called "piracy," and is a well-known phenomenon, since it already seriously affects the phonogram, which is also easy to reproduce. Unauthorised reproduction of a videogram would cause considerable loss to all holders of rights whose works or performances are included in it. Whenever a pirated videogram is sold, all the authors of the cinematographic work included in it, as well as the artist whose performance is reproduced, lose their royalties, and the producer loses his profit.

It is essential, therefore, that domestic laws should provide for suitable action to control pirating. As we have already seen, the videogram enjoys the protection extended to cinematographic works, both at national and international level, but experience in connection with pirating of phonograms has shown that, even if the phonogram is protected by a specific right under the law, the remedies available are often inadequate to combat the form of theft which piracy represents.

To control piracy it is also necessary to be confident that the owners of rights incorporated in the videogram can readily be identified, to enable them to take the necessary steps immediately.

With regard to cinematographic works reproduced in the form of videocassettes or videodiscs, that is, what French doctrine describes as "videocopies," there is a practical problem. The manufacturer of the videocassette or disc has no rights by virtue of having reproduced a pre-existing work on a new material support and all the rights, including the reproduction right, remain vested in the author(s) of that pre-existing work. The manufacturer will have acquired either an assignment of those rights, in which case he will be able to take action as the right owner, or a licence to reproduce the work. It is essential, to combat piracy effectively, that the exclusive licensee should be able to take action against piracy directly, and speedily, without having to join the author(s) of the pre-existing work themselves to every action. Experience in fighting piracy of phonograms has shown that it is highly desirable that legislation should allow anti-piracy measures to be taken by exclusive licensees as well as by the original copyright owners who in any case are the first to suffer from piracy. The Copyright Act, 1956, of the United Kingdom takes care of this problem in a special provision relating to proceedings in the case of any copyright in respect of which an exclusive licence has been granted. Under this provision,¹⁰ the exclusive licensee has the same rights of action, and is entitled to the same remedies, as if the licence had been an assignment. The rights and remedies are concurrent with the rights and remedies of the owner of the copyright.

Private Use

The ease of reproduction also raises the problem of private use; anyone who has suitable apparatus at home can make a copy of a videogram or television programme for his own use. Most domestic legislation includes provisions on "private use" or "fair dealing," but the notion and the actual limits of such use may vary from one country to another. According to the Berne Convention, reproduction for private

¹⁰ Section 19 of the Copyright Act, 1956.

use is not unlawful as such. For it to be so, it is also essential that this reproduction should "conflict with a normal exploitation of the work" and "unreasonably prejudice the legitimate interests of the author."¹¹

When they debated this subject, the Subcommittees to which I refer above considered that, in view of the wide availability of equipment on the market for reproducing videograms in the form of videocassettes, this method of reproduction did not satisfy the restrictive conditions laid down by the Berne Convention and that, therefore, any reproduction of videograms was subject to the right of reproduction under the Berne Convention. They also felt that there was no difference on this point between the Berne Convention and the Universal Convention.

The Subcommittees recognized that certain recordings could be made in good faith, at home, but they considered that the owners of the rights would "in any event suffer a loss, which, if it could not be avoided, should at least be mitigated." They therefore recommended a compensatory system designed to mitigate the loss suffered by the holders of such rights.

They suggested that it should take the form of a "charge on the sales price, either of the equipment used in the reproduction and projection of works, or of the material supports on which the sequences of images and sounds are fixed, or of both of these, the latter solution being considered the one most likely to provide the best compensation for the various categories concerned."¹²

The latter proposal is of vital importance, and the Subcommittees recommended that it should be understood as being intended for application not only in the field of videograms, but also in that of phonograms.¹³

With regard to the method of collection of these compensatory payments, the Subcommittees went on to recommend that: "The collection of these compensatory payments should be carried out as far as possible by a single body, public, private or mixed, acting on behalf of all the different categories, which would be responsible for distributing the proceeds among them."¹⁴

This idea, at international level, is very new. Such a system operates at present in only one country, the Federal Republic of Germany. The German Copyright Law of 1965 established a levy on the selling price of reproduction equipment. Currently, the introduction of legislation providing for a system of

compensation for right owners is under discussion in several other countries (Austria, Belgium, France and Japan). Most are considering putting a charge on both recording equipment and blank videocassettes and the Federal Republic of Germany itself is contemplating the possibility of imposing a levy on blank videocassettes as well.

It must be stressed that any such charge should not be regarded "as a tax or para-fiscal levy, but as compensation due to the owners of exclusive rights to offset their inability to exercise such rights."¹⁵

It is also worth a reminder that such a charge, either on the recording equipment or on the blank cassettes or both, should not be regarded as legalizing the practice of piracy. For this reason, the notion of private use must be strictly defined and demarcated before such a compensation system is established in any country.

Use for Educational Purposes

The videogram has hitherto been used primarily for educational programmes, intended for schools and universities or for industrial and technical instruction. This form of use of videograms is growing at an ever-increasing rate. As the Subcommittees noted: "Indeed, it is no longer a question of isolated cases of the use of educational material, with the recording by teachers of occasional broadcasts for the needs of their classes, but the constitution of actual centres for the production of videograms to be used by establishments providing school or university education . . ." ¹⁶ It must be recalled that the three international Conventions we have mentioned as governing the protection of videograms: the Berne Convention, the Universal Copyright Convention (revised texts of 1971) and the Rome Convention, provide exceptions to owners' rights for educational purposes. In the case of the Berne Convention, the exception can only cover part of a work used by way of illustration in teaching, provided that the audiovisual fixations have been designed and issued for the sole purpose of being used for the requirements of school and university teaching.¹⁷ The Universal Convention provides for similar exceptions,¹⁸ and both Conventions allow exceptions as regards the audiovisual field only to developing countries.

The Rome Convention, on the other hand, allows all countries the option to provide for exceptions to the protection in their domestic laws if the use is made exclusively for teaching purposes.

As for the interpretation to be given to the words "school and university," when the copyright

¹¹ See Article 9 of the Berne Convention.

¹² Report of the Subcommittees, *op. cit.*, Annex I, Inventory of Problems, D.3.

¹³ *Op. cit.*, Annex I, F.: "The foregoing considerations should be taken to apply not only to audiovisual material but also to sound recordings."

¹⁴ *Op. cit.*, Annex I, D.4.

¹⁵ *Op. cit.*, paragraph 30.

¹⁶ *Op. cit.*, paragraph 37.

¹⁷ See Article 10 of the Berne Convention and Article III(7)(b) of its 1971 Annex.

¹⁸ See Articles IV^{bis}(2) and V^{quater}(3)(b) of the Universal Copyright Convention.

Conventions were revised in 1971 these terms were clarified as being applicable not only to instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges and universities, but also to a wide range of educational activities organized outside schools or universities, for people of any age, and on any subject.

There is a danger that if the educational use of videograms is not limited, such exceptions will jeopardise creative activity and normal exploitation of videograms.

In studying this problem, the Subcommittees concluded that because of the increasing use of videograms in teaching and further education, national authorities should bear in mind the need for a precise definition of the conditions on which such exceptions can be allowed. This is a problem which will have to be thoroughly examined by the legislators before a fair answer can be found.

The Distribution of Videograms

Finally, there is an interesting question related to the use of videograms which deserves study. It is the problem of whether or not the producer of videograms is in a position to control the market for his product. The international Conventions do not in general recognise a "distribution right," however the Berne Convention does give such a right in relation to cinematographic works both to the author(s) of such works (Article 14) and to the owner of copyright in such works. The Universal Convention does not mention any such right.

This is interesting, in as much as, for the time being, it is difficult to foresee whether as a general rule the videogram will be hired or sold the most in the future. Hiring of videograms is already a considerable business. It seems that the development of this practice is due above all to the relatively high cost of the product, but it may well continue when prices come down since people may prefer to have ready access to new audiovisual programmes rather than to watch the same programmes repeatedly. Moreover, due to the present incompatibility of systems and constant technical progress, both the equipment (hardware) and material supports (video-cassettes and videodiscs) in their present form are likely to become out of date rapidly and this state of affairs encourages the public to hire rather than buy. Hiring also takes the form of sale coupled with the option to make further purchases at reduced prices.

The fact that videograms are generally regarded as being assimilated to cinematographic works for the purpose of copyright law is extremely important in this connection. Trade in films is primarily carried out through the hiring of the film to managers of cinemas and it is revenue from such hiring which

makes up the greater part of the cinema producer's income. *Mutatis mutandis*, therefore, the right of the producer of videograms to royalties on the use of his work by way of hire should be legally recognised.

The enforcement of such a right would be difficult in practice for videograms. In the case of films, the number of copies is restricted and practically every copy is identifiable. Videograms, on the other hand, are likely to become a mass-consumption product and to be sold as well as hired. When sold, the customer will normally be anonymous and it will be impossible to control the use to which he puts a videogram he has purchased.

Reimer¹⁹ defines the "right of distribution" as follows: "the right to put the original or reproductions of a work into circulation, either by sale or hire or in any other manner. Similarly, the putting on sale of copies of a work is generally included within the concept of distribution, in that it is a preliminary to such distribution."

The number of countries which recognise a distribution right are few, but include: Austria, Germany (Federal Republic of), Italy, Sweden, Switzerland, Turkey, United States of America.²⁰ In such countries, the owner of a copyright in the videogram will be able to control the market, permitting only the lending or hiring of the copies and reserving to himself the right to sell copies. "If on the other hand he has put copies of video-cassettes or audio-visual discs on the market, his right of distribution lapses — under the law, under case law and according to doctrine — even in countries which recognise the right of distribution, or else it is severely limited in favour of the free circulation of works in the trade and among the public at large."²¹ This is usually called "exhaustion of the right of distribution."²²

Thus, to summarise, if videograms are only lent for hire (for example to educational establishments) for the purpose of being used once or twice, the owner of the videogram may, in some countries and subject to certain conditions, control the market; on the other hand, if he sells the videogram to the public the distribution right becomes nearly useless.

This is a problem which the international subcommittees referred to above have not tackled so far. It is very important, and, if the future of the videogram is in hiring, then solutions will have to be found and thought will have to be given to the introduction into the law of the notion of a specific hiring right (public or private), for producers of videograms.

¹⁹ Dietrich Reimer, in *Copyright*, 1973, p. 56: "The right of distribution with special reference to the hiring and lending of books and records."

²⁰ D. Reimer, *op. cit.*

²¹ F. Klaver, *op. cit.*, paragraph 102.

²² For a complete explanation of the right of distribution and its exhaustion, see D. Reimer, *op. cit.*

Conclusion

To conclude, it is clear that, although the legal protection of videograms is reasonably favourable in that they enjoy, in principle, the protection accorded to cinematographic works both at national and international level, many questions remain to be resolved. The videogram faces an impressive number of

problems, deriving from its actual nature and from the ease with which it can be reproduced.

There is no doubt that with goodwill and cooperation between all interested parties and Governments these problems can be solved, and it is very encouraging to note that, at intergovernmental level, the will exists to confront and tackle them seriously.

Calendar

WIPO Meetings

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

1979

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 — Extraordinary Session (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

November 5 to 9 (Buenos Aires) — Development Cooperation (Copyright) — Latin American Seminar on Copyright (convened jointly with Unesco)

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 3 to 6 (Geneva) — Working Group on Industrial Property Aspects of Consumer Protection

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

1980

January 7 to 9 (Geneva) — Development cooperation (Copyright) — Working Group on the Protection of Folklore (convened jointly with Unesco)

January 28 to February 1 (Paris) — Committee of Experts on the Model Statutes of the Societies of Authors (convened jointly with Unesco)

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

UPOV Meetings

1979

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

Non-Governmental Organizations

1980

International Confederation of Societies of Authors and Composers (CISAC)

Legal and Legislation Committee — March 20 and 21 (Budapest)

Congress — November 3 to 7 (Dakar)

International Publishers Association (IPA)

Congress — May 18 to 22 (Stockholm)