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Copyright

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Contents

Berne Union

THAILAND

Accession to the Paris Act (1971) of the Berne Convention

The Government of the Kingdom of Thailand deposited, on September 29, 1980, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, subject to the following limitations, reservations and declarations:

"1. Pursuant to Article 28(1)*(b)* of that Act, this accession shall not apply to Articles 1 to 21 and the Appendix of the said Act.

2. The reservations made by the Kingdom of Thailand on its accession to the Berne Convention for the Protection of Literary and Artistic Works as revised at Berlin on November 13, 1908, and to the Additional Protocol of March 20, 1914, shall remain in full force.

3. With regard to its contribution towards the budget of the Union, in accordance with Article 25(4)*(b)* of the said Act, the Kingdom of Thailand chooses to belong to Class VII.

4. Pursuant to Article 33(2) of the said Act, the Kingdom of Thailand does not consider itself bound by the provisions of paragraph (1) of Article 33 of the said Act."

Articles 22 to 38 of the Paris Act (1971) of the said Convention will enter into force, with respect to the Kingdom of Thailand, three months after the date of this notification, that is, on December 29, 1980.

Berne Notification No. 101, of September 29, 1980.

National Legislation

ITALY

Decree of the President of the Republic

implementing the Berne Convention for the Protection of Literary and Artistic Works as revised by the Paris Act of July 24, 1971

(No. 19, of January 8, 1979) *

Article 1. The following item (7) shall be added to Article 2 of Law No. 633 of April 22, 1941:

"(7) photographic works and works expressed by a process analogous to photography, provided they are not simple photographs protected under the provisions of Chapter V of Part II."

Article 2. The first paragraph of Article 20 of Law No. 633 of April 22, 1941, shall be replaced by the following paragraph:

"Independently of the exclusive rights of economic utilization of the work referred to in the provisions of the preceeding Section, and even after the transfer of such rights, the author shall retain the right to claim authorship of the work and to object to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

Article 3. Article 32 of Law No. 633 of April 22, 1941, shall be amended as follows:

"The rights of economic utilization of a cinematographic work shall continue for fifty years from the first public showing, provided this takes place not later than five years from the end of the calendar year in which the work was produced. If this period of five years is exceeded, protection shall continue for fifty years from the year following that in which the work was produced."

Article 4. The following Article 32bis shall be inserted after Article 32 of Law No. 633 of April 22, 1941:

"The rights of economic utilization of a photographic work shall continue for fifty years from the year in which the work was produced."

Article 5. The second, third and fourth paragraphs of Article 92 of Law No. 633 of April 22, 1941, shall be deleted.

Article 6. The first paragraph of Article 144 of Law No. 633 of April 22, 1941, shall be amended as follows:

"The authors of works of art in the form of paintings, sculptures, drawings and prints and the authors of original manuscripts shall be entitled to a percentage of the amount by which the price of the first public sale of original copies of such works and manuscripts exceeds the price of first alienation, and such excess shall be presumed."

Article 7. This Decree shall enter into force on the day following that of its publication in the *Gazzetta Ufficiale* of the Italian Republic.

This Decree, bearing the Seal of State, shall be inserted in the Official Collection of Laws and Decrees of the Italian Republic. All persons are required to comply and to ensure compliance with this Decree.

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* Published in the *Gazzetta Ufficiale,* No. 29, of January 30, 1979. Entry into force on January 31, 1979. — WIPO translation.

POLAND

I

Order of the Council of Ministers

concerning the remuneration of composers

(No. 136, of July 10, 1975) *

Pursuant to Article 33(1) of the Law of July 10, 1952, on Copyright (*Dziennik Ustaw*, 1952, No. 34, text No. 234), the Council of Ministers orders as follows:

Article 1. There shall be established:

(i) a schedule of composers' remuneration for the composition and first public performance of musical works — Annex No. 1 to this Order **;
(ii) a schedule of composers' remuneration for the publication and disclosure of musical works — Annex No. 2 to this Order **;
(iii) a schedule of remuneration for work on publication — Annex No. 3 to this Order **;
(iv) the number of basic printings of music publications — Annex No. 4 to this Order **;
(v) rules for the calculation of remuneration — Annex No. 5 to this Order.

Article 2. When determining composers' remuneration, due account should be taken of the value of the work and of the creative effort necessary for its creation.

Article 3. The Minister for Culture and the Arts is authorized:

(i) to make, in agreement with the Minister for Labor, Salaries and Social Affairs, additions to the schedules of composers' remuneration and to the schedules for work on publication;
(ii) to grant, in particularly deserving individual cases, authorizations for the application:
  (a) of increased rates of composers' remuneration, provided that they do not exceed 50 % of the maximum rates laid down in the schedule of composers' remuneration;
  (b) of increased rates of composers' remuneration for works of exceptional value to national culture, provided that the amount of the increase does not exceed 200 % of the maximum rates laid down in the schedule of composers' remuneration;
(iii) to set, in agreement with the Minister for Labor, Salaries and Social Affairs, the amount and the principles of payment of the composers' remuneration for the public performance of musical works;
(iv) to lay down, in agreement with the Minister for Finance, rules for the conclusion of contracts, and model contracts, for the composition, first public performance, publication and disclosure of musical works.

Article 4. The provisions of this Order shall be applied to contracts concluded after the date of its entry into force.

Article 5. The following are repealed:

(i) Order No. 496 of the Council of Ministers of July 17, 1954, concerning the amount of remuneration of composers and the rules for the conclusion of contracts relating to the commissioning of musical works (*Monitor Polski*, No. A-73, text No. 891);
(ii) Ordinance No. 57 of the President of the Council of Ministers of February 28, 1956, concerning the amendment of the rates of remuneration for the creations of composers (*Monitor Polski*, No. 17, text No. 246).

Article 6. The Order shall enter into force on the date of its publication.

Annex No. 5

Rules for the calculation of remuneration

1. The remuneration for a given work shall be calculated by adding the fee for the duration of the work and the fee for the number of measures.

2. The remuneration for the duration of the work shall be calculated by multiplying the number of minutes by the rate for one minute; the rate for one minute shall be payable for every minute begun.

* This Order was published in *Monitor Polski*, No. 26, of August 27, 1975, text No. 159. — WIPO translation.

** Annexes Nos. 1, 2, 3 and 4 are not reproduced here.

3. The remuneration for the number of measures shall be calculated by multiplying the number of measures in a given work by the rate for one measure.

4. The remuneration for musical illustration created in the form of improvisation shall be calculated exclusively according to duration, by multiplying the rate for one minute appearing under the appropriate heading by the number of minutes.

5. The remuneration for music without measures shall be calculated by multiplying the fee for the duration of the work by two.

6. For the creative elaboration, 50 % to 75 % of the remuneration provided for the creation of an original work of the same kind shall be payable; the percentage shall be determined according to the character of the elaboration and its artistic value.

7. For instrumentation, 25 % to 50 % of the remuneration provided for the composition of an original work with the same instrumentation shall be payable; the percentage shall be determined according to the character of the instrumentation and its artistic value.

8. For the writing of the piano score, 10 % to 20 % of the remuneration provided for the creation of a work in its original instrumentation shall be payable; the percentage shall be determined according to the degree of difficulty of the writing of the score.

II

Order of the Council of Ministers

concerning the Authors' Fund

(No. 78, of May 29, 1979) *

Pursuant to Article 13(1) of the Law of November 25, 1970 — Budgetary Law (*Dziennik Ustaw*, 1970, No. 29, text No. 244), the Council of Ministers orders as follows:

Article 1. An Authors' Fund, hereinafter referred to as "the Fund," is hereby created.

Article 2. (1) The Fund shall be financed by:

(i) payments of 3 % to 5 % of the retail price of books containing:
   (a) works of belles lettres whose authors are Polish nationals, if the authors' economic rights in those works do not enjoy legal protection,
   (b) works of belles lettres whose authors are not Polish nationals, if the authors' economic rights in the originals of those works do not enjoy legal protection in the Polish People's Republic,

   published by State and cooperative publishing enterprises, hereinafter referred to as "publishing enterprises";

(ii) voluntary payments, from social organizations and natural persons.

(2) The Minister for Culture and the Arts, in agreement with the Minister for Finance, shall fix the percentage of the payment referred to in paragraph (1)(i) for every calendar year.

(3) Paragraph (1)(i) shall not apply if the book has been published on the instructions of the Central Board of Foreign Trade for the purposes of export.

Article 3. (1) The amount of the payment specified in Article 2(1)(i) shall be fixed as a percentage of the retail price of a book in paperback form. Where a book is published in a hardback binding, the amount of the payment shall be calculated on the basis of the retail price less 25 %.

(2) If a book also contains works in respect of which the author's economic rights enjoy legal protection in the Polish People's Republic, the payment shall be fixed in proportion to the volume of the works referred to in Article 2(1)(i). The volume of the books which constitutes the basis of the calculation of the payment shall also include introductions, notes, illustrations, etc.

Article 4. Publishing enterprises shall make their payments to the Fund within 30 days following the date on which the complete edition of the book whose publication creates the payment obligation is handed over for sale.

** This Order was published in *Monitor Polski*, No. 15, of June 22, 1979, text No. 85. — WIPO translation.

Article 5. The Fund shall be used:

(i) for prizes awarded for literary creation and at literary competitions;
(ii) for the remuneration of authors who are Polish nationals for the disclosure in developing countries of their works, previously published in the Polish People's Republic, if the author expresses his agreement to the disclosure of those works without payment of remuneration by the publishers in the developing country;
(iii) for remuneration for the translation of works of world repute in the field of belles lettres, which do not require the conclusion of a publishing or other contract for the disclosure of work;
(iv) for literary scholarships;
(v) for the propagation of works of Polish literature abroad;
(vi) for the payment of an equivalent in Polish zlotys of the foreign currency intended for the encouragement of literary creation, deposited in the currency accounts of the Ministry of Culture and the Arts;
(vii) for major repairs to the houses of the creative work of men of letters.

Article 6. (1) The Minister for Culture and the Arts shall be responsible for ordering payments from the Fund.

(2) The Minister for Culture and the Arts may appoint persons of lower rank to order the disposal of certain parts of the Fund.

Article 7. (1) The amount of each prize awarded is fixed at a maximum of 40 000 zlotys.

(2) The remuneration referred to in Article 5(ii) shall be fixed according to the provisions on the remuneration of authors.

(3) The literary scholarship referred to in Article 5(iv) may be granted to the author and may amount to 6000 zlotys per month, for a period not exceeding 12 months.

(4) The Minister for Culture and the Arts may, in particularly justified exceptional cases, grant the author a literary scholarship in an amount exceeding that specified in paragraph (3), but not exceeding 10 000 zlotys per month.

Article 8. The Minister for Culture and the Arts shall, in agreement with the Minister for Finance, lay down detailed rules and fix the manner of payment of amounts drawn from the Fund.

Article 9. Authors' remuneration may be paid from the Fund up to the amount allocated annually in the fund for remuneration other than staff salaries and in the fund for fees incorporated in the national, social and economic plan drawn up for the Ministry of Culture and the Arts.

Article 10. The unused balance in the Authors' Fund created pursuant to Order No. 154 of the Council of Ministers of June 2, 1964, concerning the creation of the Authors' Fund (*Monitor Polski*, No. 40, text No. 186), shall be incorporated in the Fund referred to in Article 1.

Article 11. In cases that are not provided for in this Order, the provisions concerning funds for special purposes enacted unter budgetary law shall be applied.

Article 12. Order No. 154 of the Council of Ministers of June 2, 1964, concerning the creation of the Authors' Fund (*Monitor Polski*, No. 40, text No. 186), is repealed.

Article 13. This Order shall enter into force on July 1, 1979.

General Studies

The Public Lending Right — A Comparison of National Approaches

Gavin McFARLANE *

A good deal of interest has been stimulated by the passing of the Public Lending Right Act 1979 of the United Kingdom, and the discussion which has followed relating to the nature of the scheme which is to follow in order to implement the Act. Because there is now a number of States which already have some experience of a right of this kind in various forms, it seems useful to carry out an examination of how they have developed and are being applied. It is a novel area, and at this stage of development the addition of each new country to the family of States operating the right is of great significance.

Since the publication of my last article in *Copyright* (1979, pp. 313 *et seq.*), there have been further developments in the United Kingdom. The Public Lending Right Act, it will be recalled, provided for the drafting of a scheme at some later date. Section 1(2) in particular provided that the classes, descriptions and categories of books in respect of which the right exists and the scale of payments to be made in respect of it are to be determined in accordance with the scheme. It further states that in the preparation of the scheme the authorities are to consult with representatives of authors and of library authorities who seem likely to be affected.

In pursuance of this provision, a consultative document was published by the Government in December 1979, through the medium of the Office of Arts and Libraries. It invites comments from those interested, and hopes that the results can be distilled into the final scheme to be presented to Parliament during the current[1] session. Among the recommendations of the consultative document is that authors of every nationality should be able to register for PLR under the provisions of the Act. Certainly there are no restrictions in the Public Lending Right Act on such a proposal, but there are two alternatives at least. On the one hand, registration of foreign authors can be allowed without any restriction at all and, on the other, it could be confined to nationals of those countries which in their public lending right make provision for the payment of British authors.

This proposal has been attacked by the Society of Authors. It argues that if unrestricted registration of foreign authors is permitted, then, having regard to the small size of the fund, it would be too costly and cumbersome. To include all foreign authors without restriction to nationals of countries providing reciprocity would let in for example authors of American best sellers, of whose works there are undoubtedly very many copies in British public libraries. The present proposal is that a total of £2 million is to be allocated from central funds each year for the complete funding of the right. This is to include not only all payments to entitled authors, but also the costs of administration. It is envisaged that the Registrar should recruit and pay his own staff, and their salaries would have to be met from the allocation.

The Society of Authors contends that considerable savings could be made if the public lending right were to be administered by a collecting society run by the authors themselves. Such a body now exists in the shape of the Authors' Lending and Copyright Society (ALCS), which was set up in 1977. It has the aim of exercising on behalf of the author those rights which he would have difficulty in exercising as an individual, and those which can only be exercised in concert with other writers. It is said that if ALCS were to absorb the public lending right into its existing function, administrative costs would thereby be considerably reduced.

Those countries which have brought in some form of public lending right have done so in a variety of ways. One at least has done so by making the right an integral part of its copyright law; more frequently, however, the relevant legislation has taken the right outside copyright, and into the area of social law. In some cases the funds which eventually find their way to authors do so more as the result of administrative acts than as the consequence of a legal process.

Some form of payment for the lending of their books by libraries was made in Sweden as early as 1954, although at that time it was at a much lower rate than is at present the case. Matters have improved greatly since then, and by 1978 the payment per lending of Swedish literature was 28 ore, with a lower rate of 14 ore for translations. This produced a

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[1] Spring 1980.

total of approximately 27 million Swedish crowns. The sum is administered by the Swedish Authors' Fund, and from the pool each individual author receives 16 ore in respect of each of the first 100,000 loans of his works. He then receives 8 ore per loan for the slice up to 200,000, and between that figure and 300,000 he receives 3.2 ore per loan. For loans above 400 000 his royalty drops to 1.6 ore. Thus an author whose works are loaned 500,000 times during the course of a year will receive 32,000 Swedish crowns.

The balance of the money paid in respect of each loan goes to the "solidarity fund." From this fund payments are made to the following categories of authors: *(a)* young or newly published authors are eligible for five-year working scholarships of an annual value of 22,000 Swedish crowns; *(b)* established authors whose receipts from the public lending right do not amount to 33,000 crowns per annum can have their emolument made up to this figure each year until the age of retirement, but only if they are not in full-time employment; *(c)* elderly authors can receive a pension of 20,000 crowns annually, after their decease their surviving spouse is entitled to a pension of 14,000 crowns. These are long term schemes, but in addition the solidarity fund pays working and travel scholarships.

Thus the Swedish system, while having a criterion of payment per use, nevertheless places restrictions on the amounts which an author can receive. A graduated scale operates against the more successful, and the less successful can have their share made up to a set minimum payment. In addition, a substantial proportion of each per use payment finds its way into a "solidarity fund" for social purposes, from which the writer whose work earned the payment will not necessarily benefit.

In Denmark the main copyright statute does not provide for any compensation for the lending of an author's work. This, however, is enshrined in the Act dealing with public libraries (Enactment of May 27, 1964, amended by Enactment of June 26, 1975). By this statute, Danish authors receive a sum in respect of each copy of their works in the public libraries, primary school libraries. The figure is adjusted on an index-linked basis, which by 1977 had reached 1.79 Danish crowns per copy. Only authors who are Danish nationals are entitled, and payments are also made to their surviving spouses and children under the age of majority.

Under the same legal provision a lump-sum payment is made by the Danish Government in respect of Danish translators whose works appear in the same categories of library. Translators who apply for them may be entitled to grants and pensions. The Danish system of compensation for public lending is thus for authors (but not for translators) made on a per volume rather than a per use basis, and there is no upper limit or weighting against the amount which a successful author can make. The scheme has however apparently attracted the criticism that some books are produced almost exclusively for sale to public libraries, and more particularly, for sale to school libraries. As it stands, the right in Denmark does not benefit foreign authors whose works may appear on the shelves of libraries there, although it seems that Danish translators who render their works into the Danish tongue may nevertheless benefit.

In Australia the campaign for a public lending right commenced in 1966, and steadily gathered momentum. Following the General Election of 1974 an Australian Authors Fund Committee was appointed to administer and implement the right. It was responsible to the Department of the Prime Minister and the Cabinet, but in 1976 responsibility was passed to the Australia Council. The information upon which payments were made in the first place was based on survey material which had been furnished for the Committee of Enquiry as a result of which the right had been introduced.

Public lending right in Australia is the right of the creators of a book to be compensated when it is made available for lending in public libraries. To fall within the definition of a book, a work must have at least 48 printed pages, unless they are children's books, or works of poetry or drama, when a minimum of 24 pages may suffice. In respect of multivolume works other than encyclopaedias, a separate fee is payable in respect of each volume. The following categories of works do not qualify for admission to the public lending right in Australia:

(i) magazines;
(ii) encyclopaedias and dictionaries with a multiplicity of authors;
(iii) books first published prior to 1927, unless the author is still alive;
(iv) books the authors of which are not identifiable;
(v) books where more than three authors are shown on the title page; or where the author is stated to be an association, corporation or similar body;
(vi) works in Crown copyright.

Authors, editors, illustrators, translators and certain beneficiaries of deceased authors are entitled to admission to the public lending right upon the following conditions. An eligible book author must be either an Australian national, whether or not resident in Australia, or an author normally resident in Australia, whether or not his work is published in Australia. Authorship must be listed in the Australian National Bibliography. A non-Australian author shall lose his entitlement when he ceases to be resident in Australia, as does an editor, illustrator or translator who may have enjoyed eligibility.

The public lending right in Australia is lost on the death of the author or the expiry of fifty years after the book's first publication, whichever is the later. First publication is based on the calendar year as entered in the Australian National Bibliography. An interesting provision is that authors who have assigned their copyright in books are still eligible for their public lending right entitlement, for this is based on the fact of authorship rather than on copyright. This contrasts with the situation in the United Kingdom where, by Section 1(7) of the Public Lending Right Act 1979, provision is to be made for the right to be transmissible by assignment as personal or moveable property.

Editors are to be entitled to share in public lending right in Australia if they select the text from the works of one or more authors, and are named on the title page or listed in the Australian National Bibliography. So far as co-authors are concerned, they will be eligible for public lending right in respect of books which list no more than three co-authors on the title page or in the Australian National Bibliography. The same applies to editors and illustrators.

An illustrator is eligible to participate in the public lending right in Australia where he has been a party with the author to the publisher's contract for the book, not having received a lump-sum payment outside the terms of the book contract for his illustrations. In such a case his entitlement will be in the ratio agreed in the contract for participation in either royalties, or in a lump-sum payment. If the parties do not provide copies of the relevant contract to demonstrate that the ratio should be otherwise, the public lending right payment will be divided between author and illustrator in equal shares. In order to qualify, illustrators must be named on the title page of a book, or listed in the Australian National Bibliography.

An amount is paid in respect of public lending right to the entitled author and publisher for each copy of each entitled work indicated by the library sampling system, where such sampling indicates a minimum of fifty books. In the year 1977/1978, the fee was 50 cents for authors and $12^1/_2$ cents for publishers. Separate claims are required in respect of each book by authors, illustrators, if appropriate, and publishers, although if any eligible category fails to apply, this does not prejudice the claim made by the other party or parties.

The claim to each book title is investigated via the National Library of Australia, and the Committee administering the scheme subscribes to a computer-based machine readable catalogue data file, which stores information about book titles registered with the Australian National Bibliography. From this search, the eligibility of both the claimants and the book is established, and each eligible claimant is alloted a control number, and his personal details fed into a master file. Additionally, each eligible book is alloted a control number, if possible the ISBN, and this is also fed into a master file. A physical checklist of titles is compiled in alphabetical order of authors listing the name of the author, title, publisher, and where appropriate such information as the names of editors, illustrators, and translators. The place of publication, year of publication and control number is also listed.

A sample of Australian public libraries is made up, based on stocks of books held, which is subject to certain modifications in respect of geographical factors, a very necessary feature in such a large country as Australia with such widely diverse states. From the checklists of titles distributed to them, the libraries note the numbers of copies of each title held on their shelves, and from this information an estimate is made of the number of copies held on all the shelves all over Australia, in respect of each listed title. The practice is to checklist one third of eligible titles on file each year, together with books newly claimed. By the means of this sampling procedure, each title will be sampled at least once in every three years.

The Australia Council emphasises that guidelines and definitions may from time to time need to be made by the administering Committee, and that in the early years there were some errors and anomalies. Nevertheless, in the first fifteen months of the operation of the scheme, nearly half a million Australian dollars were paid out to authors and publishers, and in the year 1975/1976, payments of 1000 dollars or more were made to 88 authors. The Australian scheme is based on a payment per copy of eligible work stored on shelf, rather than on a per loan basis, and a feature of the situation is that a payment is made to the publisher, if he cares to claim it.

The basis of payment to authors in Finland in respect of the public lending of their works is the law of May 3, 1961, regulating libraries. The compensation is not governed by the quantity of books on library shelves or the number of loans; rather it is the fact that books are available without charge in public libraries which constitutes the basis for the provision of grants and assistance to authors. There is no charge to the borrower, but the State provides a compensation to applicant authors amounting to 5 % of the annual subsidy granted to libraries.

Only Finnish national writers and translators may obtain these grants and other forms of assistance. The sums available are distributed as follows: 45 % goes to literary creative writers, 10 % to book translators, 25 % to elderly writers and translators in reduced economic circumstances, and 20 % to writers and translators who, through illness or inability to work, are in economic difficulties. Grants of this nature are allocated by the Ministry of Education, to which requests should be made. Proposals for grants are put

forward by a committee on which the national association of writers and translators is represented, as well as the Ministries of Education and of Finance.

In 1977 the total amount of grants and assistance came to 2 million Finnish marks; it should be noted that the distinctive feature of the situation in Finland is that no criterion of payment per use or per work on shelf is involved. It is an out and out grant to literary interests in a single lump sum, paid no doubt as compensation to the members of those interests for the library lending of their works; no one writer can however can claim an individual right or an individual payment in respect of the loan. Of all the schemes in operation, the Finnish system comes nearest to being a State subsidy, and indeed the factor which controls its size is not the amount of use of literary works as a whole, but the size of the annual subsidy granted to the libraries by the State.

By contrast the treatment of lending of copyright works in the Federal Republic of Germany is within the framework of copyright. The basic Copyright Act of that country passed in 1965 contains with certain limitations a form of distribution right, which is the starting point for any control on lending. But under this basic law the limitations prevented the author from exercising any control over public library lending. But by an amendment to the basic Copyright Act which was passed in 1972, a public lending right came into being in the Federal Republic of Germany.

The solution adopted nevertheless has the social overtones from which the public lending right has never entirely been able to free itself. It is not based on unfettered individual rights in favour of individual right owners, but the claim is exercised only through the medium of a collecting society. As a result of protracted negotiations between the interested parties, agreement was eventually reached on apportionment of the available funds. Having reached a situation where the law implemented a right, but exercisable only through the medium of a collecting society, a number of collecting societies thereupon claimed a share of the moneys arising from the lump-sum payment.

In November 1975 it was decided to apportion the lump sum in the following approximate shares — about $^2/_3$ to LRS-Word (WORT), about 20 % to LRS-Science, some 10 % to LRS-Arts and 2.5 % to GEMA. There is an obvious danger of a multiplicity of claimants where a law introducing a form of public lending right specifies the medium of a collecting society without nominating which one it is to be. The Public Lending Right Act 1979 of the United Kingdom has avoided any difficulty in this direction by introducing the concept of the Registrar with his own staff to collect and distribute.

So far as its interest is concerned, LRS-Word has established a form of writers' fund, and makes a contribution of a type which can be related to the employer's contribution either to the State pension scheme or to a private life insurance policy. This is for writers who derive at least half of their income from freelance literary activity. A proportion of the remainder of the funds which LRS-Word receives goes into a social fund to assist needy authors, and the balance is distributed on an individual basis.

A kind of sampling procedure is employed to allow the society to establish the extent of lending. Libraries of varying sizes and situations are resorted to, and the necessary details processed. At least 20,000 authors in addition to some 7000 translators are covered, and the libraries are nominated by the German Library Association. The libraries selected are changed from year to year to provide a regular and typical pattern for the sample. So far as the funds distributed by LRS-Word are concerned, there is an element of participation by publishers in the proportion distributed to individuals.

Because it deals with matters on a basis of copyright, the Federal Republic of Germany regards itself as having to meet its convention obligations in respect of foreign authors whose works are publicly lent within its territory. In a situation where the right is only established in a small minority of countries, and generally in a form which is more a subsidy than a right, the participation of foreign authors is not at this stage practical; indeed it may be excluded by the relevant domestic legislation. In *The Author* (Winter 1979, p. 158), the General Secretary of the Society of Authors in London, David Machin, states that the German society WORT is already holding money earned by British authors under the German public lending right system, so that in the Federal Republic of Germany at least the problems have not proved insuperable.

In the Netherlands there is no law as such which grants to authors a right to remuneration in respect of the lending of their works by libraries. There was a campaign for remuneration in the nature of a public lending right, which resulted in a limited grant being made from the budget of the Ministry of Culture for the first time in 1971. Initially experimental, this payment has nevertheless continued from year to year on a rather *ex gratia* basis. The grant is made to the controlling literary fund, which in turn distributes the amount available among Dutch literary writers in relation to the number of copies of their works purchased by the authority representing the public libraries.

The scheme is confined only to authors of works in the category of "belles lettres," and thus scientific, technical and works in the nature of textbooks are excluded. Moreover, the amount available for distribution is small in comparison with the sums made available elsewhere in Europe, and it is confined to Dutch authors only. But the situation in the Netherlands does tend to point up sharply both the

advantages and the weaknesses of the majority of schemes this far introduced to compensate authors for library lendings of their works.

It is of course of immediate financial advantage to literary men and women to receive some payment for library loans; however in some cases the payments are pitifully small, and in others the amounts are to a great extent channeled centrally to those authors who are in the worst financial circumstances. It may be that the reluctance of governments to introduce a full legal right in the nature of copyright reflects their fears about the destination of the funds made available, and the sources from which they could be drawn, but some of the schemes which were said to have been introduced on an experimental basis are beginning to harden into permanence.

Governments do not wish to undermine free library systems by imposing a charge on the borrower, and it seems unlikely that public lending right schemes will ever be widely introduced based on this principle. The only alternative therefore is that governments themselves provide the funds, which means inevitably that a grant or subsidy is being paid, and the question which follows is as to how this money is to be divided up.

When the funds come directly from the central government of any State, and the money made available outside the ordinary laws of copyright in that State, then the State can readily keep control of the manner in which that money is divided. It can ensure that a limit is placed on the amount which any author can receive, and can even ensure that authors are excluded altogether from direct receipts, or that only certain categories of works are to benefit. Above all, the State can ensure that no reciprocal payments are made to foreign nationals who might otherwise qualify.

Whether it is in the long-term interests of copyright owners for this practice to become widespread remains to be seen; there must be some danger that this so-called socio-economic approach could be seen as more desirable for governments than the established copyright system.

It must be hoped that a right of this nature will soon be introduced in such a number of States that some form of reciprocity becomes possible. Clearly no State is anxious to see funds earned within its territories pass almost entirely overseas, but as the principle of reciprocity becomes more widespread, so the fear of this should greatly diminish. It may be that the time is not far distant where considerable advantage might be derived from calling a diplomatic convention to at the least explore the possibilities of controlling laws governing public lending, either by means of a new international convention or by introducing it to an existing convention.

The Intellectual Property Aspects of Folklore Protection [1]

Marie NIEDZIELSKA *

I. Having been proclaimed "national heritage year" by Unesco, 1980 has been a year particularly favorable to all types of action for the protection of our heritage from the past. The lore of the people, better known as "folklore," combines with other elements to make up this inheritance. The need to protect folklore, which is an essential element of national culture, is not recent. Work is going on under the auspices of WIPO and Unesco on the drafting of a model law for the protection of folklore. As the work is now in progress, it seems appropriate to outline some thoughts that come to mind concerning the problem of folklore protection.

Some doubt already appears when it comes to defining the subject matter of protection, as the terminology for the type of phenomena embodied in the concept of folklore, or folk art, is far from being consistent. What we have to do above all is reconstruct the meaning of concepts such as "folklore" and "folk art" from scientific premises. "Folklore" was used for the first time in 1846 by the British archaeologist W. J. Thomson, editor of the review *Notes and Queries*; to him it had the strict sense of "knowledge of the people." It was adopted thereafter in practically all languages to define and encompass the entire subject area conveyed by the terms "knowledge of the people" and "culture of the people."

In the majority of countries, however, the term "folklore" has taken on a broader meaning in the mass media and everyday language, at the same time retaining its restricted meaning for ethnographers. Indeed the usual meaning of the word "folklore" now has to do with the entire artistic production of a

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[1] This study considers the problem of folklore protection within the limits of European countries' experience of it. In view of this restriction of the area of study, there are a number of folklore phenomena and situations created by their protection on a world scale that are not covered.

people. Ethnographers, on the other hand, respect scientific tradition and use the term to designate folk art as expressed in words (tales, histories, legends, proverbs), in music (songs), in movement (dancing) and even in ritual acts (including acts of worship and liturgies). Folklore is passed on by word of mouth, from memory or visually, from generation to generation within a specific social group which is at once its user and carrier. Sometimes intellectual level is added as a supplementary criterion, as it is also a question of preserving the non-professional character of all these creations.

Parallel to this stricter acceptation of folklore there is the concept of "folk art." Folk art comprises all works of "plastic" art created in materials as different as wood, coal, stone, iron, paper, fabric or pottery. Thus it encompasses various artistic forms such as sculpture, structural or decorative carpentry, all kinds of painting, whether on glass, paper, everyday objects (chests, dressers) or walls, wrought iron, paper cutouts, artistic pottery, tapestry, embroidery and costumery.

Folk art is thus different from folklore in that it is embodied in material objects, and thus remains a relatively durable phenomenon whereas folklore, being passed on from memory, is of a more ephemeral character, and is more liable to undergo constant modification. Folk art in this sense conveys itself to the onlooker without the direct intervention of the artist, and yet at the same time remains more personal, as its subject matter is generally the result of individual work. In the majority of cases the artist can be identified, as his name or at least his initials will have been marked on the material he used for the making of the work.

In our opinion, the processes for the continuation and development of these two artistic concepts, folklore and folk art, are also different in character. Folklore, in the narrow sense mentioned above, is so to speak a closed book, the elements of which it is made up being in most cases merely reproductions of forms that have long become crystallized. The actual forms may of course undergo some modification or correction, and yet the changes made in the course of reproduction are generally not interventions of a creative nature which would constitute the production of a new work. On the other hand, authentic folk art not only lasts but also develops continually through the work of those who, while copying old models, nevertheless continue to be genuine creators at work on their material, which they shape according to their own conceptions, because, as Professor Desbois so rightly puts it, "la qualité d'auteur [appartient à celui qui] . . ., selon l'expression vulgaire, 'a mis la main à la pâte'." [2] It may sometimes be difficult to draw the line between creation and interpretation in every case, but generally the demarcation is quite clear.

The ethnographers rightly point out, however, that this distinction between folklore and folk art in any case does not allow us to disregard the elements common to both. The links between works of "plastic" art and folklore are above all apparent in all ceremonies and practices of religious or merely traditional character, such as wedding ceremonies. It seems nevertheless that the distinction between folklore in the strict sense and popular art in the sense suggested above is necessary in order to define the area of legal protection of each of the two phenomena: the choice of means of protection could never be the same in both cases, and should be adapted to the subject matter that has to be protected.

Let us start our reflections by presenting the problem of the protection of folk art. Here too a distinction has to be made between what are called folk-art monuments (old statues of saints, products of artistic crafts, sculptures or engravings) and modern folk art, where the works are the expression of the individuality of folk artists, and of their originality in the way they see reality and give it artistic form. Examples of this are woven work, ornamental objects in the broad sense of the term, objects of workship, etc. This then is no longer really folk art in the traditional sense of the word, neither is it amateurism or "art naïf." It is merely a modern folk art which is appearing before us and is developing continuously in the ever-renewed forms of folk creation (for instance, for some time there has been a growing trend towards the use of polychromy in sculpture).

This distinction between the works that make up our cultural legacy from the past and those that form part of modern national culture is clearly discernible in the field of folk art, which also presupposes different purposes and means of legal protection.

As for the protection of this cultural legacy from the past, which is embodied in which we would call art monuments, emphasis should be placed mainly on preserving them in their unaltered state and on the prevention of any abuse or illegal transposition of their properties. The protection of modern folk art, on the other hand, should consist above all in guaranteeing the rights of folk artists and assuring them of assistance and support.

The protection of folk-art monuments is to a large extent provided by legislative measures that impose controls on the sale of this type of work of art and on the transfer of it and other cultural property from one country to another. Of these measures, we would mention that following two: *(a)* the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, of November 14, 1970; *(b)* the Convention for the Protection of the World Cul-

[2] Desbois (Henri). *Le Droit d'auteur en France*, Paris 1966, p. 67.

tural and Natural Heritage, adopted in Paris on November 16, 1972, by the General Conference of Unesco. As for the protection of modern folk art, the most appropriate way of providing it is by copyright. The 1952 Polish Law on Copyright states in essence that

> Copyright shall subsist in every literary, scientific or artistic work, in whatever form (Article 1).

According to the Polish Law, which moreover is no different in this respect from other laws, there is no doubt but that the original works of folk artists of identifiable authenticity enjoy copyright protection in the same way as other works.

These works, and the copyright in them, may be the subject of transactions; it goes without saying, however, that the sale of the physical object embodying the work of folk art does not in any way constitute transfer of the copyright, which remains vested in the creator except where otherwise provided by written agreement. Folk artists have the right to sell their products without the agreement of any other person, and to agree on prices themselves with the purchaser.

In order to protect the interests of artists and assure them of special assistance, the Polish Association of Folk Creators was set up in 1968. The main purpose of the Association (as specified in its statutes) is to cultivate folk tradition in all areas of art, literature and folklore, to popularize that tradition in its most striking and representative forms of expression, and to further the artistic level of such manifestations in order to ensure their continuation; it also aims to ensure the protection of folk artists.

Before we go on to present the problem of the protection of folklore, understood as being a creation involving words and music, further differentiations should be made, on the basis of the conclusions of the ethnographers, in order to distinguish "folklore" from what could be called "folklorism."

This distinction stems from the fact that traditional folk culture, which was closely tied up with the life of a given social class, namely, the people, being an interpretation of the surrounding world and at the same time a reflection of the relations of that class with that world, has for all practical purposes become — historically speaking — the past. And yet the natural continuation of folk culture is apparent in the emergence of a uniform modern national culture that is common to all social classes. The cultural manifestations of folk tradition are present in the life of modern societies, and not only thanks to the conscious maintenance of authentic folklore, such as orchestras or folklore singing and dancing groups, which often enjoy the support of various cultural institutions. Folk culture is also present in modern life in the form of what is sometimes called "folklorism." This consists in the use of elements of folklore either to recreate them in a similar form but in a setting different from their natural one, or to build up an artistic form more or less remote from the model from which they have been borrowed. "Applied folklore" is therefore something secondary and detached from its original environment. It appears only in special circumstances, where it serves as entertainment or satisfies local, national or regional patriotism, or alternatively when its purpose is to call forth specific aesthetic sensations (as in the use of folklore elements in professional music). Folklorism is thus a movement, or rather a social trend, the purpose of which is to propagate folklore works and exploit them outside the environment to which they belong. We would mention in passing that the phenomenon is present as much in the field of "folklore" in the strict sense as in that of folk art (an example of this being the use of folk art traditions in industrial design).

The disclosure of works of folklore outside their normal environment calls for a certain number of processes. These consist either in the discovery and classification of works of folklore (after annotation and commentary), or in their adaptation or arrangement.

The purpose of the above considerations was to organize our field of investigation and draw as precise a picture as possible of the artistic subject matter to be given protection. I do of course realize that the distinction between folklore and "folklorism" and the distinction that follows from that between works of folklore and works "akin to folklore" is somewhat inaccurate: the disclosure of works akin to folklore is always a sort of propagation of folklore as such, in the same way as the disclosure of a parody to some extent also publicizes the original work.

And yet, without making these distinctions, it would seem difficult to specify the aims of legal protection and to find adequate means of affording it. When looking for such means, the first thing we should do is ask what possibilities are available in copyright.

II. The interest shown in folklore by copyright doctrine is relatively recent, and the credit for it goes to the countries of Africa, which were starting to worry about the growing tendency to exploit the exotic in general and the rhythms, dances and three-dimensional arts of the peoples of Africa in particular; they noted that the use of technical contrivances to record the cultural heritage of any ethnic group made uncontrolled exploitation possible.

It was indeed on the initiative of the countries of Africa that a first international meeting was organized under the auspices of BIRPI and Unesco on the legal problems associated with folklore. This meeting, which was held in Brazzaville in 1963, brought together delegates from certain countries of Africa and

international experts who, with the assistance of representatives of the international organizations, studied the specific problems relating to copyright in Africa.

The first country that fell into line with the conclusions of the Brazzaville meeting (later, in Geneva in 1964 and in Tunis in 1965) and introduced national protection for folklore and works inspired by folklore was Tunisia. The new Tunisian Law relating to Literary and Artistic Property, promulgated on February 14, 1966, states in its Article 6 that folklore constitutes a part of the national heritage, and that its exploitation with gainful intent by persons other than those representing public national organizations requires an authorization from the Department in charge of Cultural Affairs. The consent of the Ministry is also required in the case of total or partial assignment of the copyright in works inspired by folklore. The latter are understood to be works composed with the aid of elements borrowed from the cultural heritage of Tunisia and perpetuated by tradition.

The problem of protecting folklore by copyright was one of those that caused the most discussion at the Stockholm Diplomatic Conference (June 11 to July 14, 1967), which was convened to revise and complete the Berne Convention of September 9, 1886, on the Protection of Literary and Artistic Works. The difficulties proved considerable, however, and the solution eventually worked out shows that the signatories of the Convention wanted to avoid adopting a unambiguous opinion. Article 15(4)*(a)* of the Convention as revised at Stockholm confines itself to stating that, in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Berne Union, the possibility exists of designating the competent bodies which would represent the interests of the presumed author and would be authorized to protect his interests in other countries of the Union. The designation of such a body is a matter for the legislation of the countries of the Union.

The purpose of including this provision in the Convention — as it transpired in the course of the discussion prior to the adoption of the Stockholm text — was indeed the protection of folklore, and yet it is significant that the provision itself does not contain any mention of folklore. Developing countries were satisfied by paragraph (4) of the Article mentioned, but the difficulties that had to be overcome in order to translate the agreed principle into reality are still apparent. This state of affairs is due to the attitude taken by the legislation of the majority of the countries of the Berne Union.

Only a few of the copyright laws in force in specific countries contain provisions governing the legal status of folklore directly, and only then in what is usually a fragmentary fashion. The principle adopted in the majority of European countries is that only collections or compilations of works of folk art can be given protection: moreover, the compiler only enjoys copyright in so far as the writing, selection or arrangement of the works of folk art reflect the characteristics of an individual and independent creation.

Article 9 of the 1952 Polish Law on Copyright seems to be fairly representative of this group of laws; this is why we have chosen to devote some attention to it here, on the assumption that it will provide an approximate picture of the state of folklore protection in the majority of laws. According to Article 9 of the 1952 Law (hereinafter referred to as "the Law"),

> Authors of collections of old manuscripts, folk songs, melodies, proverbs, fables, tales and other productions of folk art, as well as authors of chrestomathies, anthologies and annotated editions, shall be entitled to copyright if such works are of a creative nature, particularly with regard to the assembling, arrangement, or selection of texts.

This provision is therefore complementary to the provisions written into Article 1 of the Law; it states the principle that publication is also eligible for copyright. This type of activity, which manifests itself in work of a formal nature, can be applied not only to works whose legal term of protection has not yet expired, but also to those which, for reasons of time, no longer enjoy copyright protection.

And yet is should not be concluded that Article 9 of the Law deprives the distinction mentioned earlier of all sense. Indeed, if the collection contains works that are the subject matter of copyright belonging to another person, its publication can only take place with the agreement of the author of those works (or his successor in title), except in the case of anthologies however.

The situation is different in the case of works published during the author's lifetime whose term of protection has already expired or whose author is unknown. The author of a compilation or selection of such works can then disclose his work without risking the accusation of infringement of the copyright of a third party. Of course he only enjoys protection in respect of the elements of which he himself is the author. In no event could he acquire exclusive rights in relation to the actual works that he has merely compiled.

When considering the problem of the protection of folklore by copyright, we obviously cannot confine ourselves to questions that concern collections and compilations alone. As we pointed out, interest in folklore can take two forms. The discovery and classification of works of folklore more often than not take the form of collections, anthologies, selected texts, etc., but their exploitation sometimes also presupposes arrangement or interpretation; this is the general rule if works are disclosed outside their cultural area of origin. In many cases, both sorts of activity are closely linked; and yet it is impossible to

ignore the difference between, for instance, the work done by the maker of a collection of works of folk music and that done by the arranger of the same music.

The work of the author of a collection or a compiler consists above all in collecting and arranging works chosen according to a prearranged principle. The result of this is a work with more documentary than artistic character. This is why it is sometimes considered that such an activity does not warrant the grant of copyright to the author of the collection, but only neighboring rights (cf., for instance, Article 70 of the Copyright Act of the Federal Republic of Germany, enacted in 1965, concerning the right that may be claimed for all sorts of scientific arrangements of works and texts that do not enjoy copyright protection). The situation is different when someone publishes a hitherto unpublished work which a particular set of circumstances has brought into his possession. Certain legislations treat such discoveries as posthumous works, which means that copyright is attributed to the person who discovers the work or publishes it (cf. in this connection Article 71 of the Copyright Act of the Federal Republic of Germany which, for a term of ten years from the time of publication, confers on the publisher a right neighboring on copyright, with *erga omnes* effectiveness, concerning the first edition of hitherto unpublished works not covered by copyright). Such legislative arrangements thus allow the authors of collections to claim rights not only in the publication as a whole, but also in any work forming part of publication.

Beyond any doubt, the type of activity that we have just mentioned may be regarded as socially useful, inasmuch as it contributes to the safeguarding of works of folklore. Such highly commendable work should be rewarded by the grant of legal protection to the persons who undertake it. Legal protection should not however go so far as to cause a risk of folklore being monopolized by those who discover or collect folklore works.

The above considerations also relate to a certain extent to the arrangement, interpretation or adaptation of works of folklore.

As we have already pointed out, "folklorism" has become a European or even world phenomenon. It is clear however that it takes on specific forms within each national culture. As for Polish national culture, the first manifestation of "folklorism" already occurred during the Romantic period, when the country's national revival was intended to be associated with a return to folk culture. It was precisely this folk culture, which was considered supremely Polish and Slavic, that was to preside over the rebirth of national culture after the loss of sovereignty. Folklore at this time was the source of inspiration of the great poets, many of whom, like Mickiewicz, linked part of their work directly to it. Chopin himself had recourse to folk melodies when composing some of his piano works, especially the mazurkas. Elements of folk culture also characterized the work of artists during later periods, in the field of both literature (J. Kasprowicz, W. Reymont, S. Wyspiański and many others) and architecture (S. Witkiewicz) and also certain three-dimensional arts, particularly the applied arts (Z. Stryjeńska, W. Skoczylas). Thus folklore was reflected in artistic creation — as indeed it always has been — and was frequently the basis for universally significant and profoundly humanistic works.

From the copyright point of view, a distinction should be made between works inspired by folklore and works that are adapted from other works. Unlike all sorts of transformations or adaptations, the disclosure of "inspired" works, in other words those for which another work provided no more than the creative stimulus, does not require any authorization on the part of the author of the original or his successors in title (cf. Article 3(4) of the Law).

This distinction can also be validly applied in the area that interests us here: the criteria could never be the same for evaluating creative activity inspired by folklore and creative activity that involves the transformation, adaptation or arrangement of specific works of folklore. Arrangement, which as we know consists in giving a particular artistic form to a work already in existence, is at the same time an activity capable of producing a new work, although in essence the result usually remains a transformation of the arranged work. According to copyright, such transposition constitutes the individual subject matter for protection. In the area that concerns us here a paradox results therefrom, as the arrangement of works of folklore by a national of another country can enjoy copyright protection in the very country in which the folklore originated.

In the light of these considerations, it could be wondered whether works that are a transformation of folklore could not claim special status within copyright, by reference to the regime of "derived" works. As we know, the exercise of the author's rights depends in that case on the authorization given by the author of the original work, who thereby consents to the popularization of the transformation. It seems, however, that this conception could in fact never be realized for want of any party entitled to original copyright. Certainly the role could be given to the State Treasury as "heir" to this cultural estate; the effect of that would be that folklore would have to be recognized as immaterial property belonging to the State.

However, one could never, in our opinion, allow a conception granting the State Treasury copyright in this cultural heritage, even if it were by virtue of the statute of limitations. In view of the fact that these works have never been protected by copyright, there would be no justification for treating them now as an

escheated heritage. The suggestion was in fact made in copyright doctrine that certain fees should be levied for the popularization of works whose term of protection had expired *(domaine public payant)*; but the institution is treated as a tax law institution, with nothing in common with either civil law in general or copyright in particular.[3] In fact it is quite simply a form of taxation of certain kinds of commercial activity the carrying on of which is subject to no other restriction.

Let us now leave aside speculation on the possibility of resorting to this kind of legal measure, and for the time being consider a specific question, namely, whether folklore in its "raw" state can be made the subject matter of legal protection by copyright.

III. Folklore differs from other forms of popular expression by reason of elements such as its oldness, its survival within a definite community and its perfect harmonization with that community's way of living; it is moreover absorbed by that community to such an extent that the works themselves gradually become a common cultural heritage, and the names of the creators are forgotten. The effect of this is that the creation of folklore works cannot, as a rule, be ascribed to any definite person, any more than it can be situated precisely in time and place. An argument that is sometimes put forward against the protection of folklore works themselves is that they do not meet the prior condition of copyright protection, namely, that of their being "fixed," or made durable. In the great majority of cases, works of folklore are passed on from generation to generation by word of mouth, without ever being fixed. It has been very rightly observed that folklore suffers from an inherent contradiction: while its actual existence is solely for the duration of each performance, it does exist and last — despite its ephemeral character — in the collective consciousness and memory of a people, ethnic community or tribe.

In Poland, the essential condition for a work to enjoy copyright protection, according to Article 1 of the Law, is for it to be given a form whereby it can be perceived. Only cinematographic and choreographic works have to be "fixed" in the form of scenarios, drawings or photographs in order to enjoy copyright protection (cf. Article 1.2(4) of the Law). With the exception of those two cases, therefore, there is nothing to prevent copyright protecton from being available also for works that are "established" in the course of a public performance. It follows from this that folklore, despite its being never "stabilized" in the form of a durable recording, can justifiably claim copyright protection (except for choreographic works, of course).

We consider it more difficult to resolve the problem of the doubt that appears whenever one tries to determine the origin of works of folklore. Such attempts more often than not result in identification of the mere geographical origin of the works. The failure of efforts to follow the path all the way back to the creators of works of folklore leads to a situation in which many consider that folklore has no author at all, and is in some way a spontaneous folk creation. This opinion does not stand up under critical examination, however, either in copyright or in ethnographic doctrine. Cultural phenomena are generally speaking individual creations, even if they have undergone modification and have been absorbed by a community to the extent of becoming its own cultural property. There are in fact limits to the "collectivization" of creative activity: the making of a judgment, and the combining in a single act of the design and planning of the whole, can indeed only be the work of a single thinking being, which no creative group could ever replace. It seems therefore that all speculation on ways of devising principles for the protection of folklore by copyright should start from the premise that folklore is the work of an anonymous author — or several — belonging to a definite community, which latter has adopted the work to the extent of absorbing it and making it into an anonymous work.

In the search for a conception of folklore protection by copyright, it should nevertheless be borne in mind that any work enjoying that protection may — within the limits laid down by law — be the subject of what is called public use (cf. Article 18 to 23 of the Law), without there being any talk even of the use of the works as stimulus for the creation of new works (Article 3(4) of the Law).

This margin allowed for the free use of the works of others is still wider in the case of creations whose term of copyright has already expired. As we know, after expiry of the period laid down by law (which as a rule starts on the date of the creator's death), copyright ends, which means that any person may disclose the work. Where the death of the creator cannot be used as a reference to determine the start and end of the term of copyright, the date of publication is the deciding factor. Among other things this concerns anonymous works, for which the Polish Law on Copyright provides a special way of calculating the term of protection, precisely taking the date of publication of the work as the starting date (cf. Article 26(ii) of the Law).

In view of the fact that works of folklore are anonymous, the question arises whether this principle can be applied to them. It seems that the answer will have to be negative. Frist, it has to be borne in mind

[3] Recht (Pierre). *Le Droit d'Auteur, une nouvelle forme de propriété.* Paris 1969, p. 266; Mouchet (Carlos), "Problems of the 'domaine public payant'," *Copyright*, 1970, p. 197.

that, in applying by analogy the principle concerning anonymous works, whose term of protection starts on the date of their publication, one inevitably neglects all unpublished works of folklore. Furthermore, the Law concerns "anonymously published" works which are by no means the same thing as anonymous works. The first are works whose creators have kept their names secret but can be identified. The other are works whose creators are not known at all. Moreover, when regarding published works of folklore as anonymously published works, one would have to recognize the State Treasury as the owner of the copyright in the works themselves, since the person who collects or publishes such works has rights only in the elements constituting his personal creation. This conception gives rise to any number of objections, as we mentioned earlier. Taking all these considerations into account, we should come out both against the recognition of works of folklore as being *res nullius* and against the view according to which they are the property of the State by virtue of the mere fact of having been found under circumstances which make any search for an owner pointless.

Using the same terminology, folklore should rather be placed among the phenomena regarded as *res omnium communes*, in other words as "things" that cannot be appropriated by anybody. However, as Professor J. M. Mousseron so aptly remarked in his reflections on the possibility of know-how being appropriable, "the character of non-appropriable property stems not from the actual nature of the subject matter concerned, or any inherent unsuitedness to the role of object of a property right, but quite simply from the very state of our positive law. . . It could thus be argued that some property which, at a given time in the history of law, was not appropriable at all, has become so through reasons of expediency having induced law to improve its technique in respect of them." [4] Thus, from a *de lege ferenda* point of view the problem is still open.

IV. The fact of our deciding that folklore is a form of property that does not properly belong to anyone, and cannot — at least under current laws — become the object of an exclusive right in favor of anyone, does not mean that we should not look for other means of legal protection capable of producing the desired result.

It was not by chance that we mentioned know-how protection a moment ago, as it is precisely in the industrial property field that we should look for the institution that could under certain circumstances serve as a prototype for folklore protection. It would seem that, without actually disregarding all the differences that subsist, we could hazard this comparison inasmuch as the law we need for the protection of folklore has to fulfill a role comparable to that played by the provisions on unfair competition in industrial property.

The essence of the objections that have been made to this idea of folklore protection being equivalent to unfair competition action is that "the defect lies in the concept of competition." What in fact we have to do is recognize that folklore has to be protected, regardless of whether its exploitation could be considered an act of competition, in other words even where the country of origin has not itself undertaken the exploitation of its cultural heritage.[5] It seems however that these objections can — to a certain extent — be set aside if, as French case law in particular has clearly shown, the concept of unfair competition were broadened to include that of parasitic action, which would stem from the same principle but would not be limited by the existence of actual competitive relations between the parties.[6] According to this conception, parasitic activity is present "when goods or other property are marketed that are 'identical' reproductions of preexisting property, which may not be protected by a privative intellectual property right . . . in so far as a risk of confusion exists or someone lacking imagination has preferred to appropriate the effort and work of another." [7]

It is quite clear that, if this proposition were accepted, acts regarded as parasitic would have to be defined. What has to be condemned is indeed only the misuse of folklore (the mention of false sources or the lack of any such mention, violation of the integrity of the work or any other action that might be prejudicial to it, such as alteration of the meaning of the work, ridiculing of the values embodied in it, etc.).

This puts one in mind of the idea of *mutatis mutandis* application — as a supplementary guarantee — of the well-known institution of appellations of origin, which is governed in Poland by Article 4 of the 1926 Law on Unfair Competition. Appellation of origin protection consists, as we know, in introducing a collective right to the exclusive use of the names of products originating in a specific geographical territory if the individual character of the product is embodied in the appellation. The Law allows the claim of such rights not only by the producers of the products whose appeal is due to their coming from such a geographical region and not another, but also by their common representative and by any person

[4] Mousseron (J. M.). "Le Know How." 5e rencontre de propriété industrielle, Montpellier 1975. Rapport introductif, p. 65.

[5] Carbonnier (J.). "Study of the international regulation of the 'intellectual property' aspects of folklore protection." Document UNESCO/WIPO/WG. 1/FOLK/3.

[6] Perot-Morel (M. A.). *La protection des marques notoires. Evolution interne et internationale des droits de propriété industrielle*. Grenoble 1979, pp. 96-97.

[7] Desjeux (X.). "La reproduction ou copie 'servile' et l'action en concurrence déloyale dans la jurisprudence française", *La semaine juridique*, 1976, pp. 237-240.

entrusted with the sale of the products. Actions restraining the illegal use of the appellation of origin, and actions for redress on behalf of the injured parties, amount to a sort of *actio popularis* instituted in the interest of all those concerned.

We consider that the task of affording comparable protection to works of folklore could be entrusted to authors' societies, which, as a rule, do not confine themselves to protecting the interests of particular creators, but also extend protection to certain elements of cultural property.

For folk art, one might also consider the possibility of recourse to another known institution, namely, that of the collective mark, which could be granted to groups of regional craftsmen; the application of that institution would not only make it possible to have the origin of the product mentioned, but also to guarantee certain of its qualities. In the case of the products of folk craft, marking with a collective mark would guarantee that the goods marketed corresponded to the general standard of production for a given area and would thereby contribute to the maintenance of their reputation with clients.

The above survey of known legal institutions leads us to the conclusion that fulfillment of the requirements for the extensive protection of folklore at the intellectual property level is practically impossible by recourse to currently existing legal instruments. It would seem, as always when it is a question of protecting subject matter that is common property, that the measures for protection under civil law have to be paralleled by application of the provisions of administrative law; this is the case, for instance, of countries that have introduced special laws for the protection of the environment.

The discussion on the methods and means of affording legal protection to folklore continues. No one seems to question the need for protection. Folklore, that testimony of the past without which the present would have no future, is a frail structure indeed, and it therefore has to be preserved and assured of a special place in contemporary civilization. The task is a difficult one, as it is not a question of making a "Skansen" out of folklore: the measures for its protection should not create barriers that would hamper the popularization of folklore or cancel out the benefits of copyright in works based on folklore.

(WIPO translation)

International Activities

International Federation of Library Associations and Institutions (IFLA)

46th General Conference

(Manila, August 18 to 23, 1980)

The International Federation of Library Associations and Institutions (IFLA) held its 46th General Conference in Manila from August 18 to 23, 1980, at the invitation of the Philippines National Library, the Philippine Library Associations and the Unesco National Commission of the Philippines.

Over 1200 delegates from 52 countries participated in the Conference. WIPO was invited as an observer and was represented by Miss Mireille Zarb, Chief of Library at the International Bureau.

The opening session took place in the presence of President Ferdinand E. Marcos and Mrs. Imelda Romualdez-Marcos, First Lady, Minister of Human Settlement and Governor, Metro Manila.

The delegates from the associations and groups of librarians present in Manila variously attended some 165 meetings covering all areas of librarianship. Among the problems dealt with were those of copyright, which are becoming ever more acute for the librarian.

IFLA is to devote funds to two studies, one concerning the copyright problems deriving from bibliographic descriptions and the other to identify the copyright problems arising in libraries for the blind.

The Conference also heard a report drawn up for the public libraries with the title: "Copyright and Library — a Scandinavian Approach" by Mr. P. Kirkegaard, Director of the Copenhagen Royal School of Librarianship and Honorary President of IFLA, and a "Study on a Model Law for Legal Deposit," carried out on behalf of the National Libraries by Mr. J. Lunn, which contained certain related aspects of copyright.

At the various meetings at Manila, the librarians were given information on the activities pursued by WIPO in relation to copyright, and a document drawn up by the International Bureau was distributed to them. They also raised during the discussions other items such as copyright and computers, publication of long extracts of a work amounting to practically the whole of the work itself, fair use, the effect of photocopies on the sale of periodicals, the new legislation of the United States of America, particularly section 108 of the Copyright Act, infringements of copyright in audiovisual material, reproduction of foreign books for teaching purposes in the developing countries, the implications of copyright on the "universal availability of publications."

Following on these discussions, numerous motions and resolutions were transmitted to the Executive Council of IFLA for action.

The 47th General Conference of IFLA will be held in Leipzig from August 17 to 23, 1981.

Calendar

WIPO Meetings

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

1980

December 1 to 3 (Lomé) — Development Cooperation — African Regional Seminar on Copyright (convened jointly with Unesco)

December 4 and 5 (Lomé) — Development Cooperation — African Regional Seminar on Neighboring Rights (convened jointly with ILO and Unesco)

December 1 to 5 (Paris) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information — Subgroup on IPC Class G 01, etc.

December 8 to 12 (Geneva) — International Patent Classification (IPC) — Committee of Experts

December 15 to 19 (Paris) — Berne Union — Committee of Governmental Experts on Problems Arising from the Use of Computers (convened jointly with Unesco)

1981

January 12 to 20 (Geneva) — Budapest Union (Microorganisms) — Assembly (Extraordinary Session)

January 19 to 30 (Geneva) — Permanent Committee for Patent Information (PCPI) — Working Group on Search Information

February 9 to 13 (Paris) — Working Group on Intellectual Property Aspects of Folklore Protection (convened jointly with Unesco)

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

Non-Governmental Organizations

1981

International Federation of Musicians (FIM)
Executive Committee — January 12 to 15 (Zurich)

International Literary and Artistic Association (ALAI)
Executive Committee — January 23 (Paris)

Interamerican Copyright Institute (IIDA)
Second Continental Conference on Copyright — April 6 to 10 (Buenos Aires)

International Confederation of Societies of Authors and Composers (CISAC)
Legal and Legislation Committee — April 27 to 29 (Sidney)

International Federation of Translators (FIT)
Congress — May 6 to 13 (Warsaw)

Internationale Gesellschaft für Urheberrecht (INTERGU)
Congress — September 21 to 25 (Ottawa)