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Contents

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World Intellectual Property Organization

Joint Unesco/WIPO Consultative Committee on the Access by Developing Countries to Works Protected by Copyright

First Ordinary Session

(Paris, September 2 to 4, 1981)

Report

Introduction

1. In accordance with the work plan for resolution 5/01 adopted by the General Conference of Unesco at its twenty-first session and with WIPO's program for 1981, the first ordinary session of the Joint Unesco/WIPO Consultative Committee, hereinafter called " the Committee, " was held at Unesco Headquarters from September 2 to 4, 1981.

2. The object of the meeting was to make recommendations to the Directors General of Unesco and WIPO on the preparation and implementation of the activities of the Joint International Unesco/WIPO Service for Access by Developing Countries to Works Protected by Copyright, hereinafter called " the Joint Service. "

3. The members of the Committee are personalities from the world of education, publishing or copyright and neighboring rights, appointed in a personal capacity by the Directors General of Unesco and WIPO in conformity with Article III, paragraph 1, of the Committee's Statutes. Their names and titles are shown in the list of participants.

4. In reply to invitations sent to them, the session was also attended by observers from 18 Member States of Unesco and WIPO, from four intergovernmental organizations, from eight international non-governmental organizations particularly interested in the questions examined, as well as from the French National Copyright Information Center. The list of participants is annexed to this report.

5. The proceedings were opened on behalf of the Director-General of Unesco by the Assistant Director-General for Co-operation for Development and External Relations, who welcomed the participants and emphasized the importance of the meeting for guiding the future activities of the Joint Service and of Unesco in the sphere of access to knowledge.

6. The Director General of WIPO associated himself with the welcome extended by the representative of the Director-General of Unesco and expressed the hope that the Committee's work would proceed in an atmosphere of understanding and international cooperation and thus help to iron out the obstacles that could arise when developing countries wish to obtain works protected by copyright.

7. The participants then elected their officers by acclamation.

Chairman:

Mr. D.N. Malhotra
Managing Director
Hind Pocket Books Private, Ltd.
(India)

Vice-Chairman:

Mr. Miguel Angel Emery
Lawyer, Legal Adviser on Copyright and Neighboring Rights
(Argentina)

Rapporteur:

Mr. Mamadou Seck
Managing Director of Nouvelles éditions africaines
(Senegal)

8. In taking the chairmanship, Mr. Malhotra congratulated the Directors General of Unesco and WIPO for having proposed to their governing bodies the establishment of the Joint Service. He expressed the hope that this Service, with the Committee's help, could achieve concrete results and take all practical measures to permit the developing countries to obtain transfers of copyright.

9. The meeting then discussed the various items on the agenda, referring to the documents prepared by the Committee's Secretariat (documents UNESCO/WIPO/CCC/I/1, 2, 3 and 4).

Adoption of the Rules of Procedure

10. An observer having pointed out that Rule 8 of the Draft Rules of Procedure gives only English and French as working languages of the Committee, it was decided to keep to the use of those two languages at present in view of the linguistic abilities of the Committee's present members and of the fact that the addition of languages other than the working languages of the Secretariats would have considerable implications. The possibility was not ruled out, however, that certain important documents originating from the Committee might be distributed in languages other than English and French.

11. Following the discussion of that item on the agenda, the Rules of Procedure were adopted without change.

General outlook on the preparation and implementation of the activities of the Joint International Unesco/WIPO Service

General discussion

12. Consideration of document UNESCO/WIPO/CCC/I/3 " Plan of Action for 1981/1982 of the Joint International Unesco/WIPO Service for Access by Developing Countries to Works Protected by Copyright " was preceded by a general discussion that brought out the importance to the developing countries of access to works protected by copyright and the need for arrangements whereby those countries could use foreign intellectual works on preferential terms.

13. It was also recognized, even though publishers in the producer countries faced different problems from those in the developing countries, that all publishers pursued the same aim, namely to act as agents to promote national culture and endogenous cultural development. In so doing, they should show realism and determination with a view to cooperating in order to guarantee the interests of all concerned.

14. Accordingly, certain participants questioned whether there would be any point in drawing up complete lists of all protected works for which the copyright owners were willing to grant voluntary licenses, on special conditions, to nationals of developing countries, considering the hundreds of thousands of titles published in developed countries and the practical desirability of having developing countries themselves determine their educational and cultural needs.

15. The discussion also revealed that the Secretariat would have to provide some indications as to the reasons which had led Unesco's International Copyright Information Centre to ask publishers for such lists, in order to dispel an element of apprehension which was apparent during this general debate.

16. In this connection, it was recalled that the countries themselves identified their needs, either by replying to the questionnaires prepared by the Secretariat or by requesting the assistance of a consultant for the purpose. Furthermore, even after those needs had been determined, certain countries did not have enough personnel at their disposal to proceed with the selection of the foreign works they required. For that reason the publishers' catalogues which were made available to them were of little use in most cases. At the request of a number of developing countries, the Unesco Secretariat, with the help of the International Publishers Association, had asked for and obtained from certain publishers in producer countries lists of protected works to be placed at the disposal of developing countries.

17. It should be stressed that these lists were faithfully reproduced, along with their accompanying indications pertaining to conditions of cession, and circulated to all Member States to enable the latter to approach the copyright owners concerned and establish contact with them directly.

18. Lastly, reference was made to the 1971 revision of the Universal Copyright Convention and the Berne Convention with a view to granting certain advantages to the developing countries, including compulsory licenses for translation and reproduction. It was noted with satisfaction that the compulsory licensing system had not been used, a fact which demonstrated once again that copyright as such did not constitute an impediment to the circulation of works of the mind, and that the role of the Joint Service was further to facilitate access by developing countries to protected works.

19. It was noted that the long-term goal was to establish, in the developing countries, appropriate graphic industries by enabling them to produce locally such works as they required, rather than importing them, as the latter practice resulted in heavy outflows of foreign-exchange holdings. For this purpose, the Committee considered that the publishers of industrialized countries should facilitate the acquisition, on preferential terms, of reproduction and translation rights on works in their catalogues to publishers in developing countries needing those works for the cultural promotion of their countries.

20. It was acknowledged that generally direct contact between the parties concerned usually tended to facilitate negotiations in an atmosphere of mutual understanding of the interests at stake.

21. After the general discussion, the Committee turned to a more detailed consideration of the various points contained in document UNESCO/WIPO/CCC/I/3, under the following headings:

Collection and dissemination of data

22. With regard to the activities being contemplated in this area, the Committee expressed its agreement with the proposed procedures in connection with the inventory of the needs of developing countries. However, the Committee suggested that it would be desirable for the Education Sector and the Copyright Division of Unesco to assist the competent authorities in any developing countries wishing to secure assistance in identifying, by subject, their specific needs in the field of education. The same should apply to the fields of science, technology and culture. The needs thus identified could be transmitted to national copyright information centers or any other appropriate body in the country of which the copyright owner was a national.

23. With regard to access to sources of information, the Committee expressed its agreement on the activities to be undertaken in connection with this as well. The Committee also asked that a report on work completed to date be prepared and made available to it at its next session.

24. With respect to the drawing up and dissemination of lists of protected works for which the foreign copyright owners (particularly owners of translation and reproduction rights) are willing to grant clearances — on special conditions — in respect of such rights to nationals of developing countries, the Committee suggested that it would be desirable to continue preparing such lists. It was acknowledged that they would necessarily be limitative in nature, and the Committee suggested that this point should be clearly indicated on the lists themselves, along with indications of sources of further information; this would make possible the judicious use of the documentation in question.

Establishment of recommended standards

25. The Committee expressed its agreement with the proposals submitted to it by the Secretariats, particularly with regard to the preparation of a brochure constituting a *vade mecum* on the different steps to be taken in order to secure authorization to use a protected foreign work and the preparation of model contracts, in addition to those already existing, with a view to enlarging the scope of this documentation.

26. As far as the transfer of reproduction rights is concerned, it was noted that special attention should be given to the duration of such transfers. In particular, it should be possible to modify the special conditions granted to developing countries if the circumstances underlying the terms of the contract change in one way or the other.

Arrangements and machinery designed to operate realistic economic conditions

27. Despite the apprehensions expressed regarding the difficulties of undertaking a fact-finding study in this field, the Committee nonetheless considered that such a study would prove very useful. In this connection, it requested that the proposed study should supply information concerning the fees payable in developed countries so as to facilitate assessment of whether favorable terms are granted to developing countries in practice. It also considered that the study should give priority attention to the factors likely to influence the determination of copyright fees, while the question of illustrative schedule of scales would be studied later.

28. The royalties and/or fees payable vary greatly with the type of book, and its potential sale. Very broadly, the following general considerations should be borne in mind:

(1) *For reproductions*

(a) For a high-level technical, scientific or professional book, with a small sale (say less than 1,000 copies), an agreed fee could be paid for printing a single edition of 1,000 copies or less.

(b) For a book with a larger sale (e.g. a school textbook) a royalty on copies sold would be necessary, with possibly an advance payment.

(2) *For translations*

The same considerations apply as for reproductions, except that the cost of translating would need to be taken into account. So the fees and royalties would be lower than for reproductions.

The exact royalties or fees will need to be negotiated with the copyright owner of the book on an *ad hoc* basis.

29. With regard to the preparation of an illustrative schedule of scales, it was felt that the chief aim should be to inform the parties concerned of current practices. Appropriate surveys might be conducted for the information of the Committee.

30. It was noted by some participants that the law in some developed countries would not permit participation in such surveys and in any case there is such diversity in that field that it would be difficult to establish common standards.

31. As regards the procedures for transferring copyright royalties, authorities in the developing countries would be well advised to devote special attention to this matter when it comes to establishing the relevant priorities so as to secure privileged terms because of their specific cultural value and of their relative economic impact.

Procedures for settling disputes between users of works in developing countries and foreign copyright owners

32. The Committee was of the view that in the event of a dispute the parties concerned should exhaust all possible amicable expedients, including arbitration, before resorting to strictly legal proceedings.

33. It was noted that the International Publishers Association has established an arbitration system which might prove useful in settling disputes between parties.

34. It was recommended that an overall study of the topic be undertaken and reported at the next session.

Intellectual, technical and financial assistance to developing countries

35. The Committee considered that this aspect of the Joint Service's activities was of the greatest practical interest to the developing countries and it expressed its agreement with the measures contemplated.

36. With reference to the setting up and administering of funds or other machinery enabling the payment of royalties owed by users in developing countries to copyright owners in foreign countries, the Committee was informed by document UNESCO/WIPO/CCC/I/4 of the establishment, within the framework of the Unesco International Fund for the Promotion of Culture, of a Committee for International Copyright Funds (COFIDA).

37. Several members of the Committee welcomed this felicitous initiative and the advantages it would offer to developing countries.

38. Regarding the functioning of COFIDA, two Committee members expressed their concerns on the incidence that COFIDA could have if it placed itself as an intermediary among the interested parties, particularly if such an intervention could influence the selection of titles and the fixing of the copyright royalties. The explanations given to appease these apprehensions cleared up any ambiguity and showed COFIDA to be a financial body offering its support to applicants who had previously negotiated the conditions for acquiring rights in works already selected. Two Committee members regretted that anyone could have thought that COFIDA would act as an intermediary.

Other business

39. In view of the interest aroused by the proposed plan of activities the question arose as to whether a meeting of the Committee should be held every two years or else at closer intervals, since the latter arrangement would facilitate a more sustained effort on the part of all the persons involved in the activities of the Joint Service.

40. It was also suggested that an information sheet be distributed among the members of the Committee and interested organizations in order to publicize the activities of the Joint Service between sessions of the Committee.

41. It was understood, however, that these two proposals would only be taken into account if the budgetary allocations of Unesco and WIPO so permitted.

42. In addition, the Committee noted the desirability of encouraging any action designed to promote the establishment of national copyright information centers or similar bodies in order to forge closer links among those interested in gaining access to works protected by copyright.

43. Finally, the Committee noted with satisfaction that in some countries publishers' associations were offering developing countries training facilities in the field of publishing.

Adoption of the report and closing of the session

44. This report was unanimously adopted by the Committee.

45. After the usual thanks, the Chairman declared the session closed.

List of Participants

I. Members of the Committee

M. Salah Abada
Directeur général
Office national du droit d'auteur, Algeria

Mr. Clive Bradley
Chief Executive
The Publishers Association, United Kingdom
Absent, replaced for the present session by Mr. Alan Hill, Heinemann Educational Books Ltd., United Kingdom

S. Exc. le Dr Chams El-Dine El-Wakil
Ambassadeur
Délégué permanent de la République arabe d'Egypte auprès de l'Unesco

M. Miguel Angel Emery
Avocat, Conseiller juridique en matière de droit d'auteur et de droits voisins, Argentina

Mr. Townsend Hoopes
President
Association of American Publishers, United States of America
Absent, replaced for the present session by Mr. Leo Albert, Chairman, Prentice-Hall International, United States of America

Mr. D. N. Malhotra
Managing Director
Hind Pocket Books Private Ltd., India

M. Jean-Jacques Nathan
Président Directeur général
Editions Fernand Nathan, France

Mr. Modupe Oduyoye
Manager, Daystar Press
Former President, Nigerian Publishers Association, Nigeria

Mrs. Natalia I. Razina
Chief of Section, Legal Department
The Copyright Agency of the USSR (VAAP), Soviet Union

M. Mamadou Seck
Directeur des Nouvelles éditions africaines, Senegal

M. Juan Manuel Terán Contreras
Dirección General del Derecho de Autor, Mexico
Absent

Mr. Heng Wang
Head, Copyright Study Group
The Publishers Association of China, China

II. Observers

(a) States

Argentina: G. Jacovella. **Australia:** A. Siwicki. **Brazil:** J.C. Costa Netto. **Canada:** B. Couchman. **Colombia:** N. El Khazen Akl. **Cuba:** A. Muñoz. **Dominican Republic:** F. Suro Franco. **German Democratic Republic:** B. Haid. **Indonesia:** A. Zaini. **Italy:** G. Catalini. **Mexico:** J.E. Peñaloza. **Nigeria:** B.O. Odugbose. **Peru:** J.R. Ribeyro. **Republic of Korea:** Duk Sang Chang. **Sweden:** A.H. Olsson. **United Kingdom:** D. Carter. **United States of America:** H. Hardy; M. Keplinger. **Venezuela:** N. Suárez.

(b) Intergovernmental Organizations

African Intellectual Property Organization (OAPI): D. Ekani. **Agency for Cultural and Technical Cooperation (ACCT):** A. Gerald. **Arab Educational, Cultural and Scientific Organization (ALECSO):** A. Derradji. **African Cultural Institute (ICA):** E.O. Apronti.

(c) International Non-Governmental Organizations

International Confederation of Societies of Authors and Composers (CISAC): M. Pickering. **International Copyright Society (INTERGU):** G. Halla. **International Council of Museums (ICOM):** F. Chatelain. **International Federation of Producers of Phonograms and Videograms (IFPI):** P. Chesnais. **International Film and Television Council (CICT):** E. Flipo; G. Diatchenko. **International Literary and Artistic Association (ALAI):** A. Françon; W. Duchemin. **International Publishers Association (IPA):** J.A. Koutchoumow. **International Writers Guild (IWG):** E. Le Bris.

(d) National Copyright Information Center

France: J.-P. Blesbois; J.-F. Cavanagh.

III. Secretariat

World Intellectual Property Organization (WIPO)

A. Bogsch *(Director General)*; C. Masouyé *(Director, Public Information and Copyright Department)*.

United Nations Educational, Scientific and Cultural Organization (UNESCO)

D. Najman *(Assistant Director-General, Sector of Co-operation for Development and External Relations)*; M.-C. Dock *(Director, Copyright Division)*; A. Amri *(Copyright Division)*.

ZIMBABWE

Accession to the WIPO Convention

The Government of the Republic of Zimbabwe deposited, on September 29, 1981, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO).

The Convention Establishing the World Intellectual Property Organization will enter into force, with respect to the Republic of Zimbabwe, three months after the date of deposit of its instrument of accession, that is, on December 29, 1981.

WIPO Notification No. 117, of September 30, 1981.

Berne Union

ZIMBABWE

Declaration of Succession to the Berne Convention for the Protection of Literary and Artistic Works, as revised at Rome on June 2, 1928

Notification of the Swiss Government to the Governments of Union Countries

In an instrument of September 18, 1981, received by the Government of the Swiss Confederation on the 29th of the same month, the Minister for Foreign Affairs of the Republic of Zimbabwe declared that his Government considers itself bound by the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Rome on June 2, 1928. This communication is based on a declaration of application to Southern Rhodesia, given formally by the United Kingdom of Great Britain and Northern Ireland, with effect from August 31, 1931.

Consequently, the Republic of Zimbabwe is considered as a party to the said Convention since April 18, 1980, date of its accession to independence.

Berne, October 15, 1981.

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

The Government of the Republic of Zimbabwe deposited, on September 29, 1981, 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, with a declaration to the effect that its accession shall not apply to Articles 1 to 21 and the Appendix.

Articles 22 to 38 of the Paris Act (1971) of the said Convention will enter into force, with respect to the Republic of Zimbabwe, three months after the date of the notification, that is, on December 30, 1981.

Berne Notification No. 102, of September 30, 1981.

National Legislation

GREECE

I

Law No. 1064/1980

on the ratification of the Legislative Act of the President of the Republic, dated March 31, 1980, concerning the procedure applicable to the production and sale by third parties of tracings, copies, imitations, etc., of any work forming part of the property of State museums and archaeological sites, and certain other provisions

(of July 15, 1980) *

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Article 4

Measures for the protection of products of literary and artistic property

(1) The producers, importers or exporters of carriers of sounds or images or of sounds and images shall be obliged to apply for the written authorization of the specific legal entity provided for in paragraph (2) of this Article prior to the commencement of the production, import or export operation. In the case of recorded carriers, once the production, import or export operation has ended, and before the carriers are distributed in any way, the aforementioned persons, and also all those who in any way distribute the carriers concerned to the public, shall be obliged to affix on the sleeve or other container of the products concerned, or on each element of those products, a special stamp, control label or other properly validated distinctive sign, certifying the legality of the said carriers of sounds or images or of sounds and images.

(2) The authorization provided for in paragraph (1) of this Article shall be given by a specific, non-profit-making legal entity under civil law, the constitution, composition and operation of which shall be determined by a Decree issued within three months following the publication of this Law. That legal entity shall be constituted on the one hand by the relevant non-profit-making civil bodies concerned with the management of the rights of beneficiaries of literary and artistic property which shall have been recognized by Presidential Decree, and on the other hand by non-profit-making legal entities representing the producers, importers, exporters or sellers of recorded carriers of sounds or images or of sounds and images as provided for in paragraph (1). The aforementioned authorization may in particular be given within the framework of model contracts, the text of which shall have been negotiated between the aforementioned legal entity and the organizations representing the producers, importers or exporters of unrecorded carriers of sounds or images or of sounds and images. Any disputes arising between the entity granting the authorization and the persons applying for it that relate to the grant of that authorization and also to the conditions under which the authorization is to be granted shall be settled by a special arbitration body, the competence and operation of which shall be determined by a Decree issued within three months following the publication of this Law.

The cost of producing, distributing and affixing the special stamp, control label or other distinctive sign shall be borne by the beneficiaries of the present measure who form part of the aforementioned specific legal entity, which shall be further responsible for the distribution and affixing of the special stamps, control labels or other distinctive signs concerned, in accordance with the provisions of an Order of the Minister for Culture and Science published in the Official Gazette.

(3) The same Ministerial Order shall specify the form, type and content of the special stamp, control label or other distinctive sign, the means and other circumstances of its distribution, validation and affixing on the aforementioned imported or exported pro-

* Published in the Government Gazette of the Hellenic Republic, No. 167, of July 22, 1980. — English translation by WIPO on the basis of an unofficial French translation.

ducts, any other details necessary for the application of the provisions of this Article, and the date on which that Ministerial Order shall enter into force.

(4) Any infringement of the provisions concerning unrecorded carriers of sounds or images or of sounds and images shall be punished by imprisonment for at least one year and by a fine of 300 000 to 800 000 drachmas. In the case of infringement of the provisions concerning recorded carriers, the same penalties shall be doubled for the producers, importers or exporters, and reduced by half for the distributors.

(5) The committing of acts provided for in the foregoing paragraph, habitually or through other persons, shall be an aggravating circumstance which shall cause the incommutability of the penalties imposed and, for the businesses concerned, the removal or refusal to grant or refusal to renew any permits that may be required for the exercise of their activities. In the case of a second or subsequent offense, the minimum penalties provided for in the foregoing paragraph shall be doubled.

(6) In the case of infringement of the foregoing paragraph by persons having any connection either with the exercise of the professional activity of a private or public enterprise or with the operation of any service, the persons who, under whatever name or title, manage the enterprise or service concerned, and who are also considered liable under civil law jointly with the infringers, shall, in addition to the legal representative, be liable to the same penalties as the main offender.

(7) The infringement provided for in paragraph (4) of this Article shall be proceeded against *ex officio*. Both the specific legal entity provided for in paragraph (2) of this Article and each of the representatives of the persons forming part of the legal entity concerned shall be regarded as the injured party.

(8) The carriers of sounds or images or of sounds and images that have been distributed pursuant to the provisions at present in force shall be handed over to the specific legal entity provided for in paragraph (2) of this Article within one year following the entry into force of this Law, in order that the provisions of this Article concerning recorded carriers may be applied to them. On expiry of that period, the provisions of this Article shall be applied without exception to all carriers of sounds or images or of sounds and images.

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II

Law No. 1075/1980

on the permanence of the employment of musicians of the State orchestras of Athens and Thessalonica, on the calculation of the royalties payable to Greek playwrights, on the transfer of all jurisdiction for cinema to the Ministry of Culture and Science, on the protection of performers and on job creation in State theaters

(of September 23, 1980) *

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CHAPTER D'

Protection of Performers

Article 10. For the purposes of the application of this Law, the following are considered performers: musicians, actors, singers, choristers, dancers and other persons who perform intellectual works in any way, and also variety or circus artistes.

Article 11. Performers shall have the right to authorize or prohibit the recording, on a material carrier of sounds or images or sounds and images, of their performance, or the use of that performance in any manner, including reproduction and distribution. Any recording that has not been previously authorized in writing is prohibited.

Article 12. (1) As an exception to the rule stated in Article 11, in the specific case of the broadcasting of their performance by the Hellenic Radio and Tele-

* Published in the Government Gazette of the Hellenic Republic, No. 218, of September 25, 1980. Entry into force: September 25, 1980. — English translation by WIPO on the basis of an unofficial French translation.

vision Company or by the Information Service of the Armed Forces, performers shall be entitled to claim from the persons who use the performance, on condition that it has been lawfully recorded on a material carrier of sounds or images or of sounds and images, which carrier has itself been lawfully distributed, and in respect of any public performance of their recorded, broadcast or otherwise transmitted performance, only equitable remuneration, which shall consist of a proportionate share in the proceeds from exploitation of their performance, which share shall further be calculated according to the implications of such uses for the employment of performers.

(2) The rights of performers in relation to the different uses of the performance, and in particular *(a)* subsequent reproduction or distribution of the recorded, broadcast or otherwise transmitted performance, *(b)* transmission of the recorded performance to the public, *(c)* rebroadcasting or retransmission to the public of the broadcast or otherwise transmitted performance and *(d)* the situations referred to in the preceding paragraph, shall be exercised solely by the appropriate management bodies working in a personal and non-profit-making capacity, which shall be either established or recognized by Presidential Decree issued on a proposal by the Ministers of the Government Presidency and for Culture and Science. A similar Decree shall be issued concerning the procedure and criteria for establishment or recognition, including the criterion of the representative character of the bodies concerned, which shall be considered specific legal entities as referred to in Article 4(2) of Law No. 1064/1980 concerning ratification of the Legislative Act of the President of the Republic of March 31, 1980, concerning the procedure applicable to the production and sale by third parties of tracings, copies, imitations, etc., of any work forming part of the property of State museums and archaeological sites, and certain other provisions. The rights concerned shall be exercised by the management bodies only in relation to uses that follow the designation by the performers of a body of their choice, which designation, in the case of a performance by a group, shall be made by the persons specified in the following Article for the purpose of the exercise of those rights.

Article 13. In the case of a live performance by a group, the rights of the performers referred to in Articles 11 and 12(1) shall be exercised by the elected representatives of the group or, if there are none, by the leader of the group.

Article 14. The protection granted by this Law shall last for 50 years, from the end of the year in the course of which either the recording was for the first time made available to the public in a sufficient number of copies, or the recording took place if, during those 50 years, it has not been made so available. After the death of the performers, the said protection shall accrue to their successors in title.

Article 15. The legal limitations imposed on authors in the exercise of their rights, and any rights the effect of which is to compensate for those limitations, shall apply by analogy also to the rights granted to performers by this Law.

Article 16. (1) The rights of performers referred to in Articles 11 and 12(1) may only be transferred to one of the management bodies referred to in Article 12, and only for a specific period, or by donation *inter vivos* or *mortis causa* to the spouse or to one of the successors *ab intestat*. They may be made the subject of licenses for use. The scope of such licenses shall be confined to rights specifically mentioned and uses specifically described in the license agreement, which shall, on pain of nullity, be drawn up in writing.

(2) The conditions on which the aforementioned licenses are granted, which shall specify the extent, purpose, place and duration of exploitation of the performance, the equitable remuneration payable for it, the duration of the said licenses and the right of transfer to third parties may not, on pain of nullity of the grant, be less than the minimum conditions embodied in the model contracts the content of which is established by negotiation between the competent bodies referred to in Article 12 and the licensees.

(3) The provisions of paragraphs (1) and (2) are applicable also to the grant of rights deriving from the employment contracts of performers.

Article 17. Performers have the inalienable right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their performance, which would be prejudicial to their honor or reputation. The duration of these moral rights shall be calculated as in the field of copyright, performance being assimilated for this purpose to the making of a work.

Article 18. (1) Any dispute arising out of the exercise by the bodies referred to in Article 12 of the rights provided for in Articles 12 and 16 shall be settled by the special civil court provided for in Article 4(2) of Law No. 1064/1980. Any dispute arising out of the exercise of other rights shall be settled by application of the procedure referred to in Articles 664 to 676 of the CCP; the ordering of emergency measures is not excluded when the conditions for it are met.

(2) The words " arbitration body " in Article 4(2) of Law No. 1064/1980 are replaced by the words " civil court. " The following sentence is added at the end of the same paragraph:

" Recourse to this court shall be preceded, on pain of its refusal by the said court, by an attempt to

reach an amicable settlement of the dispute by a special body, the constitution, competence and operation of which shall be determined by the Order provided for in the preceding sentence."

Article 19. (1) In the case of national performers, the protection recognized by this Law is granted irrespective of the place in which the performance takes place.

(2) The provisions of this Law shall apply in all circumstances, without regard to any foreign law that might be applicable under private international law.

(3) In the case of foreign performers, where a right to equitable remuneration is granted, Article 4 of the Civil Code shall apply solely subject to reciprocity in practice, which shall be recognized by an Order of the Minister for Culture and Science published in the Official Gazette.

Article 20. (1) Recordings and legal relations that came into being prior to the entry into force of this Law shall be subject to its provisions on expiry of one year following such entry into force. Contracts, whether in writing or not, concluded prior to the entry into force of this Law shall not be affected by it, but transfers of rights effected by virtue of such contracts shall not extend to rights recognized for the first time by this Law, except solely where, and to the extent that, this is dictated by the purpose of the said contracts.

(2) Until such time as the management bodies referred to in Article 12(2) begin to operate, and particularly in cases of reproduction and distribution to the public of material carriers of sounds or images or sounds and images, performers shall also exercise their right to issue authorizations individually. Contracts concluded to this end shall cease to apply as soon as the said bodies begin to operate.

(3) During the first four years following the entry into force of this Law, the Hellenic Radio and Television Company and the Information Service of the Armed Forces shall be subject to the obligations deriving from Article 19(1). This four-year period may be extended once for two years by a decision of the body provided for in Article 4(2) of Law No. 1064/1980, which shall take due account of the financial means of the two parties. For the obligations of the Hellenic Radio and Television Company and the Information Service of the Armed Forces that arise on expiry of that period, the bodies concerned shall make available a sum representing 0.75 % to 1.25 % of the net advertising income of each of them. On expiry of a period of three years after these obligations came into being, this sum may be revised by an Order issued by the competent Ministers.

Article 21. (1) Any person who violates the provisions of Articles 11, 12, 13, 15, 16 and 17 of this Law shall be punished, where other provisions do not provide for a more severe penalty, by imprisonment for at least six months and by a fine of 300,000 to 800,000 drachmas; the provisions of Article 4(5) and (6) of Law No. 1064/1980 shall also apply in such cases.

(2) The prosecution of the infringements specified in the foregoing paragraphs shall take place *ex officio*.

Article 22. For the purposes of the application of this Law, the rights recognized by it to performers shall be considered independent, being unaffected by any other provisions that might regulate rights having the same subject matter or an identical or more extensive content, or by the subsequent fate of those rights determined by contractual means.

CHAPTER E'

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Article 27. This Law shall enter into force on its publication in the Government Gazette.

General Studies

Copyright and Broadcasting in the Asia-Pacific Region

Sonny MENON *

The Asia-Pacific Broadcasting Union (ABU) is a professional association of radio and television organizations in the Asia-Pacific region. The ABU area stretches from Iran in the west to Japan in the east and from the People's Republic of China in the north to New Zealand in the south. It is a non-political, non-governmental organization and it covers by far the largest geographical area of the regional broadcasting Unions. Its membership ranges from the most highly and technologically advanced organizations to unsophisticated and fairly basic radio stations. The nature of its membership also varies. Amongst them, we find commercial organizations, more or less autonomous broadcasting organizations and government broadcasting departments. One of the primary objectives of the ABU, when it was officially established in July 1964, was to provide a forum for broadcasters in the Asia-Pacific region to exchange views, discuss common professional problems and to seek and encourage a wide measure of joint and cooperative activities including the exchange of radio and television programs. It is in this field of program exchange that copyright laws and conventions play a major part.

Radio and television broadcasting is governed by a multiplicity of conventions, laws, agreements and regulations, both domestic and international. Among these are the general international laws and conventions, space law, the principles concerning the rights of man and freedom of information and the free flow of information, the safeguarding of privacy, libel and defamation, and copyright. In addition, broadcasting is also governed by such intangibles as good taste, custom, tradition and convention and the ethics of broadcasting and journalism. The rapid growth of technology in the communication field has brought in its wake new problems or accentuated old ones in a manner not foreseen. Even in the field of copyright protection broadcasters find themselves having to tackle issues that were unthought of when these laws and conventions were drawn up.

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As I mentioned above, one of the major objectives of the ABU when it was set up was to promote the exchange of radio and television programs between member organizations. However, we have not been very successful in implementing this activity because of the question of copyright protection for the material exchanged. Problems of language and presentation were considered capable of being fairly easily overcome — thanks to the technological capabilities of the electronic media and the professional capabilities of broadcasters. In fact, it was this technological capacity of the media that made the question of copyright protection even more urgent.

In a survey carried out last year, the ABU found that out of the twenty-two members who responded six reported that there was no copyright legislation in their country. Furthermore, only a very few of those who do have copyright laws are signatories to an international convention obligating them to protect the copyright of their fellow signatories. The implications of these two facts are easy to see and one can understand the problems faced by members in countries which have copyright legislation to exchange material, especially with those who have no copyright law at all. Only programs that were in the public domain or that were not eligible for copyright protection could be exchanged.

To overcome this problem, the ABU set up a study group on program exchange to consider, among other things, the question of copyright clearance. The possibility of the contributing country paying for the copyright was considered.

It was found that a thirty-minute program, consisting of eight three-minute pieces of copyright material sent to fifteen broadcasting organizations in non-ratifying countries, would cost as much as US$ 1,200 for a radio program and considerably more for a television program. It was not possible for convention-ratifying countries to supply programs because of this cost factor. If the receiving parties were all in signatory countries, the payment by each would be nominal because of the annual lump-sum agreements they would have with their copyright

societies. A further complication arises here because even in convention-ratifying countries there are some which do not have copyright societies.

Even if all of them had copyright societies, the question then arises as to whether these copyright societies have reciprocal business arrangements with each other. A survey was then done on the possibility of setting up a Program Exchange Fund but this came to naught because of the costs involved. Apart from that, even if the copyright fees were paid from whatever source, there was also the question of the legal safeguard against piracy for this material, especially when music was exchanged. It was realized that the governments of countries which had not ratified any of the conventions, even if they had domestic copyright legislation, were not obliged to protect foreign works and this was certainly not welcome to the authors and composers of the material that the ABU would be using. As a result of these findings, the ABU decided that a region-wide exchange was not possible, except with regard to folk music which required no copyright clearance. This exchange has been carried out very successfully amongst our members and encourages us to feel that, if this problem of copyright clearance could be overcome, then more exchanges of programs, especially of copyright works, could take place. Towards this end, the ABU has sought to encourage its members to take steps to approach their governments to elaborate copyright legislation and ratify an international convention. ABU members have not found this easy — particularly as so few of their organizations have legal departments and also because not many of them are fully awake to what copyright is all about.

In 1973, the ABU set up a Study Group 20, later renamed the Copyright Committee, to study the whole question of copyrights and their implications for their members, and to advise members on these matters. We are also looking into the possibility of holding a seminar or workshop specifically for broadcast management in this region, so that we can create an awareness of the need for copyright legislation amongst our members.

Another reason for the need of copyright protection from the broadcasters' viewpoint arises from the surge of technological development in the electronic field. The availability of cheap audio and video cassette recorders in the market has made it very easy for anyone to copy radio and television programs as well as records and other fixations. While one may argue about the intellectual worth of many television and radio programs, one cannot deny their popularity — most especially the popularity of soap operas and entertainment programs. The popularity of these programs has created a lucrative market for the pirates. While this market has not yet been exploited to the extent that the market for pirated phonograms and cinema films has been, some of our members have already suffered to some extent from this. This bodes ill for the broadcast industry in the Asia-Pacific region and worldwide. It could, on the one hand, hamper the growth and development of programming in the region because of the availability of cheap pirated western programs. It could also, as has happened already in one or two cases, bring up a situation where members' programs are pirated and sold to satisfy the needs of citizens from the countries of the said members who only constitute minorities in other countries.

The question of copyright not only concerns the broadcasters in the Asia-Pacific region, but also broadcasters in other regions of the world. At the Third World Conference of Broadcasting Unions, held in Tokyo from February 28 to March 5, 1980, this question was debated in detail and there was a unanimous decision that

> ... the broadcasting Unions should draw the attention of their members in countries which have not yet introduced legislation on copyright to the desirability of making appropriate representations to their national authorities concerning the introduction of such legislation and, in this respect, should draw attention to the Tunis Model Law established in 1976 by a committee of governmental experts as being an appropriate framework for legislation in this context.

This recommendation was endorsed by the ABU General Assembly meeting in Colombo, in September 1980. Since then, the ABU has been seeking through its individual members to obtain action on this recommendation.

As broadcasters committed to program exchange we would also wish that the governments of the Asia-Pacific countries that do have copyright laws should take action to ratify an international convention as this would help to promote a freer exchange of programs and copyright material, both within and amongst the countries of this region as well as between countries in this region and outside it.

Another problem that faces many of the ABU members occurs in countries which have copyright legislation but no copyright collecting associations or societies. Broadcasters, as copyright owners themselves, are very aware of the value of copyright payment to the creators of intellectual property. However, it is both physically and administratively impossible for any broadcasting organization to search out and pay the copyright fees to each individual author or composer whose work it uses. This problem is compounded by the fact that very often it is almost impossible for the broadcasting authorities to trace the individual owner of the copyright and we would wish that countries which have copyright laws should take steps to establish or assist in the establishment of an infrastructure so that broadcasters and other users of copyright material know which organization to approach for copyright clearance.

Finally, I would like to touch on one other area that is of concern to broadcasters — and this concerns protection against the pirating of signals transmitted by satellite. Since 1962, satellite communications have made it possible for the instantaneous transmission worldwide of words and images. Television, in particular, has not been slow to utilize this possibility, as anyone who has watched the Olympic Games on television or a news story of some international event or conference is aware. The use of satellite transmissions, however, is not confined to news and sports only. It can and has been used to transmit worldwide major cultural events and for the Asia-Pacific region, with its wide geographical spread and comparatively poor terrestrial and submarine cable links, it is potentially one of the most promising channels to bring people together and create a world consciousness amongst them. While it is true that satellites are not used amongst the countries of the Asia-Pacific region to the extent that they are in developed countries, there is a need for the law makers in this part of the world to be aware of the situation and of the potential problems that may arise. Technological progress has reached a stage where it is within the capability of anyone with some knowledge of communication engineering to set up a relatively inexpensive earth station capable of receiving and distributing program-carrying satellite signals. In Canada, the existence has been reported of a number of such unlicensed earth stations that have been receiving and distributing satellite signals not meant for such distribution. Under the Radio and Broadcasting Act, the Canadian Federal Government has initiated a number of prosecutions but they apparently only touched the fringe of these activities. A report issued in April 1981 estimated that there were at least a 1,000 such unlicensed earth stations in Canada. In this respect, it is important that countries in the Asia-Pacific region, many of whom are considering the use of direct broadcast domestic satellites and some of whom are even thinking in terms of regional satellite system, should take into account the possibility of unlicensed reception of satellite signals and their subsequent distribution and make provisions in their domestic broadcast and telecommunication laws, as well as in their copyright laws, to protect the various owners of the rights as well as the broadcast and telecommunication authorities. It is also wise at this stage to give consideration to the desirability of entering into the international convention relating to this problem — the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, which was adopted at an international conference convened by WIPO and Unesco in Brussels, in May 1974. Broadcasters in the ABU area had again agreed with their fellow broadcasters in the other regions of the world on the need and value of this convention and agreed to take whatever action was within their powers to get it ratified by their countries.

Broadcasters are constantly faced with one dilemma. On the one hand, as communicators it is their desire to facilitate and increase the free flow of information — be it educational, cultural, artistic or news. On the other hand, they are also aware of the need to protect the rights of the owners or creators of these materials, as they themselves, in one of their roles, are creators of intellectual property.

What we need to achieve is a balance between these two legitimate requirements. Without protection for the creators of intellectual property there would be very little added to the sum of the world's intellectual wealth and there would be little for us broadcasters, together with our fellow communicators in the other media, to disseminate. The world would be a lot poorer if this were to happen.

On the Interpretation of Article 5(2) of the Berne Convention, Taking as an Example the Greek Antipiracy Law of July 15, 1980

Fritz SCHÖNHERR *

I

Greece promulgated a law on July 15, 1980, introducing a new Article 4 into the Law on the procedure to be respected in the fabrication and sale of castings, copies and imitations of any work in the possession of a national museum or of a national archaeological site by third parties. It is referred to hereinafter as the "Antipiracy Law." This Antipiracy Law entered into force on October 22, 1980. Its contents are essentially as follows:

1. Anyone manufacturing, importing or exporting phonograms, videograms or video-phonograms, is required to obtain the written consent of a given legal person before commencing such activity. On completion of such activity, however, before the phonograms, videograms or video-phonograms are made available to the public in any way, both the above persons and any persons who make such mediums available to the public must place upon the medium itself or on its packaging a special stamp, control label or other distinctive sign denoting that the mediums have been lawfully manufactured, imported or exported.

2. The legal person referred to is a civil law entity and must not be profit making. It comprises non-profit-making legal persons representing the copyright owners and the manufacturers, importers, exporters and marketers of such mediums.

3. The details are to be determined by presidential decree.

4. Any disputes concerning the granting of the consent referred to above are to be subject to jurisdiction by a special arbitration court. ** Infringement of the above-mentioned obligation will be prosecuted *ex officio* and, in the case of business people, shall result in the withdrawal of the trading license.

The explanatory report to this draft law essentially points out that so-called cassette piracy has taken on such unforeseeable dimensions, some three-quarters of the entire market concerned, that *effective* measures of control have become necessary.

Greece is a party to the Berne Convention, as revised by the Paris Act.

We shall therefore examine whether the Antipiracy Law is compatible with the Berne Convention.

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** See, however, Law No. 1064/1980, Article 4 as amended by Article 18(2) of Law No. 1075/1980, reproduced above. *(Editor's Note)*

II

1. The Legal Situation under the Berne Convention

The question of the compatibility of the Antipiracy Law with the Paris Act of the Berne Convention can only be seriously posed in respect of a single provision, namely that of the first sentence of Article 5(2). This provision reads as follows in respect of national treatment guaranteed to authors by the Berne Convention:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.

This sentence corresponds, since the 1908 Berlin Revision, word for word with the first sentence of Article 4(2) of earlier Acts.

2. Interpretation of International Treaties in General

When interpreting international treaties we may nowadays base ourselves on a series of rules that can claim considerable authority,[1] namely the Vienna Convention on the Law of Treaties of May 23, 1969.[2] Although this Treaty has not yet entered into force, it does in fact reflect the legal convictions of a large number of States, including Austria.[3] The Convention has consolidated customary international law in large areas. The beginning of Section 3 of Part III, concerning the interpretation of treaties, sets out the principle that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31(1)). It subsequently (Article 31(2)) details what is to be comprised, in addition to the text, including its preamble and annexes, in the context for interpretation:

[1] Cf., for example, Fleischhauer, "Die Wiener Vertragskonferenz," *Jahrbuch für internationales Recht* 15 (1971) 202 (222).

[2] Österreichisches BGBl No. 40/1980; text in English and German, *inter alia*, in *Jahrbuch für internationales Recht* 15 (1971) 714.

[3] They are quoted, for example, (*prior* to ratification by Austria!) in the Austrian explanatory report on the agreement between Austria and the EEC on page 330. As regards their use to interpret the corresponding agreement between the EEC and Switzerland, see also Arioli, "Das zwischenstaaliche Kartell- und Wettbewerbsrecht gemäss Art. 23 ff des Freihandelsabkommens," in Meyer-Marsilius (editor), *Wettbewerb- und Kartellrecht im Freihandelsabkommen Schweiz-EWG* (1974), 35 (36).

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

In addition to the context, Article 31(3) requires to be taken into account:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

The Convention thus places in the forefront the objective method of interpretation. Although subjective grounds for interpretation are not excluded, they quite clearly are of second importance. It is said, for instance, that a special meaning may be given to a term if it is established that the parties so intended (Article 31(4)). Finally, the Convention refers to "supplementary means of interpretation," that is to say the background documentation and circumstances of the conclusion of the treaty. Recourse may be had to them in order to confirm or to determine the meaning of the objective interpretation where the latter leads to an ambiguous, obscure, manifestly absurd or unreasonable result[4] (Article 32).[5]

3. The Personal Viewpoint

1. The question whether a statutory obligation to have copyright authorization administered exclusively by a collecting society is in conflict with Article 5(2) of the Berne Convention has been variously answered in legal writings. For example, Peter, *Das österreichische Urheberrecht* (1954) 299; Mentha, UFITA 19, 156 *et seq.* (157), UFITA 45, 61 *et seq.* (64); Bappert/Wagner, *Internationales Urheberrecht* (1956) Article 4, sidenote 19 and Hubmann, UFITA 48, 22 *et seq.* (36) reply in the affirmative, and Ungern-Sternberg, GRUR Int. 1973, 61 *et seq.* (62 in footnote 2) in the negative. An intermediate solution is advocated — with temperament — by Nordeman/Vinck/Hertin, *Internationales Urheberrecht* (1977), 59, sidenote 7. They hold a *cessio legis* in favor of the collecting society and the obligation to make use of a society's services in the case of exclusive rights to be inadmissible; such obligation in the case of claims for remuneration, however, is considered to be admissible. These varying opinions, which should not and do not have to be dealt with in greater detail here, lead us to make use of the historical method of interpretation in line with Article 32 of the Vienna Convention on the Law of Treaties.

In this respect, it is still Baum, *Berner Konvention, Landesgesetze und Internationales Privatrecht*, GRUR 1932, 921 *et seq.* (923 *et seq.*) that constitutes the basis (thus also Nordemann/Vinck/Hertin, *op. cit.*, 59, sidenote 7). I go along with him here, in some cases even word for word, except that he does not always differentiate clearly enough between the home country of the author and the country of origin and that he equates formal reciprocity with national treatment.

(a) A meeting was held in Berne in 1883 by the Association littéraire internationale to prepare the Berne Convention. The meeting of September 13, 1883, adopted a draft of the Convention, whose Article 1 stipulated that the authors of literary and artistic works were to enjoy in respect of those works published or performed in one of the countries of the Union the same rights in all countries of the Union as those countries' own nationals. The sole condition for obtaining protection was to be to satisfy those formalities that were required by the country of origin.[6]

The Swiss Federal Council drew up a new draft for the Conference of States held in 1884 to prepare the Berne Convention. Under this draft (Article 2), Union protection was to depend on satisfying the formalities *and conditions* laid down by the country of origin.[7]

The German Delegation had various questions to put to the Conference, of which question No. 2 is of interest here. It was worded as follows:

> Is the matter of formalities and conditions to be satisfied by the author to obtain protection under the Convention to be governed by the law of the country to which the author belongs or by that of the country where publication of the work has taken place (country of origin), or again by that of the country where protection is claimed? [8]

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[4] Even clearer in the (Austrian) explanatory report on the Government draft law concerning this Convention (983 of the appendices to the verbatim minutes of the National Council, 14th legislature, 56, my underlining): "In view of the broad term 'context', the traditional methods of interpretation take a back seat. Consultation of the preparatory work, respect of the circumstances attaching to conclusion of the Convention are therefore now only taken into consideration in *second place* as 'supplementary means of interpretation'."

[5] Cf. Wetzl/Rauschnig. *Die Wiener Vertragsrechtskonvention, Materialien zur Entstehung der einzelnen Vorschriften*, documents, Vol. 44 (1978), and, in detail, Köck "Vertragsinterpretation und Vertragsrechtskonvention." For the significance of Arts. 31 and 32 of the Vienna Conventon on the Law of Treaties 1969, Vol. 51 of *Schriften zum Völlkerrecht* (1976).

[6] Actes 1884, 7. [*Editor's Note:* Quotations from the earlier Records (Actes 1884, 1885 and 1896) are reproduced in unofficial English translation.]

[7] Actes 1884, 11.

[8] Actes 1884, 25.

If this question had been answered in line with the final alternative ("or again that of the country where protection is claimed?"), even greater emphasis would have been given to the principle of national treatment that dominates the Berne Convention. In that case, the authors would in any case have only enjoyed the protection for their works published in a Union State that the domestic law afforded to its own nationals. Such authors would therefore have been subject to the same formalities and conditions as the national authors.

The meeting of September 9, 1884, adopted the ruling that protection should be dependent solely on satisfying the formalities and conditions laid down by the law of the country of origin or, in the case of a handwritten or unpublished work, by that of the country to which the author belonged (Article 2(3)).[9]

Thus, in fact, inroads were already made into the principle of national treatment; an author national of a Union country whose work was published for the first time in one of the Union countries was required, in order to enjoy protection, to satisfy the formalities and conditions laid down by the law of that country. A foreigner national of a Union country, on the other hand, was not required to satisfy the formalities and conditions in the Union country in which he claimed protection. He was required merely to comply with the conditions and formalities laid down by the country of origin and enjoyed unconditional protection in those cases where such conditions and formalities were not provided for by the law of the country of origin.

The national of a Union country was therefore sometimes placed in a better position than the national of the State in which he claimed protection.

According to the minutes of the meeting of September 17, 1884, a discussion was held on the principle of protection in each Union country being dependent on satisfying the formalities and conditions of the *country of origin*. The basis for the negotiations was constituted by a report submitted by the Commission. Where this report deals with the matter of formalities and conditions, its author preferred the second of the following two phrases:

" formal and material conditions " and
" formalities and conditions "

and justified his preference on the grounds that

" it seemed to him to encompass all conditions and requirements laid down by the country of origin *to constitute authors' rights.* "[10, 11]

During the discussion on this question, the German Delegate, Geheimer Oberregierungsrat Dr. Meyer, made the following statement:

It is simply a matter of noting that the wording proposed by the German Delegation: *formal and material conditions* has been replaced by the words: *formalities and conditions,* and that the word *formalities* has been taken as a synonym of the term *FORMAL conditions* and comprises, for example, registration, filing, etc.; whereas the expression *conditions,* a synonym, according to us, for the words *MATERIAL conditions,* comprises, for example, completion of the translation within the prescribed time. However, the words *formalities and conditions* comprise everything that has to be complied with to ensure that the author's rights in respect of his work may come into existence (in German: *Voraussetzungen), whilst the effects and consequences of protection*[10] (in German: *Wirkungen), particularly as regards the extent of protection, should remain subject to the principle of national treatment.*[10, 12]

Following these explanations by the German Delegate, the Swiss Delegate, Numa Droz, noted as Chairman:

... that the Conference agrees with Mr. Meyer on the significance of the words formalities and conditions.[10, 12]

At the second Conference of States for the preparation of the Berne Convention in September 1885, the question of " formalities and conditions " provoked no discussions — apart from a passing remark by the German Delegate Reichardt.[13]

At the Conference in September 1886, at the final sitting of which the Berne Convention was signed, no further substantive changes were made nor was the matter under discussion here further referred to.

Article 2(2) was therefore adopted with the following wording:

The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work; ...

(b) If the above provision is read without prejudice, a weak point appears:

Although Article 2(2) makes the affording of protection dependent on satisfying the conditions and formalities of the country of origin, it does not, however, set out the fact that it is sufficient to satisfy these conditions and formalities and that therefore the conditions and formalities of the State in which protection is claimed do not have to be complied with.

This question was already the subject of considerable discussion shortly after the adoption of the Berne Convention. The British point of view was that, in view of the principle of national treatment, those conditions and formalities also had to be complied with which applied to the State's own nationals. The Bureau in Berne, on the other hand, was of the opinion — in my view the correct one and also justified by the background history of the Berne Convention — that protection under the Convention depended simply on complying with the conditions and formalities of the country of origin.[14]

9 Actes 1884, 78.
10 Underlining by the author.
11 Actes 1884, 42.
12 Actes 1884, 43.
13 Actes 1885, 34 bottom.
14 *Le Droit d'auteur* 1889, 25, 35 and 47.

(c) The preparation for the Paris Conference for the revision of the Berne Convention in 1896 was carried out by the Bureau in Berne in conjunction with the French Government. The proposals put to this Conference took into account the implications of the difference in the interpretation of Article 2(2) and the following amended wording was put forward:

> Authors shall enjoy these rights without any conditions and formalities than those laid down by the legislation of the country of origin of the work . . .[15]

In the negotiations at the Paris Conference the view that solely the conditions and formalities of the State of origin were to be met did not as such meet any opposition. The British Delegation stated, however, that its Government was prevented from agreeing at that moment to an amendment to Article 2(2) on account of certain of its colonies, despite the fact that the British law itself recognized the principle set out in Article 2(2).[16]

Article 2(2) therefore remained unchanged; nevertheless, the Commission drafting the report expressed the fact that it maintained the considerations that had led to the proposals for amendment to Article 2(2).[17]

Consequently, Article 2(2) was interpreted in a "Declaration" to the effect that protection in the Union countries depended "*solely*" on the accomplishment of the conditions and formalities in the country of origin.[18]

(d) The 1908 Berlin Conference finally dispensed with the requirement for "conditions and formalities." A proposal made by the German Government was intended to break the link between the legal situation in the country of origin and the protection afforded the author in the various Union countries. It was approved by all delegates and resulted in the following wording for Article 4(2) of the Berne Convention:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(e) The Berne Convention Revision Conferences in Rome (1928) and in Brussels (1948) left Article 4(2) unchanged.

The 1967 Stockholm Diplomatic Conference rearranged the legal material in Articles 4 to 6. It did not alter Article 4(2) of the Brussels Act[19] but simply gave it a new number, that is to say Article 5. Lastly, the 1971 Revision Conference in Paris left Articles 1 to 20 completely unchanged, including of course Article 5(2).

(f) The background history to Article 5(2) of the Berne Convention therefore shows quite clearly that all those formalities are permissible that do not make either the creation or the existence of copyright as such dependent on their being satisfied. All other formalities are not permissible.

2. The granting of authorization to use a work in a way reserved to the author, whether by assignment or transfer of the copyright itself or by the granting of licenses as provided for in the Copyright Act of the Federal Republic of Germany (Article 31) and the Austrian Copyright Act (Article 26), is the author's foremost possibility of exploitation. The question of which possibilities of exploitation the author has, however, is a matter of the scope of protection. Whether and to what degree such possibilities of exploitation exist depends therefore solely on national legislation, without it being possible to deduce incompatibility with Article 5(2) of the Berne Convention.[20] Thus, formal requirements in respect of contracts between authors and persons entitled to exploit a work are not concerned by the prohibition of formalities under Article 5(2). This point of view has meanwhile been generally accepted.[21] Likewise, the much debated question[18] whether the provisions of national laws stipulating that copyright itself was non-transferable constituted a breach of the prohibition of formalities has quite rightly been answered in the negative for these same reasons.[20]

Anyone not yet convinced by this argument derived from the nature of the system should also note that the formal requirements contained in national copyright laws (e.g. written form in Article 31(1) of the French Copyright Law and in Article 40(1) of the Copyright Act of the Federal Republic of Germany) have not as yet been referred to as in conflict with the Convention by any member State in the competent bodies of the Berne Union; this constitutes a subsequent practice of the member States in the application of the treaty which establishes the agreement of the parties regarding its interpretation within the meaning of Article 31(3)(b) of the Vienna Convention of May 1969.

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15 Actes 1896, 37.
16 Actes 1896, 111.
17 Actes 1896, 160.
18 Actes 1896, 225. For the significance and interpretation of this Declaration, cf. Actes 1896, 180.

19 Cf. Records 1967, 1137 and, in the German-language literature, Dittrich, *Die Stockholmer Fassung der Berner Übereinkunft*, Vol. 40 of the publications of INTERGU 22, in footnote 15.
20 Baum, *op. cit.*, 930, righthand column.
21 See in particular *Guide to the Berne Convention* (1978) 33, sidenote 5; Ladas, *the International Protection of Literary and Artistic Property* (1938) I 273 *et seq.*; Nordemann/Vinck/Hertin, *Internationales Urheberrecht*, *op. cit.*, sidenote 7.

3. The considerations set out at 1. and 2. above therefore show that the provision of the Antipiracy Law, according to which *written* consent must be obtained, does *not* conflict with Article 5(2) of the Berne Convention.

4. The ruling adopted by the Antipiracy Law *does not require the author* to satisfy a formality with the legal implication that, should he not satisfy it, his right will either not come into existence or will subsequently disappear, but imposes such requirement on the person who *manufactures, imports or exports a copy*. For this reason alone the ruling does not conflict with Article 5(2) of the Berne Convention.

5. This outcome is further supported by the following teleological argument: as stated in the Preamble to the Berne Convention, its purpose is to achieve the most effective (and uniform) possible protection for authors. The Antipiracy Law however is — as explicitly and appropriately stated in the explanatory report on the draft law — to give *protection* to the authors. Even if the measures provided for in the Antipiracy Law would seem, in view of *their wording*, to fall within the formalities under Article 5(2) of the Berne Convention, a corrective interpretation would be appropriate stating that *such* formalities were in the interest of the authors and therefore to be regarded as in compliance with the Convention.[22]

6. The classical home of formalities is the United States of America. The following arguments are put forward to support the maintenance of formalities:

> The copyright notice serves four principal functions:
>
> (1) it has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;
>
> (2) it informs the public as to whether a particular work is copyrighted;
>
> (3) it identifies the copyright owner; and
>
> (4) it shows the date of publication.[23]

The measures laid down in the Antipiracy Law correspond to none of the purposes stated here. This also confirms the result to which this paper has come.

(WIPO translation)

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[22] Likewise, in a different context, Nordemann/Vinck/Hertin, *op. cit.*, 59, sidenote 7.

[23] Report No. 94-1476 by Kastenmeier, 143; cf. also *Copyright Law Division Study No. 17* and Nimmer, *On Copyright* (1978) II 7 to 9.

International Activities

Council of Europe

Committee of Experts on Legal Protection in the Media Field

(Strasbourg, September 29 to October 2, 1981)

The Committee of Experts on Legal Protection in the Media Field, hereinafter referred to as "the Committee," met at the headquarters of the Council of Europe in Strasbourg from September 29 to October 2, 1981.

Experts designated by the Governments of the following 15 States, members of the Council of Europe, took part in the work of the Committee: Austria, Belgium, Denmark, France, Germany (Federal Republic of), Greece, Ireland, Italy, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, United Kingdom. WIPO was represented in an observer capacity by Mr. Claude Masouyé, Director, Public Information and Copyright Department. The International Labour Office (ILO), Unesco and the Commission of the European Communities, as well as a number of interested international non-governmental organizations, had also delegated observers.

The meeting was opened on behalf of the Secretary General of the Council of Europe by Mr. F. W. Hondius, Deputy to the Director of Human Rights, who provided the Secretariat of the Committee.

The Committee reelected its outgoing officers, i.e.: Chairman, Mr. André Kerever, Conseiller d'Etat, Paris (France); Vice-Chairmen, Prof. Robert Dittrich, Ministerialrat, Federal Ministry of Justice, Vienna (Austria), and Mr. Willi Weincke, Commissioner, Ministry of Cultural Affairs, Copenhagen (Denmark).

Before discussing the questions on its agenda, the Committee was informed of some modifications which took place within the Council of Europe. By a decision of the Committee of Ministers, the former Ad hoc Committee on the mass media has been transformed into a Steering Committee, thereby giving it the status of a permanent body. Furthermore, the Secretary General of the Council of Europe has transferred to the Directorate of Human Rights the responsibility for the Secretariat to the Steering Committee and its subordinate Committees, including the Committee of Experts on Legal Protection in the Media Field.

The Committee devoted a great part of its discussions to consideration of legal problems related to television. As far as distribution by cable of television programs is concerned, various statements were made to the Committee on the principal developments which had taken place recently in this field in certain countries, either in legislation or in court decisions. The Committee was also informed of the present state of negotiations going on between international non-governmental organizations, including in particular ways and means of collective administration of the rights concerned. Lastly, the Committee took note of the work at present under way by WIPO, jointly with ILO and Unesco, with a view to the drafting of guidelines for legislators. In conclusion, the Committee decided to keep in its work program the consideration of the legal problems raised by the distribution by cable of television programs.

As far as direct satellite broadcasts are concerned, the Committee, after having been informed of the declaration of principles made by the organizations representing authors and broadcasters with regard to the law applicable to direct broadcast operations, agreed to follow the development of this question and asked its Secretariat to collect all information on the subject.

As regards the advisability of revising the European Agreement on the Protection of Television Broadcasts concluded in 1960 and its Protocols, the majority of the Committee considered it desirable to extend by five years the date beyond which a State could not remain party to the Agreement if it was not party to the Rome Convention, i.e., to fix as deadline January 1, 1990, instead of the present deadline which is January 1, 1985.

The Committee then proceeded to an exchange of views and informations on legal questions relating to radio, including in particular the advisability of a European agreement on alien amateur radio operators and the problems raised by the "Citizens' Band" radio. The Committee asked its Secretariat to continue to collect any information useful to the purpose.

Lastly, the Committee considered some questions related to the copyright field and more particularly to sound and audiovisual reproduction for private use, reprographic reproduction, payment to creators of works for library loans (public lending right). This gave rise only to an exchange of views and informations.

Furthermore, the Committee devoted a part of its discussions to a possible extension of its terms of reference. The said terms would not any more be limited to the adequate legal protection of the rights of those who contribute to the content of the media but would also include the giving of legal advice in relation to the operation of media in its broader meaning, i.e., not only in the field of radio and television. The result would be a modification of the title of the Committee which would then be called " Committee of Legal Experts in the Media Field, " with specific terms of reference established on that basis and determined by the competent bodies of the Council of Europe.

The next meeting of the Committee will take place in October 1982, on a date that will be specified in due course.

Book Reviews

Copyright Revision Studies. Consumer and Corporate Affairs Canada, Ottawa, 1981.

As already noted in this review, * a series of studies prepared by various authors for the Research and International Affairs Branch, Bureau of Corporate Affairs, Department of Consumer and Corporate Affairs of Canada, was started in 1980. Five more studies have so far been published this year. Their major conclusions are briefly summarized below.

Term of Copyright Protection in Canada: Present and Proposed, by Barry Torno.

The general term of protection proposed for literary, artistic, musical and dramatic works is life plus 50 years, i.e., the present term is to be retained. Photographs should be protected for the same term as other artistic works. The term proposed for sound recordings and films is either 50 years after the year of first publication or, subject to some qualifications, 75 years after the year of creation—whichever term is first to expire.

As for the moral rights, it is recommended that they should expire upon the death of the author.

An Economic Analysis of a Performers' Right, by Steven Globerman and Mitchell P. Rothman.

The authors consider that the implementation of a performers' right could indirectly contribute to a decrease in expected returns to producers, thereby encouraging a decrease in the output of cultural performances. As for the social goal of increasing performers' incomes, they state that, while the average income from performing of all performers is low, full-time performers earn incomes that are equal to or above the average for the working population. On balance, the study finds no compelling evidence of social benefits from implementation of a performers' right.

Crown Copyright in Canada: a Legacy of Confusion, by Barry Torno.

It is recommended that the circumscribed Crown immunity should be abolished and that works of the Crown should be subject to the provisions of the Act, save for special provisions as to ownership and term of copyright. As regards the term of protection, the author suggests that all Crown works, both in right of the federal and provincial governments, should: *(a)* if they are literary works, be protected either for 50 years after the first publication or 75 years after their creation—whichever term is first to expire; *(b)* if they are works other than literary, be provided with the general terms of protection for works of the same class.

Copyright, Competition and Canadian Culture: The Impact of Alternative Copyright Act Import Provisions on the Book Publishing and Sound Recording Industries, by Ake G. Blomqvist and Chin Lim.

This report considers the economic impact on the Canadian book and sound recording industries of alternative legislative provisions relating to the importation into Canada of works covered by copyright. The authors consider that, if competition in the Canadian market is sufficiently strong, prices with import restrictions might be no higher than they would be without them. In this connection, they mention that imported books constitute about 75 percent of the value of all books in Canada.

The overall conclusion is that Copyright Act import restrictions represent a costly and ineffective way of attaining Canada's cultural objectives (i.e., creating additional financial incentives for Canadian authors and recording artists to engage in creative activity). A policy of directly subsidizing royalty payments by publishers and record companies to Canadian authors and performers represents, according to the authors of the study, a far less costly method of achieving these objectives.

* See *Copyright*, September 1981, p. 262.

The Impact of Reprography on the Copyright System, by S.J. Liebowitz.

The author examines in detail the economic impact of reprography on publishers. He finds that journal subscriptions have not fallen and that they appear to have kept up with the population growth. It is also shown that libraries increase their expenditures on heavily photocopied items such as journals.

After having considered various systems suggested or applied in this field, the author proposes enhancing the ability of copyright holders to price discriminate, in other words, to charge different prices to different subscribers. According to him, such a system would have a very low operating cost, and would also keep copyright payments in line with users' valuations.

Calendar

WIPO Meetings

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

1981

November 11 to 13 (Geneva) — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

November 16 to 24 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee, Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

November 23 to 27 (London) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information — Subgroup on IPC Class G 01, G 05, G 11 and H 02

November 30 to December 7 (Geneva) — Berne Union — Executive Committee — Extraordinary Session (sitting together, for the discussion of certain items, with the Intergovermental Committee of the Universal Copyright Convention)

December 1 to 4 (Geneva) — International Patent Classification (IPC) Union — Committee of Experts

December 7 to 11 (Geneva) — Permanent Committee for Patent Information (PCPI) and PCT Committee for Technical Cooperation

1982

February 22 to 24 (Colombo) — Symposium on the Use and Usefulness of Trademarks in the Countries of the Asian and Pacific Region

September 27 to October 5 (Geneva) — Governing Bodies (WIPO Coordination Committee; Executive Committees of the Paris and Berne Unions)

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

Non-Governmental Organizations

1982

International Literary and Artistic Association (ALAI)
Study Session — May 16 to 20 (Amsterdam)