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Contents

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World Intellectual Property Organization

WIPO Worldwide Forum on the Piracy of Broadcasts and of the Printed Word

(Geneva, March 16 to 18, 1983)

Note

The WIPO Worldwide Forum on the Piracy of Broadcasts and of the Printed Word was held at the headquarters of WIPO in Geneva from March 16 to 18, 1983.

The objective of the Forum was to make public opinion and the competent governmental authorities aware of the extent of commercial piracy — that is to say, the unauthorized recording of broadcasts and the unauthorized copying of books and other printed publications, and the sale of such unauthorized recordings and copies — and its harmful effects on the creators, performers, broadcasters and publishers whose rights are pirated, as well as on the consumers. Particular emphasis was laid on the measures existing or desirable to combat piracy.

The 180 participants in the Forum were delegates of States, specially invited experts from developing and developed countries, representatives of interested private circles and international organizations, and members of the public. They came from 65 States and from all regions of the world, making the Forum truly worldwide.

The discussions, which lasted for the full three days allotted, were presided over by the Director General of WIPO, Dr. Arpad Bogsch, and by Mrs. Kapila Vatsyayan, Additional Secretary, Ministry of Education and Culture, India.

The discussions concentrated on three main topics: the nature, extent and effects of commercial piracy, the relevant laws and international treaties, and the enforcement of antipiracy measures from the viewpoints of the authors, performers, broadcasters, publishers and the law enforcement authorities.

The Forum provided an opportunity for the participants to hear and discuss statements of high quality and considerable interest. The size of the market, the legal measures available and the practices of commercial piracy were examined in detail.

A list of the delegates of States, of the specialists invited in a personal capacity and speakers, and of other participants, is given below. The majority of the statements prepared in advance were reproduced and distributed as working papers of the Forum. A brochure containing the texts of the various papers will be compiled by the International Bureau of WIPO and published in due course.

At the close of their discussions, the participants unanimously adopted the resolution reproduced below. This resolution will be brought to the attention of the WIPO Conference and of the Assembly of the Berne Union at their sessions in September 1983.

Resolution

Representatives of governments, representatives of international and national organizations of authors and users of authors' works, broadcasters and publishers, and specialists, coming from developing and industrialized countries of different social and economic systems, participants in the WIPO Worldwide Forum on the Piracy of Broadcasts and of the Printed Word, held in Geneva from March 16 to 18, 1983;

Having heard some 40 prepared statements and an equal number of interventions in the course of a general debate;

Found the holding of the Forum useful, and *commend* WIPO on having taken the initiative of organizing it;

Express their concern over the spreading of the piracy, on a commercial level, of broadcasts and the printed word, facilitated by new technological developments whose impact on copyright is frequently not clearly defined in laws and practice;

Consider that the search for measures for combating piracy more efficiently should continue;

Consider that these measures should comprise the provision of more effective sanctions, particularly penal sanctions, in the legislations, adherence to appropriate international conventions, a more effective cooperation between those whose rights are endangered and the law enforcement authorities, as well as a continuing search for simplifying the methods of obtaining the necessary authorizations from the holders of the rights at a reason-

able price, particularly as far as the use of foreign books and broadcasts in developing countries is concerned;

Ask WIPO to continue its work of making governments and the general public aware of the harmful effects of piracy on creativity and cultural progress;

Recommend that the Director General of WIPO bring this resolution to the attention of the Conference of WIPO and the Assembly of the Berne Union for the Protection of Literary and Artistic Works, with a view to the possible adoption of recommendations at the official level.

List of Participants

I. States

Algeria / Algérie

M. Salah ABADA, Directeur général, Office national du droit d'auteur, Alger

M. Messaoud MATI, Conseiller, Mission permanente d'Algérie, Genève

Austria / Antriche

Mr. Ferdinand TRAUTTMANSDORFF, Second Secretary, Permanent Mission of Austria, Geneva

Mrs. Elfriede Susanne HUFNAGL, Austrian Broadcasting Corporation, Vienna

Cape Verde / Cap-Vert

Mlle Sara BOAL, Technicien supérieur, Cabinet d'études, législation et documentation, Ministère de la justice, Praia

Chile / Chili

Sr. Pedro BARROS, Primer Secretario, Misión permanente de Chile, Ginebra

Colombia / Colombie

Sra. Bessie ALVAREZ, Primer Secretario, Misión permanente de Colombia, Ginebra

Congo

M. Dominique GANGA-BIDIE, Directeur, Patrimoine historique, Propriété littéraire et artistique, Ministère de la culture, des arts et de la recherche scientifique, Brazzaville

Ecuador / Equateur

Sr. Marco SAMANIEGO, Segundo Secretario, Misión permanente del Ecuador, Ginebra

Egypt / Egypte

Mr. Mohamed DAGHASH, Counsellor, Permanent Mission of Egypt, Geneva

El Salvador

S. E. Sr. José Luis LOVO CASTELAR, Embajador, Representante permanente, Misión permanente de El Salvador, Ginebra

Sr. Carlos Alfonso BARAHONA RIVAS, Secretario, Misión permanente de El Salvador, Ginebra

Finland / Finlande

Mr. Jukka LIEDES, Special Adviser, Ministry of Education, Helsinki

Mrs. Paivi LIEDES, Secretary General, Union of Finnish Writers, Helsinki

Mr. Karl A. M. ANDERZEN, Legal Director, Finnish Broadcasting Company, Helsinki

Mr. Pekka KALLIO, Managing Director, Finnish Composers International Copyright Bureau, Helsinki

France

M. Claude Alphonse LEDUC, Président, Chambre syndicale des éditeurs de musique de France, Paris

Gabon

M. Jérôme OBOUNOU MBOGO, Conseiller, Affaires économiques, Mission permanente du Gabon, Genève

German Democratic Republic / République démocratiqne allemande

Mr. Bruno HAID, Director, Copyright Information Centre, Berlin

Honduras

S. E. Sr. Ivan ROMERO, Embajador, Representante permanente, Misión permanente de Honduras, Ginebra

Sr. Jochem Manfred RITTER ARITA, Consejero, Misión permanente de Honduras, Ginebra

Srta. Adriana ARIZA, Segundo Secretario, Misión permanente de Honduras, Ginebra

Hungary / Hongrie

Mr. Mihály FICSOR, Director General, Bureau for the Protection of Authors' Rights, Budapest

India / Inde

Mrs. Kapila VATSYAYAN, Additional Secretary, Ministry of Education and Culture, New Delhi

Mr. S. RAMAIAH, Additional Secretary, Ministry of Law, Justice and Company Affairs, New Delhi

Mr. J. K. BHATTACHARYA, Joint Secretary, Ministry of Information and Broadcasting, New Delhi

Mrs. Lakshmi PURI, First Secretary, Permanent Mission of India, Geneva

Indonesia / Indonésie

Mr. Supjan SURADIMADJA, Director of Patent and Copyright, Department of Justice, Jakarta

Ireland / Irlande

Mr. M. J. QUINN, Controller of Patents and Designs, Patent Office, Dublin

Israel

Mr. Michael M. SHATON, Counsellor (Economic Affairs), Permanent Mission of Israel, Geneva

Mr. Avner MANUSEVITZ, Member of Central Committee, Bar Association, Tel-Aviv

Italy / Italie

M. Geraldo AVERSA, Directeur, Division des relations internationales, Bureau de la propriété littéraire, artistique et scientifique, Présidence du Conseil des Ministres, Rome

M. Mario FABIANI, Expert, Ministère des affaires étrangères, Rome

Japan / Japon

Mr. Koichi SAKAMOTO, First Secretary, Permanent Mission of Japan, Geneva

Kenya

Mr. Joseph Nguthiru KING'ARUI, Registrar General, Registrar General's Department, Nairobi

Kuwait / Koweit

Mrs. Sheikha AL NUSF, Manager, Classification Control, Ministry of Information, Kuwait

Mrs. Suhaila ABDULAH ALI, Legal Adviser, Ministry of Information, Kuwait

Luxembourg

M. Eugène EMRINGER, Premier Conseiller de Gouvernement honoraire, Luxembourg

Madagascar

M. Solofo RABEARIVELO, Premier Conseiller, Mission permanente de Madagascar, Genève

Mexico / Mexique

Sr. Francisco CRUZ GONZALEZ, Consejero, Misión permanente de México, Ginebra

Srta. María Angélica ARCE, Tercer Secretario, Misión permanente de México, Ginebra

Monaco

M. Rainier IMPERTI, Chargé de mission, Département des finances et de l'économie, Monaco

Morocco / Maroc

M. Mohammed MOULINE, Chef, Division de la presse et information, Ministère de l'information, Rabat

M. Mohamed ELOUFIR, Secrétaire général, Bureau marocain du droit d'auteur, Rabat

M. Mustafa HALFAOUI, Deuxième secrétaire, Mission permanente du Maroc, Genève

Netherlands / Pays-Bas

Mrs. Maryke REINSMA, Legal Adviser, Ministry of Justice, The Hague

New Zealand / Nouvelle-Zélande

Mr. B. T. LINEHAM, Deputy Permanent Representative, Permanent Mission of New Zealand, Geneva

Mr. John EADE, Second Secretary, Permanent Mission of New Zealand, Geneva

Norway / Norvège

Mr. Jens SUNDE, Senior Executive Officer, Royal Ministry of Cultural and Scientific Affairs, Oslo

Oman

Mr. Abdullah AL-MASHOOR, Director of External Information, Ministry of Information, Muscat

Philippines

Mr. Luis OPLE, Attaché, Permanent Mission of the Philippines, Geneva

Portugal

M. Antonio Maria PEREIRA, Consultant auprès du Ministre de la culture, Lisbonne

Repnblic of Korea / République de Corée

Mr. Jae-Uk CHAE, Attaché, Commercial Affairs, Permanent Mission of the Republic of Korea, Geneva

Saudi Arabia / Arabie saoudite

Mr. Mussfer AL-MUSSFER, Director General of Publications, Ministry of Information, Riyadh

Spain / Espagne

St. Germán PORRAS, Subdirector General del Libro, Ministerio de Cultura, Madrid

Sudan / Soudan

Mr. Yousif Mohamed ISMAIL, Counsellor, Permanent Mission of Sudan, Geneva

Mr. Mohamed Salah El Din ABBAS, First Secretary, Permanent Mission of Sudan, Geneva

Sweden / Suède

Mr. A. Henry OLSSON, Legal Adviser, Ministry of Justice, Stockholm

Switzerland / Suisse

M. Jean-Louis MARRO, Vice-directeur, Office fédéral de la propriété intellectuelle, Berne

M. Roland GROSSENBACHER, Chef, Section du droit d'auteur, Office fédéral de la propriété intellectuelle, Berne

Thailand / Thaïlande

Miss Chamnian VEERASA, First Secretary, Permanent Mission of Thailand, Geneva

Trinidad and Tobago / Trinité-et-Tobago

Mr. Harold ROBERTSON, First Secretary, Permanent Mission of Trinidad and Tobago, Geneva

Tunisia / Tunisie

M. Abdelmagid BEN JEDDOU, Président, Société des auteurs et compositeurs de Tunisie (SODACT), Tunis

M. Mohamed Ali CHARFI, Secrétaire général, Société des auteurs et compositeurs de Tunisie (SODACT), Tunis

M. Mohamed BEN SLAMA, Inspecteur général, Affaires culturelles, Ministère des affaires culturelles, Tunis

M. Hassen KHALSI, Membre du conseil d'administration, Société des auteurs et compositeurs de Tunisie (SODACT), Tunis

Turkey / Turquie

Mr. Ertugrul APAKAN, Counsellor, Permanent Mission of Turkey, Geneva

Mr. Nebi Yasa TURANTAN, Legal Consultant, Ministry of Culture and Tourism, Ankara

United Kingdom / Royaume-Uni

Mr. Derrick F. CARTER, Superintending Examiner, Industrial Property and Copyright Department, Department of Trade, London

Venezuela

Sr. Hugo SUAREZ, Primer Secretario, Misión permanente de Venezuela, Ginebra

Sr. Gustavo VAZQUEZ NUÑEZ, Gerente Ejecutivo, Sociedad de Autores y Compositores de Venezuela, Caracas

Sr. Ricardo ANTEQUERA PARILLI, Consultor Jurídico, Sociedad de Autores y Compositores de Venezuela, Caracas

II. Specialists Invited in Their Personal Capacity

M. Salah ABADA, Directeur général, Office national du droit d'auteur (ONDA), Alger, Algérie

M. Maniragaba BALIBUTSA, Directeur général, Ministère de l'enseignement supérieur et de la recherche scientifique, Kigali, Rwanda

Sr. Victor BLANCO LABRA, Director Jurídico de Asuntos Autorales y de Propiedad Industrial de TELEVISA y Asesor Jurídico en materia de Derechos de Autor de la Cámara de Radio y Televisión de México, CIRT, México D.F., México

Mr. Clive BRADLEY, Chief Executive, The Publishers Association, London, United Kingdom

Mr. José Carlos COSTA NETTO, President, National Council of Copyright, Brasilia, Brazil

Mr. Robert H. CRAVEN, Chairman, International Copyright Protection Committee, International Division, Association of American Publishers, Philadelphia, Pennsylvania, United States of America

Mr. Mihály FICSOR, Director General, Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), Budapest, Hungary

Mr. Seog Wan GIM, Secretary General, Korea Music Copyright Association, Seoul, Republic of Korea

Mr. Fumio HARADA, Assistant Manager, Copyright Division, Nippon Hoso Kyokai (NHK), Tokyo, Japan

Mr. Mohammad Abu HASSAN, Attorney, Amman, Jordan

Sr. William C. HEADRICK, Abogado, Santo Domingo, República Dominicana

Mr. Walter J. JOSIAH Jr., Executive Vice President, Motion Picture Association of America Incorporated, New York, United States of America

Mr. Ahmad KABESH, President, Central Agency for University and School Books and Educational Aids, Cairo, Egypt

Mr. Joseph Nguthiru KING'ARUI, Registrar General, Registrar General's Department, Nairobi, Kenya

Mr. Guenrikh KOLOKOLOV, Director, International Relations Department, The Copyright Agency of the USSR (VAAP), Moscow, Soviet Union

Mr. von LUCIUS, Gustav Fischer Verlag, Stuttgart, Federal Republic of Germany

Mr. Indu Chuda MENON, Director of Programme Services, Asia-Pacific Broadcasting Union (ABU), Kuala Lumpur, Malaysia

M. Samuel NELLE, Directeur, Société camerounaise du droit d'auteur (SOCADRA), Douala, Cameroun

Mr. Edmund B. ODOI ANIM, Copyright Administrator, Ministry of Information, Accra, Ghana

Mr. A. Henry OLSSON, Legal Adviser, Ministry of Justice, Stockholm, Sweden

Mr. Abdur RAZZAQ, Registrar of Copyrights, Karachi, Pakistan

Mr. Louie O. REYES, President, Book Development Association of the Philippines, New Manila, Quezon City, Philippines

M. Mamadou SECK, Président, Directeur général des « Nouvelles éditions africaines », Dakar, Sénégal

Mr. Wing-Yiu SUEN, Divisional Commander, Copyright Division, Customs and Excise Department, Hong Kong

Mr. Supjan SURADIMADJA, Director of Patent and Copyright, Department of Justice, Jakarta, Indonesia

Mr. Thomas TAVARES-FINSON, Senator, Chairman, Copyright Committee, Office of the Prime Minister, Kingston, Jamaica

Mr. Akin THOMAS, President, Nigerian Publishers Association, Ibadan, Nigeria

M. Ulrich UCHTENHAGEN, Directeur, Société suisse pour les droits des auteurs d'œuvres musicales (SUISA), Zurich, Suisse

Mrs. Kapila VATSYAYAN, Additional Secretary, Ministry of Education and Culture, New Delhi, India

III. Speakers Designated by Invited Organizations

International Confederation of Societies of Authors and Composers (CISAC) / Confédération internationale des sociétés d'auteurs et compositeurs

Mr. Denis de FREITAS, Chairman, British Copyright Council, London

M. Jean-Alexis ZIEGLER, Secrétaire général, Paris

International Criminal Police Organization (INTERPOL) / Organisation internationale de police criminelle

Mr. William WOODING, Specialized Officer, General Secretariat, Paris

International Publishers Association (IPA) / Union internationale des éditeurs (UIE)

Mr. Jean Alexis KOUTCHOUMOW, Secretary General, Geneva

European Broadcasting Union (EBU) / Union européenne de radiodiffusion (UER)

Mr. Bernard A. JENNINGS, Legal Adviser, British Broadcasting Corporation, BBC, London

Mlle Geneviève DELAUME, Chef du service des affaires générales, Radio France, Paris

Mr. Bauke GEERSING, Legal Adviser/Director, Legal Department, Nederlandse Omroep Stichting (NOS), Hilversum

M. E. SANTORO, Avocat, Radiotelevisione Italiana, RAI, Rome

Mr. Ulf PEYRON, Legal Adviser, Swedish Television, Stockholm

Customs Co-Operation Council (CCD) / Conseil de coopération douanière

Mr. Theodore LYIMO, Senior Technical Officer, Brussels

IV. Intergovernmental Organizations

United Nations / Nations Unies

Mr. Yasuhiko YOSHIDA, Division of Economic and Social Information, Department of Public Information, Geneva

United Nations Conference on Trade and Development (UNCTAD) / Conférence des Nations Unies sur le commerce et le développement (CNUCED)

Mr. Rajan S. DHANJEE, Associate Economic Affairs Officer, Geneva

United Nations Educational, Scientific and Cultural Organization (UNESCO) / Organisation des Nations Unies pour l'éducation, la science et la culture

M. Abderrahmane AMRI, Division du droit d'auteur, Paris

Arab Educational, Cultural and Scientific Organization (ALECSO) / Organisation arabe pour l'éducation, la culture et la science

Mr. Ahmed DERRADJI, Permanent Delegate to Unesco, Paris

Arab States Broadcasting Union (ASBU) / Union des radiodiffusions des Etats arabes

M. Abdallah CHAKROUN, Secrétaire général, Tunis

Commission of the European Communities (CEC) / Commission des communautés européennes (CCE)

M. Bernhard POSNER, Administrateur principal, Direction générale du marché intérieur et des affaires industrielles, Bruxelles

Council of Europe (CE) / Conseil de l'Europe

M. Frits HONDIUS, Directeur adjoint aux Droits de l'Homme, Strasbourg

V. International Non-Governmental Organizations

Council of the Professional Photographers of Europe (EUROPHOT) / Association européenne des photographes professionnels

M. Victor COUCKE, Secrétaire général, Anvers

European Broadcasting Union (EBU) / Union européenne de radiodiffusion (UER)

M. B. A. JENNINGS, Legal Adviser, British Broadcasting Corporation, BBC, London

Mlle Geneviève DELAUME, Chef du service affaires générales, Radio France, Paris

M. E. SANTORO, Avocat, Radiotelevisione Italiana, RAI, Rome

M. Bauke GEERSING, Directeur, Département juridique, Nederlandse Omroep Stichting (NOS), Hilversum

Mr. Ulf PEYRON, Legal Adviser, Swedish Television, Stockholm

M. Werner RUMPHORST, Assistant du Directeur, Département des affaires juridiques, Genève

Mme Madeleine LARRUE, Assistante du Directeur, Département des affaires juridiques, Genève

International Association of Conference Interpreters (AIIC) / Association internationale des interprètes de conférence

Mme Anne CHAVES, Secrétariat régional, Suisse

M. Basile YAKOVLEV, Genève

International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) / Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique

M. Jean-Alexis ZIEGLER, Secrétaire général, CISAC, Paris

International Confederation of Societies of Authors and Composers (CISAC) / Confédération internationale des sociétés d'auteurs et compositeurs

Mr. Denis de FREITAS, Chairman, British Copyright Council, London

M. Jean-Alexis ZIEGLER, Secrétaire général, Paris

International Copyright Society (INTERGU) / Société internationale pour le droit d'auteur

Mr. Gaston HALLA, General Secretary, Munich

International Federation of Actors / Fédération internationale des acteurs (FIA)

Mr. Gerald CROASDELL, General Secretary, London

International Federation of Journalists (IFJ) / Fédération internationale des journalistes (FIJ)

Mr. Stein Ove GRONSUND, Institutt for Journalistikk, Fredrikstad

International Federation of Associations of Film Distributors (FIAD) / Fédération internationale des associations de distributeurs de films

M. Gilbert GREGOIRE, Président adjoint, Paris

International Federation of Film Producers Associations (FIAPF) / Fédération internationale des associations de producteurs de films

M. Alphonse BRISSON, Secrétaire général, Paris

Mr. Frederick GRONICH, Counsellor, Motion Picture Export Association, London

International Federation of Translators (FIT) / Fédération internationale des traducteurs

M. Ernest B. STEFFAN, Ancien membre du Conseil, Berne

International Federation of Phonogram and Videogram Producers (IFPI) / Fédération internationale des producteurs de phonogrammes et de vidéogrammes

Mr. Michael T. EDWARDS, Coordinator, Anti-Piracy Activities, London

Mr. Edward THOMPSON, Permanent Representative of IFPI, Geneva

International Group of Scientific, Technical and Medical Publishers (STM) / Groupement international des éditeurs scientifiques, techniques et médicaux

Mr. Paul NIJHOFF ASSER, Secretary, Amsterdam

International Publishers Association (IPA) / Union internationale des éditeurs (UIE)

Mr. Jean Alexis KOUTCHOUMOW, Secretary General, Geneva

Mr. Malcolm L. ROWLAND, Deputy Director, International Division, The Publishers Association, London

International Union of Cinemas (UNIC) / Union internationale des cinémas

Mr. Josef HANDL, Legal Adviser, Vienna

VI. Other Non-Governmental Organizations

Association suisse des traducteurs et interprètes
M. Ernest B. STEFFAN, Berne

Federación de Gremios de Editores de España
Mr. Andrew TEIXIDOR DE VENTOS, Intellectual Property, Madrid

Motion Picture Association of America Incorporated (MPAA)
Mr. Walter J. JOSIAH, Jr., Executive Vice President, New York
Mr. William NIX, Vice-President and Deputy General Attorney, New York
Mrs. Elizabeth GREENSPAN, European Anti-Piracy Counsel, London

Nederlandse Omroep Stichting (NOS)
Mr. Bauke GEERSING, Legal Adviser/Director, Legal Department, Hilversum

Radiotelevisión Española
Sr. Rafael MARTINEZ DEL PERAL, Jefe del Gabinete Técnico, Dirección de Relaciones Internacionales, Madrid
Sr. Jews GARCIA GOMEZ, Gabinete Secretaría General, Madrid

Sociedad de Autores y Compositores de Venezuela (SACVEN)
Sr. Gustavo VASQUEZ NUÑEZ, Director, Gerente y Consultor jurídico, Caracas

Société anonyme hellénique pour la protection de la propriété intellectuelle (AEPI)
M. Pierre XANTHOPOULOS, Conseiller juridique, Athènes

Sociedad General de Autores de España
Sr. José María SEGOVIA GALINDO, Secretario General, Madrid

Swiss Society for Authors' Rights in Musical Works (SUISA) / Société suisse pour les droits des auteurs d'œuvres musicales
M. Ulrich UCHTENHAGEN, Directeur, Zurich
M. Patrick MASOUYÉ, Secrétaire de Direction, Zurich
Mme Gudrun STEIGER-HERMS, Service juridique, Zurich

Teleindustrier AB, Sweden
Mr. Olle ANDERSSON, Factory Manager and Project Leader, Sundsvall
Mr. Bo LÖFBERG, Inventor and Film Producer, Sundsvall

VII. International Bureau of WIPO

Dr. Arpad BOGSCH, Director General
Mr. Claude MASOUYÉ, Director, Public Information and Copyright Department
Mr. Shahid ALIKHAN, Director, Developing Countries Division (Copyright)
Mr. Roger HARBEN, Director, Public Information Division

Berne Union

BARBADOS

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

The Government of Barbados deposited, on March 16, 1983, 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.

The Paris Act of the Convention will enter into force, with respect to Barbados, three months after the date of this notification, that is, on July 30, 1983.

Berne Notification No. 106, of April 30, 1983.

CYPRUS

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

The Government of the Republic of Cyprus deposited, on April 22, 1983, its instrument of ratification of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

The said instrument of ratification contains the declaration that the Government of the Republic of Cyprus intends to substitute, in accordance with Article V(1) (a) (ii) of the Appendix, for Article 8 of the said Berne Convention as revised, concerning the right of translation, the provisions of Article 5 of the Berne Convention of September 9, 1886, as completed at Paris on May 4, 1896.

The Paris Act of the Convention will enter into force, with respect to the Republic of Cyprus, three months after the date of this notification, that is, on July 27, 1983.

Berne Notification No. 105 of April 27, 1983.

Conventions Administered by WIPO

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

BARBADOS

Accession

The Director General of the World Intellectual Property Organization (WIPO) has informed the Governments of the States invited to the Diplomatic Conference on the Protection of Phonograms * that, according to the notification received from the Secretary-General of the United Nations, the Government of Barbados deposited, on March 23, 1983, its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

The Convention will enter into force, with respect to Barbados, three months after the date of the notification given by the Director General of WIPO, that is, on July 29, 1983.

* Phonograms Notification No. 42, of April 29, 1983.

Nairobi Treaty on the Protection of the Olympic Symbol

TUNISIA

Ratification

The Government of the Republic of Tunisia deposited, on April 21, 1983, its instrument of ratification of the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty enters into force, with respect to Tunisia, on May 21, 1983.

Nairobi Notification No. 10, of April 22, 1983.

National Legislation

HUNGARY

Decree of the Minister for Culture

amending Decree No. 9, of December 29, 1969, implementing Copyright Act No. III of 1969

(No. 15, of November 20, 1982) *

1. The following Article 14A shall be inserted into Decree No. 9, of December 29, 1969, as amended by Decree No. 4, of December 7, 1978, implementing the Copyright Act (hereinafter referred to as "the Implementing Decree"):

"*Article 14A.* (1) With regard to reproduction for private use, the authors of works broadcast by radio or television or published as visual or sound recordings shall also be entitled to special remuneration according to the rules laid down by the Bureau for the Protection of Authors' Rights and approved by the Minister for Culture. The performers and the producers of sound recordings shall also receive a share of the amounts thus paid.

(2) The person who initially puts into circulation in the country blank mediums suitable for making sound or visual reproductions shall be required to remit 8 percent of the returns on sales — in the case of domestic products, the manufacturer on the basis of the cost price, in the case of foreign products, the domestic distributor according to the relevant price regulations on the basis of the wholesale price — to the Bureau for the Protection of Authors' Rights in respect of the remuneration mentioned in paragraph (1). Transfer and accounts shall be due twice yearly, two months after the end of the calendar half-year.

(3) Payment of such remuneration shall not be required in respect of

— distribution for export purposes, and
— blank mediums for sound or visual recordings fitting only devices (such as studio equipment, dictating machines) which, if utilized for their proper purpose, are not suitable for reproducing works for private use.

(4) Out of the amounts of the fees thus paid remaining after deduction of costs,

— in the case of sound mediums, 50 percent shall be due to the authors, 30 percent to the performers and 20 percent to the producers of phonograms,
— in the case of visual mediums, 70 percent shall be due to the authors and the other owners of copyright, and 30 percent to the performers.

(5) The performers' share of the fees shall be transferred by the Bureau for the Protection of Authors' Rights to the Federation of Art Workers' Unions. The Federation shall use the sum received — taking into account also the proposals of the art associations — for subsidy, welfare and collective purposes in respect of performers."

2. The following paragraphs (4) and (5) shall be added to Article 19 of the Implementing Decree:

"(4) Concerning the simultaneous communication to the public of works broadcast in radio or television programs by wire or in any other manner, made by an intermediary organization other than the original one, the author's consent and that of the radio or television organization shall be considered given if the organization communicating the work to the public has paid to the Bureau for the Protection of Authors' Rights the fee established with the approval of the Ministry of Culture. The performers shall also receive a share of the amounts thus remitted.

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* Published in *Magyar Közlöny*, of November 20, 1982, No. 70. — English translation provided by the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS) and revised by WIPO.

(5) After deduction of costs, 50 percent of the fees paid to the Bureau for the Protection of Authors' Rights according to the previous paragraph shall be due to the authors or the owners of copyright, 30 percent to the performers and 20 percent to the radio or television organization. The share due to the performers shall be employed as provided for in Article 14A(5)."

3. The enumeration contained in Article 20(2) of the Implementing Decree shall be amended as follows:

[The contracts referred to in paragraph (1) may be concluded through the intermediary of]

. . . . . .

"— the Hungarofilm enterprise or the economic organization vested with the right to carry on foreign trade activity, for the use of films;"

[and the construction bureaux for works of architecture.]

4. The present text of Article 39 of the Implementing Decree shall become paragraph (1), and the following paragraph (2) shall be added:

"(2) The fee due to the author for the public performance and for the reproduction by means of equipment designed for mechanical performance (e.g. sound recording, radio and television broadcasts, fixation of film and video background music) of musical works already made available to the public, for the sound recording of literary works already made available to the public and for the public performance of dramatic works shall be paid to the Bureau for the Protection of Authors' Rights."

5. This Decree shall come into effect on January 1, 1983.

General Studies

Legal Aspects of the Phonogram in Latin America

Miguel Angel EMERY *

Introduction

The subject of this comparative study is the phonogram, considered as "any exclusively aural fixation of sounds of a performance,"[1] in other words that which, on the initiative of the producer of phonograms ("the person who, or the legal entity which, first fixes the sounds of a performance or other sounds" [2]), incorporates the work of an author or composer of music and embodies the interpretation of a main performer and possibly also those of other performers or accompanists.

The historical evolution of the legislative treatment of this subject matter in Latin America has to a certain extent followed the development of technology, with two international landmarks that have altered and modified the overall picture: the 1961 Rome Convention and the Phonograms Convention (Geneva, 1971).

In the first phase, which coincided with the origins of the technique of mechanical reproduction, the concept of producer of phonograms merged with that of disc manufacturer, and sounds with their physical carrier, the only one known at the time, namely the phonographic disc.[3]

* Attorney-at-Law, Executive Secretary, Federación Latinoamericana de Productores de Fonogramas y Videogramas (FLAPF), Buenos Aires.

[1] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Article 3*(b)*). Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Article 1*(a)*). Argentine Law No. 19.963, Official Gazette, December 15, 1972.

[2] Rome Convention, Article 3*(c)*; Phonograms Convention, Article 1*(b)*.

[3] Henry Jessen, *Derechos Intelectuales*; Editorial Jurídica de Chile, pp. 131-132.

Electrical recording revolutionized earlier methods, and called forth a new personality, the phonographic producer, who, unlike his predecessor, the manufacturer, did not confine himself to the capturing of sounds but rather produced them,[4] and in the legislative spectrum his rights tended to merge with those of publishers or authors by virtue of a routine principle that adjusts legislative technique according to whatever legal concept is most similar; in the first case this caused consternation among producers, who were denied their artistic and technical contribution to the resulting work, namely the fixing of the sounds of a performance; in the second case it was the authors who were suspicious of the encroachment on their territory of a newcomer whom they regarded as a "parvenu" from the industrial sector.

It is in this period that we can situate Argentine Law No. 11.723 of 1933 and Colombian Law No. 86 of 1946.

As both laws have a common origin, namely the Spanish Intellectual Property Law of January 10, 1879, I shall, in setting out and developing my subject with reference to the Argentine law, be analyzing the problems of interpretation caused by both for two reasons: *(a)* because the Argentine law is in force at the present time, whereas the Colombian law was recently repealed and replaced by the modern Law No. 23 of 1982, and *(b)* because, whereas the Colombian law was applied throughout its term of validity without any jurisprudential discrepancies or serious doctrinal controversy, with respect to the Argentine law the paradoxical situation has arisen where, while in terms of case law its application has never, to my knowledge, done other than grant the producer of phonograms his intellectual property right, which has thus been given regulatory recognition, legal writers have questioned the right, considering it an industrial right alien to the subject matter of copyright.

The intervening period saw the enactment of Guatemala's Decree No. 1037 of 1954, following that country's accession to the Inter-American Copyright Convention (Washington, 1946), and although it does not expressly mention phonographic discs or phonograms, it clearly protects them as being collective works according to the wording of its Article 3, which specifies that:

> Managers and enterprises constituting a legal entity who, in the conduct of their business, have works produced by their employees [artistic director, production coordinator, etc.] and/or contractors [authors and performers] ..., shall enjoy copyright in the said works, without prejudice to any copyright owned by their employees or contractors in their respective contributions ... covered by this law.

(The expressions in square brackets do not belong to the Law, but are included for ease of interpretation.) The phonogram is regarded as a "transformation" of the musical work (Article 7) and the term of protection for the producer is 50 years following publication (Article 13). Article 274 of the Criminal Code of Guatemala protects intellectual property rights by declaring their violation to be an offense.

We have paused on this analysis, as it corresponds to the line of reasoning that we are following in this study, namely the legal entity's ownership of a completed collective work that includes a musical work and an artistic interpretation of that work.

The 1961 Rome Convention marked the beginning of a second legislative period.

This Convention did not meet with the same strong opposition in Latin America as it had received from European broadcasting organizations. The opposition in Europe was due to the fact that broadcasting organizations proved more intent on denying performers and producers the just benefits of Article 12 (economic rights on communication to the public by broadcasting and other means: dances, theaters, hotels, stadia, etc.) than on securing the rights that the same Convention granted them in its Article 13 (right to authorize or prohibit: *(a)* the rebroadcasting of their broadcasts, *(b)* the fixation of their broadcasts, *(c)* reproduction).

The technological process of cable distribution and cassette recording of their broadcasts will surely now have made broadcasting organizations appreciate the farsightedness and the pioneering spirit shown by the Convention in providing for the protection of their rights as well.

Nevertheless, certain authors' societies, falling into line with the position adopted by CISAC, fettered the progress of the Convention in certain Latin American countries, but this policy, which was last advocated at Hamburg (1975) has now lost some of its momentum since the agreement between the Pan-American Council of CISAC and FLAPF in 1977.

The fact that ten of the 23 countries that have acceded to the Rome Convention are Latin American (Brazil, September 29, 1965; Chile, September 5, 1974; Colombia, September 17, 1976; Costa Rica, September 9, 1971; Ecuador, May 18, 1964; El Salvador, June 29, 1979; Guatemala, January 14, 1977; Mexico, May 18, 1964; Paraguay, February 26, 1970; Uruguay, July 4, 1977)[5] testifies to the reality of the Convention's acceptance in Latin America.

Whereas the rights of performers had been protected in Latin American legislation ever since the 1933 Argentine law (that law, Article 56; 1937 law of Uruguay, Articles 7 and 36; 1951 law of Paraguay, Article 37; 1961 law of Peru, Article 54; 1963 law of El Salvador, etc.), it was only as from the nineteen-seventies that Latin American legislation

[4] Jessen, *op. cit.*, p. 132.

[5] *Copyright*, 1982, p. 13.

began to write provisions into their national laws on the rights of producers of phonograms, under the direct influence of the provisions of the Rome Convention.

Thus came about the new Chilean legislation of August 28, 1970, the law of Brazil of December 14, 1973, the Ecuadorian law of August 13, 1976,[6] and the new Colombian law of February 19, 1982.

The eclectic ability of the Rome Convention to influence domestic legislation is due to the fact that

> ... the absolutely fundamental point, based in theory and in practice, is that the Rome Convention neither specifies the nature of the rights it protects nor stipulates the measures by which the States party to it shall satisfy the commitments thus entered into, [7]

and that has enabled the countries party to it to legislate in different ways and to impart a different legal nature to the rights they grant to the producers of phonograms the latter being basically the following:

(a) the right to authorize or prohibit the direct or indirect reproduction of their phonograms (Rome Convention, Article 10; Phonograms Convention, Article 2);

(b) the right to receive equitable remuneration from the person concerned when a phonogram published for commercial purposes is used directly for broadcasting or for any other form of communication to the public.

A practical demonstration of the variety of options available to the legislator is afforded precisely by the Latin American countries that drew inspiration from it: whereas the Brazilian law of 1973 clearly adopts the position where the right of the producer is in the nature of an author's right, the Ecuadorian law of 1976 may be interpreted as adopting the theory of the industrial right (hence its references to the producer as a manufacturer), while neither the Chilean law of 1970 nor the Colombian law of 1982 rules expressly one way or another on the legal nature of the rights granted, although in fact it may be inferred that they are considered intellectual rights.

However, all the laws mentioned legislate on the rights of phonogram producers in the chapter that deals with neighboring rights within the context of the provisions on authors' rights.

Finally, in the wake of the technological progress made in the fixing of sounds on magnetic tape, new physical forms of containing sounds are emerging, such as cassettes and cartridges, while reproduction equipment becomes more sophisticated, less costly and easier to operate.

Countries were concerned "at the widespread and increasing unauthorized duplication of phonograms [piracy] and the damage this is occasioning to the interests of authors, performers and producers of phonograms" [8] and the States so concerned concluded the 1971 Phonograms Convention to protect the producers of phonograms by providing in their national legislation for the following means for its implementation: grant of a copyright or other specific right, protection by means of the law relating to unfair competition, and protection by means of penal sanctions.[9]

Ever since I took part, as the representative of my Government, in the debates on the Phonograms Convention, I have been pointing out that the Convention does not really offer four options but three: copyright, specific right, or unfair competition, the three being backed by criminal sanctions without which, given the clandestine nature of the phonographic pirate, the right of reproduction conferred on the author and on the producer would exist only on paper.

The Phonograms Convention also found widespread favor in Latin America, and in less than 12 years 12 countries have acceded to it: Argentina on June 30, 1973; Brazil on November 28, 1975; Chile on March 24, 1977; Ecuador on September 14, 1974; El Salvador on February 9, 1979; Guatemala on February 1, 1977; Mexico on December 21, 1973; Panama on June 29, 1974; Paraguay on February 13, 1979,[10] which have been joined in recent years by Costa Rica (Law No. 6846 of November 5, 1980), Uruguay (Law No. 15.012 of May 20, 1980) and Venezuela (Law of December 23, 1981).

Subsequent legislative developments in the area have borne out this interpretation: Ecuador, which, grants a specific right of apparent industrial nature, granted criminal protection by way of a special law intended to implement the international undertaking made on accession to the Phonograms Convention (Decree No. 2821 of August 25, 1978). Brazil, which protects the phonogram as a neighboring right of copyright character, opted for a reform of its Federal Criminal Code (Law No. 6895 of December 17, 1980), whereas Colombia, in its new law of 1982, grants the right of reproduction in the chapter on rights neighboring on copyright, and gives it criminal protection in the chapter entitled "Sanctions."

For its part Uruguay, which in its Law No. 9739 on Copyright, enacted in 1937 did not legislate on phonograms, complied with Article 3 of the 1971

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[6] For an analysis of these laws: Miguel A. Emery, "Current Legislative Trends in the Field of Copyright and Neighboring Rights in Latin America," *Copyright*, 1977, pp. 131 *et seq.* Original Spanish version in *La Propiedad Intelectual* (WIPO), first quarter of 1977, pp. 53-69.

[7] João Frank da Costa: "Some Reflections on the Rome Convention," *Copyright*, 1976, p. 81.

[8] Phonograms Convention, Geneva 1971, Preamble.

[9] Phonograms Convention, Geneva 1971, Articles 2 and 3.

[10] *Copyright*, 1982, p. 14.

Geneva Convention by taking the option of specific penal sanctions in its very recent Law No. 15.289 of 1982, Article 1 of which provides as follows:

> The reproduction of a phonogram or videogram without the written authorization of its producer, with a view to its distribution to the public, and also the distribution to the public under any circumstances of reproductions or copies obtained thereby, or their storage for such purpose, shall be punished by the penalty specified in Article 46 of Law No. 9.739 of December 17, 1937.

It should be pointed out that both the reform of Article 184 of Brazil's Criminal Code, mentioned earlier, and the new Uruguayan law extend protection to videograms, which in the Uruguayan law are defined as "the fixation of any sequence of images and sounds reproduced on a videodisc, videocassette or other, comparable carrier." In the definition a careful distinction is made between the videogram, or "fixation of any sequence of images and sounds," and the physical carrier that contains the fixation, which may be either a videodisc or a videocassette.

The authorities of Mexico and Bolivia are at present considering the adoption of criminal sanctions for the protection of phonograms and videograms.

We should pause a moment longer on the motivation and need for the Phonograms Convention. There are on this continent four well-structured copyright laws which, either on account of their age (Paraguay, Law No. 94, 1951), or on account of wrong advice given to those who drafted them (Peru 1961, Venezuela 1962, Mexico 1963),[11] did not grant the producer of phonograms the right of reproduction backed up by criminal sanctions.

It should be pointed out that the preliminary drafts of the 1961 Peruvian law and of the 1962 Venezuelan law contained chapters on neighboring rights which were deleted,[12] presumably under the influence of the recommendations of the Pan-American Council of CISAC (see the policies of the Third Inter-American Meeting on Copyright, Chile 1965),[13] which reaffirmed this preexisting trend in its declarations.

These amputations were based on a principle of legal technique that stemmed from the view that the industrial activity of the producer of phonograms was confined to the production of a physical carrier, which gave rise to the addition to copyright, as a subordinate concept, of rights for participating performers and for the producers of such carriers.[14]

The consequence of this doctrinal situation was that legislation on the rights of performers was incorporated in the actual copyright law, considering performance to generate a right akin to the rights of authors, as it

> ... originates in an artistic activity which has to be protected as an act inseparable from personal activity, and which consists in the realization of the author's creation, namely the complete, materialized work in its component parts.[15]

However, the "industrial" rights of producers of phonograms "worthy of protection" were separated off, in the course of this approach, from the context of laws on authors' rights, deserving, in the opinion of the advocates of this approach, to be governed by separate provisions which were never enacted in time.

The practical effects of this theory have been disastrous. Apart from the lack of instrinsic coherence which stems from the fact of not regulating within the body of the copyright laws one of the most important uses of musical compositions, namely phonographic recordings, its advocates did not notice that they were irreparably damaging the very legal asset they were seeking to protect.

Setting out from the theoretical notion that the right of reproduction of producers of phonograms, on being superimposed on that of authors, could under certain circumstances constitute a restriction on the author's control of his work, they did not notice the adverse practical consequences of their reasoning.

The repertoire of a producer of phonograms includes thousands and sometimes hundreds of thousands of musical compositions. Under the system of reproduction licenses, these figures may be multiplied to astronomic proportions.

The phonographic pirate selects the most successful of these compositions for unlawful reproduction. In doing so he indiscriminately appropriates the works of national or foreign authors, whether alive or dead, or works in the public domain.

An official search of a pirate factory generally makes it possible to confiscate thousands of unlawful copies.

In the majority of codes of criminal procedure on this continent, the infringement of intellectual rights is a matter for private and entirely personal action.

Where legislation merely provides for the author's or the composer's right of reproduction, it places the injured party under the obligation to grant special powers of attorney for the institution of proceedings before the criminal courts. The physical impossibility of obtaining thousands of powers of attorney from authors makes the author's protection into an empty statement, whereupon piracy spreads through the streets in the face of the impotence of producers,

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[11] Carlos Mouchet, *Los derechos de los autores e intérpretes de obras literarias y artísticas*, Editorial Abeledo Perrot, 1966, p. 100.

[12] *Idem*, p. 100.

[13] *Idem*, p. 134.

[14] Latin American and Caribbean Seminar on the Rights of Performers, Producers of Phonograms and Broadcasting Organizations, Mexico, October 1975 (from the exposé by Dr. Carlos Mouchet, *El Derecho*, Vol. 67, p. 620) by M. A. Emery.

[15] Carlos Villalba and Delia Lipszyc, *Derechos de los artistas, intérpretes o ejecutantes, productores de fonogramas y organismos de radiodiffusión — Relaciones con el derecho de autor*, pp. 24 and 13, quoting Valerio De Sanctis.

whose "industrial rights" protect their trademarks but not their phonograms.

This is exactly what is happening at the present time in Paraguay, Mexico and Peru. Venezuela has been spared such a degree of pirate penetration of the market owing to the fact that close collaboration has established itself since 1978 between producers of phonograms and SACVEN, the local society of authors and composers. Nevertheless piracy has affected some 35 % of the market, and Venezuela's recent accession to the Geneva Convention gives one reason to expect a prompt legislative solution to the problem created by the legal approach adopted in 1962.

Thus in Latin America the enactment of a copyright law without protection for producers of phonograms has generally had the effect of depriving authors, performers and producers of effective protection and increasing the popularity of piracy.

Fortunately, the latest legislative trend, reflected in the modern laws of Chile, Brazil, Ecuador, Colombia and Costa Rica, is for the right of the producer of phonograms to be regulated within the context of neighboring rights, the inspiration for this being generally drawn from the provisions of the Model Law of the ILO, Unesco and WIPO, whose application in the region was recommended by the Latin American and Caribbean Seminar on the Rights of Performers, Producers of Phonograms and Broadcasting Organizations;[16] which thereby clearly reversed the tendency that gave rise to the legislative approach criticized above.

Finally Mexico, at the direct instigation of its Director of Copyright, figured among the countries that suggested, at the WIPO Worldwide Forum on Piracy of Sound and Audiovisual Recordings (Geneva, March 25 to 27, 1981), the resolution that was unanimously approved and which recommended "to bring into force appropriate legislation, where such legislation does not already exist, which guarantees the specific rights of those affected by such piracy to prevent the unauthorized fixation and/or reproduction of the products of their creative efforts" [17] and it is therefore to be expected that it will be quick to adopt its own recommendation and legislate accordingly.

The Legal Nature of the Right of the Producer of Phonograms

The Rome Convention, as we have already seen, while protecting and regulating the rights of the phonogram producer, does not define the nature of those rights.

The Phonograms Convention offers two alternatives to the national legislation of the countries that adopt it. It grants the producer of phonograms a copyright or a "specific right," but does not rule on the nature of that specific right.

Without any doubt, when a country decides to grant the producer of phonograms protection under criminal law against unlawful reproduction of his phonograms without there being any other reference to phonogram producers in its national legislation — as in the case of Uruguay — it recognizes the existence of a legitimate legal connection between the subject, namely the producer, and the object, namely his phonogram, and, in granting him the right to bring action for the protection of his lawful interests, it is granting him a right that we could describe as specific inasmuch as there is no other definition of its nature anywhere in the legal order.

The case of Argentina provides a good example for use in this inquiry into the legal nature of the rights of producers of phonograms.

Producers of phonograms have long been using literal interpretation of the law to assert their status as intellectual property owners in relation to the phonographic discs that they produce and record.

Historical factors, accepted case law and regulatory provisions have borne out their claim. The argument does encounter doctrinal resistance, however, from the majority of authors' society lawyers,[18] certain government officials who have a visible affinity with the latter's ideas [19] and even independent writers of treatises,[20] who have not been able to escape the intellectual magnetism of the experts in a field which consequently developed in this respect under the influence of authors' society dogma.

Paradoxically, the advocates of the opposite opinion, based on the argument that the rights of producers of phonograms were a form of copyright,[21] caused the controversy to grow and resistance to intensify.

The latter group now strove all the more to assert the copyright character of the rights concerned, pointing to the relevance of the "artistic and technical efforts made by the producer of phonograms to bring about the fixation of sounds, independently of other authorized elements (the work and the performance), in the course of which the sounds, transformed or

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16 *La Propiedad Intelectual* (WIPO, Geneva), first quarter of 1976, p. 104.

17 *Copyright*, 1981, p. 191.

18 Mouchet, *El Derecho de Autor Internacional en una Encrucijada.* Villalba and Lipsyzc, *op. cit.* Héctor Della Costa, *El Derecho de Autor y su Novedad.*

19 Ricardo Tiscornia, *Fundamentos de la Protección del Derecho de Autor.* Edwin Harvey, *Derechos de Autor de la Cultura y la Información.*

20 Isidro Satanowsky, *Derecho Intelectual.* Manuel Antonio Laquis, *Derechos Reales*, Vol. II, "Propiedad y Dominio — Propiedad Intelectual e Industrial."

21 Walter Gutiérrez Eguía, "Elementos de Propiedad Intellectual y el Fonograma," Thesis, 1969. Pedro Cinqualbre, "El Fonograma. El Productor Fonográfico," *El Derecho*, Buenos Aires, Vol. 97-4.1.82.

adapted, are fixed and given permanency together with specific characteristics and the possibility of audible repetition, and the producer's own originality is conferred on them in the form or style of their presentation"[22]; from this they concluded that Argentine law which has a general character, regarded the producer as being an author and consequently as the original owner of the work.[23]

The reaction of those who did not recognize the right of the producer of phonograms was to be all the more emphatic in their argument that copyright "has been gradually conforming to the concept of individuality" or the "personality of the author, that spiritual, physical, subjective complex,"[24] which consequently was not capable of being granted to the producers of phonograms, "who are not 'intellectual creators' even though their activity contributes, by means of new technology, to the dissemination of intellectual rights." [25]

In my opinion it is wrong to try and stretch this judgment until it means that the only possible owners of authors' rights are "creators being natural persons," thereby precluding the protection of newspapers, broadcasting organizations and other owners of rights in collective works.

Argentine law did not endorse the personality theory advocated by Otto von Gierke on the basis of the teachings of the German philosopher Emmanuel Kant,[26] or the dualistic theory, or indeed any theory involving personal creation as the sole source of the rights granted to authors, quite simply because Law No. 11.723 was directly inspired by the Spanish law of 1879, and because at that time "personalistic" theories were not in fashion, or were ignored, authors being instead granted a right of "ownership" in their works.[27]

Writers on civil law who have considered the subject contend that "the only thing necessary is that there be *production*,"[28] adding that doctrine and case law grant intellectual property protection provided that: "*(a)* the *production* retains its individuality or integrity; consequently, fragments or drafts of a literary or artistic production are not 'intellectual works'; *(b)* it reflects 'original' and 'novel' creation, which does not mean that it has to be free of outside influence . . ."[29]; in other words, they refer to production and not to creation as being the manner of acquiring intellectual rights.

Phonographic production combines all these characteristics, which does not mean we are arguing that the producer of phonograms himself is the author of the resulting work, but rather that he is an owner of rights, in a manner similar to the cinematographic producer and for identical reasons.

Ultimately, therefore

> . . . a protected intellectual production is any production that is the result of creative work, possesses a degree of originality, is distinguished from others by the facts, ideas or sentiments, expressed in words, music or figurative art that it contains, and constitutes a definite product suitable for publication and reproduction. [30]

The phonogram is a new form of conveying sounds. It belongs to a category of manifestations that have attained an artistic hierarchy which includes also cinematography and artistic photography.[31] I do not intend to enlarge on the creative aspect of the phonogram producer's activity, as this subject has already been dealt with quite thoroughly.[32]

The producer is entitled to ownership of his phonograms inasmuch as the phonogram is a collective work, which entails the assignment of the rights of those who have taken part in its production,[33] a collective work being a work "in which pre-existing works of different authors are assembled into a collective whole, but without the personal participation of these authors," [34] in which case the ownership of copyright accrues to the person who establishes the final form of the work and selects, coordinates and edits the contributions, namely, for our purposes, the producer of phonograms.

The possibility of granting the exercise of copyright to other persons under the Argentine law is expressly recognized by the copyright experts whom I have quoted,[35] whereas a claim that is not acceptable owing to its extreme subtlety is the one according to which phonograms are mentioned in Article 1 as "carriers," in the same way as sculptures, photographs and engravings, with respect to which there is no denying the intellectual rights belonging to the sculptor, photographer or engraver, whether or not they are mentioned in the law.

There is no doubt whatever that, if outright rejection of the ownership theory is used to explain the legal nature of copyright, there will be doctrinal difficulty in finding a place for the rights of the phonogram producer in the Argentine law, but there, in

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22 Walter Gutiérrez Eguía, *op. cit.*

23 Villalba and Lipsyzc, *op. cit.*, p. 121.

24 Tiscornia, *Fundamento de la Protección del Derecho de Autor. La Creación Intelectual*, Buenos Aires, 1972.

25 Mouchet, *op. cit.*, note 11, pp. 119 *et seq.*

26 Jessen, *op. cit.*, p. 33.

27 Jorge E. Anzorreguy, Joaquín P. da Rocha and Héctor H. Hernández Vieyra, *Delitos contra los Derechos Intelectuales.*

28 Raymundo L. Salvat-Salvat-Argañaraz, *Derechos Reales*, C. II, No. 1211, p. 446.

29 Argañaraz, *op. cit.*, note 13, p. 447.

30 Satanowsky, *op. cit.*, Vol. II, quoting Piola Caselli.

31 Cinqualbre, *op. cit.*, note 21.

32 Jessen, *op. cit.*, Chap. XIII, "El Disco, El Productor Fonográfico." W. Gutiérrez Eguía. Thesis (UBA Law Faculty). Cinqualbre, *op. cit.*

33 Cinqualbre, *op. cit.*

34 WIPO, *Glossary of Terms of the Law of Copyright and Neighboring Rights*, p. 39.

35 Villalba and Lipszyc, *op. cit.*, p. 133.

fact, we are working on a false hypothesis, as that theory was precisely the one the law adopted.

The theory of ownership gives intellectual property rights a logical solution within the classic system of Roman law, by including them in the category of real rights. However, in the doctrinal evolution of the present century there has been a tendency for copyright experts to depart from this theory, in which they objected to:

(a) the limitation in time of intellectual property, whereas the ownership of temporal property is perpetual;

(b) the fact of it being brought into existence by the act of creation, which is a concept not provided for in Roman law;

(c) the difficulty of accommodating moral rights to it;

(d) the non-existence of a material object in relation to which the right of ownership is exercised.[36]

Nevertheless, the theory of ownership is the most suitable one, in my opinion, to explain the legal nature of the producer's title to his phonograms.

The objections to the right of ownership made by the advocates of personalistic theories of copyright do not apply in the same way to the rights of the producer of phonograms.

(a) The argument of *limitation in time* is not a valid objection at all, in view of the fact that "at the present time the right of ownership is subject on all sides to the greatest and most obvious restrictions, and it is therefore curious that any attempt should be made to invoke the intangibility of that institution as a means of combating this theory on the basis of the duration of protection."[37] In Argentine law, the concept of ownership in the broad sense covers also incorporeal and *temporary* property (in the wider sense used by Article 17 of the National Constitution), and it is applicable in any circumstances where creation exists, even to minimal degree.[38]

(b) The *mode of acquisition* of the right of the producer of phonograms originates in the fact of production, which includes creative and technical elements, but this manner of acquiring ownership is as ancient as the first fruit picked by a farmer on his land, and it is precisely the term "production" that is used to justify the grant of protection to intellectual rights — Salvat Argañaras (quoted by Laquis, footnotes 29 and 30) and Satanowsky (footnote 31).

(c) The difficulty of finding a place for *moral rights* within the concept. The rights that are granted to the producer of phonograms under intellectual property treaties and legislation do not include moral rights: there is merely the right of reproduction and the right to equitable remuneration for communication to the public.[39]

Nevertheless, in the course of his activity, the producer of phonograms exercises rights that are similar in structure to moral rights: the "authorship" of the phonogram is asserted by the phrase "produced by . . ." or the inclusion of the trademark on labels or title cards, which works more as a pseudonym for the producer than as identification for the product, which the public generally asks for by the name of the performer and of the work (no one asks for a CBS, but rather the latest LP by Roberto Carlos, or again for a Capitol, but rather "My Way" by Frank Sinatra); the right of publication, as it is for the producer to decide whether or not a phonogram that is fixed and embodied in a master copy is to be published or not, and he may forgo publication simply because the recording is not "marketable" enough or not a "good recording"; the right to "disavow," in view of the fact that the producer has the option to withdraw phonograms from the market on "intellectual" grounds (low quality of performance, balancing defects), which are grounds unquestionably different from those resulting from industrial activity (manufacturing defects, scratches, bumps, etc.).

This is also true of the international protection symbol Ⓟ (a circled letter P),[40] which provides evidence of compliance with international formalities in a manner similar to the © symbol on literary, scientific and artistic works.[41]

What we can argue is that the economic rights of the producer of phonograms, being related to or neighboring on copyright, and arising from the exercise of copyright, inevitably result in a structure similar to that of the rights of authors, and these "moral rights by analogy" are the consequence of the activity of the producer and the logical link between him and his product, without any express legislative pronouncement being necessary.

(d) The *non-existence of a tangible object* in relation to which the right of ownership may be exercised. It can further be stated that sounds are incorporeal but not immaterial inasmuch as they can be perceived by means of one of the five senses, namely hearing, and for that reason, in their legal, incorporeal materiality, they bear relation to hertzian waves and electricity.

For that reason the intellectual right of the producer of phonograms may be assimilated to the ownership of things, and thus be equated with a real

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[36] Jessen, *op. cit.*, p. 32.

[37] Jessen, *op. cit.*

[38] Isaac Halperín, *Curso de Derecho Comercial*, Ediciones Depalma, 1972, p. 81.

[39] Rome Convention, Articles 10 and 12.

[40] Rome Convention, Article 11; Phonograms Convention, Article 5 (Argentine Law No. 19.963).

[41] Universal Copyright Convention, Article III.

right of ownership, but an "incorporeal" or "immaterial" ownership, that is, a right in relation to immaterial property.[42]

Ultimately, if we regard the musical work as being the essential raw material without which there can be no commercial phonogram, the right of ownership of the producer would constitute a new, modified application of the old theory of the Proculians, who attributed the ownership to the specifier or transformer, thereby reacting against the Sabinians, who argued that the new subject matter, transformed by the work of another, nevertheless belonged to the owner of the original subject matter. The substantive difference in the field of intellectual rights is nevertheless provided by the unavoidable necessity of prior authorization, or assignment of the copyright in the work, and the subsistence of the author's unrenounceable and unassignable moral rights.

Therefore I do not hesitate to assert that in the case of Argentina, *de lege lata,* the intellectual property right of the producer of phonograms unquestionably follows from the inclusion of the phonographic disc among the scientific, literary and artistic works protected by Article 1 of Law No. 11.723.

This does not alter the fact that, *de lege ferenda,* I consider a modern copyright law based on personalistic theories to be the wrong place for it: the right of the producer of phonograms should be subject to the provisions on related or neighboring rights arising from the exercise of copyright,[43] in view of the fact that the legal nature of that right fits comfortably in the theory of intellectual property.

The question of a legal entity owning copyright

The arguments outlined above serve to emphasize the conceptual difference between the two expressions "owner of intellectual property rights" and "copyright owner."

Within the theory of intellectual property, natural persons who are authors of literary, scientific or artistic works are original owners of intellectual rights. However, it is overstating the case to assert that natural persons can be the sole owners of intellectual rights relating to copyright material.[44]

To deny the possibility of a legal entity being the owner of intellectual property rights would be at variance with the constitutional principles of the majority of Latin American countries which, like Article 19 of the Argentine Constitution, do not allow any person to be prohibited from doing what the law does not prohibit, and there is no law in Latin America that prohibits legal entities from being the owners of intellectual property rights.

"The forms of creation that entail collective action are highly varied, which frequently makes it impossible to pinpoint authorship to any natural person"; this allows room for the view that legal entities may be original owners of copyright.[45]

Moreover, denial of this principle would lead to anomalies, for instance the denial of a military geographical institute's ownership of the intellectual property rights in maps produced on commission in a collective and non-individual manner by map-makers under its authority, or the questioning of the Spanish Royal Academy's ownership of its dictionary.

The theory that copyright arises from the creation and inspiration of mankind, with these specific details of originality, content and expression, in the field of literature, art or science, while correct in itself, if it is taken to the extreme of denying ownership of intellectual rights to legal entities,[46] would militate against the creation and dissemination of intellectual works, as it would prejudice and discourage newspaper firms, advertising agencies, publishers, cinematographic producers, phonogram producers, radio and television broadcasting organizations and all those that organize products and services for the creation of collective intellectual works in which the contributions of individual authors cannot be separated or sometimes even identified, and eventually would result in lost opportunities and employment for creators.

It is for that reason that French case law has accorded the vocation and prerogatives of original authorship to the Municipality of Paris, to scientific societies, to the Academies and to the State,[47] in the same way as the recent case law of the Brussels Appeal Court in Belgium granted the firms of Balmain and Cardin ownership of copyright in the artistic design of fabrics that had been created by their employees for remuneration, that copyright being the result of the assignment of rights implicitly or explicitly written into their employment contracts.[48]

In all the cases mentioned, ownership has been granted to the legal entities mentioned by reason of their decisive contributions to the planning, coordination, compilation and financing, to the harmonization of preexisting elements, to the direction, with powers of acceptance and rejection, to technical means, and ultimately to the harmonization of all the factors contributing to the production of certain types of intellectual works, all of which does not imply that

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42 Satanowsky, *op. cit.*, Vol. I. No. 32, p. 38.
43 Villalba, *Il Diritto di Autore.*
44 Laquis, *op. cit.*, p. 250.
45 Arcadio Plazas, "Consideraciones Introducidas al Derecho de Autor," ESAP Publications, 1980, p. 8.
46 Laquis, *op. cit.*, p. 250.
47 Satanowsky, quoted by Laquis, *op. cit.*, p. 251, report 252.
48 Jan Corbet, "Letter from Belgium," *Copyright,* 1982, pp. 194, 195.

those intellectual property rights are necessarily of the same extent and scope as copyright.

Such concepts can be accommodated within the theory of intellectual property; they cannot of course be explained in terms of personality theories, but rather the laws on copyright can and must look on them as technical solutions adjusted to the circumstances that legislation is enacted to cover (see Articles 16, 20, 21 and 28 of the Argentine Law).

A good legislative expedient is to reconcile both schools of thought by means of the equitable grant of moral and economic rights to the authors, natural persons, and the recognition to legal entities of the ownership to which they are entitled in respect of certain types of work: collective works, essays and maps of academies or institutes, cinematographic works, phonograms, newspapers, magazines and reviews, broadcasts of broadcasting organizations, advertising, fashion designs, etc.

The producer's rights in his phonograms: industrial rights or intellectual rights related to copyright

A doctrinal hangover from the time during which recording was a mechanical reproduction of the work is the term "manufacturers" used by writers of the old school to denote phonogram producers, but

> ... it is curious to note, however, that there are still lawyers who, misled by the inadequate, archaic terminology of the early experts, insist on applying the same principles to discs as govern graphic reproduction of the work, seemingly in ignorance of the gulf that exists between these two forms of use. [49]

There is indeed a school of thought that works on the assumption that the phonogram is no more than a practical application or industrial exploitation of the contents of a musical work.[50]

For my part, I consider that the art and technique applied to the fixing of sounds of a performance result in the creation of an incorporeal, material asset that is perceived by means of the sense of hearing and is intended for the aesthetic pleasure or entertainment of the person listening to the public or private playing of a phonogram. I feel that this intellectual property can in no way be considered industrial property.

First, it is not connected with the industrial process whereby discs or tape carriers (cassettes, cartridges) are manufactured, but rather with the artistic work of fixing sounds.

Secondly, in order to situate the right, we have to consider its legislative, dogmatic and academic autonomy [51]; whereas copyright has always included characteristics that endow it with a degree of autonomy among intellectual property institutions, the rights of producers of phonograms do not have the same autonomy in relation to copyright.

We cannot speak of a "specific right" of producers of phonograms, such as would be independent of copyright, in view of the following:

(a) Legislative autonomy does not exist. The 1961 Rome and 1971 Geneva Conventions are included among the international treaties that govern copyright.[52]

Of the nationals laws, we have already mentioned the distinct tendency reflected in the 1970 Chilean, 1973 Brazilian, 1976 Ecuadorian and 1982 Colombian and Costa Rican laws, which legislate on these rights by incorporating them in the copyright law.

On the other hand, and outside the legislation of Latin America, the same criterion was observed in the revision of the US Copyright Law (Law No. 94-553 of 1976), Article 102 of which includes phonograms among the works it protects.

(b) Dogmatic autonomy. It cannot be stated that the rights of producers of phonograms have a method of investigation peculiar to themselves and different from the rights of authors, or that the subject matter to which they relate bears no relation to copyright subject matter.

Practically all the quotations in this article are those of copyright experts, and the few civil law specialists quoted express an opinion on the rights of producers of phonograms, either confirming them or denying them, in terms of copyright and not in terms of industrial property.

The international bodies that are considering questions associated with the application, operation and possible revision of the Rome and Geneva Conventions are Unesco and WIPO, and they are doing so through their copyright departments and not their industrial property departments.

The structure of the rights is ultimately similar, as in both cases the right of reproduction is a right to authorize or prohibit *erga omnes* and, between the public performance of the work and the communication to the public of material covered by neighboring rights, only the name and legal justification is different, not the system of royalty collection or the basic structure of the collecting societies concerned.

On the other hand, industrial property law covers subjects associated with or linked to commercial activities, like trademarks (distinctive signs printed or affixed on goods to distinguish them from other, similar ones), emblems or business signs, industrial designs (the shape or appearance incorporated in or given to an industrial product that give it ornamental

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[49] Jessen, *op. cit.*, p. 132.

[50] Mouchet, *op. cit.*, note 11, pp. 119 *et seq.* Villalba and Lipsyzc, *op. cit.*, p. 29.

[51] Halperín, *op. cit.*, p. 19.

[52] José Luis Romaní, *Propiedad Industrial y Derecho de Autor. Su Regulación Internacional*, Editorial Bosch, Barcelona, p. 83.

character) or patents, which protect new discoveries or inventions: namely new industrial products, new means and new applications of known means of producing a result or industrial product.

The right of the producer of phonograms *protects the fixing of the sounds of a performance*, independently of the actual carrier, or the manner of its industrial production or marketing.

(c) There is no *academic autonomy* either. Indeed the subject is generally taught under the generic heading of intellectual property and, within that overall concept, in the context of copyright and not industrial property.

The academic body concerned with copyright research at the level of Latin America (the Inter-American Copyright Institute) also deals with neighboring rights and the subject also features in the program of the Copyright Department of the University of São Paulo, Brazil.

The basis of industrial property is constituted by a principle of internal character which specifies that the trademark, name, business sign or patent shall not be unlawfully used by other traders or industrialists; it is further constituted by an idea of progress, a means of promoting the creation of inventions and industrial designs,[53] whereas the basis of the rights of the phonogram producer is constituted by the original and distinctive artistic combination of the sounds of a performance.

A whole series of practical differences result from these different basic conceptions:

(a) In industrial property law, protection is granted and renewed according to the actual use of the invention or mark, and the exclusive rights granted lapse as a result of failure to use the invention and cannot be renewed unless the mark is used. For phonograms, it is sufficient that the production be recorded for protection to be enforceable throughout its term.

(b) The right to make secondary uses or to communicate to the public is peculiar to authors' rights or those related to them (rights of performers), and there is no parallel in, or any similarity to, any institution of industrial property law.

(c) The compulsory license for private use within the family circle does not exist in connection with industrial property rights.

(d) The rights of inventors are the one category of industrial property law that comes closest to copyright, yet whatever may be the degree of novelty and originality of phonograms, the industrial result is not new as it is always a phonographic disc or a cartridge or cassette.

(e) There is no similarity to trademark law, the purpose of which is to protect the designation of the origin or the identification of a product, other than the *erga omnes* protection for a specified period, which is common to all intellectual rights, whether industrial or copyright, and so in that respect there is no difference in relation to copyright either.

In conclusion, the right of the producer of phonograms is a right of ownership in a temporary, incorporeal asset, closely connected with the intellectual rights of authors and related to the exercise of those rights, and not an industrial right.

Legislative technique; possibility of reconciling various conceptions at the practical level

On a number of occasions I have mentioned that, if there is no agreement on the theory of the copyright of the producer of phonograms, or if the foregoing considerations on the related right or intellectual property right are accepted only with reservations, and even in the extreme case of the rights concerned being considered industrial property rights, sound legislative technique dictates that the institution should be regulated within the law on intellectual property in conjunction with the rights of authors and performers and other neighboring rights.[54]

The adoption of any other legislative technique would involve making the treatment of the rights of the producer of phonograms, together with those of broadcasting organizations, subject to a special law. However, in view of Article 12 of the Rome Convention and the rights that it enshrines, any harmonization of these two areas is difficult, and indeed no such law has ever been enacted in Latin America, with the serious consequence that we have mentioned, namely the practical difficulty of combating piracy.

The talent of Valerio De Sanctis showed the way towards reconciliation of the views of authors' societies on the one hand and producers of phonograms on the other, at least in terms of practical results, when he said that "the rights of the producer of phonograms cannot be considered rights neighboring on or belonging to copyright, but rather rights related to the exercise of copyright." [55]

This brought about a change in the position adopted by certain of the most noted copyright experts in Argentina, who realized that it was in the interests of the author that phonograms made through lawful use of his work should be protected in accordance with copyright law.

This harmonization on the Latin American scene is to be brought about by the drafting of "a project

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[53] Rangel Medina, *Tratado de Derecho Marcario*, Mexico City, 1960, pp. 103-104.

[54] Miguel A. Emery, "El Seminario de Oaxtepec," *El Derecho*, Vol. 67, p. 622.

[55] Valerio De Sanctis, quoted by Villalba and Lipsyzc, *op. cit.*, p. 29.

for legislative structures that would be equally acceptable to all groups concerned." [56]

The drafting of the provisions of such a project should take due account of the principles that clearly specify the origin of the protection of inherently different rights, namely the rights of authors, those of performers and those of producers of phonograms.[57]

What one should not do, however, is incorporate these institutions in different laws because, as De Sanctis mentions,

> ... they all have the same carrier, they are closely linked at the economic and contractual level and, while the principle of protection is indeed different, they can be compared and balanced in relation to each other in the same legislative text. [58]

With the principles thus reconciled, it can now be stated that

> ... for the author, there is no difficulty in accepting the conferment of *erga omnes* protection (right of reproduction) on the producer of phonograms, inasmuch as his industrial or commercial activity is reflected in immaterial results. [59]

Moreover, in conformity with the intellectual property theory set forth above, it can be stated that

> ... with regard to the secondary uses of fixations of sounds, doctrine can quite well accommodate them within the principle of unjustified enrichment when it is a question of asserting the right to equitable compensation, subject to the economic interests of authors and without interfering with the latter's exclusive right to authorize the use of the work, even if it is fixed. [60]

Consequently, if the theory set forth above can be used as the basis for the right granted to the producer of phonograms by Article 12 of the Rome Convention, namely unjustified enrichment resulting from the use of another person's intellectual property for profit-making purposes that has not been authorized by its owner, it becomes easier for authors' societies to recognize that right, as it then becomes obvious that there is no intention whatever of violating or undermining the author's control over his work.

It should be mentioned in passing that this is exactly what happened in practice, as soon as experience had shown that the recognition and effective reality of this right of the producer of phonograms did not have any adverse effect on the rights of the author, which continued to grow steadily.[61]

The joint treatment advocated does not negate the diversity of the subject matter to which the protection applies: in one case it is the work, an immaterial entity resulting from the imagination of its author, and in the other it is the phonogram, a material, incorporeal object that owes its origin to production by the producer. In the same way as their relationship is due to the factors mentioned, and fundamentally to the similar structure resulting from the legislative treatment of both of them, the difference between the two types of right is increased by the deliberately misnamed "moral rights by analogy" mentioned earlier: the possibility of keeping a work unpublished, the right to disavow it and the right of authorship are the result not of creative work but rather of the strong legal bond constituted by the producer's ownership of an asset (his phonogram) and the activity, which here is an industrial one, consisting in reproduction on carriers. The very expression "sound recordings" used to describe the phonogram in the US Copyright Law No. 94-553, conforms to this view: what is protected is the recorded sound resulting from the artistic production, and not the carriers, which are industrial products.

On the other hand, this joint treatment makes it possible to harmonize the general approach and to devise common provisions for institutions that are applicable to all intellectual rights, such as the registration of works and sanctions.

When all is said and done, we are doing no more than fall into line with the legislative trend prevailing in Latin America, as evidenced by the laws of Chile, Brazil, Ecuador and Colombia already mentioned, in the hope that we have contributed some ideas that may serve to eliminate controversy, and in which authors and producers may find such common areas as will enable them to give each other mutual support in defense of their "Maginot line," which is under threat from, and frequently overwhelmed by, the technological progress that has so favored piracy, or the direct or indirect home copying and satellite and cable transmission of phonograms incorporating hundreds of thousands of musical compositions.

(WIPO translation)

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[56] Villalba and Lipsyzc, "Reflexiones para un homenaje a Valerio De Sanctis," *Il Diritto di Autore*, April-September 1979, p. 686.

[57] Villalba and Lipsyzc, *op. cit.*

[58] Valerio De Sanctis, quoted in the article mentioned (*Il Diritto di Autore*, 1962, No. 1, p. 15).

[59] Villalba and Lipsyzc, *op. cit.*, note 56, p. 687.

[60] Villalba and Lipsyzc, *Curso de Derecho Comercial*, pp. 22-24.

[61] Jessen, "Consideraciones sobre la Aplicación de la Convención de Roma sobre Derechos Conexos," *El Derecho*, Vol. 76, pp. 895-897, and Report of the Subcommittee of the Intergovernmental Committee of the Rome Convention, paragraph 17, *Copyright*, 1979, p. 102.

Correspondence

Letter from Colombia

The New Colombian Law on Copyright

Arcadio PLAZAS *

On February 19, 1982, the Government of Colombia promulgated Law 23** of the same year, which repealed and completely replaced the earlier legal regime of copyright and neighboring rights.

General Characteristics

First it should be mentioned that the Colombian Law, with its 260 sections, divided into 19 chapters, is without any doubt the longest copyright statute currently in force in any country of the world. After the relatively short law, namely Law 86 of 1946, which had been applicable until then, with its 123 articles plus the 23 articles of Title XV, Book IV, of the Commercial Code, which regulated publishing contracts of commercial character, Colombia has proceeded to adopt a statute which, at first sight, is surprising in its prolixity and sheer length. We might usefully consider the justification for this change.

First, the new Law incorporates the provisions of the Commercial Code that we have just mentioned, extending them to cover any type of publishing contract, whether civil or commercial. Secondly, it contains minutely detailed provisions based on the Tunis Model Law that introduce the privileges extended to developing countries by the Universal and Berne Conventions, as revised in Paris in 1971, to the former of which this country is party, on the subject of the compulsory licenses available to developing countries for the translation and reproduction of works protected by the two Conventions. Thirdly, pursuant to the prior legal approval and ratification by the Executive of the 1961 Rome Convention, the new Law contains the provisions recommended by the Unesco/WIPO/ILO Model Law on the protection of the so-called "neighboring" rights of performers, producers of phonograms and broadcasting organizations. Thus Colombian legislation has complied with the country's international undertaking to adopt the necessary measures at the domestic level to implement the rights covered by the international conventions to which it is party.

The case law of the Colombian Council of State, in a number of important rulings, has acknowledged the character of special laws attributed to the international treaties and conventions legislatively approved and ratified in full compliance with the requirements of the law. Before the new Law was enacted, this applied to the 1952 Universal Copyright Convention and the 1961 Rome Convention, both of which were simultaneously approved by Law 48 of 1975, and have been in force since June 18, 1976, and September 17, 1976, respectively, according to the date of their ratification by the Executive. Nevertheless it was essential that the provisions of the Conventions be incorporated in the Law, as some of them left it to member States to adopt one of two or more alternatives in cases where that was of particular importance to the Conventions' application. This is the case for instance of the periods following publication of the original work that had to elapse before licenses could be granted for the translation and reproduction of foreign works, mentioned in Articles V^{ter} and V^{quater} of the Universal Copyright Convention, and also of the system of remuneration for performers and producers of phonograms, referred to in Article 12 of the Rome Convention.

Another innovation of the new Colombian copyright statute, which has to do with its scope, is the special reference that it makes to certain contracts for uses that were not provided for in the earlier law. This is the case of the contract for cinematographic fixation, dealt with in Chapter VII, and the contract for phonographic fixation, covered by Chapter X.

The above justification does nothing, however, to hide the unnecessarily repeated inclusion of provisions on the same points, some of them even with

* Attorney-at-Law, Bogotá.

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blatant contradictions that can result in difficulties of interpretation and application. While the aspect is not really one for special consideration in this study, we feel bound to mention the main instances of this shortcoming:

— Articles 2 and 8*(a)* of the Law give different examples of the works it protects;

— Articles 5*(a)* and 13 protect translation as an independent work in identical terms, but the second adds that, "when disclosing it to the public, he shall mention the author and the title of the original work";

— Articles 26 and 96 use the same terms to specify the duration of protection for cinematographic works;

— Articles 82 and 83 make unnecessary references to the definitions given in Articles 18 and 19 on works of joint authorship and collective works respectively;

— Article 97 repeats the definition and legal responsibility of cinematographic producers, which has already been dealt with in Article 8, under *(r)*;

— the second paragraph of Article 110 and Article 132 repeat the obligation to settle and remit royalties at six-monthly intervals under the publishing contract, but the latter adds that any agreement to the contrary is null and void, and also provides for the author's right to seek rescission of the contract and the award of any damages arising out of failure to comply with the provision;

— both the second paragraph of Article 111 and the first part of Article 127 speak of the publisher's obligation to notify the author before starting a new edition, which is clearly contradictory in that the first of the two Articles refers to an edition that "has not been agreed upon" and the second to an edition that has been "authorized";

— Articles 115 and 126 say exactly the same thing about works that have by their nature to be brought up to date, where the publisher has to give preference to the author of the original work for the making of the updating supplements;

— Article 145 confers on the "competent authority," which under Article 253 is the Copyright Directorate, the power to order the suspension of public performances of a work and the withholding of the receipts from ticket sales, while Article 245 attributes it to the judge, and then not only for theatrical works but also for musical, cinematographic or other similar works. It is obvious not only that there is a contradiction between the two provisions but also that the former is totally devoid of legal effect;

— Articles 175 and 180 contain different provisions regarding the manner in which the name, trademark or other distinguishing mark of the producer or of the owner of the rights, and of the main performers, have to be mentioned on phonograms or on their labels or wrappers.

The above defects, to which may be added certain obvious printing errors in the official edition of the Law, do not however detract from the favorable aspects of this important Colombian legislative reform, of which we shall now give a brief account.

Protected Works

The Law's general criterion of protection is that it covers the rights of authors in all creations in the scientific, literary and artistic domain that can be reproduced or executed by any form of printing or reproduction or by any other known or future means (Article 2). The same Article and Article 5*(a)* give a non-exhaustive list of examples of the main forms in which works falling under this general criterion of protection are expressed.

The Law extends protection to derived works such as translations, adaptations, arrangements of music and other transformations (Article 5) in so far as they represent original creations duly authorized by the author of the work from which they are derived and the work is in the private domain.

The new provisions correct a defect of the previous law by protecting collective works, the ownership of which is conferred on the person or persons who coordinate or publish them.

One thing that is important is the express exclusion of the ideas or conceptual content of protected works, which the Law declares to be "not the subject of appropriation" (Article 6). With regard to works of art applied in industry, they are protected only in so far as their artistic value may be dissociated from their industrial use (Article 6).

Concerning nationality, the Law affords protection to all the works and productions of Colombian citizens and foreigners resident in the country and to the works of foreigners published for the first time in the country (Article 11). It endorses the principle of reciprocity written into the National Constitution (N. C., Article 35) for works published in countries where Spanish is spoken, and recognizes the effect of international conventions to which the country is party. In this connection it should be mentioned that Colombia is party to the 1952 Universal Copyright Convention, the 1910 Buenos Aires and 1946 Washington Pan-American Conventions and the 1961 Rome Convention on neighboring rights. It is party to bilateral agreements concluded with Spain, France, the Federal Republic of Germany, Ecuador and Switzerland. It is also party to the Convention Establishing the World Intellectual Property Organization, signed at Stockholm in 1967.

The System of Formalities

Registration

The new Colombian Law puts an end to the system of copyright originating with registration. "The protection granted to the author by this Law originates in the act of intellectual creation, without any registration being necessary" (Article 9).

This effectively abrogates the system of compulsory registration under the earlier legislation, which set a period of four months for securing registration, on pain of having the work stay in the public domain until such time as the rights in it are retrieved by registration. Nevertheless, the new Law keeps registration as a compulsory requirement for all national works and for all acts and contracts associated with the establishment or transfer of copyright. The purpose of this registration is to publicize the rights of copyright owners and the acts and contracts by which they are transferred or altered, and also to serve as a guarantee of authenticity and security for the owners of intellectual property and for the acts and documents that refer to it (Article 193).

Of the works subject to registration, "all scientific, literary and artistic works in the private domain, according to this Law" and "all artistic productions fixed on a physical medium" are listed (Article 192). With regard to foreign works that are protected by international conventions or treaties in force or by mere legislative reciprocity, it is provided that their registration is optional (Article 208).

Berne Convention

The exemption of foreign works from this obligation, which represents an effort to align the Law's provisions on those of the Berne Convention, is undoubtedly a discriminatory measure to the detriment of national authors. The obligation extends also to legal acts performed abroad, with the result that, for the rights in foreign works to operate in Colombia, it will be necessary to register the corresponding contracts for the acquisition of the rights, and also the translation, adaptation, publishing and other contracts; this ultimately makes the new Colombian legal system incompatible with Article 5(2) of the Berne Convention, which says that "the enjoyment and the exercise of these rights shall not 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."

Universal Copyright Convention

Of the formalities referred to in Article III of the Universal Copyright Convention, the one requiring deposit and registration of acts or contracts associated with the acquisition of rights remains in force in Colombia. Consequently Colombia will continue to be one of the Contracting States affected by the obligation imposed by the same Article III of the Universal Convention, in other words it will have to consider those requirements or formalities satisfied with respect to all works published for the first time in other Contracting States on account of the mere fact of the reserved rights notice being printed on them in the manner required by that Article. From this it follows that any requirement imposed by the Law that detracts from the full validity of the reserved rights notice is contrary to the spirit and letter of the international obligations of reciprocity entered into by Colombia pursuant to Article III of the Universal Convention.

Deposit

Articles 194, 195 and 202 to 206 of the Law refer to formal aspects of the procedure for the registration of works. Articles 196 to 201 provide details of the form in which the deposit of the various types of works should take place, and the bodies with which deposit should be effected. For printed works, phonograms and videograms, it is provided that six copies should be submitted as follows: two to the National Library, one to the Library of the National University, one to the Library of Congress, one to the *Instituto Caro y Cuervo*, and another one to the Office of Registration (Articles 196 and 197). Article 207 provides for the deposit of an additional copy at the same Office of Registration, confirms the term of 60 working days following the date of publication for effecting such deposits and introduces the penalty of a fine equal to 10 times the commercial value of each copy not deposited. The second paragraph of Article 196 specifies that no request for registration of *literary* or *scientific* works shall be processed without prior proof that the copies have been presented. The omission of *artistic* works from this provision leads one to the conclusion that musical works fixed on phonograms or videograms are still exempt from the sanction.

Articles 209 and 210 impose the obligation on the publishers of periodicals, both official and private, to deposit three copies of each publication, one with the Government Ministry, one with the National Library and one with the Library of the National University.

Owners of Rights

The Law accords ownership of the rights protected by it first to the author of the work (Article 4*(a)*). In view of the important amendment introduced by the protection of neighboring rights, the Law then accords ownership of those rights to the performer in relation to his performance (Arti-

cle 4*(b)*), to the phonogram producer in relation to his phonogram (Article 4*(c)*) and to the broadcasting organization in relation to its broadcast Article 4*(d)*). It should be pointed out that, according to the spirit of Article 1 of the Rome Convention, the Colombian Law makes a clear distinction between the rights of authors proper and neighboring rights. This is why Article 4 speaks of rights recognized by the Law and not of copyright. Article 1 makes already this clear distinction by saying that the protection laid down by the Law refers to the authors of literary, scientific and artistic works, and adding that "this Law shall also protect performers, producers of phonograms and broadcasting organizations with respect to their rights neighboring on copyright." Thus the area of these two different types of right is perfectly demarcated, which in turn dispels any doubts and gives an answer to those who used to contend that Colombian law promoted to the rank of copyright those rights that were merely related to copyright.

Under *(e)*, the same Article 4 of the Law extends its recognition of ownership to successors in title, either specific or universal, of the owners mentioned.

Still in the same Article, under *(f)*, the Law expressly recognizes ownership in favor of persons, whether natural or legal, who by contract obtain the right, for their own account and at their own risk, to produce a scientific, literary or artistic work. This contract for the performance of a work is dealt with in Article 20 of the Law, which presumes that the mere fact of there being a contract transfers the copyright to the commissioning party, whereupon the commissioned parties have the right only to the fees agreed upon, retaining in addition the moral rights written into Article 30 of the same Law. Both in this case, in the case of collective, cinematographic and anonymous works, and in the case of neighboring rights, the Law neither denies nor subjects to any conditions the authorship of the natural person or persons who may have had a part in the creation of the work, its performance or its communication to the public. The reference is exclusively to the legal concept of ownership, which provides satisfactorily for those cases where a third person, either natural or legal, has a part in the process of creation of the work or its communication, and where it is impossible to pinpoint the authorship of the creation to a natural person.

The provisions of the Colombian Law on commissioned works are not new to legal tradition. They already existed, in very similar terms, in the old Law 32 of 1886 (Article 17), whereupon they disappeared with Law 86 of 1946 and were then reintroduced, as part of the provisions on publishing contracts, by Article 1.367 of the Commercial Code.

Other types of ownership, which may accrue to legal entities as well as to natural persons, relate to collective works (Articles 5*(b)* and 83), collections of poems or popular songs (Article 17), compilations (Article 19), anonymous or pseudonymous works (Article 201), cinematographic works (Articles 81 and 96), works created by public employees or officials (Article 91) and collective works created under an employment contract or a contract for services (Article 92).

Content of Copyright

Economic Rights

From its very first provisions (Article 3), the Law clearly establishes the difference between the economic and the moral content of copyright. In the first two subdivisions of Article 3 the author is granted the exclusive right to dispose of the work and exploit it, with or without gainful intent, by any means, while the third specifies the prerogatives concerning moral rights, on which we shall be commenting in the following section.

The first section of Chapter II of the Law is devoted to the regulation of economic rights and their duration. Article 12 gives details of the most important generic aspects of the economic content of copyright, synthesizing them into the exclusive right to reproduce, to transform and to communicate the work.

Chapter V lists some of the more important forms of reproduction, transformation, communication and publication, including publishing, translation, incorporation in photographic film, videogram, videotape or phonogram, performance, recitation, sound or audiovisual broadcasting, dissemination by loudspeaker, telephony and phonograph, nevertheless leaving open any other known or future means whereby use may be made of such economic rights.

This strange Chapter of the Law contains provisions relating to the right of public performance, authors' associations, tariffs or scales of fees for public performance and the lapse of mandates, together with provisions on the interpretation of the Law as important as those contained in Articles 77 and 78. In it we find the right of expropriation of economic rights (Article 80) when the work is regarded as being of great value to the country and of social interest to the general public, subject to equitable prior indemnification of the copyright owner. This limitation, in conformity with the general spirit of Colombia's constitutional and legal provisions on property and other acquired rights, appears in the Law in qualified form, the condition being that the work, to be susceptible of expropriation, has to have been published at least three years previously and has to be out of print, apart from which there has to be "little probability" of the owner of the copyright publishing a new edition. We need hardly point out

the inopportuneness of the latter condition, due to the difficulty or even impossibility of providing the necessary proof.

Moral Rights

To the two traditional rights that were already recognized by the former law, namely the author's right to claim authorship of the work and to demand the mention of his name or pseudonym (Article 30*(a)*), and the right to object to any distortion, mutilation or other modification of the work (Article 30*(b)*), the new Colombian Law adds the right to keep the work unpublished or anonymous until the author's death, or after it where he has so ordered by testamentary provision (Article 30*(c)*), the right to alter it either before or after its publication (Article 30*(d)*), and the right to withdraw it from circulation or suspend any form of use even where such use has been previously authorized (Article 30*(e)*), subject to appropriate indemnification for any prejudice that might be caused.

These rights are endowed with perpetual, inalienable and unrenounceable character. The new provision introduces an important new feature in relation to the distortion, mutilation or modification of the work by a third party when it requires that such acts be prejudicial to the honor or reputation of the author or that they discredit the work itself, before the author may object to them with the right to seek redress for damages. This amendment, inspired by paragraph (1) of Article 6bis of the Berne Convention, changes the system of the earlier law, which merely gave the author the right "to object reproduction or public exhibition of the work if it be changed, mutilated or modified," without any condition.

After the author's death, the defense of the moral rights written into items *(a)* and *(b)* of Article 30 fall to his spouse and consanguineous heirs. If he has neither, that defense accrues to any person, natural or legal, who provides proof of his title to the work concerned (Article 30, paragraph 2). The defense of the authorship, integrity and authenticity of works that have fallen into the public domain is the responsibility of the Colombian Institute of Culture when the works do not have owners or successors in title who can defend or represent those moral rights (Article 30, paragraph 3).

The new Colombian Law expressly protects moral rights, or some of them, in special cases in which they are liable to be violated. In the case of commissioned works, where the economic rights vest in the commissioning party, the moral rights conferred by items *(a)* and *(b)* of Article 30, namely the right to claim authorship and to object to any distortion and mutilation or other amendment, are reserved to the author or authors who made the work (Article 20).

In the case of works created by public employees or officials in the exercise of legal or constitutional obligations, the exercise of the moral rights is again reserved to them, in so far as they are not incompatible with the rights and obligations of the public bodies concerned (Article 91).

Article 93 of the Law contains a general provision referring to the various types of work covered by Chapter VI — cinematographic works, works of joint authorship, collective works, letters and other correspondence, photographic works, works created by public employees and officials and collective works created under an employment contract or a contract for services — according to which "the provisions contained in the foregoing Articles shall not affect the exercise of the moral rights of authors as specified by this Law."

Article 171 introduces the general provision that performers have the moral rights specified in Article 30 of the Law.

Article 182 repeats the fundamental provision that "the transfer of rights, whether whole or partial, shall not include the moral rights specified in Article 30."

Limitations on Copyright

Uses Free of Charge

In this category, the Law allows quotations or transcriptions of necessary passages that cannot reasonably be considered a simulated or substantial reproduction of the work from which they are taken (Article 31); the use of literary or artistic works or parts thereof by way of illustration for teaching purposes, either in printed or in broadcast works, within the same limits and without gainful intent (Article 32); the reproduction of articles, photographs or commentaries on current events by the press (Article 33); the reproduction, distribution or communication of news or other information on topical facts (Article 34) or of speeches delivered or read at deliberative assemblies, in the course of legal proceedings or before public authorities (Article 35); the publication of a person's portrait for scientific, educational or cultural purposes or in connection with topical facts or current events (Article 36); the reproduction of works of art, photographs, cinematograph films and architectural works permanently located on public highways or in public places (Article 39); the reproduction of works or fragments of such works in so far as it is considered necessary by the competent authority for use as judicial proof or for legislative or administrative purposes of the State (Article 42), and the alteration of architectural designs by the commissioning party (Article 43).

The Law expressly excludes from protection the texts of the Constitution and of laws, decrees, ordi-

nances, orders, regulations and other administrative texts and judicial decisions, which may be freely reproduced subject to the obligation to abide strictly by the official edition (Article 41).

With regard to the purposes for which the work is used, the Law contains the general principle according to which the use of scientific, literary and artistic works is free when it takes place in a private residence without gainful intent (Article 44).

With regard to the delicate problem of reprography, the Law allows the reproduction by any means of a literary or scientific work, such reproduction having been arranged or effected by the party concerned in one copy for his private use and without gainful intent (Article 37). An exception is also made in favor of public libraries, which may produce, for the exclusive use of their readers and where such reproduction is necessary for conservation or for exchange services with other libraries, likewise public, one copy of protected works deposited in their collections or archives and which are out of print on the local market. The same right is granted to the libraries that benefit from loan services, under the conditions specified in the general provision (Article 38).

The free use of all protected works in a private residence without gainful intent is laid down as a general principle (Article 37), as is the public performance of music made for educational purposes, under the same conditions as above (Article 164), and the use of phonograms, also under the same conditions (Article 178).

Use by Means of Compulsory Licenses

In its Chapter IV (Articles 45 to 71), the Law embodies the provisions under which protected works may be translated or reproduced by means of non-exclusive licenses for the purposes of teaching or research, subject to equitable remuneration laid down by the competent authority and under the conditions specified in the Universal Copyright Convention as revised in Paris in 1971. This part of the Law is based on the Tunis Model Law for Developing Countries. It calls attention to the fact that, by introducing this system of compulsory licenses, Colombian law has renounced the most important of the concessions made towards those countries, namely the fixing at three years of the minimum period that had to elapse following publication of the original work before a translation license might be obtained. A period of seven years has been fixed in place of that minimum period. On the other hand, for reproduction licenses, which have far less bearing on the cultural and educational circumstances of Colombia, the periods of three, five and seven years laid down in the revised Paris text have been retained.

The Period or Term of Protection

The National Constitution of Colombia is the only one in the world that specifies the period of protection for literary and artistic property in its own provisions (Article 35): "Literary and artistic property shall be protected as transferable property during the lifetime of the author for and 80 years thereafter, subject to the formalities laid down in the law."

This provision, which has been in force since 1886, has been respected by domestic legislation as a provision of general character. The new Law 23 of 1982 departs from this criterion, however, and introduces two separate periods of protection, namely: *(a)* for natural persons, when they are original owners of copyright, the period of 80 years after the author's death, and *(b)* for legal persons and entities under public law, when they are also original owners of copyright or neighboring rights, the period of 30 years as from the first publication of the work.

The Drafting Commission of the Bill for the new Law interpreted Article 35 of the National Constitution as concerning exclusively natural persons, inasmuch as it set the period of protection to run from time of death, which could not be applicable to legal persons or public entities. In accordance with that interpretation, the Commission regarded the protection afforded by the new Law to such entities as being different protection from that established by the Constitution, with the result that it could fix the conditions for enjoyment of the right without being bound by the period laid down in the Constitution. The same reasoning led the Commission to introduce a period of protection for neighboring rights, in favor of performers, producers of phonograms and broadcasting organizations, which was different from the constitutional one and equal to that applicable to legal persons and public entities as just mentioned, namely 30 years from first publication or first public performance, first fixation of a phonogram or first transmission of a broadcast, as the case may be.

In order to abide by constitutional principle, the Law makes an express exception (in Article 29) in favor of original owners of neighboring rights who, if they are natural persons, will be protected for the same period of 80 years after the death of the author, as specified in the Constitution.

In the case of works of joint authorship the period of protection will be 80 years, counted from the date of the death of the last surviving co-author (Article 21). For works consisting of two or more volumes or in the form of fascicles or periodical installments, the period of protection is counted independently for each volume, fascicle or installment (Article 22). Should there be no heirs or successors in title, the work falls into the public domain on the death of the author. Where the copyright has been transferred by a transaction *inter vivos*, the transferee

will be protected during the lifetime of the author and 25 years thereafter, whereupon the heirs recover the right for the time remaining until the 80 years of the overall term are completed (Article 23). For collective works the period will be 80 years calculated as from publication, and it will accrue to the editors (Article 24). Anonymous works will also be protected for 80 years as from the date of their publication, in favor of the publisher. Should the author reveal his identity, the term of protection will accrue to him (Article 25). Cinematographic works will be protected also for 80 years from the completion of the production, which is to be understood as being the date of its first communication to the public. If however the owner of the cinematographic work is a legal entity, protection will be for 30 years following publication (Article 26). In all cases in which the period is counted from publication, it is understood that the period will end on December 31 of the relevant year (Article 28).

Contracts for Use

As we mentioned in the introduction to this study, the Colombian Law includes a number of chapters that rule on the mutual obligations and rights of the parties to the contracts for use that are most frequently entered into, for instance the contract for a cinematographic work, the publishing contract, the performing contract and the contract for incorporation in phonograms.

Cinematographic Work

In the contract for a cinematographic work it is specified that, unless otherwise agreed, the economic rights in this type of work accrue to the producer, who is defined as being the natural person or legal entity legally and economically responsible for the contracts with all the persons and bodies involved in the making of the work (Articles 97 and 98). The exercise of moral rights vests in the director or maker of the work, without prejudice to those that accrue to the various authors or performers who participated in it (Article 99). Minimum conditions are specified for the contract (Article 100), as are the exclusive rights of the producer (Article 103); the prior authorization of the authors or performers, which may be given by themselves or through the societies that represent them, is required for the exploitation of the cinematographic work in any medium not agreed upon in the contract (Article 104).

Publishing Contract

Chapter VIII (Articles 105 to 138) contains a range of detailed provisions on the mutual rights and obligations of the author and publisher. It gives those that are an essential feature of the contract (Articles 106, 107, 108, 109, 110, 113, 114, 118, 120, 122, 132), others that are mandatory for the author or accrue to him by virtue of public policy (Articles 111, 112, 113, 114, 116, 126), and still others that are also mandatory for the publisher or accrue to him by virtue of public policy (Articles 109, 110, 122, 132). It further contains provisions for restrictive interpretation in favor of the author (Articles 119, 130, 131). It prohibits the making of contracts for future works (Article 129). It specifies the procedure in the case of bankruptcy of the publisher (Article 124). It allows arbitration to be agreed upon for the settlement of disputes, failing which it specifies the summary oral proceeding (Article 137). Finally it extends the provisions of the publishing contract to cover contracts for the publication of musical works, as appropriate (Article 138).

Performing Contract for Stage Performance

Chapter IX (Articles 139 to 150) contains the basic provisions on performing contracts. It provides for the suspension of performances and the withholding of receipts from ticket sales, at the request of the author or his representatives, where no proof is provided of the royalties having been paid (Article 145). A performance will not be considered a public performance when it is given for educational purposes within the premises or buildings of the public or private educational establishments concerned, provided that no admission charge whatever is made (Article 149).

Contract for Phonographic Fixation

Chapter X (Articles 151 to 157) contains the basic provisions on the rights and obligations of authors and phonogram recording firms. One provision that deserves particular mention is the one that excludes public performance of the phonogram from the authorization given by the author under the contract (Article 151). The author is given the right, in the same way as with publishing contracts, to make the necessary inspections on the premises of the phonogram producer in order to verify the accuracy of royalty settlements where remuneration is agreed to be proportionate to the number of phonograms produced or manufactured (Article 152). It also prohibits contracts for future works, except where the commitment is to the production of a maximum of five works of the same kind as that which is the subject of the contract and during a period that may not be longer than five years from its date (Article 155).

Public Performance of Musical Works

Chapter XI of the Law (Articles 158 to 164) contains a number of provisions that are very important

to the effectiveness of the right of public performance. After having specified that express prior authorization has to be obtained from the authors or their representatives (Article 158), it presumes that the corresponding royalties have to be paid by all theaters, cinemas, concert or dance halls, bars, clubs, sports grounds, circuses, restaurants, hotels, commercial, banking and industrial establishments and finally any place in which musical works are performed or transmitted by radio and television, either with the participation of performers or by mechanical or electronic sound or audiovisual processes (Article 159).

It gives the administrative authorities the power to deny operating licenses to public establishments liable to the payment of royalties that have not given prior evidence of having come to terms with the authors of the music or their representatives, that is, with the associations of authors (Articles 160, 161). The Ministry of Communications is given the control of public performances by broadcasting organizations (Article 162). The Law imposes the obligation to keep and present planning sheets of works performed (Article 163). Finally, as mentioned earlier, a performance is not considered a public performance when it is made for strictly educational purposes within the grounds or buildings of the educational establishments concerned, provided that no admission charge whatever is made (Article 164).

In its Ruling No. 80, handed by down by its Plenary Chamber on October 21, 1982, the Supreme Court of Justice declared Articles 160 and 161 of the Law to be in conformity with the National Constitution. The first of the two Articles requires the administrative authorities to refrain from authorizing the holding of shows or public performances without the person responsible for them presenting the program thereof, together with the authorization of the owners of the rights or their representatives. The second requires the same authorities not to issue operating licenses to establishments in which musical works are performed in public until such time as the applicant for the license in question presents evidence of having paid the corresponding copyright fees.

Neighboring Rights

As we mentioned in the introductory remarks, the Colombian Law protects neighboring rights in favor of performers, producers of phonograms and broadcasting organizations within the meaning of the 1961 Rome Convention, which was approved jointly with the Universal Copyright Convention by Law 48 of 1975, and duly ratified by the Government of Colombia. It was also mentioned that Chapter XII of the Law, which refers to such rights, was drafted along the lines of the Unesco/WIPO/ILO Model Law, which explains why its provisions are properly ordered and drafted.

Pursuant to Article 12 of the Rome Convention, Article 173 of the Law provides that, when a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used directly for broadcasting or for any other form of communication to the public, a single equitable remuneration for the performers and for the producer of the phonogram *is to be paid by the user to the producer.* Article 174 rules that *half of the amount received* by the producer under the previous Article is to be paid by the producer to the performers, or to those who represent them, unless it is agreed that they are to be paid a higher amount.

Transfer of Copyright

In accordance with constitutional principle, copyright is recognized as being transferable, either wholly or in part, and either universally or in particular (Article 182), with the express exception of moral rights (Article 30; Article 182, paragraph).

Instruments or contracts disposing of copyright may be evidenced either by a public deed or by a private deed executed before a notary, both having to be registered at the Office of Copyright Registrations (Article 183). With regard to photographs, paintings, drawings, sculptures and other similar works, it is provided that the work is the property of the person who commissioned it (Article 184) and, with regard to the alienation of a pictorial work, sculpture or work of figurative art in general, it provides that the work does not confer on the acquirer the right of reproduction, which continues to belong to the author or his successors in title (Article 185). Finally, in the case of photographic works it is provided that remittance of the negative presumes assignment of the photograph to the acquirer, who also has the right of reproduction.

Assignment or transfer of copyright may be effected in all the forms provided for in the Civil Code and in the Commercial Code with respect to movable and immovable property. Law 153 of 1887 incorporated Law 32 of 1886 on Literary and Artistic Property in the Civil Code (Article 83 thereof). The laws that subsequently replaced Law 32 of 1886, namely Law 86 of 1946 and the new Law 23 of 1982, should also be considered incorporated in the same Code.

Article 671 of the Civil Code says that "products of talent or intellect shall be the property of their authors. This type of property shall be governed by the special laws on the subject."

Pursuant to Article 1 of Law 23 of 1982, copyright is protected as laid down by the same Law and,

in so far as they are compatible with it, by ordinary legal provisions.

Consequently, it should be considered that the provisions written into Title II of Book II of the Civil Code, which refer to the ownership or property, are applicable to the assignment or transfer of copyright in so far as they are compatible with the specific law.

The Public Domain

This short Chapter specifies the circumstances that cause a work to be considered in the public domain, namely the expiry of the term of protection, express renunciation on the part of the owner and the absence of treaty or legal provisions on reciprocity in the case of foreign works. Works of folklore and traditional works by unknown authors are expressly regarded as being in the public domain (Article 187), and it is added that indigenous art in all its manifestations forms part of the cultural heritage (Article 189). In the absence of further specification of the latter provision, the cultural heritage must be construed as being that of the Colombian nation or State.

There is no provision on the "domaine public payant," although that institution was in fact proposed by the Drafting Commission responsible for the Bill that resulted in the Law we are considering here.

Authors' Associations

The new Colombian Law takes up an intermediate position in relation to the delicate matter of supervising the activities of authors' associations. There is neither the permanent, total control exercised under some laws nor the generous freedom of others.

According to the National Constitution, which establishes freedom of association and legal representation, such associations may be two or more in number, even for one and the same type of literary creator or performer. This plurality, which in some countries has had very adverse effects on the efficacy of the essential functions of royalty collection and distribution, and has led to notorious problems regarding the conduct of administrators, could not be altered by the new Colombian Law.

The exercise of executive authority under the Law, entrusted to the new National Copyright Directorate, now extends from the approval of statutes and the recognition of legal personality, which was previously entrusted to the Ministry of Justice, to the right to exercise control, inspection and supervision over the exercise and accomplishment of the functions and responsibilities specified in the Law (Articles 212 and 231).

Of the most striking provisions of the Law, we should mention the one that specifies a minimum of 25 authors for any society to function (Article 213), the possibility of a member belonging to two or more associations (Article 214), the legal presumption of conferment of legal representation or mandate on the associations by the simple fact of affiliation to them (Article 216, paragraph 3), the right to represent the interests of foreign societies, either on specific instructions or under reciprocal arrangements (Article 216, paragraph 6), the prohibition on any restriction of the contractual freedom of members (Article 224), the limit of 30 % placed on the value of sums collected for assignment to administrative costs (Article 225), and the statute-barring after three years, in favor of the associations, of claims for fees or royalties collected but not recovered by the beneficiaries (Article 226).

The Law establishes the supremacy of the association's Assembly, and its power to elect its Management Council, Supervisory Council and Treasurer (Articles 218 to 222).

One subject that has caused particular concern is the limitation of the provisions of Chapter XVI to authors' associations, as is clearly apparent in its title and in the terms in which all its Articles are drafted. As we have already mentioned, the Law has been very clear in its demarcation of the independent areas of action of copyright proper on the one hand and neighboring rights on the other. Nevertheless, in drafting this Chapter of the Law, it was overlooked that the owners of neighboring rights, especially performers and producers of phonograms, act and indeed have to act through associations with representative, collecting and administrative functions that are similar to those set up for authors and composers. Faced as we are with a promising future for the beneficiaries of those rights, it would be contrary to legal equity for them to be allowed to form associations and carry on their collective activities without any control or supervision, whereas authors, composers and other owners of copyright are subject to official supervision in the manner commented on in this section.

Sanctions and Procedure

Chapters XVII and XVIII of the Law serve to define infringements of or other offenses against copyright and neighboring rights, to lay down the criminal and civil sanctions and to specify the legal procedures that can be used with a view to repressing such infringements and offenses. It was to be expected that these provisions would face severe criti-

cism for their supposed leniency and ineffectualness. The authors of the Bill made it quite clear that the criterion on which they had based the Law was derived from the principle, which today is accepted by the specialists, that any excessiveness in the penalties imposed can lead all the more easily to impunity, above all when those penalties go far beyond the scales laid down for other cases of similar type and embodying similar social risks, which are punished by general criminal provisions.

Implementing Body

Two of the final Articles of the Law (253 and 254) create the Copyright Directorate, which will be responsible for monitoring the implementation and operation of the Law, together with registration functions and any others that may be entrusted to it by the competent authority elsewhere in its text. In the second paragraph of Article 253, a grave error is made in that some of its powers are specified and followed by the abbreviation "etc.," with the obvious risk of the Copyright Directorate being entrusted with functions that, by reason of their character and by virtue of the general provisions on legal and administrative jurisdiction within the country, should be entrusted to different officials.

Another provision that has been severely criticized is the one to be found in Article 256, which orders the revision of contracts in force to adapt them to the provisions of the new Law. In accordance with Article 35 of the National Constitution of Colombia, and the country's sound legal traditions, this provision will adversely affect rights acquired in the proper way under earlier laws.

Article 257 reintroduces the most-favorable-provision rule for the owners of copyright in all cases of conflict or doubt regarding the application of the new Law.

The regulatory power of the Executive has so far shown itself in the promulgation of a Decree, No. 1.035 of 1982, which confines itself to establishing the Copyright Directorate as a department of the Government Ministry, and generally entrusting it with the main functions attributed to it by the Law.

(WIPO translation)

Conventions Not Administered by WIPO

Additional Protocol to the Protocol to the European Agreement on the Protection of Television Broadcasts

The member States of the Council of Europe, signatory hereto,

Having regard to the European Agreement on the protection of television broadcasts of 22 June 1960, hereinafter called "the Agreement", as modified by the Protocol of 22 January 1965 and the Additional Protocol of 14 January 1974;[1]

Having regard to the fact that the date given in Article 13, paragraph 2, of the Agreement was extended by the said Additional Protocol of 14 January 1974;

Considering the desirability of further extending this date for the benefit of States which are not yet Parties to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, signed in Rome on 26 October 1961.

Have agreed as follows:

Article 1

Paragraph 2 of Article 13 of the Agreement, as last modified by Article 1 of the Additional Protocol of 14 January 1974, is replaced by the following text:

"2. Nevertheless, as from 1 January 1990, no State may remain or become a Party to this Agreement unless it is also a Party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations signed in Rome on 26 October 1961."

Article 2

1. This Additional Protocol shall be open for signature by member States of the Council of Europe which have signed or acceded to the Agreement, which may become Parties to this Additional Protocol by:

a. signature without reservation as to ratification, acceptance or approval, or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Any State not a member of the Council which has acceded to the Agreement may also accede to this Additional Protocol.

3. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary General of the Council of Europe.

Article 3

This Additional Protocol shall enter into force on the first day of the month following the date on which all the Parties to the Agreement have become Parties to this Additional Protocol in accordance with the provisions of Article 2.

Article 4

From the date of entry into force of this Additional Protocol, no State may become a Party to the Agreement without at the same time becoming a Party to this Additional Protocol.

Article 5

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any State which has acceded to the Agreement and the Director General of the World Intellectual Property Organisation of:

a. any signature of this Additional Protocol;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. the date of entry into force of this Additional Protocol, in accordance with Article 3.

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[1] See *Le Droit d'Auteur*, 1960, p. 201; *Copyright*, 1965, p. 55, and 1974, p. 110.

In witness whereof the undersigned, being duly authorised thereto, have signed this Additional Protocol.[2]

Done at Strasbourg, this 21st day of March 1983, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to any State invited to accede to the Agreement and to the Director General of the World Intellectual Property Organisation.

[2] The Secretary General of the Council of Europe has notified the Director General of WIPO that this Additional Protocol was signed on March 21, 1983, by Denmark and Sweden, without reservation as to ratification, acceptance or approval, and by Belgium and Greece, subject to ratification, acceptance or approval.

Book Reviews

Urheberrecht. Textbook edited by *Heinz Püschel* and written by *I. Barthel, A. Glücksmann, W. John, G. Münzer, H. Püschel, H. J. Sauerstein, F. Staat, A. A. Wandtke* and *D. Wendt.* One volume of 212 pages. Staatsverlag der Deutschen Demokratischen Republik, Berlin, 1980.

This comprehensive manual on both copyright and neighboring rights is a textbook for education in the universities and high schools of the German Democratic Republic. As a source of information, it can be useful not only to students, but also to lawyers interested in various philosophical and practical aspects of socialist copyright law as codified, interpreted and implemented in the German Democratic Republic.

The book comprises the following 10 chapters: development and basic positions of socialist copyright; the work and its author; objectives, rights and obligations of cultural institutions using authors' works; rights and obligations of authors; free use and statutory licensing; succession following the death of the author; duration of protection; legal relations concerning the use of the work in the society; relations under the law of rights in "productions" (*Leistungsschutzrechte*, including the rights generally referred to as neighboring rights, but also rights in maps, sketches for technical purposes, etc.); the protection of rights; international copyright.

Copyright is dealt with by the authors in the context of the entire legal system of the GDR, by considering the relevant provisions not only of the Constitution but also of the Civil Code 1975, the Law on Civil Procedure of the same year and the Labor Law 1977, in particular. The Copyright Act of September 13, 1965, of the GDR is reproduced in annex. The book offers insight in relevant case law as well.

Corresponding to the principle, derived from the Constitution of the country, that copyright should promote both creation and dissemination of literary, artistic and scientific works needed by the socialist society, relations between authors and cultural institutions disseminating their works are considered as a fundamental social affair governed by the copyright law.

Special didactic value of the book consists in interpreting, also by means of ample reference to proper examples, notions of copyright not defined by the law; this proves to be useful even concerning basic terms such as work, plagiarism, public or private use, basic kinds of restricted acts. It is to be regretted that the authors did not touch upon some topical problems raised by technological development, as e. g. the protection of computer software, or the impact on copyright and neighboring rights of distribution by cable.

The part devoted to various forms of the use of authors' works represents more than one-third of the book. Besides various kinds of contracts for the use of works concluded between authors or their successors and a cultural institution, all aspects of both the legal bases and the practice of the collective administration of musical performing and mechanical rights in the GDR have been dealt with. The detailed portion on the protection of the interests of employee authors deserves special attention.

As regards international copyright, the book introduces briefly into the substance of the major international copyright conventions, and the bilateral agreement the GDR signed with the Soviet Union in 1973 and which still applies to their copyright relations parallel with the Universal Copyright Convention. As to the Berne Convention, reference to its Paris Act has been made throughout the book, and various provisions of the Copyright Act of the GDR (e. g. those concerning reproduction under statutory license for purposes of documentation) have been interpreted in the light of relevant articles of that Act.

Information is available also on the role of state organizations competent in copyright matters, such as the *Büro für Urheberrechte* [Bureau for Authors' Rights] as regards conclusion of contracts across the frontier, or the Copyright Information Center of the GDR, concerning relevant assistance given by the GDR to developing countries.

G.B.

Internationales Urheberrecht, by *Heinz Püschel*. One volume of 155 pages. Staatsverlag der Deutschen Demokratischen Republik, Berlin, 1982.

Two years after the publication in 1980 of a textbook on copyright, edited by him, Professor Heinz Püschel published a compendium on international copyright, for students of universities as well as practicians in the field of the international use of authors' works. The book also covers questions of international protection of the rights of performers, producers of phonograms and broadcasting organizations, notwithstanding the fact that the German Democratic Republic has not so far adhered to any international convention for the protection of neighboring rights.

As an introduction into the manifold subject, the author elaborates the basic principles of contemporary protection of copyright at the international level with special regard to the copyright relationship of socialist countries, based on the requirement of cultural and scientific cooperation among them. In this context he offers a detailed analysis of the bilateral agreement in force between the German Democratic Republic and the Soviet Union since 1974. Attention should be paid to special features of that agreement, such as the provisions on complementary application, besides the requirement of national treatment, of the principle of material reciprocity, or the regulation of the payment of authors' fees under the agreement and, last but not least, its relation to the Universal Copyright Convention. With regard to the implementation of the said agreement, the book also contains information on the activities of the Soviet Union's Copyright Agency (VAAP).

The introduction is followed by a survey of the history of the multilateral conventions for the protection of authors' rights, and the Convention Establishing the World Intellectual Property Organization, to wich the German Democratic Republic has been a party from the beginning. The historical survey also comprises a report on the international adoption of special faculties open to developing countries, and concludes by surveying the coming into existence of the various neighboring rights' conventions; special attention is focused on the Satellites Convention (1974).

The trunk of the compendium is a concise but comprehensive commentary on the provisions of both the Berne and Universal Copyright Conventions, including substantive and administrative rules alike. Special merit of the author consists in informing about the practical implementation of those conventions, both at the international level (e. g. as regards cooperation between WIPO and Unesco, or convening of various groups of specialists) and in the German Democratic Republic. Often also comparative aspects are involved (e. g. in connection with the collective administration of musical performing rights in different countries).

Finally, Püschel surveys the Rome Convention on the protection of neighboring rights, analyzing also aspects of its implementation. In the framework of his commentary on the provisions concerning the producers of phonograms, he extends his attention, in a comparative manner, also to the Phonograms Convention.

The compendium comprises in annex relevant extracts from the Copyright Act of September 13, 1965, and the full German texts of the bilateral copyright agreement with the Soviet Union of November 21, 1973, the Paris Acts of the Berne and Universal Copyright Conventions, the Rome Convention 1961, the Phonograms Convention 1971, the Act of December 5, 1975, on the application of the law of the German Democratic Republic to international relations under civil, family and labor law and international economic conventions, and the Decree of the Minister for Culture on the protection of authors' rights by the *Büro für Urheberrechte* [Bureau for Authors' Rights] of February 7, 1966.

G.B.

Calendar

WIPO Meetings

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

1983

June 6 to 17 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information

June 13 to 17 (Geneva) — Committee of Experts on the Legal Protection of Computer Software

June 20 to 24 (Geneva) — Permanent Committee on Patent Information (PCPI) — Ad Hoc Working Group on the Revision of the Guide to the IPC

July 4 to 8 (Geneva) — Joint Unesco-WIPO Consultative Committee on the Access by Developing Conntries to Works Protected by Copyright (convened jointly with Unesco)

September 12 to 20 (Geneva) — International Patent Classification (IPC) Union — Committee of Experts

September 14 to 16 (Paris) — Forum of International Non-Governmental Organizations on Double Taxation of Copyright Royalties (convened jointly with Unesco)

September 19 to 23 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

September 26 (Geneva) — Paris Union — Celebration of the Centenary of the Paris Convention for the Protection of Industrial Property

September 26 to October 4 (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; Execntive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

October 17 to 21 (Geneva) — Committee of Governmental Experts on Model Statutes for Institutions Administering Anthors' Rights in Developing Countries (convened jointly with Unesco)

November 21 to 25 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Gronp on General Information

November 28 to December 2 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Special Qnestions and Working Gronp on Planning

December 5 to 7 (Geneva) — Berne Union, Universal Copyright Convention and Rome Convention — Subcommittees of the Executive Committee of the Berne Union, of the Intergovernmental Copyright Committee and of the Intergovernmental Committee of the Rome Convention, on Cable Television (convened jointly with ILO and Unesco)

December 8 and 9 (Geneva, ILO Headquarters) — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

December 12 to 16 (Geneva) — Berne Union — Executive Committee — Extraordinary Session (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

1984

February 27 to March 24 (Geneva) — Revision of the Paris Convention — Diplomatic Conference

UPOV Meetings

1983

June 7 to 10 (Tystofte, Skaelskør) — Subgroups and Technical Working Party for Agricultural Crops

September 20 to 23 (Rome) — Subgroup and Technical Working Party for Fruit Crops

September 27 to 29 (Conthey) — Technical Working Party for Ornamental Plants and Forest Trees

October 3 and 4 (Geneva) — Technical Committee

October 11 (Geneva) — Consultative Committee

October 12 to 14 (Geneva) — Council

November 7 and 8 (Geneva) — Administrative and Legal Committee

November 9 and 10 (Geneva) — Hearing of International Non-Governmental Organizations

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

Non-Governmental Organizations

1983

Council of the Professional Photographers of Europe (EUROPHOT)
Congress — October 6 to 13 (Munich)

International Confederation of Free Trade Unions (ICFTU)
Congress — June 23 to 30 (Oslo)

International Copyright Society (INTERGU)
Congress — October 31 to November 4 (Buenos Aires)

International Federation of Library Associations and Institutions (IFLA)
Congress — August 21 to 28 (Munich)

International Federation of Musicians (FIM)
Executive Committee — June 27 to 30 (Amsterdam)
Congress — September 19 to 23 (Budapest)

International Federation of Phonogram and Videogram Producers (IFPI)
Council — June 1 and 2 (Venice)

International Literary and Artistic Association (ALAI)
Executive Committee — September 12 (Paris)

1984

International Council on Archives (ICA)
Congress — September 17 to 21 (Bonn)

International Publishers Association (IPA)
Congress — March 11 to 16 (Mexico)