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World Intellectual Property Organization (WIPO)

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World Intellectual Property Organization

Governing Bodies of WIPO and the Unions Administered by WIPO

Fifteenth Series of Meetings

(Geneva, September 24 to 28, 1984)

NOTE*

The Governing Bodies of WIPO and the Unions administered by WIPO held their fifteenth series of meetings in Geneva from September 24 to 28, 1984. The following six Governing Bodies held sessions:

WIPO Coordination Committee, eighteenth session (15th ordinary);

Paris Union Assembly, ninth session (3rd extraordinary);

Paris Union Conference of Representatives, eleventh session (5th extraordinary);

Paris Union Executive Committee, twentieth session (20th ordinary);

Berne Union Executive Committee, twenty-third session (15th ordinary);

PCT (Patent Cooperation Treaty) Union Assembly, twelfth session (8th extraordinary).

Delegations of 77 States participated in the meetings. Eleven intergovernmental organizations and four international non-governmental organizations were represented by observers. The list of participants, including the list of officers, follows this note.

Accounts and Activities. The Governing Bodies reviewed and noted with approval reports by the Director General on the financial accounts for 1982 and 1983 and on the activities of WIPO from September 1983 to September 1984. All the delegations that intervened in the discussion expressed satisfaction with the accomplishments of the International

Bureau since the 1983 sessions of the Governing Bodies. Several of those delegations also noted that the activities had been carried out in accordance with the approved program, that the activities — particularly those related to development cooperation — had increased in comparison with those of the preceding period and that all activities had been carried out in a highly competent manner, fully meeting the concerns for the efficient management and rational use of resources. In the course of their interventions, a number of delegations described the development cooperation activities undertaken by the International Bureau in their respective countries or to which their governments had contributed financial support and other assistance. Several of those delegations stated that in carrying out those development activities, WIPO was a model of inter-governmental cooperation for development which made it stand out among the specialized agencies of the United Nations system. The delegations of developing countries expressed their thanks to the International Bureau for the development cooperation activities that had been carried out for the benefit of their countries, and they conveyed their appreciation to the governments of those States and institutions that had contributed to the execution of those activities by providing training, sending consultants and furnishing documentation. A number of delegations referred to the session of the WIPO Permanent Committee for Development Cooperation Related to Industrial Property which was held in the week preceding the meetings of the Governing Bodies and, in endorsing the conclusions of that body, pointed to the valuable suggestions made by that Committee for the program of future work in the field of development cooperation. Several delegations expressed satisfaction with the plans concerning the celebration of the centenary of the Berne

* Prepared by the International Bureau.

Union in 1986 and thanked the Government of Switzerland for its generous offer of hosting the celebration in the *Palais fédéral* in Berne. Several delegations expressed the wish that WIPO should, by specific program activities, make a concrete contribution to international cooperation for the promotion of peace, referring to relevant resolutions of the General Assembly of the United Nations.

Director General. The WIPO Coordination Committee decided, upon the proposal of the Delegation of the United States of America, to nominate, unanimously and by acclamation, Dr. Arpad Bogsch for reappointment by the WIPO General Assembly at its session in 1985 for a six-year term as Director General of WIPO. A great number of delegations of States and the representatives of several international organizations conveyed their congratulations to Dr. Arpad Bogsch on his nomination. The Director General expressed his profound appreciation to all the Delegations for their unanimous decision. In his speech, he made the following statement as to the future tasks of WIPO:

“First of all, WIPO will have to further increase its usefulness for the developing countries. Intellectual property should contribute directly to the realization of the aims of their governments for improving their economic conditions and thus contribute to their self-reliance and competitiveness. This is an objective which is uncontested and crystal clear. The International Bureau will continue to try to be imaginative, dynamic and prompt to respond equally to the wishes of the developing countries in every region of the world.

“Second, WIPO will have to increase its work on the solution of the protection of intellectual property in new fields, both in copyright and industrial property. I mean computer programs, copyright and design piracy, biotechnology, satellite broadcast, cable television, etc. If WIPO does not act fast enough, those matters will escape from the domain of intellectual property and the whole system will diminish in importance. We should not allow that to happen.

“Thirdly, I am convinced that with over 160 independent countries in the world, the securing of protection on the international level must be simplified and made more economical. Otherwise, the patenting of inventions, and the registration of trademarks, in foreign countries, will fall into desuetude. This is why the Patent Cooperation Treaty should be accepted by more countries, and this is why a solution, acceptable worldwide, should be found for the international registration of marks.”

Revision of the Paris Convention. The Diplomatic Conference on the Revision of the Paris Convention, at the conclusion, in March 1984, of its fourth session, had recommended to the Paris Union Assembly that it reconvene the Diplomatic Conference as soon as it finds prospects for positive results; the countries participating in the Diplomatic Conference asked the Paris Union Assembly to consider the setting up of a machinery for consultation designed to prepare, on substance, the next session. The Paris Union Assembly decided that the said machinery would consist of consultative meetings of up to 10 representatives of States, including the spokesman, for each Group of countries; China would be invited to participate in such meetings as soon as it becomes a member of the Paris Union; the three spokesmen would, by consensus, agree on the dates, duration, agenda, chairmanship and documentation of the consultative meetings, and any distribution of documents; the International Bureau would provide the secretariat of the meetings; it would also provide interpretation not only for those meetings but also for any meeting of any Regional Group; the Director General of WIPO would report on any consultative meeting to each ordinary session of the Assembly of the Paris Union and to each extraordinary session of that Assembly convened for the purpose of considering matters relating to the Diplomatic Conference; the competence of the Assembly of the Paris Union, and the competence of the Diplomatic Conference, would not be affected by any conclusions of the consultative meetings; a preparatory meeting between the three spokesmen would take place at the headquarters of WIPO on December 20, 1984; the first consultative meeting would take place within the first six months of 1985.

International Registration of Marks. The Paris Union Assembly agreed that a Committee of Experts be convened to discuss ideas suggested by the International Association for the Protection of Industrial Property (AIPPI) concerning possible links between the Madrid Agreement Concerning the International Registration of Marks and the Proposed Regulation of the European Community on the Community Trade Mark, and suggestions for certain provisions in a new variant of the Madrid Agreement.

Preparation of the Draft Agendas of the 1985 Ordinary Sessions of the Governing Bodies. The Governing Bodies approved items for the draft agendas of the 1985 sessions of the WIPO General Assembly and Conference and the Paris Union and Berne Union Assemblies.

PCT Matters. The PCT Union Assembly fixed new amounts, with effect from January 1, 1985, of the fees specified in the Schedule of Fees annexed to the PCT Regulations. It is to be noted that a maximum amount of the designation fee, corresponding to the amount due for 10 designations for which the fee is due, is provided for. It also approved an amendment to the Agreement between the International Bureau of WIPO and the European Patent Organisation, with a view to the European Patent Office acting, once the United States of America has withdrawn its reservation excluding the application of Chapter II of the PCT, as an International Pre-

liminary Examining Authority for international applications filed with the United States Patent and Trademark Office. Finally, the PCT Union Assembly agreed that an international application which is received by telecopier by a receiving Office is to be accorded an international filing date, and that any formal defect, such as the lack of signature or of fitness for reproduction, may be subsequently corrected without affecting the international filing date. It was understood, however, that no receiving Office would be obliged to make telecopier facilities available to applicants.

LIST OF PARTICIPANTS**

I. States

- Algeria**^{1, 2, 4}: D. Hadj-Sadok; H. Touati.
Argentina^{1, 2, 4}: R. Villambrosa; J. Pereira.
Australia^{1, 2, 5, 6}: P.A. Smith.
Austria^{1, 2, 4, 6}: O. Leberl; E. Kubesch.
Belgium^{2, 6}: J.M. Poswick; P. Ceuninck.
Bolivia: I. Paz Claros.
Brazil^{1, 2, 4, 6}: P. Nogueira Batista; A. Gurgel de Alencar; E. Cordeiro; P.R. França; P. Mendes de Carvalho.
Bulgaria^{1, 2, 5}: I. Markova; A. Angelov; R. Atanassova Kazandiyewa; G. Sarakinov.
Byelorussian SSR: V. Grekov.
Cameroon^{2, 6}: W. Eyambe.
Canada^{1, 2, 5}: R. Gagnon; D.S. McCracken; P.A. Van Brakel; R. Hornby.
Chile^{1, 5}: J. Bustos; F. Pérez.
China¹: Tang Zhongshun; Deng Shaoxi; Ma Yaoyang.
Colombia¹: H. Charry-Samper; C. Arévalo Yepes.
Congo^{1, 2, 4, 6}: E. Kouloufoua; S. Bayalama.
Costa Rica^{1, 5}: E. Soley Soler; J. Rhenan Segura.
Cuba²: M. Jiménez Aday.
Czechoslovakia^{1, 2, 5}: M. Bélohávek; J. Prošek.
Denmark^{2, 6}: L. Østerborg.
Egypt^{1, 2, 4}: S. Alfarargi; I. Salem; M. Daghash; A.G. Fouad.
Finland^{2, 6}: T. Kivi-Koskinen; E. Wuori; K.M. Ilander.
France^{1, 2, 5, 6}: J.-C. Combaldieu; M. Hiance; A. Chapard; L. Nicodème; J.-M. Momal.
Gabon^{2, 6}: P.-M. Dong.
German Democratic Republic^{1, 2, 4}: J. Hemmerling; D. Schack; K.-D. Peters; M. Förster.
Germany (Federal Republic of)^{1, 2, 4, 6}: A. Krieger; I. Koch; J. Schade; C. Wunderlich; B. Bockmair.
Ghana²: A.J.B. McCarthy.
Greece²: A. Cambitsis; A. Souloyanni.
Holy See²: O. Rouillet; A. Marelle.
Honduras: J.M. Maldonado Muñoz; A. Ariza; G. Bu.
Hungary^{1, 2, 5, 6}: G. Pusztai; M. Ficsor.
India^{1, 5}: M.M. Singh.
Indonesia²: I. Darsa; S. Sutowardoyo; N. Wisnoemoerti; R. Tanzil; M. Jalaluddin; A. Tobing.
Ireland²: M. Kennedy; B. O'Gorman.
Italy^{1, 2, 5}: G.L. Milesi-Ferretti; G. Aversa; R. Boros.
Ivory Coast^{1, 2, 4}: F.K. Ekra.
Jamaica: K.G.A. Hill; P. Robotham.
Japan^{1, 2, 4, 6}: M. Shiga; H. Sasaki; S. Ono; K. Sakamoto; K. Shimizu.
Kenya²: J.N. King'Arui.
Lebanon^{1, 3, 4}: I. Kharma; H. Dimachkie.
Libya²: G. Ferjani.
Liechtenstein^{2, 6}: R. Marxer.
Luxembourg^{2, 6}: F. Schlessler.
Madagascar^{2, 6}: P. Verdoux. J. Velontrasina.
Malaysia: W.A. Sepwan.
Mexico^{1, 2, 5}: R. Beltrán Guerrero; F.J. Cruz González; N. Pizarro Macias.
Monaco^{2, 6}: J. Brunschvig; E. Lindenfeld.
Mongolia¹: S.-O. Bold.
Morocco^{1, 2, 5}: A. Kandil; M. Halfaoui.

** A list containing the titles and functions of the participants may be obtained from the International Bureau.

¹ WIPO Coordination Committee.

² Paris Union Assembly.

³ Paris Union Conference of Representatives.

⁴ Paris Union Executive Committee.

⁵ Berne Union Executive Committee.

⁶ PCT [Patent Cooperation Treaty] Union Assembly.

Netherlands^{1, 2, 4, 6}: J.J. Bos; J.H. Van Kreveld.
New Zealand³: B.T. Lineham.
Norway^{1, 2, 4, 6}: A. Gerhardsen; J. Smith.
Pakistan: M. Ahmad; R. Mahdi; K. Niaz.
Panama: J.A. Medrano Valderrama; I. Aizpurúa Pérez.
Peru: R. Villarán Koechlin; C. Castillo; S. Vegas de Otero.
Poland^{1, 2, 4}: J. Szomański; D. Januszkiewicz; J. Hajduk.
Portugal^{1, 2, 4}: F. Reino; J. Mota Maia; A.M. Pereira;
 R. Morais Serrão; A. Mendonça e Moura.
Republic of Korea²: S.-J. Hong; J.-U. Chae; T.-C. Choi.
Romania^{2, 6}: P. Gavrilesco; P. Baloiu.
Senegal^{1, 2, 5, 6}: A. Sène; S.C. Konate.
Somalia: M.H. Abby.
Soviet Union^{1, 2, 4, 6}: I.S. Nayashkov; V.F. Zubarev;
 V.E. Troussov; P.E. Dapkounas.
Spain²: L. Padiar Martin; A. Casado Cervino; G. Porras;
 M. Pérez del Arco.
Sudan¹: Y. Ismail; S.Y.A. Mahmoud; Y. Abdelgalil Mah-
 moud.
Sri Lanka^{2, 6}: J. Dhanapala; S. Palihakkara.
Sweden^{2, 6}: G. Borggård; I. Schalin; A.-K. Wegmann.
Switzerland^{1, 2, 4, 5, 6}: P. Braendli; R. Grossenbacher;
 R. Dürler; A.-M. Buess; W. Frei.
Syria³: A. Daoudy; A. Saker; M. Sayadi; F. Salim.
Thailand: P. Chindasilpa; C. Chutharatkul; T. Petchsuwan;
 K. Kittisataporn; K. Phutragool.
Trinidad and Tobago^{1, 3, 4}: H. Robertson.
Tunisia^{1, 2, 5}: T. Ben Slama; M. Blanco; H. Boufares.
Turkey^{1, 2, 5}: H. Gögüs; E. Suphan.
United Kingdom^{1, 2, 5, 6}: I.J.G. Davis; V. Tarnofsky;
 A. Sugden; J. Richards.
United Republic of Tanzania^{1, 2, 4}: E.E.E. Mtango.
United States of America^{1, 2, 4, 6}: G.J. Mossinghoff;
 M.K. Kirk; H.J. Winter; L. Schroeder; G. Dempsey.
Uruguay^{1, 2, 4}: C. Fernandez Ballesteros.
Viet Nam^{1, 2, 4}: Nguyen Thuong; Vu Huy Tan.
Yugoslavia^{1, 2, 4}: G. Fejic.

II. Intergovernmental Organizations

United Nations (UN): United Nations Development Programme (UNDP): E. Bonev. **United Nations Educational, Scientific and Cultural Organization (UNESCO)**: A. Amri. **General Agreement on Tariffs and Trade (GATT)**: A.T. Otten. **African Intellectual Property Organization (OAPI)**: G. Meyo-M'Emane. **Benelux Trademark Office (BBM)**: P. Rome. **Benelux Designs Office (BBDM)**: P. Rome. **Commission of the European Communities (CEC)**: M.B. Schwab. **Council for Mutual Economic Assistance (CMEA)**: I.V. Cherviakov. **European Patent Office (EPO)**: J.B. Van Ben-
 them; P.G.M. Zwartkruis; G. Kolle. **Interim Committee for the Community Patent**: H.W. Kunhardt. **League of Arab States**: M. El May; M. Oreibi; Z. Tlili.

III. Non-Governmental Organizations

European Association of Industries of Branded Products (AIM): G.F. Kunze. **International Chamber of Commerce (ICC)**: J.M.W. Buraas. **International Federation of Industrial Property Attorneys (FICPI)**: K. Raffnsøe. **International Federation of Pharmaceutical Manufacturers Associations (IFPMA)**: D.T. Rossiter.

IV. Officers

WIPO Coordination Committee

Chairman: C. Fernandez Ballesteros (Uruguay). *Vice-Chairmen*: I. Markova (Bulgaria); J. Mota Maia (Portugal).

Paris Union Assembly

Chairman: J.C. Combaldieu (France). *Vice-Chairmen*: I. Nayashkov (Soviet Union); C. Fernandez Ballesteros (Uruguay).

Paris Union Conference of Representatives

Chairman: H. Robertson (Trinidad and Tobago). *Vice-Chairman*: E. Mtango (Tanzania).

Paris Union Executive Committee

Chairman: M. Daghash (Egypt). *Vice-Chairmen*: J. Hemmerling (German Democratic Republic); M. Shiga (Japan).

Berne Union Executive Committee

Chairman: P.A. Smith (Australia). *Vice-Chairmen*: M. Bělohávek (Czechoslovakia); T. Ben Slama (Tunisia).

PCT [Patent Cooperation Treaty] Union Assembly

Chairman: I. Marinescu (Romania). *Vice-Chairman*: G. Borggård (Sweden).

V. International Bureau of WIPO

A. Bogsch (*Director General*); K. Pfanner (*Deputy Director General*); M. Porzio (*Deputy Director General*); L.E. Kostikov (*Deputy Director General*); C. Masouyé (*Director, Public Information and Copyright Department*); S. Alikhan (*Director, Developing Countries Division (Copyright)*); L. Baeumer (*Director, Industrial Property Division*); G. Boytha (*Director, Copyright Law Division*); P. Claus (*Director, Patent Information and Classification Division*); F. Curchod (*Director, PCT Division (Patent Cooperation Treaty)*); R. Harben (*Director, Public Information Division*); L. Kadirgamar (*Director, Development Cooperation and External Relations Bureau for Asia and the Pacific*); T.A.J. Keefer (*Director, Administrative Division*); G. Ledakis (*Legal Counsel*); E. Pareja (*Director, Development Cooperation and External Relations Bureau for Latin America and the Caribbean*); I. Thiam (*Director, Development Cooperation and External Relations Bureau for Africa and Western Asia*); B. Davoudi (*Head, Building and Common Services Section*); I. Pike-Wanigasekara (*Senior Assistant, Office of the Director General*); H. Rossier (*Head, Mail and Documents Section*).

Notifications

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

CZECHOSLOVAKIA

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 the Czechoslovak Socialist Republic deposited, on October 5, 1984, 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 the Czechoslovak Socialist Republic, three months after the date of the notification given by the Director General of WIPO, that is on January 15, 1985.

* Phonograms Notification No. 43, of October 15, 1984.

National Legislation

BENIN

Law on the Protection of Copyright

(No. 84-008, of March 15, 1984)*

CHAPTER I

Subject and Scope of Copyright

Article 1. The author of any original work of the mind, whether it be literary, artistic or scientific, shall enjoy in that work, by the mere fact of its creation, an exclusive, incorporeal property right which shall be enforceable against all persons.

Article 2. The existence or conclusion of a contract for hire by the author of a work of the mind

shall in no way derogate from the enjoyment of the right afforded by Article 1.

Article 3. Copyright shall comprise attributes of an intellectual and moral nature and also attributes of an economic nature.

A. Moral Rights

The moral rights shall comprise the author's right:

- to defend his work,
- to decide to disclose or not to disclose his work,
- to modify his work,
- to respect for his name, his authorship and his work.

* Adopted by the National Revolutionary Assembly (*Assemblée Nationale Révolutionnaire*) on February 17, 1984, and promulgated by the President of the Republic on March 15, 1984. — WIPO translation.

Entry into force : March 15, 1984.

The name of the author shall be stated, in conformity with usual practice, on each copy of the work and each time the work is made available to the public.

No modification may be made to the work without the author's consent given in writing. No one may make the work available to the public in a form or under circumstances prejudicial to the honor or reputation of the author.

The rights afforded to the author under the preceding paragraphs shall be perpetual, inalienable and imprescriptible.

B. Economic Rights

The author shall enjoy the exclusive right to exploit his work in any form whatsoever and to obtain monetary profit therefrom.

He shall have the exclusive right, in particular, to carry out or have carried out any of the following acts:

(1) reproduce the work in any material form whatsoever, including cinematographic films and sound recordings, by any process enabling it to be communicated to the public in an indirect manner;

(2) perform or recite the work in public by any means or process whatsoever, including sound or television broadcasting;

(3) communicate the broadcast work to the public by wire, loudspeaker or any other process or means for transmitting sounds or images;

(4) make a translation, adaptation, arrangement or any transformation whatsoever of the work.

For the purposes of this Article, work shall mean both the work in its original form and in any form derived from the original.

None of these acts may be carried out by another person without the formal authorization or the authorization in writing of the author. Any reproduction or performance, whether in part or in whole, made without the consent of the author, his successors in title or cessionaries shall be unlawful.

The same shall apply to translation, adaptation, arrangement and transformation.

CHAPTER II

Authors and Protected Works

A. Authors of Works

Article 4. (1) The author of a work shall be the person who has created that work. A work shall be

deemed to have been created, irrespective of public disclosure, by the mere fact of the author having conceived it or realized it, even incompletely.

Authorship shall vest, unless proved otherwise, to the person or persons under whose name the work is disclosed.

(2) Subject to the provisions of Article 26 below, copyright, even in a work produced under a contract for hire, shall belong *ab origine* to the author.

However,

- (a) where the work has been produced by staff of the Administration, within the framework of their functions, the pecuniary rights deriving from disclosure of the work may be distributed in accordance with the special regulations of the Administration employing them;
- (b) the pecuniary rights deriving from disclosure of the works of students or trainees at a school or artistic establishment may be distributed in accordance with the special regulations of that school or establishment.

Article 5. "Original work" shall mean a work whose characteristic elements and whose form, or whose form alone, enable its author to be distinguished.

"Derived work" shall mean a work based on preexisting elements.

"Work of collaboration" shall mean a work whose creation results from the contributions of two or more authors, irrespectively of the work constituting an indivisible whole or being composed of parts having an autonomous creative nature.

"Composite work" shall mean a new work in which a preexisting work is incorporated without the collaboration of the author of that latter work.

"Collective work" shall mean a work created on the initiative of a natural or legal person who discloses it under his direction and name, and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.

"Posthumous work" shall mean a work made available to the public after the death of the author.

Article 6. The authors of pseudonymous and anonymous works shall enjoy therein the rights afforded by Article 3.

They shall be represented in the exercise of those rights by the original publisher or editor, until such time as they declare their identity and prove their authorship.

The declaration referred to in the preceding paragraph may be made by will: however, any rights that may have been previously acquired by other persons shall be maintained.

The second and third paragraphs above shall not apply where the pseudonym adopted by the author leaves no doubt as to his identity.

Article 7. The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection established by this Law, without prejudice to the rights of the author of the original work as defined in Article 3 of this Law.

The same shall apply to authors of anthologies or collections of different works which, by reason of the choice or arrangement of the material, constitute intellectual creations.

B. Protected Works

Article 8. The following shall be deemed works of the mind within the meaning of this Law, whereby this list shall not be exhaustive:

- (1) books, pamphlets and other literary, scientific or artistic writings;
- (2) lectures, addresses, sermons, pleadings and other works of such nature;
- (3) works created for the stage or for broadcasting (sound or visual), including both dramatic and dramatico-musical and choreographic and dumb-show works, the acting form of which is set down in writing or in other manner;
- (4) musical compositions with or without words;
- (5) works of painting and drawing, lithographies, etchings or wood engravings and other works of like nature;
- (6) sculptures, bas-reliefs and mosaics of all kinds;
- (7) works of architecture, including both plans and models as well as the construction itself;
- (8) tapestries and objects created by artistic and applied art craftsmen, including both sketches or models as well as the work itself;
- (9) maps, illustrations, drawings and graphical and three-dimensional reproductions of an artistic or scientific nature;
- (10) cinematographic works, to which shall be assimilated for the purposes of this Law, those expressed by a process analogous to cinematography;
- (11) photographic works of an artistic or documentary nature, to which shall be assimilated for the purposes of this Law, those expressed by a process analogous to photography;
- (12) derived works such as translations, arrangements or adaptations of the above-mentioned works;
- (13) folklore and works inspired by folklore, subject to the specific provisions to be set out in a special law on the protection of the national heritage.

Article 9. The title of a work shall be protected in the same way as the work itself where it is original in character. The title may not be used, even if the work is no longer protected, to distinguish a work of the same kind if such use is liable to create confusion.

Article 10. Folklore shall belong *ab origine* to the national heritage.

For the purposes of this Law:

(1) Folklore shall mean all literary, artistic, religious, scientific, technological and other traditions and productions created by the national communities, passed on from generation to generation and thus constituting the basic elements of the national cultural heritage.

(2) This definition shall cover in particular:

- (a) literary works of all types and of all oral and written categories, tales, legends, proverbs, sagas, chronicles and myths;
- (b) artistic styles and productions:
 - musical works of all kinds;
 - dances;
 - dramatic, dramatico-musical, choreographic and dumb-show productions;
 - styles and works of plastic and decorative art by any process;
 - architectural styles;
- (c) religious traditions and events:
 - rites and rituals;
 - objects, clothing, places of worship;
- (d) educational traditions: initiation, sport, games, codes of good manners and behavior;
- (e) scientific knowledge and works:
 - practices and products of medicine and of pharmacopoeia;
 - acquired theoretical and practical knowledge in the fields of natural science, physics, mathematics and astronomy.
- (f) knowledge and works of technology:
 - metallurgy and textiles;
 - agricultural techniques;
 - hunting and fishing techniques.

A work inspired by folklore shall mean any work composed of elements taken from the traditional Beninese heritage.

The adaptation of folklore or of elements taken from folklore must be declared to the body set up under Chapter III.

The public performance or the direct or indirect fixation of folklore with a view to exploitation for profit shall require prior authorization from the Beninese copyright body against payment of a fee to be fixed in conformity with usual practice in each of the categories of creation concerned.

CHAPTER III

The National Copyright Protection Structure

Article 11. There shall be set up a public establishment of professional nature with the title: Beninese Copyright Office [*Bureau béninois du droit d'auteur*] (BU.BE.DR.A.).

This Office shall have legal personality and shall be responsible for the management and defense of the rights defined in this Law.

It shall be entitled, to the exclusion of all other natural or legal persons, to act as an agent for the granting of authorizations and for the collection of the appropriate royalties.

The conditions of collection: rates of royalties, distribution of royalties, shall be laid down by decree of the National Executive Council on proposal by the Ministers responsible for culture and for finance.

The organization and operation of the Beninese Copyright Office shall be set out by decree on a proposal by the Minister responsible for culture.

CHAPTER IV

Limitations of Copyright

Article 12. Where a work has been made lawfully available to the public, the author may not prohibit:

(1) Communications such as performance, sound broadcasting, television:

- (a) if they are private, carried out exclusively within the family circle, and give rise to no form of revenue;
- (b) if they are carried out free of charge for strictly educational or school purposes or during a religious service on the premises reserved for that purpose.

(2) Reproductions, translations and adaptations intended for strictly personal and private use on

condition that the title of the work and the name of its author be mentioned.

(3) Parody, pastiche and caricature, observing the rules of the genre.

Article 13. The following shall be lawful on condition that the title of the work and the name of its author be mentioned: analyses and short quotations taken from a work already lawfully made available to the public, on condition they comply with fair practice, to the extent justified by the scientific, critical, polemic, teaching or information purpose, including quotations from newspaper articles and periodicals in the form of press reviews.

Such quotations and analyses may be used in their original version or in translation.

Article 14. The following may be reproduced by the press, in sound or television broadcasting or by other means for information purposes, subject to the name of the author and of the source being mentioned and on condition that the right of reproduction has not been expressly reserved:

- articles of a political, economic or socio-cultural nature, published in their original version or in translation;
- speeches intended for the public given at political, judicial, administrative or religious assemblies, in public meetings of a political nature or at official ceremonies.

Article 15. The following shall be lawful when reporting on current events by means of photography, cinematography or sound or television broadcasting, to the extent justified by the information purpose: recording, reproduction and public communication of literary, scientific or artistic works that may be seen or heard during such events.

Article 16. Reproduction with a view to cinematography, sound or television broadcasting and public communication of works of art and architecture permanently located in a public place or included in a film or broadcast in an accessory manner or that are merely incidental to the main subject, shall be lawful.

Article 17. Translation and/or reproduction by public libraries, non-commercial documentation centers, scientific institutions and teaching establishments, of the number of copies required for the needs of their activities, of works of any kind already lawfully made available to the public shall be lawful on condition that such translation and/or reproduction does not impair the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 18. Use of works under the provisions of this Chapter shall not give an entitlement to remuneration to the authors or their successors in title. The provisions of Article 3 above shall remain applicable in all the reserved cases.

CHAPTER V

Transfer of Copyright

Article 19. Except for the right to modify the work, copyright as defined in Article 3 of this Law shall be transferable by succession.

The moral rights shall be concurrently exercised by the successors and the Beninese Copyright Office (BU.BE.DR.A.).

The right to disclose posthumous works shall be exercised during their lifetime by the executor or executors named by the author. If there are none or after their death, and unless the author has willed otherwise, this right shall be exercised in the following order: by the descendants, by the spouse or spouses against whom there exists no final judgment of divorce or who have not remarried, by the heirs other than descendants, who inherit all or part of the estate, and by the general legatees or donees of the totality of the future estate.

This right may be exercised even after the exclusive right of exploitation laid down in Article 40 has expired.

In the event of manifest abuse of the exercise or non-exercise of the right of disclosure by the deceased author's representatives referred to in the second paragraph of this Article, the civil court may order any appropriate measures. The same shall apply if there is a conflict between the aforesaid representatives, if there is no known successor in title, no heir or no spouse entitled to inheritance.

Legal proceedings may be instituted by the Minister responsible for culture.

The economic rights of an author without heirs shall fall to the Beninese Copyright Office (BU.BE.DR.A.) and the proceeds of royalties therefrom shall be devoted to cultural and social purposes for the benefit of Beninese authors, without prejudice to the rights of creditors and the implementation of any assignment contracts concluded by the author or his successors in title.

Article 20. Assignment, in whole or in part, of any one of the rights listed in Article 3 of this Law shall not imply assignment of any other of those rights.

Where a contract requires total assignment of one of the rights, its scope shall be limited to the use laid down in the contract.

The assignment in whole of future works shall be null and void.

Article 21. The transfer of ownership of the sole copy or of one or more copies of a work shall not imply transfer of the copyright in the work.

Unless otherwise provided, authorization to broadcast a work shall cover all free communications made by the *Office de radiodiffusion et télévision du Bénin* by its own means and under its own responsibility.

This authorization shall not extend to any transmissions by wire or by wireless means made by other persons, nor to communication of broadcasts made in public places such as cafés, restaurants, hotel rooms, cabarets, shops and various so-called "private" clubs, for which prior authorization must be obtained in accordance with Article 3 of this Law. In the event of manifest abuse on the part of the owner preventing exercise of the right of disclosure, the civil court may take any appropriate measure in accordance with Article 19 of this Law.

Article 22. Any assignment clause giving the right to exploit the work in a form that is not foreseeable or not foreseen at the date of the contract must be expressly worded and must lay down correlative participation in the exploitation profits.

Article 23. Notwithstanding any assignment of the original work, authors of graphic and three-dimensional works shall have an inalienable right of participation in the profit from any sale of the work made at public auctions or through a dealer.

Following the death of the author, such *droit de suite* shall subsist in favor of his heirs during the term of protection laid down in Article 44 of this Law.

This right shall be constituted by a five percent levy on the proceeds of sale payable to the author or his heirs.

Article 24. The conclusion of contracts to commission three-dimensional or graphical works, comprising a period of exclusivity not exceeding five (5) years and respecting the independence and freedom of expression of the author, shall be lawful.

Article 25. The rights of performance, reproduction, adaptation and translation shall be assignable against payment or free of charge. The author may assign his rights in his work in whole or in part. Assignment must comprise a proportional participation for the author in the revenue deriving from sale or exploitation.

However, the author's remuneration may constitute a lump sum in the following cases:

- (1) the basis for calculating participation cannot be determined in practice;
- (2) the cost of surveillance would be out of proportion with the results to be achieved;
- (3) the use made of the work has but an accessory nature in relation to the exploited subject matter.

Notwithstanding assignment of his exploitation right, the author shall enjoy, even after publication of his work, a right of retraction or withdrawal in respect of the assignee.

This right may only be exercised, however, if the author makes prior compensation to the assignee for the prejudice occasioned to him by such retraction or withdrawal.

Where, subsequent to exercising his right of retraction or withdrawal, the author decides to have his work published, he shall be required to give first priority in the rights of exploitation to the assignee that he had originally chosen.

CHAPTER VI

Cinematographic and Broadcast Works

Article 26. A cinematographic work shall be the property of the natural or legal person who takes the initiative for making the work and the financial responsibility for exploiting it.

The author's rights shall vest in that person, known as the producer.

The producer shall be required, before undertaking production of the cinematographic work, to conclude contracts with all those persons whose works are used in making the film.

These contracts, except for those concluded with the authors of musical compositions with or without words, shall comprise, except where otherwise stipulated, assignment to the producer of the exclusive right of cinematographic exploitation; they shall be in writing.

Article 27. Before undertaking production of the cinematographic work, the producer shall also be required to conclude contracts with the intellectual creators of the cinematographic work, in particular:

- (1) the author of the screenplay,
- (2) the author of the adaptation,
- (3) the author of the musical compositions, with or without words, specially made for the work.
- (4) the director,
- (5) the author of the spoken text.

Unless otherwise stipulated, these contracts shall comprise assignment to the producer of the right of cinematographic exploitation; they shall be in writing.

Article 28. The natural person who assumes the direction of a cinematographic work and the artistic responsibility for its transformation into pictures and sounds, for the cutting and final editing, shall be deemed to be the director of the cinematographic work.

A cinematographic work shall be deemed to have been completed once the first master print has been established by common accord between the director and the producer.

Article 29. If one of the intellectual creators of the cinematographic work refuses to complete his contribution to that work, or is unable to complete it due to circumstances beyond his control, he shall not be entitled to object to the use of the part of his contribution already in existence for the purpose of completing the work.

Unless otherwise agreed, the intellectual creators of a cinematographic work may dispose freely of their personal contribution with a view to their exploitation in a different field, provided that this does not prejudice the exploitation of the work to which they have contributed.

Article 30. The natural and legal persons who perform the intellectual creation of a sound radio or television work shall be deemed the authors of such work. The provisions of Articles 26 to 29 of this Law shall apply to sound radio and television works.

CHAPTER VII

Authors' Contracts

Article 31. Contracts by which the author or his successors in title authorize the performance or publication of his works must be set down in writing on pain of nullity. The same shall apply to performance authorizations given free of charge.

Such contracts shall state the mode of exploitation and the mode of remuneration decided by the author or his successors in title. They shall be subject to the appropriate statutory and regulatory provisions.

Transfer of the author's rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined in respect of its scope, purpose, place and duration.

Where special circumstances demand, a contract may be validly concluded by exchange of telegrams on condition that the field of exploitation of the assigned rights be defined in compliance with the third paragraph of this Article.

A. Publishing Contracts

Article 32. A publishing contract is a contract under which the author of a work or his successors in title assign, under specified conditions, to the publisher the right to manufacture or have manufactured a sufficient number of graphical, mechanical or other copies of the work, on condition that the latter ensures publication and dissemination thereof.

The form and mode of expression, the terms of execution of the publication and the termination clauses shall be specified in the contract.

Article 33. The publishing contract must state the minimum number of copies that are to constitute the first printing. However, this requirement shall not apply to contracts providing for a minimum of royalties guaranteed by the publisher.

It must provide for remuneration proportional to the proceeds of exploitation, except in the case of lump sum remuneration in accordance with Article 25 of this Law.

Article 34. The publisher may not transmit the benefits of the publishing contract to a third party, for or without payment, or as a contribution to the assets of a partnership, independently of the business, without having first obtained the authorization of the author.

In the event of transfer of the business in such a way as to seriously compromise the material or moral interests of the author, the latter shall be entitled to obtain reparation, even by means of cancellation of the contract.

Where the publishing business has been run as a company or a coparcenary, the allocation of the business to one of the former partners or one of the coparceners, as a consequence of the winding up or division thereof, shall in no case be considered a transfer.

In the case of a fixed-term contract, the assignee's rights shall automatically terminate on expiry of the term without need for formal notice.

However, for three years following such expiry, the publisher may continue to sell at the normal price the copies remaining in stock unless the author prefers to buy those copies at a price to be established, failing amicable agreement, by a valuation, whereby this faculty afforded to the first publisher

shall not prevent the author from having a new edition made within a period of 30 months.

Article 35. The publisher shall be required to provide to the author appropriate proof to establish the accuracy of his accounts.

Failing special provisions laid down in the contract, the author may require the publisher to furnish at least once a year a statement showing the number of copies made during the period, specifying the date and the quantity of printings, the number of copies in stock, the number of copies sold by the publisher, the number of copies used for publicity, the number of copies used or destroyed by accident or due to unavoidable circumstances, the amount of royalties owing and, possibly, the amount of royalties already paid to the author.

Any contrary provision shall be deemed null and void.

Neither bankruptcy nor winding up by court decision of the publishing firm shall terminate the contract.

The receiver in bankruptcy may not sell at reduced price or sell out the manufactured copies until at least fifteen (15) days after having advised the author of his intention by registered letter with acknowledgment of receipt.

The author shall have a preemptive right over all or part of the copies. Failing agreement, the price shall be fixed by expert opinion.

Article 36. The publishing contract shall end, independently of the cases set out in general legal provisions or in the preceding Articles, when the publisher carries out the complete destruction of the copies.

Termination shall take place as of right when, upon formal notice by the author fixing a suitable period, the publisher has not effected publication of the work or, should the work be out of print, its republication.

An edition shall be deemed out of print if two orders for the delivery of copies addressed to the publisher have not been met within three months.

If, in the event of the author's death, the work is incomplete, the contract shall be rescinded as regards the unfinished part of the work, except where otherwise agreed between the publisher and the author's successors in title.

Article 37. The author shall present to the publisher, within the period of time laid down in the contract, the work that is to be published in a form enabling it to be fabricated. Unless otherwise agreed or for unavoidable technical reasons, the work to be published furnished by the author remains the latter's property. The author shall be responsible for it

during a period of one year after completion of fabrication.

Article 38. Contracts referred to as “at the author’s expense” shall not constitute publishing contracts within the meaning of Article 32.

Under such contracts, the author or his successors in title pay to the publisher an agreed remuneration against which the latter manufactures a sufficient number of copies of the work in the form and according to the modes of expression specified in the contract and ensures its publication and dissemination.

Such contracts constitute contracts of undertaking governed by the agreement, customary practice and the statutory and regulatory provisions in force.

Article 39. Contracts referred to as “at joint expense” shall not constitute publishing contracts within the meaning of Article 32.

Under such contracts, the author or his successors in title commission a publisher to manufacture at his expense a sufficient number of copies of the work in the form and according to the modes of expression specified in the contract and to ensure their publication and dissemination in accordance with the agreement reciprocally contracted to share the profits and losses of exploitation in the agreed proportion.

Such contracts shall constitute joint undertakings.

B. Performance Contracts

Article 40. A performance contract is a contract under which the author of a work of the mind or his successors in title authorize a natural or legal person to perform that work under conditions laid down therein.

A “general performance contract” is a contract under which the Beninese Copyright Office grants to an entertainment promoter the right to perform, for the duration of the contract, the existing or future works constituting the repertoire of that Office under the conditions laid down by the author or his successors in title. In the case referred to in the preceding paragraph, the provisions of Article 20 may be waived.

Article 41. A performance contract shall be concluded for a limited term and for a given number of communications to the public.

Except where exclusive rights are expressly stipulated, it shall not afford any exploitation monopoly to the entertainment promoter.

The entertainment promoter may not transfer the benefits of his contract without the written consent of the author or his representative.

The term of the exclusive rights afforded by a playwright may not exceed five years; the interruption of performances for two consecutive years shall automatically terminate those rights.

Article 42. “Entertainment promoter” shall mean any natural or legal person who, on occasion or in a regular fashion, performs or causes to be performed in an establishment to which the public is admitted, and by any means whatsoever, works protected by this Law.

The entertainment promoter shall be required:

- (1) to obtain prior authorization from the Beninese Copyright Office;
- (2) to inform the author or his representatives of the exact program of public performances;
- (3) to supply to them a documented statement of receipts;
- (4) to pay to them the amount of the stipulated royalties;
- (5) to ensure that the public performance takes place under technical conditions such as to guarantee the intellectual and moral rights of the author.

CHAPTER VIII

Duration of Protection

Article 43. (1) Copyright shall last for the whole lifetime of the author and for fifty calendar years after the end of the year of his death, with the exception of:

- cinematographic, sound radio and audiovisual works for which the duration of protection expires fifty years after the work has been made available to the public with the consent of its author or, if such event has not taken place within fifty years of such work having been made, it shall expire fifty years after such making;
- photographic works and works of applied art for which the duration of protection shall expire twenty-five years after the work has been made.

(2) In the case of a work of joint authorship, only the death of the last surviving joint author shall be taken into account when calculating the duration.

Article 44. Copyright shall expire at the end of a period of fifty years as from the end of the year in

which the work has been lawfully made available to the public:

(1) where the copyright belongs *ab origine* to a natural person, with the exception of the State's right in folklore, which is imprescriptible;

(2) in the case of anonymous or pseudonymous works, for as long as the author of the work remains unknown;

(3) in the case of posthumous works.

Article 45. A general lien on debtors property shall be attached to the author's economic rights. The lien shall survive bankruptcy and legal winding up. It shall be exercised immediately after that guaranteeing the salaries of servants.

CHAPTER IX

Domaine Public Payant

Article 46. On expiry of the terms of protection laid down in Articles 43 and 44, during which an exclusive and acknowledged right belongs to the authors, their heirs and to their successors in title, the author's work shall fall into the public domain.

Performance of works in the public domain shall be subject to:

- respect of the moral rights;
- prior declaration;
- payment of a fee whose proceeds shall be paid to the Beninese Copyright Office (BU.BE.DR.A.) and devoted to cultural and social purposes of benefit to authors.

The right to perform works in the public domain shall be administered by the Beninese Copyright Office (BU.BE.DR.A.). The rate of the royalty will be fixed by the Minister responsible for culture and may not exceed 50% of the rate charged for copyright during the term of protection.

CHAPTER X

Procedures and Sanctions

Article 47. The Beninese Copyright Office shall be empowered to take legal action to defend the moral and economic rights of the authors for which it has responsibility. It shall be required to appear in court when direct proceedings are instituted by the owners of the rights.

The duly constituted professional associations of authors shall be empowered to act only to defend the collective interests of their members.

Article 48. Any person exploiting a work of folklore or the right of performance of a work that has fallen within the public domain who omits to make prior declaration to the Beninese Copyright Office (BU.BE.DR.A.) shall be liable to a fine amounting to twice the royalties normally payable but to a minimum of 5,000 francs.

Article 49. Any publication, reproduction, performance or dissemination by any means whatsoever or any importation and dissemination for commercial purposes on the territory of the People's Republic of Benin of a protected work in violation of the author's rights shall constitute an act of infringement as defined and sanctioned by the penal code.

Article 50. At the request of any author of a work protected under this Law, of his successors in title or of the Beninese Copyright Office, the examining judge competent for the infringement or the presiding judge in all cases, including imminent threat of violation of the author's rights shall be empowered to order, against guarantee where appropriate, seizure at any place, and even at times other than those specified in the applicable law, of the copies already manufactured or in the process of manufacture of an unlawfully reproduced work, of the unlawfully used copies and of the revenue deriving from any unlawful reproduction, performance or dissemination of a protected work. He may also order the suspension of any manufacture or public performance, in progress or announced, that constitutes an infringement or an act leading to infringement.

This Article shall apply to cases of irregular exploitation of folklore or of the right of performance of a work that has fallen within the public domain.

Article 51. Where the proceeds of exploitation due to the author of a work of the mind have been subject to a seizure, the presiding judge shall order payment to the author, as an allowance, of a sum or of a given share of the sums seized.

Article 52. The measures ordered by the examining judge under Article 51 shall be automatically lifted in the event of a nonsuit or a *nolle prosequi*.

They may be lifted at any time by the examining judge or by the criminal jurisdiction, subject where appropriate to guarantee or to the appointment of an administrator as receiver with the task of resuming manufacture or public performance and holding the proceeds of exploitation of the work on behalf of the person to whom it rightfully belongs.

Measures ordered by the presiding judge shall be automatically lifted on the thirtieth day following the decision if the plaintiff fails to refer the matter to the competent civil court, unless criminal proceed-

ings are pending; they may be lifted at any time by the presiding judge ruling in chambers or by the civil court to which the matter of substance has been referred where appropriate under the conditions set out in the second paragraph of this Article.

Article 53. Physical proof of infringement of the regulations concerning the protection of copyright may be furnished either by the reports of police officers or constables or the reports of sworn agents of the Beninese Copyright Office (BU.BE.DR.A.).

Article 54. In the event of an infringement of Article 23, the acquirer and the ministerial officials may be jointly ordered to pay damages to the owners of the *droit de suite*.

CHAPTER XI

Field of Application of the Law

Article 55. The provisions of this Law shall apply to ongoing contracts whose execution shall continue up to the date stipulated when the agreement was concluded.

Article 56. This Law shall apply:

- (a) to works of Beninese nationals;
- (b) to works of foreign nationals first published in the People's Republic of Benin;

- (c) to works of architecture erected on the territory of the People's Republic of Benin and to any work of art incorporated in a building situated on that territory.

Works that do not fall within one of the above-mentioned categories shall not enjoy the protection afforded by this Law unless the country of which the original owner of copyright is a national or in which he is resident affords equivalent protection to works of Beninese nationals.

However, neither the integrity nor the authorship of those works shall be affected. The royalties shall be paid to the Beninese Copyright Office.

The countries for which the reciprocity required by the second paragraph above is deemed to have been met shall be determined jointly by the Minister Responsible for Literacy and People's Culture and the Minister for Foreign Affairs and Cooperation.

The agreements or conventions signed with foreign countries or organizations shall determine the conditions under which works not falling within one of the above-mentioned categories shall enjoy the same protection as works of Beninese nationals.

Article 57. All contrary provisions, particularly Law No. 57-298 of March 11, 1957, on Literary and Artistic Property, shall be repealed.

Article 58. This Law shall be implemented as a Law of the State.

UNITED KINGDOM

The Copyright (British Indian Ocean Territory) Order 1984

(No. 541, of April 11, 1984)

1. This Order may be cited as the Copyright (British Indian Ocean Territory) Order 1984 and shall come into operation on 14th May 1984.

2. In this Order “the Territory” means the British Indian Ocean Territory.

3. The provisions of the Copyright Act 1956 specified in Part I of the Schedule hereto shall extend to the Territory subject to the modifications specified in Part II of that Schedule.

4. The Copyright (International Organisations) Order 1957¹, as amended² and the Copyright (Broadcasting Organisations) Order 1961³ (being Orders in Council made under Part V of the said Act) shall extend to the Territory.

SCHEDULE

Article 3

Part I

**Provisions of the Copyright Act 1956
Extended to the British Indian Ocean Territory**

All the provisions of the Act, as amended by the Performers' Protection Acts 1958 and 1963, the Films Act 1960, the Design Copyright Act 1968, the Statute Law (Repeals) Act 1974, the Criminal Law Act 1977, the Broadcasting Act 1981, the British Nationality (Modification of Enactments) Order 1982, the Copyright Act 1956 (Amendment) Act 1982, the Criminal Justice Act 1982 and the Copyright (Amendment) Act 1983, except sections 23 to 30, 32, 34, 35, 42 and 44 and Schedules 4 and 5, shall extend to the Territory.

Part II

Modifications of the Provisions Extended

General Modifications

1. In sections 7, 8(11) and 15(4), for references to the Board of Trade there shall be substituted references to the Commissioner.

¹ See *Le Droit d'auteur*, 1958, pp. 180 and 181.

² *Ibid.*, 1959, pp. 57 and 58.

³ See *Copyright*, 1962, p. 45.

2. In sections 8(1) and 8(10), 10(2) and (3), 12(6), 21(1) and 21(6), 22(2) and 22(3), 31(4), 43, 48(4) and 49(2) and paragraph 46 of Schedule 7, for “the United Kingdom” there shall be substituted “the Territory”.

Particular Modifications

3. The provisions mentioned in the first column in the following table shall be modified in the manner specified in the second column.

Provision	Modification
<i>Section 8</i>	In subsections (2) and (4) for “three farthings” there shall be substituted “one penny” and in subsection (2), for “farthing” there shall be substituted “penny”. For subsection (3) there shall be substituted the following: “(3) If at any time by an order made under this section in its operation in the law of the United Kingdom any different rate of, or minimum amount of, royalty is prescribed either generally or in relation to any one or more classes of records, the provisions of this section shall be construed subject to the provisions of any such order as is for the time being in force.” In subsection (4)(a), all the words after the first reference to works shall be omitted.
<i>Section 10</i>	For subsection (5) there shall be substituted the following: “(5) For the purpose of this section a design shall be taken as being applied industrially if it is applied in the circumstances for the time being prescribed by rules made under this section and section 36 of the Registered Designs Act 1949 as extended by this section in the law of the United Kingdom.”
<i>Section 13</i>	For subsection (3) there shall be substituted the following: “(3) Copyright subsisting in a cinematograph film by virtue of this section shall continue to subsist until the film is published and thereafter until the end of the period of fifty years from the end of the calendar year which includes the date of its first publication and shall then expire, or if copyright subsists in the film by virtue only of the last preceding subsection, it shall continue to subsist as from the date of first publication until the end of the period of fifty years from the end of the calendar year which includes that date and shall then expire.” In subsection (8), for “any such film as is mentioned in paragraph (a) of subsection (1) of section 38 of

Provision	Modification	Provision	Modification
	the Films Act 1960 (which relates to newsreels)" there shall be substituted "any film consisting wholly or mainly of photographs which, at the time they were taken, were means of communicating news".	<i>Section 33</i>	For subsection (1) there shall be substituted the following: “(1) An organisation to which this section applies is one declared to be such by an Order in Council made under this section as part of the law of the United Kingdom which has been extended, in relation to that organisation, to the Territory.”.
	Subsection (11) shall be omitted.	<i>Section 37</i>	Subsection (4) shall be omitted.
<i>Section 17</i>	Subsection (6) shall be omitted.	<i>Section 39</i>	In subsection (8), for “section three of the Crown Proceedings Act, 1947” there shall be substituted “section 5 of the Crown Proceedings Ordinance, 1984”.
<i>Section 18</i>	In subsection (1), in the proviso, “, or of any corresponding provision which may be enacted by the Parliament of Northern Ireland” shall be omitted. Subsection (4) shall be omitted.	<i>Section 40</i>	Subsection (3) shall be omitted. In subsection (4), for “either of the two last preceding subsections” there shall be substituted “the last preceding subsection”, and “or the programme to be transmitted, as the case may be” shall be omitted. In subsection (5), the reference to a work shall be omitted.
<i>Section 21</i>	In subsections (7C) and (7D), all the words after “Criminal Justice Act 1982” shall be omitted. Subsection (10) shall be omitted.	<i>Section 41</i>	Subsection (7) shall be omitted.
<i>Section 22</i>	In subsection (1), for the “Commissioners of Customs and Excise (in this section referred to as “the Commissioners”)” there shall be substituted “the Commissioner” and, subject to the modifications to subsection (4) hereinafter provided, for subsequent references to the said Commissioners there shall be substituted references to the Commissioner. In subsection (4), for “the Commissioners” where those words first occur there shall be substituted “the Commissioner” and for “the Commissioners consider” there shall be substituted “the Commissioner considers”. In subsection (5), for “the Commissioners” shall be substituted “the Commissioner”. Subsection (6) shall be omitted. For subsection (7) there shall be substituted the following: “(7) Where by virtue of this section the importation into the Territory of any copy of a work to which the section applies is prohibited, the importation into the Territory of such a copy shall, for the purposes only of provisions as to the forfeiture of goods in any law relating to imports be deemed to be a contravention of that law.”.	<i>Section 46</i>	Subsection (1) shall be omitted. In subsection (2), “(including any enactment of the Parliament of Northern Ireland)” shall be omitted.
<i>Section 31</i>	Subsections (1) and (2) shall be omitted. In subsection (4), for “in a country” there shall be substituted “in the United Kingdom or in any country other than the Territory”.	<i>Section 47</i>	The whole section except subsection (4) shall be omitted. In subsection (4), “or rules” shall be omitted.
		<i>Section 51</i>	For subsection (2) there shall be substituted the following: “(2)—(a) Any provision of this Act empowering the Commissioner to make regulations shall come into operation on the commencement of the Order in Council extending that provision to the Territory. (b) All the other provisions of this Act shall come into operation on 14th September 1984.”. Subsection (3) shall be omitted.
		<i>Seventh Schedule</i>	Paragraphs 25, 26, 40 and 41 shall be omitted.

EXPLANATORY NOTE

(This Note is not part of the Order)

This Order extends the provisions of the Copyright Act 1956 with certain exceptions and modifications to form part of the law of the British Indian Ocean Territory.

The Order also extends two Orders in Council made under Part V of that Act. The extension of these Orders will give protection in the Territory to works produced by certain international organisa-

tions and to lawfully authorised broadcasts originating in other Commonwealth countries to which the 1956 Act has already been extended. Broadcasts by organisations in the Territory will also have protection in the Territory and in those countries by virtue of this Order.

The copyright protection given by the law of the Territory will be similar to that given by the law of the United Kingdom.

General Studies

The Brazilian Indian and Copyright

Hildebrando PONTES NETO*

Contents

1. Introduction
2. Legal capacity of the Indian
3. Capacity of the Indian to institute legal proceedings
4. The Indian and Law No. 5988 of December 14, 1973
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6. FUNAI Order No. 448/N of October 13, 1977
7. The right of the Indian in his own likeness
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9. Actual examples of infringement of the Indian's copyright
10. Conclusion

Art is inherent to the Indian. It manifests itself in all that he does, whether it be the simplicity of a bow, the sophistication of a "kanitar" of feathers or, again, the pictorial fantasy of zoomorphic pottery. In the Upper Xingu, pottery is altogether utilitarian. However, despite the fact that it is utilitarian, a pot that is worthy of the name is entirely decorated; indeed, if it is not painted, it is not a pot. Its painting is a lengthy operation, the ingredients are secret and the whole disappears rapidly when the pottery is placed on the fire, sitting on three stones.¹

1. Introduction

At first sight, it could seem an idle proposition to submit to those interested in juridical science, particularly copyright, a study dealing with certain aspects of the copyright of the Brazilian Indian.

I am quite aware that the subject may seem unusual, may generate surprise, speculation and even suspicion.

These reactions can all be attributed to the lack of knowledge of the juridical circles as regards copyright, and above all to the fact that, in its ignorance of the Indians, our society has created stereotypes that ridicule them, it treats them as "aliens," as "foreign" elements, as veritable "pariahs," an ethnic minority that is becoming "extinct," of no importance and of no value whatsoever in its social relationships.

This is surely the worst kind of obscurantism.

That is why it is even more difficult to impress upon people's minds that the Indian is a creator and that his artistic work is capable of copyright protection.

Unfortunately, what our "civilized" society has demonstrated to us, thereby casting us into deep perplexity, is its lack of esteem for the customs and culture of the native communities, its appropriation of their land and their art that has been infringed in a great variety of ways by commercializing works created by individual Indians or by tribes, without authorization and, most frequently, without even knowing their authors.

Finally, to complete this sad picture, we may cite the violation of one of the most personal rights by the unwarranted and disrespectful use of the likeness of the Indian.

The nation has not yet attained a degree of rigor and consciousness that would permit it to understand the philosophical impact and value of achieving a multi-ethnic, plurinational Brazilian nation in which the cultural assets of the minorities must be preserved and respected in their entirety since they constitute a precious heritage capable of perpetuating national memory.

That is why, far from being a minor issue, the Indian's copyright gains importance and scope: it exercises a special fascination in view of the fact that the creative work of the Indian constitutes the roots of national culture.

2. Legal Capacity of the Indian

Before being able to examine aspects of the Indian's copyright, it is necessary to devote some

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¹ Orlando Villas-Boas and Claudio Villas-Boas, *Territorio Tribal*; Maureen Basilliat, et al., *Xingu, Territorio Tribal*, p. 19.

attention to the institution of his legal capacity under civil law.

As regards the question of capacity, the Brazilian Civil Code lays down in Article 2:

In the civil order, every person has rights and obligations.

For Pontes de Miranda

... the rule of law set out in Article 2 would apply even if it had not been written down. The principle from which it derives is of such transcendence that no rule of law derogating from it could be applied in Brazil, where it would be without effect, nor in any other country of the same level of civilization.²

Legal capacity does not set up a distinction between human beings; on the contrary, it lays down the basic principle of their equality before the law.

The concept of capacity is therefore closely linked to the subject of rights, that is to say the person.

The author of this treatise tells us:

A person is to be understood as anyone who may be the subject of rights: he who dons the mask to enter onto the stage of the legal world is capable of playing the part of the subject of rights.³

Thus defined, capacity is nothing more than a faculty inherent in the person which the legal order places at his disposal to enable him to carry out acts, to acquire rights and to assume obligations.

However, the capacity of a person to be the author of a legal transaction of any kind should not be confused with the exercise of the right itself.

Washington de Barros Monteiro sees capacity as "the aptitude to acquire rights and to carry out, for oneself or for other persons, civil acts."⁴

In this way, capacity has been divided up into *de jure* capacity and *de facto* capacity.

The former, inherent in any human being, is born with him and the legal order knows no exception to this faculty to acquire rights and to enter into obligations.

As to the latter, this constitutes the faculty possessed by any person to carry out civil acts on behalf of other persons.

Realization of the individual's *de jure* capacity is placed in the field of consciousness and will.

It is these factors that legitimize the latter's independence in accomplishing given acts.

De facto capacity is therefore always linked to objective factors which play a decisive part in every case in preserving or annulling the *de jure* capacity.

Those who are not fully conscious of the effects of those objective factors are deemed by civil law to be incapable of acquiring rights and entering into obligations.

Thus, Article 5 of the Civil Code lays down:

The following shall be totally incapable of carrying out themselves the acts of civil life:

- (i) persons of less than 16 years of age;
- (ii) deranged persons of any kind;
- (iii) deaf-mutes who cannot express their will.

And Article 6 lays down:

The following shall be incapable in respect of certain acts or of the manner of accomplishing them:

- (i) persons of more than 16 years and less than 21 years of age;
- (ii) prodigals;
- (iii) forest populations.

Sole paragraph — The forest populations shall remain subject to the tutelage laid down in the special laws and regulations, which shall be brought to an end as they adapt to the civilization of the country.

In addition to setting up this progressive legal capacity, the lawmaker has instituted special arrangements for protecting the rights and obligations of the Indians.

He has subjected them to tutelage by providing them with a guardian and has adopted special legislation to determine the application of these arrangements.

However, it must be admitted that the provisions of Article 6 and its sole paragraph in no way prevent a person who is relatively incapable of expressing his will from carrying out legal acts.

His incapacity does not mean that he is without consciousness or without will and that he may not take decisions that concern him immediately.

Thus, the incapacity defined by the law is always relative and is not absolute to the point of demanding representation by a guardian to accomplish legal acts.

Under Brazilian law, whether it be the Civil Code or the special legislation, the capacity of the Indian is only restricted in a relative manner since it is not necessary for him to be represented, but only to be assisted.

It is assumed that gradual adaptation to civilization will take place, whereby everyone is deemed *de jure* capable, but relatively incapable, that is to say incapable as regards certain legal acts for which they must be assisted.⁵

It is clear that the basic requirement of the law is that the Indian must always be assisted.

Pontes de Miranda backs up this interpretation in his analysis of Article 156 of the Civil Code, dealing with capacity as regards unlawful acts, or offenses, as he has called them:

A minor, from 16 to 21 years of age, may be assimilated to a person who is of age as regards the obligations deriving from unlawful acts that he has committed.⁶

² *Tratado de Direito Privado*, general part, Vol. I, Borsoi, p. 160.

³ *Op. cit.*, p. 161.

⁴ *Curso de Direito Civil*, Vol. 1, p. 61.

⁵ Pontes de Miranda, *op. cit.*, p. 210.

⁶ Pontes de Miranda, *op. cit.*, p. 212.

He then adds:

As regards those whose incapacity is relative, it was not necessary to insert in the Civil Code any legal rule whatsoever in their respect.

The forest populations therefore have capacity in respect of unlawful acts in the same way as the civilized populations.⁷

Thus, the Indian has been afforded legal protection by means of Law No. 6001 of December 19, 1973 (Indian Statute), laying down tutelage for the Indians and the communities native to the country not integrated in the national community.

In its Title II, this Law deals with the assistance or tutelage, and stipulates the following in Article 7(1) and (2):

Article 7. — The Indians and the native communities not yet integrated into the national community shall be submitted to tutelage as laid down by this Law.

(1) — The arrangements provided by this Law shall be governed, as appropriate, by the principles and rules of common law tutelage, whereby exercise of tutelage shall be independent of specific mortgage on immovable property and of giving material security or surety.

(2) — It shall be incumbent on the Union to exercise tutelage through the federal organism competent for assistance to the forest populations.

The organism currently responsible for exercising the tutelage set up by Laws No. 5371 of December 5, 1967, and No. 68377 of March 19, 1971, is the *Fundação Nacional do Índio* (FUNAI) [National Indian Foundation] directly responsible to the Ministry of the Interior.

The Article reproduced above bears witness to the unsuitability of its provisions whose legal effects are antagonistic and contradictory and therefore warrant our analysis and commentary.

Caio Mario da Silva Pereira, quoted by Pedro Agostinho in his magnificent work published by the Rio de Janeiro State section of the Brazilian Lawyers' Association, declares:

The legislation does not institute a system of incapacity in order to discriminate against those thus affected, but indeed in order to protect them.⁸

As for Pedro Agostinho, he explains:

What is true of incapacity in general is also true of that of the Indian. However, it is only a relative incapacity and not an absolute one, meaning that the guardian is required to aid and protect the Indian and not to ignore his will.⁹

Silvio Rodrigues also deals with relative incapacity and asserts that:

The law assumes the principle that the immaturity of pubescent minors or of the forest populations, or the deficiency that characterizes prodigals, is less than that of the totally incapable persons referred to in Article 5 of the Civil Code. Indeed, these are persons who, without having an adequate view of things, nevertheless possess a non-negligible

degree of intellectual development. This is why, whilst restricting their liberty of action in the legal field, the law authorizes them to carry out acts. However, in order to recognize the validity of legal acts carried out by a relatively capable person, that person must take advice from a fully capable individual — his father, his guardian or his curator — who must give him assistance in such acts.¹⁰

Is it an advantage for the Indian Statute to permit the common law principles and rules of tutelage to be applied although it has already foreseen designation of a guardian as the loyal agent of the policy dictated by the central authorities in respect of the natives?

What will happen when this policy is contrary to the legal interests of the person under tutelage? Will his wishes not be ignored? Will the guardian not show servility towards the federal executive authorities to whom he is responsible and whose instructions he must respect?

In such a hypothesis, it is not possible to replace him since his designation derives from the wording of the law.

That is why he acts without any judicial intervention or surveillance on the part of the magistrate who, under the common law tutelage system, has a duty to ask for his removal and to make him responsible for acts that are contrary to the interests of the person he represents.

This situation has indeed occurred in practice.

Frequently, indeed very frequently, no mention is made of the protecting organism, or the latter acts contrary to the interests of the Indian or of the native groups in order to serve the policy of the public authorities, because, being linked to those authorities, it forgets the rights of the person protected.

As is rightly emphasized by Pedro Agostinho:

As for the minor of between 16 and 21 years of age, the Indian has a right to participate in acts concerning him and FUNAI has the duty to respect his wishes, to assist him to implement them as needed and to intervene, *motu proprio*, when his interests are prejudiced or threatened. FUNAI may not lawfully prevent a person from expressing his wishes or impose its wishes on him by formulating them and expressing them in his stead, since the appropriate form of protection of those interests is exercised in this case through assistance and not through representation.¹¹

This argument is supported by Article 8 of the Indian Statute in its sole paragraph which reads as follows:

Any act carried out between a non-integrated Indian and any person foreign to the native community shall be null and void where assistance has not been provided by the competent tutelage organism.

The rule set out in this Article shall not apply where the Indian shows that he is conscious of and has knowledge of the act carried out, except where it be prejudicial to him, and the extent of its effects.

⁷ *Ibid.*, p. 212

⁸ Pedro Agostinho, *O Índio e o Direito*, p. 59.

⁹ *Ibid.*, p. 59.

¹⁰ Silvio Rodrigues, *Direito Civil*, general part, Vol. 1, p. 44.

¹¹ Pedro Agostinho, *op. cit.*, p. 59.

This provision contains the rule of relative incapacity whose application may be suspended where the Indian, in exercising his right, has shown that he is conscious of and has knowledge of the act in question.

Pedro Agostinho sums up as follows:

Designed to protect the person concerned and not to prejudice him, the relative incapacity of the Indian may not be used as a pretext for arbitrarily restricting his action.¹²

Finally, Silvio Rodrigues explains:

Thus, if a pubescent minor carries out a legal act (purchase, sale or contract to undertake), the law takes into account his will and respects its manifestation.

The lawmaker validates the legal act deriving from his will, which may be supplemented and made more effective if the incapable person is assisted by his representative who approves the transaction concerned.¹³

The same reasoning applies to the Indian since any manifestation of his will is recognized by the legislation.

3. Capacity of the Indian to Institute Legal Proceedings

A further institution, close to that of legal capacity, warrants examination here: that is to say the capacity of the Indian to institute legal proceedings.

The Brazilian Code of Civil Procedure lays down in Article 7:

Whoever enjoys exercise of his rights shall have the capacity to institute legal proceedings.

According to Celso Agricola Barbi, the *legitimitio ad processum* can only be afforded to persons who enjoy the exercise of their rights. Thus, minors, deranged persons and forest populations are expressly excluded:

The reason for this restriction is to protect the persons concerned. Indeed, during the procedure, it is necessary to carry out numerous acts and in the case of a formal defect or if the interested party is missing, serious impairment of his right could result or even lead to loss of that right.¹⁴

I cannot agree with the well-known specialist on the point of non-recognition of the Indian's capacity to institute legal proceedings. In my opinion, the restrictions mentioned are not justified.

Indeed, Article 37 of Law No. 6001 of December 19, 1973, reads as follows:

The tribes or native communities shall constitute lawful parties in respect of the defense of their legal rights and shall enjoy in such case assistance from the federal magistrature (*Ministério Público Federal*) or from the organism responsible for protecting Indians.

The wording of Article 37 of the Indian Statute leaves no doubt at all as to the exercise of the right to institute legal proceedings by the native community or by the individual Indian.

Dalmo de Abreu Dallari, an eminent specialist in constitutional law, recently wrote in an article:

The possibility left to the native communities to take up their own defense before the courts and to enjoin the assistance of FUNAI for that purpose has a very solid legal basis and such faculty was only offered to the native groups after a prolonged and painstaking examination of all the legal aspects of the problem.¹⁵

He then adds:

One important fact not taken into account by the most formalist of lawyers is that the native community constitutes a special form of association that is not subject to the formalities required for other types of associations.¹⁶

The Indian Statute does not provide for this type of organization; nevertheless, it recognizes its existence and guarantees its rights. Beyond that, any demand is absurd.

In addition to the fact that it affords *legitimitio ad processum* to the tribal community or to the individual Indian, Article 37 of Law No. 6001/73 stipulates that they shall enjoy the assistance of the magistrate or of FUNAI.

The individual Indian or the native community is legally entitled to obtain jurisdictional assistance by using the services of a lawyer, either voluntarily or for lack of a guardian. It suffices that a request be made to the judge to inform the magistrate or FUNAI of the wish of the Indian or of the tribal community to be assisted in the proceedings that had been instituted.

As regards the capacity to accept a brief, Dallari has dealt with this as follows:

One interesting point that also defies formalism is that of the form of representation of the native communities, that is to say who is to brief one or more lawyers on behalf of the community. This is in fact a very important detail since Brazilian legislation requires as a rule that the parties be represented by a lawyer in order to institute proceedings.¹⁷

For this author, the solution is very simple if one considers that a native community is a form of specific association governed by its own rules.

The representation of the community is undertaken by the individual Indian or the group of Indians who, in accordance with their customs, speaks on behalf of the native community.

The author describes the procedure to be adopted:

It suffices for the habitual members of the native community to appear before a notary, accompanied by two or more

¹² *Ibid.*, p. 60.

¹³ Silvio Rodrigues, *op. cit.*, p. 44.

¹⁴ Celso Agricola Barbi, *Comentarios ao Código de Processo Civil*, Vol. 1, p. 122.

¹⁵ Dalmo de Abreu Dallari, "Justiça para o Índio," *Folha de São Paulo*, April 23, 1983, cad. 1, p. 3.

¹⁶ *Ibid.*, p. 3.

¹⁷ Dalmo de Abreu Dallari, *op. cit.*, p. 3.

persons, in possession of their identity cards, who confirm that the Indians concerned are the true representatives of their community. An official document of proxy will then be issued whose validity is incontestable.¹⁸

As to the risk of bad faith or falsification in order to obtain a proxy for the purpose, in due time, of carrying out acts contrary to the interests of the community, this is inexistent. It is in fact the judge who, exercising his functions, examines whether the magistrate or FUNAI should pronounce on this matter.

Furthermore, as so rightly commented by Salvio de Figueiredo Teixeira:

Whereas the Code of Civil Procedure is a set of principles and rules governing procedure and regulating the way in which legal order is guaranteed, its principles are reinforced for that same reason, as stated by Couture, that any procedural law, in specific texts that regulate the course of the procedure, constitutes primarily a development of the principle. The procedural systems are based on given principles, some of which are common to everyone, others accompanied by local particularities, which always reflect the constitutional order.¹⁹

Incontestably, every rule derives from a principle. However, the latter is always more important than the rule.

In the specific case of the Indian, Law No. 6001, which regulates his legal situation, guarantees him the right to jurisdictional tutelage, which is primarily a constitutional-type principle; it is therefore a quite considerable guarantee.

4. The Indian and Law No. 5988 of December 14, 1973

Following these considerations as to the legal capacity of the Indian and his capacity to institute legal proceedings, it remains to examine his situation in respect of the Copyright Law that is the subject matter of this study.

In the sole paragraph of its Article 1, Law No. 6001 of December 19, 1973, stipulates that:

The Indians and the native communities shall be protected by the laws of the country in the same way as other Brazilians, without prejudice to native usage and customs and traditions or to the special conditions recognized by this Law.

And in Article 47:

Respect for the cultural heritage of the native communities, their artistic values and their means of expression shall be guaranteed.

In view of the above-mentioned provisions, it is clear that Law No. 5988 of December 14, 1973, governing authors' rights, applies to the Indian as a creator.

Although the law protects the Indian in his capacity as an author, the majority of the population has difficulty in accepting him as such, in considering him from that point of view.

Nothing is more significant than the comment written by Terena:

Frequently, in the minds of Brazilians, that is to say those who form part of what I will call the "surrounding" society, exists an image of an Indian armed with arrows and hatchets, painted in many colors, who serves for taking photographs or for inspiring anecdotes; this Indian who produces such pretty articles of handicraft and is a source of revenue both for FUNAI and for those who exploit this kind of thing.

For some, he is naive, wild, stubborn; for the others, he is the one that has prevented and still prevents progress.²⁰

How can an Indian be considered an artist whose author's rights are capable of protection?

Indeed, what is an author-Indian?

It would be very arduous to survey within the framework of this study all the manifestations of the creative spirit of the Brazilian native.

However, it is necessary to demonstrate, although briefly, that this creative vitality constitutes an absolutely material aspect of the life of the native peoples in order then to examine the violation of that artistic work in practice.

For that purpose, nothing prevents us, as a simple illustration, from highlighting the creator-Indian by means of the institution of the Moitara.

Four years ago, a new word was adopted in the Brazilian language: Moitara, which in the language of the Upper Xingu Indians, designates a large-scale event held to exchange handicraft objects and foodstuffs in accordance with a ritual that has an eminently economic purpose but which also promotes fraternization between groups of differing culture.²¹

The first Moitara was organized by FUNAI in 1980 in order to celebrate the Indian Week.

These events have gained impetus as a result of their success and have developed from the presentation of a general native theme to that of a single community each time, enabling knowledge of that community to be gained in depth.²²

This year, in Brasilia and Sao Paulo, 261 items (masks, wickerwork, ornaments and pottery made by the Kayapos Indians who live in Para and Mato Grosso) were shown at the fourth Moitara.

This event succeeded in reflecting the unequalled beauty of the works created by the Kayapo tribe, who descend from the "people who live on the roof of the sky."²³

The members of this tribe seek their raw materials in nature in order to make the creative works for which they use the most varied of means, the art of

²⁰ Marcos Terena, *O Indio e o Direito*, coll. OAB/RJ — Debate, 1, p. 78.

²¹ Cicero Cavalcante Albuquerque, "IV Moitara, a Arte dos Kayapos," *Interior*, p. 20.

²² *Ibid.*, p. 21.

²³ *Ibid.*, p. 21.

¹⁸ *Ibid.*, p. 3.

¹⁹ Lopes da Costa, *Manual Elementar de Direito Processual Civil*, revised and updated by Salvio de Figueiredo Teixeira, p. 61.

feathering being the strong point of their creative activity.

Their ornaments are fabricated with feathers of ara, mutum, parrot, king congo, egret down, king urubu, royal falcon, threads of cotton and of wood of all kinds, of varying fibers, all arranged with grace and lightness.

As to the ornaments, these are most varied: arm bands, ear hangers, crests, necklaces, head pieces, and so on.

They create garments, arms made from the thigh-bones of ounces, instruments, utensils such as calabashes with lids made of buriti straw and with patterns painted in annotto as well as various types of baskets.

Not to mention, of course, body decoration: symbolic shapes and the language of the community in which "body painting represents the social color."²⁴

In addition to this pictorial art, as emphasized by Julio Cezar Melatti:

As is the case in all human societies, the manifestations of art are not lacking in the native tribes of Brazil. These manifestations take on the most varied forms depending on the tribe. Thus, although all of them make articles of feathers, the styles are different and some of them give this type of art a much more prominent place than others. Some tribes are distinguished by their pottery, others by wood sculpture and others yet again by their elaborate techniques of body painting.²⁵

There is therefore no doubt that the Indians perform works of the mind within the meaning of Article 6 of Law No. 5988 of December 14, 1973.

According to Article 21 of this Law:

The author is the owner of the moral and economic rights in the intellectual work created by him.

The wording of Article 21, affording to the author the ownership of the moral and economic rights in the artistic work he has created, strengthens the essential nature of copyright whose two constitutive, distinct and different elements, that are nevertheless intimately bound up and in perfect correlation, constitute the cornerstone, that is to say the moral rights and the economic rights.

Article 25 of Law No. 5988/73 defines the author's moral rights:

The moral rights of the author are:

- (i) the right to claim authorship of the work at any time;
- (ii) the right to have his name, pseudonym or conventional mark indicated or declared as being that of the author when his work is used;
- (iii) the right to withhold publication of his work;
- (iv) the right to ensure the integrity of the work, by opposing any modification or acts which might, in any way, be prejudicial to it or have an adverse effect on his reputation or honor as an author;

- (v) the right to modify the work before or after its use;
- (vi) the right to withdraw the work from circulation or to suspend any previously authorized form of use.

As I emphasized in my article entitled "Copyright and the Architect"²⁶:

According to the text of the law, the constituent elements of moral rights are the rights in respect of authorship, non-publication, integrity, modification, repentance:

Authorship. This is the author's right to demand that his name be associated with the work created. Thus, his name must be attached to the work at the time of its use, its reproduction or its performance. In addition, the author may prevent his name from being attached to his own work. It may further be noted that this right gives its owner the possibility of publishing a given work as being his own.

Non-publication. This is the author's exclusive right to decide whether or not his artistic work is to be disseminated. This is a personal right.

Integrity. This right gives the author the possibility of keeping his work intact by preserving it from any derogatory acts. Under this right, any modification of the work is prejudicial to the reputation or honor of the author.

Modification. This is the author's right to modify his work. The changes he wishes to make may be incorporated prior to or after utilization of the work.

Repentance. This is the right under which the author has the faculty of modifying a work he has already published or preventing its circulation by withdrawing it from the market.

It is useful to remember that, as a general rule, any infringement of the author's moral rights is prejudicial to the authorship, the integrity and the dissemination of the work.

Moral rights are untransferable and imprescriptible under Article 28 of Law No. 5988/73.

Subsequently, Article 29 specifies the economic rights:

The author shall have the right to use, to profit by and to dispose of the literary, artistic or scientific work, and to authorize third parties to use it or profit by it, wholly or in part.

This provision gives the author-Indian, and him alone, the right to use and to profit by the work of art he has created and the right to authorize its use or enjoyment by third parties, either wholly or in part.

By stipulating that it is the author who may authorize third parties to economically exploit the work of art he has created, the Copyright Law requires that the author should be first consulted to authorize or not the commercialization of his work.

Indeed, the spirit of this Article 29 could not have been any other since the lawmaker had faithfully aligned the wording of that Article on Article 150(25) of the Federal Constitution, that reads as follows:

The right to use literary, scientific or artistic works shall belong exclusively to the authors thereof.

²⁴ *Ibid.*, p. 22.

²⁵ Julio Cezar Melatti, *Indios do Brasil*, p. 161.

²⁶ See *Copyright*, 1983, p. 248.

After examining the provisions reproduced above, the following conclusion is reached: under the Brazilian copyright system, any infringement of the author's moral right immediately involves an irreversible prejudice of an economic nature that may only be made good by compensation.

Among the civil and administrative sanctions laid down by Law No. 5988/73, that set out in Article 123 would seem the most general, that is to say the least specific, leading to the most severe civil penalty.

The author whose work has been unlawfully reproduced, disclosed or used in any way may, where he is aware of the offense, apply for seizure of the copies produced or suspension of the disclosure or use of the work, without prejudice to his right to compensation for losses and damages suffered.

5. Penal Sanctions

In respect of copyright, the sanctions are not limited to those set out in Law No. 5988/73.

For instance, Law No. 6895 of December 17, 1980, amended Articles 184 and 186 of the Penal Code, approved by Decree-Law No. 2843 of December 7, 1940.

These articles are now therefore worded as follows:

Article 184. — Violation of copyright:

Penalty: detention for three months to one year, or a fine of 2,000 to 10,000 cruzeiros.

(1) If the violation consists in the reproduction by any means of an intellectual work, in whole or in part, for commercial purposes, without the express authorization of the author or his representative, or consists in the reproduction of a phonogram or videophonogram without the authorization of the producer or his representative:

Penalty: imprisonment for one to four years, and a fine of 10,000 to 50,000 cruzeiros.

(2) The penalty specified in the preceding paragraph shall also apply to any person who sells, offers for sale, brings into the country, acquires, conceals or stores for the purpose of sale the original or copy of an intellectual work, phonogram or videophonogram produced in violation of copyright.

Article 186. — With regard to the crimes referred to in this Chapter, proceedings shall be instituted only by means of a complaint, except when they are brought against a government entity, autonomous organization, public corporation, mixed economy company or foundation instituted by the Government, and in cases provided for in paragraphs (1) and (2) of Article 184 of this Law.

Again therefore penal legislation is seen to join civil legislation since the wording of Law No. 6895 of December 17, 1980, contains concepts laid down by Law No. 5988/73.

However, the lawmaker has taken care to highlight violation of copyright as the reproduction, in whole or in part, of a work of artistic creation for commercial purposes without the express authorization of the author or his representative. The author

of such an offense is liable to a penalty of between one and four years imprisonment, together with a fine.

Therefore, both the Copyright Law and the Penal Code lay down sanctions for any use made of an Indian work of art without the express authorization of its author.

In its Title II — Crimes against Indians — Law No. 6001 of December 19, 1973, already stipulated in Article 58:

The following shall constitute crimes against Indians and native culture:

(1) To make fun of ceremonies, rituals, usage and customs or of native cultural traditions, to jeer at them or to disturb their celebration in any manner whatsoever.

Penalty: between one and three months' imprisonment.

(2) To utilize the Indian or the native community for the promotion of tourism or for exhibition for gainful purposes.

Penalty: between two and six months' imprisonment.

And in its sole paragraph:

The penalties laid down by this Article shall be increased by one-third where the crime is committed by a civil servant or an employee of the agency responsible for giving assistance to the Indians.

Title II also contains Article 59:

In the case of a crime perpetrated against the person, the heritage or the customs of a non-integrated Indian or a native community, the penalty shall be increased by one-third.

A critical interpretation of Article 58(2) convinces us that the intention of the lawmaker was to prevent any unwarranted exploitation by third parties of the Indians or of their community as regards "habitat," the conduct of day-to-day activities, the celebration of ceremonies or the observance of customs, whether individually or collectively.

He sought mainly to prevent the likeness of the Indian or of the tribal community being used for promoting tourism or for a gainful purpose.

6. FUNAI Order No. 448/N of October 13, 1977

The commercial exploitation of the likeness of the Indian or of his tribe in material for promoting tourism, on postcards, calendars and posters representing certain aspects of his life and activities is a frequent occurrence.

Despite Article 58(2) of Law No. 6001/73, FUNAI still applies today its Order No. 448/N of October 13, 1977, which replaced Order No. 120/N approving the regulations and the authorization in respect of social communication activities in the native area.

Paragraph (1) is worded as follows:

Any person not belonging to the services of the National Indian Foundation or any national, foreign or international entity who has the intention to enter those areas of the national territory occupied by the natives must obtain the necessary authorization for that purpose in accordance with Decree No. 65057/69, in addition to the consent of FUNAI.

Paragraph (5) of the Regulations, for its part, stipulates:

The authorizations entitling persons, groups or organizations to produce, for commercial or scientific purposes, photographic or cinematographic documents concerning Indians, their customs and their environment, are only issued by the President of FUNAI after having obtained the obligatory opinion of the General Department of Community Planning.

Order No. 448/N of October 13, 1977, is not only contrary to Law No. 5988/73 but also, and above all, to Article 58(2) of Law No. 6001/73.

Its wording, apart from being absurd, reveals how little attention is paid to the guardian of the incapable person and the lack of consideration for that latter person. The text is most unfortunate and leaves much to be desired when it stipulates that the authorizations concerned "are issued only by the President of FUNAI" or by the guardian.

What about the Indian, why is he never heard?

Is it not for him to authorize any photographic production, whether commercial or scientific, that concerns him or his community?

From a legal point of view, the Order makes FUNAI not the guardian of the Indian but his representative and thus prevents him from manifesting his will and from expressing himself whereas, according to the law, FUNAI is there to assist him and has the duty of acting according to the wishes of the person placed under tutelage.

If an Indian participates in a cinematographic production as an actor or an extra this will constitute the case laid down in Articles 94 *et seq.* of Law No. 5988/73 (related rights) in respect of performers.

It may thus be seen that Order No. 448/N has in practice promoted the improper utilization by third parties of the likeness of the Indian and of his artistic work for gainful purposes contrary to the provisions of his Statute and those of the Copyright Law.

7. The Right of the Indian in his Own Likeness

It should be emphasized that, apart from the reproduction of artistic patterns on vessels, fabrics or garments, the exploitation of Indian art (ethnographical items, body paintings), the use of musical compositions and songs — the habitual forms of usurpation of an artistic work — the likeness of the Indian is frequently violated despite the right in his likeness incorporated in Law No. 5988/73.

No one can deny, today, that this constitutes a primordial right.

As expressed so pertinently by Antonio Chaves, quoted by Walter Moraes, it concerns:

An aspect of human personality that one cannot continue to ignore at a time when the indisputable progress of technology multiplies considerably the possibilities of exploiting it.²⁷

When dealing with the likeness as property in the legal sense, Walter Moraes extends the concept by asserting that it covers "all formal and sensitive expressions of human personality."²⁸

From the point of view of law, the notion of likeness is not linked to the visible aspect of the person. It is not limited to the physical aspect of the individual. Any element that may be highlighted and presented as an integral part of the person's own body is to be considered a likeness within the legal meaning.

As part of the right of personality, only the likeness of a natural person is protected by law.

As remarked by Walter Moraes,

...alone the aspect of a natural person is concerned in this type of study. The natural person referred to as a legal person does not possess a likeness but only symbols.²⁹

In his classic on the rights of personality, Adriano de Cupis writes in respect of the right of safeguard:

Either the right of likeness is afforded general significance, limited solely by the specific exceptions dictated by public interest, or one considers that it constitutes a part of the right of honor in the sense that legal tutelage applies only where the dissemination of the likeness of the person may be detrimental to his honor. If this latter solution is chosen, it is not safeguard as such which constitutes property in the legal sense since the decisive reason for the intervention of the law is the fact that honor has been damaged.³⁰

In explaining that the theory of honor is of current interest, Walter Moraes states explicitly:

However, it would seem quite clear that as a theory this construction is "suicidal" since it wishes to institute a right of likeness under which the protected property is honor.³¹

In an outstanding work, Milton Fernandes teaches us in dealing with the right in one's own likeness that:

After having been broadly and actively disputed, it now tends to be classified by legal writers among the rights of personality. Today, it is indisputably the solution enjoying the greatest and most serious support.³²

Moreover,

Placing himself among the advocates of this theory, Antonio Chaves asserts that, among the rights of personality, there is no right as human, as profound and as passionate as that in one's own likeness.³³

²⁷ Walter Moraes, "Direito a Propria Imagem," *Rev. Trita*, Vol. 444, p. 12.

²⁸ *Ibid.*, Vol. 443, p. 64.

²⁹ *Ibid.*, Vol. 443, p. 65.

³⁰ Adriano de Cupis, *Os Direitos da Personalidade*, p. 180.

³¹ *Ibid.*, Vol. 443, p. 69.

³² Milton Fernandes, *Proteção Civil da Intimidade*, p. 171.

³³ *Ibid.*, p. 171.

There is no doubt that the rights of personality provide the best framework for the right of likeness.

His likeness is born with the individual and becomes the element enabling him to be identified.

As pertinently formulated by Walter Moraes, ...the right of likeness is not acquired; it arises along with the person. During his lifetime, the subject cannot change his likeness, he can but transform it; someone undergoing plastic surgery, however transfigured he may be, does not obtain a likeness other than that which is his own.³⁴

According to Professor Milton Fernandes, ...such is, precisely, the point of view of North American case law. In a vast study of this topic, Ruprecht Kamlah declares that the "right of privacy" protects the characteristics of personality which may be designated under the general term of identity. Among these characteristics, he identifies the likeness.³⁵

He adopts the notion of privacy where ...it consists in keeping others in ignorance of ideas, facts and data concerning one's own person. The aim of protecting privacy is to limit any external intrusion into the sphere that each person wishes to keep private.³⁶

The juxtaposition of the notion of privacy and of the right of likeness suggests that the latter may only be used with the consent of the subject.

When examining the question of fixation and reproduction of likeness, Milton Fernandes describes it in a restrictive way:

When defining the content of the right of likeness, we may observe that it prevents any fixation or reproduction of the likeness without the explicit and specific consent of the person concerned.³⁷

Pontes de Miranda is no less incisive: ...it is the right of every person who does not wish his likeness to be used at will. Whence the need to obtain his consent.³⁸

Hermano Duval argues in the same way: ...the important element is the right of the person concerned in his own likeness, which is not dependent on the extent of publicity but on himself since the owner of this right is the only person who can decide the conditions under which he wishes to appear in public.³⁹

According to Cupis: As far as the personality rights are concerned, apart from the fact that they are inalienable, they are also imprescriptible by reason of their "essential" nature. Indeed, legal personality will lose its entire practical value if the individual is entitled to voluntarily waive his rights.⁴⁰

Following these reflections of a doctrinal nature, we may now examine the way in which our legislative system deals with this matter.

Article 666(X) of the Brazilian Civil Code contains a ruling on the right of likeness:

Article 666. — The following shall not be considered infringements of copyright:

(X) The reproduction of portraits or busts made as a result of a private commission when such reproduction is made by the owner of the commissioned works. The person portrayed or his immediate successors may oppose the reproduction of the public exhibition of the portrait or bust.

In his comments on this Article, J.M. de Carvalho Santos states:

The person portrayed or his immediate successors may nevertheless oppose reproduction or public exhibition of the portrait or of the bust. The person represented is the person who is shown in the photograph or whose bust has been sculptured. This means, therefore, that he may oppose any reproduction since his will prevails over that of the owner of the portrait or of the bust, a consequence that is logical since the person portrayed is the one most directly concerned and it would not be admissible for an object representing him to be exhibited in public against his will.⁴¹

However, Article 49(f) of Law No. 5988 of December 14, 1973, derogates from the corresponding provision in the Brazilian Civil Code:

Article 49. — The following acts do not constitute an infringement of copyright:

(I) reproduction:

(f) of commissioned portraits or other forms of representation of the human form, when such reproduction is made by the owner of the commissioned object and provided that the person portrayed or his heirs do not object to it.

However, the wording of this Law differs but little from that of the corresponding provision in the Brazilian Civil Code.

The important factor is that when derogating from this provision of the 1917 Code, our lawmaker incorporated, although in an inappropriate way, in Law No. 5988/73 the right of likeness that had been included in personality rights.

8. Conclusions Drawn in the Light of Article 58(2) of the Indian Statute, the Right of Likeness and FUNAI Order No. 448/N

The following conclusions may be reached from what has been said before:

- (a) the commercial exploitation of the likeness of a Brazilian Indian constitutes a crime laid down in the Indian Statute (Article 58(2));
- (b) the right of likeness constitutes one of the personality rights and, even where the like-

³⁴ Walter Moraes, *op. cit.*, p. 11.

³⁵ *Ibid.*, p. 175.

³⁶ *Ibid.*, p. 177.

³⁷ *Ibid.*, p. 180.

³⁸ Pontes de Miranda, *op. cit.*, Vol. 53, p. 231.

³⁹ Hermano Duval, *A Publicidade e a Lei*, p. 106.

⁴⁰ *Op. cit.*, p. 53.

⁴¹ J.M. Carvalho Santos, *Codigo Civil Brasileiro Interpretado*, Vol. VIII, p. 476.

ness of an Indian is used for purely didactic or scientific purposes, the explicit authorization of the owner of the human form is always required;

- (c) FUNAI Order No. 448/N is in no event applicable since it is obviously in conflict with the Indian Statute and Law No. 5988/73;
- (d) it is not for the President of FUNAI to authorize third parties, on behalf of the tutelage agency, to photograph or film Indians or tribal communities, even if they do so in a correct manner, since the right of likeness is an eminently personal right, an attribute inherent to the personality of the Indian and, consequently, untransferable.

It is therefore incontestable that FUNAI Order No. 448/N has caused grave prejudice to the Indians and the native communities, thus showing that the guardian does not always protect nor defend the interests of those he represents, which would be an essential condition for exercising tutelage.

9. Actual Examples of Infringement of the Indian's Copyright

To illustrate and demonstrate the truth of this claim, I will provide a number of actual examples.

The first example concerns a work entitled *Xingu Territorio Tribal*, illustrated by Maureen Bisilliat and written by Orlando and Claudio Villas Boas, describing the Xingu community both as a whole and in the individual case, illustrated by photographs of various Indians and of their customs and traditions.

The first edition of this work in Portuguese (also edited in English) appeared in October 1979, the exclusive rights for Brazil having been assigned to HRM Editores Associados Ltda., by agreement with William Collins Sons & Co. Ltd., Glasgow. The work was set by Linoart Ltda. in Univers 10, printed by William Collins Sons & Co. Ltd., Glasgow, and edited by Livraria Cultura Editora.

Although the artistic, cultural and scientific value of the work cannot be denied, that work was nevertheless edited for an essentially gainful purpose thus characteristically constituting commercial exploitation of the likeness of the Indians and of the tribal community of the Xingus and therefore constitutes an offense against the Indian Statute and Law No. 5988/73 (Article 49(f)).

I may add that the selling price of a copy of *Xingu Territorial Tribal* ranges from 20,000 to 23,000 cruzeiros in Brazilian bookshops and that it exceeds 40,000 cruzeiros in the embarcation hall bookshop at Galeao airport.

There is no doubt that the photographer and the authors have received or receive royalties for this work both in Brazil and abroad.

Furthermore, the photographer has published his pictures without the explicit authorization of the Indians or of the Xingu community in respect of a commercial exploitation of their likeness and without compensating them either for such commercialization.

In order to produce this work, Maureen Bisilliat was authorized by FUNAI Order O94/76 to enter the Xingu territory and to work there from June 1 to December 31, 1976.

One of the persons to whom she dedicated her work was General Ismarth de Araujo Oliveira, who was the originator of Order No. 448/N of October 13, 1977, and who, according to the photographer, "has done his utmost, as President of FUNAI, to guarantee the territorial rights of the Brazilian Indian."

A further example of violation of copyright, that FUNAI has submitted to the National Copyright Council for its views, concerns the amount of the royalties to be paid to the Indians who participated in filming the work entitled *Aritana*.

According to the report by Counsellor Carlos Alberto Bittar, the film was made by the Tupi television network in the Xingu national park without the express authorization of the National Indian Fund (FUNAI).

On presentation of a film recorded by Mr. Orlando Villas Boas, it would seem that the film crew managed to obtain the collaboration of some hundred Indians, both adults and children, to record various native rites.

In exchange, the participants received cardboard boxes containing "presents" such as uneatable bread and oranges and other articles of little value.

Unsatisfied by these presents and unhappy at the exploitation of the name *Aritana* — that of a great native Xingu chief — the Indians attempted to settle their dispute amicably and even travelled to Sao Paulo to negotiate, but without success.

The affair was examined within FUNAI which condemned the activities of the television network and proved the opinion formulated by Milton Sebastiao Barbosa as regards the royalties that were due.

FUNAI transmitted the file to the National Copyright Council for it to determine the remuneration to be paid to the native community by the television network. That was the purpose of the consultation.

On analysis of the case, the illustrious rapporteur had the following observations to make:

The facts prove the complete disrespect of the television station for the traditions and customs of the native, in addition to having carried out an unauthorized economic exploitation of the name, likeness and performance of the Indians who appeared in this work of fiction. Consequently, the station has

infringed in various ways the personality rights belonging to the Indians involved, including the rights of performance; the law therefore requires the station to pay them compensation.

And then:

The question of compensation in respect of the right of likeness will have to be reexamined by the ordinary court in order to set the appropriate amount.

The Third Chamber of the National Copyright Council approved the report unanimously and reached Decision No. 37, that was accompanied by the following note:

Related Rights — Natives

— The royalties due in respect of any participation in a television film must be calculated in accordance with the formula set out in this decision in the absence of an explicit statutory provision.

— The royalties that may be demanded in compensation for any improper use of a likeness must be asserted in personal legal proceedings.

The fact, on the one hand, that the Tupi television network did not possess explicit authorization from FUNAI to enter the Xingu National Park does not mean, however, that the presence of the television station on that territory was unknown to FUNAI.

The fact that the film crew obtained — by ruse — the participation of the Indians to film certain scenes in no way disproves the complicity of FUNAI with the infringers.

This is indeed so true that the anthropologist Olympio Serra, FUNAI administrator at that time, was removed from his functions for not having approved the presence of the Tupi television network in the Xingu National Park for making the film.

The National Indian Foundation also made itself responsible for the copyright infringements suffered by the tribe concerned since it admitted and tolerated the presence of a technical crew belonging to the television station on that tribe's territory and did not prohibit the filming of *Aritana*. Moreover, it did not ensure respect for the economic rights of the Indians concerned.

It was only once the act had been committed and its image had been tarnished that FUNAI asked for the opinion of the National Copyright Council by requesting it to set the amount of royalties due to the Indians who had participated in the film.

In fact, FUNAI and the Tupi television network, through their legal representatives and the members of the latter's technical crew, had committed the crime laid down in Article 58(2), sole paragraph, of Law No. 6001/73. To this must be added non-authorized economic exploitation of the performance of Indians in the film, which is unlawful and generates a claim to compensation through the courts.

A further example of violation concerns authorization No. 038/81 to film in the native area granted

on July 23, 1981, by Joao Carlos Nobre da Veiga, President of the National Indian Foundation (FUNAI).

By this document, the crew belonging to Producoes Cinematograficas L.C. Barreto Ltda., composed of 13 persons, was authorized to spend a period of 15 days in the native area of Javaé comprising the Barreira do Piqui and the Aldeia dos Javaés, which are areas located in the Ilha do Bananal (Araguaia native park) subject to the conditions laid down in the above-mentioned authorization.

The anthropologist Maria Guiomar de Melo was designated by FUNAI to advise the company during filming with the Javaé Indians (Executive Technical Instruction No. 030/81 — AGESP).

In accordance with its report of September 14, 1981, in order to obtain authorization to film, the film producers entered into the following commitments:

(1) to respect the directives of Order No. 448/N of October 13, 1977;

(2) to respect the customs of Javaé society and not to film sexual scenes involving natives, according to the telegram reproducing page 38 of the FUNAI minute BSB/1951/81;

(3) to pay to the community of the Javaé native park, as royalty, a sum of 500,000 cruzeiros, i.e. 0.5% of the film's takings, to be paid in advance as follows: payment of 250,000 cruzeiros 30 days after the first payment, the funds being deposited with the headquarters of FUNAI and, subsequently, allocated to the area occupied by that same community;

(4) to pay additionally a compensation for any prejudice that may have been suffered by the Indians or their heritage or again by FUNAI;

(5) to produce a documentary on videocassettes, devoted to the Javaé community and to give it to FUNAI who would archive it with ACS and would bear the cost of sending an anthropologist to monitor the filming (FUNAI minute BSB/1951, pp. 93 and 94).

Maria Guiomar de Melo concludes the report on her trip as follows:

Since this film constituted the first experience of the joint working group composed of copyright and national cinema representatives, no effective action was to be expected from it. Following the film, made by a crew enjoying some reputation in Brazilian film circles, we proposed a number of rules to be respected in future by those who submit requests for authorization to make commercial films of any native society. These rules are as follows:

(1) establish a complete scenario of the scenes that are to be filmed in the native area and of the film as a whole;

(2) obtain the services of an anthropologist having knowledge of customs to be responsible for the scenario and to advise the film crew;

(3) comply with all requirements of Order No. 448/N of October 13, 1977;

(4) instruct the working group to carry out a prior examination of the scenario in view of the fact that the films all depict socio-political reality and even simple cartoons give an ideological image of reality.

Following that, the anthropologist asserted that the cinema company had not respected two of its undertakings:

- (1) it had not made the documentary on the Javaé;
 (2) its crew had not respected their customs.

I must emphasize the fashion, according to Maria Guiomar de Melo, in which their customs were not respected:

In the morning, we saw Eliseu and the film director discuss the bathing scene. Suddenly, Eliseu declared that the extras would have to wear briefs or bikinis.

Taking into account the circumstances, we lost all credit with the group.

The director also asked that for this scene the Javaé Indians should be as at ease as possible in front of the cameras and the film crew since the shots taken so far had made obvious the fact that filming intimidated the Indians.

Furthermore:

The director and some members of the crew then asked us to request the Indians to take off their clothes. We explained to them that this would be contrary to their custom since, regarding us as whites, they would not bathe without clothes in our presence. Furthermore, the film makers had ensured the President of FUNAI that the crew would respect all the customs of Javaé society.

Despite this, in view of our stance, they approached Eliseu to settle the problem. On his arrival, the head of the native park ordered the Indians, in Javaé language, to undress.

In fact, only the youngest followed his order, being in the water in bikinis. Gloria Pires also removed her dress and simply kept a loin cloth.

Having set out the facts, this is now the accusation:

What we wish to denounce here is not the semi-nudity of the actress but the lack of respect shown towards the young Javaé Indians who were forced to adopt an uncustomary behavior in the presence of whites, together with the commercial exploitation of this scene since, even before our arrival, the national press had already announced that Gloria Pires would appear naked in the film. That fact had led the President of FUNAI to request the producers in writing to give explanations and to undertake not to film such scenes.

Luiz Carlos Barreto then sent a telegram attesting simply that "there would be no sexual scenes involving natives in the film *India*, contrary to the baseless information recently carried in the press." (FUNAI minute BSB/1951/81 — p. 88).

This is just one more example of violation of the Indian Statute and of the Copyright Law.

Article 58(2) of Law No. 6001/73 qualifies commercial exploitation of the Indian or of the native community as a crime.

Nevertheless, FUNAI authorized the film *India* on the basis of Order No. 448/N.

As denounced by the anthropologist Maria Guiomar de Melo, the scenes filmed with the participation of Javaé Indians constituted a crime within the meaning of Article 58(1) of the Indian Statute.

Finally, the use for gainful purpose of the likeness of the Javaé Indians required authorization by FUNAI.

Even if such authorization had been given, the film could not have been made without the explicit consent of each individual Indian.

10. Conclusion

All that has gone before attests to the fact that the Brazilian Indian is the creator of artistic works.

The examples that have been given show that the natives' copyright has been violated, in some cases with the approval of the National Indian Foundation (FUNAI).

Now, alone the owner of a work, that is to say the creator and thus the owner of copyright, may decide the manner in which it is to be commercialized.

For that very reason, exercise of tutelage does not afford the power to suppress such manifestation of will. On the contrary, the National Indian Foundation (FUNAI) and the whole of the "surrounding society" have a first duty to respect and appreciate the Indian and the work he creates. It is a known fact that the Great Charter makes him a Brazilian and that the law of life makes him a brother.

The moment has come to listen to him and to learn of the form in which he wishes his artistic work to be used. It is necessary to equip him in practice with the copyright that the law affords to him.

One may not forget the gigantic nature of his fight for survival as an Indian, principally his fight against emancipation, tantamount to ethnic negation, the destruction of his race, an irreversible process aimed to transform him into a "non-Indian."

The time has come, more than ever, to make national legal circles aware by forcing them to concern themselves carefully and effectively with the legal situation of the Brazilian Indian as an indispensable contribution to creating a new national conscience in respect of the natives.

(WIPO translation)

Correspondence

Letter from the Federal Republic of Germany

The Development of Copyright Between 1979 and the Beginning of 1984

Adolf DIETZ*

(First Part)

(1) The previous "Letter from the Federal Republic of Germany"¹ dealt with the development of copyright during the years from 1972 to the beginning of 1979. This new "Letter" will therefore report, in principle, on subsequent developments in the years 1979 to the beginning of 1984. It is, however, a well-known fact that important court decisions are frequently published with a certain amount of delay. It has therefore proved necessary, to ensure a full report on developments, to include in this "Letter" a number of decisions which, although they date from before 1979, were not known at the time the last "Letter" was written. Similarly, this new "Letter" can only contain decisions taken before the beginning of 1984 if they have already been published at the time the manuscript was completed.²

A. Copyright Legislation and Literature

I. Legislative Developments

(2) The most recent substantial reform of the German Copyright Act of 1965 took place in 1972 and was reported on in detail in a previous "Letter."³ Apart from recent plans for a reform, with

which we shall deal presently, the copyright legislation itself has not been modified during the reported span from 1979 to the beginning of 1984. It should be mentioned, however, that the *Bundestag* approved the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite of May 21, 1974, by means of a specific Law of February 14, 1979,⁴ with the result that the Convention entered into force (on August 25, 1979) for the initial five member States in accordance with its Article 10.⁵ Article 2 of the German Ratification Law lays down a 25-year exclusive right for the original broadcasting organization in the case of the satellite broadcasts covered by the Convention (i.e. not including broadcasts via direct reception satellites). This provision corresponds by its nature to that of the neighboring right of broadcasting organizations laid down in Part II of the 1965 Copyright Act (Article 87) together with other neighboring rights. This newly-created right for broadcasting organizations in a State party to the Convention nevertheless is additional to that existing protection and explicitly leaves it unaffected.⁶

(3) It is of great significance for the forthcoming reform of German copyright legislation that the draft of a further law to amend the Copyright Act is already before the *Bundestag*⁷ that, in its most important parts, introduces the obligation to pay in respect of private reprographic reproduction of

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¹ Cf. *Copyright*, 1980, pp. 85 *et seq.* (first part) and pp. 129 *et seq.* (second part).

² For the abbreviations used in this "Letter," particularly in the footnotes, for courts, publications and collecting societies, see *Copyright*, 1980, p. 85.

³ Cf. *Copyright*, 1973, pp. 93 *et seq.* (first part) and 1974, pp. 86 *et seq.* (second part).

⁴ *Bundesgesetzblatt* II, No. 7 of February 16, 1979, pp. 113 *et seq.* = Bl.f.PMZ 1979, pp. 376 *et seq.*

⁵ Cf. *Copyright*, 1979, pp. 190 and 191.

⁶ Cf. the justification of the ratification law, *Bundestagsdrucksache* No. 1390, of December 20, 1977, pp. 15 *et seq.* = Bl.f.PMZ 1979, pp. 37 *et seq.*

⁷ Cf. *Bundestagsdrucksache* 10/837, of December 22, 1983, containing both the Government draft together with the justification, the opinion of the Federal Council and the response of the Federal Government to that opinion.

copyrighted works on the part of the operator of reprographic equipment and also contains a new provision on the claim to remuneration for video and audio recordings of copyrighted works for private use; this aims to supplement the fee paid by the manufacturers of equipment since 1965 under Article 53(5) of the Copyright Act by a further fee on blank cassettes.

(4) In addition, the draft imposes greater limitation, as a result of the "Church Music" decision of the Federal Constitutional Court (BVerfG),⁸ on the cases of permitted public reproduction of protected works without authorization or remuneration under Article 52 of the Copyright Act, introduces full copyright protection for works of photography (for photographs which are not in the nature of a work, the present arrangement is to be maintained) and improves the arbitration procedure under the law on collecting societies (Copyright Administration Act)⁹ that was promulgated at the same time as the Copyright Act in 1965. There is no need to place particular emphasis on the fact that this envisaged provision, which continues to meet with quite considerable opposition, would constitute, if adopted, a further important improvement to copyright protection in the Federal Republic of Germany, and also one which would certainly receive corresponding attention at the international level.

II. Literature

(5) The literature that has been published in the Federal Republic of Germany during the period reported on in the shape of textbooks, commentaries, monographs and studies on copyright is extremely rich and cannot be reviewed here in detail. I would, however, like to refer to a number of important works. Mention must first be made of the fact that Eugen Ulmer, the grand old man of German copyright theory (and indeed my revered teacher) brought out in 1980 the third, completely revised edition of his textbook on copyright and publishing law,¹⁰ of which the clarity of thought and sure basis in theory make it a standard work of German and continental European copyright literature. Likewise, the well-known manual by H. Hubmann on copyright and publishing law appeared in 1984 in its fifth

edition¹¹ and the time-tested *Commentary on the Copyright Act* by Fromm/Nordemann in 1983,¹² likewise in a fifth edition. The third edition of the important *Documentation on the Law of Copyright Contracts* by E. Schulze appeared in 1982¹³ and a second, new revised edition by T. Maunz and G. Schricker of the significant Bappert/Maunz *Commentary on Publishing Law* was published in 1984.^{13a}

(6) A whole number of excellent monographs have been brought out in the various series of copyright publications, that is to say the *Copyright Treatises* of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich,¹⁴ the series ("Schriftenreihe") published by UFITA¹⁵ and the *Papers on Industrial Property, Copyright and Media Law* (SGRUM).¹⁶ As

¹¹ *Urheber- und Verlagsrecht. Ein Studienbuch*, fifth revised edition, Munich, 1984.

¹² Fromm/Nordemann, *Urheberrecht. Kommentar zum Urheberrechtsgesetz und zum Wahrnehmungsgesetz*, continued by Nordemann/Vinck/Hertin, fifth revised and supplemented edition, Stuttgart, etc., 1983; cf. also Nordemann/Vinck/Hertin, *Internationales Urheberrecht und Leistungsschutzrecht. Kommentar, deutsche Ausgabe*, Düsseldorf, 1977.

¹³ See footnote 16; cf. also Schulze (Hrsg.), *Urheberrecht in der Musik*, fifth revised edition, Berlin and New York, 1981, and Mestmäcker/Schulze, *Kommentar zum deutschen Urheberrecht, Loseblattausgabe*, 9. Lfg., Frankfurt am Main, 1982. The series also edited by Schulze "Rechtsprechung zum Urheberrecht. Entscheidungssammlung mit Anmerkungen" (Status: December 1983) constitutes one of the most complete sets of documentation on copyright law and related areas and is quoted in the footnotes to this "Letter" as "Schu."

^{13a} Bappert/Maunz, *Verlagsrecht. Kommentar zum Gesetz über das Verlagsrecht of 19.6.1901*, second, new revised edition by Maunz/Schricker, Munich, 1984.

¹⁴ The following were published during the report period: Heft 17: Dietz, *Urheberrecht und Entwicklungsländer*, 1981; Heft 18: Schweyer, *Die Zweckübertragungstheorie im Urheberrecht*, 1982; Heft 19: Liebrecht, *Die Zweckübertragungslehre im ausländischen Urheberrecht*, 1983; Heft 20: Wagner-Silva Tarouca, *Der Urheberschutz der ausübenden Künstler und der Tonträgerproduzenten in den USA*, 1983; Heft 21: Davies/von Rauscher auf Weeg, *Das Recht der Hersteller von Tonträgern. Zum Urheber- und Leistungsschutzrecht in der Europäischen Gemeinschaft*, 1983.

¹⁵ The following were published during the report period: Edition 63: Herschel/Hubmann/Rehbinder (Hrsg.), *Festschrift für Georg Roeder zum 10. Dezember*, 1981, 1982; Edition 64: Haberstumpf, *Zur Individualität wissenschaftlicher Sprachwerke*, 1983; Edition 65: Osenberg, *Die Unverzichtbarkeit des Urheberpersönlichkeitsrechts* (in preparation); Edition 66: Schulze (Gernot), *Die kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts*, 1983; Edition 67: Dittrich, *Zur Vereinbarkeit der österreichischen Regelung des Kabelfernsehens mit dem Recht der Berner Konvention* (in preparation); cf. Platho, *Urheberrechtsprobleme der Weiterverbreitung von Sendungen in Kabelnetz*, Cologne, 1983.

¹⁶ During the report period, the following volumes were published in respect of copyright: Band 1: Schulze, *Urhebervertragsrecht. Materialsammlung mit Erläuterungen*, third

⁸ Cf. the previous "Letter," *loc. cit.* (footnote 1 above, paragraph 81).

⁹ The full title of the Law is: Act Dealing with the Administration of Copyright and Related Rights, of September 9, 1965, reproduced in translation in *Copyright*, 1965, pp. 268 *et seq.*

¹⁰ *Urheber- und Verlagsrecht*, third revised edition, Berlin/Heidelberg/New York, 1980.

for the specialized journals that exist in the copyright field, reference should be made to the list set out at the beginning of the previous "Letter" in 1980.¹⁷ Indeed, the numerous copyright studies published in these periodicals clearly denote the continuing high level of theoretical study and interest in copyright and also the treatment of its practical problems in the Federal Republic of Germany.

B. Copyright and Neighboring Rights Case Law

(7) During the period covered by this "Letter" there have been many decisions published in the general field of copyright by both the higher courts, particularly the Federal Court, and the lower instances, that is to say the district courts (AG), the provincial courts (LG) and the provincial high courts (OLG), or in Berlin, the chamber court (KG). In their decisions, the courts have been required to pronounce on numerous important individual questions but also on new problems of copyright law, such as computer programs, cable television, video rentals and private use in the field of reprographic reproduction or of audio and video recording (equipment levy). I will attempt, in this "Letter," to resume the 200 or so decisions of German courts and, despite the small amount of space available, will endeavor as in the previous "Letters" to present a more or less complete picture of developments in case law in respect of copyright and neighboring rights.

I. Categories of Works and the Scope of Copyright Protection

1. Protectability of Individual Works

(a) Literary and Scientific Works

(8) Since the categories of works listed in Article 2 of the Copyright Act may only be protected when they constitute "personal intellectual creations," it

edition, 1982; Band 3: Hubmann (Hrsg.), *Rechtsprobleme musikwissenschaftlicher Editionen*, 1982; Band 5: Melichar, *Die Wahrnehmung von Urheberrechten durch Verwertungsgesellschaften. Am Beispiel der VG Wort*, 1983; Band 7: Dietz, *Das primäre Urhebervertragsrecht in der Bundesrepublik Deutschland und in den anderen Mitgliedstaaten der Europäischen Gemeinschaft. Legislatorischer Befund und Reformüberlegungen*, 1984; Band 8: Plett, *Urheberschaft, Miturheberschaft und wissenschaftliches Gemeinschaftswerk*, 1984; Band 11: Bullinger (Hrsg.), *Rechtsfragen der elektronischen Textkommunikation. Videotext, Bildschirmtext, Kabeltext — Medien und Urheberrecht in rechtsvergleichender Sicht*, 1984.

¹⁷ See *Copyright*, 1980, p. 85.

has frequently been necessary to examine written works to determine whether they in fact meet the standard of protectability laid down by the law. This has been confirmed by the courts in the cases, for example, of a program of a political party,¹⁸ an extensive written memorandum by a lawyer¹⁹ and a series of newspaper articles.²⁰ On the other hand, protectability was denied in the case of a canine pedigree book,²¹ at least as far as certain information compiled in the pedigree book was concerned that was of importance for the breeding of the dogs, such as that concerning their ancestors.

(9) The Federal Court pronounced in three important decisions on the protectability of scientific works. In the "Monumenta Germaniae Historica" case,²² the proceedings concerned a critical edition of source material of historically and artistically significant German medieval texts that are no longer protected as such. Nevertheless, the Federal Court confirmed the view that, although the scholarly teaching as such was not protectable in scholarly works, protectable characteristics were to be found, however, in the creative compilation, arrangement and presentation of the scholarly material. In the case in point, protection covered both the introductions and notes and also the indexes for the individual sections of the collection.

(10) The Federal Court followed similar thinking in the "WK Documentation" case²³ in holding protectable a scholarly work that constituted the outcome of numerous years of work by the Scientific Commission for the History of German Prisoners of War. In this case again, it concerned a collection of source material which the Federal Court held to be protectable both as a literary work (Article 2 of the Copyright Act) and as a collection (Article 4 of the Copyright Act). Whereas, in the case of a collection, protectability is founded exclusively on the form and nature of the collection, and the division and arrangement of the material presented, these elements may additionally lead to protection under Article 2 of the Copyright Act, particularly where

¹⁸ LG Munich I — 7 O 21477/76 — of 20.9.1977, Schu LGZ 160 (Hubmann).

¹⁹ OLG Düsseldorf — 20 U 64/83 — of 14.7.1983, GRUR 1983, 758.

²⁰ OLG Munich — 6 U 2050/79 — of 24.1.1980, GRUR 1980, 234 = UFITA Bd. 90 (1981) p. 172.

²¹ LG Munich I — 7 O 4269/77 — of 28.6.1977, Schu LGZ 159 (Kleine).

²² BGH — I ZR 157/77 — of 7.12.1979, Schu BGHZ 263 (Seydel) = GRUR Int. 1980, 230 = GRUR 1980, 227 (Nordenmann) = IIC 1981, 416 = UFITA Bd. 87 (1980) p. 277.

²³ BGH — I ZR 95/79 — of 12.6.1981, Schu BGHZ 297 (Seydel) = GRUR 1982, 37 = UFITA Bd. 94 (1982) p. 270.

the individual sources are not simply reproduced one after the other but frequently related to each other by means of texts that link and explain them.

(11) These two decisions that have been mentioned must be compared to the decision taken by the Federal Court in the "Degree Thesis" case.²⁴ Once more in this case, protectability was indeed confirmed for a degree thesis in the field of biology, dealing with the anatomical and histological details of a plant species. However, the scope of copyright protection in relation to a second paper that dealt with the examination and description of the same plant species was evaluated very restrictively by the Federal Court with the final result that there had been no infringement of copyright. The Federal Court once more emphasized that certain limits applied to scientific works on account of the principle of scientific teaching being freely available to everyone and therefore not eligible for copyright protection. Despite the fact that the specific composition and presentation of the teaching was eligible for copyright protection, the fact that the scientific teaching itself enjoyed freedom therefore imposed limitations on the copyright for such presentation and compilation. It was further to be assumed that the usual expressions used in a given scientific field would, as a rule, lack the individually creative nature required for copyright protection. The same applied to a structure and a type of presentation that was imposed by scientific grounds or which was quite usual in the field concerned.

(b) Computer Programs and Video Games

(12) The debate on copyright protection for computer programs was given considerable stimulus by the decision of the LG Mannheim,²⁵ in which computer programs were held for categorical reasons to be non-copyrightable as a principle since they had no intellectually aesthetic content. However, this decision was rapidly to be opposed by a whole series of decisions taken by provincial courts²⁶ which confirmed copyright protection for computer programs and refused to apply the aesthetic yardstick. Additionally, the decision by the LG Mannheim was subsequently reversed by the OLG Karlsruhe.²⁷

(13) Despite this reversal, the decision by the OLG Karlsruhe in no way constitutes an unreserved recognition of the copyrightability of computer programs. It represents in fact a prudent judgment that, in the case in point, has done no more than to afford not very extensive copyright protection with certain misgivings. The Court held, *inter alia*, that a computer program was a sequence of instructions composed in any language enabling a digital computer to identify, perform or obtain a given function of the problem or a given result. The point of importance for copyright matters was that the algorithm, that is to say the calculating rule inherent in the program, its mathematical principles, could not as such be covered by copyright protection. Copyright did not serve to give a legal status to scientific knowledge since such knowledge had to remain common property. Since the algorithm, as a scientific instruction, was not eligible for copyright protection, neither could it be used on principle to justify the existence of a copyrightable performance in devising the program.

(14) Finally, the OLG Karlsruhe also expressed its doubts as to that copyright protection which was indeed afforded by questioning whether copyright in all its phases, particularly in its characteristic protection for personal rights, could remain a basis for the legal protection of computer programs or whether it would not be more appropriate to apply specific statutory arrangements of a more formal nature. Nevertheless, until the pending decision of the Federal Court has been given, it must be noted that the great majority of German courts²⁸ have likewise agreed with the copyrightability of computer programs.

(15) A related problem, that in some cases was in fact identical, arose in proceedings where a decision had to be taken on copyright protection for video games. Three decisions taken by the OLG Frankfurt,²⁹ in particular, dealt with this question. In all three cases it refused copyright protection for video games, either because the protectability of the video games concerned could not be justified, since the program had not been submitted, or because, using the sequence of play that was physically visible on the screen as a yardstick, the fact that certain procedural steps had been used in the same se-

²⁴ BGH - I ZR 106/78 - of 21.11.1980, Schu BGHZ 280 (Seydel) = GRUR 1981, 352.

²⁵ LG Mannheim - 7 O 143/81 - of 12.6.1981, Betriebs-Berater 1981, 1543 (Zahrnt).

²⁶ LG Kassel - 8 O 84/80 - of 21.5.1981, Betriebs-Berater 1983, 992; LG Mosbach - KfH O 35/82 - of 13.7.82, GRUR 1983, 70; LG Munich I - 7 O 2490/82 - of 21.12.1982, GRUR 1983, 175.

²⁷ OLG Karlsruhe - 6 U 150/81 - of 9.2.1983, GRUR 1983, 300.

²⁸ Cf. in particular also OLG Koblenz - 6 U 294/80 - of 13.8.1981, Betriebs-Berater 1983, 993; LArbG Schleswig-Holstein - 2 Sa 605/71 - of 24.6.1981, Betriebs-Berater 1983, 994 and Bundesarbeitsgericht (BAG) - 3 AZR 371/81 - of 13.9.1983, GRUR 1984, 429 (Ulmer).

²⁹ OLG Frankfurt - 6 W 34/83 - of 13.6.1983, GRUR 1983, 753; OLG Frankfurt - 6 U 16/83 - of 21.7.1983, GRUR 1983, 757; OLG Frankfurt - 6 U 19/83 - of 14.8.1983, FuR 1984, 41.

quence did not suffice to prove copyright infringement. Nor were the video games concerned accepted as cinematographic works or as so-called cinematographic films (i.e. the subject matter of neighboring rights under Article 95 of the Copyright Act) since they did not constitute moving sequences of images or sounds, but a special manner of representing a result.

(16) The OLG Hamburg, on the other hand, in the "Puckman" case,³⁰ confirmed the protectability of a video game on account of its very nature as a cinematographic work and left unanswered the question of protection of the computer program on which it was based. However, in this case also there was no judgment of infringement since the idea of a game as such is not protectable and the competing game was not based on an unchanged borrowing and furthermore, despite certain similarities in the idea of the game, sufficient differences had been maintained in its realization.

(c) Cinematographic Works

(17) The LG Munich I held³¹ that a three-part television film entitled "Laterna Teutonica" tracing the historic development of sound films in Germany by using a series of excerpts from early films, incorporated within its overall concept, could itself be afforded copyright protection as a cinematographic work, whereby the use of the film excerpts was covered by the right of quotation (Article 51 of the Copyright Act).

(18) The question of copyright protection for sound radio and television broadcasts as cinematographic works arose in proceedings³² heard by the Federal Court, in which the point of debate was whether the compère of quiz and entertainment programs could claim a neighboring right as a performer. Since protection under Article 73 of the Copyright Act presupposes the presentation of a work, a decision had first be taken on the preliminary question of whether such programs constituted copyrightable works. The outcome on this point was that the characteristic of a work could be acknowledged initially not for the whole series of programs but, at most, for individual programs within the ser-

ies, and that a compilation of musical performances, singing, acting scenes, reports, interviews, and the functions of announcer and compère in an entertainment program did not as a rule possess the unity of form required to constitute a cinematographic work. Thus, only the individual sequences in an entertainment show could constitute a work in specific cases.

(19) A further boundary case within cinematographic works is constituted by the so-called sound slide shows in which a sequence of slides are shown one after the other, whilst a recorded tape is run off at the same time, giving the explanatory text and also possibly music. In a case heard by the OLG Frankfurt,³³ the Court tended to initially accept sound slide shows as works "constituted in a similar way to cinematographic works." Finally, however, the Court left this question unanswered since it held that the unauthorized use of the music employed in the show constituted an infringement of copyright, however the sound slide show was to be qualified.

(d) Works of Music

(20) The question of affording copyright protection to works of popular music had to be resolved by the Federal Court in the "Dirlada" case.³⁴ This concerned a song of the same name by a Greek composer, taking the form of monometric antiphony between soloist and choir, similar to recitative singing, with instrumental accompaniment. As regards copyrightability, the Federal Court first emphasized that the creative specificity of musical works was to be found in their individual aesthetic expression. It was, however, sufficient for the composers' formative activity to comprise but a slight degree of creativity, as was indeed usually the case in popular music. The artistic value was of no account. On the other hand, a purely craftsman's activity, that comprised no intellectual creation, like all commonly available elements, lay outside the area of protection, such as for example the formal elements of composition based on the laws of harmony, rhythm and melody, or which are expressed in the antiphony between soloists and choir. Nevertheless, the Federal Court rejected the view held by the previous instance that as a general rule the manner of treatment was to be accounted part of the common trade of a composer. The physical form could also, in fact,

³⁰ OLG Hamburg — 3 U 192/82 — of 31.3.1983, GRUR 1983, 436.

³¹ LG Munich I — 21 O 22160/82 — of 30.9.1983, FuR 1983, 668.

³² BGH — I ZR 73/78 — of 14.11.1980, Schu BGHZ 279 (Reichardt) = GRUR 1981, 419 = IIC 1981, 893 = UFITA Bd. 90 (1981) p. 132. As regards the lower court, cf. details given in the previous "Letter," *loc. cit.* (footnote 1 above), footnotes 67 and 68, and 272 and 273.

³³ OLG Frankfurt — 6 U 44/80 — of 16.10.1980, Schu OLGZ 232 (Reichardt) = UFITA Bd. 90 (1981) p. 192 = FuR 1980, 666.

³⁴ BGH — 1 ZR 17/78 — of 26.9.1980, GRUR 1981, 267 = IIC 1981, 898 = UFITA Bd. 90 (1981) S. 125. For the decision by the lower court, cf. previous "Letter," *loc. cit.* (footnote 1 above) footnote 81.

be determined in part by the manner of treatment and became eligible for protection where it went beyond the common application of musical laws. This question has therefore to be examined once more by the preceding instance with the assistance of an expert.

(21) The OLG Karlsruhe came to a similar decision³⁵ in the case dealing with the unauthorized use of pieces of music as a background to pornographic films. This Court likewise emphasized that the conditions for determining whether musical works were protected should not be stretched too far. Although a simple formless sequence of sounds did not meet the requirements of creative fashioning, a particular creation of melody was still no condition of eligibility for copyright protection. Equally unimportant for the form of the sound sequences was the respect of the laws of harmony, the adopted rhythm and the melody.

(e) Works of Architecture

(22) Copyright protection is not given automatically to works of architecture, particularly in the case of utility constructions. This has emerged from decisions which have refused copyright protection for buildings, groups of buildings and architectural plans, such as the case heard by the OLG Hamm,³⁶ which concerned the drawings for a two-and-a-half room flat. The OLG Schleswig likewise refused copyright protection in the "Louisenlund" case³⁷ as regards the construction of various student and teacher hostels, whereby it emphasized that not every new idea conceived and translated into drawings by an architect was necessarily eligible for copyright protection.

(23) Copyright protection was afforded, on the other hand, by the Federal Court in the "All-Weather Pool" case³⁸ concerning a single-storey swimming pool comprising novel forms, particularly its characteristic tent-like roof, its spatial arrangement and the functional design of the overall installation. The LG Munich I likewise confirmed copyright for buildings in two cases,³⁹

namely a semi-detached bungalow with hipped roof and a high-rise building (banking offices).

(24) In the "Church Interior Design" case,⁴⁰ the Federal Court emphasized that the church construction involved did not only constitute a protectable work of architecture, but that such architectural protection also extended to the interior design. The interior of the church was given a protectable architectural expression by a number of individual elements: the intentionally simple, exposed, concrete wall of the chancel; division by means of a narrow stained-glass window; slight bend towards the exterior; arrangement of the body of the church and the chancel, and so on. The problem in this case, however, was that of the installation of an electronic organ which the architect did not want, but which the Federal Court held to be neither a prohibited alteration nor a disfigurement of the building.

(f) Artistic Works and Works of Applied Art

(25) The courts were called upon more than once to examine the copyright eligibility of the bronze casting taken from a death mask. The KG Berlin⁴¹ held in the case of a mislaid death mask of the painter Max Liebermann, that had been made by the sculptor Arno Breker, that such a death mask constituted a work of art. Although the making of a death mask gave the artist a lesser degree of creative freedom than did the sculpting of a bust of a living person, the creative influence exerted on the likeness produced could not be denied.

(26) Copyright was also confirmed in the case of a poster⁴² designed to resemble a photographic montage and also of a "laughing sun" emblem (a round disk bearing a laughing sun with spiked edges and the slogan "Nuclear Power? — No Thanks") as individual intellectual creations of an independent nature.⁴³

(27) The courts in the Federal Republic of Germany have had also to concern themselves with the "Smurfs" created by the Belgian cartoonist Pierre

³⁵ OLG Karlsruhe – 6 U 1/78 – of 23.8.1978, Schu OLGZ 202 (Movsessian).

³⁶ OLG Hamm – 4 U 95/80 of 30.9.1980, UFITA Bd. 91 (1981) p. 236.

³⁷ OLG Schleswig – 3 U 118/78 – of 11.7.1980, Schu OLGZ 234 (Gerstenberg) = GRUR 1980, 1072.

³⁸ BGH – I ZR 168/79 – of 13.11.1981, GRUR 1982, 369.

³⁹ LG Munich I – 7 O 2345/75 – of 9.12.1976, Schu LGZ 157 (Gerstenberg); LG Munich I – 7 O 7866/77 – of 7.6.1977, Schu LGZ 158 (Gerstenberg).

⁴⁰ BGH – I ZR 137/79 – of 2.10.1981, Schu BGHZ 302 (Gerstenberg) = GRUR 1982, 107. See also at paragraph 57.

⁴¹ KG Berlin – 5 U 2295/81 – of 22.5.1981, Schu KGZ 79 (Gerstenberg) = GRUR 1981, 742 = UFITA Bd. 93 (1982), p. 193. Cf. in addition KG Berlin – 5 U 376/82 – of 8.2.1983, Schu KGZ 82 (Gerstenberg) = GRUR 1983, 507 and LG Munich I – 21 S 7144/83 – of 9.9.1983, FuR 1983, 561.

⁴² LG Munich I – 7 O 7038/80 – of 9.9.1980, Schu LGZ 182 (Gerstenberg).

⁴³ LG Frankfurt – 2/6 O 263/81 – of 23.7.1981, UFITA Bd. 94 (1982) p. 334.

Culliford (known as Peyo). The OLG Frankfurt⁴⁴ confirmed in injunction proceedings that these figurines enjoyed copyright protection and commented in detail on their childlike, humanoid characteristics and their typical facial expression. The real problem, however, was not copyrightability as such but the scope of protection. Indeed, in these proceedings, the Court based itself on the fact that the alleged infringement, a figure that gave a heavy and sad overall impression, did not represent a copy of the protected "Smurf." In the case heard by the LG Munich I,⁴⁵ on the other hand, not only was the copyrightability of the "Smurf" similarly confirmed but the Court also decided that the so-called "dwarf watches," manufactured without the consent of the copyright owner, constituted a prohibited copy.

(28) In the field of applied utility art it would seem, above all, that various shapes of chairs are able to obtain copyright protection. This was the case, for instance, in the "Tubular Steel Chair II" proceedings⁴⁶ heard by the Federal Court, in which copyright protection was afforded — once more (as the Federal Court itself explained) — to the famous tubular steel chair without back legs that had been created by Mart Stam in 1926. In the "Lounge Chair" case,⁴⁷ the OLG Frankfurt afforded copyright protection to the lounge chair designed by Charles Eames, that obtained numerous prizes and that is permanently exhibited at the New York Museum of Modern Art.

(29) On the other hand, the Federal Court refused artistic copyright for a step stool on casters in the "Caster Stool" case.⁴⁸ In further proceedings, the "Office Furniture Program" case,⁴⁹ the Federal Court accepted that, in general, items comprised in a furniture program could enjoy joint copyright protection, despite the fact that they could be purchased singly, where they were accepted and utilized by the trade as a unit. However, the fact that the previous instance had held the furniture program in question

to enjoy artistic protection was criticized by the Federal Court for lack of adequate grounds having been set out; it considered, in particular, that the novelty of the combination had been overvalued when judging the question of creative individuality. As far as copyright was concerned, the novelty of the form was not a question of principle although a certain relationship did exist to the extent that a form which was objectively known beforehand could not possess creative individuality.

(30) Finally, in a further decision,⁵⁰ the Federal Court refused copyright for a textile design (blackberry pattern). The pattern in fact went practically no further than to depict a realistic reproduction of closely growing blackberries between which a few leaves and flowers were visible, i.e. an almost unmodified copy of the model appearing in nature. At the same time, the Federal Court reiterated the fact that, although a work of applied art could enjoy copyright in the form of a textile design, a greater degree of aesthetic content was required for copyright protection than was the case for objects that were given protection as designs. On the other hand, the LG Munich⁵¹ held that a textile design in the style of the French painter Henri Rousseau was eligible to obtain copyright protection as a free adaptation of a work of art.

(31) Finally, a decision by the KG Berlin in the "Happening" case⁵² should be mentioned, in which copyright protectability was afforded to an artistic work constituted by a happening recorded on video tape. In this case, it was the happening itself and not in fact the recording that constituted the subject matter of copyright and therefore the organizer of the happening, that had taken place as part of a guest lecture at a media center, was afforded the sole authorship. The video tape recording of the happening made by another person therefore represented a dependent adaptation of the work created by the organizer of the happening.

(g) Copyright "Small Change"

(32) The OLG Munich⁵³ refused copyright for the well-known line "Ich bin von Kopf bis Fuss auf Liebe eingestellt" from the 1930 film "The Blue Angel" since the line, as an isolated sentence, did

⁴⁴ OLG Frankfurt — 6 U 169/83 — of 23.2.1984, GRUR 1984, 520.

⁴⁵ LG Munich I — 21 — O 13235/79 — of 22.1.1980, Schu LGZ 176 (Gerstenberg). Similarly LG Munich I — 7 O 17352/79 — of 18.3.1980, Schu LGZ 178 (Gerstenberg).

⁴⁶ BGH — I ZR 102/79 — of 27.5.1981, Schu BGHZ 288 (Seydel) = GRUR 1981, 820.

⁴⁷ OLG Frankfurt — 6 U 160/79 — of 19.3.1981, GRUR 1981, 739 = GRUR Int. 1981, 757 = IIC 1982, 777 = UFITA Bd. 94 (1982) p. 316.

⁴⁸ BGH — I ZR 48/79 — of 23.1.1981, Schu BGHZ 293 (Gerstenberg) = GRUR 1981, 517 = IIC 1982, 781 = UFITA Bd. 92 (1982). Cf. further decision by BGH — I ZR 43/79 — of 13.2.1981 in the "Tables and Chairs" case in which copyright protection was only imputed since the basic question was that of loss of copyright due to late assertion.

⁴⁹ BGH — I ZR 62/79 — of 23.10.1981, GRUR 1982, 305.

⁵⁰ BGH — I ZR 177/80 — of 27.1.1983, Schu BGHZ 303 (Gerstenberg).

⁵¹ LG Munich I — 7 O 9099/76 — of 24.8.1976, Schu LGZ 156 (Gerstenberg).

⁵² KG Berlin — 5 U 2956/81 — of 17.9.1982, GRUR 1984, 507.

⁵³ OLG Munich — 6 U 2593/77 — of 15.12.1977, Schu OLGZ 211 (von Westerholt-Weisstanner).

not constitute a copyrightable performance irrespective of the effect produced. The OLG Hamburg⁵⁴ likewise refused copyright, thereby giving detailed grounds, in a case where passages had been taken from a series of press contributions (concerning information on groceries, tips for shopping, instructions for use, recipes and the like) and reproduced in a so-called kitchen lexicon; the passages concerned were held not eligible for copyright protection. In its grounds, the Court pointed out that factual knowledge concerning the composition, treatment and processing of groceries could not be taken into account for copyright protection. Alone the intellectual activity constituted by expressing such knowledge in language and the arrangement, presentation and communication of the subject matter was to be taken into account. Not every written expression was in the nature of a work of literature. The lower limit of protectability had to be drawn at the point where the intellectual, creative performance clearly took second place to the simple communication of facts by the medium of language.

(33) In a similar way, the OLG Hamm found against copyright protection in the "Examination Form" case⁵⁵ on the grounds that it was not the factual content of each work and, specifically, not the methodology behind the tables concerned, that had been developed from a practical point of view, that is to say a given method of arrangement, that was to be taken into account. The personal intellectual creation of the author was in fact to be found in the manner of presentation as such, that is to say in the aesthetic field and in the form that was used, for instance by means of language or by means of illustrative presentation. In a further case⁵⁶ heard by this same Court, copyright protection was also refused on grounds that differentiated in a similar way between actual content and manner of presentation in respect of technical illustrations of clamps for industrial scaffolding. Finally, the OLG Munich⁵⁷ refused copyright for the drawings of a sailing boat on grounds that tended in a similar direction.

(34) On the other hand, in the "Collection of Questions" case,⁵⁸ the Federal Court pointed out that a literary work did not only derive its expression as an individual intellectual creation from the

sequence of thoughts and the development of thoughts expressed in the literary form, but also from the creative collection, selection, classification and arrangement of existing material. It was possible, under certain circumstances, that even a modest degree of intellectual activity would suffice. The abstract idea, which had led to the proceedings, of adding a list of questions to a book used for checking work done under medical training, was not eligible for copyright protection. This also applied to the scientific content of the collection of questions since scientific knowledge was freely available to everyone. However, since the collection of questions constituted more than just a simple mechanical compilation of existing facts in the form of questions and the production of the collection of questions already constituted a selection made from the contents of the basic work, the Federal Court held that the degree of creative individuality sufficed to justify copyright protection.

(h) Copyright Protection for Titles

(35) Copyright protection for titles was refused in three cases of this type. To begin with, in the "Seventh Sense" case,⁵⁹ the Federal Court pointed out explicitly that in order to obtain copyright protection it was necessary that the title, as an independent work or as a part of a work, constitute a personal intellectual creation. Similarly, the OLG Frankfurt⁶⁰ refused copyright for the popular song title "Das bisschen Haushalt" (That Little Bit of Housework) as did the OLG Cologne for the designation "Film als Film."⁶¹

2. Collections

(36) In the "WK Documentation" case,⁶² already mentioned, heard by the Federal Court, copyright was afforded to scientific documentation both as an individual literary work and also as a collection within the meaning of Article 4 of the Copyright Act. Furthermore, a decision by the KG Berlin⁶³ confirmed that the individual numbers of periodicals constituted, for their part, typical collections. In that case, the Court had awarded damages to a publisher in connection with the publication of

⁵⁴ OLG Hamburg – 3 U 24/80 – of 17.7.1980, Schu OLGZ 229 (Movsessian).

⁵⁵ OLG Hamm – 4 U 228/79 – of 6.12.1979, Schu OLGZ 223 (Nordemann) = GRUR 1980, 287.

⁵⁶ OLG Hamm – 4 U 98/80 – of 20.8.1980, Schu OLGZ 235 (Nordemann) = GRUR 1981, 130 = UFITA Bd. 90 (1981) p. 277.

⁵⁷ OLG Munich – 6 U 2979/78 – of 28.6.1979, Schu OLGZ 219 (Hubmann).

⁵⁸ BGH – I ZR 20/79 – of 27.2.1981, Schu BGHZ 286 (Seydel) = GRUR 1981, 520 = UFITA Bd. 92 (1982) p. 203.

⁵⁹ BGH – I ZR 165/76 – of 25.2.1977, Schu BGHZ 249 (Reichardt).

⁶⁰ OLG Frankfurt – 6 W 108/78 – of 28.8.1978, Schu OLGZ 203 (Seydel).

⁶¹ OLG Cologne – 6 U 117/81 – of 30.4.1982, FuR 1982, 456.

⁶² Cf. footnote 23.

⁶³ KG Berlin – 5 U 1562/80 – of 20.2.1981, Schu KGZ 80 (Seydel).

a periodical, entitled "Psychotronik" that had been planned but that had not come about.

(37) A collection of a special nature constituted the subject matter of a case heard by the OLG Düsseldorf,⁶⁴ in respect of unauthorized "duplication" of a travelling exhibition. The exhibition consisted of 250 panels, 11 glass cases with exhibits, 17 desks and 18 music cabinets. The exhibition was awarded copyright protection by the Court.

3. Official Works

(38) Under Article 5 of the Copyright Act, official works enjoy absolutely no copyright protection. However, in two recent decisions the Federal Court spoke against an all too broad interpretation of that provision. The first case was that of the "WK Documentation"⁶⁵ already mentioned a number of times, i.e. the documentation drawn up by a scientific commission in respect of the history of prisoners of war. The Federal Court gave detailed grounds to explain why this documentation did not constitute an official work. It contained no external indication of having been produced by an authority. In addition, despite the fact that the work had been commissioned by the Federal Government, it had been entrusted to an independent commission of private individuals who had drawn up the documentation without receiving any instructions. Although the fact that a work is drawn up by private individuals does not exclude the possibility of it being an official work, in this case there were no reasons to assume that the documentation was of an official nature.

(39) The decision of the Federal Court was similar in the second case,⁶⁶ in which it did not recognize as an official work the rules for awarding building contracts, or at least Part C of those rules (general technical requirements for the execution of building works). These rules constituted neither a law nor a statutory instrument since the general applicability that would be necessary in order to recognize them as a legal provision was in fact lacking. Indeed, Part C of the rules had not been produced by an authority and had also not become an official work through reference in official announcements or official publications. Despite the participation of official bodies, this standardizing activity remained a private task undertaken by industry's own services, according to the decision by the Federal Court.

⁶⁴ OLG Düsseldorf – 20 U 77/81 – of 30.7.1981, Schu OLGZ 246 (Movsessian).

⁶⁵ Cf. footnote 23.

⁶⁶ BGH – I ZR 129/81 – of 30.6.1983, Schu BGHZ 306 (Seydel) = GRUR 1984, 117.

4. Works of Joint Authorship and Composite Works

(40) The OLG Cologne⁶⁷ held that a metal founder did not qualify as a co-author, within the meaning of Article 8 of the Copyright Act, in his relationship with the artist who had produced the original models in clay and plaster. The metal mould was a purely technical means of transforming the plaster or clay models into a bronze sculpture. His activity was therefore ancillary to the creative performance of the sculptor.

(41) On the other hand, the special circumstances of the case meant that the Federal Court was unable to take a final stance on the question of sole authorship or co-authorship in respect of the figure of a mouse⁶⁸ created by a designer and sculptor which had become the basic form for a television cartoon series. The aim of the broadcasting organization, on the basis of the claimed co-authorship of the film producer, was to prevent the designer from commercially exploiting the mouse figure. However, this was not allowed by the Federal Court in view of the contractual agreements that had been concluded.

(42) The OLG Hamburg⁶⁹ held, however, that a laboratory assistant working on the basis of instructions and keywords together with a structure of the contents had participated creatively in the production of a ready-to-print manuscript on animal diseases and could therefore claim, as a co-author, a share in the proceeds from the utilization of the work (Article 8(3) of the Copyright Act).

(43) In a legal dispute between the popular singer and composer Udo Jürgens and his former manager and publisher, the Federal Court decided,⁷⁰ *inter alia*, that termination of a music publishing contract by the composer also required the approval of the writer of the words in the case of pop songs. The songs involved, in which music and words were by different persons, constituted composite works within the meaning of Article 9 of the Copyright Act. Together, the composer and the writer of the

⁶⁷ OLG Cologne – 6 U 212/82 – of 4.3.1983, FuR 1983, 348.

⁶⁸ BGH – I ZR 136/80 – of 25.11.1982, GRUR 1983, 370 = UFITA Bd. 96 (1983) p. 247.

⁶⁹ OLG Hamburg – 3 U 84/78 – of 23.11.1978, Schu OLGZ 207 (Seydel). For the preliminaries, cf. also previous "Letter," *loc. cit.* (footnote 1 above), paragraph 113.

⁷⁰ BGH – I ZR 81/79 – of 2.10.1981, Schu BGHZ 290 (Schulze) = GRUR 1982, 41 = UFITA Bd. 94 (1982) p. 291. Cf. in addition BGH – I ZR 5/80 – of 9.6.1982, GRUR 1982, 743 = UFITA Bd. 96 (1983) p. 221. Cf. also in this respect paragraph 125.

words therefore constituted an exploitation partnership in the form of a civil law company. Thus, however, the conduct of business and the right to terminate contracts belonged jointly to all members of the company and therefore to the authors of the composite work.

5. Delimitation of Adaptations and Free Use

(a) The Concept of Adaptation and Translation

(44) The OLG Cologne⁷¹ had to decide, in respect of both a play for radio and a radio feature, whether the producer was entitled to adapter's copyright for his part in the versions capable of being broadcast. The Court refused such copyright. It pointed out that all the features specific to the performance, resulting from production, which did not alter the message intended by the author in his work, already enjoyed specific protection under the neighboring rights afforded to performers by Articles 73 *et seq.* of the Copyright Act. These specific features of the performance had therefore to be viewed separately from the authorship of the written work. Taking this into account, the fact that a producer had made cuts, even considerable cuts, in a work was in itself no basis for deciding whether he had carried out a creative activity. Similar grounds were given by the Court as regards the claimed adaptation of the radio feature.

(45) The KG Berlin came to the conclusion in the previously mentioned "Happening" case⁷² that the recording on a video tape constituted a dependent adaptation within the meaning of Article 23 of the Copyright Act and not, for instance, simply fair use, as laid down in Article 24 of the Copyright Act, of the happening work. Although the sequence of events when recorded on video tape was backed by music, still pictures of a painting were faded in and an introductory lecture by an outside person was included, the happening was otherwise recorded without change. In view of that fact, therefore, the special ruling in the second sentence of Article 23 of the Copyright Act meant that the approval of the author of the happening would have been required before the adaptation was made, that is to say the video recording, since it constituted a cinematographic adaptation.

(b) Musical Adaptations (Protection of Melodies)

(46) A particularity of German copyright law is to be found in the provision in Article 24(2) of the Copyright Act which excludes fair use of a musical work where a melody has been recognizably borrowed from that work and used as the basis for a new work. This provision is generally referred to as the rigid protection of melodies. In the previously mentioned "Dirlada" case⁷³ the Federal Court took a general stance on the question of fair use or prohibited use in the case of musical adaptations, without, however, entering into detail as regards the particular situation of rigid protection of melodies. However, the OLG Frankfurt based its decision that copyright had been infringed in the already mentioned "Sound Slide Show" case⁷⁴ explicitly on that specific ruling.

(47) According to this decision, it is no longer a case of fair use of works of music if the melody of the musical work that has been used is recognizable in the new one. It therefore always constitutes an adaptation or arrangement, that is to say a non-free use, and publication or dissemination requires the author's consent. Likewise, in the "Musical Background to Pornographic Cassettes" case,⁷⁵ the OLG Hamm pointed to the importance of this comprehensive copyright protection of melodies in infringement proceedings in respect of music.

(c) Copies of Works of Art and Applied Art

(48) A good example of the relationship between the scope of protection of a work and the question of fair use is constituted by the previously mentioned decision of the Federal Court in the "Tubular Steel Chair II" case.⁷⁶ Not only was the well-known chair without back legs by Mart Stam acknowledged as a highly artistic work with a correspondingly broad degree of protection, but also the infringing chair was held to be a copy that did not constitute fair use. The shape of the seat and back of the chair and the slightly sloping backrest with its special form meant that the extensive identity with the characteristic aesthetic features of the protected chair were not to be excluded. In the "Change of Architect" case,⁷⁷ on the other hand, the Federal Court found that the use was a fair one since the "bold design" of the building had become an

⁷³ Cf. footnote 34.

⁷⁴ Cf. footnote 33.

⁷⁵ OLG Hamm – 4 U 97/82 – of 13.1.1983, GRUR 1983, 575.

⁷⁶ Cf. footnote 46.

⁷⁷ BGH I – ZR 32/78 – of 8.2.1980, Schu BGHZ 268 (Gerstenberg) = GRUR 1980, 853.

⁷¹ OLG Cologne – 6 U 8/79 – of 27.4.1979, Schu OLGZ 217 (Nordemann) = UFITA Bd. 87 (1980) p. 331 = FuR 1980, 214.

⁷² Cf. footnote 52.

“unpretentious two-storey countryside house” following assumption of the construction work by another architect.

(49) The OLG Frankfurt⁷⁸ dealt with a case of unauthorized reproduction of elements from a special town map that had been drawn up as a guide to the “artistic scene” in Frankfurt am Main. The Court refused to acknowledge fair use and decided that it constituted a dependent (disguised) adaptation since the creative features of the model that had been used “shone through” all too clearly. The fact that various details (such as the line of streets) had been simplified in the adaptation did not change the final result. A further case of non-fair use was decided by the LG Munich in the previously mentioned “Dessin Rousseau”⁷⁹ case. A specific shape of flower and its coloring had been clearly borrowed from the protected textile design and the overall aesthetic impression of the copy also reproduced that of the model.

(50) Finally, the LG Frankfurt,⁸⁰ in the likewise already mentioned case of the “Laughing Sun,” had to deal with the claim that to replace the surrounding words “Nuclear Power? — No thanks” by the words “Democracy? — No Thanks” in a newspaper advertisement constituted use of the protected poster as a parody in the sense of an antithesis, which was indeed permissible fair use. This proposition was refused by the Court, however, on the grounds that parodies enjoyed no special copyright position. Even in the case of parodies, the borrowed part could only appear as a reference and the independently created part that made reference must be of such a nature that it constituted the significant element. The view of the Court, which in this specific case was perhaps a little too strict, shows just how difficult it is to solve the problem of parody in the context of fair or unfair use.

(d) Scientific Works and Collections of Works

(51) In the “Degree Thesis” case,⁸¹ the Federal Court held that copyright had not been infringed despite the fact that the two theses were the same in structure and that a large number of sentences had been simply reformulated by replacing individual words or phrases. In view of the fact that the material and the subject were the same and the fact that, in any event, scientific results were not copyrightable, infringing reproduction of protected elements of

the work could not have taken place. The possibility of a further scientific description of the same subject matter could not be made unreasonably difficult. In the “WK Documentation” case,⁸² already referred to on a number of occasions, dealing with scientific source documentation, the Federal Court refused to acknowledge fair use since both the selection of the material and also its structure had been copied to a quite considerable extent.

II. Protection of the Moral Rights of the Author

1. *The Right of Dissemination*

(52) The right afforded to the author by Article 12 of the Copyright Act, as a part of his moral rights, to determine whether and how his work is to be disseminated, rarely arises in a direct form since the dissemination of the work in most cases also constitutes an exploitation of the work. However, the “Portrait Picture” case⁸³ heard by the LG Berlin shows that the right of dissemination can have an independent significance as a moral right in respect to the obligation to pay damages (solatium) in accordance with Article 97(2) of the Copyright Act. The event concerned in this case was the showing of a portrait by a well-known painter on television, that was not covered by fair use for the purpose of reporting (Article 50 of the Copyright Act). The picture had already been seen in an exhibition. In its decision, the LG Berlin also examined the opinion that the right of dissemination constituted a moral right of the author exclusively in respect of the right of first dissemination and that such right was exhausted as soon as the first dissemination had taken place. The Court held the view that the right of dissemination covered not only the first dissemination but that the author in any event preserved the right to decide whether his work was to be disseminated by means or in a form that had not yet taken place — which could also mean a specific place.

(53) Conversely, the KG Berlin decided in the “Death Mask” case⁸⁴ that the right of dissemination under Article 12 of the Copyright Act could not be used to enforce the artist’s claim to restitution against the owner of a work of art, in order to permit the work to be exhibited. In a subsequent decision,⁸⁵ however, the KG Berlin found in the same case a

⁷⁸ OLG Frankfurt — 6 U 152/77 — of 1.6.1978, Schu OLGZ 201 (Gerstenberg).

⁷⁹ Cf. footnote 51.

⁸⁰ Cf. footnote 43.

⁸¹ Cf. footnote 24.

⁸² Cf. footnote 23.

⁸³ LG Berlin — 16 S 5/83 — of 9.6.1983, GRUR 1983, 761.

⁸⁴ Cf. footnote 41 (Decision of 22.5.1981).

⁸⁵ Cf. footnote 41 (Decision of 8.2.1983). Cf. also in this respect paragraph 60.

favorable solution for the author through the right of access (Article 25 of the Copyright Act).

2. *Recognition of Authorship
and the Requirement that the Source be Stated*

(54) The second important right afforded to the author as part of his moral rights is that to recognition of authorship of his work in accordance with Article 13 of the Copyright Act. This provision is supplemented by Article 63 of the Copyright Act which requires the source to be stated in those cases where certain utilizations of the work are permitted by law as part of the limitations of copyright. In the previously mentioned decision of the OLG Frankfurt,⁸⁶ concerning the unauthorized copying of a town map of the art scene in Frankfurt, it was justifiably pointed out, however, that for a draftsman the reproduction of his name (naming of the author) was also of a certain economic interest and not only a result of the author's moral rights.

(55) The LG Munich I⁸⁷ held that the right to be named under Article 13 of the Copyright Act applied not only in the case of a photographic work within the meaning of Article 2 of the Copyright Act but also in the case of a simple photograph that is only protected under neighboring rights in accordance with Article 72.

(56) Two further decisions concerned the requirement to state sources under Article 63 of the Copyright Act. In the first case,⁸⁸ that was also heard by the LG Munich I, photographs of a building had been reproduced in an advertising brochure without the sources having been stated. This was in fact permissible in view of the special limitation laid down in Article 59 of the Copyright Act (use of reproductions of works located in public places). The question of an offense under Article 63 of the Copyright Act was not, however, decided by the Court since the second edition of the brochure named not only the author but also gave his full address and thus exceeded the requirements of Article 63 of the Copyright Act, completely making good any damage. The decision taken by the OLG Hamm in the second case⁸⁹ shows that the requirement to state

sources under Article 63 of the Copyright Act goes beyond the author's moral rights since not only must the author's name be given, but in some cases the name of the publisher or of the newspaper that has served as a source or of another information sheet is necessary.

3. *Protection of the Intactness of the Work
and Prohibition of Changes*

(57) A further important right laid down by Article 14 of the Copyright Act as part of the moral rights is the right of the author to prohibit distortions or other mutilations of his work. This provision is supplemented by Article 39 of the Copyright Act which forbids the owner of a right of utilization to change the work, unless otherwise agreed. The Federal Court made the scope of these two complementary regulations quite clear in its previously mentioned decision in the "Church Interior Design" case.⁹⁰ The view of the Federal Court was, however, that the prohibition on changes went further than Article 39 of the Copyright Act, which merely regulated the relationship with the person entitled to utilize the work. Its general basis was to be found in the nature and content of copyright and therefore also applied to the owner of the original of a work. However, the concept of a change to a work fundamentally required, contrary to Article 14 of the Copyright Act, an intervention in the substance of the work. In the case of a work of architecture, the change must therefore concern the work in its material substance. In respect of other mutilations affecting the overall aspect of the work, the author remained adequately protected by the prohibition on distortion in Article 14. In a further case,⁹¹ the Federal Court held that the changes clause contained in the fee conditions of a broadcasting organization, laying down the admissibility of translation, adaptation and transformation of works while maintaining their intellectual characteristics, was not objectionable.

(58) A particularly striking case of judicial interpretation of the prohibition on mutilations in Article 14 of the Copyright Act concerned the artistic decoration of an administrative building using sculptures, strips of color, textured areas, external and internal paintings, and the like, carried out by a well-known sculptor. A part of these individual elements was removed by the owner, a motoring club, when carrying out transformations and extensions.

⁸⁶ Cf. footnote 78. Cf. also in this respect the similar reasoning of the LG Munich I – 7 O 5761/78 – of 21.6.1979, Schu LGZ 173 (Hubmann) in the case of an unauthorized film version of a novel by a Yugoslav author made without naming the writer.

⁸⁷ LG Munich I – 7 S 6349/79 – of 18.8.1979, Schu LGZ 186 (Gerstenberg) = UFITA Bd. 87 (1980) p. 338.

⁸⁸ LG Munich I – 7 O 7288/78 – of 10.10.1978, Schu LGZ 184 (Gerstenberg).

⁸⁹ OLG Hamm – 4 U 247/81 – of 18.2.1982, UFITA Bd. 96 (1983) p. 265. Cf. also in this respect paragraph 83.

⁹⁰ Cf. footnote 40.

⁹¹ BGH – I ZR 81/80 – of 18.2.1982, GRUR 1984, 45 = UFITA Bd. 96 (1983) p. 185. Cf. also in this respect paragraph 105.

In the initial decision of the LG Munich I,⁹² the motoring club was ordered to remove the distortion that had resulted from the partial removal of the work. The removal of the distortion could be effected in various ways, however. The owner could either reconstitute the original condition or remove the remaining fragments of the work that had been already removed in part. In a second decision by the LG Munich I⁹³ in the same case, it was once more confirmed that the owner of a work of art was entitled to destroy it completely if he decided, for any reasons whatsoever, that he had had enough of it.

(59) The KG Berlin⁹⁴ held — perhaps somewhat restrictively — that infringement of the author's personal rights could not be assumed where the commissioner of a work of sculpture subsequently decided not to have the commissioned work, that existed as a project, actually made. The author had no claim to his creative idea being transformed into reality. Likewise, the cessation of work in progress could not be equated with intervention in a completed work since modification or distortion, by definition, required that an already existing object be interfered with. In the case already referred to, heard by the LG Munich, in respect of a high-rise building project,⁹⁵ however, an injunction was given to prevent a change in the project that would have been damaging to its balanced proportions (shortening the corners of the building, omission of storeys) and would have constituted a serious modification to the ground plan and to the overall project. However, the legal dispute simply concerned changes at the planning stage.

4. Right of Exhibition and Right of Access

(60) In the "Death Mask" case already referred to, which came before the KG Berlin twice,⁹⁶ the point in question was the significance of the right of exhibition under Article 18 of the Copyright Act in respect of an unpublished work of art, that was inherently linked to Article 25 of the Copyright Act that affords the author, under certain circumstances, the right of access to the original or a copy of a work in the possession of another person. In its first decision, the KG Berlin⁹⁷ held that, in the same way as the right of dissemination contained in Article 12 of

the Copyright Act, the right of exhibition provided by Article 18 of the Copyright Act did not afford a claim against the current owner of a work to deliver up the work so that it may be exhibited. In its second decision, however, the Court⁹⁸ found a way, using the right of access (Article 25 of the Copyright Act) to enable the artist concerned to have a copy made of the sole existing bronze casting, that belonged to that other person, of the death mask of Max Liebermann, in a foundry chosen by the artist himself. The Court emphasized that the owner's interest in possessing a unique work of art and the particular value deriving from that fact had to be subordinated to the author's interest in reproducing his work, if only to satisfy the statutory intent of Article 25 of the Copyright Act.

III. The Author's Exploitation Rights and Rights to Remuneration and their Statutory Limitations

1. The Notion of Publication

(61) In two cases decided by the Federal Court on the same day, invoking essentially the same grounds, as regards the "publication of phonograms,"⁹⁹ the point at issue was the neighboring right belonging to producers of phonograms under Articles 85 and 86 of the Copyright Act. The parties to the proceedings were a phonogram producer and the Society for the Administration of Neighboring Rights (GVL) which, *inter alia*, asserts the performers' claims to remuneration and also the phonogram producers' relevant claims to participation under Articles 76(2) and 86 of the Copyright Act with respect to the broadcasting organizations. Since the existence of claims to remuneration or to participation under these provisions presumes, however, that the phonograms concerned have been published, it had to be decided whether the special tape recordings that had been manufactured and supplied by the phonogram producer to special customers (radio and television stations, film producers and advertising agencies) had in fact been *published*. The Federal Court held that such was the case. It found, firstly, that the statutory definition of publication in Article 6(2) of the Copyright Act was indeed applicable. However, it was sufficient for the public to have had the possibility of perceiving the work with their eyes or ears. It was not necessary, on the other

⁹² LG Munich I – 7 O 17562/79 – of 8.12.1981, Schu LGZ 190 (Gerstenberg) = FuR 1982, 510.

⁹³ LG Munich I – 7 O 12918/82 – of 3.8.1982, Schu LGZ 191 (Gerstenberg) = FuR 1982, 513.

⁹⁴ KG Berlin – 5 W 1763/79 – of 26.10.1979, Schu KGZ 73 (Gerstenberg).

⁹⁵ Cf. footnote 39 (Decision of 7.6.1977).

⁹⁶ Cf. paragraph 25, footnote 41 and paragraph 53.

⁹⁷ Cf. footnote 41 (Decision of 22.5.1981).

⁹⁸ Cf. footnote 41 (Decision of 8.2.1983).

⁹⁹ BGH – I ZR 170/78 – of 23.1.1981, Schu BGH 276 (Schulze) = GRUR 1981, 360 = IIC 1982, 384 = UFITA Bd. 92 (1982) p. 177 and BGH – I ZR 62/78 – of 23.1.1981, IIC 1982, 389.

hand, that a copy of the work or a phonogram be made available to the public, that is to say to all those concerned. The legislator had also intended to cover those cases in which a third party intervened to make enjoyment of the work possible. Thus, a film was to be deemed published when supplied to the distributors for the purpose of public performance. Correspondingly, in the case in point, "publication" of the tapes involved could be assumed despite the fact that they were suitable only for the institutional customers (broadcasting organizations, film producers and advertising undertakings) and had indeed only been intended for that market. The outcome was that the GVL was required to take the phonogram producer concerned into account when distributing the proceeds.

(62) The OLG Hamburg¹⁰⁰ decided in a case concerning neighboring rights in a simple photograph (Article 72(1) of the Copyright Act), as regards the interpretation of the statutory definition of publication in Article 6(2) of the Copyright Act, that, as a result of the lack of consent given by the entitled person in the case in point, the photograph concerned could not be held to have been published in Germany despite the fact that it had been disseminated in a high circulation periodical intended for the general public.

(63) The question of publication also played a certain part in the case, heard by the LG Munich I¹⁰¹ and the OLG Munich¹⁰² concerning Puccini's opera "Tosca."¹⁰³ In the view of the LG Munich, the deposit of individual copies of excerpts from the complete opera with the Library of Congress in Washington, USA, and with provincial prefects in Italy did not constitute publication within the meaning of Article 3(3) of the Berne Convention.¹⁰⁴ Likewise, a work was not already published as a result of individual copies having been included in public libraries for use by the general public. Indeed, the distribution of copies of the opera to the limited circle of organizers of the first performance could also not be held to constitute publication. Conversely, however, the public offer and dissemination of adaptations of the opera in the form of extracts from the complete opera meant that publication of the (entire) opera was to be assumed.

¹⁰⁰ OLG Hamburg – 3 U 118/82 – of 16.12.1982, Archiv für Presserecht 1983, 347 (Sieger). Cf. also in this respect paragraph 164.

¹⁰¹ LG Munich I – 7 O 10862/81 – of 12.1.1982, GRUR Int. 1983, 114.

¹⁰² OLG Munich – 6 U 1659/82 – of 3.12.1983, GRUR 1983, 295.

¹⁰³ Cf. paragraph 161.

¹⁰⁴ This provision of the Berne Convention corresponds to the German definition of publication in Article 6(2) of the Copyright Act.

2. *The Right of Distribution and its Exhaustion*

(64) A number of decisions by German courts dealt with the implications of the well known decision taken by the European Court of Justice in the "Difference in Fees" case.¹⁰⁵ In this case — on the basis in fact of a request for a preliminary ruling from the German Federal Court¹⁰⁶ — it was decided that in view of the provisions concerning the free movement of goods, any placing on the market of a physical copy of a protected work in any member State of the European Communities made it permissible to further disseminate it within the entire Community territory. One may therefore refer to a kind of European exhaustion of the right of distribution as explicitly provided for by German law in Article 17(2) of the Copyright Act. Following the rather stringent views of the European Court, European exhaustion takes place particularly in respect of a phonogram (record) placed on the market in a country (Britain in this case) in which a statutory license exists for the production of phonograms. Such also applies when the appropriate collecting society in a further country (the German GEMA in this case) only collects the difference in fees between the lower rate of the statutory license in the country of manufacture of the records and the higher rate charged in the country of destination under a contractual license and in no way attempts to prevent the import of records as such.

(65) In applying these principles pronounced by the European Court, the Federal Court,¹⁰⁷ in its decision "Differences in Fees III" suggested a possible way out by putting the question whether there had not been failure in Britain already to place the phonogram on the market. Such would have been the case if there had existed between the German record dealer and the record supplier involved in Britain legal and economic links under company law, with the result that the records would have been directly obtained from the British firm without passing through the market. In such case it could have been a purely internal movement of goods within the company.

(66) The clarification of this legal situation, following referral by the Federal Court, was the responsibility of the Lower Court, that is to say the

¹⁰⁵ European Court of 20.1.1981 (joined cases 55/80 and 57/80), casebook 1981, 147 = Schu EuGH 2 (Schulze) = GRUR Int. 1981, 229.

¹⁰⁶ BGH – I ZR 81/77 – of 19.12.1979, GRUR Int. 1980, 304.

¹⁰⁷ BGH – I ZR 92/78 – of 6.5.1981, Schu BGHZ 294 (Schulze) = GRUR 1982, 100 = GRUR Int. 1982, 57 = IIC 1982, 511 = UFITA Bd. 94 (1982) p. 257.

OLG Frankfurt.¹⁰⁸ However, it transpired that the disputed records were indeed in the shops in Britain and therefore had already been on the Common Market since they had not been manufactured by the associated British firm, for instance, for the sole purpose of supply to the Federal Republic of Germany. Indeed, the British associate had first tried to sell the records in Britain. When this became impossible, it sought a market for the records that were left over, those that had been returned unsold and those that had not yet been delivered, by exporting them. Thus, the final possibility indicated by the Federal Court for GEMA to collect the difference in fees was eliminated by the facts. Moreover, the Federal Court had already made it clear in its decision that a conceivable differentiation between license fees in Britain as a direct result of the statutory provisions (compulsory license) or fees based on a contractual agreement adapted to the statutory provisions, had no influence on the question of placing on the market and thus on the related exhaustion.

(67) On the other hand, the Federal Court confirmed in its decision on "Difference in Fees IV"¹⁰⁹ that the Community law extension of exhaustion of the right of distribution did not apply in the case of a non-Community country. In such case, the general principles were indeed to be applied fully as had been done by the Federal Court itself in the "Record Importation" case.¹¹⁰ In that case the Federal Court had first decided that the principle of exhaustion under Article 17(2) of the Copyright Act was also to be applied to the right of distribution that belonged to the phonogram producer under Article 85(1) of the Copyright Act. This gave the Federal Court the opportunity to take a detailed stance on the question of scope and legal grounds of the principle of exhaustion in Article 17(2) of the Copyright Act. In so doing, it explicitly recognized the author's right to give territorially limited licenses. For the decision, that meant that an authorized placing on the market abroad outside the European Communities (Israel in the case in point) does not automatically lead to exhaustion of the right of distribution in the country of origin where the copyright authorization has only been given to the foreign party with a territorial limitation to foreign countries.¹¹¹

¹⁰⁸ OLG Frankfurt — 6 U 98/77 — of 23.6.1983, GRUR Int. 1983, 868.

¹⁰⁹ BGH — I ZR 81/77 — of 6.5.1981 = IIC 1982, 517.

¹¹⁰ BGH — I ZR 186/78 — of 27.2.1981, Schu BGHZ 185 (Hubmann) = GRUR 1981, 587 = GRUR Int. 1981, 562 (Ulmer) = IIC 1982, 93 (Ulmer) = UFITA Bd. 92 (1982) p. 210.

¹¹¹ The decision by the LG Berlin — 16 O 42/81 — of 3.3.1981, FuR 1981, 382, in which the German right of distribution was held to have been exhausted in respect of records manufactured in Canada and placed on the market in the

(68) Finally, a number of decisions provided a more precise definition of the notion of distribution itself. For instance, the Federal Court held in the "Monumenta Germaniae Historica" case¹¹² that the offer of a work to the public, and therefore an act of distribution within the meaning of Articles 17(1) of the Copyright Act, already existed when a single delivery had been made of an expensive scientific edition of considerable size. Execution of an order generally proved the basic will to supply even in the case of purchase on approval. The OLG Düsseldorf¹¹³ held, on the other hand, that the simple showing of certain protected chairs on an exhibition stand did not suffice to constitute an act of distribution since, indeed, it was necessary to have made an offer of acquisition of ownership or possession by the general public.

(69) Finally, the OLG Karlsruhe decided in the "Returns" case¹¹⁴ that the right of distribution could be regenerated, despite the effect of exhaustion under Article 17(2) of the Copyright Act, where copies of the work had been sent for pulping as used paper, but then had subsequently reached department stores and supermarkets in which they were sold. The regeneration of the right of distribution occurs even in the case of returned periodicals that have already been delivered but then returned to the publisher for lack of sales.

3. *The Hiring and Lending of Copies (Lending Rights)*

(a) *Laying out of Periodicals*

(70) In recent years, a secondary aspect of the provision in Article 27 of the Copyright Act concerning the claim to remuneration in the event of hiring or lending of copies has constituted the subject matter of numerous court decisions. The collecting societies, particularly the VG Bild/Kunst that administers the claims under Article 27 for the pictorial authors who are its members, are attempting to obtain the full economic value of the right under Article 27 of the Copyright Act in cases not covered by the public lending right. The starting point is the concept of lending in Article 27 of the Copyright Act which the VG Bild/Kunst considers to apply also to the act constituted by laying out

Netherlands, must also be mentioned here although the impact of the decision cannot be fully determined as a result of certain unclaritys.

¹¹² Cf. footnote 22.

¹¹³ OLG Düsseldorf — 20 U 74/83 — of 27.9.1983, GRUR 1983, 760.

¹¹⁴ OLG Karlsruhe — 6 U 160/78 — of 27.6.1979, GRUR 1979, 771.

newspapers and periodicals for the use of customers in business premises and in waiting rooms belonging to service undertakings or members of the liberal professions. The proceedings instituted to date have concerned either hairdressing saloons or dentists' surgeries. In proceedings before the OLG Munich,¹¹⁵ the VG Bild/Kunst was able to assert its claim under Article 27 of the Copyright Act against a hairdressing undertaking. In a supplementary decision,¹¹⁶ the LG Munich also confirmed that the relevant schedule of fees of VG Bild/Kunst was appropriate.

(71) On the other hand, a different Chamber of the LG Munich I, in a subsequent decision¹¹⁷ in proceedings resulting from declaratory action to establish the non-existence of a right instituted by dentists, rejected a claim by the VG Bild/Kunst under Article 27 of the Copyright Act in respect of newspapers and periodicals available to be read by patients in waiting rooms. Previously already, the LG Cologne¹¹⁸ and the OLG Cologne¹¹⁹ had likewise decided against the VG Bild/Kunst in a joint action instituted by hairdressers.

(b) Video Lending Rights

(72) A similarly disputed development, as in the case of the laying out of periodicals, has taken place in German case law as regards the question whether the manufacturers or the owners of distribution rights in videograms may prohibit the commercial hiring of videograms not approved by them, e.g. through video libraries and video shops. In this case again, the courts are divided into two camps. The OLG Hamm¹²⁰ holds that exhaustion of the right of distribution under Article 17(2) of the Copyright Act can only be prevented by contractual means, particularly since the law specifically affords a claim to remuneration under Article 27 of the Copyright Act in the case of the hiring out of purchased copies. The OLG Frankfurt,¹²¹ on the other hand, holds that Article 17 of the Copyright Act must be read in con-

junction with Article 32, that permits the owners of neighboring rights to afford such rights subject to limitations in respect of place, term or content. However, since Article 17(2) of the Copyright Act links exhaustion to sale "with the consent of the owner of the right of distribution," this exhaustion can only occur likewise if the person entitled to the right permits the sale and transfer of the rights of utilization.

(73) In three decisions,¹²² the LG Munich I has joined the OLG Hamm in holding that exhaustion under Article 17(2) of the Copyright Act occurs automatically and derives solely from the sale of the copies concerned as such. It cannot be relativized by contractual means. The third of these decisions also concerned the phonogram producers' neighboring rights under Article 85 of the Copyright Act, under which exhaustion of the right of distribution according to Article 17(2) likewise occurs. The fact that Article 27 of the Copyright Act does not apply to phonogram producers and therefore, in the case of hiring, does not imply remuneration, in no way justifies a different approach to the problem. The LG Hamburg¹²³ and the OLG Karlsruhe,¹²⁴ on the other hand, joined the opinion of the OLG Frankfurt and accepted a limitation on exhaustion as a result of contractual agreement or by means of a notice printed on the copies concerned (records and video-cassettes).

4. Droit de Suite

(74) The true field of activity of the VG Bild/Kunst is to be found in the administration of the *droit de suite* in the originals of works of fine art. Unfortunately, the payment of a *droit de suite* amounting to 5% of the proceeds of sale by an art dealer or auctioneer, required by Article 26 of the Copyright Act, is still not always applied. However, the "Basic Agreement Between the Working Group of German Associations of Art Dealers and the Collecting Society Bild/Kunst r.V." concluded in 1980 constituted an important step towards an amicable solution between the various groups involved. In addition, both prior to conclusion of this basic contract and after its conclusion, a number of important questions of *droit de suite* had to be clarified by the VG Bild/Kunst in legal proceedings.

¹¹⁵ OLG Munich – 6 U 3229/78 – of 22.3.1979, UFITA Bd. 86 (1980) p. 264 = FuR 1979, 329.

¹¹⁶ LG Munich I – 7 O 19189/77 – of 23.8.1979, as yet unpublished.

¹¹⁷ LG Munich I – 21 O 10388/81 – of 12.3.1982, FuR 1982, 216.

¹¹⁸ LG Cologne – 28 O 140/81 – of 14.7.1981, FuR 1981, 494.

¹¹⁹ OLG Cologne – 6 U 163/81 – of 23.4.1982, FuR 1982, 330.

¹²⁰ OLG Hamm – 4 U 15/81 – of 12.5.1981, Schu OLGZ 242 (Hubmann) = GRUR 1981, 743 = UFITA Bd. 92 (1982) p. 233.

¹²¹ OLG Frankfurt – 6 W 175/81 – of 21.1.1982, UFITA Bd. 94 (1982) p. 325 = FuR 1982, 111.

¹²² LG Munich I – 21 O 18550/81 – of 18.12.1981, FuR 1982, 509; LG Munich I – 7 O 8399/83 – of 9.6.1983, GRUR 1983, 763; LG Munich I – 7 O 12426/83 – of 27.9.1983, FuR 1984, 48.

¹²³ LG Hamburg – 74 O 124/82 – of 30.4.1982, FuR 1982, 392.

¹²⁴ OLG Karlsruhe – 5 U 246/83 – of 14.12.1983, GRUR 1984, 198.

(75) The art dealers involved frequently attempt to deny that the VG Bild/Kunst possesses active legitimation for the collective assertion of *droit de suite*, i.e. the right to assert the *droit de suite* of domestic or foreign artists or their heirs. In the “Paul Klee” case,¹²⁵ heard by the OLG Munich, the art dealer was successful, at least in one case, in his objection that the VG Bild/Kunst was unable to fully prove the heritage of Paul Klee that had to be assessed according to foreign law. However, the OLG Munich considered that the vendors required to pay *droit de suite* under Article 26(1) of the Copyright Act also comprised the commission agents, that is to say the art dealers who sold works of art in their own name but on behalf of third parties.

(76) The decision of the OLG Frankfurt on the subject of “*droit de suite* of foreign artists”¹²⁶ also refers to the question of active legitimation of the VG Bild/Kunst with reference to the statutory provision in Article 26 of the Copyright Act. This provision stipulates that the rights afforded to authors to receive information on the originals of works of fine art sold during the preceding calendar year through art dealers or auctioneers may be asserted only through a collecting society. The legislative aim expressed in this statutory provision to implement *droit de suite* by reinforcing the position of collecting societies would make it appear necessary to ensure the obtaining of that right at a procedural level. The statutory provision would be pointless if the collecting society were now required to prove its legitimacy to the dealer or auctioneer in every individual case where it asserted its right to information. There exists a real assumption that the artists and their successors in title shown in the lists of the VG Bild/Kunst have effectively assigned their *droit de suite* to that collecting society. This means that the Court indeed confirmed the right of the VG Bild/Kunst to institute proceedings in those cases of *droit de suite* administered by the foreign collecting societies SPADEM, ADAGP and COSMOPRESS.

(77) In its “Art Dealers” decision,¹²⁷ the Federal Court further extended the legitimation of the VG Bild/Kunst. It pointed to the trust nature of the copyright utilization contracts concluded with the collecting societies. Although the lapse of the administration agreement meant that the VG Bild/Kunst was no longer entitled from that point in

time onwards to administer the rights of utilization that had been transferred to it, it nevertheless had the right to continue to assert all those claims that had arisen during the term of the representation agreement that resulted from the exploitation of the rights of utilization transferred to it. As regards the matter of asserting on the basis of reciprocity the rights of French artists, the Federal Court, however, instructed the Lower Court to examine in greater detail the rights afforded by the French artists or their heirs to the French collecting society and therefore this question has not yet been finally clarified.

5. Cable Television

(78) The first case heard by the Federal Court on the subject of cable television¹²⁸ following from so-called GEMA proceedings, provided a disappointment for the authors. The decision in fact confirmed that broadcasting by wire, and therefore also cable television, was covered in principle by the definition of the right of broadcasting in Article 20 of the Copyright Act. The concept of public deriving from the statutory definition of public communication of a work in Article 15(3) of the Copyright Act was also held to extend to the right of broadcasting. However, the Federal Court adopted an unusual and disputed extension of the concept of exhaustion of copyright in the specific case of simultaneous communication of broadcasts having copyright authorization and for which remuneration was paid by means of cable television installations in areas blacked out by high-rise buildings. Although, from a technical point of view, this constituted a new transmission operation, the transmission constituted no newly extended exploitation of the work. The most problematic aspect of this decision is, however, the observation, added rather as an afterthought, that the fact that certain transmitters (in the case in point these were programs from the GDR and regional programs from other parts of the Federal Republic) could possibly only be received with high performance aerials constituted no objection to the findings; it was for the recipient to exploit the existing technical possibilities of obtaining good reception.

(79) It is interesting to note that the LG Munich I very recently, in the first truly relevant decision,¹²⁹ refused to extend the findings that had been arrived

¹²⁵ OLG Munich – 6 U 1075 + 3869/78 – of 21.6.1979, Schu OLGZ 218 (Gerstenberg) = GRUR 1979, 641.

¹²⁶ OLG Frankfurt – 6 U 99/79 – of 8.5.1980, GRUR 1980, 916 = GRUR Int. 1981, 184 = UFITA Bd. 90 (1981) p. 182.

¹²⁷ BGH – I ZR 182/79 – of 21.1.1982, GRUR 1982, 308 = GRUR Int. 1982, 549 = UFITA Bd. 94 (1982) p. 301.

¹²⁸ BGH – I ZR 24/79 – of 7.11.1980, Schu BGHZ 73 (Hubmann) = GRUR 1981, 413 (Nordemann) = IIC 1982, 104 = UFITA Bd. 91 (1981) p. 211.

¹²⁹ LG Munich I – 7 O 10998/83 – of 7.2.1984, GRUR 1984, 347.

at by the Federal Court for the specific field of cable installations in areas blacked out by high-rise buildings. The case concerned a genuine cable television installation in the Bavarian town of Kaufbeuren where, in addition to national and regional German programs, foreign programs, particularly from Austria and Switzerland, were fed into the system. Nevertheless, the Munich Court, not quite logically in my view, made a distinction between the cable transmission of programs within the statutory service area of the corresponding broadcasting organization, and cable transmission of programs outside that area or of programs from broadcasting organizations that have no statutory service area. In the case of broadcasts within the statutory service area, the court "failed to understand" why the author of a work should be paid twice for such simultaneous distribution. However, that consideration did not apply to the other cases, in which the Court found that copyright had in fact been infringed.

6. *Recording of School Broadcasts*

(80) Article 47 of the Copyright Act contains a limitation provision in favor of schools and teacher training institutions that may make individual copies of works included in a school broadcast by reproducing them on videograms or phonograms. The limits of this privilege were set out in a decision given by the OLG Munich.¹³⁰ The Court refused permission to a State provincial film service from carrying out such recordings on behalf of schools on a centralized basis. The fact that, for technical and organizational grounds, the basis used for reproduction was not recording of the broadcasts themselves but working tapes which the broadcasting organization concerned had made available to the provincial film service, also went beyond the privilege afforded by Article 47 of the Copyright Act. This means therefore that a recording that is to enjoy the privilege of Article 47 must be made by the school itself simultaneously with the emission of the school broadcast and on the basis of that school broadcast itself.

7. *Limitations in Respect of the Freedom of Information, Reporting and Quotations, and their Limits*

(a) *Reproduction of Press Articles and Remuneration for Press Reviews*

(81) Article 49 of the Copyright Act permits, under certain circumstances and against equitable

¹³⁰ OLG Munich I – 6 U 2386/82 – of 9.12.1982, FuR 1983, 273.

remuneration, the reproduction and distribution of individual broadcast commentaries and individual articles from newspapers and information sheets in other newspapers and information sheets and their broadcasting where the subject matter concerns political or other events of the day. Three actions brought by the VG Wort in order to obtain the press review remuneration to be collected by that society were decided in its favor; it succeeded in fact in obtaining that the claim to remuneration be accepted at least in the preliminary form of a right to information. In its decision,¹³¹ the OLG Munich rejected the objection that only such newspaper articles had been concerned that constituted news of a factual content and news of the day which did not enjoy copyright protection under the explicit provision found in Article 49(2) of the Copyright Act.

(82) The OLG Cologne,¹³² on the other hand, was required to decide on the objection that the VG Wort did not possess active legitimation to represent, according to its own claims at the time, some 400 publishing houses and over 10,000 authors, including the leading journalists in the Federal Republic. The Court showed great understanding for the tasks of the collecting societies in noting that their tasks laid down and legitimized in the Copyright Administration Act would be unacceptably handicapped if they were required to prove the conclusion of a corresponding administration contract in each individual case where a potential opponent to the claim systematically denied their legal competence. It was sufficient for the collecting societies to designate their members by presenting a specific list of members.

(83) In a further case, heard by the OLG Hamm,¹³³ which did not concern remuneration for press reviews, the argument was whether in fact it constituted a case of permissible reproduction of a newspaper article at all. The publisher of an advertising newspaper had, at the wish of an advertising customer, reproduced from a competing advertising newspaper, without the latter's consent, an editorial contribution that was closely related to the business announcement of his customer and was placed next to the latter's announcement. Its advertising purpose meant that such reproduction was not covered by Article 49(1) of the Copyright Act since a provision laying down exceptions was to be restrictively interpreted and its purpose was the dissemination of current news for informational purposes and not, however, that of advertising.

¹³¹ Cf. footnote 20.

¹³² OLG Cologne – 6 U 213/79 – of 19.3.1980, Schu OLGZ 226 (Nordemann) = GRUR 1980, 913. Cf. also in this respect paragraph 119.

¹³³ Cf. footnote 89.

(b) Freedom of Reporting

(84) Under the provision of the freedom of visual and sound reporting of events of the day (Article 50 of the Copyright Act), works that become perceptible in the course of the events which are being reported on may be used to the extent justified by the purpose of the report. The VG Bild/Kunst, which has assumed the administration of the reproduction rights in works of fine art and photographs in periodicals and newspapers, had to obtain clarification, in two actions that went as far as the Federal Court, whether daily newspapers could reproduce the works of artists in their reporting on exhibitions and other events. In both its decisions,¹³⁴ given on the same day, the Federal Court gave a relatively generous interpretation of Article 50 of the Copyright Act. It allowed, in fact, the reproduction of works of art as part of a newspaper report on the opening of an art exhibition as it did the reproduction of works of art contained in art books in a newspaper report on the publication of a series of art books. Article 50 of the Copyright Act in no way required that works may only be perceptible in a fragmentary manner or only in connection with an event that constituted news of the day (e.g. in the background at the opening ceremony of an exhibition). The only corrective measure to prevent abuse was the requirement that a work may only be reproduced to the extent required by the purpose of reporting. The objection that the work was not an independent subject of reproduction, but may only appear in the background, was to be countered by the fact that such case was already covered by the special provision on the use of works "as accessories of secondary importance" in Article 57 of the Copyright Act. Finally, the fact that the reproduction was an archive photograph and not a current photograph taken at the exhibition itself did not mean either that the reporting was not permissible.

(85) Solely in respect of a specific situation,¹³⁵ concerning the donation of an art collection referred to in the press, did the Federal Court hold that the reproduction of a painting from the collection ap-

¹³⁴ BGH – I ZR 118/80 – of 1.7.1982, *Schu BGHZ* 300 (Gerstenberg) = GRUR 1983, 25 = IIC 1984, 387 = UFITA Bd. 96 (1983) p. 226 and BGH – I ZR 119/80 – of 1.7.1982, *Schu BGHZ* 301 (Gerstenberg) = GRUR 1983, 28 = UFITA Bd. 96 (1983) p. 233. The lower courts in the second case were LG Berlin – 16 O 436/78 – of 16.1.1979, *Archiv für Presserecht* 1979, 323 (Günther) and KG Berlin – 5 U 1036/79 – of 22.4.1980, *Schu KGZ* 74 (Gerstenberg). The lower court in the first case was KG Berlin – 5 U 1100/79 – of 22.4.1980, *Schu KGZ* 75 (Gerstenberg). Differently again AG Cologne – 111 C 1260/78 – of 29.9.1978, *Archiv für Presserecht* 1979, 325 (Günther).

¹³⁵ Contained in the first of the two BGH Decisions (I ZR 118/80).

pearing on that occasion was not permissible. Indeed, that painting was not in fact shown during the report on the donation ceremony itself, nor was it otherwise to be seen. Thus, the work had not become perceptible within the meaning of Article 50 of the Copyright Act. The LG Berlin¹³⁶ took a similarly restrictive decision when it found that an article in a periodical concerning the system of acquisition in a State collection did not constitute news of the day and therefore the reproduction of a painting purchased two years earlier by that collection was not justified.

(86) In a case heard by the LG Frankfurt,¹³⁷ the complete transmission of two works of music during the ceremony at the opening of a concert hall was declared unacceptable. Although the opening of the concert hall constituted news of the day of considerable public interest, about which the station could indeed report, the full transmission of the two musical works nevertheless exceeded the scope permitted by Article 50 of the Copyright Act. Finally, the OLG Hamburg¹³⁸ held a 40-minute program on a theatrical festival to be unacceptable since it had gone beyond the scope of Article 50 of the Copyright Act. Current reporting may not cross the line to approach a thoroughgoing analysis and the discussion of entire subjects.

(c) Freedom of Quotation

(87) Problems of delimitation similar to those of the freedom of reporting dealt with above also arise in the case of the freedom of quotation governed by Article 51 of the Copyright Act. In a number of the cases dealt with above, namely the reporting on the art donation¹³⁹ and the broadcast analyzing the theatrical festival,¹⁴⁰ their acceptability as quotations was additionally examined and rejected since the aim of quotation was lacking. Likewise, in the repeatedly mentioned case of the "WK Documentation,"¹⁴¹ the Federal Court found against quotation in view of the extent of the passages reproduced from the collection of sources.

(88) The question whether it is possible to quote entire works under the minor quotations permitted by Article 51(2) which, contrary to the major scien-

¹³⁶ LG Berlin – 16 O 555/82 – of 15.2.1983, *Schu LGZ* 193 (Gerstenberg). Cf. also in this respect paragraph 158.

¹³⁷ LG Frankfurt – 2/3 O 472/82 – of 19.5.1983, reported by Spautz in *FuR* 1983, 477.

¹³⁸ OLG Hamburg – 3 U 43/83 – of 27.1.1983, *UFITA* Bd. 96 (1983) p. 255.

¹³⁹ Cf. paragraph 85 and footnote 135.

¹⁴⁰ Cf. paragraph 86 and footnote 138.

¹⁴¹ Cf. for instance footnotes 23 and 62.

tific quotations under Article 51(1) of the Copyright Act, only permit "passages of a work" to be used, arose on a number of occasions. This was confirmed in two cases heard by the LG Munich I¹⁴² and the LG Frankfurt,¹⁴³ respectively, on the grounds that interpretation of the provisions on the right of quotation in conformity with the constitution permitted the use of whole works in the political debate in those cases where "passages" of a work could not be meaningfully quoted. In the first case, the dispute concerned the reproduction of a poster in an electioneering pamphlet; the second case concerned a newspaper advertisement with economic motivation, reproducing the photograph of a man bearing on his back the "laughing sun" sticker already referred to in connection with other proceedings.¹⁴⁴ Finally, the LG Munich I confirmed the permissibility of a film quotation on the grounds of its purpose in a case¹⁴⁵ concerning a three-part television series on the development of sound films in which, *inter alia*, extracts from the film totalling more than five minutes duration had been shown.

(89) The LG Munich I heard a case¹⁴⁶ in which it had to examine the permissibility, as quotations, of reproductions of works of art in an exhibition catalogue in connection with the freedom of catalogue illustrations under Article 58 of the Copyright Act. Even assuming that an exhibition catalogue could represent a scientific work, the application of major scientific quotations was impossible since it was not just a few works that had been added in addition to those exhibited but the number of such works was so large that the bounds placed on the freedom to quote had been exceeded over and over again. Likewise, compared with the text, the illustrations were of such extent that they could no longer be claimed to illustrate the content of the text.

8. The Limits of Permissible Public Communication

(90) According to Article 52 of the Copyright Act, it is permissible, within strictly limited circumstances, to make public communication of works that have been published, without the consent of the author. The previous "Letter"¹⁴⁷ already reported on

the "church music" judgment of the Federal Constitutional Court in which this provision had been declared unconstitutional insofar as it refused a claim to remuneration in respect of church music. The Court furthermore let its feeling be known that the provision was generally formulated in all too broad a manner. On the other hand, numerous decisions taken by the Federal Court and the lower courts, that were favorable to the authors, had already clarified to a great extent the significant terms "public" and "gainful purpose" used in Article 52. Following on from this judicial practice,¹⁴⁸ a multiplicity of proceedings were instituted, largely by GEMA, with success, and led to further identification and delimitation of the scope of free public communication under Article 52 of the Copyright Act. Such free public communication does not exist, for instance, in the view of the Federal Court,¹⁴⁹ where protected works of music or literature are communicated by means of radio, phonograms or videograms in the common rooms of the customs and finance schools maintained by the public authorities.¹⁵⁰ In this case, the Federal Court also criticized the characteristic of gainful purpose that did not really apply in connection with such state institutions as customs and finance schools. Nevertheless, the Federal Court held that these cases were not covered by the freedom of communication under Article 52 of the Copyright Act. If these state institutions wished to offer course participants the possibility of entertainment and recreation during their leisure, there was no reason that this should be at the cost of the authors.

(91) Application of Article 52 of the Copyright Act was also refused in the following cases: performance of music by means of radio, television and tape cassettes in an NCO's hostel,¹⁵¹ projection of sound films in penal institutions,¹⁵² communication of music in common rooms and visitors' rooms in psychiatric hospitals,¹⁵³ television in common rooms in post-natal homes with the exception of television rooms for the staff of the homes,¹⁵⁴ opera-

¹⁴² LG Munich I – 7 O 7038/80 – of 9.9.1980, Schu LGZ 182 (Gerstenberg).

¹⁴³ LG Frankfurt – 2/3 O 306/81 – of 11.8.1981, UFITA Bd. 94 (1982) p. 338.

¹⁴⁴ Cf. footnotes 43 and 80.

¹⁴⁵ LG Munich I – 21 O 22160/82 – of 30.9.1983, FuR 1983, 668.

¹⁴⁶ LG Munich I – 7 O 13891/77 – of 11.4.1978, Schu LGZ 162 (Gerstenberg). Cf. in this respect paragraph 100.

¹⁴⁷ *Loc. cit.* (footnote 1) paragraphs 81 *et seq.*

¹⁴⁸ Cf. previous "Letter," *loc. cit.* (footnote 1) paragraphs 86 *et seq.*

¹⁴⁹ BGH – I ZR 186/80 – of 17.3.1983, GRUR 1983, 562 (Nordemann).

¹⁵⁰ Similarly LG Hannover – 18 S 1/78 – of 9.6.1978, Schu LGZ 165 (Movsessian).

¹⁵¹ AG Bad Mergentheim – 3 C 290/79 – of 25.3.1980, Schu AGZ 24 (Schatz).

¹⁵² LG Berlin – 16 O 353/77 – of 6.12.1977, Schu LGZ 161 (Nordemann).

¹⁵³ OLG Cologne – 6 U 44/79 – of 19.9.1980, Schu OLGZ 230 (Movsessian) = UFITA Bd. 90 (1981) p. 212 = FuR 1980, 669.

¹⁵⁴ LG Kassel – 1 S 33/79 – of 12.7.1979, Schu LGZ 174 (Movsessian).

tion of a television set in a club home,¹⁵⁵ in recreational rooms of "youth villages" and apprentices' hostels¹⁵⁶ and in a home for youth work within the framework of socio-pedagogical educational work.¹⁵⁷

(92) Mention must also be made in this context of the efforts undertaken by an individual composer to obtain specific examination by the courts, on the basis of the doubts expressed by the Federal Constitutional Court, of the constitutionality of Article 52 of the Copyright Act in the case of performances of contemporary serious music within the framework of studio and diploma examination concerts organized by musical high schools. Compositions of contemporary serious music are frequently utilized in great number at such events, in musical high schools in particular, whereby the application of Article 52 of the Copyright Act fatally leads, as a general rule, to remuneration being refused. The LG Hamburg¹⁵⁸ shared the composer's view that it constituted an unconstitutional act and therefore decided to obtain from the Federal Constitutional Court a ruling as to the constitutionality of Article 52(1)(1). The LG Hamburg further confirmed — thus agreeing with a decision taken by the LG Berlin¹⁵⁹ — the composer's right to take action despite the fact that he was a member of that society and therefore had assigned his performance rights to GEMA. The second decision to be expected from the Federal Constitutional Court as regards Article 52 of the Copyright Act will probably be significant also for the forthcoming amendment to the Copyright Act¹⁶⁰ since it is not certain that the Federal Government's present draft has taken into full account all the grounds set out in the decision of the Federal Constitutional Court as regards Article 52 (church music decision).

9. *Reproduction for Private Use and the Equipment Levy*

(a) *The Activities of "Copyshops"*

(93) The question of the legality of the operation of so-called copyshops in respect of reproduction

¹⁵⁵ OLG Hamm — 4 U 97/81 — of 14.7.1981, Schu OLGZ 245 (Reichardt) = UFITA Bd. 93 (1982) p. 209.

¹⁵⁶ OLG Stuttgart — 4 U 59/79 — of 17.10.1979, Schu OLGZ 220 (Movsessian).

¹⁵⁷ LG Berlin — 16 S 6/78 — of 28.11.1978, Schu LGZ 167 (Schatz).

¹⁵⁸ LG Hamburg — 74 O 337/79 — of 9.5.1980, GRUR 1980, 920 = UFITA Bd. 90 (1981) p. 231.

¹⁵⁹ LG Berlin — 16 S 4/79 — of 24.4.1980, FuR 1980, 611. The LG Berlin required GEMA, in this case, to agree to assert claims to remuneration against such musical organizers (schools).

¹⁶⁰ Cf. paragraph 3.

for private use was dealt with firstly by the OLG Hamm¹⁶¹ and then by the Federal Court.¹⁶² The customers of the shop (essentially students) were able, on payment, to either make photocopies themselves or, at least in some of the cases, have them made by the proprietor's employees. The Federal Court made a distinction between these two types of cases and confirmed, to begin with, that the making of photocopies by the owner of the shop or by his employees constituted an infringement of copyright. At least as far as the "test case" of the copying of a legal treatise was concerned, this did not constitute personal use under Article 53(1) of the Copyright Act since copies for professional training were not included under that provision. Likewise, it was not a case of permissible making or causing to be made for personal scientific use under Article 54(1)(1) of the Copyright Act since reproduction was not necessary in view of the possibility of obtaining the treatise at any time at a price that was reasonable compared with the extent of the reproduction. Nor did reproduction of the paper as an individual work constitute reproduction of a small part of the published work within the meaning of Article 54(1)(4)(a) of the Copyright Act.

(94) As far as the second configuration was concerned, in which the owner of the shop simply made the photocopying equipment available to his customers, the Federal Court was not able to see its way to a condemnation. Although the copying carried out by the students for their own purposes was not covered, at least in the cases examined, by Articles 53 and 54 of the Copyright Act and was therefore infringing, the person making available the equipment was nevertheless only required to take the suitable measures that could be expected of him and that were necessary to prevent as far as possible the occurrence of infringements. It could not be demanded of him, however, that every unauthorized reproduction of educational material be prevented, particularly since the person making available the equipment could not reasonably be expected to check all material being photocopied. The Federal Court found, in fact, that the person making available the equipment had done all that was necessary and reasonable in that his general conditions of business contained a reference to the customer's obligation to respect copyright and, additionally, a clearly visible notice was affixed in the business premises.

¹⁶¹ OLG Hamm — 4 U 148/80 — of 29.1.1981, FuR 1982, 210.

¹⁶² BGH — I ZR 70/81 — of 9.6.1983, GRUR 1984, 54 = IIC 1984, 392.

(b) *Obligation of Manufacturers and Importers to Pay the Equipment Levy*

(95) In order to implement the equipment levy under Article 53(5) of the Copyright Act (private audio and video recording), the three collecting societies GEMA, GVL and VG Wort have joined together to form a Central Office for Private Performing Rights (ZPU) in the form of a civil law company. Acting together under this name, the participating collecting societies found it necessary to institute a whole series of proceedings in order to enforce the equipment levy. The aim of those proceedings was, *inter alia*, to determine the type of equipment that was to be subject to the levy, how the proceeds of sale by the manufacturers were to be determined and, finally, to decide who was a manufacturer and who was simply an importer of such equipment.

(96) In the two "video recorder" decisions,¹⁶³ taken on the same date and whose grounds coincided to a great extent, the Federal Court examined the question whether the equipment concerned was intended to record broadcasts on videograms or phonograms or to transfer from one videogram or phonogram to another in the context of personal use. The particularity was to be found in the fact that this equipment was in fact designed primarily for recording personal shots with an electronic camera and reproducing them. In order to record broadcasts or to transfer records from one videogram or phonogram to another, it was necessary to use additional equipment. However, for the Federal Court, this constituted no obstacle and it therefore confirmed that the equipment possessed the necessary capability and a claim to remuneration under Article 53(5) was therefore justified.

(97) However, in the context of detailed considerations concerning the possibility of the manufacturers of the equipment to disprove the assumption of the actual use made of the equipment, the Federal Court reached a finding that was less gratifying to the collecting societies. This was the view that the equipment was capable of private use did not mean that the same amount of remuneration was to be laid down for every type of equipment nor that remuneration was indeed to be paid at all for every model. When determining equitable remuneration under Article 53(5) of the Copyright Act, each individual type of equipment had to be taken into

account together with its particularities. Where the examination of a certain model showed that the probability of private use was of no consequence, the obligation to pay remuneration could disappear altogether.

(98) The Federal Court came to similar conclusions in the "Sound Film Equipment" case.¹⁶⁴ However, in this case there was a further important finding in respect of sound film projectors to the effect that the equitable remuneration under Article 53(5) of the Copyright Act was also to be calculated on the basis of the proceeds of sale of the *entire* apparatus in the case of combined equipment performing a number of functions. On the other hand, it would appear necessary to take into account the fact that a part of the proceeds of sale concerned facilities that did not serve the recording of sound when determining the percentual rate of remuneration. In so doing, the Federal Court explicitly rejected the argument that the statutory maximum of 5% was to be considered the general rule. Indeed, the wording of the law showed that the equitable remuneration was to vary within a range of up to 5% of the proceeds of sale. Although this range could be fully exploited in individual cases, where particular grounds appeared, there were no indications that would justify the maximum rate automatically constituting the normal rate. However, one may wonder whether these considerations expressed by the Federal Court as regards the amount of the equipment levy under Article 53(5) of the Copyright Act have not made its practical application more complicated than was necessary. The planned new wording of Articles 53 and 54 of the Copyright Act could indeed become unavoidable in the near future.¹⁶⁵

(99) A further decision taken by the Federal Court¹⁶⁶ concerned the notion of the manufacturers' proceeds of sale used by Article 53(5) of the Copyright Act for calculating the equipment levy where equipment manufactured by third parties is placed on the market by a distribution firm under its own name or own trademark. The Federal Court decided that only the person who actually produced the equipment was to be considered a manufacturer; the view that the person placing the equipment on the domestic market constituted a manufacturer was

¹⁶³ BGH - I ZR 126/78 - of 29.12.1980, Schu BGHZ 274 (Reichardt) = GRUR 1981, 355 = IIC 1982, 393 = UFITA Bd. 90 (1981) p. 141 and BGH - I ZR 81/78 - of 29.12.1980, Schu BGHZ 275 (Reichardt) = IIC 1982, 400.

¹⁶⁴ BGH - I ZR 43/80 - of 18.9.1981, Schu BGHZ 296 (Schulze) = GRUR 1982, 104 = UFITA Bd. 93 (1982) p. 161. Lower court: OLG Munich I - 6 U 1607/79 - of 20.12.1979, GRUR 1980, 721. Cf. also, as regards assertion of the right to information in respect of equipment manufacturers, LG Munich I - 7 O 3125/80 of 24.6.1980, Schu LGZ 179 (Movsesian).

¹⁶⁵ Cf. paragraph 3.

¹⁶⁶ BGH - I ZR 200/81 - of 22.2.1984, GRUR 1984, 518.

in no way supported by the law. The question at point was whether the equipment levy under Article 53(5) was to be based on the lower proceeds of sale of the actual manufacturer or the considerably higher proceeds of distribution of the distributor. Indeed, in two decisions,¹⁶⁷ the OLG Frankfurt came to similar conclusions that the domestic distribution of equipment manufactured by another undertaking abroad did not oblige the importer to assess the equipment levy on the basis of his own proceeds of sale. According to the unequivocal wording of the law, the importer was only responsible (jointly) for the equipment levy of the foreign manufacturer based on the latter's proceeds of sale. The proceeds of sale constituted in that case the specifically calculated price that the manufacturer charged the German importer. The Court therefore refused to consider the importer as the manufacturer although he formed part of the same concern as the foreign manufacturer. However, in the case of combined equipment, the OLG Hamm¹⁶⁸ held that the costs of freight and insurance were not to be first deducted from the manufacturer's proceeds. The basis of assessment was in fact the proceeds obtained by the manufacturer, that is to say the gross proceeds, and not the manufacturer's profit. Furthermore, when determining the maximum rate of 5%, the statutory value added tax was not to be taken into account.

10. Other Limitations of Copyright

(a) Freedom of Catalogue Illustrations

(100) The LG Munich I¹⁶⁹ had reason to examine the freedom of catalogue illustrations (Article 58 of the Copyright Act) under which works of art that are to be exhibited in public or intended for public exhibition may be reproduced in exhibition catalogues. The Court held, in the case of a "travelling exhibition" for which a single common catalogue was published, that the freedom of catalogue illustrations also applied, within certain limits, to the reproduction of works that were not shown at all locations. On the other hand, books of sketches shown in a glass case, which the visitors could not turn over at will, were only held to be publicly ex-

bited as regards the open pages. This decision also held the sale of catalogues through the general book trade to be prohibited. Likewise, the freedom of catalogue illustration did not cover the manufacture of exhibition posters.

(b) Buildings on Public Premises

(101) Article 59 of the Copyright Act permits the utilization (even for gainful purpose) of reproductions of works that are permanently placed on public ways, streets or places. In a case heard by the LG Munich I,¹⁷⁰ a building had been reproduced in an advertising brochure. According to this decision, the question of whether such a public way exists does not depend on public law designation in favor of the general public but on the free access for the general public provided at the will of the entitled person.

(c) Portraits

(102) According to Article 60 of the Copyright Act, the person ordering a portrait or the person thus portrayed may, under certain circumstances, reproduce the portrait and distribute it *free of charge*. In a case heard by the LG Munich I,¹⁷¹ the Court did not accept that it was free of charge since the photograph concerned was reproduced in a commercially distributed weekly. The fact that the author had not received remuneration did not change the fact that distribution was for gainful purpose. On the other hand, the OLG Hamm¹⁷² held that the distribution of handouts for advertising purposes by the person portrayed still constituted distribution without payment. Likewise, the manufacture of a photographic enlargement of a portrait and the use of that enlargement in a showcase was covered by Article 60 of the Copyright Act. The fact that distribution had taken place within the framework of a commercial undertaking was of no significance since Article 60 in no way restricted the right of distribution of the person portrayed to his private circle. Nor did reproduction with changed format or size constitute a prohibited change within the meaning of Article 62 of the Copyright Act.

(WIPO translation)

¹⁶⁷ OLG Frankfurt – 6 U 50/82 – of 3.2.1983, FuR 1983, 283 and OLG Frankfurt – 6 U 47/82 – of 10.2.1983, FuR 1983, 280.

¹⁶⁸ OLG Hamm – 4 U 77/81 – of 10.11.1981, Schu OLGZ 247 (Schulze) = UFITA Bd. 94 (1982) p. 328.

¹⁶⁹ Cf. footnote 146.

¹⁷⁰ Cf. footnote 88.

¹⁷¹ Cf. footnote 87.

¹⁷² OLG Hamm – 4 U 197/80 – of 1.10.1980, Schu OLGZ 236 (Gerstenberg) = FuR 1980, 672.

Calendar of Meetings

WIPO Meetings

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

1984

- November 26 to December 7 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- December 10 to 14 (Paris) — Group of Experts on the Intellectual Property Aspects of the Protection of Folklore at the International Level (convened jointly with Unesco)
- December 17 (Geneva) — Informal Meeting with International Non-Governmental Organizations Essentially Concerned with Industrial Property or Copyright and Neighboring Rights

1985

- January 21 to 25 (Geneva) — International Patent Classification (IPC) Union: Committee of Experts
- February 4 to 8 (Geneva) — Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights
- February 25 to March 1 (Geneva) — Group of Experts on Copyright Protection of Computer Software (convened jointly with Unesco)
- March 11 to 15 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information
- March 18 to 22 (Paris) — Group of Experts on Copyright Problems in the Field of Direct Broadcasting Satellites (convened jointly with Unesco)
- April 22 to 26 (Paris) — Joint Unesco-WIPO Consultative Committee on the Access by Developing Countries to Works Protected by Copyright (convened jointly with Unesco)
- May 6 to 17 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- June 6 to 14 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Planning and on Special Questions
- June 17 to 25 (Paris) — Berne Union: Executive Committee (Extraordinary Session) (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)
- June 26 to 28 (Paris) — Rome Convention: Intergovernmental Committee (Ordinary Session) (convened jointly with ILO and Unesco)
- September 11 to 13 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Patent Information for Developing Countries
- September 16 to 20 (Geneva) — Permanent Committee on Patent Information (PCPI)
- September 23 to October 1 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)
- October 7 to 11 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information
- November 18 to 22 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning
- November 25 to December 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information

UPOV Meetings

1985

March 27 and 28 (Geneva) — Administrative and Legal Committee

March 29 (Geneva) — Consultative Committee

May 8 to 10 (Wageningen) — Technical Working Party on Automation and Computer Programs

June 4 to 7 (Hanover) — Technical Working Party for Agricultural Crops, and Subgroup

June 18 to 21 (Aarslev) — Technical Working Party for Fruit Crops, and Subgroup

June 24 to 27 (Aars and Aarslev) — Technical Working Party for Ornamental Plants and Forest Trees, and Subgroups

July 8 to 12 (Cambridge) — Technical Working Party for Vegetables, and Subgroup

October 14 (Geneva) — Consultative Committee

October 15 and 16 (Geneva) — Meeting with International Organizations

October 17 and 18 (Geneva) — Council

November 12 and 13 (Geneva) — Technical Committee

November 14 and 15 (Geneva) — Administrative and Legal Committee

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

Non-Governmental Organizations

1985

European Broadcasting Union (EBU)

Legal Committee — April 24 to 26 (Geneva)

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)

Annual Meeting — September 16 to 18 (Geneva)

International Copyright Society (INTERGU)

Congress — June 7 to 12 (Munich)

International Literary and Artistic Association (ALAI)

Executive Committee — January 12 (Paris)

Study Session — April 10 to 12 (Oxford)

International Union of Architects (IUA)

Congress — January 20 to 26 (Cairo)