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# Copyright

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World Intellectual Property Organization (WIPO)

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## World Intellectual Property Organization

### The World Intellectual Property Organization in 1984\*

#### Copyright and Neighboring Rights Activities

##### Information Concerning Copyright

###### Objective

The objective is to increase and spread knowledge about the doctrine, legislation and practical administration of copyright and neighboring rights.

###### Activities

The periodicals *Copyright* and *Le Droit d'auteur* continued to be published each month.

WIPO continued to keep up to date its *collection of the texts of the laws and regulations of all the countries of the world and of all treaties* dealing with copyright and neighboring rights, both in their original languages and in English and French translations. The basic texts were published in the monthly periodicals *Copyright* and *Le Droit d'auteur*.

The *Copyright Law Survey*, a loose-leaf publication containing summaries of national laws and other provisions on copyright and neighboring rights, was updated by the publication, in April 1984, of a supplement which, apart from bringing former entries up to date, added new summaries for seven countries. The total number of countries covered is 80.

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\* This article is the second part of a report on the main activities of WIPO in general and in the fields of copyright and neighboring rights. Activities in the field of industrial property are covered in a corresponding report in the review *Industrial Property*.

The first part dealt with the activities of WIPO as such and with development cooperation activities in the fields of copyright and neighboring rights (See *Copyright*, 1985, pp. 85 *et seq.*). The second part deals with other activities in those fields.

For the purpose of preparing a *survey on the practical administration and application of the copyright and neighboring rights laws* in Asia and the Pacific, a request for information was addressed to the appropriate authorities in 35 countries of the region in June 1984. *By the end of 1984, replies had been received from 11 countries.*

##### Copyright Questions of Topical Interest

###### Objective

The objective is to look for solutions to specific questions of a legal nature, and of topical interest, in the fields of copyright and neighboring rights. These questions are of topical interest because they are raised by relatively recent changes in the social, economic or technological environment in which mankind lives.

###### Activities

A *Discussion Meeting on the Possible Contents of Copyright Legislation Concerning Employee Authors* was held in Geneva in October 1984, in order to assist WIPO in preparing for a meeting, to be convened jointly with Unesco, on draft model provisions for national laws. The consultants who took part in the discussion meeting, at the invitation of WIPO, came from China, Costa Rica, the Soviet Union, Sweden and the United States of America.

The consultants advised, *inter alia*, that the work of preparing model provisions for national legislation should concentrate mainly on the rights of persons employed for the purpose of creating works protected by copyright (rather than of persons who incidentally create such works within the scope of

their employment), and on the situation in industries (such as films, broadcasting, the press), as well as in the fields of science, where such employment is common; the principles to be established should, so far as possible, be valid also for other circumstances, but special rules can be envisaged for particular cases; the model provisions should encourage the conclusion of contracts (collective, standard or individual) between employers and employed authors concerning the exercise of economic rights, and should provide a reasonable minimum level of protection for the employee. Both contractual and statutory arrangements should be flexible enough to provide additional rewards in the case of unexpected or unusually successful uses of the works, taking into account such factors as the normal scope of duties of the employee, the normal scope of activities of the employer, the expectations of both parties, technological and economic developments and the actual profitability of a given work; cheap and easily accessible means of resolving disputes should be available.

In addition, the consultants provided advice on a number of points contained in a draft check-list of issues and questions prepared by WIPO.

*A Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property*, jointly convened by WIPO and Unesco, met in Paris in December 1984. The experts, invited in their personal capacity, were nationals of the following 12 countries: Australia, Bolivia, Burkina Faso, Finland, Ghana, Hungary, India, Mexico, Philippines, Soviet Union, Tunisia, United States of America. Delegations from the following 18 States were present at the meeting: Australia, Belgium, Brazil, Congo, Egypt, Finland, France, Haiti, Holy See, Israel, Italy, Kenya, Senegal, Spain, Sweden, Tunisia, Turkey, United States of America. Observers from two intergovernmental organizations and 11 international non-governmental organizations also attended the meeting.

Under its terms of reference, the Group of Experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft.

The discussions were based mainly on a document prepared by the Secretariats containing the draft of an international treaty. They reflected a general recognition of the need for international protection of expressions of folklore, in particular with regard to the rapidly increasing uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the community in which they originate. A number of participants supported the idea of preparing an international

multilateral treaty on the protection of expressions of folklore, on a *sui generis* basis of safeguarding intellectual property. Several participants stressed that the draft text prepared by the Secretariats was a good starting point to this end. Several participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular concerning the implementation of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted in 1982 by a Committee of Governmental Experts. Other participants, however, referred to the fact that there was sufficient evidence as to the need for an international protection of expressions of folklore.

Some participants suggested starting with international recommendations or guidelines. Other participants said that the elaboration of draft texts of a treaty may provide guidelines for national regulation of the matter. The view was noted that the urgency of the establishment of an international treaty on the protection of expressions of folklore may be different in various regions. Many participants emphasized the importance of strengthening, in the proposed treaty, the links between the expressions of folklore and the respective communities in which they originated.

After a detailed discussion of the draft treaty, article by article, the participants noted that the secretariats would further explore various aspects of a treaty for the intellectual property type protection of expressions of folklore and would prepare a revised text, in the light of the observations made, and the advice given by the participants, also considering possible alternative means of implementing the protection. The Secretariats would communicate the report of the meeting to the Executive Committee of the Berne Union and to the Intergovernmental Committee of the Universal Copyright Convention.

*A Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works*, convened by WIPO and Unesco, met in Geneva in June 1984. The participants were six consultants, invited in their personal capacity, from Algeria, Brazil, China, France, Germany (Federal Republic of) and Poland, together with observers from three international non-governmental organizations.

The meeting examined model provisions for national laws on the rights and obligations of authors and publishers under publishing contracts for literary works, with special emphasis on the interests of developing countries. The Working Group had be-

fore it documents containing draft annotated model provisions and an inventory of national legal provisions governing various aspects of authors' contracts.

After having engaged in a wide-ranging exchange of views on the draft model provisions, and having noted that they took due account both of established customs and of the specific position of developing countries, the Working Group expressed its agreement on the general structure of the provisions and then concentrated on certain specific points, either in the text itself or in the comments on it. After an examination, provision by provision, of the draft, the Working Group recommended a revised text, it being understood that the comments on the model provisions would subsequently be reworked by the Secretariats in order that the various observations made in the course of the discussions might be taken into consideration.

The Working Group noted that the Secretariats would submit the revised draft model provisions for national laws on contracts for publishing literary works in book form, along with the completed comments, to a Group of Experts in 1985 for further consideration.

*A Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter*, convened by WIPO and Unesco, met in Geneva in June 1984. The experts, invited in their personal capacity, were nationals of Argentina, Austria, India, Rwanda, the Soviet Union, Tunisia and the United States of America. The States party to the Berne Convention or to the Universal Copyright Convention had been invited to follow the discussions; the following 32 States were represented by delegations: Argentina, Australia, Austria, Brazil, Canada, Congo, Czechoslovakia, El Salvador, France, Germany (Federal Republic of), Ghana, Holy See, Hungary, Israel, Japan, Kenya, Libya, Luxembourg, Madagascar, Mexico, Netherlands, Niger, Norway, Panama, Philippines, Poland, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America. Observers from one intergovernmental organization and 14 international non-governmental organizations also attended the meeting.

The Group of Experts had before it a document, drawn up by the Secretariats with the assistance of a consultant, on the unauthorized reproduction for private purposes of sound and audiovisual recordings, broadcasts and the printed word.

The participants noted that, according to the international copyright conventions, the author had an exclusive right of authorizing the reproduction of his work. The right of reproduction was not limited to reproduction for public or profit-making use. It

was recalled that, according to the 1971 Paris Act of the Berne Convention, national legislation may provide for limitations of the right of reproduction in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the authors, and that, under the Universal Copyright Convention, the Contracting States have to provide for the adequate and effective protection of the rights of authors and to accord a reasonable degree of effective protection to any rights to which exceptions are made. It was noted that the cumulative effect of reproduction for private purposes of sound and audiovisual recordings and broadcasts, as well as reprographic reproduction for private use of printed works, was prejudicial to the author's legitimate interests, and such kinds of reproduction might also conflict with the normal exploitation of the work; it also conflicted with the requirement of guaranteeing a reasonable degree of effective protection of the right of reproduction. Consequently, national legislations should not exempt reproductions for private purposes from copyright liability.

The participants also considered the provisions of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations permitting exceptions to protection as regards private use. They underlined, however, that any limitation of the rights of holders of neighboring rights in respect of reproduction for private purposes could be, for practical reasons, permissible only under the same conditions as those applying to the reproduction of protected works.

The participants agreed that the use of modern technology for reproduction of works for private purposes should not be hindered, and its adverse effects on the interests of authors and beneficiaries of neighboring rights should be mitigated by appropriate means of protection. Appropriate systems for protection with regard to reproduction for private purposes could be collective administration of the exclusive right of reproduction or various forms of non-voluntary licensing, such licensing implying the obligation to pay proper remuneration.

It was found that technological development during the past decade would justify reopening discussion at the international level on reprographic reproduction of works protected by copyright.

A number of participants underlined that the exercise of the exclusive right of reproduction for private purposes should be effected by means of collective agreements between representative organizations of right owners and users. Legislation should provide that relevant claims of the owners of rights concerned may only be asserted by their respective organizations and such organizations should be in a position to guarantee the users against claims from

right owners outside the authorizing organization. Where a system of collective agreements could not be introduced, the States might introduce non-voluntary license schemes for certain kinds of reproduction for private purposes, subject to the payment of proper remuneration.

Several participants stressed that the fees to be collected by the competent organization for the reproduction of protected works were royalties and should be paid, as regards reproduction equipment and/or blank material support of recorded productions, ultimately by the users and distributed to the owners of rights in proportions corresponding to the probable extent of use. The modalities of calculating the fees and the fixation thereof should be a matter of negotiation, as far as possible, between the interested representative organizations, even in case of non-voluntary licensing schemes, and legislation or competent authorities should fix them only in the absence of such an agreement. Any fees fixed by legislation or competent authority should correspond, as far as possible, to amounts that might have been agreed upon by the interested parties.

A great number of participants emphasized that the introduction of a fiscal tax (instead of copyright fees) on blank tapes and cassettes and/or equipment for reproduction of works for private purposes was contrary to the basic principle under the law of copyright according to which fees paid for the use of protected productions were due to the respective owners of the rights in such productions. Other participants felt that this was a question of implementation, which could make a tax-type system compatible with principles of copyright provided the proceeds of the tax are used to remunerate the right owners concerned.

In conclusion, the participants in the Group of Experts "suggested that the Secretariat of Unesco and the International Bureau of WIPO continue to study the impact, on copyright and the so-called neighboring rights, of recording and reprographic reproduction for private purposes of protected works and productions protected by neighboring rights and that they prepare, on an urgent basis, annotated principles for the related protection of copyright and neighboring rights." (UNESCO/WIPO/GE/COP.I/3, paragraph 24.)

In the opinion of the Director General of WIPO, the meeting has demonstrated the extreme urgency of the matter. He recommends that the suggestion of the Group of Experts be followed and that the Executive Committee of the Berne Union authorize him to prepare a draft of the said annotated principles, with the help of outside consultants and a committee of experts that would be convened early in 1985. If Unesco is ready to associate itself with such activities within the said time frame, these activities would be joint between WIPO and Unesco.

*A Group of Experts on the Rental of Phonograms and Videograms*, jointly convened by WIPO and Unesco, met in Paris in November 1984.

Eight experts participated in their personal capacity, from Cameroon, Egypt, India, Japan, Mexico, the Soviet Union, Switzerland and the United States of America. Delegations from the following 25 States followed the discussions: Argentina, Australia, Belgium, Brazil, Cyprus, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Holy See, Hungary, Israel, Italy, Netherlands, Norway, Poland, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom, United States of America. Observers from one intergovernmental organization and 14 international non-governmental organizations also attended the meeting.

The mandate of the Group of Experts was to examine the copyright problems arising from the rental of phonograms and videograms, including draft guiding principles for possible solutions of such problems.

After an ample exchange of views, in which the representatives of governments and international non-governmental organizations fully participated, the Group of Experts expressed the view that authors should enjoy, under copyright law, an exclusive right to authorize the rental or lending of phonograms or videograms embodying or constituting their works, and that where phonograms or videograms are not considered to be original works of authorship, but where they are recognized as particular subject matters of protection under copyright laws or where their producers are protected by a specific right at least against the unauthorized copying of their phonograms and videograms, the producers of phonograms or videograms should, without prejudice to the rights of authors, have a similar exclusive right; they recognized that some exceptions to the said rights may be desirable in certain special circumstances, and that the soliciting and granting of licenses may, especially where the number of right holders is great, require legislative measures which facilitate the negotiations of licenses and their implementation, measures preferably resulting in the collective administration of the rights; they recommended that further studies should identify various alternatives for modalities and mechanisms for such negotiations and such administration, that such studies should deal separately with phonograms and videograms and should deal also with the uses (copying, performance, etc.) to which rented or lent copies may be put, and that the Secretariats consider the desirability of extending the studies also to the rights of performing artists.

A *Group of Consultants on the Advisability of Setting up an International Register of Audiovisual Works*, convened by WIPO in cooperation with the International Federation of Film Producers Associations (FIAPF), met in Geneva in July 1984. The purpose of the meeting was to assist in the preparation of a future meeting of a committee of governmental experts to advise on the setting up, at the International Bureau of WIPO, of an international register of audiovisual recordings (cinematographic works, recordings of television programs, etc.), it being understood that the use of such register would be voluntary and that the provisions setting up the register would under no circumstances make recordal in the register a condition for protection of copyright or neighboring rights but would be merely intended as a means facilitating proof of the existence of the audiovisual recording on the date on which the request for recordal was filed. Ten experts participated in the meeting in their personal capacity. They were selected in consultation with FIAPF and came from Germany (Federal Republic of), India, Italy, the Philippines, Spain, Switzerland, the Soviet Union, Tunisia, the United Kingdom and the United States of America. FIAPF participated in the meeting by six representatives.

The participants unanimously held that it was necessary, and therefore highly desirable and urgent, to establish an international register of audiovisual works. They held that such a register was highly desirable because of the fact that the exploitation of many audiovisual works more and more took place not only in the country in which they were made but also in more and more other countries, that is, in different countries with different copyright laws and different practices of enforcing those laws, facts which frequently caused great difficulties for the owners of rights in the work to have their rights clearly indicated to others and respected by them. The participants also found that for the purposes of the international licensing of the exploitation of the audiovisual works, and for the purposes of the international financing of such exploitation, the existing national registers were of limited usefulness. An international register would greatly increase the security of international transactions, be helpful in identifying right owners, efficiently further the repression of piracy, promote awareness of distinct rights relating to different forms of uses of the audiovisual work, facilitate any collective administration of rights and make it much easier for right owners to refuse unjustified claims.

The meeting gave detailed advice on the contents of an international register, the legal effect of registration, the organization of the registry and the future procedure to be followed, including the preparation of draft application forms for registration, etc., and consultation with the interested circles.

Such consultations have started with FIAPF in September 1984, on the basis of draft regulations, forms and other papers prepared by the International Bureau according to the advice given by the Group of Consultants.

### **Cooperation with States and Various Institutions in Matters Concerning Copyright and Neighboring Rights**

WIPO continued to cooperate with States, with intergovernmental organizations, and with international and national non-governmental organizations.

#### **States**

*Spain.* In April 1984, a WIPO official visited Madrid at the request of a Committee of the Spanish Senate considering the revision of the copyright law, and provided information to the said Committee. During the same mission, the WIPO official gave a lecture at a seminar organized by the College of Advocates in Barcelona.

*United States of America.* In June 1984, a WIPO official, at the invitation of the Library of Congress, gave lectures on the Berne and Rome Conventions at a symposium in Washington on international copyright law.

In September 1984, a WIPO official attended a meeting of the International Copyright Panel of the Advisory Committee on International Intellectual Property at the Department of State.

#### **Intergovernmental Organizations**

*Arab States Broadcasting Union (ASBU).* Within the framework of cooperation between WIPO and ASBU, a *Workshop on Copyright and Neighboring Rights* was organized jointly by WIPO and ASBU at WIPO headquarters in May 1984. Fourteen specialist participants came from the following eight States members of ASBU: Bahrain, Lebanon, Libya, Morocco, Qatar, Saudi Arabia, Tunisia, United Arab Emirates. Two officials of the League of Arab States also participated. The General Secretariat of ASBU was represented by three participants, including the Secretary General. Three experts from Hungary, Japan and Mexico participated at the invitation of WIPO.

The purpose and objective of the Workshop was to encourage an exchange of information, experience and opinions on copyright and neighboring rights. In his opening address, the Secretary General of ASBU referred to the Workshop as being an

example of cooperation between the League of Arab States and its specialized institutions and WIPO, forged during the visit to Tunis in 1983 of the Director General of WIPO. Eight papers were presented by officials of WIPO and of ASBU, and by the invited experts. After a full discussion, the participants stressed the importance of promulgation of a copyright law at the national level; of harmonization of such copyright laws at the regional and worldwide levels; of the common interests between broadcasting organizations and authors, other copyright holders, and their societies; of accession to international conventions in the fields of copyright and neighboring rights; of having and enforcing adequate remedies and effective sanctions, particularly penal sanctions, against piracy; and of regular consultation among responsible officials of broadcasting organizations to ensure that the relevant legal systems keep pace with technological developments.

Finally, the participants recommended that ASBU should seek to disseminate the texts of the papers delivered in the course of the Workshop through one of its publications; that ASBU and WIPO should jointly organize a symposium on the question of copyright in the Arab States during the past and at present, and arrange for the necessary preparation of studies and papers and allocation of funds for this purpose; that ASBU and WIPO should cooperate in providing increased training opportunities in the field of copyright for personnel working in broadcasting, television and the mass media in the Arab States, and should explore the possibility of holding training courses in a country of the region and in the Arabic language; that WIPO should send to the Ministries of Information and to broadcasting and television organizations in Arab countries copies of reports and studies concerning

the experience in other countries in the field of copyright and neighboring rights and in the suppression of piracy; and that ASBU and WIPO should continue their cooperation in the field of copyright and neighboring rights and exchange reports in this connection.

*Commission of the European Communities.* In June 1984, the Commission of the European Communities published a "Green Paper" (a consultative document for public discussion) in which, after several references to the Berne Convention, a possible Directive is suggested which "would oblige Member States of the European Community to amend their relevant [copyright] laws...in such a way that the right of prohibition enjoyed by copyright holders...in connection with cable transmission by radio and television organizations is repealed..." the interests of such holders being "protected by granting a right to equitable remuneration...enforceable only through collecting societies" (document COM(84)300 final of June 14, 1984, pp. 330 and 331). WIPO was represented at a consultative meeting of government experts on the said document in Brussels in November 1984.

*Council of Europe.* WIPO was represented at a meeting of the Committee of Legal Experts in the Media Field in Strasbourg in September 1984.

*Customs Cooperation Council (CCC).* WIPO was represented at a meeting of the Enforcement Committee of the CCC in Brussels in June 1984, for discussion of an agenda item concerning copyright and industrial property piracy.

## Seminar on Copyright and Neighboring Rights for Central American and Caribbean States

(Mexico City, February 19 to 22, 1985)

### Report and Conclusions

prepared by the International Bureau of the  
World Intellectual Property Organization (WIPO)  
and adopted by the participants

#### Introduction

1. At the kind invitation of the Government of Mexico and in close cooperation with the Directorate General of Copyright of the Ministry of Public Education, the World Intellectual Property Organization (WIPO) organized and convened a Seminar on Copyright and Neighboring Rights for Central American and Caribbean States, which was held in Mexico City from February 19 to 22, 1985.

2. The purpose of the Seminar was to consider, in the overall context of development, the role of national and international copyright, to discuss the general principles in the field of copyright and neighboring rights which are of special interest to the countries of the region; to disseminate information with respect to international conventions in the field of copyright and neighboring rights; and to examine the effect of technological development on the protection of the rights and interests of authors, performers, record producers and broadcasters.

3. Twenty-eight specialists from 11 countries (Barbados, Belize, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama), participated, in addition to three guest speakers, one each from Argentina, Jamaica (who was also one of the country participants) and Switzerland, invited by WIPO in consultation with the Government of Mexico. These invited guest speakers were the Secretary General, Argentinian Centre of the Interamerican Copyright Institute; the Director of Legal Reforms, Jamaican Ministry of National Security and Justice; and the Director General, Swiss Society for Authors' Rights in Musical Works (SUISA). There were also observers from three international non-governmental organizations namely the International Confederation of Societies of Authors and Composers (CISAC); the International Federation of Actors (FIA); and the International Federation of Phonogram and Videogram Producers (IFPI). In addition, there were a number of observers drawn from the pub-

lishing and record industries, university faculty, etc., who attended the sessions; the total daily attendance varied between 75 to 100 persons.

4. The list of participants is annexed to this report.

#### Opening of the Session

5. The Seminar was opened by His Excellency Sr. Lic. Jesus Reyes Heróles, Minister for Public Education of the Government of Mexico, in the presence of a large and distinguished gathering consisting of around 350 persons, including the Undersecretary of State for Culture; the Resident Representative of the United Nations Development Programme (UNDP); the Director General for International Organizations of the Ministry of Foreign Affairs; the Director General of the International Affairs Office in the Ministry of Public Education; the Director General of Radio, Television and Cinematography in the Ministry of Interior; the Director of Patents, Trademarks and Transfer of Technology, Ministry of Commerce; the Assistant Secretary for Administration in the Ministry of Public Education.

6. The Minister for Public Education briefly addressed the participants and welcomed them after statements were made by the Director General of the Mexican Copyright Office and by the representative of the Director General of WIPO.

#### Election of Officials

7. The participants unanimously elected Mr. Hesi-quo Aguilar de la Parra, Director General, Mexican Copyright Office, as Chairman, and Mrs. Mary Nassar Perez (Costa Rica) and Mrs. Shirley Miller (Jamaica) as Vice-Chairmen.

## Substantive Discussions

8. In accordance with the program, papers were presented on various aspects of copyright and neighboring rights: three by the representative of WIPO; nine by Mexican specialists; three by invited guest speakers. Two subjects were dealt with by representatives of two international non-governmental organizations, namely CISAC and IFPI.

9. Much interested discussion followed the presentation of various papers in which most of the participating specialists took part. The conclusions drawn from the exchange of information and related discussions, as well as on the basis of proposals made by participating specialists are set out below:

## Conclusions

10. The participants at the Seminar:

(i) expressed their deep gratitude to the Government of Mexico for having hosted the Seminar and for its generous hospitality;

(ii) expressed their great appreciation of WIPO for having organized this Seminar which gave rise to an interesting and informative exchange of views among officials from developing countries of the region facing similar problems in the field of copyright and neighboring rights and between them and the observers from international non-governmental organizations;

(iii) noted that certain countries have not yet been able to draft and adopt effective legislative instruments for the protection of copyright and neighboring rights, while certain others were in the process of doing so and were either revising their existing copyright laws or drafting new laws on copyright and neighboring rights, in order to promote creativity and to provide the necessary incentive to authors and artists, as well as to safeguard expressions of their folklore;

(iv) noted also that certain countries do not have the necessary infrastructures that would enable effective implementation of legislative provisions for the protection of copyright and neighboring rights;

(v) considered that the objective of improving the protection of copyright and neighboring rights in developing countries should not solely be to provide effective legal and administrative infrastructures, but also to establish a system of such protection that would be integrated with and would effectively contribute to the social, cultural and economic development strategies of the countries concerned;

(vi) identified the needs of the region for supporting the economies of publishing by effectively countering piracy of literary and artistic works; for promoting national recording industries by effective measures against piracy of sound and audiovisual recordings; for promoting legislation for the protection of expressions of folklore; and for encouraging the writing of school and college textbooks by national authors;

(vii) concluded and urged that, in view of the problems faced by authors, performing artists, producers of phonograms, and broadcasting organizations:

*Governments should:*

(a) enact legislation on copyright and neighboring rights where such legislation does not exist, in order to provide an appropriate and up-to-date national law that would be the most suitable nationally as well as compatible regionally and internationally; and in countries where such legislation was considered inadequate or obsolete, should amend it so as to bring it up to date;

(b) in enacting new legislation or updating existing legislation, reflect the traditional respect of the people of the countries concerned for creators and performing artists, and safeguard the cultural and economic interests of the communities from which folklore originates, duly ensuring that dissemination of various expressions of folklore does not lead to any improper exploitation of the cultural heritage of the nation;

(c) give consideration to enactment of suitable legal provisions, including civil remedies and deterrent penal sanctions against infringements, for the protection of authors as well as performing artists, producers of phonograms and broadcasting organizations;

(d) where they do not exist, help in the setting-up of appropriate, cost-effective administrative infrastructures, to ensure proper application of national laws and international obligations in the field of intellectual property;

(e) consider, where they have not yet joined, urgent accession to the Berne Convention for the Protection of Literary and Artistic Works and to the relevant international conventions in the field of neighboring rights;

(f) where they are already members of WIPO, and since it is at no additional cost, notify the Director General of WIPO of their intention to serve on the WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring

Rights, so as to strengthen the reviewing, monitoring and improving of programs of interest to the countries of the region;

(g) assist in organizing information dissemination campaigns at the national level by the competent authorities and organizations in order to make the public at large as well as policy-makers and the law enforcement agencies aware of the nature of intellectual property rights and their importance in the context of economic, social and cultural development;

*WIPO should:*

(i) within the framework of its programs for development cooperation, intensify provision of advice and assistance to countries in the Central American and Caribbean Region in preparing or amending and updating legislation in the field of copyright and neighboring rights, as well as in set-

ting up or modernizing institutions and national administrative infrastructures;

(ii) increase assistance in providing suitable training facilities for personnel required to man the respective national infrastructures;

(iii) consider projects for further strengthening its activities in, and assistance to, countries in this region in the field of copyright and neighboring rights;

(iv) consider organizing a series of such subregional seminars and courses for countries in this area, to enable concerned officials to acquire the required information and understanding of various aspects of the law of copyright and neighboring rights, and to discuss and mutually consult on some of the problems in this field;

(v) continue and increase its consultations with governments of countries in the region and subregion in order that regional/subregional solutions could increasingly be identified and found in the field of copyright and neighboring rights.

## List of Participants

### I. Experts

#### Barbados

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#### Belize

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Acting Solicitor General, Attorney General Ministry,  
Belmopan

#### Colombia

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Asesora de la Dirección Nacional del Derecho de Autor,  
Ministerio de Gobierno, Bogotá

#### Costa Rica

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Ministerio de Relaciones Exteriores y Culto, San José

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(ONAP), Presidencia de la República, Santo Domingo

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#### Guatemala

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Didactico "José de Pineda Ibarra", Guatemala

#### Honduras

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Director of Legal Reforms, Ministry of National Security  
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ral del Derecho de Autor

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Subdirector de Registro e Información de la Dirección  
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- Sr. Victor Carlos Garcia Moreno  
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- Sr. Manuel Guillen Rabasa  
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- Sr. Aldo Casasa Araujo  
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- Sr. José Bustillos  
Presidente de la Federación Latinoamericana de Productores de Fonogramas
- Sr. Jaime Guzman Mayer  
Secretario del Consejo Directivo de la Sociedad de Autores y Compositores de Música
- Sr. José Ma. Fernandez Unsain  
Presidente de la Sociedad General de Escritores de México
- Sr. Venustiano Reyes Lopez  
Presidente de la Sociedad Mexicana de Ejecutantes de Música
- Sr. Victor Blanco Labra  
Director Jurídico de Industria de Video, Televisa S.A.
- Sr. Luis Fernandez Gonzalez  
Presidente de la Cámara Nacional de la Industria Editorial Mexicana
- Sr. Gabriel E. Larrea  
Presidente del Instituto Mexicano del Derecho de Autor
- Sr. Mario Vasquez Escobedo  
Radio Educación, Secretaria de Educación Pública

## II. Guest Lecturers

### Argentina

- Sr. Miguel Angel Emery  
Secretario General, Centro Argentino del Instituto Interamericano de Derecho de Autor, Buenos Aires

### Jamaica

- Mrs. Shirley Miller  
Director of Legal Reforms, Ministry of National Security and Justice, Kingston

### Switzerland

- Mr. Ulrich Uchtenhagen  
Director General, Swiss Society for Authors' Rights in Musical Works (SUISA)

## III. Observers

### *International Non-Governmental Organizations*

- International Confederation of Societies of Authors and Composers (CISAC):** D. de Freitas. **International Federation of Actors (FIA):** R. Rembe. **International Federation of Phonogram and Videogram Producers (IFPI):** E. Thompson. **Swiss Society for Authors' Rights in Musical Works (SUISA):** U. Uchtenhagen.

## IV. World Intellectual Property Organization (WIPO)

- Mr. Shahid Alikhan  
Director, Developing Countries Division (Copyright)

## Berne Union

### Group of Experts on the Copyright Aspects of the Protection of Computer Software

(Geneva, February 25 to March 1, 1985)

#### Report

#### I. Introduction

1. In pursuance of the decisions adopted by the General Conference of Unesco at its twenty-second session (October–November 1983) and by the Governing Bodies of WIPO at their fourteenth series of meetings in October 1983, the Secretariat of Unesco and the International Bureau of WIPO (hereinafter referred to as “the Secretariats”) convened jointly a “Group of Experts on the Copyright Aspects of the Protection of Computer Software” (hereinafter referred to as “the Group of Experts”) which met at WIPO headquarters, Geneva, from February 25 to March 1, 1985.

2. The mandate of the Group of Experts was to examine the copyright aspects of the protection of computer software at both the national and international levels.

3. The experts invited in their personal capacity were nationals of the following nine countries: Argentina, Brazil, China, Germany (Federal Republic of), Hungary, India, Japan, the Soviet Union and the United States of America.

4. The States Party to the Berne Convention for the Protection of Literary and Artistic Works, to the Universal Copyright Convention or to the Paris Convention for the Protection of Industrial Property were invited to follow the discussions of the Group of Experts. The delegations from the following 39 States attended the meeting: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Cuba, Denmark, Egypt, Finland, France, Germany (Federal Republic of), Greece, Hungary, India, Indonesia, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Luxembourg, Netherlands, Nigeria, Norway, Paraguay, Peru, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, Thailand, Tunisia, United Kingdom, United States of America.

5. Observers from six intergovernmental organizations and 26 non-governmental organizations also participated in the meeting.

6. The list of participants is appended to this report (Annex A).

#### II. Opening of the Meeting

7. The meeting was opened by Dr. Arpad Bogsch, Director General of WIPO and, on behalf of the Director-General of Unesco, by Mr. Abderrahmane Amri, who welcomed the participants.

#### III. Election of Officers

8. Mr. André Kerever (France) was unanimously elected Chairman of the meeting, and Messrs. Haidar Mahmoud (Jordan) and Vitaly Troussov (Soviet Union) were unanimously elected as Vice-Chairmen.

#### IV. Documentation

9. The participants had before them a document, established by Mr. Michael S. Keplinger (United States of America) at the request of the Secretariats, entitled “Legal Protection for Computer Programs: A Survey and Analysis of National Legislation and Case Law” (document UNESCO/WIPO/GE/CCS/2).

10. The participants stressed the high quality and comprehensiveness of the document and congratulated Mr. Keplinger and the Secretariats on its preparation.

11. Several participants informed the meeting of developments in legislation or case law concerning the protection of computer programs under the copyright law of their respective countries since the preparation of the document referred to above. That information is contained in Annex B to this report. That document reflects a continuing general tendency to consider computer programs as works protected by copyright.

## V. Discussions

### *Need for Protection*

12. It was agreed that although the title of the meeting uses the expression computer "software," the discussions concerned only computer "programs."

13. The discussions reflected a general recognition of the pressing need for adequate protection of computer programs both nationally and internationally. Some participants stressed that such a protection should encourage the creation of modern technology as well as the international trade of computer programs and should be based on an internationally harmonized approach. Some participants referred to the increase of piracy also in the field of data processing.

14. The participants considered the differences between the protection of computer programs in general on the one hand, and of integrated circuits (semiconductor or microchips), on the other. There was a general agreement that questions of the protection of microchips should be dealt with separately. The participants noted that the Director General of WIPO intended to convene a meeting on the subject in October 1985.

15. Several participants expressed the view that the international copyright conventions protected computer programs and required no amendment to that effect. Other delegations expressed their doubts as to the applicability, with their present content, of those conventions.

### *Applicability of Copyright Law to Computer Programs; Sui Generis Protection of Computer Programs*

16. A great number of participants stated that computer programs were works protected by copyright provided that they were original productions, constituting individual, creative expression of the set of instructions developed in them; they stated that computer programs may be assimilated to literary

works. Some said that the creation of computer programs even had aesthetic aspects. During the last years, relatively few court cases had been decided and, that too, only in a few countries; some cases were still pending; however, whenever judgments had been delivered, they, by and large, confirmed the applicability of copyright.

17. A great number of participants developed arguments in favor of recognizing copyright protection of computer programs; patentability of computer programs *per se* had been ruled out under the law of virtually every country; other possible forms of protection under industrial property law did not grant exclusive rights to the creator of such a program; copyright, in its development, had proved to be flexible enough to extend to works of a technical nature, such as plans. They added that the protection under existing international copyright conventions would promote the production and international circulation of programs without delay, by means of extending the protection granted to national creators of computer programs to nationals of other Contracting States; copyright provided for effective protection not only against reproduction, but also against other forms of uses such as telecommunication (e.g., broadcasting) of the program and allowed, on the other hand, free use of the methods or ideas (algorithms) embodied in the program; the Berne Convention excluded the possibility of introducing compulsory licensing in the case of protected programs. One expert said that the protection of computer programs by copyright also strengthened the protection of traditional types of works when stored in computers.

18. Delegations from countries where computer programs were protected by copyright said that, in general, copyright provided an effective means of protection.

19. Several delegations said that in their countries the possibility of adopting *sui generis* protection was under consideration.

20. Several participants said that the copyright law of their respective countries applied at present, without any amendment, to the protection of programs. Several other participants stressed the importance of introducing special rules adapting copyright protection to particular features of computer programs, or, at least, to make it clear, by means of legislation, that computer programs were works protected by copyright, since case law might change without a clear legislative basis.

21. Some participants raised doubts as regards the applicability of copyright to computer programs. Some said that copyright protection would upset the delicate balance of creators' and users' interests as generally provided for under industrial property laws. Others said that the problem was a political issue, where questions of users' and consumers' protection were involved, and that that issue could not be decided at the technical level. Some participants said that copyright protection did not leave room enough for the regulation of the international circulation (export-import) of computer programs; that computer programs were of a nature other than the traditional kinds of authors' works; that various types of law other than copyright (e.g., trade secrets, contracts, unfair competition, etc.) should apply in combination and should all be considered in developing a *sui generis* system of protection, possibly providing also for registration. Automatic copyright protection would make it more difficult for the beneficiaries to prove the existence of their rights. Some participants considered the term of copyright protection too long and proposed that any computer program in demand should become freely accessible before it ceased to have commercial value. Some participants were of the view that object codes were not suitable for copyright protection since they were not intended for human perception and that it was difficult to state which phase of creating a program called for copyright protection; a program was of dual nature, calling for industrial property protection as to its contents, and for copyright protection as to its source code. They also referred to difficulties resulting from the unclear coverage of copyright protection as regards various uses of the program and had doubts about its efficacy. In their view, the recognition of copyright protection of computer programs would erode the system of protecting traditional forms of authors' works.

22. One delegation said that in its country copyright protection had been extended to computer programs under the understanding that this was a short-term solution and it would be seen later on whether it should prevail in its present form, or should rather be amended by special rules, possibly in the form of a *sui generis* type of protection. Some participants said that in their countries no decision had been taken so far as to whether copyright protection should be adapted to computer programs or whether a *sui generis* system of protection should be elaborated. Some participants emphasized that already available tools of protection were not necessarily the best ones, and one expert said that trying to properly adapt the existing system of copyright protection to computer programs would delay the finding of a possibly better *sui generis* kind of protection.

#### *Questions of the Originality of Computer Programs*

23. One delegation said that in its country a decision of the Supreme Court required a higher degree of originality as regards scientific works than in the case of other works; this might also apply to computer programs. Other participants found that the requirement of originality should apply to computer programs in the same way as it applied to other works protected by copyright and that the criterion of copyright protection should be that the program was not copied totally or substantially from another work; copyright protection applied irrespective of the quality or purpose of the work; in practice, it would be difficult to distinguish between different levels of originality. In the view of some participants, not all programs, and in the view of one participant, about 50 percent of all programs, might not comply with the required level of originality.

24. One expert suggested considering the establishment of a treaty providing for the protection of programs not eligible for copyright protection owing to the lack of sufficient originality; such a treaty should not prejudice copyright protection where it was applicable and should make it a matter for legislation to provide the means of protection for programs not qualifying for copyright protection. Other participants advised caution in dealing with such a plan since it might undermine the efficacy of copyright protection and raise a number of difficulties in qualifying the programs to be protected; references in a treaty to different levels and systems of protection in relation to the same kind of works should be avoided.

#### *Protection Against Various Forms of Use of a Program*

25. Several participants found that it was necessary to clarify that various uses of a program in a computer amount to reproduction. In this connection, one delegation drew the attention to the use of small portions, for minimal duration, of programs in a computer. One delegation said that this did not amount to reproduction, whereas another delegation said that even the use of small portions, for minimal duration, amounted to reproduction. Still another delegation emphasized that any such use was necessarily preceded by a reproduction of the program, unquestionably subject to authorization.

26. One participant emphasized the importance of contracts for the use of programs by means of which certain guarantees of the control over initial entries in a computer and further uses of the program could

be provided for; it was understood, however, that contracts had no effect against third parties.

27. One delegation emphasized the importance of the fact that copyright law also provided for the right of adaptation, which meant that where basic elements of a given program were used for the creation of a new one, the adaptation required the authorization of the creator of the given program.

28. One delegation said that the questions concerning "expert systems" should be considered.

29. One delegation said that it was important to consider also cases of access to programs stored in a central computer memory, enabling the use of the same program by different users.

30. Some participants underlined the importance of considering the usual scope of "fair use" with regard to computer programs and, in particular, the necessity of making an exception to free reproduction for private purposes, where such a limitation of copyright existed, as regards copying of computer programs for private use.

#### *Moral Rights*

31. Some participants said that the protection of the moral rights of the author was important and perfectly applicable in the case of computer programs. Others said that it was difficult in practice. Some participants emphasized that the problem was similar to that of the protection of the moral rights of employee authors in general. Several participants suggested further study of the question.

#### *Term of Protection*

32. Some participants expressed the opinion that the general term of copyright protection might be far too long for computer programs. Some other participants emphasized that only very few programs retained their commercial value over several years but there was no harm in protecting those long-lived programs as long as they can be commercially exploited.

33. One delegation proposed to consider the application of Article 7(4) of the Berne Convention to

computer programs. That Article made it a matter for national legislation to provide for a period of protection — not less than 25 years from the making of the work — as regards works of applied art.

34. One delegation raised the question of making the copyright protection of computer programs subject to reciprocity by applying the so-called "comparison of terms" rule and considering the term of protection as being zero in a country where computer programs were not protected at all.

35. One delegation emphasized that the protection given to creators of computer programs should not be more than the protection given to other authors.

#### *Creation of Programs by More than One Author or by One or More Employee Authors*

36. Some participants referred to difficulties in applying copyright protection to computer programs, owing to the fact that such programs were frequently created by several authors, or by one or more employee authors. Other participants underlined, however, that the problems in question were common with those arising from other kinds of creations made by more than one author or by employee authors.

37. The representative of the ILO pointed out that, while her Organization might not have any competence in relation to the protection of computer programs as such, it was on the other hand responsible for dealing, on the tripartite basis of ILO, with the status of those persons who, within the framework of employment relations, were the originators of the programs. She informed the participants that the ILO would in 1986–1987 be convening a tripartite meeting on salaried authors and inventors, who of course included salaried persons who created computer programs.

#### **VI. Adoption of the Report**

38. This report was unanimously adopted by all participants on March 1, 1985.

## ANNEX A

## List of Participants

## I. Experts

- Mr. Koji Abe  
Professor, Faculty of Law, Okayama University, Member of the Copyright Council, Okayama—City
- Mr. Miguel Teixeira de Carvalho  
Subsecretario Industrial, Secretaria Especial de Informatica, Brasilia
- Mr. Mihály Ficsor  
Director General, Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), Budapest
- Mr. Guo Shoukang  
Professor, People's University of China, Beijing
- Mr. Michael S. Keplinger  
Attorney, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.
- Mr. Subhash Chandra Mehta  
Principal Scientific Officer, Electronics Commission, Department of Electronics, New Delhi
- Mr. Wilhelm Nordemann  
Copyright Expert, Professor of Law, Free University, Berlin (West)
- Mrs. Natalia Ivanovna Razina  
Chief, Legislation Division, Legal Department, The Copyright Agency of the USSR (VAAP), Moscow
- Sra. Hilda Retondo  
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## II. States

## Argentina

- Mr. Roberto Villambrosa  
First Secretary, Permanent Mission of Argentina, Geneva

## Australia

- Ms. Lauren Gay Honcope  
Acting Principal Legal Officer, Attorney General's Department, Robert Garran Offices, Barton

## Belgium

- Mr. Jean M. Poswick  
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- Mr. Guy Vandenberghe  
Professor, Management School, University of Gent; Computer/Law Institute, Free University of Amsterdam; repr. Ministry of Economic Affairs, Brussels

## Brazil

- Sr. Manoel Pereira Dos Santos  
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- Sra. Regina Gasparly Torres  
Sociedad de Usuarios de Computadores y Equipamentos Integredos (SUCESU), Saõ Paulo

- Mr. Paulo Franca  
Secretary, Permanent Mission of Brazil, Geneva

## Bulgaria

- Mr. Ozlin Delev  
Second Secretary, Permanent Mission of Bulgaria, Geneva

## Canada

- Mr. Howard Knopf  
Policy Analyst, Department of Consumer and Corporate Affairs, Ottawa

- Mr. Ross Hornby  
Third Secretary, Permanent Mission of Canada, Geneva

## Chile

- Sr. Jorge Bustos  
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- Sr. Eduardo Ruiz  
Primer Secretario, Misión Permanente de Chile, Ginebra

## Colombia

- Sr. Jorge Phillips  
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- Sr. Fernando Jordan  
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## Denmark

- Mr. Johannes Norup-Nielsen  
Legal Adviser, Ministry of Cultural Affairs, Copenhagen

- Mr. Mogens Koktvedgaard  
Professor, University of Copenhagen, Copenhagen

## Egypt

- Mrs. Olfat H. Abdel-Rahjm  
Manager, Publishing Department, The General Egyptian Book Organization (GEBO), Cairo

- Mr. Wafik Zaher Kamil  
Counsellor, Permanent Mission of the Arab Republic of Egypt, Geneva

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- Mr. Jukka Lieder  
Special Adviser, Ministry of Education, Helsinki
- Ms. Satu Lahtinen  
Governmental Secretary, Ministry of Education, Helsinki
- Mr. Auvo K. Sarmanto  
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**France**

- M. André Kerever  
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- M. Jean Jonquères  
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- M. Pierre Leclercq  
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- Mrs. Margret Möller  
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- Dr. Erich Haeusser  
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**India**

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**Indonesia**

- Ms. Raziaty Tanzil  
Third Secretary, Permanent Mission of Indonesia, Geneva

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- Mrs. Anne Coleman-Dunne  
Copyright Division, Patents Office, Department of Industry, Trade, Commerce and Tourism, Dublin

**Israel**

- Mr. Michael Ophir  
Deputy Commissioner of Patents, Patent Office, Ministry of Justice, Jerusalem
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- S.E. M. Gian Luigi Milesi-Ferretti  
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- Mr. Yukifusa Oyama  
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- Mr. Hideki Ogawa  
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- Mr. Akitoshi Inoue  
Deputy Director, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo
- Mr. Hiromi Sato  
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- Mr. Shinjiro Ono  
First Secretary, Permanent Mission of Japan, Geneva
- Mr. Koichi Sakamoto  
First Secretary, Permanent Mission of Japan, Geneva
- Mr. Kazuro Fujimoto  
Former President, Japan Software Industry Association, Tokyo

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Mr. Roland Halvorsen  
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Mr. Bengt Gamstorp  
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M. Tahar Ben Slama  
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**United States of America**

Mr. Michael Kane Kirk  
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Mr. Harvey J. Winter  
Director, Office of Business Practices, Bureau of Economic and Business Affairs, Department of State, Washington, D.C.

Mr. Christopher Meyer  
Senior Attorney, Policy Planning Advisor, Copyright Office, Library of Congress, Washington, D.C.

Miss Francine Schulberg  
Trade Analyst, Office of the United States Trade Representative, Washington, D.C.

### III. Observers

#### (a) Intergovernmental Organizations

United Nations (UN): E. Stauder. International Labour Organisation (ILO): C. Privat. Arab League Educational, Cultural and Scientific Organization (ALECSO): T. Gsouri. Commission of the European Communities (CEC): R.J. Coleman; J. Delmoly; E. Peeters; B. Posner. Council of the European Communities (CEC): K. Mellor. Intergovernmental Bureau for Informatics (IBI): G. Librando.

#### (b) Non-Governmental Organizations

Association of Data Processing Service Organizations (AD-APSO): R.J. Palenski. Committee of National Institutes of Patent Agents (CNIPA): J.U. Neukom; J. Betten. Computer and Business Equipment Manufacturers Association (CBEMA): O.R. Smoot. Computer Law Association (CLA): S.H. Nycum. Council of European Industry Federations (CEIF): M. Kindermann. European Computer Manufacturers Association (ECMA): R. Ernst. European Computing Services Association (ECSA): P. Walti. European Federation of Agents of Industry in Industrial Property (FEMIP): G. Hommery. Information Industry Association (IIA): G. Hauptman. Inter-American Copyright Institute (IIDA): M.J. Pereira Dos Santos. International Association for the Protection of Industrial Property (IAPIP): T. Mollet-Vieville. International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM): D. de Freitas. International Chamber of Commerce (ICC): J.M.W. Buraas; S. Vidal-Naquet. International Confederation of Free Trade Unions (ICFTU): D. Cockroft. International Confederation of Societies of Authors and Composers (CISAC): D. de Freitas. International Copyright Society (INTERGU): G. Halla. International Federation of Film Produc-

ers Associations (FIAPF): A. Brisson. International Federation of Industrial Property Attorneys (FICPI): T. Jennings; H. Bardehle. International Federation of Phonogram and Videogram Producers (IFPI): B. von Silva Tarouca-Wagner. International Group of Scientific, Technical and Medical Publishers (STM): P.N. Asser. International Literary and Artistic Association (ALAI): A. Troller. International Publishers Association (IPA): J.-A. Koutchoumow; C. Clark. Latin-American Federation of Performers (FLAIE): A. Millé; M.J. Pochat. Pacific Industrial Property Association (PIPA): G. Hauptman; S. Ozawa. Union of European Practitioners in Industrial Property (UEPIP): J. Betten. Union of Industries of the European Community (UNICE): R.J. Hart; G. Kretschmar; M. Kindermann.

### IV. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

A. Amri (*Senior Lawyer, Copyright Division*).

World Intellectual Property Organization (WIPO)

A. Bogisch (*Director General*); C. Masouyé (*Director, Public Information and Copyright Department*); G. Boytha (*Director, Copyright Law Division*); L. Baeumer (*Director, Industrial Property Division*).

Consultant

Mr. M.S. Keplinger

Attorney, Office of Legislation and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

## ANNEX B

### Legal Protection for Computer Programs: A Survey and Analysis of National Legislation and Case Law

#### Introduction

1. During the discussions of the Group of Experts, a number of participants provided information with respect to legal developments in their countries in order to update the survey contained in document UNESCO/WIPO/GE/CCS/2.

2. The present Annex contains the said information.

#### Argentina

3. In Argentina, the National Directorate of Copyright has started to register computer programs following a pattern provided by national doctrine. There has been a court ruling based on the protection principles of the Universal Copyright Convention. The dispute, which is now pending before the courts, could be of considerable interest. In the

legislative field, a report is being drawn up by a commission recently created for the purpose.

#### Australia

4. Further studies will be undertaken as part of an enquiry which will look into particular problems and additional developments at the international level. Four points will be taken into account by the enquiry even though the final terms of reference are not yet set:

- a) international developments;
- b) use of computer programs should be encouraged;
- c) certain features of copyright law tailored to the fine arts may not necessarily be applicable to computer programs;
- d) the solution adopted must balance the needs of producers and users.

### Brazil

5. Brazil adopts the view that *sui generis* legislation is appropriate for computer programs. There are no final court decisions; some cases have been settled while some are still pending. The Brazilian Copyright Council, the Special Secretariat for Informatics and the National Institute of Industrial Property all favor *sui generis* legislation.

6. A bill to protect computer programs under a *sui generis* system was introduced in the last session of the Brazilian Congress and more legislative activity is predicted in the new Congress.

### Canada

7. There have been additional court cases in Canada interpreting the application of copyright in the context of preliminary injunction hearings. In two of these cases *La Société d'informatique R.O.G., Inc. v. Dynabec, Ltee.*, Superior Court of Quebec, District of Montreal No. 500-05-008597-849, August 14, 1984, and the *F & I Retail Systems, Ltd. v. Thermo-Guard Automotive Products Canada, Ltd.*, High Court (i.e. Trial Division) of Supreme Court of Ontario, June 26, 1984 (Court No. 17357-84/L7357-84), the courts granted the plaintiffs injunctive relief against further infringements by the defendants.

8. However, in the case of *Apple Computer Inc. v. Macintosh Computers, Ltd.*, No. T-1232-84, January 17, 1985, the Federal Court of Canada in Toronto refused a similar plea for injunctive relief on the ground that there were triable issues involving program copyright even though the plaintiff's allegations of copyright in the AUTOSTART and APPLESOFT programs were sufficient to constitute a *prima facie* case as to the copyrightability of the source programs. Moreover, irreparable harm sufficient to grant an injunction had not been sufficiently proven under the circumstances.

9. Following the election on September 5, 1984, the proposals in the "White Paper" on copyright released on May 2, 1984, are no longer official government policy. On January 24, 1985, however, the new Government referred the White Paper to the Parliamentary Standing Committee in Communications and Culture of the House of Commons for study and recommendations. The Committee has been requested to report by May 25, 1985. The Canadian Government is closely studying alternatives to the White Paper proposals on computer programs. These include the possible option of providing essentially traditional copyright protection to computer programs as literary works.

### China

10. In China, the protection of the patent law is not denied to computer programs and the situation with respect to copyright and *sui generis* protection is under study. As a practical matter, programs can be protected by contracts in China.

### Denmark

11. The present position is that the copyright law protects computer programs, but clarifying amendments to the copyright law are planned.

### Finland

12. At present there is no case law in Finland, but, in view of the importance attached to this problem, the Government intends to modify its copyright law to remove any doubt that copyright applies to computer programs.

### France

13. In France, the Supreme Court will shortly be ruling on contradictory decisions handed down by lower courts which concern not only the problem of computer programs protection in itself, but also that of screen video games, from the point of view of copyright.

### Germany (Federal Republic of)

14. Further jurisprudential developments were noted in the discussions. In particular, it was mentioned that, in the Karlsruhe appeals court decision, the court stated that, while programs could be protected by copyright, a special protection system might be more appropriate.

15. In a recent decision, a federal supreme court held that in the case of technical specifications for soliciting bids on the construction of a pipeline, the standard of originality to qualify the work for copyright protection is to be shown solely in the outward appearance of the work and not in its scientific content. This principle may put certain programs outside copyright. However, as the copyright law in the Federal Republic of Germany also protects "*kleine Münze*" or "small change," that is to say, works of lesser intellectual content as well as more substantial works, the federal supreme court may apply this principle to computer programs. It should also be noted that the decision of the Federal Labor Court cited in paragraph 35 of UNESCO/WIPO/GE/CCS/2 is the decision of a federal supreme court.

16. A recent case in the Frankfurt Court of Appeals also held that programs are protected by copyright in the Federal Republic. Four tests to determine if a particular work was protected were set forth:

- (a) the work must be more than a simple program;
- (b) the author is free to choose from among different ways of expressing the program;
- (c) the program is not generally common or ordinarily used; and
- (d) the work exhibits qualities of selection and arrangement.

17. In the Federal Republic, legislation is in Parliament in order to affirm that computer programs are to be considered a type of linguistic work to the extent that they qualify as personal intellectual creations. Programs would not be subject to the private copying exception of the copyright law of the Federal Republic of Germany.

### Greece

18. Greece is considering a non-exclusive, *sui generis* form of protection for computer programs which is to be based on industrial property principles.

### India

19. In India, the bill mentioned in paragraph 39 of UNESCO/WIPO/GE/CCS/2 has passed the Parliament. The amendment has since been issued.

### Ireland

20. In Ireland, the present copyright law protects all forms and types of computer programs as literary works. No amendment of the law is contemplated.

### Israel

21. Patent protection was granted by the Commissioner of Patents for a system as a whole which, in part, implemented a computer program. On the specific facts in that case, the system was considered to fulfill the statutory requirements of novelty and non-obviousness. The decision has not been overruled and is felt, therefore, to reflect the present position. Where, however, the very basis of the invention lay in the computer program itself, patent protection has been denied by the Commissioner of Patents, which denial was upheld by the District Court. In the absence of a supreme court ruling, the judgment of the court establishes the present position.

22. A case is presently awaiting the judgment of the District Court on the applicability of the Israel copyright law to computer programs. It is felt, in general, that computer programs are protected under the present copyright law. A Copyright Law Revision Committee appointed by the Minister of Justice has yet to consider all aspects as to copyright protection of computer programs.

### Japan

23. It was clarified that the *Report on Japanese Legal Protection of Software* discussed at paragraphs 48 through 51 of UNESCO/WIPO/GE/CCS/2 was a survey of existing legal protection, and, as such, it did not deal with the possible establishment of new *sui generis* systems of protection. A new document setting forth the present status of the proposals of the Agency for Cultural Affairs and the Ministry of International Trade and Industry was circulated, copy of which is appended to this Annex in its original language (English). On January 13, 1985, for the first time in a criminal case, the Tokyo District Court found the criminal law applicable to copyright infringement in computer programs.

### Netherlands

24. The question of the protection of computer programs has recently been studied by a government working group. In August 1984, this working group issued its report on piracy of copyright protected works in which it proposed to mention explicitly, as a clarification, computer programs in Article 10 of the Copyright Act as works susceptible of copyright protection. The Government of the Netherlands will soon make known its official point of view with regard to the proposals of the working group.

### Norway

25. In Norway, the current copyright legislation is applicable to the protection of programs. Specific amendments tailored to program protection are in progress.

### Spain

26. In the forthcoming intellectual property law which is being drawn up at this time, Spain is considering the adoption of copyright protection of computer programs.

### Sweden

27. In Sweden, there are no cases in the courts dealing with program copyright. However, revisions to the copyright law that would clarify that computer programs are literary works are under active consideration. Under the contemplated amendments programs in both source and object forms will be protected. Programs that do not meet the test of originality would fall under the coverage of the special 10-year protection afforded to certain collections of information.

### Union of Soviet Socialist Republics

28. In the USSR, interpretive rulings on the patent laws expressly exclude programs from patent protection, and the copyright law does not specifically include computer programs. The USSR is considering the adoption of a *sui generis* system for computer programs protection preferably on the basis of the use of some principles, included in the WIPO model provisions.

### United Kingdom

29. In the United Kingdom, a private member's bill, the Copyright (Computer Software) Amendment Bill is supported by the Government. The Bill would provide that all original programs will be protected by copyright in the same manner as literary works, that the preparation of an adaptation of the program without the authorization of the author would be an infringement, and that the enhanced penalties applicable to the illegal manufacture of and trading in infringing audio and video recordings would apply to computer programs embodied in a disc, tape, chip or any similar device, as would the increased powers to pursue investigations.

## APPENDIX TO ANNEX B

**Present Condition in Japan**

With regard to the question of legal protection of computer programs, discussion has been going on among the government agencies concerned and the conclusion is yet to be reached.

The Government of Japan considers it necessary to further coordinate views of the government agencies taking into account the balance between the interests of software developers and users, as well as the need of international harmonization.

**Main points of the Draft Bill prepared by  
the Agency for Cultural Affairs  
for a partial amendment of the Copyright Law**

On the recommendations given by the Interim Report of the Subcommittee of the Copyright Council, the Agency for Cultural Affairs intends to amend the present Copyright Law along the following lines:

1. *Clarification of protection of programs*

It is clear that computer programs constitute intellectual works protected under the present Copyright Law, but in order to make this more explicit, "works of computer programs" should be expressly mentioned in the provisions for examples of protected works listing literary works, musical works, artistic works, etc., and a computer program should be defined in the provisions for definition as "a set of instructions capable of causing a computer ("computer" means an electric machine having information processing capabilities) to perform a particular function."

2. *Modification of the provisions for works of legal persons*

In order to cope effectively with the actual situation of the production of computer programs by legal persons, the existing provisions should be modified to the effect that the authorship of a work which, on the initiative of an employer, is made by his employee in the course of his duties shall be attributed to such employer, unless otherwise stipulated in a contract, work regulation or the like. Under this modification, the authorship of a computer program produced by an employee shall be attributed to his employer, not only in case where such program is made public under the name of the employer but also in case where such program is made public anonymously or where it is not made public.

3. *Exception to the right to the integrity*

The use of computer programs generally requires a certain degree of modification, addition or reduction, but this does not result in any prejudice to the honor or reputation of the producers of computer programs. Therefore, a new

provision should be made for an exception to the right of reserving the integrity in case of such modifications of computer programs as are necessary to meet the purpose of using programs or to improve the functions of programs.

4. *Exception to the right of reproduction, etc. for lawful possessor*

New provisions should be made for an exception to the right of reproduction and of adaptation in order to enable the lawful possessor of a copy of a computer program to make another copy or adaptation of that program in such cases as are necessary to provide against destruction, damage or deterioration of that copy.

5. *Control over the use of programs produced by an infringing act*

In order to prevent the use in a computer of illegally reproduced programs, a new provision should be made to the effect that an act of knowingly using in a computer such objects as made by an act infringing copyright in a work of computer program shall be considered to constitute an infringement on copyright.

6. *Other points*

(1) *Period of protection*

If computer programs are granted the same period of protection of the life of the author plus 50 years as that granted to other protected works, this does not involve any difficulty. Some programs having a long life span should be protected so long as they maintain utility value and, therefore, unless the international copyright conventions are modified, the present period of protection should be applied to computer programs as well.

(2) *The right of use*

If the right of use be generally recognized, this would be an obstacle to the distribution and utilization of computer programs in case where such right is not cleared. Therefore, such right should not be created. Last year, the present Copyright Law was partially amended to create the right of lending which is in force from January 1 this year. Therefore, it is possible to exercise the right of reproduction and of lending against illegal uses, and the use of illegally reproduced programs can be prevented by the new provision mentioned under paragraph 5 above.

(3) *Compulsory licensing system*

Compulsory licensing system of a general nature should not be introduced, because it would prejudice the legitimate interest of the producers of programs, it would result in declining the desire to develop new programs and, moreover, it is difficult to introduce such system under the present copyright conventions.

**Explanatory Notes on the Interim Report\*  
of the Information Industries Committee  
of the Industrial Structure Council  
(The Ministry of International Trade  
and Industry, Japan)**

1. The proposal of this Interim Report consists of two categories of contents: one that is similar to the concept of the present Japanese Copyright Law, and another which is intended to correct the inadequacies of the same Copyright Law.

2. The following concepts are similar to those contained in the present Copyright Law:

- (a) that non-Japanese as well as Japanese copyright holders should be protected without discrimination;
- (b) that "ideas" shall not be protected;
- (c) that programs that may in effect resemble existing programs should be protected so long as they were independently developed; and
- (d) that the genesis itself of program rights does not require registration.

3. The following points differ from the concept of the present Copyright Law:

*(1) Establishment of the right of use*

This is a right of the developer of a new program.

A program has the inherent danger of duplication without due permission. Possession of a computer is usually a sufficient means of duplicating an existing program. Moreover, it is exceedingly difficult to prove who has duplicated a program without permission. This makes it necessary to give the developer of a program the right (here called "the right of use") to request issuance of injunction to and damage compensation from, anyone who is using the developer's program without permission.

*(2) Establishment of the right of rental*

Like other countries, Japan has recently experienced a rapid increase in the number of people whose business is to rent computer software. This makes it necessary to establish the right of the developer to prohibit a third party from renting the developer's programs without his permission. (This right will be here called "the right of rental.")

*(3) The decision not to provide for moral rights*

Japan is a signatory of the Berne Convention. The Berne Convention treats so-called moral rights as central to the author's rights. Moral rights are defined as the copy-

right holder's inalienable rights which prohibit modification without permission of his work, and which enable the copyright holder to have his name appear on his work as the author, even after the proprietary rights have been transferred.

It has been determined that in the case of computer programs it is not necessary to allow for these particular rights, and that, further, allowing for these rights would only confuse business transactions.

*(4) Procedure for the settlement of disputes*

The Japanese Constitution requires that trials be conducted publicly. This means that bringing a case to court might at times mean making "source programs" public. At the same time, a dispute involving computer programs often requires a professional and prompt resolution. For this reason it has been deemed necessary to establish a procedure in which a team of legal and technical professionals may be asked to intervene by way of mediation, arbitration or conciliation, when such procedure is favored by the parties involved.

*(5) Duration of rights*

What is the proper period of protection for computer programs? Basically, this period should be equal to the length of time that the program developer requires to recover his investment and secure an appropriate amount of profits on his program. From this standpoint, the period of protection lasting from 50 to 75 years that is provided for in the copyright laws of some countries is too long. If the period of patent right protection had been set at 50 to 75 years, the kind of advancements we have experienced in science and technology might not have been achieved.

The Universal Copyright Convention provides for a 10-year protection period for published "applied arts" as an exception to the 25-year protection period for general work. We consider that it is contradictory to propose a lengthy protection period for economic properties such as computer programs.

We feel nevertheless that Japan alone should not set a brief protection period for computer programs, and that the question of a protection period should be thoroughly discussed by the countries involved, so that a shorter protection period may be established through cooperation and understanding.

*(6) Registration*

Registration is needed to clarify which individual is entitled to program rights. However, it is advisable to effect it as a voluntary system. Specific registration procedures suited to computer programs will have to be devised.

\* This Interim Report was published in December 1983.

## National Legislation

### CENTRAL AFRICAN REPUBLIC

#### Ordinance No. 85 002 on Copyright

(of January 5, 1985)\*

#### CHAPTER I

##### Subject, Scope and Beneficiaries of Copyright

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

The following, in particular, shall be deemed works of the mind within the meaning of this Ordinance:

- books, pamphlets and other writings;
- lectures, addresses, sermons and other works of such nature;
- works created for the stage, 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;
- musical works, whether or not they are in written form and whether or not they include accompanying words;
- works of painting and drawing, lithographies, etchings or wood engravings and other works of like nature;
- sculptures, bas-reliefs and mosaics of all kinds;
- works of architecture, including both plans and models as well as the construction itself;
- tapestries and objects created by artists and craftsmen, including both sketches or models as well as the work itself; whether produced by handicraft or by industrial process;

- maps, drawings and graphical and three-dimensional reproductions of an artistic or scientific nature;
- cinematographic, broadcast and audiovisual works;
- photographic works of an artistic or documentary nature, to which shall be assimilated, for the purposes of this Ordinance, those expressed by a process analogous to photography;
- derived works such as translations, arrangements or adaptations of the above-mentioned works;
- works of Central African folklore and works inspired by that folklore.

*Article 2.* 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 decide to disclose his work, to respect for his name, his authorship and his work.

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, except where the work is included incidentally or accidentally when reporting current events by means of sound broadcasting or television.

The author shall have the right to object to any distortion, mutilation or modification of his work or of any other derogatory action in relation to that work, where such action has been or would be prejudicial to his honor or his reputation. The author shall further have the right to seek relief in respect of such action.

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

*Source:* Communication from the Centre African authorities. — WIPO translation.

\* *Entry into force:* January 5, 1985.

## B. ECONOMIC RIGHTS

The author shall enjoy the exclusive right to exploit his work in any form whatsoever and to obtain monetary profit therefrom. The work shall mean both the work in its original form and in any form derived from the original.

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

- (a) reproduce the work in any material form whatsoever, including cinematographic films, phonograms or by means of a magnetic process or by the repeated execution of a plan or of a model project;
- (b) perform or recite the work in public by any means or process whatsoever, including sound or television broadcasting;
- (c) communicate the work broadcast by sound radio or television to the public by wire, loudspeaker or any other device for transmitting signs, sounds or images;
- (d) make a translation, adaptation, arrangement or any transformation whatsoever of the work.

*Article 3.* 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 4.* 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's concept being realized, even incompletely.

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

Where the work has been created by the author for a natural person or a legal person, private or public, under an employment contract or where the work has been commissioned from the author by a third person, authorship shall belong to the author, unless otherwise stipulated in writing in the contract.

However,

(a) Where the work has been produced by staff of the administration, within the framework of their functions, the royalties deriving from disclosure of the work may be distributed in accordance with the special regulations of the administration employing them.

(b) The royalties 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 pre-existing elements.

Work of collaboration shall mean a work produced jointly by two or more authors insofar as the contribution of each author may be separated from that of the other author or authors.

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

A new work shall be known as "composite" if a preexisting work has been incorporated in it without the collaboration of the author of the preexisting work.

A work shall be known as "collective" if it has been 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 have 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.

*Article 6.* A work of collaboration shall belong jointly to the co-authors. The co-authors shall exercise their rights by common accord, failing which the courts shall decide. Where the contribution of each of the co-authors is of a different kind, each shall be entitled, in the absence of agreement to the contrary, to exploit separately his personal contribution without, however, prejudicing the exploitation of the common work.

A composite work shall belong to the author who has created it, subject to the rights of the author of the preexisting work.

A collective work shall belong to the natural or legal person who has taken the initiative of its creation and who has disclosed it.

*Article 7.* The authors of pseudonymous and anonymous works shall enjoy therein the rights afforded by Article 2.

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 8.* The authors of translations, arrangements, adaptations or transformations of literary, artistic or scientific works shall enjoy the protection established by this Ordinance, without prejudice to the rights of the author of the original work as defined in Article 2.

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

*Article 9.* Folklore shall belong *ab origine* to the national heritage.

Folklore shall mean all the literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage.

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

The public performance or the direct or indirect fixation of folklore with a view to exploitation for profit shall require prior authorization from the Central African Copyright Office against payment of a fee.

The fees due in connection with the collection for a work of folklore shall be distributed as follows:

- (1) Collection without arrangement or personal contribution
  - 50% to the person who has made the collection
  - 50% to the Central African Copyright Office.
- (2) Collection with arrangement or adaptation
  - 75% to the author
  - 25% to the Central African Copyright Office.

The proceeds of fees shall be administered by the Central African Copyright Office and be devoted to cultural and welfare purposes for the benefit of authors.

## CHAPTER II

### Permanent Limitation

*Article 10.* The protection afforded by Article 2 shall not apply to:

- laws, judicial or administrative decisions, or to the official translations of such texts;

- news of the day published, broadcast by sound radio or television or communicated in public.

*Article 11.* Where a work has been made lawfully available to the public, the author may not prohibit:

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

if they are private, or carried out exclusively within the family circle, and give rise to no form of revenue;

if they are carried out free of charge for strictly educational or school purposes or during a religious service on premises reserved for that purpose.

(2) Reproductions, translations and adaptations intended for strictly private use on condition that the title of the work and the name of the author be clearly stated.

However, the organizers of the communications referred to above shall be required to inform the author or his successors in title or the Central African Copyright Office in advance thereof.

*Article 12.* 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 made available to the public, on condition that they comply with fair practice, to the extent justified by the scientific, critical, teaching or information purpose, including quotations and borrowings from newspaper articles and periodicals in the form of press reviews.

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

*Article 13.* Save where the right of reproduction has been expressly reserved, political, social, economic or religious articles of current affairs, political speeches, speeches given during judicial ceremonies and also sermons, lectures, addresses and other works of like nature may be reproduced. However, the source shall always be clearly stated.

*Article 14.* 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: reproduction and public communication of literary, artistic or scientific works that may be seen or heard during such events.

*Article 15.* Reproduction with a view to cinematography, sound or television broadcasting or 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 16.* Notwithstanding the provisions of Article 2, any broadcasting organization may make, without the authorization of the author or of the owner of the right of reproduction in the work concerned, for the purposes of its own broadcasts and by means of its own facilities, an ephemeral recording, in one or more copies, of any work which it is authorized to broadcast. All copies of it shall be destroyed within six months of the making or within any longer term agreed to by the author; however, where such recording has an exceptional documentary character, one copy of it may be preserved in official archives.

*Article 17.* Translation 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 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 2 shall remain applicable in all such cases.

### CHAPTER III

#### Exceptional Limitations

*Article 19.* Subject to and in compliance with the conditions laid down in the annex, licenses may be granted by the competent administrative authority to any natural or legal person of Central African nationality for the translation of foreign works already lawfully made available to the public and for the publication of the works thus translated in printed form or in any other similar form of reproduction on the territory of the Central African Republic.

However, such licenses may not be granted for the publication of literary or scientific works of which an edition in the French language is available abroad unless such publication on the territory of the Central African Republic provides economic conditions that are advantageous for the desired dissemination.

*Article 20.* The cases laid down in this Chapter shall not prejudice the rights afforded to authors by Article 2. In addition, the author shall be entitled to equitable remuneration laid down, failing amicable agreement, by the competent administrative authority, whose decision may be referred, in the event of dispute, to the competent court in accordance with Article 41.

### CHAPTER IV

#### Transfer of Copyright

*Article 21.* The authors' rights shall be movable; they shall be transmitted by succession to the authors' heirs or to his successors in title. They may also be assigned in whole or in part.

The assignment in whole of future works shall be null and void. However, it shall be lawful to conclude contracts to commission three-dimensional or graphical works, comprising a period of exclusivity not exceeding five years and respecting the independence and freedom of expression of the author.

The transfer of any of the rights referred to in Article 2 shall be recorded in writing.

The economic rights of an author without heirs shall fall to the Central African Copyright Office and the proceeds of royalties therefrom shall be devoted to cultural and welfare purposes, without prejudice to the rights of creditors and the implementation of any assignment contracts concluded by the author or his successors in title.

*Article 22.* Assignment of the right to communicate a work to the public shall not imply assignment of the right to reproduce it.

Assignment of the right to reproduce a work shall not imply assignment of the right to communicate it to the public.

Where a contract comprises total assignment of either of the rights referred to in this Article, its scope shall be limited to the uses laid down in the contract.

*Article 23.* The transfer of the sole copy or of one or more copies of a work shall not imply transfer of the copyright in the work.

*Article 24.* Unless otherwise provided, authorization to broadcast a work shall cover all free communications made by the sound broadcasting or television organization by its own means and under its own responsibility.

In accordance with Article 2, this authorization shall not extend to any communication of broadcasts made in public places nor to any transmissions

by wire or by wireless means made by third parties.

*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 share for the author in the revenue from sale or exploitation of the work.

However, remuneration may be a lump sum where:

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

*Article 26.* Notwithstanding any assignment of the original work, the authors of graphical or three-dimensional works and the authors of manuscripts shall have an inalienable right to a share in the proceeds of sale of such works or of such manuscript by public auction or through a dealer, whatever the methods used by the latter to carry out the operation.

This provision shall not apply to works of architecture or works of applied art.

After the death of the author, this *droit de suite* shall subsist in favor of his heirs during the term of protection laid down in this Ordinance.

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

## CHAPTER V

### Cinematographic and Broadcast Works

*Article 27.* Authors' rights in a cinematographic work shall belong *ab origine* to the intellectual creators of the work.

The natural or legal person who takes the initiative for making the work and the financial responsibility for exploiting it, known as 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 such work.

These contracts, except for those concluded with the authors of preexisting works used in making the work and those concluded with the authors of musical compositions with or without words, shall com-

prise, except where otherwise stipulated, assignment to the producer of the author's rights of cinematographic exploitation of the work; such contracts shall be in writing.

*Article 28.* The natural person who assumes the artistic direction and responsibility for the transformation of a cinematographic work 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 persons collaborating in 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 persons collaborating in a cinematographic work may dispose freely of their personal contribution with a view to 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 person or persons who have effected the intellectual creation of a cinematographic or a television work shall be deemed to be the authors of such work.

The provisions of Articles 26 and 27 shall apply to sound radio and television works.

## CHAPTER VI

### Publishing Contracts

*Article 31.* 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 copies of the work on condition that the latter ensures publication and dissemination thereof.

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

*Article 32.* 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 23 of this Ordinance.

*Article 33.* The publisher may not transfer the benefits of a 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 or of his successors in title.

*Article 34.* Contracts referred to as “at the author’s expense” shall not constitute publishing contracts within the meaning of Article 29.

Under such contracts, the author or his successors in title shall pay to the publisher an agreed remuneration against which the latter manufactures a 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.

*Article 35.* Contracts referred to as “at joint expense” shall not constitute publishing contracts within the meaning of Article 29.

Under such contracts, the author or his successors in title commission a publisher to manufacture, at his expense and in quantity, 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.

*Article 36.* The publisher shall be required to provide to the author appropriate proof to establish the accuracy of his accounts, failing which he may be obliged to do so by the competent court.

## CHAPTER VII

### Performance Contracts

*Article 37.* A performance contract is a contract under which an author or the Central African Copyright Office affords to a natural or legal person or to an entertainment promoter the faculty of performing his works or the works comprised in the repertoire of that body under conditions that he lays down.

A “general performance contract” is a contract under which the Central African 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.

*Article 38.* A performance contract shall be in writing; it shall be concluded for a given term or number of communications to the public. The exclusive rights, the terms of execution and the termination clauses shall be stipulated in the contract.

*Article 39.* The entertainment promoter shall be required to inform the author or his representatives of the exact program of public performances, to furnish to them a documented statement of receipts and to pay to them the amount of the stipulated royalties.

He shall ensure that the public performance takes place under technical conditions such as to guarantee the intellectual and moral rights of the author.

## CHAPTER VIII

### Term of Protection

*Article 40.* Copyright shall last for the whole lifetime of the author and for 50 calendar years after the end of the year of his death, with the exception of:

- (1) cinematographic, sound radio and audiovisual works for which the term of protection expires 50 years after the work has been made available to the public following the consent of the author, or, failing such an event, within 50 years from the making of such a work, the term shall expire 50 years after the making;
- (2) photographic works and works of applied art for which the term of protection shall expire 20 years after the work has been made.

In the case of works of joint authorship, only the death of the last surviving joint author shall be taken into account when calculating the term.

*Article 41.* Copyright shall expire at the end of a period of 50 years as from the end of the year in which the work has been lawfully made available to the public in the following cases:

- (1) where the copyright belongs *ab origine* to a legal person, with the exception of the State’s imprescriptible right in works of folklore;
- (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 42.* On expiry of the terms of protection referred to Articles 40 and 41, during which authors, their heirs or successors in title, are afforded an exclusive right, exploitation of works of folklore shall be subject to the person exploiting them entering into a commitment to pay to the Central African Copyright Office a fee calculated on the basis of the gross proceeds of exploitation.

This fee shall be equal to one half the rate of remuneration normally afforded to authors of protected works.

The proceeds of the fees collected under this Article shall be devoted to welfare or cultural purposes for the benefit of authors and composers who are registered with the Central African Copyright Office.

## CHAPTER IX

### Procedures and Sanctions

*Article 43.* Notwithstanding the right of the injured party to take action, as appropriate, before the penal courts, all disputes arising from application of this Ordinance shall be heard by the civil courts.

The Central African Copyright Office shall be entitled to take legal action to defend the 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 right owners belonging to that Office.

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

*Article 44.* Any publication, reproduction, performance or dissemination by any means whatsoever, or any importation into the territory of the Central African Republic of a work protected by this Ordinance in violation of the author's rights, shall constitute an act of infringement as defined and sanctioned by the law.

*Article 45.* Confiscation of all equipment specially installed with a view to unlawful reproduction and of all infringing copies and articles will be ordered.

*Article 46.* Exploitation of a work of folklore without prior authorization shall constitute an offense of the fifth category.

## CHAPTER X

### Field of Application of this Ordinance

*Article 47.* The provisions of this Ordinance shall apply to all works, with the exception of works of folklore, that are not within the public domain at the time of its entry into force.

Contracts concluded prior to its entry into force shall be governed by these provisions as of that date.

*Article 48.* This Ordinance shall apply:

- (a) to the works of Central African nationals;
- (b) to the works of foreign nationals first published in the Central African Republic;
- (c) to works of architecture erected on the territory of the Central African Republic 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 Ordinance 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 Central African nationals. However, neither the integrity nor the authorship of those works shall be affected. The royalties collected in respect of those works shall be paid into the welfare and cultural fund of the Central African Copyright Office.

The countries in respect of which the condition of reciprocity stipulated in the second paragraph shall be deemed to have been met will be jointly determined by the Minister for Foreign Affairs and the High Commissioner responsible for Information, Youth, Sport, the Arts and Culture.

*Article 49.* The administration of the rights referred to in Article 2 and the defense of the interests referred to in that same Article shall be entrusted to the Central African Copyright Office.

*Article 50.* The terms of the constitution and operation of that Office shall be laid down by decree.

*Article 51.* This Ordinance, which repeals all earlier contrary provisions and which shall enter into force from the date of its signature, will be registered and published in the Official Journal under the emergency procedure. It shall be implemented as a law of the State.

## Correspondence

### Letter from the Netherlands

D.W. Feer VERKADE\*

With this correspondence I continue my "Letter from the Netherlands" published in *Copyright*, 1981, pages 176 *et seq.* Many developments reported at that time have continued and this "Letter" will in some respects constitute a "serial story." Thus, for the non-Dutch reader it may be helpful to follow my references to the 1981 "Letter." Of course, there are also new matters to be discussed.

Last year (in 1984), the importance of copyright law, and also its inevitably growing complexity, received a nicely-worded recognition from the Chairman of the Standing Parliamentary Committee for the Administration of Justice, Dr. Kosto. He observed:

He who was once a law student, and may now be deemed to be middle-aged, will remember copyright as a small subsidiary subject. Nowadays, however, we can see its complexity that has resulted in part from reproduction techniques far removed from the printing press of the days when the Berne Convention was signed and our own 1912 Copyright Act was passed, in part from new views on what law should be and in part from developments in a world in which distances no longer exist.

The Minister of Justice, Dr. Korthals Altes, replied as follows:

I believe that today it has been again shown that we can no longer take the line, taken some 25 or 30 years ago, that copyright law as such is a small and well-ordered subject.

#### Legislation

##### *Adaptation of the Copyright Act to the Stockholm and Paris Acts of the Berne Convention: copyright in films*

The words I have quoted were spoken in the parliamentary debate on the bill to adapt the Copyright Act to the Stockholm (1967) and Paris (1971) Acts of the Berne Convention.<sup>1</sup> By now, the bill will have

passed one of the two Chambers of Parliament and it will doubtlessly be accepted — and it cannot be amended — by the other Chamber. Thus, enactment is to be expected this year, together with ratification of the Stockholm and Paris Acts. Yet, a long time from 1971.

Adaptation required the 1912 Act to be amended with regard to "refugee protection" (cf. Article 3(2) of the Paris Act). Modifications of minor importance were made in respect of the *right of quotation* and, a more complex and important matter, statutory provisions were incorporated to cover copyright in films. Although film works had been protected by copyright law since 1912, no provisions existed with regard to ownership and the case law in this field did not meet the standards laid down in the Stockholm and Paris Acts (Articles 14 and 14<sup>bis</sup>).

As mentioned in my 1981 "Letter,"<sup>2</sup> the Standing Committee for Copyright Affairs, in its report of 1975, had opted for the system of *cessio legis*. The Government and Parliament, however, did not go along with that recommendation and preferred the system of *presumption of assignment*, as adopted in the Federal Republic of Germany and in France. Thus, the copyright of the contributor to a film work will belong to the producer, unless otherwise stipulated by the contributor in writing. The presumption of assignment formula has been chosen since it seems sufficient for the film producer and, on the other hand, satisfies as much as possible the general principles of ownership under Dutch copyright law.

The new chapter on film works (including videograms) — Articles 45a to 45g in the Act — is quite detailed. It contains, *inter alia*, provisions defining a film work and its completion; provisions enabling the producer to complete the work if the contributor is not able or not willing to continue his activities, stipulations on the moral rights of the contributors, including the right to have their names mentioned in the usual way or to refuse such mention, if reasonable, and provisions with regard to non-elemen-

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<sup>1</sup> Bills 16.739 and 16.740, introduced into Parliament in 1982.

<sup>2</sup> Page 178.

tary exploitation rights. The contributor keeps — unless otherwise agreed in writing — his own rights with regard to “separable” elements for separate exploitation (e.g. merchandising rights of the contributor to an animated cartoon film). Of course, the same applies, for example, to the book rights of the author whose book was already written before being chosen for screening by a producer. Full rights, even with regard to the basic exploitation of the film, are preserved by composers in conformity with the Stockholm and Paris Acts. For all other contributors, Article 45*d* stipulates that a producer, although free to exploit, shall pay equitable remuneration if a particular mode of exploitation did not exist and was not reasonably foreseeable at the time of making the film work.

In many respects — but not all — the French Copyright Act in particular has served as a model for the new Dutch provisions, as has been acknowledged in the explanatory notes.

#### *Class action; fight against counterfeiting*

The counterfeiting of copyrighted works (as well as trademarks, designs, etc.) is challenging authors and other copyright owners to an ever-growing extent, both world-wide<sup>3</sup> and in the Netherlands. Phonogram counterfeiting still carries on and counterfeiting of videograms, computer software and integrated circuits has, unfortunately, grown to maturity.

Under these circumstances, in 1983, the Minister of Justice established a working group (Lukács Committee, after its Chairman) in order to study piracy and counterfeiting and the damages caused by them, and to propose better instruments for fighting against them.

The — first — report of the working group was published in August 1984.<sup>4</sup> Among a lot of other information and other recommendations, some 10 proposals for statutory law reform have been made. Although the Dutch jails are overcrowded, there are proposals for severer penal sanctions and better instruments for criminal police officers. To improve civil law remedies, it is proposed, *inter alia*, that computer programs be made unequivocally eligible for copyright protection,<sup>5</sup> that improved rights be afforded to copyright *licensees* against infringers and also that a statutory provision be introduced en-

abling *unions* of copyright owners to act as plaintiffs in court against infringers. Under common law, the ability of unions to be plaintiffs in class actions is somewhat unclear and disputed, although at least in the important District of Amsterdam, the District Court favors such actions (informal “Amsterdam Code of Civil Procedure”).<sup>6</sup>

Although the Government had promised to introduce rapidly a bill, based upon the Lukács report, probably in 1985, Parliament considered the introduction of the class action of such importance that it was included, by amendment, in the Stockholm and Paris revision bill. Thus a new statutory law<sup>7</sup> may well be in force in 1985 (instead of 1986 or 1987) all over the country.

However, the class action instrument applies to *injunctions* (prohibitions under penalty) and not to proceedings to claim damages or to seizure.

#### *Copyright mediation, reprography and cable television*

In my 1981 “Letter,”<sup>8</sup> I reported on the Note produced by “CIBRA,” known as the Martens Committee, dealing with the above matters. The Committee’s final report was published in May 1982. The recommendations did not differ fundamentally from the views expressed in the Note. For non-Dutch readers, the final report has been commented on in a detailed way by Jaap H. Spoor in RIDA (October 1982, Vol. 114, pp. 111 *et seq.*).

We are still awaiting a legislative follow-up.

As to the collection, administration and distribution of reprography moneys in connection with new statutory provisions on the admissibility of reprography and home taping, and on payment for reprographic instruments (hardware and software), a bill is to be expected, but not before 1986.

As to cable television, the violent fight between the (semi-public) cable operators and the copyright owners, and the latter’s victories will be reported *infra* under court decisions. I will report also *infra* on the negotiations and their results, which seem to mean that, for the time being, statutory compulsory licensing or other measures will not be necessary. Of course, the already existing statutory provision, permitting the Crown to issue a compulsory license, will have had its influence on the results of the negotiations.

#### *Public lending right*

A public lending right does not as yet exist in the Netherlands, although the Government has for

<sup>3</sup> Cf. also the Resolution by the Council of the European Communities on the fight against piracy of audiograms and videograms, adopted on July 24, 1984.

<sup>4</sup> *Piraterij van auteursrechtelijk beschermde werken* (Piracy of copyrighted works), published by *Staatsuitgeverij* (State Printing Office), The Hague, 1984.

<sup>5</sup> See also *infra* under Court decisions.

<sup>6</sup> *Ibid.*

<sup>7</sup> New Article 29a.

<sup>8</sup> Pages 176 to 178.

many years contributed "by moral obligation" to the Netherlands Literature Fund money that is shared between the authors of books of fiction lent out by public libraries.

A bill, providing for a claim under statutory law for authors of books lent out by public libraries, is expected in 1985 or 1986. However, the Government plans to keep this subject outside the Copyright Act and the copyright conventions. According to the options at the Ministry of Welfare, Public Health and Culture, the public lending right will be part of a general statute on "welfare," and will be included in its chapter on public libraries. Lending moneys would be paid only to authors of Dutch nationality and to authors and publishers having their place of residence in the Netherlands. One might doubt whether such an option is in accordance with (the spirit of) the copyright conventions and, moreover, whether it is in accordance with the EEC Treaty (in relation to authors and publishers in other EEC countries).

According to the preliminary proposals, the amount available for public lending moneys is to be fixed from year to year by the Minister and to be financed partly from general tax income and partly from levies on the public libraries. The grant of moneys would require registration by interested authors and publishers. Claims would exist only during the life of the authors concerned.

It is quite understandable that the proposals have been criticized by the Dutch ALAI group. From a quite different point of view, library officials are also unhappy with the proposals.

#### *Neighboring rights*

A bill on the protection of performing artists, producers of phonograms and broadcasting organizations, along the lines of the Rome Convention of 1961, has been for many years already expected. Parliament has repeatedly and almost unanimously stressed the desirability of such a law and also of ratification by the Netherlands of the Rome Convention. The introduction of a bill granting rights to nationals is very probable, as is a bill providing for ratification of the Geneva Phonograms Convention of 1971. We may expect them in 1985 or 1986. However, the Government would still seem opposed to ratification of the Rome Convention.

#### *Semiconductor chip products*

Whether mask works and semiconductor chip products are eligible for copyright protection under the existing Copyright Act is debatable, although at

least one Dutch court decision is favorable to it.<sup>9</sup> Although copyright protection is denied, in general or in particular cases, the Dutch courts are inclined to grant protection under unfair competition law in cases of slavish imitation or counterfeiting.<sup>10</sup> Under such circumstances, special statutory provisions regarding chip products do not seem to be necessary in the Netherlands yet, apart from general new provisions to fight counterfeiting, which have been mentioned above.

However, the reader may know that in the United States of America, on November 8, 1984, a *sui generis* Semiconductor Chip Protection Act was passed<sup>10a</sup> which, according to the American legislator, does not fall under the Universal Copyright Convention or the Paris Convention. On the contrary, sections 902 and 914 of this Act ask for reciprocity, presupposing "Uncle Sam's" approval of the national laws of other countries who wish their nationals to be protected in the United States. The foreign laws will have to meet the same standards as the protection granted by the special new U.S. Act. Since the Netherlands is likely to be interested in the protection of Dutch chip products in the United States under the special Act, I presume that the Dutch Government will enter into discussions with the U.S. Government. In my opinion, the U.S. Government, learning of our case law, could "approve" the existing protection in the Netherlands, at least on the condition that the — of course independent — courts *continue* to grant protection under copyright law and/or unfair competition law. However, the United States have taken the stance that any other country is dependent on the President's own evaluation of foreign law. Maybe this will condition special statutory provisions in our own legislation. In that case, the Netherlands would have to choose between protection under copyright law, under a utility model protection act, or under a *sui generis* protection act. Apart from the choice between such instruments, there is also a possible choice between the option of national legislation or, together with the other Member States, EEC legislation. In any case, it would be wise to develop any *sui generis* legislation in *consultation* with other States and with WIPO. It seems to me very improbable that EEC legislation could be enacted and enter into force within the three years mentioned in section 914(e) of the U.S. Act, that is to say before January 1, 1988. To pass a national *sui generis* act — even as an interim measure — within that time could be a difficult task and one could well doubt the wisdom of "investing" so much legislative effort in a special law that could prove to be temporary, if, indeed,

<sup>9</sup> See *infra* under Court decisions.

<sup>10</sup> *Ibid.*

<sup>10a</sup> See *Copyright*, 1985, pp. 112 *et seq.*

EEC legislation were to enter into force in, say, the 90's. With regard to the utility model option, a draft for a general bill was in fact published in 1984, but it is still questionable whether and when that draft will be transformed into a bill, and such a bill into an act. Moreover, protection under the draft bill is restricted to a maximum period of six years (not 10, as in the U.S. Act) and grants a full monopoly to the first person to file (and does not allow independent creation and reverse engineering, as permitted by the U.S. Act). Therefore, if necessary, the best interim solution would seem to be a very simple addition to the Copyright Act, stating that mask works and chip products are protected by copyright, since they are original creations, even if a "personal character" is absent. Although this might conflict a little with copyright orthodoxy, it would be "nothing new" in the Netherlands, since the same has applied — from 1881 — to copying of any writings or printed matter, published or intended for publication, irrespective of the "personal character." Even telephone and railway directories have always been protected by copyright in the Netherlands.

### Some Court Decisions

#### *Works eligible for copyright (Copyright Act, Article 10)*

#### *Computer programs; ROM's; semiconductor chip products*

Turning to court decisions, I will first continue the subject of the last subchapter above, that is to say chips and, closely related, computer programs which may — or may not be — embodied in read-only memories (ROM's) or chips.

Since the latter 60's, copyright protection for computer programs has been advocated in Dutch literature.<sup>11</sup> However, it was not until the early 80's that computer software (and hardware) became so common and popular in this country that the question proved to be more than an academic one and courts had to decide on litigation. Now, early in 1985, we count in the Netherlands at least 12 cases, decided between January 1981 and December 1984.

In none of these decisions has copyright protection been denied in principle. In one case, brought before the President of the District Court of Roermond,<sup>12</sup> and two cases, brought before the President

of the District Court of Amsterdam,<sup>13</sup> all concerning hardware and ROM counterfeiting, the judges did not deny copyright but — asked to grant an injunction within a very short term, in one case within two days — they put aside the question of copyrightability, being convinced that, in any event, the injunction could be granted on the alternative cause of unfair competition. In one of these cases, the Court of Appeals of Amsterdam<sup>14</sup> held expressly that "a computer program may be eligible for copyright," confirming, however, the decision of the lower court, since the Court of Appeals also was convinced of the unfair competition cause of action, and it also deemed it to be "unnecessarily complicated" to consider the copyrightability of the ROM *in casu*. The same Court of Appeals had held in 1983<sup>15</sup> that both the sequence of a video game and the underlying computer program may be protected by copyright; an injunction, based in that case on infringement of copyright in (the sequence and the visualization of) the video game, was granted.

Having accepted the principle of copyrightability of computer software, the District Court of Assen ordered in 1981<sup>16</sup> that more evidence should be obtained on the alleged infringement *in casu*. In 1984,<sup>17</sup> the President of the Court — having read the contradictory opinions of two experts — gained the conviction that the plaintiff and his expert were right and severe injunctions, based upon copyright infringement, were granted.

Copyright protection of computer programs has also been assumed in two criminal cases, heard in 1984 by the District Court of Arnhem and the District Court of Amsterdam, respectively.<sup>18</sup>

More complex cases, with regard to the facts, had to be decided by the President of the District Court of Utrecht and by the District Court of 's-Hertogenbosch. In the Utrecht case,<sup>19</sup> the President, although accepting the principle of copyrightability of computer software, decided that *in casu* only very few parts of the program had been copied and that an allegedly "borrowed" general principle did not enjoy copyright protection at all. The District Court of

<sup>13</sup> October 8, 1982, KG 1982, 194, BIE 1983, p. 329 (*Apple/Cab I*) and May 24, 1983, BIE 1983, p. 331 (*Apple/Cab II*).

<sup>14</sup> June 26, 1984, *Computerrecht*, 1984/3, p. 21 (*Apple/Cab II*).

<sup>15</sup> March 31, 1983, *Auteursrecht/AMR*, 1983, p. 56, reversing the decision of the President of the District Court of Amsterdam of December 12, 1982, *Auteursrecht/AMR*, 1983, p. 17 (*Atari/Philips* ("Pac-Man/Happelaar")).

<sup>16</sup> July 28, 1981, *Nederlandse Jurisprudentie* (NJ) 1982, 74, BIE 1983, p. 322 (*Bartels/Koerhuis*).

<sup>17</sup> January 10, 1984, KG 1984, 30, BIE 1984, p. 238 (*SCIA/Koerhuis* ("Bestmix")).

<sup>18</sup> Not yet reported; Amsterdam case to be reported in *Computerrecht*, 1985/1.

<sup>19</sup> March 10, 1983, BIE 1983, p. 328 (*PSM/Decal*).

<sup>11</sup> Cf. my article in *Intermediar* (5), October 31 and November 7, 14, 1969 — *Bijblad bij de Industriële Eigendom* (BIE) 1970, pp. 58 to 69.

<sup>12</sup> August 20, 1984, *Kort Geding* (KG) 1984, 266, *Computerrecht*, 1984/3, p. 23 (*Apple/Brouns*).

's-Hertogenbosch provided, perhaps, the most interesting and best reasoned decisions in a case of computer program plagiarism, which were partly based upon the report of an expert witness. Copyright infringement was established and compensation of damages was granted in this case, that merited to be published in GRUR Int. 1983, page 669.<sup>20</sup> It was also decided in this case, that the mere offer or sale of one copy of an infringing program to a third party constituted "publishing" that could be prohibited by the copyright owner.

As I have mentioned before, in the first case to arise in the Netherlands in which counterfeiting of a semiconductor chip occurred (a chip in a transmitter carried by a cow to inform the farmer's computer of the cow's eating, drinking, milk production, etc.), the judge accepted the principle of copyrightability since "a certain creativity of the designer with regard to the print and its components cannot be denied. It is common knowledge that, even in electronics, many different roads lead to Rome."<sup>21</sup> An injunction was granted.

Although one may appreciate, like me, the general antipathy of the Dutch courts towards plagiarism and counterfeiting, it is difficult to accept the ruling of the Criminal Chamber of the Court of Appeals of Arnhem, given in 1983.<sup>22</sup> In this case, a former employee (in fact the programmer himself) had copied computer programs belonging to his employer before leaving his job and starting his own business. He was sued not on account of copyright infringement or contravention of trade secrets or non-competition regulations, but merely for "theft" and "embezzlement" of information. And he was fined. Contrary to the District Court, the Court of Appeals held the opinion that "information" (as such) may be the "property" of somebody else and can be "stolen" or "embezzled" like a pack of cigarettes although the information has only been copied (duplicated). Is it not true that, with such a ruling, we do not need copyright law at all? And that the "crude" Criminal Code regulations on theft and the like do not and cannot recognize the subtle and well-balanced equilibrium, found in copyright law, as between protected and unprotected information and copying (with some additional protection under civil unfair competition law in cases of slavish imitation or in other *special* circumstances)? I feel the Supreme Court would have reversed the decision of the Court of Appeals. But the culprit did not apply for annulment, as he was only *fined* (no jail, no pro-

hibition to *use* the copied programs) and he was very glad that the programs, written by himself as an employee of the "robbed" employer, now seemed to be very well protected against copying by third parties. At least, that is what he said to the newspapers. A funny case, but a weak case that made bad law.

#### *Writings and printed matter lacking a personal character*

As mentioned before, the Dutch Copyright Act protects all "writings" (Article 10(1)), even if all personal character is lacking. Of course, "borrowing" from the writing has to be proved by the plaintiff, under copyright law. However, in the Broadcasting Act (1967), the *onus probandi* has been placed on the defendant in the case of television broadcasting programs. The defendant is required to prove that he has not borrowed (directly or indirectly) from the programs published by the broadcasting organizations. He can only prove that such is not the case by mentioning the names of his informants, in general employees or contributors of the broadcasting unions, who will be dismissed if it is proved that they have given such information to third parties.

Of course, this system is much criticized and disputed. Its background is to be found in the broadcasting licensing system under which licenses are granted only to non-profit unions and broadcasting time is divided between them in proportion to the number of their paying members. Reasonably or unreasonably, the legislator accepted the "marketing" aspect of the existing unions, that membership is linked to subscriptions to program weeklies, published by the unions, and to be published by them *only*, since program weeklies published by other publishers would disturb the subtle system of membership and distribution of broadcasting time, based thereupon.

We will have to see whether this system, although still politically accepted within the Netherlands, will survive the next decade. There will be a confrontation with commercial television coming from abroad, directed more and more towards the Netherlands, not only by cable (which is still under the "control" of the Government) but also by satellite, which at present still needs the cable for further dissemination. But for how long yet?

Turning from the political background of broadcasting again to copyright matters, I must mention that attempts to fight the monopoly of broadcasting lists, based upon the incompatibility of Dutch law with supranational law, have failed. In 1976, the European Commission of Human Rights decided that the monopoly was compatible with the Euro-

<sup>20</sup> Decisions of January 30, 1981, and May 5, 1982, also reported in BIE 1983, p. 323 and *Auteursrecht/AMR*, 1983, p. 107 (HIC/BAS (logging program)).

<sup>21</sup> President of the District Court of Zwolle, July 22, 1983, KG 1983, 246, BIE 1983, p. 332 (*Daca/Hokofarm*).

<sup>22</sup> October 27, 1983, NJ 1984, 80 (*Databridge*).

pean Convention on the Protection of Human Rights and Fundamental Freedoms.<sup>23</sup> The other attempt was based upon incompatibility with the EEC Treaty, where the Dutch publisher had bought and/or borrowed the lists from a Belgian publisher, who in turn had acquired the information legally from the Dutch broadcasting organizations. It was argued that the stipulation by the broadcasting organizations placed on foreign publishers in the EEC, to use this information in their own countries only, was null and void under Article 85 of the EEC Treaty and that the information, being legally available in another EEC country, could be "reimported" freely to the Netherlands by "outsiders" under application of Articles 30 and 36 of the Treaty. The pleas were rejected, however, by both the Courts of Appeals of Leeuwarden<sup>24</sup> and 's-Hertogenbosch.<sup>25</sup> Indeed, as follows from the decision of the EC Court of Justice in the *Coditel* case,<sup>26</sup> licensing to publish "intangible" information may be restricted to parts of the EEC territory. Moreover, Articles 30 and 36 were not applicable in that case, since only intangible information was concerned, and not the importation of "hard copies." Articles 30 and 36 were applicable only to tangible goods.

Advertisements, published in newspapers, trade journals, etc., are also protected by copyright. Recently, some cases of a similar type were reported. A publisher started up a new journal and offered to persons advertising in competing journals to publish the same advertisements in the new journal at a very low rate, or even free of charge in the first issue(s). The advertisers were not of consequence, but of course, the competing publishers were. Since, for smaller advertisers, publishers prepare the layout of the advertisements, these publishers may oppose the infringement of their copyright through such practices.<sup>27</sup>

Whether the most simple layout (the typesetting alone) of a text may be protected under Article 10(1) of the Copyright Act is not clear. The question may arise in the case of (photographic) reprography

of texts which do not enjoy copyright protection. As pointed out, such cases will be rare in the Netherlands, but they might occur if the term of copyright protection of the text itself has lapsed, or in the event of the copyright owner of the text wishing to have the text published by another publisher,<sup>28</sup> or if the text itself is excluded from copyright protection since it is an *official text*. Texts of statutes and court decisions are excluded from copyright protection by Article 11 of the Copyright Act.

In a case decided by the President of the District Court of Rotterdam,<sup>29</sup> the photographic reproduction of a statute — the new *Inland Navigation Police Regulations*, a copy of which has to be obligatorily on board every inland vessel — was at dispute. The State Printing Office had, in its normal course of duty, effected publication in the *Official Gazette of the Kingdom*. In view of the big "market," the State Printing Office had also prepared a booklet with the same text and the same typesetting, offered to the public for Dfl. 19.50. A private publisher in the field of navigation used a photographic reproduction of this typesetting for a competing booklet, offering it for Dfl. 6.90. The State sued the publisher, of course *not* on account of copyright infringement with regard to the statute, and surprisingly not on account of copyright infringement with regard to the typesetting, but only for unfair competition. On that ground, an injunction was indeed granted. The private publisher had profited in too "ample" a way from the investments made by the State Printing Office, the judge decided. An appeal is pending and it would be no surprise if this case subsequently came before the Supreme Court. Of course, all publishers in the Netherlands are very interested in the final outcome. In the case of protection of typesetting as granted by the Rotterdam Court, they will be sorry for their Rotterdam colleague, but it would create, at least to a certain extent, a kind of non-derived publishers' right. That might be helpful not only against their (outside) competitors, but also against, for instance, (State) universities and schools, using not only the texts but also their typesetting in anthologies (readers). If their Rotterdam colleague finally wins the case, protection of typesetting could be pursued again in another case between *private* competitors, and the private publishers would then be glad that use of the typesetting of the State Printing Office was *not* considered to be unfair. One can assume that most private publishers in the Netherlands take the political view that the State Printing Office *should not compete at all* with them.

<sup>23</sup> Decision of July 6, 1976, *Decisions and Reports* 1977, p. 5 (*Geïllustreerde Pers/State of the Netherlands*).

<sup>24</sup> January 19, 1983, *Auteursrecht/AMR*, 1983, p. 33, reversing the decision of the President of the District Court of Groningen of January 22, 1982, *Auteursrecht/AMR*, 1982, p. 33 (*NOS/Nieuwsblad van het Noorden*).

<sup>25</sup> March 29, 1983, to be reported in BIE 1985, confirming the decision of the President of the District Court of Breda of August 27, 1982, KG 1982, 156 (*NOS/Schorpioen*).

<sup>26</sup> Decision of March 18, 1980 (case 62/79), ECR 1980, 833, CMLR 1981, 362.

<sup>27</sup> Cf. President of the District Court of Almelo, November 18, 1981 KG 1981, 174 (*Twentsche Courant*) and President of the District Court of Zutphen, July 19, 1984, KG 1984, 240 (*Kluwer/CPS*).

<sup>28</sup> If not prevented by cartel regulations between printers.

<sup>29</sup> March 20, 1984, KG 1984, 119 (*State Printing Office/Den Ouden*).

### *Applied arts/Design protection*

Counterfeiting of the famous *Rubik's cube* gave rise to court proceedings in several countries, including the Netherlands. Professor Rubik had neither filed in due time a patent application in the Netherlands, nor a deposit for protection under the Benelux Designs Law.

Having failed in the first instance, Professor Rubik won his case, at least partly, at the Court of Appeals.<sup>30</sup> The Court held that the cube was eligible for copyright protection since it possessed a "significant artistic character." The Court deduced this opinion from testimonies by famous art experts and from its own perception: "by turning one or more layers of the cube, one can obtain (maintaining the form of the cube) an indefinite mixture of the six colors, and from such an indefinite number of variations of the outward appearance of the cube it acquires an artistic character entirely of its own." It is not quite clear (and it has been disputed in literature) whether this judgment protects the cube with the six colors or the cube as such, with, for instance, small animals or figures on the lateral faces.

Should designs, in order to be eligible for copyright protection, have a "significant artistic character" or is a "personal character" sufficient, as for music or photographic pictures? In the *Rubik* case, the Court of Appeals was convinced of a "significant artistic character," so that no problem arose in that case. In other cases, the question may create difficulties since, under the Dutch Copyright Act, a mere "personal character" may be considered to be sufficient, whereas the Benelux Designs Law, also applicable in the Netherlands and in force since 1975, requires that the artistic character should be "significant" if copyright protection for a design is claimed. For political reasons, it is unlikely that either text will be aligned by the Dutch or Benelux legislator. In the Netherlands at least, most authors on this tiresome problem advocate that the Benelux law should be interpreted in such a way that "a significant artistic character" does not require any more than a "personal character." Historical reasons (the Benelux law aimed only to upgrade the formerly very low Belgian "minimum level") and teleological arguments (how can a court distinguish between designs having a "normal" personal artistic

character and those having a "marked" artistic character?) are in favor of this opinion. However, for as long as the highest court, in this case the Benelux Court of Justice, has not decided the question, it will continue to bother the designers, the lawyers and the lower courts. In the meantime, the Court of Appeals of 's-Hertogenbosch took a straightforward decision in the way advocated by most Dutch authors.<sup>31</sup> The losing party did not ask for annulment.

### *Employees' works (Copyright Act, Article 7)*

Article 7 of the Copyright Act grants copyright, and even "authorship," to the employer, if the tasks, carried out by an employee, consist in making certain works of literature, science or art. For many years, it has been disputed in literature whether, and if so in how far, this provision applies to university teachers and researchers (professors and others). In practice, the question is hardly in dispute. Generally, teachers and researchers, and their employers, act as if Article 7 did not apply.

In a case decided in 1981, the President of the District Court of Zutphen took the same opinion, with a clear reasoning.<sup>32</sup> It should be noted that in this case the employee and the employer were not each other's adversaries. In order to be sure with regard to the question of ownership, they sued a plagiarist *together*. Whether the copyright was owned by the employee or by the employer, it was in any case on the plaintiffs' side. However, when considering the admissibility of the claims of each plaintiff, the judge had to make a choice. The judge held that the mere fact of employment did not imply that the texts, written within the framework of the (graduation) research of the employee, should be considered as products of labor carried out in employment and accomplished as a consequence of direct instructions from the university.

### *Cable television: separate communication to the public*

(*Berne Convention, Article 11<sup>bis</sup>; Copyright Act, Article 1 and Article 12, first and fourth paragraphs*)

In my 1981 "Letter,"<sup>33</sup> I reported on a fundamental cable television case (in fact two cases), at that time pending before the Supreme Court. With different reasonings, both the District Court and the Court of Appeals of Amsterdam had decided that

<sup>30</sup> Court of Appeals of Amsterdam, July 16, 1981, reversing the decision of the President of the District Court of Amsterdam of May 7, 1981; *Auteursrecht/AMR*, 1982, p. 13, BIE 1982, p. 145. As far as I know, protection against (slavish) imitation has been granted also in Britain for infringement of the copyright in working drawings; and in Austria, Belgium and the Federal Republic of Germany, on the basis of slavish imitation/unfair competition. Protection was refused in Australia (information received with thanks from Mr. M.G.F.M.V. Janssen, Amsterdam).

<sup>31</sup> Decisions of February 6 and September 24, 1980, *Auteursrecht/AMR*, 1982, p. 34, BIE 1983, p. 313 (*Olly/Optima*).

<sup>32</sup> April 28, 1981, KG 1981, 58, *Auteursrecht/AMR*, 1982, p. 16, BIE 1982, p. 182, GRUR Int. 1982, p. 391.

<sup>33</sup> Pages 180 to 182.

transmission of works over cable by the (semi-public) central antenna system (CAI) of Amstelveen, near Amsterdam, did not constitute a new or separate communication (*openbaarmaking*), requiring the consent of the copyright owners.

The petition for annulment at the Supreme Court has been successful; the copyright owners won their cases, although the final decisions in these actions, instituted in 1977, were not pronounced until 1984. The Supreme Court gave its fundamental decision on October 30, 1981,<sup>34</sup> but following the annulment of the previous decision of the Court of Appeals, the latter Court had to reconsider the case and to judge further points of defense submitted by CAI Amstelveen. Those defenses having been dismissed on January 27, 1983,<sup>35</sup> CAI Amstelveen then pleaded for annulment of the new Court of Appeals decision, but the petition was rejected by the Supreme Court on May 25, 1984.<sup>36</sup> I will turn now to the most important decision of October 30, 1981.

This decision — and the comprehensive conclusion of the Advocate-General — has cleared up quite a number of misunderstandings, even at the highest governmental levels, that occurred during the preparation of the 1973 copyright law reform. At that time, the copyright aspects of cable television had already been discussed in Parliament, since the Copyright Act was to be adapted to the Brussels Act of the Berne Convention and its Article 11<sup>bis</sup>, and since large-scale cabling was then being planned in the Netherlands.

In the 1973 law reform, a paragraph (4) was added to Article 12 of the Copyright Act, providing that *no* separate communication should be assumed in the case of transmission by the *same organism*; such a provision being in conformity with Article 11<sup>bis</sup> of the Berne Convention. Not immediately, but after a rather short time, it became clear to almost everybody that this paragraph was only of an “academic” interest in the Netherlands as a result of the particular Dutch structure of broadcasting, over the air or by cable, comprising a fair number of “organisms.” However, the addition of this paragraph has led to confusion and given rise to the argument of an “analogy of reflection,” used by the District Court to reject the claim mentioned in my 1981 “Letter.”

Moreover, in the course of the 1973 law reform, the Government had advocated in a rather convincing way<sup>37</sup> — at least Parliament was convinced — that neither Article 11<sup>bis</sup> of the Berne Convention

nor the basic articles in our national law (Articles 1 and 12, first paragraph) nor earlier Supreme Court decisions on cable broadcasting,<sup>38</sup> would mean that cable transmission within the zones of “direct reception” would constitute a “separate communication.” The Government argued that since the audience — receiving signals by individual antenna or by cable — would be the same, there would not be a new, separate audience and “thus” no separate communication.

The link “thus” has proved to be the flaw in the chain of reasoning. The Supreme Court has not said whether this might be deduced from its former interpretation of Articles 1 and 12 of the national law, although that interpretation could have been changed of course in the new decision since the *stare decisis* principle does not apply in the Netherlands. However, based upon the ample research done by the Advocate-General, the Supreme Court formed the opinion from the documents of the 1948 Brussels Conference that it should be concluded that the criterion of a “*nouveau cercle d’auditeurs*” had been *rejected* by the Contracting Parties, it being mentioned in the documents that such a criterion would be too “vague.” Instead, and because of its vagueness, the more formal criterion of the “other organism” was chosen. Whether the audience or the public be the same or not is irrelevant under Article 11<sup>bis</sup> of the Berne Convention, was the Supreme Court’s reasoning, based on a reading of the document. Now, in Dutch jurisprudence, arguments derived from the *history* of a statutory or even conventional provision may be important, but they are not alone decisive. The Supreme Court added further arguments. The “new circle” criterion should indeed be rejected because of its vagueness. It was unpractical and would give rise to controversies, particularly since the borders of direct reception zones will frequently change. Furthermore, the Supreme Court acknowledged that cable transmission, even for people within the direct reception zone, had advantages over reception by individual antenna. Finally, the Supreme Court noted that its opinion seemed to be in accordance with the prevailing trend in literature and foreign case law.<sup>39</sup>

At this stage of the reasoning, the dispute had already been decided in favor of foreigners, nationals of other members of the Berne Union, who may, in the Netherlands, directly invoke the provisions of the Convention. This does not apply to Dutch nationals. In a rather surprising way, the Supreme Court nevertheless came to the same result in respect of Dutch nationals. Notwithstanding all the

<sup>34</sup> NJ 1982, 435, *Auteursrecht/AMR*, 1981, p. 111.

<sup>35</sup> *Auteursrecht/AMR*, 1983, p. 31.

<sup>36</sup> NJ 1984, 697, *Auteursrecht/AMR*, 1984, p. 62.

<sup>37</sup> I should mention the name of my colleague Herman Cohen Jehoram as one of the few who were never convinced, and never tired of saying so.

<sup>38</sup> *Inter alia*, the decision of June 27, 1958, NJ 1958, 405.

<sup>39</sup> The Supreme Court has expressly reserved its opinion on so-called *community* antennas (operated by the owner(s) of apartment buildings and on a similar small scale).

confusion during the 1973 law reform, it could be concluded from the history of the 1973 Act that it was the explicit aim of the Government and Parliament to follow the Berne Convention and its Article 11<sup>bis</sup>, although it was misunderstood. The aim of the legislator should prevail over his misunderstanding, the Supreme Court decided, and the national law should thus be interpreted in conformity with Article 11<sup>bis</sup> of the Berne Convention.

In his Note on the decision, Van Nieuwenhoven Helbach sighed: "In the light of subsequent events, everything is so clear that one may wonder how such a long-lasting battle has been possible."

Agreeing with him, I may put another question. Should copyright owners and their supporters be angry at the 1973 misunderstanding and at the Government and its experts of the time? I think copyright owners should be grateful. Indeed, if it had been clear in 1973 that cabling in direct reception zones was *not* irrelevant to copyright, I do not think that we would have had the cable density in the Netherlands that we now have, if we had any significant density at all. Cable has been "sold" through the "mediation" of the communities and their councils, who accepted it on the condition of relatively low cost, and — in order to reach low average cost — they prohibited by means of community by-laws the possession of individual antennas.<sup>40</sup> Majorities for this option have indeed been achieved in most of the communities by far, but I am quite certain that this score would not have been obtained if a real fear of claims by copyright owners (after compulsory removal of your individual antenna) had existed. Thus, the 1973 misunderstandings have proved to be misleading to the consumers and their representatives in community councils, but they have proved to be favorable for the copyright owners.

Indeed, copyright owners will receive extra payment from central antenna systems. On October 12, 1984, representatives of the (most important) copyright owners and representatives of the cable operators agreed on the main points, under Government surveillance. The Government might — but now probably will not — issue a compulsory license. Cable subscribers will have to pay about Dfl. 12 (US 3.50) more a year if they receive up to five stations; Dfl. 15.50 (US 4.50) up to 10 stations, and Dfl. 19 (US 5.50) up to 15; 19% VAT not included.<sup>41</sup>

<sup>40</sup> Such by-laws have been found void (contrary to Article 10 of the European Human Rights Convention) by the *Raad van State*, insofar as cable cannot offer the same stations as an individual (undangerous, not too large-sized) antenna can offer, and a subscriber installs such an individual antenna.

<sup>41</sup> There exist two official Dutch television stations; most Dutchmen live in the "direct reception zone" of three to five foreign (Belgian, German) stations. Copyright payments for (cabling) satellite programs (in the Netherlands now: Sky

*Cable piracy*  
(Copyright Act, Articles 1 and 12)

In the early 80's, television "pirates" frequently used central antennas for the dissemination of movies. They did so both for entertainment and for commercial purposes, movies being interspersed with advertisements by (local) business enterprises. Such "piracy" is prohibited by public broadcasting law, but the pirates proved able, at least for some time, to keep their anonymity. To locate and to eliminate their (multiple) transmitters was a difficult task for the authorities. Cable operators were technically able to "close" their cable transmitters for pirates, but they were reluctant to do so, since a lot of subscribers liked the pirates and even claimed a contractual right — sometimes a "human right"<sup>42</sup> — to receive the pirates' transmissions, particularly in the (rare) cases in which they could be received by individual antenna. Pirates generally transmitted during the periods that channels for official programs were silent (e.g. from 12pm to 4am), and central antenna proprietors generally felt they did not harm anybody by tolerating it, feeling obliged, moreover, to keep the channels open for the case that the (more powerful) official transmitters started immediate broadcasting, e.g. in the event of emergencies. They did not want to have their switch-rooms manned during the night, if it could be avoided, in view of the cost. And, it has occurred that a cable owner who has switched off pirate transmissions has been confronted with sabotage and demolition of his equipment by pirates and their accomplices.

This situation changed drastically following civil procedures instituted by the copyright owners, particularly the owners of the pirated movies. They were likewise not able to sue the pirates,<sup>43</sup> but they sued the CATV owners for infringement of copyright by simply *tolerating* the use of their antennas

Channel, Music Box and the French station TV-5) will be paid by the transmitters, not by the central antenna proprietors. In January 1984, lacking such agreement, the Dutch composers society BUMA succeeded in obtaining an injunction against the Amsterdam Cable System, prohibiting under penalty the transmission of the TV-5 program (decision of the President of the District Court of Amsterdam of January 12, 1984, KG 1984, 37, *Auteursrecht/AMR*, 1984, p. 30).

<sup>42</sup> Not accepted by the Presidents of the District Courts of Dordrecht, November 26, 1981, KG 1981, 177, and Rotterdam, December 30, 1981, KG 1982, 11.

<sup>43</sup> They sued, on one occasion, a publisher who published a weekly "*The Pirate*" with full details and schedules of clandestine film transmissions. On the basis of unfair competition, an injunction was granted by the President of the District Court of Amsterdam on June 25, 1981, KG 1981, 89, *Auteursrecht/AMR*, 1981, p. 85, BIE 1983, p. 147 (*Nederlandse Bioscoopbond/De Piraat*).

and transmitters by the pirates. After a refusal in early 1981 by the President of the District Court of Amsterdam,<sup>44</sup> the Court of Appeals granted an injunction in September of that year, and a petition for annulment before the Supreme Court was rejected in 1984.<sup>45</sup> A comparison with the situation of the owner of a blank wall, used by somebody else for the projection of a movie, was not accepted. The Supreme Court held that “the operation of a central antenna system,” i.e. “the processing, amplification and transmission through a cable network” constituted communication within the meaning of Articles 1 and 12 of the Copyright Act.<sup>46</sup>

*Parody or plagiarism?  
(Copyright Act, Article 13)*

Comic strips are very popular in the Netherlands and are also appreciated by many adults. And adults may also appreciate parodies. In any event, (licentious) parodies of the well-known comic strips *Suske & Wiske* by Willy Vandersteen, and *Asterix & Obelix* by René Goscinny and Albert Uderzo, proved to sell quite well.

The copyright owners sued the imitators and their publishers, pleading copyright infringement, trademark infringement and tort. In the *Suske & Wiske* case, the President of the District Court of Amsterdam accepted in principle the excuse of an allowable parody (therefore not a copyright infringement), considering also that the characters, being “the products themselves,” could not be protected by trademark law as trademarks for the books. However, the imitation of the layout of the covers was held to constitute copyright infringement and in that respect an injunction was granted.<sup>47</sup>

The plaintiffs appealed and the Court of Appeals of Amsterdam granted a more severe injunction.

<sup>44</sup> Decision of February 26, 1981, KG 18, *Auteursrecht/AMR*, 1981, p. 69 (*Columbia Pictures and others/Kabeltelevisie Amsterdam*).

<sup>45</sup> Decision of January 14, 1984, NJ 1984, 696.

<sup>46</sup> In the meantime (after the decision of the Court of Appeals of September 17, 1981), the copyright owners have strengthened their position considerably by obtaining a more general injunction in favor of all members of the *Nederlandse Bioscoopbond* (class action by the producers and distributors): see President of the District Courts of Amsterdam, October 22, 1981, KG 1981, 158 and Haarlem, December 2, 1981, KG 1982, 14. In other respects, the plaintiffs strengthened their position by obtaining an injunction not only with regard to cable piracy in the “silent periods,” but also in the case of a pirate “displacing” a regular program: see President of District Court of Amsterdam, March 3, 1983, KG 1983, 107, confirmed by the Court of Appeals, February 9, 1984 (see *Auteursrecht/AMR*, 1984, p. 69).

<sup>47</sup> Decision of April 16, 1982, *Auteursrecht/AMR*, 1982, p. 83.

Since Dutch law lacks a special provision on parodies, such as that in Article 41(4) of the French Copyright Act, the Court had to make a distinction between a forbidden imitation and a permitted — partly imitated or “inspired” — “new, original” work, both within the meaning of Article 13 of our Copyright Act. Leaving aside the question of criterion as far as purely written (not drawn) literary works are concerned, the Court of Appeals held that, in this case, the original drawings of the characters, protected as drawings under Article 10(1)(6) of the Copyright Act, had been imitated exactly. According to the Court of Appeals, it is very easy, in the case of well-known comic strip characters, to make a drawing that conjures up the character for the public; a more or less exact imitation is not necessary, and such a drawing is therefore forbidden under Article 13. Petition for annulment was rejected by the Supreme Court.<sup>48</sup>

In the *Asterix & Obelix* case, an injunction was also granted, but it was based by the President of the District Court of The Hague on a different cause.<sup>49</sup> Like the President of the Amsterdam Court, his colleague at The Hague accepted the claim of sufficient “parodying originality,” but a complete injunction was granted by him under application of the law of torts. The defendants had taken advantage of *Asterix* popularity in a gross way and had also damaged the reputation of the character by the “suspicious alloy” of the stories thus treated. The judgment was not appealed from.

*Reciprocity under Article 2(5)  
of the Berne Convention (Brussels Act)*

For foreign readers, it may be interesting to learn of one more Dutch court decision that interprets Article 2(5) of the Brussels Act of the Berne Convention in respect of works of applied art and industrial designs. According to the second sentence of this paragraph

Works protected in the country of origin solely as designs and models shall be entitled in other countries of the Union only to such protection as shall be accorded to designs and models in such countries.

As reported earlier in this “Letter,” a special Benelux law on industrial designs has been in force in Belgium, Luxembourg and the Netherlands since 1975. Under transitional provisions, however, the “former” law has continued to apply to designs

<sup>48</sup> Decision of April 13, 1984, NJ 1984, 524, preceded by a very interesting comparative law study by the Advocate-General.

<sup>49</sup> Decision of January 12, 1983, KG 1983, 50, *Auteursrecht/AMR*, 1983, p. 91.

known prior to 1975. However, before 1975, designs were protected by copyright and unfair competition law only.

In 1978, a case was brought before the President of the District Court of Zwolle concerning a "pre-1975 design" which enjoyed in its country of origin no copyright protection, but only protection under a special designs law. The question was therefore whether the Netherlands, under application of Article 2(5) of the Berne Convention (Brussels Act), should refuse *all* protection or — since the design was deemed to be eligible for copyright protection under Dutch provisions — *should grant copyright* protection. Both the President of the District Court — quoting contradictory national and international literature — and the Court of Appeals decided in favor of the latter view. The Court of

Appeals expressly considered that the principle of national treatment should prevail whenever possible over the exceptions to that principle, and that the exception in the said paragraph therefore should be read in a narrow way: if the foreigner, although protected in the country of origin only by a special designs law, *cannot* (and could not) claim similar protection in another Union State, that State should grant copyright protection as it does for nationals.<sup>50</sup> We know that this interpretation of Article 2(5) of the Brussels Act is in conformity with the new paragraph (7) of Article 2 of the Stockholm and Paris Acts.

<sup>50</sup> Decisions of the President of the District Court of Zwolle, July 28, 1978 and the Court of Appeals of Arnhem, October 1, 1979, BIE 1982, p. 47 (*Insect destroyers*).

## Book Reviews

**Les Correspondances inédites**, by André Françon and Claude Goyard. One volume of 388 pages, published in 1984 by Economica, Paris.

André Françon and Claude Goyard, both Professors at the Paris University of Law, Economics and Social Science, had the excellent idea of compiling in one work the various communications presented to an international symposium held in Paris in June 1983. The subject of the symposium was not without interest — unpublished correspondence: the legal, technical and administrative problems of conserving, consulting and publishing correspondence. The symposium attracted over 150 attorneys, professors of law, lawyers and research workers. The conclusions of the symposium were drawn by Professor Roland Drago, of the same University, and President of the *Société de législation comparée*.

The various questions discussed are grouped together in four parts dealing, respectively, with legal aspects in French law, publication, legal aspects in comparative law and the case of the correspondence of the well-known author Frédéric Mistral, whose holographic will is reproduced in an annex together with various interesting documents on this case.

As remarked by André Kerever, *Conseiller d'Etat*, in one of his contributions, "there is no need to emphasize the great cultural and humanistic value of publishing hitherto unknown correspondence since it is such an obvious source of ideas and of thinking; in a way, it belongs to the universal heritage, but

it also remains, and there lies the problem, the subject of private appropriation."

The subject is a vast one; the range of questions that it poses and of the fields on which it touches is impressive: personality rights, copyright (and of course moral rights), quotations, commercial law, publishing contracts (frequently post-humous), possession of the manuscripts, the contents of letters missive, the right of secrecy, conservation of originals, archiving, and so on. It is indeed a very wide field with implications that are not only legal but also technical, economic and administrative.

The authors of the reports submitted to the symposium treated all these matters with great competence.

Although the combination of statutory provisions, case law trends and day-to-day practice often leads to compromises that satisfy no one, it nevertheless remains that the question of unpublished correspondence suffices to demonstrate the need to give copyright a strong and effective protection. The conflicts of rights that may arise in this context must be resolved, in our view, in such a way that prime importance is given to copyright.

This work compiled by Professors Françon and Goyard incontrovertibly represents a precious source of references and a useful working tool for anyone interested in this subject which, although it sometimes engenders passions, certainly deserved that such a work be devoted to it.

C.M.

**Estudios sobre derecho de autor; reforma legal colombiana**, by *Arcadio Plazas*. One volume of 305 pages, published in 1984 by Temis, Bogotá.

Arcadio Plazas, a Bogotá lawyer and one of the most eminent copyright specialists in Latin America, has recently published a book, in December 1984, which contains a number of studies devoted to copyright. The first part of the book comprises a collection of articles on copyright that he has written, to quote the author, "over more than 40 years of professional activity." In the second part, he gives a commentary on the new Colombian Law on Copyright of January 28, 1982, which is reproduced in an annex to the work.

No one could be better qualified than Arcadio Plazas to give the interested circles the benefit of his reflections on this important legislative reform carried out in Colombia. He was a member of the committee of lawyers set up to advise the minister responsible for preparing the draft law between September 1978 and July 1979, and he is surely one of those who best know this legislation. Indeed, he himself mentions that he had submitted to the committee no less than 26 notes dealing with various of the provisions.

The Colombian Law is known to be one of the longest (it comprises 260 articles), covering not only copyright in general, including provisions on publishing contracts and representation contracts, but also neighboring rights, not to forget collective administration rights and the usual chapter on civil and penal sanctions.

While giving a detailed analysis of the text of the Law, Arcadio Plazas does not spare his criticism of those points which he feels lead to controversy or to problems of application. Indeed, it suffices to refer to the "Letter from Colombia" written by the author and published in the April 1983 issue of this review.

This book represents an eminent contribution to legal writings in the Spanish language and deserves to be widely distributed, particularly in the Latin American countries where it may serve the authorities as a precious source of references to Colombian doctrine in copyright. It permits Arcadio Plazas to demonstrate once again the measure of his vast legal knowledge, his competence and his experience in the field of intellectual property.

C.M.

## Calendar of Meetings

### WIPO Meetings

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

#### 1985

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

**June 3 to 7 (Geneva) — Nice Union: Committee of Experts**

**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)**

**July 8 to 12 (Geneva) — Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions**

**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**

**October 21 to 25 (Geneva) — Nice Union: Committee of Experts**

- November 4 to 30 (Plovdiv) — WIPO/Bulgaria: World Exhibition of Young Inventors and International Seminar on Inventiveness for Development Purposes (November 12 to 15)
- 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
- November 26 to 29 (Geneva) — Committee of Experts on a Treaty for the Protection of Integrated Circuits
- December 9 to 13 (Geneva) — Committee of Experts on the International Registration of Marks

## UPOV Meetings

### 1985

- 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

- May 2 to 4 (Perugia) — International Confederation of Societies of Authors and Composers (CISAC) — Legal and Legislation Committee
- May 6 to 9 (Zurich) — International Federation of Musicians (FIM) — Executive Committee
- June 7 to 12 (Munich) — International Copyright Society (INTERGU) — Congress
- June 19 and 20 (Geneva) — International Federation of Phonogram and Videogram Producers (IFPI) — Council and General Assembly
- August 18 to 24 (Chicago) — International Federation of Library Associations and Institutions (IFLA) — Congress
- September 10 to 14 (Athens) — International Federation of Actors (FIA) — Congress
- September 16 to 18 (Geneva) — International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) — Annual Meeting

#### 1986

- May 8 and 9 (Heidelberg) — International Publishers Association (IPA) — Reprography Symposium
- September 8 to 12 (Berne) — International Literary and Artistic Association (ALAI) — Congress

