

Published monthly  
Annual subscription:  
fr.s. 130.—  
Each monthly issue:  
fr.s. 13.—

# Copyright

21<sup>st</sup> year — No. 5  
May 1985

Monthly Review of the  
World Intellectual Property Organization (WIPO)

---

## Contents

BERNE UNION	
Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite (Paris, March 18 to 22, 1985) . . . . .	180
NOTIFICATIONS	
Nairobi Treaty on the Protection of the Olympic Symbol Mexico. Ratification . . . . .	189
NATIONAL LEGISLATION	
ICELAND. Act Amending the Copyright Act No. 73, of May 29, 1972 (No. 78, of May 30, 1984) . . . . .	190
UNITED KINGDOM. The Copyright (International Conventions) (Amend- ment No. 2) Order 1984 (No. 1987, of December 19, 1984) . . . . .	191
GENERAL STUDIES	
The First Sale Doctrine — The Defense That Never Was? (Richard Colby) .	192
ACTIVITIES OF OTHER ORGANIZATIONS	
International Literary and Artistic Association (ALAI). Study Session, Executive Committee and General Assembly (Oxford, April 10 to 13, 1985) . . . . .	205
BOOK REVIEWS	
Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976 (J.H. Reichman) . . . . .	206
Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models (J.H. Reichman) . . . . .	207
CALENDAR OF MEETINGS . . . . .	208

---

© WIPO 1985

Any reproduction of official notes or reports, articles and translations of laws or agreements,  
published in this review, is authorized only with the prior consent of WIPO.

ISSN 0010-8626

---

## Berne Union

### Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite

(Paris, March 18 to 22, 1985)

#### Report

#### I. Introduction

1. In pursuance of the decisions taken by the General Conference of Unesco at its twenty-second session 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") jointly convened a "Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite" (hereinafter referred to as "the Group of Experts") which met at Unesco headquarters in Paris from March 18 to 22, 1985.

2. The mandate of the Group of Experts was to examine the legal problems in the field of copyright raised by direct broadcasting by satellite, and the results of the meeting were to be submitted to the Intergovernmental Committees of the copyright conventions at their next session in June 1985.

3. The experts attending the meeting, who were invited in a personal capacity, were nationals of the following five countries: Barbados, China, India, Senegal and the United Kingdom. The two consultants who had assisted the Secretariats in drafting the preparatory documents also attended the meeting.

4. The States party to the international treaties concerning intellectual property were invited to follow the discussions of the Group of Experts. Delegations from the following States attended the meeting: Algeria, Australia, Austria, Bangladesh, Belgium, Brazil, Cameroon, Canada, Congo, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic of), Ghana, Greece, Haiti, Holy See, Hungary, Indonesia, Iraq, Israel, Ivory Coast, Jordan, Kenya, Mongolia, Netherlands, Niger, Nigeria, Norway, Poland, Portugal, Rwanda, Saudi Arabia, Senegal, Soviet Union, Sweden, Togo, Tunisia, Turkey,

United Kingdom, United States of America and Yugoslavia.

5. Observers from three intergovernmental organizations and 18 international non-governmental organizations also attended the meeting.

6. The list of participants is appended to this report.

#### II. Opening of the Meeting

7. On behalf of the Director-General of Unesco, Mr. H. Ben Amor, Acting Assistant Director-General for the Programme Support Sector, opened the meeting and welcomed the participants. The Director General of WIPO, Dr. Arpad Bogsch, echoed his words of welcome and thanked Unesco for hosting the meeting.

#### III. Election of Officers

8. Mr. Jennings (United Kingdom), Mr. Li Qi (China) and Mr. Sonko (Senegal) were unanimously elected Chairman and Vice-Chairmen, respectively, of the Group of Experts.

#### IV. Documents

9. The participants had before them two working documents, drafted by Mr. André Kerever and Mr. Gabriel Perle at the request of the Secretariats.

10. The participants were unanimous in praising the quality and comprehensiveness of these two documents, on which they warmly congratulated their authors.

## V. Discussions

### General questions

11. The meeting first heard the oral presentation that the authors of the two preparatory documents, Mr. A. Kerever and Mr. G. Perle, made.

12. During the discussion that followed on general questions, the Director General of WIPO advanced the following tentative views on certain of those questions:

- (i) Broadcasting through direct broadcasting satellites is broadcasting in the sense of Article 11<sup>bis</sup> of the Berne Convention.
- (ii) According to that Article, broadcasting is a means of communication to the public by wireless diffusion (namely by radio waves). The said Article uses the concepts "communication to the public" and "diffusion" and does not use the concept "emission," a concept that is narrower than "communication to the public" and "diffusion." Consequently, broadcasting takes place where the wireless diffusion takes place as a communication to the public. Where communication to the public by means of radio waves is effected through a direct broadcasting satellite, the communication takes place in all countries which are covered by the "footprint" of the satellite.
- (iii) Under the Berne Convention, which provides for national treatment, the national law of each country covered by the "footprint" of the satellite is applicable. The national laws may grant an exclusive right (Article 11<sup>bis</sup>(1)), or may provide for what may be called a non-voluntary license (Article 11<sup>bis</sup>(2)). Any broadcasting through direct broadcasting satellites, when the "footprint" covers more than one country, must, therefore, comply with the copyright laws of each of the countries covered by such broadcasting. Otherwise, a communication to the public in one country would be governed by the national law of another country, a result contrary to the principle of national treatment.
- (iv) Where the "footprint" covers only a part of a country, one might consider, according to the "de minimis" principle, that the national copyright law of that country need not be taken into account.
- (v) Compliance with the applicable national copyright laws is the responsibility of the person or organization that gives the order for the broadcasting through direct broadcasting satellite. No other entity has any responsibility.

In particular, no person who receives the broadcast in any country has any responsibility, in particular needs no authorization from, and needs not pay anything to, the owner of the copyright in the broadcast work, for such reception.

- (vi) These views are based on the Berne Convention as it is today.

13. The representative of the Director-General of Unesco noted that the Universal Copyright Convention as revised in 1971 provided in its Article IV<sup>bis</sup>, *inter alia*, for the exclusive right to authorize the broadcasting of intellectual works. That provision could be applied to this new technique of diffusion inasmuch as broadcasting in the sense of the Convention encompassed direct broadcasting by satellite.

14. A number of participants emphasized the need for examining the questions arising in connection with direct broadcasting satellites in the field of copyright. Some of them stressed the urgency of the issue, with particular regard to the fact that broadcasting by satellite may compete with traditional broadcasting in the countries within the coverage area of the satellite.

15. The representative of the Commission of the European Communities informed the participants of the publication, in June 1984, of the Green Book on "Television without frontiers," dealing with the establishment of a common market of broadcasting, among others, by satellite. The Commission is waiting for direct broadcasting by satellite becoming operational and is inclined, for the time being, to think that the related copyright problems could be solved within the Community by means of contracts.

16. One participant referred to the discussion of copyright questions concerning direct broadcasting satellites in the Council of Europe.

17. Participants from Nordic countries informed the meeting of discussions that took place on the subject among the Nordic countries, where a Nordic satellite project was under consideration. According to present plans, only the national law of the country of emission would apply, even where the "footprint" covered several countries.

18. Several participants said that it was also necessary to deal with questions of so-called neighboring rights relating to direct satellite broadcasting. The representative of the International Labour Office noted with satisfaction that certain participants had

highlighted the importance of additional discussion of so-called neighboring rights in connection with satellite transmission. Doubtless no one would dream of disputing their importance. It was not the responsibility of the present meeting to deal with the matter, since its mandate was confined to copyright. Nevertheless, in technical terms it would already be providing useful food for thought concerning so-called neighboring rights. The speaker announced that, on the combined initiative of ILO, Unesco and WIPO, the Intergovernmental Committee of the Rome Convention would be called upon to consider, at its next session (June 1985), a proposal to undertake a study of the problems raised, insofar as these concerned the Rome Convention, by legal and practical developments in the sphere of cable and satellite transmission. The study would be submitted to the Committee at its next session. If the proposal were accepted, it would be possible to study problems affecting neighboring rights with due regard to the specific characteristics of the Rome Convention.

19. Several participants dealt with the narrowing of the technical difference between fixed satellite services and broadcasting satellite services. Powerful communication satellites allowed easier reception, in some cases even by individual members of the public, and distribution on earth of the signals received was increasingly effected by cable; on the other hand, the direct broadcasting satellite industry was developing only slowly and dishes for domestic reception of direct satellite broadcasts were expensive. Distribution by cable enabled the use of uncomparably more channels than possible through satellites, and cable technology was quickly developing. Local distribution by cable of programs transmitted by fixed satellite service was spreading in particular in the United States of America, but also in Europe (Sky Channel, Music Box, etc.). Nevertheless, the participants found that copyright questions of direct satellite broadcasting should be dealt with separately.

20. The participants were informed of the British Cable and Broadcasting Act of 1984 which assimilated direct broadcasting by satellite to broadcasting. In France, the Bill introduced to the Parliament on the revision of the Copyright Act 1957, contained a new term, "*télédiffusion*" which was defined as "the diffusion by any telecommunication process of sound, images, documents, data and messages of any kind." The purpose was to use a single term to cover all forms of telecommunications; it therefore applied to both radio broadcasting and cable distribution. Under Article 8 of the Bill, the diffusion of a work by the emission of signals towards a satellite for subsequent reception either di-

rectly by the public or, under certain conditions, through the mediation of some other body, was assimilated to the broadcasting of the work in question.

21. One participant said that satellite broadcasting was, by its very nature, broadcasting in the traditional meaning of the word, since the satellite replaced, for purposes of television broadcasting, the so-called Heaviside layer which naturally reflects to earth short waves used in sound broadcasting.

22. A great number of participants said that broadcasting via direct broadcasting satellites amounted to broadcasting also from the point of view of copyright. Many participants found that, as a consequence, direct satellite broadcasting needed no special consideration, and the use of direct broadcasting satellites merely increased the effect of the original emissions.

23. A number of other participants, however, emphasized that the quantum jump as regards the extent of the area covered by satellite broadcasting resulted in a new quality of broadcasting. Whereas in the case of traditional broadcasting the coverage of territories neighboring to the country of the emission could be generally considered as a mere "overspill," broadcasting via satellite frequently covered the territory of several countries, totally or to a considerable extent, even where the emission was effected from a country having a large territory. Moreover, broadcasting via satellite could not be compared with sound broadcasting by short waves over large distances, owing to technical differences, differences in attainable quality of reception, and relative economic considerations. These factual differences called for a corresponding legal treatment. Aspects which could be neglected in the case of traditional broadcasting have to be considered in the case of direct broadcasting satellites.

24. Some participants referred to the possibility of developing technical means of narrowing the actual coverage area of a direct broadcasting satellite and limiting it to the area allotted, under the International Telecommunication Convention, to the country under the law of which the satellite operates. Other participants held, however, that the feasibility of such technical solutions was yet to be proved and that the difference in the coverage areas of traditional and satellite broadcasting would in any case remain so significant that special copyright considerations seemed unavoidable.

25. Some participants asked the question whether direct broadcasting by satellite could not be re-

garded under the Berne Convention as a *sui generis* communication to the public governed by Articles 11 and 11<sup>ter</sup>, or, in the case of cinematographic productions, as distribution under Articles 14 and 14<sup>bis</sup>, and noted that those four Articles did not allow — as did Article 11<sup>bis</sup>(2) — for the determination, by national legislation, of the conditions of the exercise of copyright in the work communicated to the public. It was found, however, that communication to the public by means of radio waves came under the provisions of the special rules contained in Article 11<sup>bis</sup> concerning broadcasting.

### *The applicable law*

26. The participants agreed that it was always the broadcaster originating the direct broadcasting by satellite (determining its program and giving the order for its distribution) who was responsible vis-à-vis the owners of the copyright concerned.

27. One participant expressed the view that among countries that were party to the Berne Convention or the Universal Copyright Convention (1971 text), the rule that only the laws of the country of emission were applicable did not raise any problems, except in the case of non-voluntary licenses; it would therefore suffice to settle that problem, and there was no need to take the laws of the countries of reception systematically into account. As for countries that were not party to the above-mentioned international treaties, it was hardly feasible to make them show greater respect for the authors' rights of nationals of other countries.

28. Several participants said that, since direct broadcasting by satellite was broadcasting, the law applicable to the responsibility of the broadcaster under international conventions should be determined in the traditional way, as has generally been determined in connection with traditional broadcasting. According to these participants, the law of the country of the broadcaster, and that law alone, should apply to the copyright responsibility of the broadcaster, even where the satellite broadcasting covered several countries. This country was, according to some of the said participants, the country where the broadcaster had its headquarters, whereas according to others it was the country where the emission to the satellite took place. One participant informed the meeting that, under the law of the United Kingdom, the broadcast was deemed to be made from the place from which it was transmitted to the satellite. In the view of some participants, there was nothing in the Berne Convention which would support the application of the laws of all countries covered by the satellite; this would amount to considering the reception as an act rele-

vant to the copyright liability for broadcasting; the necessity of acquiring the right to broadcast the work in each country concerned would often cause unmanageable difficulties in practice, particularly since the refusal of the grant of the right for one of the countries covered by the satellite would make it impossible to go ahead with the broadcasting by satellite of that work at all. Two participants said that such an interpretation of the Berne Convention would open the way to obstructing direct broadcasting by satellite for political reasons, enabling the copyright owner or his representative to refuse the authorization for certain countries where he or it regarded the broadcast of the work politically undesirable.

29. Other participants said that the application only of the law of the country where the broadcast originates would imply a concept according to which broadcasting is merely emission, and it is just such a concept which is alien to the Berne Convention, in which broadcasting is considered as communication to the public and emission is not even mentioned. Whereas emission took place only in one country, communication to the public of the work was effected in each country where the work was made available to the public by means of diffusion of radio waves, under the law applicable according to Article 5(1) of the Berne Convention. Making available to the public was not the same concept as the concept of reception and did not imply any responsibility of anyone who received the broadcast. It was said that in the case of traditional broadcasting, the question did not arise since, characteristically, traditional broadcasting concerned only the country where the emission was made. Several participants said that the acquisition of rights with regard to several countries usually did not cause any practical difficulties, since the owner of the rights relating to various countries was, in most cases, one and same person, and those rights which were collectively administered could generally be obtained for all countries from one and the same organization, namely the organization of the country of the broadcaster since such organization represented also the organizations of the other countries concerned; furthermore, it was said that where rights for various countries were owned by different persons or organizations, the broadcaster would not be in a worse situation than, for example, publishers are with regard to books containing works of several authors and intended to be distributed in several countries. It was also stressed that political considerations should not deprive the author of the exercise of his exclusive right at his discretion and that it followed from the author's moral right that in certain cases he may refuse his authorization for reasons of political convictions.

30. One participant said that whereas a publisher may still proceed to the publication of a book if he was not allowed to distribute it in certain countries, the satellite broadcaster had to refrain necessarily from the entire broadcast if he was not allowed to diffuse the work in one of the countries of the satellite's coverage area. It was also said, however, that in countries where the right of broadcasting was an exclusive right, the possibility of refusal of the authorization could not be avoided.

31. One participant said that appropriate remuneration, corresponding to the extent of the actual use of the work by satellite broadcasting, could also be secured to the author through contractual stipulations, under the single law of the country of the origination of the broadcast. On the other hand, it was said that this argument could apply only where the country of the broadcaster recognized the right of broadcasting as an exclusive right (otherwise the legal basis for effective negotiation was missing) and that, in any case, the application of several laws under the international conventions did not merely serve the purpose of securing remuneration. Any diffusion of a work without the author's express authorization in a given country may interfere with other kinds of uses of the work, e.g. in the case of the broadcasting of an audiovisual work in a country where the owner of the copyright did not wish that television reception be possible before theatrical exhibition had taken place.

32. One participant said that copyright fees for the broadcast were usually calculated in consideration of the public intended to be served and it was difficult to estimate the public actually reached within the entire "footprint" of the satellite since, for instance, the language of the broadcast may not interest most of the people in different language areas; it should be also considered that in the last few years the viewing time was generally becoming shorter and shorter (owing, *inter alia*, to the increasing number of channels and the use of video cassettes), and that towards the peripheries of the "footprint" the broadcast signals were weakening so that they could be received satisfactorily only by means of sophisticated receiving sets and it was hardly possible to determine under which conditions of reception could the broadcast still be considered as communication to the public. Another participant said that the effect on the reception of different language areas and other factors influencing the probable number of receivers within the "footprint" of the satellite should be considered when negotiating the amount of the remuneration; as to the type of receivers supposed to be suitable for the reception of satellite broadcasts, that participant referred to the ITU Radio Regulations according to which individ-

ual receptions in the broadcasting satellite service should be possible by a simple domestic installation and in particular those possessing small antennae. Some participants said that broadcasting satellite services financed from advertising fees would face difficulties if they were required to respect authors' rights in each country covered by their broadcast since advertisers were not prepared to pay for diffusion in countries where they were not interested in advertising. On the other hand, it was said that any actual use of protected works was subject to copyright liability irrespective of whether it was profit-making or not.

33. Several participants referred to the difficulties in enforcing rights concerning the satellite broadcast of a work in a country party to a copyright convention protecting the work broadcast if the broadcast was originated in a country not bound by that convention. Others said, however, that the mere fact that one could not enforce a right in certain cases should not mean that the right should not be recognized and that there might be cases where, because of the foreign broadcasters having assets or other interests in the country of infringement, remedies could be available. It was also said that if something was illegal in a country, it would not become legal just because it came from abroad. One participant said that it was rather academic to consider such cases. It was recalled, however, that there were still important countries not party to the Berne Convention and that broadcasts could be originated also from international waters.

34. One participant was of the view that if the application of several laws did not follow from the Berne Convention, one could have recourse to a special agreement under Article 20 of that Convention.

35. Some participants suggested that if the Berne Convention were to be interpreted as meaning that the author of a work transmitted by direct broadcasting satellite had no rights in a country covered by such broadcast other than the country of the broadcaster, then such interpretation would logically imply that any cable distribution of such broadcast in those countries should also be free; this, however, would be an unacceptable result. On the other hand, other participants said that cable distribution was an act separate from broadcasting and was governed by its own rules.

36. The representative of cable distributors said that the broadcaster should acquire the rights required to make legitimate diffusion of its program in all countries covered by its broadcast, including the right of cable distribution of the broadcast in those countries.

37. One participant saw difficulties in drawing the borderline between irrelevant coverage by broadcast of the territory of a country and coverage involving copyright liability.

#### *Non-voluntary licensing*

38. Some participants recalled that at the time of the 1928 Rome Conference for the revision of the Berne Convention when it was made a matter for national legislation to determine the conditions of the exercise of the right of broadcasting, enabling the countries of the Union to introduce systems of non-voluntary licensing in favor of broadcasting organizations, the factual situation was characterized by the following: (i) broadcasting was made overwhelmingly by organizations under public law, (ii) television broadcasting was non-existing and (iii) both the emission of the radio waves and the communication to the public of the sounds took place essentially, if not exclusively, within the limits of the country of the broadcaster. Since that time, commercial broadcasting had become more and more important, television broadcast became a reality, and the diffusion of the signals increasingly covered also territories of countries other than the country of the broadcaster. Thus, the initial conditions that were underlying the said provisions in the Berne Convention had profoundly changed and there was no reason any more to allow the granting of non-voluntary licenses, at least not to commercial broadcasters, and because in most cases it also became impossible to limit the effects of a non-voluntary license to the territory of the country under the law of which such a license was granted.

39. One participant recalled that when considering the possibility of non-voluntary licensing in the Diplomatic Conference of 1948 for the revision of the Berne Convention, one delegation proposed to exclude the application of such licenses in the case of commercial broadcasts. That proposal was not adopted, so that Article 11<sup>bis</sup>(2) may be equally applied to broadcasts financed by public funds, subscribers' fees or fees paid by advertisers.

40. Some participants emphasized that the grant of so-called compulsory licenses to broadcast protected works by means of direct broadcasting satellites was inconsistent with the Berne Convention since by their very nature such broadcasts characteristically covered territories of countries other than that where the compulsory license was granted and since the Berne Convention expressly limited the effect of any compulsory license to the territory of the country that granted such license.

41. Other participants mentioned the consequences of the inapplicability of compulsory licenses to broadcasting satellite services in countries where such licenses prevail: under the law of such countries, the author had no exclusive right based on which he could negotiate a contract and, owing to the inapplicability of compulsory licensing, the situation was not regulated at all.

42. One participant informed the meeting of the idea of the Nordic countries to agree upon, in a convention, the use of non-voluntary licensing of direct satellite broadcasting in each of them.

43. Some participants said that according to the national treatment rule of the Berne Convention the national law of each country covered by the direct broadcasting satellite applied to the authors' rights relating to the diffusion of the work over the territory of that country: in any country where there is a compulsory licensing the broadcaster may benefit from it, in any country where the right is an exclusive right the broadcaster has to respect it.

44. Some participants emphasized that under Article 11<sup>bis</sup>(2) of the Berne Convention the countries may limit compulsory licensing, if any, to certain types of broadcasts, for example to broadcasts by governmental broadcast services.

45. One participant said that one should not, with reference to Article 11<sup>bis</sup>(2), speak generally of compulsory licenses. The "conditions" mentioned in that provision may equally consist of statutory or compulsory licenses, obligatory collective administration of broadcasting rights in certain kinds of works, compulsory representation by authors' organizations of non-members of those organizations, etc.

46. One participant suggested considering the establishment of an arbitration body for the determination of the amount of remuneration to copyright owners where it could not be agreed upon by the parties.

#### *Pay television*

47. One participant raised the question whether the so-called "pay television," that is, television broadcasting receivable only by those members of the public who hired or bought the decoder necessary to decrypt the encrypted signals diffused by the broadcaster, could be qualified as broadcasting at all, since the public to which the communication of signals is intended was restricted to those who availed themselves of the additional service of the broadcas-

ter consisting in providing his customers with decoders ("real audience").

48. One participant said that such decoders should be considered as any other accessories of receiving equipments, such as, for instance, converters or normal aerials, which did not add any new act of communication to the broadcast; thus "pay television" amounted to broadcasting.

49. Some participants said that the rental or sale of decoders was a kind of guarantee of receiving the subscription fee and was a trading activity of the broadcaster. It was also said that fees charged to the public by the user of a work for access to it did not alter the type of the act of using the work.

50. Several participants said, however, that although "pay television" was broadcasting, national legislation should not allow for its non-voluntary licensing. The meeting was informed of a bill introduced to the Parliament in Denmark providing that the use of protected works in encrypted broadcasts may not be subjected to compulsory licensing.

#### *Ephemeral recording*

51. One expert said that the unavoidable recording of the broadcast work in the direct broadcasting satellite, placed on a geostationary orbit, was kept only for a minuscule portion of a second and, therefore, it was irrelevant for all practical purposes; the geostationary position over the coverage area rendered recordings for deferred diffusion to the area allotted to the satellite unnecessary.

#### *Conclusion*

52. In conclusion, the participants agreed that direct broadcasting of works by means of a satellite (broadcasting satellite service) was broadcasting in the sense of both the Berne and Universal Copyright Conventions. The participants suggested that various aspects of the application of those Conventions when broadcasting is effected through direct broadcasting satellites should be further studied by the Secretariats, in particular as regards the following questions: (i) the law of which country or countries applicable in the case of direct broadcasting by satellites covering several countries; (ii) the applicability of non-voluntary licensing; (iii) the applicability of remedies under criminal law and civil law other than the law on copyright; (iv) differences between, and common characteristics of, fixed satellite and broadcasting satellite services; (v) links between satellite broadcasting and cable distribution. The participants also suggested to extend the study to the field of neighboring rights. The participants noted that the Secretariats would report on the meeting to their respective Copyright Committees.

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

53. This report was adopted unanimously by the participants on March 22, 1985.

#### **VII. Closing of the Meeting**

54. After the usual thanks, the Chairman declared the meeting closed.

### **List of Participants**

#### **I. Experts**

- Mr. Bernard Antony Jennings  
Legal adviser, British Broadcasting Corporation
- Mr. Li Qi  
Head, Copyright Study Group, The Publishers Association of China
- Mr. Sherman Rudolph Moore  
Senior Parliamentary Counsel, Attorney-General's Chambers, Bridgetown
- Mr. Venkatasubbiah Siddhartha  
Scientist, Department of Space, New Delhi
- M. Ousmane Sonko  
Chef du Service juridique, Office de radiodiffusion télévision du Sénégal

#### **II. Consultants**

- M. André Kerever  
Conseiller d'Etat, Paris
- Mr. E. Gabriel Perle  
Counsel, Proskauer Rose Goetz and Mendelsohn, New York

#### **III. States Party to International Conventions on Intellectual Property Invited to Follow the Discussions**

##### **Algeria**

- M. Sid Ahmed Baghli  
Ministre plénipotentiaire, Conseiller, Délégation permanente de l'Algérie auprès de l'Unesco

Mrs. Taous Djellouli  
Second Secretary, Permanent Delegation of Algeria to  
Unesco

#### Australia

Mr. David Macintyre  
Deputy Permanent Delegate of Australia to Unesco

#### Austria

Mr. Robert Dittrich  
Director, Federal Ministry of Justice

Mme Elfriede Hufnagl  
Département du droit et des relations internationales, Ra-  
dio-Télévision autrichienne

Mr. Walter Dillenz  
Director, Performing Rights Society (AKM)

#### Bangladesh

Mr. Abu K.M. Jalaluddin  
Minister, Embassy of Bangladesh in France

#### Belgium

M. Frans Van Isacker  
Professeur à l'Université de Gand, Président de la Com-  
mission consultative sur le droit d'auteur

#### Brazil

Mrs. Almerinda Augusta de Freitas Carvalho  
Second Secretary, Permanent Delegation of Brazil to  
Unesco

#### Cameroon

M. Pierre Ilouga-Mabout  
Administrateur civil, Chargé d'études à la Cellule juridique  
du Ministère de l'information et de la culture

#### Canada

Mr. Frank Keyes  
Director of Copyright, Department of Communications

Ms Wanda Noel  
Barrister and Solicitor

M. Richard Tetu  
Directeur adjoint, Direction du droit économique et des  
traités, Ministère des affaires extérieures

#### Congo

M. Jean-Prospér Miamona  
Chef de la Section traités et conventions, Ministère des  
affaires étrangères et de la coopération

#### Czechoslovakia

Mr. Vlastislav Sedláč  
Third Secretary, Permanent Delegation of Czechoslovakia  
to Unesco

#### Denmark

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

#### Finland

Mr. Jukka Liedes  
Special Adviser, Ministry of Education

Mr. Kaj-Peter Mattsson  
Finnish Broadcasting Company

Mr. Jaakko Eskola  
Teosto ry. (Composers' Copyright Office)

Mr. Matthias Anderzen  
Director, Sanoma Corporation

#### France

M. André Bourdalé-Dufau  
Sous-Directeur des affaires juridiques et de la propriété  
intellectuelle, Ministère de la culture

Mme Marie-Christine Rault  
Chef du Bureau des médias, Sous-Direction des affaires  
juridiques et de la propriété intellectuelle, Ministère de la  
culture

M. Pascal Hamon  
Bureau des médias, Ministère de la culture

Mme Nicole Renaudin  
Chargé de mission, Ministère des relations extérieures

#### Germany (Federal Republic of)

Mrs. Margret Möller  
Ministerialrätin, Federal Ministry of Justice

#### Ghana

Mrs. Dife Kusi  
Attaché, Permanent Delegation of Ghana to Unesco

#### Greece

M. Nicolas Papageorgiou  
Conseiller juridique, Radio-Télévision hellénique  
(ERT-1)

#### Haiti

M. Lucien Adam  
Directeur général, Conseil national des télécommunica-  
tions

M. Eddy Célestin  
Conseiller technique, Conseil national des télécommunica-  
tions

#### Holy See

Maître Louis Rousseau  
Avocat honoraire au Conseil d'Etat et à la Cour de cassa-  
tion de Paris

Maître Renée-Virginie Blaustein  
Avocat à la Cour d'appel de Paris

**Hungary**

Mr. Mihály Ficsor  
Director General, Hungarian Bureau for Authors' Rights  
(ARTISJUS)

**Indonesia**

Mr. Tjitrosidojo Sumartono  
Directorate-General for Radio, Television and Films, Department of Information

**Irak**

M. Jamil Hamoudi  
Director, Ministry of Culture and Information

**Israel**

Mr. Meir Shamir  
Minister Plenipotentiary, Permanent Delegate of Israel to Unesco

**Ivory Coast**

M. Kouandé Charles Tiemele  
Conseiller technique, Ministère de l'information

**Jordan**

M. Salem Bader  
Conseiller culturel, Ambassade de Jordanie en France

**Kenya**

Mr. J.K. Mbaluli  
Deputy Permanent Delegate of Kenya to Unesco

**Mongolia**

Mr. Purejavyn Gansukh  
Attaché, Permanent Delegation of Mongolia to Unesco

**Netherlands**

Mr. Erik Lukács  
Legal Counsel, Ministry of Justice  
Mr. Peter Van Moort  
Legal Adviser, Ministry of Welfare, Health and Culture

**Niger**

M. Seyni Siddo  
Conseiller culturel, Ambassade du Niger en France

**Nigeria**

Mr. Joseph Adeleke Araoye  
Counsellor, Permanent Delegation of Nigeria to Unesco

**Norway**

Mr. Helge Mossige Soenneland  
Deputy-Director General, Ministry of Cultural and Scientific Affairs

**Poland**

Mr. Léon Waściński  
Permanent Delegate of Poland to Unesco

**Portugal**

M. Alberto Carvalho  
Assistant universitaire, Faculté des sciences sociales et humaines, Université nouvelle de Lisbonne

**Rwanda**

M. Fidèle Nkulikiyumukiza  
Chef, Section des programmes de radio, Office rwandais d'information

**Saudi Arabia**

Mr. Mohammad Fawzan Al-Sabek  
Director-General, Ministry of Information

**Senegal**

M. Babacar Ndoye  
Directeur général, Bureau sénégalais du droit d'auteur

**Soviet Union**

Mr. Vladimir Gaï  
First Secretary, Permanent Delegation of the USSR to Unesco

**Sweden**

Mr. Henry Olsson  
Director, Ministry of Justice

**Togo**

S. Exc. M. N'Sougan Agblemagnon  
Directeur, Laboratoire africain de coordination, de recherche et d'études interdisciplinaires

**Tunisia**

M. Bechir Zgaya  
Responsable du Bureau juridique et du Contentieux, Ministère des affaires culturelles  
M. Tahar Ben Slama  
Directeur général, Société des auteurs et compositeurs de Tunisie

**Turkey**

Mr. Ozger Sezen  
Legal Adviser, Copyright Division, Turkish Radio and Television Organization  
Ms Nilgün Senyüz  
Rapporteur, Copyright Division, Turkish Radio and Television Organization

**United Kingdom**

Mr. H.P. Nicholas Steinitz  
Principal Industrial Property and Copyright Department, Department of Trade and Industry

**United States of America**

Mr. William H. Skok  
Office of Business Practices, Department of State

Ms Lucy Hummer  
Senior Policy Adviser, Office of the Coordinator for International Communication and Information Policy, Department of State

**Yugoslavia**

M. Lado Hribar  
Chef du Service du droit d'auteur, Radio-Télévision de la Slovénie

Mme Radmila Mihailović  
Chef des relations internationales, Radio-Télévision yougoslave

**IV. Observers***a) Intergovernmental Organizations*

**International Labour Organisation (ILO):** R. Cuvillier. **European Economic Community (EEC):** D. Franzone. **Arab Educational, Cultural and Scientific Organization (ALECSO):** F. Ammar; Y. Al-Eryani.

*b) International Non-Governmental Organizations*

**European Broadcasting Union (EBU):** W. Rumphorst. **International Alliance for Distribution by Wire (AID):** G. Moreau. **International Association of Art (AIAP):** C. Bleyne. **International Association of Broadcasters (AIR):** N. Pizarro. **International Bureau of Societies Administering**

**the Rights of Mechanical Recording and Reproduction (BIEM):** J. Elissabide. **International Chamber of Commerce (ICC):** D. Ladd; C. Colombet; O. Carmet; D. Gaudel. **International Confederation of Societies of Authors and Composers (CISAC):** J.-A. Ziegler; C. Joubert; R. Abrahams. **International Copyright Society (INTERGU):** G. Halla. **International Federation of Actors (FIA):** R. Rembe. **International Federation of Associations of Film Distributors (FIAD):** G. Grégoire. **International Federation of Film Producers Associations (FIAPF):** A. Brisson; S. Madoff; H. Dobrensky. **International Federation of Journalists (IFJ):** S. Ove Gronsund. **International Federation of Musicians (FIM):** Y. Burckhardt. **International Federation of Phonogram and Videogram Producers (IFPI):** M. Burnett; E. Thompson. **International Federation of Translators (FIT):** M. Voituriez. **International Literary and Artistic Association (ALAI):** R. Castelain; D. Gaudel. **International Publishers Association (IPA):** D. Duclos. **International Secretariat of Arts, Communications Media and Entertainment Trade Unions (ISETU):** M. Lesage.

**V. Secretariat**

**United Nations Educational, Scientific and Cultural Organization (UNESCO)**

H. Ben Amor (*Acting Assistant Director-General for the Programme Support Sector*); A. Amri (*Acting Director, Copyright Division*).

**World Intellectual Property Organization (WIPO)**

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

**Notifications****Nairobi Treaty on the Protection of the Olympic Symbol****MEXICO****Ratification**

The Government of the United Mexican States deposited, on April 16, 1985, its instrument of ratification of the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty enters into force, with respect to the United Mexican States, on May 16, 1985.

Nairobi Notification No. 28, of April 16, 1985.

## National Legislation

### ICELAND

#### Act Amending the Copyright Act No. 73, of May 29, 1972\*

(No. 78, of May 30, 1984)\*\*

*Article 1.* Two new paragraphs shall be added to Article 11 of the Act and shall read as follows:

“The authors of works which have been broadcast or published on audio or video tape are entitled to special remuneration on account of the recording of their works on audio or video tapes for private use under provisions contained in the first paragraph of the present Article. A levy shall be paid in respect of equipment for the recording of works on audio or video tapes for private use as well as unrecorded audio and video tapes and other tapes which may be considered to be intended for such use. The levy shall be paid on equipment and tapes imported into Iceland or manufactured in this country and the duty to effect payment of this levy is imposed upon importers and manufacturers. The levy on equipment shall amount to four per cent (4%) of the import price or manufacturing price in case of domestic manufacture. The levy on unrecorded audio tapes shall amount to Kr. 10,00 but to Kr. 30,00 in case of unrecorded video tapes. The Minister of Culture and Education will lay down further rules relating to this levy, including the value guarantee thereof.

A joint collection center of a federation of copyright holders, including performing artists and producers, will collect copyright levies in accordance with the preceding paragraph and will dispose thereof. Statutes shall be laid down in respect of the collection center in cooperation with the Ministry of Culture and Education and these shall be subject to the Ministry's confirmation. The Statutes shall,

among others, stipulate the distribution of income among the member associations, and therein may also be contained instructions with respect to contributions for the support of the publication of audio and video tapes.”

*Article 2.* The words “first paragraph of Article 11” in the second paragraph of Article 45 shall be replaced by: “first and third and fourth paragraphs of Article 11”.

*Article 3.* The words “A gramophone record or other sound recordings may not be copied” at the outset of the first paragraph of Article 46 shall be replaced by: “Video tapes and audio recordings, including gramophone records, may not be copied”.

*Article 4.* The words “the first paragraph of Article 11” in the second paragraph of Article 46 shall be replaced by: “the first and third and fourth paragraphs of Article 11”.

*Article 5.* The beginning of the second paragraph of Article 54 shall be worded as follows:

“The following violations shall be subject to fines or imprisonment of up to two years”.

*Article 6.* A new clause shall be added to the second paragraph of Article 54 and this will be clause 6, reading as follows:

“(6) the importation and manufacture of equipment and audio or video tapes for the purpose of distribution thereof to the public and the distribution of such equipment or tapes to the public without copyright levy being paid thereon, in accordance with the third and fourth paragraphs of Article 11 or rules which are laid down in accordance therewith, cf. the third paragraph of Article 11”.

\* See *Copyright*, 1973, pp. 242 *et seq.*

\*\* The official Icelandic text of this Act was published in the *Law Gazette*, Series A, No. 78/1984, of May 30, 1984. Authorized English translation communicated to WIPO by courtesy of the Ministry of Culture and Education of Iceland.

*Article 7.* The second paragraph of Article 56 shall be worded as follows:

“A person who has criminally infringed the rights of an author or a performing artist shall be ordered by the Court to pay compensation to the injured party for mental suffering”.

*Article 8.* The first and second paragraphs of Article 59 shall be worded as follows:

“Violations of the present Act shall be subject to official indictment, but the institution of legal action shall at all times be permissible for the injured party. Violations shall be subject to official indictment only upon the requirement of the injured party, unless important public interests require legal action.

After an author's death, official indictment may furthermore be required or legal action may be instituted by the party whom the author has authorized to exercise his copyright in accordance with the second paragraph of Article 31, or alternatively the husband or wife of the deceased author, his parents, children, brothers and sisters may do so on account of violations of the first and second paragraphs of Article 4, the second and third paragraphs of Article 26, the first paragraph of Article 28, and the direc-

tions of the author in accordance with the second paragraph of Article 31, or a performing artist may do so in accordance with the same provision, cf. the second paragraph of Article 45”.

*Article 9.* Item B of Article 61 shall be worded as follows:

“B. The provisions of Article 46 apply to video and audio recordings wherever and by whomever these have been produced, but the right to remuneration in accordance with the third and fourth paragraphs of Article 11 applies only to recordings made in this country or in States granting similar rights to Icelandic recordings”.

*Article 10.* The present Act enters into force forthwith. The Ministry of Culture and Education is, however, authorized to postpone laying down rules in accordance with Article 1 with respect to the collection of levies on video tapes and equipment for recording thereonto.

*Article 11.* When the present Act enters into force, the provisions thereof shall be included in the text of the Copyright Act No. 73, of May 29, 1972 and the Act shall be published thus amended.

## UNITED KINGDOM

### The Copyright (International Conventions) (Amendment No. 2) Order 1984

(No. 1987, of December 19, 1984)\*

1. This Order may be cited as the Copyright (International Conventions) (Amendment No. 2) Order 1984 and shall come into operation on 21<sup>st</sup> January 1985.

2. The Copyright (International Conventions) Order 1979(b) shall be amended as follows:

(a) in Schedule 3 (which names countries in whose case copyright in sound recordings includes exclusive right to perform in pub-

lic and to broadcast) there shall be included a reference to the Philippines;

(b) in Schedules 4 and 5 (which name countries whose broadcasting organisations have copyright protection in relation to sound broadcasts and television broadcasts respectively) there shall be included a reference to the Philippines with a related reference in each Schedule to 25<sup>th</sup> September 1984.

3. (1) This Order, except for paragraph (b) of Article 2, shall extend to all the countries mentioned in the Schedule hereto.

(2) Paragraph (b) of Article 2 shall extend to Bermuda and Gibraltar.

\* The Copyright (International Conventions) Order 1979 has been amended by Orders in 1980, 1983 and 1984. See *Copyright*, 1980, pp. 212 *et seq.*; 1981, p. 80; 1984, pp. 287 *et seq.*

## SCHEDULE

## Article 3(1)

## EXPLANATORY NOTE

Countries to which this Order  
(except Article 2(b)) extends*(This Note is not part of the Order)*

Bermuda	Gibraltar
British Indian Ocean Territory	Hong Kong
British Virgin Islands	Isle of Man
Cayman Islands	Montserrat
Falkland Islands	St Helena
Falkland Islands Dependencies	St Helena Dependencies (Ascension, Tristan da Cunha)

This Order further amends the Copyright (International Conventions) Order 1979 to take account of the accession of the Philippines to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

The Order extends to the dependent countries of the Commonwealth to which the 1979 Order now extends.

## General Studies

### The First Sale Doctrine — The Defense That Never Was?

Richard COLBY\*

The Committee concludes that the first sale doctrine was never intended to allow or to sanction commercial record rentals which lead inevitably to widespread and unauthorized home taping.<sup>1</sup>

Senate Judiciary Committee,  
June 1983

\*Senior Distribution & Marketing Counsel, Twentieth Century Fox Pictures; Adjunct Professor of Law, Pepperdine University School of Law, Malibu, California; Member of the California and New York Bars; J.D. Yale Law School 1949; Chairman, 1982–1985, American Bar Association Subcommittee on Employment for Hire of the Committee on Authors of its Patent, Trademark and Copyright Section; Chairman, Copyright Committee, Member, Executive Committee of the Patent, Trademark and Copyright Section of the State Bar of California; Trustee of the Copyright Society of the USA; Trustee of the Los Angeles Copyright Society; Member of the Advisory Board of Communications and the Law; Former Chairman of the Copyright Committee of the Motion Picture Association of America, Inc.

Mr. Colby's analysis and opinions are, of course, his own, and do not necessarily represent the views of the American Bar Association or of the State Bar of California, or any of their respective Sections or Committees, or of any other organization with which Mr. Colby is associated.

Mr. Colby gratefully acknowledges the research assistance of Dr. Joseph V. Nash, who is Adjunct Professor in the Business School of Seaver College, and is a third-year student at Pepperdine University School of Law. Dr. Nash contributed to the writing of Part II of this article.

<sup>1</sup> Senate Report (S. Rep.) No. 98–162, 98th Congress, 1st Session, at 4 (1983).

#### PART I

#### The First Sale Doctrine — Rentals?

One of the most important limitations on a copyright owner's rights is found in § 109(a) of the 1976 Copyright Act. This limitation, sometimes called the first sale doctrine, has been popularly understood to mean that, if a copyright owner sells a video cassette or a phonorecord, the person to whom that video cassette or phonorecord is sold may, without the copyright owner's consent, resell it or rent it.

The availability of modern copying equipment in the home, and the rental of video cassettes and phonorecords to the public, by retailers who are apparently aware that many of their patrons will make copies, has caused the Congress to reassess the first sale doctrine. In the case of sound recordings and phonorecords, Congress recently changed the law, except as to nonprofit libraries and nonprofit educational institutions. The present article reviews the case law and applicable statutory provisions under both the 1909 and 1976 Copyright Acts, and concludes that, even before the Record Rental Amendment of 1984, neither Act would permit the rental to the public of video cassettes or phonorecords purchased by a retailer.

Thus, each such rental transaction, whether for viewing or listening or for copying, is potentially a copyright infringement. In short, is the video cassette rental business in the United States illegal?

In *U.S. v. Atherton*, the Court of Appeals for the Ninth Circuit referred to the so-called first sale doctrine in this fashion:

Although nothing in section 104 specifically refers to "the first sale doctrine," that doctrine has been judicially read into the statute from a judicial gloss drawn on 17 U.S.C. § 27.<sup>2</sup>

On this foundation, various copyright related industries, including the video cassette rental business, are based. In case after case, the first sale doctrine has been characterized in the following manner:

The first sale doctrine provides that where a copyright owner parts title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. *Wise, supra*, at 1187. Although the owner's other copyright rights (reprinting or copying, etc.) remain intact, the exclusive right to vend the transferred copy rests with the vendee. *United States v. Drebin*, 557 F.2d 1316 (9th Cir.), *cert. denied*, 436 U.S. 904 (1978).<sup>3</sup>

Under the first sale doctrine, a copyright holder who conveys title to a particular copy of a copyrighted work relinquishes the exclusive right to vend that particular copy. *United States v. Wise*, 550 F.2d 1180, 1187 (9th Cir.), *cert. denied*, 434 U.S. 929, 98 S. Ct. 416, 54 L. Ed. 2d 290 (1977). Although the holder's other rights remain intact (reprinting, copying, etc.), the vendee holds the right to distribute the transferred copy in whatever manner he chooses. *Id.* The Ninth Circuit has applied the first sale doctrine in cases where the copyright holder released legitimately produced works for commercial showing.

These cases focused on whether the type of release in fact constituted a first sale terminating the copyright holders' distribution rights. See *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), *cert. denied* 436 U.S. 904, 98 S. Ct. 2232, 56 L. Ed. 2d 401 (1978).<sup>4</sup>

However, there is no reported case in which the first sale doctrine has been applied to rental to the general public of video cassettes or phonorecords purchased by a retailer from the copyright owner or other distributor. Even though legislation, to be re-

viewed briefly below, is pending in the Congress to modify the first sale doctrine,<sup>5</sup> it is the purpose of this article to explore the basis for the doctrine, and to inquire as to its perhaps unsatisfactory judicial and legislative history. In short, is there a valid basis in law for a first sale defense?

For purposes of this study, analysis will be limited to video cassettes and motion pictures, as distinguished from phonorecords and sound recordings, or computer programs. However, special problems related to phonorecords and sound recordings, including the Record Rental Amendment of 1984, P.L. 98-450, effective October 4, 1984, are touched upon below.<sup>6</sup>

Available statistics indicate that the rental to the public of video cassettes purchased by retailers from copyright owners is a growing 800,000,000 business, not shared by retailers with copyright owners.<sup>7</sup>

<sup>5</sup> See Parts III and IV *infra*.

<sup>6</sup> See Part IV and note 10 *infra*. For the statutory definitions of copies, motion pictures, phonorecords, sound recordings, and computer programs, see 17 U.S.C. § 101.

For special problems relating to *motion pictures and other audiovisual works*, 17 U.S.C. § 102(a)(6), and other potential legislation, see Colby, "Copyright Revision Revisited: Commissioned Works As Works Made For Hire Under The United States Copyright Act," 5 *Whittier Law Review* 491 (1983); 1984 American Bar Association Patent, Trademark and Copyright Section Committee Reports at 174-176; Colby, Helen Sousa Abert, Mary Baker Eddy and Otto Harbach, "The Road To A Copyright Term Of Life Plus Fifty Years," 6 *Communications and the Law* 3 (June 1984); and Colby, "Works Made For Hire In International Copyright Law," 3 *Loyola of Los Angeles Entertainment Law Journal* 87 (1983), 9 *New Matter* 1, Number 2, Summer 1984 *Journal of the State Bar of California Patent, Trademark and Copyright Section*.

For an example of potential legislation proscribing the rental, lease, or lending of *computer programs* for purposes of direct or indirect commercial advantage, unless authorized by the copyright owner, see S.3074 (98th Congress, 2nd Session) introduced as the Computer Software Protection Act of 1984 (Congressional Record for October 5, 1984, at S 13706-7). Also see, 1984 American Bar Association Patent, Trademark and Copyright Section Committee Reports at 265.

<sup>7</sup> The 1983 Senate Judiciary Committee Hearing, note 20 *infra*; the 1983-84 House Judiciary Committee Hearings, note 52 *infra*; the 1981 Senate Judiciary Committee Hearings on Oversight of the Copyright Act at 313-323 (97th Congress, 1st Session, July 29, 1981); *Daily Variety*, December 30, 1983, April 30, 1984; *Fortune Magazine*, April 30, 1984; *New York Times*, May 7, 1984; *Los Angeles Times*, June 28, 1984; *Newsweek*, August 6, 1984, at 51:

"Together, the 14,000 outlets that retail cassettes rang up 1 billion in revenues last year, mostly from rentals — and according to many analysts, that figure could rise to 5 billion by 1988."

And, in a Special Report on VCR's, in *Broadcasting Magazine*, August 20, 1984, at 43:

"How big is the market for home video? According to research compiled by Mark Riely, a media analyst with F. Eberstadt & Co., total home video software revenues may grow from 1 billion in 1983 to 5 billion in 1988. Riely and others believe that in that time there will be shifts in the structure of that market, with films decreasing in importance some-

<sup>2</sup> 561 F.2d 747, 750, 195 USPQ 615, 616, 41 C.O. Bull. 1055, 1057-1058 (9th Cir. 1977).

<sup>3</sup> *U.S. v. Bernstene*, CCH Copyright Law Decisions Paragraph 25,480 (USDC, CD Ca. 1982).

<sup>4</sup> *U.S. v. Powell*, 701 F.2d 70, 72, 217 USPQ 609, 610-611, CCH Copyright Law Decisions Paragraph 25,510 (8th Cir. 1983).

Thus, these issues are of vital concern to an important segment of the copyright industry, and permit a fascinating study of the law.

It is the thesis of this study that the first sale doctrine, at least insofar as it relates to video cassettes, provides little or no support for the right to rent video cassettes purchased by a retailer, and that each unlicensed rental transaction is potentially a copyright infringement, violating the copyright owner's exclusive right under § 106(3) of the Copyright Act of 1976 (the 1976 Act) to distribute by "rental, lease or lending," notwithstanding § 109(a), in part because of the impact of § 202, formerly § 27 of the Copyright Act of 1909.<sup>8</sup>

what, but still accounting for 50% of the market, compared to the current two-thirds market share held by films. Many also see prerecorded cassette sales increasing as rentals decline on a percentage basis. In 1983 for example, according to Riely's report, rentals, driven by popular theatrical releases, accounted for 80% of the home video market, or 800 million, while sales accounted for the remaining 20%, or 200 million. By year-end 1988, projected Riely, the tables will be turned, with rentals totaling 2 billion, or 40% of the market, and sales totaling 3 billion, or 60% of the market."

Nor do writers, actors, directors, composers and other talent receive any residual or royalty payments from the retailers' rental income. Guild and union members receive nothing from rental income flowing only to retailers. (The 1983 Senate Judiciary Committee Hearing at 23, statement of David Ladd, Register of Copyrights; at 296-305 testimony of George David Weiss, President of the American Guild of Authors and Composers; and at 314-315, letter from Beverly Sills, as General Director of the New York City Opera).

<sup>8</sup> Sections 106(3), 109 and 202 of the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (Supp. V 1981) Public Law 94-553, 90 Stat. 2541 (amending 17 U.S.C. §§ 1-216, the Copyright Act of 1909, 35 Stat. 1075) read in full as follows:

"§ 106. *Exclusive rights in copyrighted works*

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;"

"§ 109. *Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord*

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonore-

## The Textual Argument

Before reviewing the cases, from *Bobbs-Merrill v. Snellenburg* in 1904 to *Columbia Pictures v. Redd Horne* in 1983, it may be useful first to summarize the arguments for and against a first sale defense under the 1976 Act.<sup>9</sup>

### The 1976 Act

Section 109(a) of the 1976 Act only permits the owner of a particular copy lawfully made to sell or otherwise dispose of the "possession" of that copy, and not, in so many words, to rent, lease or lend the copy or the copyrighted work embodied in that copy. Section 202 of the 1976 Act, based on § 27 of the 1909 Act, reminds us that

Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object;

Does the sale or other transfer of ownership of such a material object carry with it any right to dis-

cord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it."

"§ 202. *Ownership of copyright as distinct from ownership of material object*

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object."

§ 27 of the Copyright Act of 1909 reads in full as follows:

"§ 27: *Copyright Distinct From Property in Object Copyrighted; Effect of Sale of Object, and of Assignment of Copyright*

The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

<sup>9</sup> Generally, see M. Nimmer, *Nimmer on Copyright*, § 8.12 (1984); N. Boorstyn, *Copyright Law* § 4:4 and § 5:18 (1981, 1984); A. Latman, *The Copyright Law*, 176-180 (5th edition 1979); Latman and Gorman, *Copyright for the Eighties*, 391-394 (1981); and Nolan, "All Rights Not Reserved After The First Sale," 23 *Journal of the Copyright Society of the USA*, 76 (1975). Also see Lewson, "The Videocassette Rental Controversy" 30 *Journal of the Copyright Society of the USA*, 1 (1982); Beard, "The Sale, Rental and Reproduction of Motion Picture Videocassettes: Piracy or Privilege?" 15 *New England Law Review* 436, 458-462 (1980); and Zechow, "Cheaper By the Dozen: Unauthorized Rental of Motion Picture Videocassettes and Videodiscs," 34 *Federal Communications Law Journal* 259 (1982).

tribute those copies by rental, lease or lending? The exclusive rights of a copyright owner under § 106(3) of the 1976 Act are to do and to authorize any of the following:

- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

Since § 109(a) only permits the owner of a particular copy (lawfully made) to "sell or otherwise dispose of the possession of that copy..." we may fairly inquire whether the omission from § 109(a) of the disjunctive words of § 106(3): "or by rental, lease, or lending" undermines the so-called first sale doctrine, when taken together with the principles of § 202, which carefully distinguish between the material object (the copy) and the copyrighted work (the motion picture) embodied in that object.

Stated somewhat differently, does the lawful owner of a copy have the right under § 109(a) to do anything other than transfer *ownership* of that copy? Noting the function of the word "otherwise" in § 109(a), it might be concluded that the words "sell or otherwise dispose of" that copy mean transfer of ownership only whether denominated a "sale" or other transfer of title.

Thus, the function of the words "or otherwise dispose of the possession of that copy" is to capture all possible methods of transfer of *ownership*, thereby avoiding any limitative connotation implied by the word "sell." The whole clause, it would be argued, may be directed only at a right to transfer title — ownership — and not to the rest of the copyright owner's distribution rights, such as the exclusive rights, set forth in § 106(3), of "rental, lease, or lending." Thus, rental rights would be reserved to the copyright owner, notwithstanding the first sale of the copy.

Does the permitted disposition of possession contemplate a permanent transfer of possession? To "dispose" of *possession* would seem to mean more than a temporary transfer. In the case of a rental, the copy is to be returned to the renter, who is the owner of the copy. If a copy is to be returned after, perhaps, one day's use, did the owner/lessor "dispose of the possession" of that copy? Does the word "dispose" carry with it the notion that the owner shall no longer have the right to possess that copy?<sup>10</sup>

<sup>10</sup> The words "dispose of" are defined in Black's *Law Dictionary* (5th edition, West Publishing Company 1979) at 423:

"To alienate or direct the ownership of property... To exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of... Often used in restricted sense of 'sale' only..."

The word "dispose" is defined in Bouvier's *Law Dictionary* (3d revision 1914) at 888: "To alienate or direct the ownership of property..."

Since the owner/lessor's only authority, under § 109(a) of the 1976 Act, is to sell or otherwise dispose of the *possession* of that copy, we may well

The word "dispose" or variations appear in the 1976 Act nine times, in §§ 109(a), 407(b), 503(b), 506(b), 509(b), 704(b) and (c), and Transitional and Supplementary Provisions § 111; all but § 109(a) dealing with deposit and remedies. See Concordance of the Copyright Law at 85 (Copyright Office 1979).

The Semiconductor Chip Protection Act of 1984, P.L. 98-620, enacted November 9, 1984, passed the Senate on October 3, 1984, and the House of Representatives on October 9, 1984. Its § 906 uses the words "first sale" in the heading, but not in the text, of subdivision (b) thereof which reads as follows:

"(b) Notwithstanding the provisions of section 905(2), the owner of a particular semiconductor chip product made by the owner of the mask work, or by any person authorized by the owner of the mask work, may import, distribute, or otherwise dispose of or use, but not reproduce, that particular semiconductor chip product without the authority of the owner of the mask work."

The word "distribute" is defined in § 901(a)(4) as follows: "(4) to 'distribute' means to sell, or to lease, bail, or otherwise transfer, or to offer to sell, lease, bail, or otherwise transfer;"

The prior House version, as quoted in H.R. Rep. 98-781 (98th Congress, 2nd Session, May 15, 1984) at 36, read as follows:

"(b) Notwithstanding the provisions of section 905(2), the owner of a particular semiconductor chip product lawfully made under this chapter, or any person authorized by such owner, is entitled, without the authority of the owner of the mask work, to sell or otherwise dispose of that semiconductor chip product."

It may be that, by virtue of the change of the word "sell" to the defined word "distribute," which includes the right to "lease," the Congress meant to permit rentals of a semiconductor chip product after its "first sale." This would seem to reinforce the thesis of this article that § 109(a) of the 1976 Copyright Act, in using the words "sell or otherwise dispose of the possession of that copy or phonorecord," does *not* include rentals, as might have been the case if § 109(a) used the word "distribute," which, under § 106(3) of the 1976 Act means the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending."

See H.R. Rep. 98-781 (98th Congress, 2nd Session) at 21-23, S. Rep. 98-425 (98th Congress, 2d Session, May 2, 1984) at 18-19, 26 and 32, Hearing on the Semiconductor Chip Protection Act of 1983, S. 1201 (98th Congress, 1st Session, May 19, 1983) before the Committee on the Judiciary of the United States Senate at 3, 22-23, 45-49. Copyright Protection for Semiconductor Chips: Hearings on H.R. 1028 (98th Congress, 1st Session, August 3, 1983, and December 1, 1983) Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the House of Representatives at 72-73 and 110-111. Congressional Record for October 3, 1984, at S. 12909-12930, for October 9, 1984, at H 11598-11617, and for October 10, 1984, at E 4432-4435.

Since September 1, 1983, the State of California has imposed a sales tax on rentals to the public of videocassettes for "private use." Sections 6006(g)(7) and 6010(e)(7) of the California Revenue and Taxation Code refer to:

"...private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the videocassette, videotape, or videodisc."

inquire where the owner/lessor finds the right to exercise the copyright owner's § 106(3) right to distribute copies by rental, lease or lending.

Some help in finding the meaning of these words may be found in § 115(c)(2) of the Act. While dealing with obligations for payment of statutory royalties upon the exercise of a compulsory license, the concept of *permanent* disposition does appear in the 1976 Act. The words are:

For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession.

This would seem to lend some support to the view that to sell or otherwise dispose of possession means not only to transfer possession permanently, but also that to *otherwise* dispose of possession means a transfer of complete dominion, and perhaps ownership. The language of the Act, it bears repeating, is "to sell or otherwise dispose of the possession of that copy..."

And, it must be remembered, a copy is only the material object, not the copyrighted work, rights to which require a separate agreement under § 202. Even if lawful possession of a copy has been obtained, *no rights* to use the copyrighted work embodied in that copy are conveyed to the possessor of that copy "in the absence of an agreement" under § 202.

It should also be observed that § 109(c) carefully draws a distinction between ownership and acquiring possession by rental or lease, in the sense that acquisition of possession by rental or lease is very different under § 109 from acquisition of possession by purchase, and carries different consequences. Among those differences are, of course, that a person who acquires possession by rental cannot sell that object; not owning the object, no greater rights can be sold than the possessor has. If there is a distinction in § 109(c) between sale and rental, does that difference affect § 109(a)?

In the absence of any litigation or clear legislative history which might support a rental right, the first sale defense may rest on doubtful ground.

The legislative history may consist of no more than a doubtful statement in the 1975 Senate and the 1976 House Reports,<sup>11</sup> repeated from prior Reports,<sup>12</sup> themselves tracing back to general opinions

of the Register of Copyrights,<sup>13</sup> that the lawful owner of a copy is entitled to dispose of it "by sale, rental, or any other means." Yet, § 109(a) does not say "by sale, rental, or any other means," it says "sell or otherwise dispose of the possession..."

And, the statement quoted from the Senate and House Reports — "by sale, rental, or any other means" — is immediately followed by the assertion that "this principle...has been established by the court decisions and section 27 of the present law..." Since there are no decisions establishing a rental right for video (or audio) cassettes purchased by a

<sup>13</sup> Supplementary Report of the Register of Copyrights at 29 (1965), a print of the House Judiciary Committee, 89th Congress, 1st Session, Copyright Law Revision, Part 6, also published in 4 Grossman, *Omnibus Copyright Revision Legislative History* (17 volumes 1976–1977), to the effect that, in the opinion of Abraham L. Kaminstein, then Register of Copyrights, under § 109(a) [then § 108(a)] the copyright owner's exclusive rights under § 106(3) "would have no effect as against anyone who owns a copy or phonorecord lawfully made under this title and who wishes to sell, lend, rent it, give it away, or destroy it."

The legislative hearings, the pre-legislative meetings of the Panel of Consultants to the Copyright Office, and the Copyright Office Studies on Copyright are otherwise silent with respect to the questions discussed in this article, except as noted below. See, *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* (the first five volumes of which are now available through the Copyright Society of the USA and New York University School of Law, 1981–1984).

And see Transcripts of Meetings of the Panel of Consultants to the Copyright Office (entitled *Copyright Law Revision* Parts 2, 3, 4 and 5), and the 1961 Report of the Register of Copyrights on the General Revision of the Copyright Law at 21, the 1965 Supplementary Report of the Register of Copyrights and the 1975 Draft Second Supplementary Report of the Register of Copyrights, Chapter II at 30 (Prints of the Committee on the Judiciary of the House of Representatives, also printed in Grossman, *Omnibus Copyright Revision Legislative History*).

And see the 1975 testimony of Barbara Ringer, then Register of Copyrights, and 18 Briefing Papers, before the Committee on the Judiciary of the House of Representatives, Hearings on H.R. 2223, 94th Congress, 1st Session, at 91, 1779, 1807, 1865, 1901 and, for the Briefing Papers, at 2051–2091, especially at 2054–2055 to the effect that: "...§ 109(a) makes clear that, once a copy or phonorecord has been lawfully made, it can be *disposed of* by its owner without the copyright owner's permission." (Emphasis added).

And see the 35 Studies on Copyright prepared for the Copyright Office 1955–1963 (Prints of the Committee on the Judiciary of the United States Senate, reprinted in Arthur Fisher Memorial Edition, 2 volumes, 1963, also reprinted in Grossman, *Omnibus Copyright Revision Legislative History*).

A book lending right was considered and rejected in the drafting process in the Copyright Office. See *Copyright Law Revision* Part 2 at 345–347 (1963); *Copyright Law Revision* Part 3 at 128–135 (1964); Hearings on H.R. 4347 (89th Congress, 1st Session) at 1903–1904 (1965); and *Copyright Law Revision* Part 5 at 61, 79, 238 and 316 (1965).

For a summary of the "revision effort lasting more than 20 years," see Mr. Justice Blackmun dissenting in *Sony Corporation v. Universal City Studios, Inc.*, note 49 *infra*, at its note 9.

<sup>11</sup> S. Rep. No. 94–473, 94th Congress, 1st Session at 71 (1975); H.R. Rep. No. 94–1476, 94th Congress, 2nd Session at 79 (1976), reprinted in 4, *Nimmer on Copyright*, Appendix 4, also reprinted in 1976 U.S. Code Cong. & Ad. News 5659; and see, Conference Report, H.R. Rep. No. 94–1733, 94th Congress, 2nd Session (1976).

<sup>12</sup> See, e.g., H.R. Rep. No. 2237, 89th Congress, 2nd Session at 67 (1966), and H.R. Rep. No. 83, 90th Congress, 1st Session at 38 (1967).

retailer under § 27 of the 1909 Act, nor under the 1976 Act, it may be that the assertion that the first sale doctrine as to rental rights "has been established by the court decisions" is entirely without foundation. At least, a searching inquiry would seem to be appropriate. Has the legislative history been tainted with a too ready willingness to adopt a generalization without examining the court decisions — which, it bears repeating, deal only with non-rental aspects of the so-called first sale doctrine.

It may, however, be argued that once possession has been acquired by a consumer, that consumer may lawfully perform the copyrighted work *in private* because the copyright owner only controls the right to perform the copyrighted work *publicly*. In other words, since the bundle of exclusive rights owned by a copyright owner under § 106 of the 1976 Act does not include the right to perform in private, does a person who lawfully acquires possession of a copyrighted work embodied in a video cassette have the right to perform that work in private? However, even this argument depends for its validity on whether the consumer acquired lawful possession, and that depends in turn on whether the retailer had the right under § 109(a) to transfer possession to the consumer other than by sale or other transfer of ownership.

Moreover, when the textual analysis of the 1976 Act is considered in the light of its legislative and judicial history, *the reason for the doctrine may come into question*. Thus, the first sale doctrine, as basis for the rental to the general public of video cassettes purchased from the copyright owner, may be an example of a "doctrine" without support in statute or in case law. As was noted by the Court of Appeals for the Ninth Circuit,<sup>14</sup> the doctrine "has been judicially read into the (1976) statute from a judicial gloss drawn on" § 27 of the 1909 Act.

#### Resale Price Maintenance Cases/Rule Against Restraints on Alienation

A reading of the cases traces back, as noted by the Ninth Circuit in *U.S. v. Atherton*,<sup>15</sup> to decisions dealing with resale price maintenance issues in a copyright setting, presented to the federal courts in 1904 and 1908 — "the trail left by *Bobbs-Merrill v. Straus*,"<sup>16</sup> and by its predecessor, *Bobbs-Merrill*

*v. Snellenburg*.<sup>17</sup> Other cases relate to burden of proof in both criminal and civil "piracy" cases. None of the reported cases deals with rental of video cassettes. The closest we come is *Columbia Pictures v. Redd Horne*, in which the district court noted that:

It is important to note here what is not at issue in this infringement action. The plaintiffs do not challenge either the possession of the video cassette copies by the defendants or the rental of the cassettes for private in-home use by Maxwell's patrons.<sup>18</sup>

David Ladd, the Register of Copyrights, on April 29, 1983, in testimony before the United States Senate Judiciary Committee *in support* of S.33 (98th Congress, 1st Session), analyzing the development of the first sale doctrine and the roots of the distinction between a material object and the copyrighted work embodied therein, and citing *Bobbs-Merrill v. Straus*,<sup>19</sup> noted that in 1908 the Supreme Court considered the issue to be one concerning "a restriction upon the subsequent alienation of the subject matter of copyright..."<sup>20</sup>

The House Judiciary Committee, in H.R. Rep. 98-987 (98th Congress, 2nd Session) on August 31, 1984, reported that:

The first sale doctrine has its roots in the English common law rule against restraints on alienation of property.

Thus, the cases require analysis of the common law rule against restraints upon alienation of personal property, as well as resale price maintenance cases. The modern cases rarely, if ever, examine the sources of the first sale doctrine, preferring instead merely to cite the doctrine in one of its oft-stated guises, but always in a non-rental setting. Yet, it appears that the first sale doctrine is the legal basis for the video cassette rental business.

Having outlined the scope of this study, each of the issues indicated earlier requires some examination. Such an analysis must take into account that it may be too late in the day to raise issues that were there all the time, but perhaps it is not too late to find the law as it may be revealed on closer analysis. And then we may at last have the judgment of the court upon the issue left untouched in 1908, in a somewhat different setting, in *White-Smith Publishing Co. v. Apollo Co.*, Mr. Justice Holmes concurring:

<sup>17</sup> 131 F. 530 (USDC, Ed Pa. 1904).

<sup>18</sup> 568 F. Supp. 494, note 3, CCH Copyright Law Decisions Paragraph 25,574 (USDC, WD Pa. 1983), *affirmed* as No. 83-5786, Slip Opinion at 5 (November 23, 1984),... F.2d...at... (3d Cir. 1984).

<sup>19</sup> See note 16 *supra*.

<sup>20</sup> Hearing on Audio and Video Rental, S.32 and S.33, 98th Congress, 1st Session at 19 (1983) Before the Subcommittee on Patents, Copyrights and Trademarks, of the Committee on the Judiciary of the United States Senate — "the 1983 Senate Judiciary Committee Hearing."

<sup>14</sup> Note 2 *supra*.

<sup>15</sup> 561 F.2d at 751.

<sup>16</sup> 210 U.S. 339, 28 S. Ct. 722, 52 L. Ed. 1086, 13 C.O. Bull. 364 (1908). For a recent resale price maintenance opinion by the Supreme Court, see *Monsanto Co. v. Spray-Rite Service Corp.* — U.S. — 104 S. Ct. 1464, 79 L. Ed. 2d 775, 52 U.S. Law Week 4341 (March 20, 1984).

What license may be implied from a sale of the copyrighted article is a different and harder question, but I leave it untouched, as license is not relied upon as a ground for the judgment of the court.<sup>21</sup>

### Recent Cases

The modern cases can be grouped, initially, into criminal proceedings and civil proceedings. Those to be reviewed, for such illumination as they may provide as to the somewhat variable content of the first sale doctrine, include *Columbia Pictures v. Redd Horne*,<sup>22</sup> *U.S. v. Powell*,<sup>23</sup> *U.S. v. Bernstene*,<sup>24</sup> *U.S. v. Atherton*,<sup>25</sup> *A.I.P. v. Foreman*<sup>26</sup> and *CBS v. Scorpio Music Distributors*.<sup>27</sup>

If the first sale doctrine has been codified into § 109(a) of the 1976 Act, and if what has been codified is a judicial rule first enunciated under the 1909 Act, it behooves us to examine the cases. The Senate and House Reports supporting the 1976 Act each say that § 109(a) "restates and confirms" the first sale doctrine as "established by the court decisions and section 27 of the present law."<sup>28</sup> Even this statement raises questions inasmuch as § 27 of the 1909 Act was the forerunner of § 202 of the 1976 Act; yet § 109(a) of the 1976 Act introduces new concepts apparently intended only to "restate and confirm" the first sale doctrine.

In view of the perhaps startling statement by the Senate Judiciary Committee in 1983, with respect to audio recordings, that "the first sale doctrine was never intended to allow or to sanction commercial record rentals..."<sup>29</sup> immediate and close examination of the cases seems quite appropriate to this study.

## PART II

### The First Sale Cases

The *Bobbs-Merrill* decisions<sup>30</sup> established the right of a purchaser of a copyrighted article to vend

<sup>21</sup> 209 U.S. 1, 20, 28 S. Ct. 319, 324, 52 L. Ed. 655, 663, 15 C.O. Bull. 2978, 2986 (1908).

<sup>22</sup> See note 18 *supra*.

<sup>23</sup> See note 4 *supra*.

<sup>24</sup> See note 3 *supra*.

<sup>25</sup> See note 2 *supra*.

<sup>26</sup> 576 F. 2d 661, 198 USPQ 580, CCH Copyright Law Decisions Paragraph 25,024, 42 C.O. Bull. 27 (5th Cir. 1978).

<sup>27</sup> 569 F. Supp. 47, 222 USPQ 975, CCH Copyright Law Decisions Paragraph 25,585 (ED Pa. 1983), *affirmed* without opinion No. 83-1688 (3rd Cir. June 21, 1984).

<sup>28</sup> See note 11 *supra*.

<sup>29</sup> See note 1 *supra*.

<sup>30</sup> See notes 16 and 17 *supra*.

it free from the seller's restraint on its resale price. In *Snellenburg*,<sup>31</sup> the court defeated a publisher's attempt to prevent subsequent purchasers from vending copies of a copyrighted book at less than the resale price specified in the notice printed in the book on the same page as its copyright notice that:

The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.<sup>32</sup>

The court held that the copyright statutes cannot be used to "control the price in the retail trade."

It is evident that the object of the plaintiffs is to control the retail price of this book in their vending of the same by their vendees and subsequent purchasers by means of the copyright statutes of the United States, by the notice therein contained, but it can amount to no more, at most, than a notice to all who may come into possession of a copy or copies that the plaintiffs are attempting to control the price in the retail trade.

But the right to restrain the sale of a particular copy of the book by virtue of the copyright statute has gone when the owner of the copyright and of that particular copy has parted with all his title to it, and has conferred an absolute title to the copy upon the purchaser, although with an agreement for a restricted use.

The copyright statutes cannot be invoked to control the retail trade of books the title to which the copyright owner has transferred. Where would such a right end? If purchasers of these books can be regarded as violators of the law in case any of them should sell at less than 1, it is putting a construction on the right of a copyright owner to have the "sole liberty \*\*\* of vending" so broad that, so long as the copyright continues, this plaintiff holds control as to price and mode of selling books over every volume owned and held throughout this whole United States, by men, women, and children, as well as those now held by defendants and other retail dealers; and the owner of a volume, however anxious he might be to sell, as a result, perchance, of necessity, could not dispose of his secondhand copy for less than 1 without placing himself in the humiliating attitude of being a violator of the law.

It is simply a violation of the contract with their vendee, and they must look to their remedy upon their contract.

Undaunted by the denial of their request for preliminary injunction in *Snellenburg*, the same publisher, attempting to maintain the retail price on copies of the same book — "The Castaway" — which had been the subject of the prior litigation, proceeded to the Supreme Court against another seller in *Straus*.<sup>33</sup> The Supreme Court upheld the concept, later to become known as the first sale doctrine,<sup>34</sup> that the copyright owner may "vend" a

<sup>31</sup> See note 17 *supra*.

<sup>32</sup> The 1983 English treatise, *International Copyright and Neighbouring Rights*, by Stephen M. Stewart (Butterworth & Co., London, 1983), contains the following notice on the same page as its copyright notice: "This book is sold subject to the Standard Conditions of Sale of Net Books and may not be re-sold in the UK below the net price fixed by Butterworths for the book in our current catalogue."

<sup>33</sup> See note 16 *supra*.

<sup>34</sup> In *U.S. v. Atherton*, 561 F.2d at 751, the court reviewed *Bobbs-Merrill v. Straus* and stated that: "The Supreme Court held that any transfer of title is a first sale, and no copyright remedy is permissible to enforce the breach of contract in-

copyrighted book, but may not control, through the copyright laws, subsequent sales to further purchasers after the initial or first sale.

The Court interpreted the applicable copyright statute's grant of "the sole liberty of vending"<sup>35</sup> to mean that:

...the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract. This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work, a right which is the special creation of the statute.<sup>36</sup>

While the subsequent purchaser was free to resell the copyrighted article, the Court recognized other reservations on unrestricted use and enjoyment, noting that:

The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.

In what may be controlling language as to what would constitute a first sale, the Supreme Court in

involved." The *Straus* court, however, had not used the term "first sale."

The term "first sale" has never been and is still not used in copyright statutes. It appears to have been first employed in the House Report on the Copyright Act of 1909, H.R. Rep. No. 2222 at 19 (1909) as follows:

"Your Committee feels that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." (Reprinted in 4 *Nimmer on Copyright*, at 13-25).

The first reported decision in which the words "first sale" are used may have been *Fawcett Publications, Inc. v. Elliott Publishing Co., Inc.* 46 F. Supp. 717, 54 USPQ 137, 24 C.O. Bull. 237 (USDC SDNY 1942):

"It is conceded here that the defendant has not multiplied copies but merely resold the plaintiff's (comic books) under a different cover. The exclusive right to vend is limited. It is confined to the first sale of any one copy and exerts no restriction on the future sale of that copy... The defendant is not charged with copying, reprinting or rearranging the copyrighted material of the plaintiff or any of its component parts nor has it removed the plaintiff's copyright notice."

<sup>35</sup>Section 4952 Revised Statutes of the United States (U.S. Comp. St. of 1901 at p. 3406), based on the Copyright Act of 1870. The 1909 Copyright Act, enacted the year after *Bobbs-Merrill v. Straus*, was the third general revision of copyright law (the 1976 Act was to be the fourth). The 1909 Act (35 Stat. 1075) had been preceded by the first U.S. Copyright Law, the 1790 Act (1 Stat. 124), and by the general revisions of 1831 (4 Stat. 436) and of 1870 (16 Stat. 212).

The Chace Act of 1891 (26 Stat. 1106) in its § 13 extended copyright protection in the United States to foreign authors for the first time. See 17 U.S.C. § 104, and § 9 of the 1909 Act. Colby, "International Copyright Protection," 10 *New York Law Forum* 45-67 (1964). "Copyright Enactments" (*Copyright Office Bulletin* No. 3, 1973). "Copyright in Congress 1789-1904" (*Copyright Office Bulletin* No. 8, 1905, reprinted in 1976 by Greenwood Press, Westport, Connecticut).

<sup>36</sup> 210 U.S. at 350-351.

*Straus* referred to the owner who "had parted with the title to one who had acquired *full dominion* over it ..." (Emphasis added). This notion of "full dominion" may find its parallel in the reference in § 109(a) of the 1976 Act to the right, notwithstanding § 106(3), "to sell or otherwise dispose of the possession of that copy or phonorecord."

The principle basis for the Supreme Court's decision in *Straus* would appear to have been the Court's view that the "main purpose" of that copyright statute was "to secure the right of multiplying copies," and that the owner of the copyright "did sell copies of the book in quantities" and had thus "exercised the right to vend."

That exercise of the exclusive federal statutory right to multiply and sell copies exhausted the right to "vend" becomes clearer upon reading the Opinion of the Circuit Court in *Straus*,<sup>37</sup> requiring some analysis of that Court's review of basic, but old, distinctions between common law and federal statutory copyright. Because the first sale doctrine emerges from those, perhaps archaic, distinctions (made generally unnecessary by § 301 of the 1976 Act, as to subject matter covered by §§ 102 and 103 of that Act, preempting common law copyright) the 1906 Opinion by the Court of Appeals for the Second Circuit assumes some importance in reaching for the origins and reasons *and limitations* of the so-called first sale doctrine.

The Court of Appeals, searching for the "main purpose" of the copyright statute, started its Opinion by characterizing the defendant's contention as a claim to "a right of restricted publication, (which) disregards the fundamental distinction between the common law of literary property, commonly called common law copyright, and copyright under the statute." Upon general publication, defendant surrendered its common law copyright right of restricted publication, in return for the benefits of federal statutory copyright — the "peculiar right ... to multiply copies after publication, to the exclusion of others."

Thus, the copyright owner's asserted inability at common law to control multiplication of copies, although able to impose restrictions on limited publication, was the stated reason that federal statutory copyright was valuable, granting the copyright owner the exclusive "liberty of vending." And, the court tells us,

...[the] common law right of first publication and its incident of restricted publication were sufficient for the protection of authors prior to the invention of printing. Thereafter, when the substantial profit to be derived from literary property consisted in the multiplication of copies by printing, the statutory protection was substituted for the common law protection, upon the condition precedent of the surrender of the common law right.

<sup>37</sup> 147 F. 15, 13 C.O. Bull. 350 (2d Cir. 1906).

One may wonder whether legal rules that were developed following the invention of the printing press in the 15th century should influence video cassette rentals under a different, 1976, statute.

Several of the subsequent leading cases turn on whether a "first sale" had occurred, and in the course of the opinions the courts comment on the developing first sale doctrine.

In *Hampton et al. v. Paramount Pictures Corporation*,<sup>38</sup> the court held that commercial exhibition in theaters of the 1923 silent motion picture "The Covered Wagon" without Paramount's consent infringed Paramount's copyright notwithstanding that the Hamptons had purchased a print of the motion picture from a third party, Kodascope. The court made alternate rulings, first that Paramount's predecessor had not sold the print to Kodascope, and second that even if it was assumed that the 1927 contract between Paramount's predecessor and Kodascope was an assignment and not a license (the words sale or first sale are not used by the court in characterizing the original transaction), and if it was assumed that Kodascope was thereby given the power to sell prints, "the fact remains that any such power to sell was not unlimited, but was expressly restricted ... to make (prints) for strictly non-theatrical exhibitions."

The second notion of a power to sell subject to restrictions can also be considered as a holding that Kodascope could not sell what it did not own — and thus that the transfer of the print to Kodascope was not a complete or a first sale. The first ground for the decision — that the 1927 contract was a license and not an assignment — was based on the following considerations:

It is asserted that the contract contains no limitations as to time; a flat lump-sum payment was to be made for each film transferred; there was no requirement that outstanding prints and negatives were to be returned; no limitation was placed on the right to alter or abridge the films transferred; and the contract gave Kodascope exclusive territorial rights co-extensive with the rights of Paramount.

If the contract in question were ambiguous with regard to its nature as an assignment or a license or as to the purposes for which Kodascope might make reproductions, the fact that provisions of the kind referred to above were present or absent would be helpful in construing the instrument. Here, however, the contract expressly provides that Paramount "licenses" Kodascope to do certain things, thereby precluding a construction that there was an assignment.

This issue, whether there had been a first sale, assumes particular significance in *U.S. v. Atherton*,<sup>39</sup> a criminal case in which a conviction for selling allegedly stolen property was reversed largely on the basis that the government had failed to prove there had not been a first sale of prints of such motion

pictures as "Airport," "The Way We Were" and "Young Winston."

The court in *Atherton* determined that a first sale had occurred under the copyright owner's television network license agreement permitting the network to retain permanently a print for "file, reference, and audition purposes." The court held that this contractual provision (now no longer used) "clearly contemplates the sale of a film print to the network."<sup>40</sup>

The court also held that, in a criminal prosecution, "a sale for salvage purposes can be a first sale."

The court in *Atherton* restated the first sale doctrine, quoting its earlier opinion in *U.S. v. Wise*, to the effect that:

Thus, the first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. While the proprietor's other copyright rights (reprinting, copying, etc.) remain unimpaired, the exclusive right to vend the transferred copy rests with the vendee, who is not restricted by statute from further transfers of that copy, even though in breach of an agreement restricting its sale. (*United States v. Wise, supra*, 550 F.2d at 1187.)

In *A.I.P. v. Foreman*,<sup>41</sup> a civil not a criminal proceeding, the burden of proof as to the occurrence of a first sale of the films covered by the complaint was placed on the defendant, the party asserting possessory claims in conflict with the copyright owner's *prima facie* rights arising out of a copyright certificate, contrary to the burden of proof resting on the government in criminal proceedings such as *Atherton* and *Wise*.

The court in *Foreman* held that "the law surrounding the first sale doctrine is clear."

After the first sale of a copy the copyright holder has no control over the occurrence or conditions of further sales of it.

<sup>40</sup> The old "file, reference, and audition" clause, quoted by the court in *Atherton* as a basis for its decision, can probably be traced to the collective bargaining agreement covering "talent" employed by networks on taped television programs. That labor agreement, the AFTRA National Code of Fair Practice for Network Television Broadcasting, provides in part in its paragraph 88 that: "Recordings may be used for reference, file and private audition for prospective sponsors and their agencies."

Read together with paragraph 73 of the AFTRA Code establishing re-play fees for additional uses of program material following first network broadcast, the "file, reference, and audition" clause in the AFTRA Code confirms that there are no re-play fee obligations if a recorded program is used for file, reference or audition purposes.

It seems bizarre for the court to have found that a "first sale" occurred because of a clause ensuring that the network would have use of a print for file, reference or audition purposes. The court's opinion in *Atherton* is unclear as to any basis for its finding that:

"Here, as in *Wise*, this contractual provision clearly contemplates the sale of a film print to ABC at its election."

<sup>41</sup> See note 26 *supra*.

<sup>38</sup> 279 F.2d 100, 125 USPQ 623, 32 C.O. Bull. 171 (9th Cir. 1960), cert. denied 364 U.S. 882, 127 USPQ 555 (1960).

<sup>39</sup> See note 2 *supra*.

Without elaboration or explanation, the court went on to say that:

The first sale thus extinguishes the copyright holder's ability to control the course of copies placed in the stream of commerce.<sup>42</sup>

In *U.S. v. Powell*,<sup>43</sup> the defendants unsuccessfully appealed their convictions for conspiracy to commit criminal copyright infringement and for two counts of copyright infringement arising from the sale of "bootleg" records — phonograph records reproduced without the authorization of the copyright owner. In rejecting the defense of first sale, the Court of Appeals for the Eighth Circuit in effect held that a first sale defense was irrelevant, stating that:

We agree with the reasoning of the district court that, "because there can be no lawful distribution of a bootleg record, the copyright holder, cannot, by definition, part with legal title through a first sale."

Courts have applied the first sale doctrine only where the possibility existed that the person possessing the copyrighted work obtained it lawfully in the first place. None of the cases cited by appellants involve bootleg records.

From *Bobbs-Merrill* to *Foreman*, courts have uniformly referred to the first sale doctrine in terms of the right to vend. In *Powell* the term "vend" is, without explanation, replaced by "distribute." Defining the first sale concept otherwise generally in harmony with prior decisions, the court said:

Under the first sale doctrine, a copyright holder who conveys title to particular copy of a copyrighted work, relinquishes the exclusive right to vend that particular copy. (*United States v. Wise*, 550 F.2d 1180, 1187.)

But then, misquoting the Ninth Circuit in *Wise*, the terminology shifts to "distribute," without definition.

Although the holder's other rights remain intact (reprinting, copying, etc.), the vendee holds the right to distribute the transferred copy in whatever manner he chooses.<sup>44</sup>

In *U.S. v. Bernstene*,<sup>45</sup> a district court in California, similarly to *Powell* in the Eighth Circuit Court of Appeals, held that a first sale defense in a criminal proceeding for infringement of the copyright owner's exclusive § 106(1) right "to reproduce the copyrighted work in copies or phonorecords" is irrelevant. The court ruled that:

Absence of a first sale can be proved in two ways. First, the government can offer proof negating the possibility of a first sale by showing that no copies of the work have ever been sold or that any copies sold were never resold to defendant. *U.S. v. Atherton*, 561 F.2d at 750. Second, the government can show that the tape in question was unauthorized. *United States v. Moore*, 604 F.2d 1228, 1232 (9th Cir. 1979). In *Moore*, the Ninth Circuit held that "evidence suggesting that the tapes had an illegitimate origin negates the possibility of a

valid first sale as much as proof from tracing the distribution of the tape to its original source." *Id.*, at Paragraph 1232-1233.

The court finds that the evidence amply establishes the illegitimate origin of the tapes and the absence of a first sale.

Also paraphrasing *Powell*, but not misquoting the Ninth Circuit in *Wise*, the *Bernstene* court said that:

The first sale doctrine provides that where a copyright owner parts title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy. *Wise, supra*, at 1187. Although the owner's other copyright rights (reprinting or copying, etc.) remain intact, the exclusive right to vend the transferred copy rests with the vendee. *United States v. Drebin*, 557 F.2d 1316 (9th Cir.), cert. denied, 436 U.S. 904 (1978).

*CBS v. Scorpio Music Distributors*<sup>46</sup> involved the novel question whether phonorecords lawfully made in a foreign country and lawfully sold in that foreign country could lawfully be imported into the United States in apparent violation of exclusive United States copyright distribution rights owned by the plaintiff. The district court held that § 602(a) of the 1976 Act dealing with infringing importation of copies or phonorecords as constituting "an infringement of the exclusive right to distribute copies or phonorecords" was not subject to § 109(a), the so-called first sale doctrine.

The court in *Scorpio*, apparently using the terminology of § 602(a) as to importation, incorrectly paraphrased the Supreme Court in *Bobbs-Merrill v. Straus*, which had not used the word distribute, when the *Scorpio* court said that:

Sale of copies of a work that has been legally manufactured with the copyright owner's consent extinguishes the copyright owner's distribution rights as to those copies. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 28 S. Ct. 722, 52 L. Ed. 1086 (1908); see also *Burke & Van Heusen, Inc. v. Arrow Drug, Inc.*, 233 F.Supp. 881, 884 (E.D. Pa. 1964).<sup>47</sup>

It would appear that the courts in *Powell* and *Scorpio* (and in *Redd Horne* discussed below) did not consider the implications, or the distinctions between the word "vend" as used in § 1(a) of the 1909 Act, and the word "distribute" as used in § 106(3) of the 1976 Act.<sup>48</sup> For, as noted earlier in this study, § 106(3) recognizes the copyright owner's exclusive rights to distribute by "sale or other transfer of ownership, or by rental, lease, or lending"; whereas § 109(a), as a limitation on § 106(3), covers

<sup>46</sup> See note 27 *supra*. *CBS v. Scorpio Music Distributors* is discussed in Sloane and Thorne, "International Aspects of United States Copyright Law: The Music Business," Seventh Annual Symposium, Los Angeles County Bar Association 381-389 (1984). Also see *Nimmer on Copyright*, §§ 8.11, 8.12[B] [6] and 15.04.

<sup>47</sup> See note 27 *supra*, at its note 7.

<sup>48</sup> The distribution right under the 1976 Act is broader than the right to vend under the 1909 Act. 2 *Nimmer on Copyright*, § 8.11 at n.2.

<sup>42</sup> 576 F.2d at 664.

<sup>43</sup> See note 4 *supra*.

<sup>44</sup> 701 F.2d at 72.

<sup>45</sup> See note 3 *supra*.

the rights to "sell or otherwise dispose of the possession" of a copy or phonorecord. Section 109(a) does not use the words of § 106(3) "by rental, lease, or lending" thereby raising the issue whether the omission of those words from § 109(a) results in the copyright owner having retained the § 106(3) rights to distribute "by rental, lease, or lending."

*Columbia Pictures v. Redd Horne*<sup>49</sup> implicates the first sale doctrine in a case involving the copyright owner's § 106(4) exclusive right to "perform the copyrighted work publicly," rather than the copyright owner's § 106(1) exclusive right to "reproduce the copyrighted work in copies or phonorecords," such as was involved in *Powell* and in *Bernstene*. The rental issue was not raised by the plaintiffs in the *Redd Horne* case, the district court noting in footnote 3 that:

It is important to note here what is not at issue in this infringement action. The plaintiffs do not challenge either the possession of the video cassette copies by the defendants or the rental of the cassettes for private in-home use by Maxwell's patrons.

In *Redd Horne* the district court explained that plaintiffs did not lose their separate public performance rights by sale to defendant of the video cassettes performed publicly by defendant, stating that:

The proposition that a copyright owner may dispose of a copyright of his work and at the same time retain all underlying copyrights which are not expressly or impliedly disposed of with that copy is beyond contention. Section 202 of the 1976 Copyright Act states that one may own a copy of another's copyrighted work yet not acquire any of the exclusive rights accompanying the copyright.

The plaintiffs' sales of video cassette copies of their copyrighted motion pictures to the defendants resulted only in a waiver of the exclusive distribution right held in those particular copies sold, 17 U.S.C. § 109(a) (1976); therefore, any other rights the plaintiffs held in the motion pictures remain with them in their capacity as copyright owner.

The rights granted by section 106 are separate and distinct and, as such, are severable from one another.

<sup>49</sup> See note 18 *supra*. And see *Bally Midway Manufacturing Co. v. New Technology Computer Inventions, Inc. et al.* No. 84 C 1466 (USDC 111. 1984) and *Atari, Inc. v. William D. Kiss et al.* No. 84 C 1469 (USDC 111. 1984), in which a consent judgment was entered on March 9, 1984, restraining defendants from, among other things, manufacturing, offering for sale or distributing defendant's jukebox type, coin-operated equipment designed for public performances of up to 32 video games, including plaintiffs' copyrighted audiovisual video games.

In *Bally* and *Atari*, the Court (Judge John F. Grady) noted that "non-infringing uses of that machine are extremely speculative" (Transcript of Proceedings on motion granted for temporary restraining order, February 17, 1984, at p. 63) — a point of law discussed by the Supreme Court in *Sony Corporation v. Universal City Studios, Inc. et al.*, — U.S. — 104 S. Ct. 774, 78 L. Ed. 2d 574, 52 U.S. Law Week 4090, 220 USPQ 665, Copyright Law Decisions (CCH) Paragraph 25,615, 27 *Patent, Trademark and Copyright Journal* 259 (January 17, 1984).

The plaintiffs' sales of video cassette copies of their copyrighted motion pictures which resulted in a waiver of their exclusive rights to distribute those copies sold, 17 U.S.C. § 109(a) (1976), did not result in a waiver of any of the other exclusive rights enumerated in section 106. Thus the plaintiffs retain the exclusive right to perform their motion pictures publicly despite the sale of video cassette copies to the defendants.<sup>50</sup>

There are no reported cases deciding or in any way involving the issue whether an unlicensed rental transaction is a copyright infringement of the copyright owner's exclusive rights under § 106(3) of the 1976 Act to distribute copies or phonorecords "by rental, lease, or lending."

### PART III

#### Pending Legislation — Video Cassettes

Pending bills in the Congress include S.33 (98th Congress, 1st Session) and a draft "omnibus" revision bill (not introduced and still a draft) in the House of Representatives, which would "modify" the so-called first sale doctrine.

S.33 reads as follows:

*Section 1.* This Act may be cited as the "Consumer Video Sales/Rental Amendment of 1983".

*Sec. 2.* Section 109(a) of chapter 1 of title 17 of the United States Code is amended by replacing the period at the end thereof with a colon and inserting thereafter the following: "Provided, however, That a particular copy of a motion picture or other audiovisual work may not, for purposes of direct or indirect commercial advantage, dispose of the possession of that copy by rental, lease, or lending, or by any other activity or practice in the nature of rental, lease, or lending."

*Sec. 3.* This amendment becomes effective upon its enactment.

The omnibus draft bill in the House would also supplement 17 U.S.C. § 109(a). The additional language would read as follows:

#### TITLE IV — AUDIOVISUAL WORKS

##### Conditions on rentals

(c) (1) Notwithstanding the provisions of subsection (a), the copyright owner of a motion picture or other audiovisual work may elect to notify the owner of a particular copy of that motion picture or other audiovisual work, by affixing to the copy a notice, that such owner may not, for purposes of direct or indirect commercial advantage, distribute or otherwise dispose of the possession of that copy by rental, lease, or lending to any person. Upon such notice, no person may, unless authorized by the copyright owner, so distribute or dispose of that copy. If the copyright owner of a motion picture or other audiovisual work elects to give such notice, the copyright owner shall assure that other copies of that particular motion

<sup>50</sup> 568 F. Supp. at 498. 2 *Nimmer on Copyright*, 8.14[C] [3], at 8-142.1.

picture or other audiovisual work are made available for commercial rental, lease, or lending of the work to the public under fair and reasonable conditions. Except as otherwise provided by contract, nothing in this paragraph shall apply to the rental, lease, or lending of a copy of a motion picture or other audiovisual work for nonprofit purposes by a nonprofit library or nonprofit educational institution.<sup>51</sup>

<sup>51</sup> This exception for nonprofit libraries and nonprofit educational institutions did not appear in S.32 in the form it first passed the Senate in June of 1983 as the Record Rental Amendment of 1983. Referring to amended § 109(a) in S.32, without this exception, but proscribing rentals "for purposes of direct or indirect commercial advantage," the Senate Judiciary Committee stated in S. Rep. 98-162 (98th Congress, 1st Session 1983) at p. 6: "Nor does it prevent nonprofit public libraries from lending phonorecords on a noncommercial basis, even if they charge a nominal fee to cover their administrative costs."

As amended by the House Judiciary Committee (see Part IV *infra*), S.32 contains an explicit exception for nonprofit libraries and nonprofit educational institutions. The House Judiciary Committee stated in H.R. Rep. 98-987 (98th Congress, 2nd Session 1984) at pp. 4 and 5:

"During Subcommittee hearings, questions emerged concerning the impact of these amendments on nonprofit libraries and educational institutions. In response, the Subcommittee adopted language confirming that the legislation not apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. By accepting this language, the Committee thereby intends that the legislation not interfere with the usual lending activities of nonprofit libraries or the educational programs of nonprofit educational institutions when the rental, lease, or lending of phonorecords is part of their customary activities and not in the nature of a commercial enterprise. These activities must be directly related to the ordinary lending activities of the nonprofit library or the educational mission of the nonprofit educational institution."

"By requiring the lending activity to be 'for nonprofit purposes,' the Committee does not intend to bar a small fee to cover administrative costs of the lending program, if that is customary. However, this provision is not intended to allow nonprofit libraries and nonprofit educational institutions to engage in record rentals for the purpose of raising funds to support other activities."

It may be acknowledged that the "vending" right under the 1909 Act, and predecessor statutes going back to the Statute of Anne (U.K. 8 Anne C. 19, 1709), recognized *nonprofit* library lending rights as a matter of public policy.

In 1964 Hearings of the Panel of Consultants to the Copyright Office, a spokesman for the American Library Association, Charles F. Gosnell, said as to the then draft of a revision bill: "I find difficulty in justifying the long-established procedures of libraries in lending and occasionally renting books, or collecting fines on overdue books. May I ask for a clarification there?"

The Register of Copyrights, Abraham L. Kaminstein, replied: "It seems to me that you certainly have that right now, and there was no intention to affect that situation."

See *Copyright Law Revision*, Part 5 (note 13 *supra*) at 79.

In H.R. Rep. 94-1476 (98th Congress, 2nd Session, 1976), the House Judiciary Committee noted, with respect to present § 109(a) of the 1976 Act, at 79:

"Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose."

(2) Nothing in this subsection shall affect any provision of the antitrust laws. For purposes of the preceding sentence, "antitrust laws" has the meaning given that term in the first section of the Clayton Act and includes section 5 of the Federal Trade Commission Act to the extent that section relates to unfair methods of competition.

Each bill would, in effect, add to § 109(a) the words of § 106(3) "by rental, lease, or lending." As noted in Part I of this study, the exclusive rights of a copyright owner provided for in § 106(3) include the right to distribute copies of the copyrighted work "by sale or other transfer of ownership, or by rental, lease, or lending," whereas the present limitation on these rights in § 109(a) only permits the owner of a particular copy lawfully made to "sell or otherwise dispose of the possession of that copy."

Whether the foregoing drafting technique should be understood to create a new right — a commercial lending right — or to recognize an existing right to be clarified by such new legislation remains to be seen.<sup>52</sup>

## PART IV

### The Record Rental Amendment of 1984

A separate Record Rental Amendment, S.32, passed the Senate in June of 1983, and, in somewhat different form as H.R. 5938 (formerly H.R. 1027), the Record Rental Amendment of 1984, passed the House of Representatives on September, 11, 1984. (During final passage in the House, H.R. 5938 was redesignated as S.32, and as so renumbered was approved by the Senate.)

S.32 was signed by the President and became effective on October 4, 1984.<sup>53</sup>

A Bill was introduced in the 98th Congress, 1st Session (S. 2192) to establish in the Library of Congress a National Commission on the Public Lending of Books, to study and make recommendations on the desirability and the feasibility of compensating authors whenever their books are borrowed from public libraries. See Congressional Record for November 18, 1983 at S 17059-17060; 27 *Patent, Trademark & Copyright Journal* at 126-127 (December 1, 1983). Also see note 13 *supra*.

A "public lending right" for books has now been recognized by statute in the United Kingdom in its Public Lending Right Act 1979, conferring on authors a right to receive payments out of a Central Fund for "registered books" lent out to the public by local libraries in the U.K. *Copinger and Skone James on Copyright*, at pp. 416-419 (12th edition, 1980).

<sup>52</sup> Hearings on Audio and Video Rental, H.R. 1027, S. 32 and H.R. 1029, 98th Congress, 1st Session (1983-84) Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the Committee on the Judiciary of the House of Representatives — "the 1983-84 House Judiciary Committee Hearings."

<sup>53</sup> Congressional Record for October 9, 1984, at D 1323, 98 Stat. 1727. The text of the Record Rental Amendment of 1984 was published in *Copyright*, March 1985 issue, pp. 111 *et seq.*

As first passed by the Senate, and as quoted in S. Rep. 98-162 (98th Congress, 1st Session), S.32 would have included the same "Provided, however" clause as in S.33, and recognize the rights, subject to compulsory license, of the copyright owners of the copyright in a sound recording, and in the musical works embodied in the sound recording, over the "rental, lease, or lending," of phonorecords.

As enacted, as P.L. 98-450, and as quoted in H.R. Rep. 98-987 (98th Congress 2nd Session, August 31, 1984), the Amendment first redesignates subsections (b) and (c) of § 109 as subsections (c) and (d) respectively, and then inserts after existing subsection (a) the following:

(b) (1) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.

This Amendment has no retroactive effect and thus does not apply to the inventory of phonorecords owned by a retailer as of October 3, 1984, the day before the date of its enactment. Section 4(b) of the Record Rental Amendment of 1984 permits the phonorecord owner "to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act." (Emphasis added.)

Section 4 of the Record Rental Amendment of 1984 reads in full as follows:

#### Effective Date

Sec. 4. (a) The amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) The provisions of section 109(b) of title 17, United States Code, as added by section 2 of this Act, shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before the date of the enactment of this Act, to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 of title 17, United States Code, as in effect on the day before the date of the enactment of this Act.

(c) The amendments made by this Act shall not apply to rentals, leaseings, lendings (or acts or practices in the nature of rentals, leaseings, or lendings) occurring after the date which is five years after the date of the enactment of this Act.

As to whether this Amendment recognizes a new right or confirms existing rights should be considered in light of the following statement in S. Rep. 98-162:

The first sale doctrine was originally adopted by the courts to give effect to the early common law rule against restraints on the alienation of tangible property. It was first codified in the Copyright Act of 1909, and retained in somewhat modified form in the 1976 Copyright Act. The Committee concludes that the first sale doctrine was never intended to allow or to sanction commercial record rentals which lead inevitably to widespread and unauthorized home taping.

and with regard to the following remarks in the debate in the House when passing H.R. 5938 without dissent:

The first sale doctrine was never intended to be used as a means to create a second-hand rental market that, left alone, would eventually replace a primary sales market.<sup>54</sup>

and this careful statement by Senator Charles McC. Mathias, Jr. of Maryland during final approval of S.32 by the Senate:

Under the current Copyright Act, these (record rental) outlets had an *arguable* defense: the so-called first sale doctrine. (Emphasis added.)<sup>55</sup>

#### Conclusion<sup>56</sup>

Although it required 75 years to "obliterate"<sup>57</sup> distinctions engendered by *White-Smith Publishing*

<sup>54</sup> Remarks of Congressman Carlos J. Moorhead on September 11, 1984, Congressional Record, H 9292-9297 at 9296-9297.

<sup>55</sup> Congressional Record for September 21, 1984, at S 11673.

<sup>56</sup> Japan has recently adopted a special law effective June 2, 1984, relating to the commercial lending of phonograms. Under this statute, the lender is required to obtain the authorization of the copyright owners for a period of one year "from the date of the first sale of such commercial phonograms." Failure to obtain such authorization constitutes an infringement of this newly recognized lending right. See *Copyright*, 1984, pp. 285-286.

"The rapid growth of commercial record rentals in this country parallels recent experience in Japan, where the record rental business originated in June 1980." S. Rep. 98-162 at 2, 98th Congress, 1st Session (1983).

A joint WIPO-Unesco meeting of a Group of Experts on the Rental of Phonograms and Videograms was held in Paris in November 1984. See *Copyright*, 1985, pp. 16 *et seq.*

For further discussion of international law in relation to video rental rights, see Karnell, "Rental and Related Market Phenomena Concerning Videograms and the Right of Distribution under Copyright Law," 115 RIDA (1983) reviewing developments in Austria, Belgium, Denmark, Finland, France, Germany (Federal Republic of), Italy, Japan, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

And see 18 *Copyright Bulletin* (UNESCO) No. 1, 1984, pp. 39-41 for a brief report from Canada on "proposals for the enactment of commercial renting rights for films, videotapes and sound recordings, (and for) work currently in progress in (other) countries on the preparation of draft legislation introducing rights in favor of authors, performers and producers of phonograms with respect to the rental of the various materials."

*Co. v. Apollo Co.*,<sup>58</sup> it may be even longer before there is a judicial answer to the question posed by Mr. Justice Holmes in his concurring opinion in *White-Smith v. Apollo*:

---

For detailed discussion of a potential public renting right for films, videotapes and sound recordings in Canada, see Proposals for the Revision of the Canadian Copyright Act, A White Paper on Copyright entitled From Gutenberg to Teldon, at 20 (1984). The White Paper was prepared jointly by the Canadian Department of Consumer and Corporate Affairs, the Department of Communications for review and consideration by the Parliamentary Standing Committee on Communications and Culture.

<sup>57</sup> *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1248, Slip Opinion at 16, 219 USPQ 113, 120, CCH Copyright Law Decisions, paragraph 25,565 at 18,345 (3rd Cir. 1983). Boorstyn, Copyright Law § 2:21 (1981, 1984).

<sup>58</sup> 209 U.S. 1, 28 S. Ct. 319, 52 L. Ed. 655, 15 C.O. Bull. 2978 (1908), in which the Supreme Court, in an opinion by Mr. Justice Day, quoted and questionably cited as precedent the English case of *West v. Francis*, 5 B. & A. 737, 743 (1822).

For the most recent reference to *White-Smith v. Apollo* by the Supreme Court, see notes 11 and 13 of *Sony Corporation v. Universal*, note 49 *supra*. Also see Colby, "An Historic

What license may be implied from a sale of the copyrighted article is a different and harder question, but I leave it untouched, as license is not relied upon as a ground for the judgment of the court.<sup>59</sup>

Following the perhaps invisible "trail left by *Bobbs-Merrill v. Straus*" (1908)<sup>60</sup> and *Bobbs-Merrill v. Snellenburg* (1904)<sup>61</sup> may be equally as challenging when applying a "doctrine (that) has been judicially read into the statute from a judicial gloss drawn on 17 U.S.C. § 27."<sup>62</sup>

---

'First' — Copyright Office Accepts Magnetic Video Tape for Registration," 8 *Journal of the Copyright Society of the USA* 205 (1961). Colby, "Music in Motion Pictures," 30 *Journal of the Copyright Society of the USA* 34 (1982), 2 "The Entertainment and Sports Lawyer" 3 (American Bar Association Forum Committee on the Entertainment and Sports Industries, 1983), 9 *New Matter* 3, Number 1, Winter 1984 (*Journal of the State Bar of California Patent, Trademark and Copyright Section*).

<sup>59</sup> See note 21 *supra*.

<sup>60</sup> See note 15 *supra* for the quotation from *U.S. v. Ather-ton*. And see note 16 *supra* for the citation to *Bobbs-Merrill v. Straus*, another 1908 Opinion by Mr. Justice Day for the Supreme Court.

<sup>61</sup> See note 17 *supra*.

<sup>62</sup> See note 2 *supra*.

## Activities of Other Organizations

### International Literary and Artistic Association (ALAI)

#### Study Session, Executive Committee and General Assembly

(Oxford, April 10 to 13, 1985)

1. At the invitation of its British National Group (the British Literary and Artistic Copyright Association, shortly referred to as BLACA), the International Literary and Artistic Association (ALAI) held a Study Session in Oxford on April 11 and 12, 1985, on the subject "Copyright in Free and Competitive Markets." The Session, which took place in the Music Room of the Wadham College, was chaired by Professor Georges Koumantos (Greece), President of ALAI, and was attended by some 90

participants from the following countries: Austria, Belgium, Denmark, Finland, France, Germany (Federal Republic of), Greece, Italy, the Netherlands, Norway, Sweden, the United Kingdom and the United States of America. WIPO was represented by Mr. György Boytha, Director of the Copyright Law Division.

2. The discussions were based on three main papers, delivered by Professor René Joliet (Judge of

the European Communities Court of Justice, Luxembourg) on "The Impact of the Jurisprudence of the EC Court of Justice on Copyright," by Messrs. Michel Walter (Austria) and Jan Rosen (Sweden) on "Free Trade and Competition: EFTA and the EEC," and by Mr. David Ladd (former Register of Copyrights, United States of America) on "Antitrust Policy and Copyright: the US Experience."

3. "Initial discussants" were Messrs. Adolf Dietz (Federal Republic of Germany) and Claude Joubert (France), concerning the subject "Impact of the Policy of Free Movement of Goods and Free Provisions of Services"; Professor Valentine Korah (United Kingdom), concerning the subject "Impact of the Rules of Competition"; Messrs. Charles Clark (United Kingdom) and Nelson Landry (Canada), concerning the subject "Antitrust Policy and Copyright." The contributions of the "initial discussants" were followed by a wide exchange of views among the participants.

4. On the occasion of the Study Session, the Executive Committee of ALAI met twice in the Seminar Room of the Wadham College, on April 10 and 13, 1985. Besides approving the Note prepared by Professor André Françon (Secretary General of ALAI) on the January 1985 meeting of the Executive Committee held in Paris, noting the reports of the Secretary General on past and planned activities of ALAI and of Mrs. Gaudel (Treasurer of ALAI)

on the finances thereof, as well as discussing various questions related to those subjects, the Executive Committee adopted, as a result of the Study Session, the following statement:

The ALAI Executive Committee

Notes that certain recent trends in case law and certain recent initiatives by European Community bodies, although claiming to concern solely the exercise of copyright, are in fact liable to prejudice the very existence of that right;

Considers that the implementation of the principles of free movement of goods, of freedom to provide services and of free competition should not lead to restrictions on the rights afforded to authors by the international conventions and by national legislation;

Further notes, with satisfaction, that in certain countries that had not hitherto recognized the specific nature of copyright the concept was gaining acceptance in case law and in certain legislative drafts;

Stresses that it is necessary to safeguard copyright if it is wished to promote creativity, which enriches the cultural heritage of mankind and constitutes the source of the cultural industries.

5. On April 12, 1985, ALAI also held its General Assembly in the Music Room of the Wadham College. The Note prepared by the Secretary General on the General Assembly of April 7, 1984, held in Paris was adopted. The General Assembly noted further the report of the General Secretary on past and planned activities of the Association, as well as the report of the Treasurer on its finances.

## Book Reviews

**Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976**, by *J.H. Reichman*. One volume of 121 pages. Article reprinted from the *Duke Law Journal*, No. 6, December 1983.

Can and should aesthetic qualities and utility be separated, for the purposes of granting protection to utilitarian articles incorporating an artistic element? This 18th-century debate is far from being resolved in our age: since the often-cited salt-cellar designed in the 16th century by Benvenuto Cellini, the ever-continuing consequences of the industrial revolution have made the problem increasingly complex, and extended the argument to "plastic salad bowls, drinking glasses, fire-place grates, a hair brush, the luggage rack of a motor scooter, and the hexagonal head of a lubricating pump."

The author, an Associate Professor of Law at the Ohio State University, considers, in this first reprinted article, the evolution of design protection in certain member countries of the Berne Union for the Protection of Literary and Artistic Works, in the light of the options they provided for the United States of America, and goes on to trace different influences in that country until the General Revision of the Copyright Law in 1976.

The three options outlined by the author are, predictably, total cumulation (concurrent protection offered under copyright law, as well as special *sui generis* design laws), non-cumulation (protection offered exclusively under such special design laws), and partial cumulation (protection in principle offered under special design laws, but without excluding the possibility of other protection in the case of objects considered to incorporate expressions of high artistic value). In explaining the theories "unity of art" versus "duality of art," the author quotes, in connection with the former, an interesting passage from Pouillet, who wrote in the late 19th century in France, an outstanding example of a country affording total cumulative protection:

"Whence comes the difficulty that is found in clearly defining the nature and character of the industrial design and model? It comes ... from the fact that we have got it in our heads that art and industry, two things made to be allied and united, should be separated, and because we have dreamed of establishing a line of demarcation between them."

How, indeed, can acts of demarcation by the courts between "art" and "industrial design" escape the charge of being esta-

blished, at least to a certain extent, on subjective criteria? On the other hand, how to avoid the pitfalls of the "unity of art" theory, where lack of rigor in granting relatively lengthy copyright protection makes possible excessive private appropriation of items embodying little creativity?

The author holds the view that in the United States of America a non-cumulative line, limiting access to copyright protection, was followed from 1954 to 1969 whilst the Copyright Office was pressing for a *sui generis* design law, and that from 1969 to 1976 that Office acted to reinforce the non-cumulative line in the face of delay by Congress in the enactment of both the revised copyright law and the special design law incorporated within it. He ends with the revised law of 1976, which further reinforced non-cumulation by retaining and incorporating the Italian doctrine of "scindibilità" or separability: a design could only be considered a work of art if it were possible to identify it as such in its being distinct (separate) from the utilitarian aspects of the article. In the author's opinion, the United States of America got the worst of both worlds because "the reformed copyright law lacked the special regime of design protection that gave coherence to the Italian system."

This article, as well as the second<sup>1</sup> in the series, appropriately read like academic dissertations of undoubted scholarship. However, their structure does not always assist the comprehension of readers less well-versed than himself in the subject. For instance, it would have been clearer to discuss the respective merits and demerits of copyright and industrial property protection more fully at the outset, as an integral part

<sup>1</sup> See the review, below, of his second article, "Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models."

**Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models**, by J.H. Reichman. One volume of 119 pages. Article reprinted from the Journal of the Copyright Society of the USA, Volume 31, No. 3, February 1984.

This second article is less a sequel to than an illustration and amplification of the author's conclusions in his first article.\*

A large part of it is devoted to the practical implications and actual application of legislation in the United States of America, as well as in the countries supplying the "interim models" in Europe. His analysis of case law in the United States of America is particularly informative. He outlines important legal decisions from the case of *Stein v. Mazer* in 1909, which first established the protectibility of applied art under copyright law (the objects in question were dancing figures used as lamp bases), to recent times. Of special interest is the case *Kuddle Toy Inc. v. Pussycat-Toy Co. Inc.* (1974), which highlights the greater legal and economic complexity engendered by conceptual separation: a collection of copyrighted teddy bears, many owned by the plaintiff, were followed by yet another teddy bear, examined for real originality as opposed to trivial variations in comparison with the others. To uphold trivial variations as eligible for copyright protec-

\* See the review, above, of his first article, "Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976."

of the main line of argument, rather than to put them in somewhat incidentally here, and then at the very end of his second article.

A salient feature of the author's views is his strong impression of the success of the Italian system, although it is true that he also recognizes its weaknesses. It is worthwhile, perhaps, to quote one of the critics of that system: "the form of clothing, shoes, furniture, cars, typefaces, or typewriters (famous Italian designs there!) can never be protected by copyright... One could ask what then really is left for copyright protection of applied art... According to Fabiani, the criterion of 'separability' in reality boils down to the idea of 'artistic value,' which according to Benussi is an illusory distinction."<sup>2</sup>

In his interpretation of legislative developments in the United States of America, the author has some views worthy of serious study concerning the Bill S. 2075 of 1959 — which was not enacted — that he sees as a watershed, and as a promising combination of the originality criterion and greater ease and length of copyright protection and the stricter regime of eligibility of design patent law. In his own words, "the proposal attempted to relegate applied art to a mini-regime of copyright law, which would coexist with a stricter regime of design patent law, in return for a shortened period of protection." The failure of its passage is regretted by the author, and this refrain is increasingly echoed in the views of other experts in the field, who share his desire for a more composite approach bringing together different areas of intellectual property law.

A.S.

<sup>2</sup> See *Copyright*, 1983, pp. 317 to 323 ("Protection of Industrial Designs Between Copyright and Design Laws: A Comparative Study," by Herman Cohen Jehoram).

tion would have been "tantamount to private appropriation of the item in question from the public domain," in the author's words, and brought up the issue of the excessive generosity, in some cases, of copyright law, which could confer a commercial monopoly for a long period, on softer terms than industrial property law.

The author also examines and compares conceptual and practical difficulties of different systems in various countries (notably, total cumulation in France, partial cumulation in the Benelux countries and the Federal Republic of Germany, and non-cumulation in Italy). Where partial cumulation and non-cumulation exist, the courts, even in some examples against their will, in some way are turned into arbiters of artistic creation; where total cumulation is used to avoid this dilemma, in the author's opinion, the resulting over-protection, creating unjustifiable economic monopolies, itself produces efforts by the courts to limit copyright protection in practice. A noteworthy example given by the author is Belgium, before the enactment of the Uniform Benelux Designs Law in 1975: although a Royal Decree of 1935 declared acceptance of the "unity of art" thesis, within a matter of months the courts in actual practice found themselves asserting artistic criteria for purposes of granting protection. Equally striking are some examples of the pains taken by legislators to deny the use of truly artistic criteria: in the Netherlands, before 1975, such thinly-veiled terms as "the aesthetic 'effect' desired by the creator" were used.

The author returns to the conviction expressed in his first article — that the only realistic solution is a dual regime, a combination of *sui generis* and copyright protection. Both articles contain useful and stimulating material for specialists in this field.

A.S.

## Calendar of Meetings

### WIPO Meetings

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

#### 1985

- 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) and PCT Committee for Technical Cooperation (PCT/CTC)
- 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 29 (Paris) — Committee of Governmental Experts on Model Provisions for National Laws on Publishing Contracts for Literary Works (convened jointly with Unesco)
- 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 3 to 6 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property
- December 9 to 13 (Geneva) — Committee of Experts on the International Registration of Marks

### UPOV Meetings

#### 1985

- 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

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

September 19 (Geneva) — International Literary and Artistic Association (ALAI)— Executive Committee

#### 1986

April 24 and 25 (Heidelberg) — International Publishers Association (IPA) — Copyright Symposium

September 8 to 12 (Berne) — International Literary and Artistic Association (ALAI) — Congress

