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

21st year — No. 10
October 1985

Copyright

Monthly Review of the
World Intellectual Property Organization (WIPO)

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ISSN 0010-8626

Notifications

Nairobi Treaty on the Protection of the Olympic Symbol

ITALY

Ratification

The Government of the Italian Republic deposited, on September 25, 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 Italian Republic on October 25, 1985.

Nairobi Notification No. 31, of September 27, 1985.

National Legislation

FRANCE

Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises

(No. 85–660, of July 3, 1985)*

TITLE I

Copyright

Article 1. I. In Article 3 of Law No. 57–298 of March 11, 1957, on Literary and Artistic Property,** the words "cinematographic works and works made by processes analogous to cinematography" shall be replaced by the words "cinematographic works and other works consisting of moving sequences of images, with or without sound, together referred to as audiovisual works."

II. In that same Article, the words "photographic works of an artistic or documentary character, and other works of the same character produced by processes analogous to photography" shall be replaced by the words "photographic works and other works produced by techniques analogous to photography."

III. In that same Article, following the words "choreographic works," shall be inserted the words ", circus acts and feats."

* Published in *Journal officiel de la République française*, of July 4, 1985. — WIPO translation.

** See *Le Droit d'auteur*, 1957, pp. 116–121 and 133–137.

IV. In that same Article, after the word "lithography;" shall be inserted the words "graphical and typographical works;".

V. In that same Article, after the words "the sciences" shall be inserted the words "; software, according to the conditions set out in Title V of Law No. 85–660 of July 3, 1985, on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises."

Article 2. In Articles 14 and 15 of the above-mentioned Law No. 57–298 of March 11, 1957, the words "cinematographic work" shall be replaced by the words "audiovisual work."

Article 3. Article 16 of the above-mentioned Law No. 57–298 of March 11, 1957, shall read as follows:

"*Article 16.* An audiovisual work shall be considered completed when the final version has been established by common accord between the director or, possibly, the joint authors, on the one hand, and the producer, on the other.

Destruction of the master copy of such version shall be prohibited.

Any change made to such version by adding, deleting or modifying any element thereof shall require the agreement of the persons referred to in the first paragraph.

Any transfer of an audiovisual work to another kind of medium with a view to a different mode of exploitation shall require prior consultation with the director.

The authors' own rights, as defined in Article 6, shall be exercised by them only in respect of the completed audiovisual work."

Article 4. Article 17 of the above-mentioned Law No. 57–298 of March 11, 1957, shall be worded as follows:

"*Article 17.* The producer of an audiovisual work shall be the natural or legal person who takes the initiative and responsibility for making the work."

Article 5. In Article 18 of the above-mentioned Law No. 57–298 of March 11, 1957, the words "or television" and "and television" shall be deleted.

Article 6. The second sentence of the first paragraph of Article 19 of the above-mentioned Law No. 57–298 of March 11, 1957, shall read as follows: "He shall determine the method of disclosure and shall fix the conditions thereof, subject to Article 63.1."

Article 7. In Article 20 of the above-mentioned Law No. 57–298 of March 11, 1957, the words "or rights to exploit" shall be inserted following the words "right to disclose."

Article 8. I. The second paragraph of Article 21 of the above-mentioned Law No. 57–298 of March 11, 1957, shall be supplemented by the following sentence: "However, for musical compositions with or without words the term shall be seventy years."

II. The first sentence of the first paragraph of Article 22 of the said Law shall be supplemented as follows: "; however, for musical compositions with or without words the term shall be seventy years."

III. The first paragraph of Article 23 of the said Law shall be supplemented as follows: "; however, for musical compositions with or without words the term shall be seventy years."

Article 9. Article 27 of the above-mentioned Law No. 57–298 of March 11, 1957, shall read as follows:

"*Article 27.* Performance shall consist in the communication of the work to the public by any process whatsoever, particularly:

— public recitation, lyrical performance, dramatic performance, public presentation, public projection and transmission in a public place of a telediffused work;
— by telediffusion.

Telediffusion shall mean distribution by any telecommunication process whatsoever of sounds, images, documents, data and messages of any kind.

Transmission of the work towards a satellite shall be assimilated to performance."

Article 10. I. In Article 31 of the above-mentioned Law No. 57–298 of March 11, 1957, the words "contracts for performance and publication" shall be replaced by the words "contracts for performance, publication and audiovisual production."

II. That same Article 31 shall be supplemented as follows:

"Transfers of the rights of audiovisual adaptation shall be effected by written contract in an instrument that is separate from the contract relating to publication proper of the printed work.

The assignee shall undertake in such contract to endeavor to exploit the assigned right in conformity with professional usage and to pay to the author in the event of adaptation a remuneration that is proportional to the revenue obtained therefrom."

Article 11. In the fourth paragraph of item (iii) in Article 41 of the above-mentioned Law No. 57–298 of March 11, 1957, the word "broadcast" shall be replaced by the word "telediffusion."

Article 12. Article 45 of the above-mentioned Law No. 57-298 of March 11, 1957, shall read as follows:

"*Article 45.* Unless otherwise stipulated:

(i) authorization to telediffuse a work by electromagnetic waves shall not include cable distribution of such telediffusion unless made simultaneously and integrally by the organization holding the authorization and without extension of the contractually stipulated geographical area;

(ii) authorization to telediffuse the work shall not constitute an authorization to communicate the telediffusion of the work in a place to which the public has access;

(iii) authorization to telediffuse a work by electromagnetic waves shall not include its transmission towards a satellite enabling the work to be received by the intermediary of other organizations unless the authors or their successors in title have contractually authorized the latter organizations to communicate the work to the public; in such case, the emitting organization shall be exempted from paying any remuneration."

Article 13. There shall be added to Title III of the above-mentioned Law No. 57-298 of March 11, 1957, a Chapter III reading as follows:

Chapter III

Audiovisual Production Contracts

"*Article 63-1.* Contracts binding the producer and the authors of an audiovisual work, other than the authors of a musical composition with or without words, shall imply, unless otherwise stipulated and notwithstanding the rights afforded to the author by Title II above, assignment to the producer of the exclusive exploitation rights in the audiovisual work.

Audiovisual production contracts shall not imply assignment to the producer of the graphic rights and theatrical rights in the work.

Contracts shall lay down the list of elements that have served to make the work that are to be preserved and the conditions of preservation.

Article 63-2. Remuneration shall be due to the authors for each exploitation mode.

Subject to Article 35, where the public pays to receive communication of a given, individually identifiable audiovisual work, remuneration shall be proportional to the price paid, subject to any decreasing tariffs afforded by the distributor to the operator; the remuneration shall be paid to the authors by the producer.

Article 63-3. The producer shall furnish at least once a year to the author and the joint authors a statement of revenue from exploitation of the work in respect of each exploitation mode.

At their request, he shall furnish to them all documentary evidence necessary to establish the accuracy of the accounts, in particular copies of the contracts in which he assigns to third parties all or a part of the rights he enjoys.

Article 63-4. The author shall guarantee to the producer the undisturbed exercise of the rights assigned.

Article 63-5. The producer shall be required to exploit the audiovisual work in conformity with the practice of the profession.

Article 63-6. As regards payment of the remuneration due to them for exploitation of an audiovisual work, the authors shall enjoy the privilege instituted by Article 2101(4) and Article 2104 of the Civil Code.

Article 63-7. Rehabilitation of the producer ordered by a court shall not imply termination of the audiovisual production contract.

Where the making or exploitation of the work is continued under Articles 31 *et seq.* of Law No. 85-98 of January 25, 1985, on the judicial rehabilitation or liquidation of enterprises, the receiver shall be required to respect all of the producer's commitments, particularly as regards the joint authors.

In the event of assignment of all or a part of the undertaking or of liquidation, the receiver, the debtor or the liquidator, as appropriate, shall be required to establish a separate lot for each audiovisual work that may be subject to assignment or to auction. He shall be required to inform, on pain of nullity, each of the authors and coproducers of the work by registered letter one month before any decision on assignment or any procedure for sale by auction of property held indivisum. The assignee shall similarly be held to the obligations of the assignor.

The author and the joint authors shall have a right of preemption in respect of the work unless one of the coproducers states his intention to acquire. Failing agreement, the purchase price shall be fixed by expert opinion.

Where the activities of the enterprise have ceased for more than three months or where liquidation is ordered, the author and the joint authors may require termination of the audiovisual production contract."

Article 14. In the case of a commissioned work used for advertising, the contract between the producer and the author shall imply, unless otherwise stipulated, assignment to the producer of the exploi-

tation rights in the work on condition that the contract specifies the separate remuneration payable for each mode of exploitation of the work as a function, in particular, of the geographical area, the duration of exploitation, the size of the printing and the nature of the medium.

An agreement between the organizations representing the authors and the organizations representing the advertising producers shall lay down the basic elements used to form the remuneration that correspond to the various uses of works.

The term of the agreement shall be of between one and five years.

Its provisions may be made compulsory for all the parties by way of decree.

Failing agreement concluded either within nine months of the promulgation of this Law or on the date of expiry of the preceding agreement, the bases for the remuneration referred to in the second paragraph of this Article shall be determined by a Committee chaired by a magistrate of the judiciary designated by the First President of the Court of Cassation and composed, in addition, of one member of the Council of State (*Conseil d'Etat*) designated by the Vice-President of the Council of State, one qualified person designated by the Minister responsible for culture and an equal number of members designated by the organizations representing the authors and of members designated by the organizations representing advertising producers.

The organizations entitled to designate members of the Committee and the number of persons each organization shall be entitled to designate shall be specified by an order of the Minister responsible for culture.

The Committee shall take its decisions on a majority of the members present. In the event of an equally divided vote, the chairman shall have a casting vote. The Committee's decisions shall be enforceable if, within one month, its chairman has not requested a second decision.

The decisions of the Committee shall be published in the Official Journal of the French Republic.

TITLE II

Neighboring Rights

Article 15. Neighboring rights shall not prejudice authors' rights. Consequently, no provision within this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners.

In addition to any person having a justified interest, the Minister responsible for culture shall be entitled to take legal action, particularly where there is no known successor in title or where there is no heir or no spouse entitled to inheritance.

Article 16. Save for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts.

Article 17. A performer shall have the right to respect for his name, his authorship and his interpretation.

This inalienable and imprescriptible right shall be attached to his person.

It may be transmitted to his heirs in order to protect the interpretation and the memory of the deceased.

Article 18. The fixation of his performance, its reproduction and its communication to the public and also any separate use of the sounds or the images of the performance, where the latter has been fixed as regards both the sounds and the images, shall be subject to written authorization by the performer.

Such authorization and the remuneration deriving therefrom shall be governed by Articles L 762-1 and L 762-2 of the Labor Code, subject to the fourth paragraph of Article 19 below.

Article 19. The signature of a contract concluded between a performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer.

Such contract shall lay down separate remuneration for each mode of exploitation of the work.

Where neither a contract nor a collective agreement mention the remuneration for one or more modes of exploitation, the amount of such remuneration shall be determined by refererence to the schedules established under specific agreements concluded, in each sector of activity, between the employees' and employers' organizations representing the profession.

Article L 762-2 of the Labor Code shall only apply to that part of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective agreement or specific agreement.

Contracts concluded prior to the entry into force of this Law between a performer and a producer of audiovisual works or their assignees shall be subject to the preceding provisions in respect of those modes of exploitation which they excluded. The corresponding remuneration shall not be in the nature of a salary. This right to remuneration shall lapse at the death of the performer.

Article 20. The provisions of the conventions or agreements referred to in the preceding article may

be made compulsory within each sector of activity for all the parties concerned by order of the Minister concerned.

Failing agreement concluded in accordance with the preceding Article either within six months following the entry into force of this Article or at the date of expiry of the preceding agreement, the types and bases of remuneration for the performers shall be determined, in respect of each sector of activity, by a Committee chaired by a magistrate of the judiciary designated by the First President of the Court of Cassation and composed, in addition, of one member of the Council of State designated by the Vice-President of the Council of State, one qualified person designated by the Minister responsible for culture and an equal number of representatives of the employees' organizations and representatives of the employers' organizations.

The Committee shall take its decisions on a majority of the members present. In the event of equally divided voting, the chairman shall have a casting vote.

The Committee shall decide within three months of the expiry of the time limit laid down in the second paragraph of this Article.

Its decision shall have effect for a duration of three years unless the parties concerned reach an agreement prior to that date.

Article 21. The producer of phonograms shall be the natural or legal person who takes the initiative and the responsibility for the initial fixation of a sequence of sounds.

The authorization of the producer of phonograms shall be required prior to any reproduction, making available to the public by way of sale, exchange or rental, or communication to the public of his phonogram, other than those referred to in the following Article.

Article 22. Where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose:

(i) its direct communication in a public place where it is not used in an entertainment;

(ii) its broadcasting or the simultaneous and integral cable distribution of such broadcast.

Such uses of phonograms published for commercial purposes, whatever the place of fixation of such phonograms, shall entitle the performers and the producers to remuneration.

Such remuneration shall be paid by the persons who use the phonograms published for commercial purposes in accordance with items (i) and (ii) in this Article.

Such remuneration shall be based on the revenue from exploitation or, failing that, may be calculated as a lump sum in those cases laid down by Article 35 of the above-mentioned Law No. 57-298 of March 11, 1957.

It shall be shared half each between the performers and the producers of phonograms.

Article 23. The schedule of remuneration and the conditions of payment of the remuneration shall be laid down by specific agreements for each branch of activity between the organizations representing the performers, the producers of phonograms and the persons using phonograms in accordance with items (i) and (ii) in Article 22.

Such agreements shall set out the terms under which the persons using phonograms under such conditions shall satisfy their obligation to furnish to the societies for the collection and distribution of royalties the detailed program of uses which they effect and all the documentary elements that are indispensable for distributing the royalties.

The provisions of such agreements may be made compulsory for all of the parties concerned by order of the Minister responsible for culture.

The term of such agreements shall be of between one and five years.

Article 24. Failing agreement within six months of the entry into force of this Law or if no agreement is achieved on expiry of the preceding agreement, the schedule of remuneration and the conditions for paying remuneration shall be decided by a Committee chaired by a magistrate of the judiciary designated by the First President of the Court of Cassation and composed, in addition, of one member of the Council of State designated by the Vice-President of the Council of State, of one qualified person designated by the Minister responsible for culture and of an equal number of members designated by the organizations representing the beneficiaries of the right to remuneration and of members designated by the organizations representing those persons who, in the branch of activity concerned, use the phonograms in accordance with the conditions laid down in items (i) and (ii) in Article 22. The organizations that shall be entitled to designate members of the Committee and the number of persons that each organization shall be entitled to designate shall be determined by an order of the Minister responsible for culture.

The Committee shall take its decisions on a majority of the members present. In the event of an equally divided vote, the chairman shall have a casting vote.

The decisions of the Committee shall be enforceable if, within a period of one month, its chairman has not requested a second decision.

The decisions of the Committee shall be published in the Official Journal of the French Republic.

Article 25. The remuneration referred to in Article 22 shall be collected on behalf of the entitled persons and distributed among them by one or more bodies mentioned in Title IV of this Law.

Article 26. The producer of videograms shall be the natural or legal person who takes the initiative and the responsibility for the initial fixation of a sequence of images, whether accompanied by sounds or not.

The authorization of the producer of videograms shall be required prior to any reproduction, making available to the public by means of sale, exchange or rental, or communication to the public of his videogram.

The rights afforded to the producer of a videogram under the preceding paragraph, the authors' rights and the performers' rights of which he disposes in respect of the work fixed on the videogram may not be separately assigned.

Article 27. The reproduction of its programs, making them available to the public by sale, rental or exchange, their telediffusion and their communication to the public in a place to which the latter has access in exchange for payment of an entrance fee, shall be subject to the authorization of the audiovisual communication enterprise.

Audiovisual communication enterprises shall be those bodies referred to in Title III of Law No. 82–652 of July 29, 1982, on audiovisual communication and the suppliers of audiovisual communication services holding a public service concession or declared or authorized in accordance with Title IV of the said Law.

Article 28. Subject to the international conventions, the right to remuneration afforded by Articles 22 and 32 shall be shared amongst the authors, performers, producers of phonograms or of videograms in respect of phonograms and videograms fixed for the first time in France.

Article 29. The beneficiaries of the rights afforded by this Title may not prohibit:

(i) private and gratuitous representations carried out exclusively within the family circle;

(ii) reproductions strictly reserved for private use by the person who has made them and not intended for any collective use;

(iii) subject to adequate elements of identification of the source:

— analyses and brief quotations justified by the critical, polemical, pedagogical, scientific or informatory nature of the work in which they are incorporated;

— press reviews;

— dissemination, even in full, for the purposes of current affairs information, of speeches intended for the public in political, administrative, judicial or academic assemblies and in public meetings of a political nature or in official ceremonies;

(iv) paradoy, pastiche and caricature, observing the rules of the genre.

Performers may not prohibit reproduction and public communication of their performance where it is accessory to an event that constitutes the main subject of a sequence within a work or audiovisual document.

Article 30. The term of the economic rights under this Title shall be fifty years as from January 1 of the calendar year following that of first communication to the public, of performance of the work, of its production or of the programs referred to in Article 27 above.

TITLE III

Remuneration for Private Copying of Phonograms and Videograms

Article 31. The authors and performers of works fixed on phonograms or videograms and the producers of such phonograms or videograms shall be entitled to remuneration for the reproduction of the said works made in accordance with item (ii) in Article 41 of the above-mentioned Law No. 57–298 of March 11, 1957, and item (ii) in Article 29 of this Law.

Article 32. The remuneration for private copying shall be assessed, under the conditions defined below, as a lump sum as laid down in the second paragraph of Article 35 of the above-mentioned Law No. 57–298 of March 11, 1957.

It shall be exempted from value added tax.

Article 33. The remuneration laid down in the preceding Article shall be paid by the manufacturer or importer of recording mediums that may be used for reproduction for private use of works fixed on phonograms or videograms, at the time these mediums enter into circulation in France.

The amount of the remuneration shall depend on the type of medium and the recording time it offers.

Article 34. The types of medium, the rates of remuneration and the conditions of payment of

such remuneration shall be determined by a Committee chaired by a representative of the State and composed, in addition, in half of persons designated by the organizations representing the beneficiaries of the right of remuneration, in quarter of persons designated by the organizations representing the manufacturers or importers of the mediums referred to in the first paragraph of the preceding Article and in quarter of persons designated by the organizations representing the consumers.

The organizations entitled to designate members of the Committee and the number of persons that each organization shall be entitled to designate shall be determined by an order of the Minister responsible for culture.

The Committee shall take its decisions on a majority of the members present. In the event of an equally divided vote, the chairman shall have a casting vote.

The decisions of the Committee shall be enforceable if, within one month, its chairman has not requested a second decision.

The decisions of the Committee shall be published in the Official Journal of the French Republic.

Article 35. The remuneration referred to in Article 32 shall be collected on behalf of the entitled persons by one or more of the bodies referred to in Title IV of this Law.

It shall be distributed amongst the entitled persons by the bodies mentioned in the preceding paragraph as a function of the private reproductions of which each work has been the subject.

Article 36. The remuneration for private copying of phonograms shall belong in half to the authors, in quarter to the performers and in quarter to the producers.

The remuneration for private copying of videograms shall belong in equal parts to the authors, the performers and the producers.

Article 37. The remuneration for private copying shall be refunded when the recording medium is acquired for their own use or production by:

(i) audiovisual communication enterprises;

(ii) producers of phonograms or videograms and persons who carry out the reproduction of phonograms or videograms on behalf of their producers;

(iii) legal persons or bodies, of which the list shall be established by the Minister responsible for culture, that use recording mediums for the purpose of assisting the visually or orally handicapped.

TITLE IV

Royalty Collection and Distribution Societies

Article 38. The societies for the collection and distribution of authors' royalties and the royalties of performers and producers of phonograms and videograms shall be established in the form of civil law companies.

The members must be authors, performers, producers of phonograms or videograms, publishers or their successors in title. Such duly established civil law societies shall be entitled to take legal action to defend the rights for which they are responsible under their statutes.

The statutes of the royalty collection and distribution societies shall lay down the conditions under which associations of general interest shall enjoy in respect of events for which no entrance fee is charged a reduction on the amount of authors' royalties and of the royalties of performers and producers of phonogramns which they are required to pay.

The royalty collection and distribution societies shall hold available for potential users the complete repertoire of the French and foreign authors and composers they represent.

These societies shall be required to utilize for activities to promote creation, to promote live entertainment and training activities for performers, 50% of the non–distributable amounts collected under Article 22 above and 25% of the amounts obtained from the remuneration for private copying.

The distribution of the corresponding amounts, which shall not be to the benefit of just a single body, shall be subject to a vote at the general meeting of the society taken on a two–thirds majority. Failing such majority, a new general meeting, convened specifically for that purpose, shall take a decision on a simple majority.

The use made of such sums shall be subject, each year, to a special report by the auditors.

Article 39. I. The royalty collection and distribution societies shall be required to appoint at least one auditor and one alternative from the list referred to in Article 219 of Law No. 66–537 of July 24, 1966, on commercial companies, who shall carry out their duties in compliance with the provisions laid down in the said Law, subject to the rules specific to them. Article 457 of the above–mentioned Law No. 66–537 of July 24, 1966, shall be of application.

Article 29 of Law No. 84–148 of March 1, 1984, on the prevention and amicable settlement of disputes in enterprises shall be of application.

II. The draft statutes and general regulations of the royalty collection and distribution societies shall

be addressed to the Minister responsible for culture.

Within one month of receipt, the Minister may apply to the first instance court in the event of substantial and earnest reasons against the incorporation of a society.

The court shall assess the professional qualifications of the founders of such societies, the human and material means that they intend to use to collect royalties and to exploit their repertoire.

III. Any member shall be entitled, subject to the conditions and time limits set out by decree, to obtain communication:

(i) of the annual statement of accounts and the list of administrators;

(ii) of the reports of the administrative council and the auditors that are to be submitted to the general meeting;

(iii) where appropriate, the text and motivation of resolutions submitted and information concerning candidates for the administrative council;

(iv) the overall amount, certified by the auditors, of the remuneration paid to the most highly remunerated persons, whereby the number of such persons shall be ten or five depending on whether the staff exceeds 200 employees or not.

IV. Any group of members representing at least one tenth of the membership may take legal action for the designation of one or more experts to be entrusted with submitting a report on one or more administrative operations.

The public prosecutor and the works council shall be entitled to act in the same way.

The report shall be addressed to the requestor, to the public prosecutor, to the works council, to the auditors and to the administrative council. This report shall be annexed to the report drawn up by the auditors for the purposes of the first general meeting; it shall be given the same publicity.

Article 40. Notwithstanding the general provisions applicable to civil law companies, the request for dissolution of a royalty collection and distribution society may be submitted to the court by the Minister responsible for culture.

In the event of infringement of the law, the court may order a society to cease exercising its collection activities in one sector of activity or for one mode of exploitation.

Article 41. The royalty collection and distribution society shall communicate its annual statement of accounts to the Minister responsible for culture and shall bring to his notice, two months at least before examination by the general meeting, any draft amendment to the statutes or rules for the collection and distribution of royalties.

It shall address to the Minister responsible for culture, at the latter's request, any document relating to the collection and distribution of royalties or copy of agreements concluded with third parties.

The Minister responsible for culture or his representative may obtain, from documents or on the spot, the information referred to in this Article.

Article 42. Contracts concluded by the civil law societies of authors or of owners of neighboring rights, in implementation of their purpose, with the users of all or part of their repertoire shall constitute civil law instruments.

Article 43. The societies that collect and distribute the royalties of producers of phonograms and videograms and of performers shall have the faculty, within the limits of the mandate given to them by all or part of the members or by foreign organizations having the same purpose, to collectively exercise the rights afforded by Articles 21 and 26 by concluding general contracts of joint interest with the users of phonograms or videograms for the purpose of improving the dissemination of the latter or of promoting technical or economic progress.

Article 44. The legal persons at present governed by the Law of July 1, 1901, relating to contracts of association and having as their purpose the collection and distribution of royalties may transfer to a civil law society for the collection and distribution of royalties all or part of their assets and, in particular, the mandates given to them by their members, by simple decision of an extraordinary general meeting of the association. Such transfer must take place within a maximum period of one year as from the promulgation of this Law. The associations referred to in this Article may be partners in the civil law society for a maximum period of two years as from transfer.

TITLE V

Software

Article 45. Unless otherwise stipulated, software created by one or more employees in the exercise of their duties shall belong to the employer together with all the rights afforded to authors.

Any dispute concerning the application of this Article shall be submitted to the first instance court of the registered place of business of the employer.

The first paragraph of this Article shall also apply to servants of the State, local authorities and public establishments of an administrative nature.

Article 46. Unless otherwise stipulated, the author may not oppose adaptation of the software within the limits of the rights he has assigned nor exercise his right to correct or to retract.

Article 47. Notwithstanding item (ii) in Article 41 of the above–mentioned Law No. 57–298 of March 11, 1957, any reproduction other than the making of a back–up copy by the user or any use of software not expressly authorized by the author or his successors in title shall be subject to the sanctions laid down by the said Law.

Article 48. The rights afforded by this Title shall lapse on expiry of a period of 25 years as from the date of the creation of the software.

Article 49. The price of assignment of rights in software may be calculated as a lump sum.

Article 50. In respect of software, infringement seizure shall be carried out under an order issued on request by the presiding judge of the first instance court. The presiding judge shall authorize distraint where appropriate.

The officiating bailiff or the police commissioner may be assisted by an expert designated by the petitioner.

Failing a writ of summons within fifteen days of the seizure, the infringement seizure shall be null and void.

In addition, the police commissioners shall be required, at the request of any author of software protected by this Law or of his successors in title, to carry out a descriptive seizure of the infringing software, whereby such descriptive seizure may take the physical form of a copy.

Article 51. Subject to the international conventions, foreigners shall enjoy in France the rights afforded under this Title on condition that the law of the State of which they are nationals or on the territory of which they have their place of residence, their registered offices or an effective establishment affords its protection to software created by French nationals and by persons having in France their place of residence or an effective establishment.

TITLE VI

Guarantees and Sanctions

Article 52. Publishing, reproduction, distribution, sale, rental or exchange activities in respect of videograms intended for the private use of the general public shall be subject to supervision by the National Cinematographic Center.

Those persons whose activity it is to publish, reproduce, distribute, sell, rent or exchange videograms intended for the private use of the general public shall be required to keep up–to–date documents enabling the origin and destination of videograms to be established as also the exploitation revenue from such videograms. The sworn agents of the National Cinematographic Center shall be entitled to have communicated to them such documents of an accounting or other than accounting nature.

The lack of such documents, the refusal to supply information, the supply of false information and acts for the purpose of dissimulating the origin or the destination of videograms or of revenue from the exploitation of videograms shall be liable to the penalties laid down by Article 18 of the Cinematographic Industry Code, subject to the conditions laid down therein.

Article 53. In addition to the reports of police officers or agents, proof of the existence of any infringement of this Law may be provided by the statements of sworn agents designated by the National Cinematographic Center and by the societies referred to in Title IV. Such agents shall be approved by the Minister responsible for culture.

Article 54. Publication of the acts and agreements entered into in the production, distribution, performance or exploitation in France of audiovisual works shall be given by entering them in the register referred to in Title III of the Cinematographic Industry Code.

However, the filing of a title under Article 32 of the above–mentioned Code shall be provisional for audiovisual works other than cinematographic works.

Article 55. Indirect communication to the public in the form of videograms of an audiovisual work shall require the formality of statutory deposit of a videogram as stipulated by Law No. 43–341 of June 21, 1943, amending the statutory deposit arrangements.

Article 56. There shall be inserted after Article 426 of the Penal Code an Article 426–1 worded as follows:

"*Article 426–1.* Any fixation, reproduction, communication or making available to the public, on payment or free of charge, or any telediffusion of a performance, a phonogram, a videogram or a program made without autorization, where such is required, of the performer, the producer of phonograms or videograms and the audiovisual communication enterprise shall be punishable by imprisonment of between three months and two years and a

fine of between 6,000 francs and 120,000 francs or one only of the two penalties.

Any importation or exploitation of phonograms or videograms made without the authorization of the producer or the performer, where such is required, shall be subject to the same penalties.

Failure to pay the remuneration due to the author, the performer or the producer of phonograms or videograms in respect of private copying or public communication or of the telediffusion of phonograms shall be subject to the fine laid down in the first paragraph."

Article 57. Once the offenses under Article 426–1 of the Penal Code have been established, the competent police officers may effect seizure of the unlawfully reproduced phonograms and videograms, of the copies and articles manufactured or imported unlawfully and of the equipment specially installed for the purpose of such acts.

Article 58. The last but one paragraph of Article 425 of the Penal Code shall be worded as follows:

"Infringement in France of works published in France or abroad shall be punishable by imprisonment of between three months and two years and a fine of between 6,000 francs and 120,000 francs or by one only of these penalties."

Article 59. The first two paragraphs of Article 427 of the Penal Code shall be worded as follows:

"In the event of repetition of the infringements specified in the three preceding articles, the penalties involved shall be doubled.

In addition, the court may order, either definitively or temporarily, for a period not exceeding five years, the closure of the establishment operated by the convicted person."

Article 60. Article 428 of the Penal Code shall be worded as follows:

"*Article 428.* In the cases referred to in the four preceding Articles, the court may order confiscation of all or part of the revenue obtained through the infringement and that of all phonograms, videograms, articles or copies that are infringing or have been unlawfully reproduced and of the equipment specifically installed for the purpose of committing the offense.

It may also order, at the cost of the convicted person, posting of the judgment in compliance with the conditions and subject to the penalties laid down by Article 51, and its publication in full or in extract in such newspapers as it may designate, without however the costs of such publication exceeding the maximum amount of the fine incurred."

Article 61. I. The beginning of Article 429 of the Penal Code shall read as follows:

"In those cases set out in the five preceding Articles, the equipment, the infringing articles and the receipts that have been confiscated shall be remitted to the victim or his successors in title to compensate the prejudice they have suffered; the surplus ..."

II. Consequently, at the end of this Article, the word "infringed" shall be replaced by the word "infringing."

Article 62. There shall be inserted after the fourth paragraph (3) of Article 97 of the above–mentioned Law No. 82–652 of July 29, 1982, two additional paragraphs worded as follows:

"4. Any infringement of the provisions on time limits for disseminating cinematographic works contained in the authorizations, assignment contracts, work specifications and decrees mentioned in Articles 32, 78, 79, the third paragraph of Article 83 and Article 89.

Once an infringement of Article 89 has been established, the police officers may proceed with the seizure of the mediums unlawfully made available to the public."

Article 63. This Law shall apply to the territorial entity of Mayotte and to the overseas territories.

Article 64. Decrees taken in the Council of State shall set out the terms of application of this Law.

Article 65. There shall be carried out, under the name of Code of Copyright and Neighboring Rights, a codification of the relevant legislative and regulatory texts by means of decrees taken in the Council of State after having obtained the opinion of the commission responsible for studying the codification and simplification of legislative and regulatory texts.

These decrees shall make such adaptations to the legislative texts as are required for the codification work, excluding any substantive amendment.

Article 66. This Law shall enter into force on January 1, 1986. However, the provisions in the first, second and third paragraphs of Article 19 and those of Article 20 shall enter into force on promulgation of the Law.

This Law shall be implemented as a law of the State.

Correspondence

Letter from Yugoslavia

Ivan HENNEBERG*

My last "Letter," which was published in this review in April 1980, was entirely devoted to the new Copyright Law of March 30, 1978. In this one I intend to highlight the present position regarding international treaties on copyright and neighboring rights, and then to give a retrospective account of the relevant case law, confined to a few cases concerned with matters of principle, and finally to impart certain items of miscellaneous information.

I. International Treaties

1. Berne Convention

After the enactment of the Law on the Protection of Copyright of December 26, 1929, the Yugoslavia that then was acceded, by a Law of March 22, 1930, to the Berlin Act (1908) of the Berne Convention with the Berne Additional Protocol (1914), and at the same time to the Rome Act (1928) of the same Convention. It has been bound by the Berlin Act and the Additional Protocol since June 17, 1930, and by the Rome Act since August 1, 1931.

It should be noted that the former Yugoslavia acceded to the above Acts subject to the reservation provided for in their Article 25(3), whereby Article 8 of the Acts was replaced by Article 5 of the original Convention in the version of the 1896 Paris Additional Act with respect to the exclusive right of translation into the national languages of Yugoslavia.

The new Yugoslavia ratified the Brussels Act (1948), maintaining the earlier reservation with respect to the "ten–year regime" concerning the right of translation. It became bound by that Act on August 1, 1951.

Finally Yugoslavia ratified the Paris Act (1971), retaining, under Article 30(2) of that Act, the benefit of the reservation that it had made earlier. At present Yugoslavia is bound by that Act as of September 2, 1975.

2. Universal Copyright Convention

With a view to establishing a minimum of protection in countries outside the Berne Union, Yugoslavia ratified the Universal Copyright Convention in its Geneva (1952) version. That ratification became effective on May 11, 1966.

After the revision of the above Convention in Paris in 1971, Yugoslavia ratified the Universal Copyright Convention in its Paris version with effect from July 10, 1974.

3. Other International Treaties

Of the various multilateral treaties on copyright, Yugoslavia acceded to the 1974 Convention Relating to the Distribution of Programme–Carrying Signals Transmitted by Satellite on August 25, 1979.

With regard to bilateral relations, a "war extension" agreement was concluded between Italy and Yugoslavia. Under the Peace Treaty of February 10, 1947, between Italy and the Allied Powers, it was agreed that Italy and Yugoslavia mutually undertook to prolong for a period of six years, on their own territory, the normal period of validity of copyright for Yugoslav and Italian nationals respectively who enjoyed that right on April 6, 1941.

Finally it should be mentioned that no convention concerning neighboring rights has been ratified by Yugoslavia. It did sign the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), but in the absence of any national law on neighboring rights or provisions on that category of rights in the Copyright Law, ratification of the Rome Convention has not yet taken place.

By the same token, Yugoslavia has not yet ratified the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

The rights of performers do nevertheless benefit from protection by virtue of case law (Supreme Economic Court, January 10, 1973). Moreover, case law has awarded remuneration to performers for the secondary use of phonograms under conditions spe-

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cified by contract (Higher Economic Court of Croatia, June 13, 1976).

It should be added that, in terms of tax law, the remuneration of performers is treated in the same way as that of authors.

II. Case Law

1. In a ballet, the scenario and music on the one hand and the choreography on the other are divisible elements, protected separately

For the ballet entitled "Devil in the Village," the scenario and the choreography were created by the plaintiffs (a couple of ballet artistes), while the music was composed by the father of the defendant. The plaintiffs considered that the ballet was the product of the collective work of the authors of the scenario and choreography and the composer of the music, and that consequently the ballet was an indivisible work. It had been made clear between the authors of the scenario and of the choreography on the one hand and the composer of the music on the other, by verbal agreement according to the plaintiffs, that half of the copyright belonged to the composer and half to the plaintiffs for each performance given according to the composer's musical score and the plaintiff's scenario and choreography. No one could rework the choreography, and therefore the authorization of its authors was essential for each performance.

The defendant, himself a composer as well as the son of the composer of the music, emphasized in his rebuttal that, after his father's death, he had devised a new musical version of the ballet. He recognized the plaintiff's right in relation to the scenario, but he disputed the contention that each performance of the ballet had to be given according to the plaintiff's choreography.

The Departmental Court of Zagreb endorsed the opinion of three experts and ruled that the choreography of the ballet was not an element inseparable from the scenario and music, and that consequently 50% of the copyright belonged to the plaintiffs only where the ballet was performed according to their scenario and their choreography.

The Supreme Court of Croatia upheld the ruling of the Zagreb Court, adding in the statement of the grounds for its decision that the lower court's reasoning conformed to the formulation of Article 3 of the Copyright Law, in which musical works are mentioned separately from choreographic works (Supreme Court of Croatia, March 2, 1972).

2. The complete works of a single writer may constitute a collection of works, protected by the Copyright Law

The plaintiff had prepared the first edition of the complete works of writer B.C., and in it the publisher had recognized his authorship of the collection of works.

At the time of the second edition of the same set of works, the joint publishers refused to mention the name of the compiler of the edition.

At the request of the latter, the first–instance court ruled that the joint publishers of the second edition were bound to mention retrospectively, in the appropriate manner, the name of the plaintiff, or alternatively to pay appropriate indemnification for infringement of moral rights.

The defendants appealed, and the Supreme Court of Serbia reversed the lower court's decision and rejected the petition. In the view of the Supreme Court, the Copyright Law protected collections of literary works which, by reason of the selection and arrangement of material, constituted independent creations. It held that the concept of a collection, like an independent creation, included collections of literary works by two or more authors, but not the complete works of one and the same author. The work of the plaintiff was not expressed in the form protected by the Copyright Law, and consequently it did not qualify for protection under it. The work of the plaintiff could be catered for within the framework of employment relations or under a contract for the making of a work. The treatment of the complete works of a single author as an independent intellectual work would be prejudicial to the writer's copyright in the individual works concerned (Supreme Court of Serbia, March 20, 1981).

Here we reported that, in terms of the Law, collections of literary works are protected when they constitute independent creations "by reason of the selection and arrangement of material." These are cumulative conditions ("the selection and arrangement of material") as in Article 4 of the 1957 French Law on Literary and Artistic Property, and neither the "selection" nor the "arrangement of material" is sufficient alone, as it would be under Article 2(5) of the Berne Convention.

On the intervention of the Federal Prosecutor, the Federal Court found that the judgment of the Supreme Court of Serbia was a wrong application of the provision of the Copyright Law concerning the protection of collections. It further held that when, in the publication of a work, persons other than the author were involved who made a certain contribution to the presentation of the work and thereby made a certain intellectual effort, the result of which was a new intellectual work, according to the contemporary conceptions written into the Copyright Law, the persons mentioned had to be granted protection on condition that their provision of intellectual effort and their original contribution to the presentation of the work were supported by reliable evidence. Even the manner of preparation of the work of an author, either in the form of a publica-

tion of the complete works or as selected works, as long as it is a case of prior sorting, and selection and arrangement according to certain criteria determined by a certain view of the author's developmental path, etc., perhaps also with the addition of other writings such as selected criticisms of his works, etc., constitutes intellectual effort and thus an intellectual work protected by the Law (Federal Court, December 23, 1982).

3. Deformation of the scenario and music of a ballet through the intervention of the choreographer infringes the moral rights of the author of the scenario and the composer of the music

The National Theater of B. gave a performance of the ballet entitled "The Legend of Ohrid," with scenario and music by composer S.H., and with a new choreography by choreographer D.P.

The Yugoslav Authors' Agency, in its capacity as administrator of the estate of the deceased composer, found that this performance was a deformation of the composer's work, and that the deformation infringed his moral rights. In its action the Agency demanded the prohibition of future performances of that work in the version of choreographer D.P.

The expert opinion given by the Academy of Music of B. found that the choreographer had reworked the setting up in which the action of the ballet took place and altered the names of characters, and that he had then mutilated the score by the omission of certain fragments and by the transposition of fragments from one act to another, and finally that he had deformed the score by the insertion of fragments from another composition, of inferior quality, by the same composer.

The Departmental Court of Belgrade, relying on that expert opinion, ruled that the intervention of choreographer D.P. had deformed, mutilated and altered the ballet "The Legend of Ohrid," and that performance of the ballet in that version was an infringement of the moral rights of composer S.H. On those grounds the Tribunal prohibited performances of the ballet in the version by choreographer D.P. The Supreme Court of Serbia upheld this ruling on June 29, 1973.

4. The producer of a cinematographic work is liable for infringement of the economic and moral rights of the author of a musical and choreographic piece incorporated in a cinematographic work of obscene character

The plaintiff alleged in his complaint that he was the composer of the music and also the creator of the choreography of a play entitled "The Dances of Posavina" and that the defendant, who was a producer of cinematographic works, had without authorization inserted a portion of the play in a film which was criticized as being obscene. The plaintiff demanded prohibition of public performances of this film until such time as the portion in question was removed from it, the prohibition of the infringement itself, the payment of appropriate compensation and finally the publication of the decision in the press.

The defendant replied that he had no relations with the plaintiff. He had engaged the "Lado" singing and dancing ensemble for the performance of a piece of folklore in the film concerned, and he was unaware that the plaintiff was the author of that piece. If the copyright of the plaintiff was infringed, the defendant was of the view that the ensemble was the party liable for the infringement.

The first–instance court found that the author had not transferred the right of exploitation of his work to the "Lado" ensemble, and that it was the defendant who had exploited the plaintiff's piece. For that reason the defendant was liable for infringement of the plaintiff's copyright. The defendant lodged an appeal, in which he pointed out that, at the time of engaging the "Lado" ensemble, the plaintiff was the latter's employee, that he had knowledge of the scenario of the film concerned, and that the ensemble had his work in its repertoire.

The appeal was set aside, and the ruling of the lower court was confirmed on the grounds that the defendant, in his capacity as producer of the cinematographic work, was bound to know and apply the provisions of Article 39 of the Copyright Law, according to which the authors of literary, musical, scientific and artistic works had the exclusive right to authorize the cinematographic adaptation or reproduction of those works, the distribution of the works thus adapted or reproduced and the public performance of the works thus adapted or reproduced. Taking into account the character of the film, which was described as obscene, the Higher Economic Court of Croatia concluded that the producer of the cinematographic work was liable for infringement of the economic rights of the author of the musical and choreographic piece, and in addition for infringement of the same author's moral rights, as the inclusion of the piece in the film concerned was prejudicial to the latter's honor and reputation (Higher Economic Court of Croatia, April 6, 1982).

5. Publication of a photograph showing a work of architecture without the name of the architect being mentioned is a violation of the moral rights of the author of the architectural work

The building firm I.L. published an album of photographs showing buildings constructed by it.

One of the photographs was of the "Revolution Monument."

The plaintiff, as creator of the monument, which in fact is a work of architecture, found that there was no mention in the publication that he was the creator of the work of architecture, and that consequently his moral rights had been violated.

The firm made the same omission in another publication, this time an illustrated calendar.

The plaintiff demanded the protection of his rights, and claimed damages for each moral rights violation.

The defendant opposed the action on the grounds that it had not published the plans of the work of which the author was the plaintiff, but rather a photograph of the object built by itself. The monument in question is located on a city square, and consequently accessible to the public. The plaintiff had not prohibited publication of his work. In the view of the defendant, the plaintiff had not been prejudiced by the publication of the photograph. The Departmental Economic Court of Split ruled that the action was well–founded. Any person who exploits an intellectual work publicly is bound to mention the name of the author of the work in connection with each exploitation. In the case in point the intellectual work was a work of architecture, and the defendant's failure to mention the name of the creator of the work in its publications was a violation of the plaintiff's moral rights.

This judgment was upheld by the Higher Economic Court of Croatia on February 10, 1981.

6. Broadcasting the work and communicating the broadcast to the public by loudspeaker are two different means of exploiting an intellectual work

The 1968 Copyright Law took into account the specific difficulties that could occur in connection with negotiations on remuneration for the right to perform non–scenic musical and literary works, and included a special provision under which authors' organizations acquired the right to draw up tariffs for remuneration for the public performance and communication to the public of non–scenic musical and literary works.

Under that provision, the Union of Yugoslav Composers (SAKOJ), now known as the Union of Organizations of Composers of Yugoslavia (SOKOJ), adopted the Regulations on Remuneration for the Public Performance and Communication to the Public of Musical Works. The 1971 version of those Regulations and the 1975 amendments to it were published in the Official Gazette of the Socialist Federative Republic of Yugoslavia.

According to one provision of the Regulations, the owner of a receiving set is obliged to pay remuneration for the communication of broadcast musical works to the public.

The "Hairdressing Salon" associated work organization of Ljubljana brought an action before the Constitutional Court of Yugoslavia contesting the legality of this provision for the following reasons: the owner of a receiving set was obliged to pay a fee to the broadcasting organization for the use of its broadcasts. The author's right to remuneration for the use of his work was thus fulfilled by the payment of the fee. It was not the owner of the receiving set who effected the communication of the musical works to the public, but on the contrary the broadcasting organization, and consequently the owner of the set could not be obliged to pay remuneration for the communication of broadcast works to the public. As soon as the new Copyright Law of 1978 came into force, the 1968 Law and the Regulations adopted under it were repealed.

The Court found first that, according to a transitional provision of the new Copyright Law (Article 106), the provisions of the regulations mentioned were applicable until such time as a self–management agreement on the setting of the amount of remuneration for each specific type of performance and communication to the public of non–scenic musical and literary works had been concluded. The legality of the regulations had to be evaluated in terms of the Copyright Law currently in force and the Berne Convention, which had the character of a law.

Under the provisions of the Law and the Berne Convention (Paris Act), the author enjoys the right to remuneration for the communication to the public of broadcast musical works where their communication is accessible to all and not only to the circle of persons covered by the fees for the use of broadcasts of the broadcasting organization. The broadcasting of musical works and the communication of the broadcasts to the public are two different methods of exploiting intellectual works, and the author has the right to remuneration for each such method.

For the above reasons the Court found that the provisions of the regulations concerned were in conformity with the provisions of the Copyright Law and also with the provisions of the Berne Convention (Constitutional Court of Yugoslavia, May 13, 1980).

7. The self–management agreement on the remuneration for the public performance and communication to the public of non–scenic musical and literary works

The 1978 Copyright Law, in accordance with the provisions of the Constitution concerning employ-

ment conventions and self-management agreements, provides that (Article 57, third paragraph):

> With regard to public performance and the communication to the public of non-scenic musical and literary works, including the transmitting and broadcasting thereof by radio and television, the amount of remuneration for each particular type of performance or communication of the works, or transmission and broadcasting thereof by radio and television, shall be fixed by self-management agreement between the organizations of authors of such works, the associated work organizations for radio and television, the Economic Chamber of Yugoslavia, the Federation of Trade Unions of Yugoslavia and the Socialist Alliance of Working People of Yugoslavia.

At the same time, however, the Law orders that (Article 106):

> Pending the conclusion of the self-management agreement....the provisions of the general acts of self-management of the organizations of authors concerning the fixing of the amount of remuneration...shall apply.

The "Sloga" work organization of Titovo Uzice proposed to the Constitutional Court of Yugoslavia that it declare Article 106 of the 1978 Copyright Law to be incompatible with the Constitution because it did not set any time limit by which the self-management agreement provided for in Article 57, third paragraph, of the same Law had to be concluded.

The Constitutional Court found that Article 106, being a provision of transitional character, did not conflict with the provisions of the Constitution. Nevertheless, taking into account the fact that the self-management agreement in question had not yet been concluded, which was to the disadvantage of both the authors and the users of musical works, the Constitutional Court advised the National Assembly of the Socialist Federative Republic of Yugoslavia of the situation (Constitutional Court of Yugoslavia, April 20, 1982).

Following that advice, legislative intervention in the text of the Copyright Law of 1978 is to be expected.

III. Miscellaneous

1. Teaching of Copyright

In 1981, the Law Faculty of the University of Zagreb introduced specialized teaching of copyright at the level of the Diploma of Advanced Studies. The Head of the Department is Professor Martin Vedriš.

The duration of the course is three semesters, and the syllabus includes the following: fundamental problems of copyright theory, copyright in the Socialist Federative Republic of Yugoslavia, international copyright treaties, neighboring or related rights, aspects of private international law in relation to copyright, the fundamental institutes under civil law concerned with copyright, problems of international payment and taxation in connection with copyright, and legal protection of copyright.

In 1982 and 1983, 20 students from Belgrade, Ljubljana, Pristina, Skopje and Zagreb — most of them employees of the Copyright Agency, publishing houses, companies producing phonograms and broadcasting organizations — underwent the course.

2. The new edition of the work "Copyright Theory and Copyright in the Socialist Federative Republic of Yugoslavia" by Professor Vojislav Spaić

On November 22, 1983, in Zagreb, the new edition of the above work by Professor Vojislav Spaić was presented to the public, having been published by the Law Faculty of the University of Zagreb in collaboration with the Yugoslav Authors' Agency of Belgrade. The author has completed the first edition of his work, which was published in 1969 under the same title, with the results of developments, since that date, in theory, legislation, international treaties and case law.

3. Publication of the texts of the Berne Convention

The Institute of International Law and International Relations of the Law Faculty of the University of Zagreb devoted issue No. 19 of its publication "Contributions to Comparative Law and International Law Studies" to the Berne Convention. This issue of "Contributions" was presented to the public on May 31, 1983, by Professor Budislav Vukas, Director of the Institute, and by Mr. Branko Marsić, Director of the Authors' Agency for Croatia.

Under the title "The Berne Convention for the Protection of Literary and Artistic Works of 1886, and Subsequent Acts up to 1971," this issue comprises an introduction, followed by a study entitled "The Berne Union and its System for the Protection of Literary and Artistic Works" by Dr. Ivan Henneberg, and then the texts of the Acts of the Convention from 1886 up to 1971, in the original French and in Serbo-Croatian translation (official translations of the Brussels and Paris Acts with notes by the author of the study, and translations of the other Acts by the same author). This is the first publication in our country of the full set of texts of the Berne Convention. At the same time, it is our contribution to the preparatory work on the celebration of the centenary of the foundation of the Berne Union.

(WIPO translation).

Collective Administration of Authors' Rights

Development and Objectives of Collective Administration of Authors' Rights

Mihály FICSOR*

(1) Crisis: that word can be heard more and more frequently at international meetings dealing with problems of copyright. A lot of articles have been published and many lectures have been delivered about it recently. There is fairly wide discussion on the nature of the present situation. Some experts are extremely pessimistic. If we listen to them, we have the feeling that copyright is approaching a new and final ice age or a sort of nuclear winter. Others use the word with a more optimistic connotation. They think there is nothing tragic in the present cold wave. We lived through similar gloomy periods in the past too. It may be a little harder than usual winters, but after some snow showers spring comes sooner or later. However, there is one point everybody seems to agree on, namely that technological development is an important or even decisive factor in this crisis situation.

With wildly galloping technological progress, newer and newer ways and means of using protected works emerge: reprography, reproduction for private use of sound and audiovisual recordings and broadcasts, cable television, satellite broadcasting, rental of phonograms and videograms, computer storage of protected works and so on. Those new uses have given rise to a lot of serious problems in copyright protection at both national and international levels. Authors' rights are exposed to manifold and accelerating erosion.

One of the main causes of those unpleasant developments can be found in the fact that because mainly some secondary mass utilizations are involved here authors' rights often cannot be exercised in traditional ways. In the majority of cases the owners of exclusive rights are unable to control such uses on an individual basis and it would be an idealistic and impracticable idea to oblige users to ask for authorization to use the works and also to pay the fees in the framework of a classical "grand rights" type authorization system.

Certain overhappy enemies of copyright are ready to jump to the conclusion that in such cases — and not only in such cases — authors' rights are senseless and are becoming obsolete. Consequently, they should be done away with or assimilated to the rights of employees and other "hired" workers or — as a minimum — restricted to a mere right to remuneration.

Fortunately, it is fairly obvious that such a conclusion is wrong and false. It is a typical example of wishful thinking and an aggression against basic rules of logic to claim that if a right cannot be practiced in traditional ways, it should be abolished.

It is true that we should not content ourselves with repeating nice puristic statements about sacrosanct exclusive rights. If they cannot be really exercised in practice, they represent necessarily less than certain less "strong" rights which have the important advantage of being enforceable. So, we should accept the slogan of "realism." However, we should not follow those who want to lead us under that slogan toward arbitrary and excessive restrictions of exclusive rights and authors' rights in general.

Exclusive rights are the very core of copyright. Only such rights correspond really to the specific internal relations between authors and their works, which — in a way — are the expression of their personalities. Experience shows unambiguously that the existence of exclusive rights is the most efficient guarantee for the enforcement of authors' basic moral and pecuniary rights and interests. Therefore, we should maintain them wherever it is possible and practicable.

In the case of mass secondary uses where individual exercise of exclusive rights has become impossible, it is not the system of non–voluntary licenses which should be studied as a first alternative. There is a much better option, which is also traditional already, because it has been working excellently in the field of non–dramatic musical works for many decades. It is the *collective administration of exclusive rights*. We cannot deny that, even with this method of exercising rights, the relations between authors and their works change in certain respects, but these relations still preserve their exclusive nature and — even if through collective channels —

* This article was commissioned by WIPO at the time when its author was Director General of the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS).

they can be expressed and taken into account in the most appropriate manner under present circumstances.

A non-voluntary license can be accepted only as a last resort, where collective administration cannot be introduced, and it should be abandoned as soon as it becomes unnecessary.

A sort of collective administration can play a role also in cases where authors' rights are reduced to a right to remuneration. It is not without significance from the viewpoint of authors' interests whether their collective body has a say in negotiations with users and guarantees a correct distribution or whether tariffs are fixed by statutory provisions and the income is used mainly or exclusively for certain general cultural and social purposes.

(2) The growing importance of collective administration as a "third way" between individual exercise of authors' rights and non-voluntary licensing has been duly recognized by different bodies of WIPO and Unesco dealing with new problems of copyright emerging with technological development.

Some examples:

The Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee, dealing with the problem of *reprographic reproduction* in Washington in June 1975, studied different methods of control and remuneration suggested by a previous working group (contractual schemes, non-voluntary licenses, "surcharge" on equipment and so on) but in the fairly short resolution — beside the statement that it rested with each State to resolve that problem by adopting any appropriate measures in keeping with the international conventions — they drew the attention to one of them only. They emphasized that in States where the use of processes of reprographic reproduction was widespread those States *could consider*, among other measures, *encouraging the establishment of collective systems* to exercise and administer the rights involved.[1]

The Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, convened jointly by WIPO and Unesco, which held its meeting in Geneva in June 1984, confirmed the principle of collective administration regarding all sorts of private reproduction. A number of participants underlined that non-voluntary license schemes may be applied *only if the system of collective agreements cannot be introduced.* Of course, in the case of *home taping* it is only a certain right to remuneration which can be administered collectively (in the form of royalties to be paid as on reproduction equipment and/or blank material for recorded productions).[2]

The Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, at its June 1982 meeting in Paris, reached similar recommendations regarding the rights concerned by *storage in and retrieval from computer systems of protected works.*[3] The recommendations emphasize that such a use of works should be based upon contractual agreements or other freely negotiated licenses arranged either individually or collectively. However, it was stated in the discussion that, because of rapid technological development, the exercise of authors' rights on an individual basis becomes extremely complicated in that field and that *the real alternative to the introduction of non-voluntary licenses is collective administration of rights.*

Much attention is paid to collective administration in the "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable" adopted by the meeting of the Subcommittees of the Committees of the Copyright Conventions and the Rome Convention in Geneva in December 1983, and approved subsequently by the three Committees.[4] In Principle 1, it is declared that authors have the exclusive right of authorizing any distribution by cable of the broadcast of their works protected by copyright. However, the Annotated Principles emphasize that, as regards certain kinds of works, the clearance of the rights through program-by-program negotiations with every copyright owner concerned is impracticable and in such cases *authorization should be effected by means of collective administration.* Not less than three Principles deal with the details and necessary guarantees of such administration.

Those examples seem to be enough to prove that *collective administration is getting more and more widespread and important.* However, we simply cannot avoid this subject if we deal with any other new uses emerging with technological progress. (It is enough to mention here two recent examples: at the meeting of the Group of Experts on the Rental of Phonograms and Videograms in Paris in November 1984, a number of participants were in favor of collective administration of the rights involved,[5] and even at the meeting of the Group of Experts on Direct Satellite Broadcasting in Paris in March 1985, it was also widely studied what role authors'

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[1] See *Copyright*, 1975, p. 175.

[2] *Ibid.*, 1984, pp. 280 to 282.

[3] *Ibid.*, 1982, pp. 239 to 245.

[4] *Ibid.*, April 1984, special issue.

[5] *Ibid.*, 1985, pp. 16 to 19.

societies might play in authorizing such broadcasting.)[6]

So, there is no need for emphasizing repeatedly that more attention should be paid to this important alternative of administration of rights at both national and international levels. We should study its different forms and organizational solutions and identify the conditions that should be met for correct operation of such systems.

(3) It is obvious that the best way to start studying the functioning of collective administration systems is to analyze the structure and activities of certain traditional authors' societies.

The first societies dealing with the protection of authors' rights and interests were established in France.

The foundation of the very first society was closely linked with the name of Beaumarchais, the author of "The Marriage of Figaro." He led the fight of French dramatic authors against theaters and public authorities in order to have the creators' legitimate rights recognized. It was a hard fight but they won. Those legal battles led to the formation of the *Société des auteurs et compositeurs dramatiques* (SACD) which played an important role in their success. (SACD, although it has to tackle grave new problems in the field of mass media, is a well functioning and flourishing authors' society even now.)

Honoré de Balzac, Alexandre Dumas, Victor Hugo and other French writers followed suit in the field of literature more than half a century later when they constituted the *Société des gens de lettres* (SGDL). Its first general assembly took place on the last day of 1837.

However, the events leading to a real "full speed" collective administration started only in 1847, when one day two composers, Paul Henrion and Victor Parizot, accompanied by their friend, the writer Ernest Bourget, attended a "café–concert" at the Ambassadeurs in the Avenue des Champs–Elysées in Paris. They saw a flagrant contradiction in the fact that they had to pay for their seats and meals, whereas nobody had the intention of paying for their works performed by the orchestra. They took the very brave — and logical — decision that they would not pay as long as they were not paid as well. The legal debate was dealt with by the courts and the authors won. The owner of the Ambassadeurs was obliged to pay a substantial account in damages. Enormous new possibilities were opened for composers and text writers of non–dramatic musical works by that court decision. However, it was clear that they could not control and enforce their newly identified rights separately. That realization led to the foundation of a collecting agency in 1850, which was replaced very soon by the "Société des auteurs, compositeurs et éditeurs de musique" (SACEM). And is it necessary to say that SACEM has become and still is one of the strongest and most prosperous organizations in the world in the field of collective administration of authors' rights?

At the end of the last century and during the first decades of this one, similar authors' societies were formed in Europe and in some other countries as well. Cooperation developed rapidly among those organizations and they felt a more and more urgent need for an international body to coordinate their activities and contribute to a more efficient protection of authors' rights throughout the world. It was in June 1926 that the delegates from 18 societies set up the International Confederation of Societies of Authors and Composers (CISAC). CISAC has since fully met the above demands; it has become stronger and stronger with the continuous widening of its membership, and if anybody undertakes fighting for authors' rights and interests at international level, he can hardly find a more faithful and devoted ally than CISAC.

Authors' societies may be set up with different objectives; however, the most fundamental one — the very *raison d'être* of such organizations — is the collective administration of authors' rights. It is reflected in the Statutes of CISAC too. Under Article 5 of the Statutes, only societies administering copyright may be admitted to CISAC as ordinary members.

By a society administering copyright is to be understood, according to the same Article, an organization which

(a) has as its aim and effectively ensures the advancement of the moral interests of authors and the defense of their material interests;

(b) has at its disposal effective machinery for the collection and distribution of copyright royalties and assumes full responsibility for the operations attaching to the administration of the rights entrusted to it.

An organization which fulfills only the first or the second of the above mentioned conditions can be admitted only in the capacity of associate member. And, of course, it is generally the second condition some authors' organizations are unable to meet (meeting the first one is much easier), and that is the reason why several organizations fall in the category of associate members.

(It is interesting to mention here that the expression "authors' societies" is used traditionally not only when real *societies* fulfill those basic functions, but also in cases where, for example, public or semi–public organizations do the same. So, that term has a very specific meaning in the field of administration of authors' rights and it is used in the same way in this article too.)

[6] *Ibid.*, 1985, pp. 180 to 189.

Collective administration may mean different levels of "collectivity." In the case of certain rights and types of works it does not cover the whole authorization–control–collection–distribution chain. For example, dramatic authors very often retain the right of authorizing performances — even if they may use their society as agent or representative in that respect as well — and it is only control, collection and distribution which are directly managed by the society (and royalties here do not go through a real *collective* distribution system, as a rule).

As I have briefly mentioned when writing about the birth of SACEM, it is in the field of musical non–dramatic works (or more precisely the public performance of so–called "small rights" works) that collective administration has been developed and is functioning in the fullest way. This system shows all the typical features and advantages of collective administration, and at the same time — because of its widespread and intensive nature — it is the best possible basis also for studying strains, contradictions and unpleasant side effects that may occur in such a system (including the most appropriate ways and means for avoiding them).

Collective administration is really the only way of exercising performing rights in musical non–dramatic works. Such works are performed in many forms in an extremely great number of places. In the same program many works are used and in the works sometimes several beneficiaries are interested. Individual control and collection is practically impossible.

Composers and other authors entrust authors' societies with the administration of such rights. Those societies conclude mutual representation contracts with each other and so they get in the position to be able to authorize users to perform practically any work in the world repertoire. The societies control uses in their territories, collect royalties and — after the deduction of actual expenses and using a certain restricted part of the income for general cultural and social purposes — they distribute them among individual right owners (including foreigners to whom the royalties are transferred through sister societies).

CISAC plays an outstanding and indispensable role in organizing cooperation among societies. Without model contracts, recommendations, standard forms and methods worked out by different CISAC bodies, this complex system could not work as smoothly as it does.

In the field of mechanical reproduction rights there is even closer international cooperation. It is true that those rights are not so widely and universally administered by authors' societies as in the case of performing rights; however, the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) and the International Federation of Phonogram and Videogram Producers (IFPI) negotiate directly (in keeping with the mandate received from their member organizations) about the tariff system and other contractual conditions, and the member societies as well as the member producers undertake to apply them in their agreements at national level.

(4) Even in the circle of traditional authors' societies we can meet different forms, methods and rules of collective administration. And now that with the emerging and rapidly spreading new mass secondary uses more and more types of works and rights are concerned by this manner of administration, newer and newer variants and versions are introduced. The picture is getting so motley that it would be very hard to describe all its details and shades.

Some types of collective administration, in certain significant respects:

(a) According to the level of collectivization:

(a)(1) Collective representation, individualized authorization, direct distribution (mainly in the field of dramatic rights).

(a)(2) Full collective administration, blanket licensing, distribution among beneficiaries with certain "corrections" (musical "small rights").

(a)(3) Collective enforcement of rights, blanket licensing, no distribution among individual right owners (societies administering reprographic reproduction rights follow that way fairly frequently).

(b) According to the right owners' freedom of choice between individual and collective ways of administration:

(b)(1) Right owners can choose freely (at least there is no legal obligation to choose collective administration, even if they may have no other choice from practical viewpoint).

(b)(2) The law subjects the exercise of rights to the condition of collective administration (for example in the case of reprography and home taping).

(b)(3) The law determines also the only organization through which the rights can be administered in a collective way.

(c) According to the circle of rights and right owners covered by collective administration:

(c)(1) The society can administer only its members' rights.

(c)(2) In the circle determined by the law the society administers the rights of non–members too (extended collective administration), unless they renounce it under certain conditions.

(c)(3) Extended collective administration without the possibility of renouncing it.

(d) According to freedom of negotiation in the framework of collective administration:

(d)(1) Free negotiation; in the case of dispute, a court or similar neutral body decides.

(d)(2) There are negotiations between the society and the users but any agreement can be applied only if a supervisory administrative body (for example the Ministry of Culture) approves it.

(d)(3) The tariffs are fixed by legal provisions.

With the above mentioned examples, we have not exhausted the "typology" of collective administration. However, they are sufficient to illustrate that when the possibility of collective administration is mentioned it can mean such ways and forms of administration which may differ in many important respects.

For example, if we take an *(a)*(2)–*(b)*(1)–*(c)*(1)–*(d)*(1) variant, we can say that it is really an appropriate alternative for administering exclusive rights when its exercise is impossible on an individual basis. However, an *(a)*(3)–*(b)*(3)–*(c)*(3)–*(d)*(3) "mixture" is not further than a very small step away from non-voluntary licensing. (To tell the truth, there is a need for a fairly great amount of benevolence for speaking even about that small step. Such solutions can be accepted without serious doubts only in such cases where the minimum rules of the international conventions and national laws do not provide for unrestricted exclusive rights and where such "low speed" protection may be acceptable.)

(5) Further significant differences can be identified if we look at the organizational structures in which collective administration takes place.

(a) We have so far spoken about collective administration as if it could not be done by any other sort of organization but an authors' society. However, we should ask the question whether it is really the only possibility.

First of all, we should take into account the fact that even many of the strongest and oldest authors' societies — the musical "small rights" organizations — do represent not only the rights of authors, but also those of publishers. They are admitted as members and what is more, sometimes they play a decisive role in the governing bodies of such societies.

The alliance between composers and text writers on the one hand and music publishers on the other is traditional. We should not forget that when Henrion, Parizot and Bourget started the famous lawsuit in 1847, they enjoyed the backing of their publisher, Jules Colombier, and without him their chance of victory would have been much more meager. Publishers were managers and patrons of their composers and their interests were in harmony — at least in general. So it was no accident that they joined forces and tried to enforce their rights and represent their interests in the framework of the same societies.

However, we should not forget that publishers are also businessmen. The majority of them cannot neglect such factors as income and profit. So, it is undeniable that certain conflicts of interests may emerge between publishers and authors (for example when negotiating contractual stipulations or determining authors' and publishers' shares in distribution rules).

Authors should be protected against the possibility that economically stronger users may abuse their position. In certain countries legal provisions regulate some basic conditions of contracts protecting authors by means of minimum rules. In other countries — for example in some Eastern European socialist countries — the publishers' share is abolished in general by the law and publishers can get only restricted licenses for well determined concrete uses of works. It is evident that in such countries publishers are not admitted as ordinary members of authors' societies. (It is another matter that in international relations certain publishers' and subpublishers' rights prevail and are administered by authors' societies.)

When I mention those examples I do not intend to suggest that it is necessarily against the interests of authors if publishers are admitted as members even if they are allowed to play an active role in the governing bodies of authors' societies. Experience shows that correct methods can be found and applied against abuses of dominant positions and as a result of it authors and publishers can work together harmoniously and efficiently in the protection and exercise of their rights.

That is an important lesson we can draw from the example of joint societies of authors and publishers. It can prove that such "coalitions" of creators and "first users"–licensees are workable and desirable. It is just the problem that sometimes even the members of those joint societies do not see clearly that there is a need for even wider coalitions in the present situation.

I could not express that problem more clearly than Stephen Stewart in his excellent study on the present problems of international copyright:

> The new, mainly corporate, right owners discovered their position and their "noblesse oblige" function in copyright only slowly, and sometimes at the eleventh hour. On the other hand, the traditional copyright owners, mainly through their societies, were not entirely free from blame either. Some of them have...acted in the sincere belief that the best way to defend and enhance their members' copyrights was to deny rights to others who are actual or potential right owners. This is a tragic fallacy. It is an essential difference between a vendor

and a licensor that, whereas the vendor has no interest in the legal position of his purchaser as long as the latter can raise the purchase money to pay him, the licensor has a vital interest in the strength of the legal position of his licensee. The stronger the latter's legal rights the better he will be able to defend both his own rights and those of the licensor.[7]

Stewart has taken the Anglo–Saxon legal systems as his basis and he speaks about phonogram producers, broadcasting organizations and film producers as about copyright owners, which is only partly the case in "continental" systems. Those organizations (with the exception of film producers) enjoy mainly "neighboring rights" protection there. However, that does not change the essence of the new situation come about as a result of technological development. It is invariably true that if record and videogram producers are not appropriately protected against piracy and compensated for the losses caused by widespread home taping, that is bad from the viewpoint of "traditional" copyright owners' interests too.

In parallel their rights are infringed and their royalties are cut, together with the income of the producers (and the performers). The same can be said about the joint interests of broadcasting organizations and "program contributors" in the field of protection against unauthorized uses of programs by means of cable systems or about those of book publishers and writers regarding piracy and systematic reprographic reproduction. It is more and more frequent that first users–licensees as owners of copyrights or neighboring rights (together with other neighboring rights' owners, like performers) on the one hand, and authors on the other, have a better chance of efficient protection of their rights if they join forces in fields where their "coalition" is possible and advisable (not forgetting that, of course, they have also divergent and even conflicting interests as well). All those interest groups have to realize that *they need a new strategy* for such situations. It has to involve different elements of copyright and neighboring rights infrastructure that go beyond the scope of the present article. As far as collective administration is concerned there are two possible ways in which common or parallel interests and rights can be represented and enforced. The first is the adoption of the example of composers, text writers and music publishers who work together so efficiently in "small rights" societies. The second is the cooperation between separate societies.

Those are not only theoretical alternatives any more. Both approaches are applied in practice.

It is just in the field of new mass secondary uses that new societies administering both copyrights and neighboring rights (or neighboring right type copyrights) have been set up. For example, there are such "coalition–societies" in Scandinavian countries in the field of reproduction rights (reprography, etc.) which have collection and distribution activities in favor of authors, performers and phonogram producers. All those beneficiaries seem to be satisfied with the way those societies administer their rights. The other solution is that existing societies (mainly authors' societies) undertake the administration of the parallel rights of other interest groups in certain fields where it does not raise any conflict of interests. For example, the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), which is a general copyright organization dealing with the protection of nearly all sorts of authors' rights, acts as a collecting society not only for authors but also, as far as home taping royalties are concerned, for performers and phonogram producers; it does the same for performers and broadcasting organizations in the field of royalties due for simultaneous and unchanged cable retransmission of broadcast programs. (Joint collective administration may have several advantages for all groups. It makes their position stronger in negotiations with secondary users. It is also important that collection and distribution can be done with less expense because there is no need for parallel infrastructures. Negative elements may occur too if separate interests are not taken into account in an appropriate manner. Therefore, certain guarantees are necessary for avoiding and settling possible conflicts. The example of musical "small rights" societies can be well utilized for that.)

However, it is a more widespread practice that authors (even different groups of authors) and neighboring rights owners establish separate organizations for the administration of their rights. Of course, it does not exclude the possibility of cooperation in the fields where it is necessary and desirable. Many experts are of the opinion that it is a clearer and more recommendable model (because it facilitates the fullest representation of differing interests) and in countries where there are several societies functioning in parallel also in the field of traditional authors' rights it is a more logical choice.

We cannot exclude the possibility that in fragmented administration infrastructures, corporate copyright owners (producers of audiovisual works, owners of rights in so–called "collective works," or in Anglo–Saxon systems: phonogram producers and broadcasters) form separate organizations for the collective administration of their copyrights. It is not necessarily dangerous and condemnable from the viewpoint of authors' rights if such bodies concentrate really on their neighboring right type copyrights or on authors' rights acquired by them — for example by *cessio legis* — for uses strictly covered

[7] Stephen Stewart, "International Copyright in the 1980s. Part II: Crisis in the 1980s," in *European Intellectual Property Review*, 1981, pp. 266 and 267.

by their original business activities, respect the rights of authors and are ready to cooperate honestly with authors' societies.

However it is not always the case. Unfortunately there are disquieting examples which show that such "author free" collective administration bodies may become aggressive, tend to forget certain basic objectives of copyright protection and want to take over the administration of other authors' rights as well, which are not necessary for their original field of activity.

There was a very animated discussion about this phenomenon at the Rome Congress of CISAC in 1982 on the basis of Ulrich Uchtenhagen's report which drew attention to the activities of two societies set up by broadcasting organizations for the territory of the Federal Republic of Germany, Austria and Switzerland. The purpose of those societies was — as the statutes of one of them put it — "to protect and administer the copyrights belonging originally or indirectly to radio and television companies in accordance with copyright law." Their membership was restricted to the broadcasters of the countries concerned and the authors had no say in their administration.

It was emphasized in the discussion that the problem did not reside in the fact that the broadcasting organizations had set up separate societies — because it was their legitimate right — but in their objective to put pressure on authors to grant them rights that were not necessary for their original activities, to take over the administration and to enjoy the benefits of those rights which should belong to authors and their societies.

The Congress has adopted a formal resolution about that way of collective administration. It states that CISAC

> Considers it to be contrary to equity and justice to deny authors, by whatever means, the total and absolute exercise of their rights,
>
> Opposes in particular all arguments which can be used for endeavoring to state or presume that broadcasters, especially those using new techniques in the audiovisual field, be assignees of authors' rights,
>
> Opposes equally the affirmation whereby legal safety of such broadcasters can only be assured at the price of the legal or contractual assignment in their favor of authors' rights on the pretext that, in the present–day world, the administration of copyright by authors themselves is an archaic and out–of–date concept,...
>
> Emphasizes its attachment to the principle of self–management by authors and their professional organizations and solemnly calls upon authors of all countries to stay united so as to defend their liberty.[8]

If I wrote about the need of a new strategy of authors and their societies in the framework of which they should abandon a certain traditional opposition toward neighboring rights or neighboring right type copyrights and should try to cooperate with "newcomer" right owners in certain fields of common or parallel interests, then I have to state here with double emphasis that broadcasters and similar right owners make a very dangerous strategic mistake if they try to monopolize copyrights and their administration to the exclusion and detriment of authors. In that way they endanger not only the rights of authors, but also the development and the very future of copyright, which is against their own interests as well.

Uchtenhagen drew attention very rightly to those dangers, when he said in his report I have mentioned above:

> ...copyright should serve to protect the author. It owes to this function the particular and unique position it occupies in private law. This position is threatened as soon as copyright no longer protects the author but defends the interests of economic or political groups.[9]

It is a basic truth and it has outstanding importance also beyond the field of collective administration of copyrights. The international copyright system has a chance for a recovery from the present crisis, or indeed for survival, only if we succeed in demonstrating and reconfirming the basic considerations and principles necessitating an appropriate level of protection of authors' rights in a convincing manner. And we should be aware of the fact that our favorite arguments will lose all their persuasive force toward policy makers and the public, if it turns out that the rights we have claimed in the name of the creators are not exercised, administered and enjoyed by them, but by some others. It is obvious that the whole nature and the social function of copyright change substantially and get questioned if we have to admit that it is not the author it serves but, for example, first of all or exclusively those who invest in "cultural industry."

(b) As we could see above, the collective administration of copyrights is not necessarily equal with the activities of authors' societies (even if that is the most widespread and commendable way). Now, if we turn our attention to the infrastructure in which authors' societies themselves function, we are again faced with a multicolored, diversified picture.

There are countries where separate societies deal with the protection of nearly all kinds on types of works and rights. There is a musical performing right society, a mechanical right society, another society for dramatic works, another one for literature, a separate one for fine arts, a specialized society for the collection of home taping or reprographic reproduction rights royalties and so on. It happens sometimes that some of those functions are

[8] 33rd Congress, Rome. Report of the Congress published by the Secretariat General of CISAC, p. 317. Regarding Ulrich Uchtenhagen report and the discussions on it, see pp. 230 to 237.

[9] *Ibid.*, p. 237.

entrusted to one organization (for example musical "small rights" and mechanical rights are administered by the same society) but the existence of parallel administration of rights still remains typical.

The other basic type of solution is that it is a centralized general organization for the protection of all sorts of authors' rights or at least for the great majority of them (for example in the Soviet Union, Italy, Spain, Hungary, etc.).

It was at the 1978 Toronto/Montreal Congress of CISAC that the representatives of authors' societies discussed in detail which of those structures might be more efficient.[10] The rapporteur of the theme, Karol Malcuzynsky, was of the opinion that the creation of authors' societies whose sphere of activities was as wide as possible would promote the improvement of copyright protection. Others emphasized that it would be pointless to suggest a uniform solution; it was the social, political, cultural and legal circumstances which determined the necessity to have either a multiplicity of copyright societies or centralization in a single organization.

What seems here the most important is that all kinds of authors whose rights cannot be administered efficiently but in a collective way should have an appropriate organization to represent them. It is easier to avoid the subordination of the interests of certain groups to those of others if all groups of authors form separate societies. At the same time, that multiplicity does not exclude coordinated actions wherever they have joint interests which can be asserted more successfully in that way.

However, in the present circumstances where more and more uses emerge with technological developments, which concern several "genres" and types of works and where authors are faced with huge mass media corporations, they seem to have a better chance for an efficient protection of their rights in the framework of bigger, overall societies. It is true that in organizations assembling several or all kinds of authors, the reconciliation — and what is better, the prevention — of internal conflicts needs much more care and tact, but the experience of certain traditional societies — like those of musical "small rights" — show that appropriate methods and guarantees can be found for that purpose.

General comprehensive copyright organizations have better chances not only in negotiations with users but at the level of national copyright policy too. On the one hand, they represent a more significant and concentrated force in legislative battles and on the other, they can offer more attractive alternatives when the possibility of collective administration comes up as opposed to non-voluntary licensing. It is obvious that the advocates of legal or obligatory licenses have a stronger case if they can prove that the necessary collective administration bodies do not exist or, even if there are certain authors' societies, they cannot guarantee general authorization for complex programs (for example in the case of simultaneous and unchanged retransmission of broadcast programs).

We have not yet dealt with the possible situation where there are not only such separate organizations which administer the rights of different kinds of authors (composers, text writers, dramatic authors, painters, sculptors, etc.) or different rights in works belonging to the same genre (performing rights, mechanical rights, reproduction rights concerned by home taping and so on), but also those which function in parallel in the same field.

Such a situation can arise in two ways. The first is that parallel societies are set up at national level (and one of them acquires the right to authorize the use of the whole world repertoire or they do it jointly sharing that repertoire). That is the case for example in the field of musical "small rights" in the United States of America and Canada. Such a solution may be encouraged by anti–trust legislation. The other possibility for parallel collective administration of rights is that there is no national society in the position to authorize the repertoire of certain foreign authors because their societies have not concluded reciprocal representation contracts and they try to enforce those rights directly — or through an agent organization — in the country concerned. It may happen for example in countries where copyright infrastructure has not been built up in an appropriate manner or the existing society — because of its unsatisfactory activities — does not enjoy the confidence of the partner societies. Anti–trust provisions prevailing in the framework of economic integrations may also contribute to the occurrence of such a situation. For example the EEC Commission took such a decision in the so–called GEMA case, which could have led to a dangerous fragmentation of collective administration of authors' rights in the countries of the European Economic Community if authors and their societies had had the intention to go along the avenues opened by that decision.

Fortunately, they did not accept that very dubious invitation. (The Commission — on the basis of a fairly bureaucratic interpretation of the relevant anti–trust provisions of the Treaty of Rome — suggested that the authors might split their rights entrusted by them to societies in the Community both territorially and by categories of rights, and that societies could grant only a non–exclusive mandate in their reciprocal relationships and preserve the

[10] See 31st Congress, Toronto/Montreal. Report of the Congress published by the Secretariat General of CISAC, pp. 193 and 194, 227 and 228.

right to intervene directly in the territory of their contractual partners.)[11]

I have expressed my view above that a global, comprehensive organization representing as many kinds of works and rights as possible corresponds better to the requirements of collective administration and to the interests of authors in general. So it is needless to say that I do not find this sort of fragmentation of administration a workable solution at all. It can weaken the authors' position in a very dangerous manner and may lead to chaos, to a complicated system of authorizations which must not be attractive from the viewpoint of users either. It is no less than a sort of negation of collective administration.

Of course, users have also other interests in the field of authorization of using protected works than that they could get it in the simplest way possible and that they should not be obliged to deal with a multiplicity of owners, agencies and societies. They want to get those authorizations cheaply, as well, which can be attained by them more easily if their counterparts are in a weaker position in the "market" and consequently in negotiations. And then there are also certain users' organizations which — as we could see above — have the intention to take over the collective administration of certain secondary rights. So it is no accident that some users try to make use of the anti–trust provisions of national laws and economic cooperation agreements.

It is a hypocritical claim on behalf of big users that blanket licensing and other aspects of collective administration of authors' rights (for example, the fact that the world repertoire of certain types of works is authorized in a centralized manner by one national organization) are incompatible with anti–trust provisions. The purpose of any anti–trust legislation is to protect the weaker against those who are in a dominant, monopolistic position in the market. It is obvious that the establishment of collective administration societies is a self–protecting reflex of authors which serves the same objectives as anti–trust provisions do. Individual authors or even smaller isolated groups of them would be in a hopeless position when faced with extremely strong mass media producers and users. Unity and solidarity are the only hope for them. They would be deprived of that hope, that only possibility for a relatively efficient protection of their rights and interests, if the courts, commissions and other authorities accepted those false "anti–monopolistic" arguments.

Fortunately, the decisions have been positive so far regarding the essence of the question. It has been found that collective administration of authors' rights and blanket licensing are not incompatible with anti–trust principles. That was the tenor of the decision of the EEC Commission mentioned above (even if it declared that changes are needed in certain details) and the attack of Buffalo Broadcasting Co. against the two American musical "small rights" societies — ASCAP and BMI — has failed for the same reasons.[12] (We hope that the Supreme Court of the United States will be of the same opinion when the case reaches that instance.)

It is another matter that some guarantees are necessary against the possible abuses of authors' societies being in monopolistic situation in certain fields. However those guarantees are available everywhere (copyright tribunals, arbitration fora, etc.) and their application is relatively rarely needed.

(c) There is one more important organizational question of collective administration. What is preferable: that it is done by a private organization or by a public one?

Of course, that question cannot be answered in general. Much depends on the political, economic, cultural, social and legal circumstances in which collective administration has to be organized. And — as in many other fields — tradition is an important factor here too.

In Western industrialized countries private organizations dominate. (However some of them have a semi–governmental character, others function with government participation, and still others work under fairly close public supervision.) In socialist countries, public institutions are in majority but some of them are of a rather "mixed" nature with author–dominated governing bodies; for example, in Poland a typical private society (ZAIKS) is the number one copyright organization. In developing countries, we can find both private societies and public institutions. However, as far as the latter countries are concerned, I agree with Salah Abada:

> For all developing countries with recent copyright provisions, experience seems to have shown that the public law entity is the most suitable formula. Under that system, authors do not have to face the initial expenses of installation which are always high and difficult to meet from individual contributions. Moreover, public entities, invested as they are with the authority and the consideration peculiar to public services, are demonstrably more efficient in their dealings with public users in relation to the respect and defense of the rights of authors.[13]

In this article I deal with the collective administration of authors' rights. It is from that viewpoint that we should study the organizational and constitutional aspects. If we do so, we can see that the pri-

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[11] See Michael Freegard, "The Situation of Authors' Copyright in Europe in 1984." Regional report for the 1984 Tokyo Congress of CISAC, pp. 31 and 32.

[12] See *European Intellectual Property Review*, February 1985. Case Comment. Reported by Jeffrey E. Jacobson, pp. 48 and 49.

[13] Salah Abada,"Objectives and organization of an author's institution in a developing country," a lecture delivered at a WIPO/SUISA training course in Zurich, in June 1980.

vate or public nature of an organization is not decisive in itself. Neither the private nor the public element is exclusive in practice, at least in the great majority of cases. The activities of private societies are supervised by public authorities or they even get semi-public characteristics very frequently. And the public nature of an organization does not mean necessarily either that authors could not and should not take part or even have a decisive role in the collective administration of their rights.

In theory, one could imagine that simple civil servants could administer the rights of authors in a correct and efficient way. They could collect all royalties and distribute them among right owners after deduction of administrative costs. However, without appropriate guarantees that is nothing but a very dubious hypothesis (and no guarantee is really appropriate without authors' participation — and what is more, without their dominance — in collective administration). Such a system would not be in keeping with the provisions of the international conventions and national laws which award authors exclusive rights. Exclusive rights to be enjoyed by individuals without any possibility of those individuals having a say in the administration of those rights? Exclusive rights whose owners have not got any influence on the tariff system, the licensing practice, the control of users and the distribution rules? No, it is nonsense. Or, well, it is not nonsense, but it is not an exclusive right either. It is nothing more than a right to an equitable (or not too equitable, who knows) remuneration.

So there are only two acceptable alternatives in this field:

—authors' rights can be administed by authors' societies (even if certain governmental supervision or participation is possible) or

—they can be administed in the framework of a public or semi-public entity, but still in an autonomous manner, where authors and other owners have the decisive say about the way their rights are administered (even if it is with governemental supervision or participation).

The Model Statutes for Public Institutions Administering Authors' Rights in developing countries, worked out by a Unesco/WIPO Committee of Governmental Experts which met in Geneva in October 1983, have been based on these two alternatives.[14]

Annex II to the report of the meeting contains the Model Statute for Private Societies Administering Authors' Rights. It is a typical example of a private organization. Even the supervision by a public authority (for instance a Ministry) is mentioned in brackets only as a possibility.

The Model Statute for Public Institutions Administering Authors' Rights is contained in Annex I. (The order — I and II — is not accidental. As we have seen above, public institutions seem to be a better choice for developing countries where there is no appropriate copyright infrastructure as yet). Annex I recommends practically the same provisions regarding the functions of the organization and the administration of rights as Annex II does in the case of private societies. There are only constitutional, organizational differences between the two models. However, Annex I also contains clear guarantees in order to ensure the dominance of authors in the administration of their rights.

Under Article 4 of Annex I, the administration of the public institution administering authors' rights shall be exercised by the Management Board and the Director-General. Article 5 provides for the composition and the functions of the Management Board. It has to consist mainly of authors. Its members are appointed by the competent authority (for example the Ministry of Culture) "with due regard to equitable representation of the various categories of authors." The Management Board hears the reports of the Director-General and it decides about all the important questions of collective administration and the management of the organization. According to Article 6, the Director-General is appointed by the competent authority. He has the task of the actual managing and administering of the public institution, but he has to do it "in accordance with the decisions of the Management Board."

So, the Model Statute is in keeping with the principle of autonomy of authors in the administration of their rights and contains appropriate guarantees for it. (It is another matter that it could and should have been even more generous in that respect. For example, it could have given a decisive — or at least an advisory — role to the unions of authors in the selection and appointment of members of the Board. The election of the President should have been entrusted to the members of the Board instead of his separate appointment. And, for example, paragraph (6) of Article 5 is unnecessarily rigid when obliging the Board to draw up a detailed report of each session and to submit it to the competent authority.)

(6) In accordance with the subject of this article we have turned our attention to collective administration of rights as a "third alternative" between individual administration and non-voluntary licensing and we could see that this function is the *raison d'être* of real authors' societies. However, we should not forget the fact that authors' societies (and here I am using this expression in its broader sense, again covering not only private societies but also public entities fulfilling the tasks of real collec-

[14] See *Copyright*, 1983, pp. 348 to 357.

tive administration) have different other functions as well. Even if briefly, we should study them too, because it may be important from the viewpoint of the interests attached to collective administration what other tasks are undertaken by a society. Some of them may promote those interests, while other functions may be in contradiction with them.

Additional objectives of authors' societies are traditionally subdivided into three categories:

(a) moral and professional objectives,
(b) objectives of a cultural nature,
(c) objectives of a social nature.

That is the subdivision used, for example, by the representatives of CISAC.[15] The three categories cover several different objectives, so we have to study them more in detail.

ad *(a)* This category of objectives includes all functions in connection with the protection of authors' moral and pecuniary rights and interests, other than the tasks of concrete collective administration of rights.

Some functions belonging to this category are mentioned by the Model Statutes for developing countries in Article 3 of both models:

- establishing model forms for contracts with the users of protected works or with their representative bodies;
- acting on behalf of authors or their successors in title to secure respect for the conditions governing authorization to use protected works, and in the event of violation to assert all rights recognized by national legislation or by bilateral or multilateral international agreements...;
- providing authors or their successors in title with information or advice on all matters relating to copyright;
- providing the competent authorities with information or opinions on any legislative or practical problems relating to copyright;
- fostering such harmony and understanding between authors and the users of their works as are necessary for the protection of the authors' rights.

There are authors' societies which undertake other tasks too in the framework of general representation and promotion of authors' rights and interests. For example:

- proposing amendments to national legislation and adhesion to international conventions,
- representing the country at intergovernmental copyright meetings,
- organizing seminars and training courses, receiving trainees and so on.

[15] See, for example, Leon Malplate, "The role of societies or associations of authors and of CISAC" in a BIRPI publication *Symposium on practical aspects of copyright*, Geneva, 1968, pp. 21 and 22, and Jean-Alexis Ziegler "The role of authors' societies and CISAC," a. lecture delivered at a WIPO/ARTISJUS training course in Budapest, in October 1982.

ad *(b)* While there is a fairly general agreement about the need of functions included in the previous category, representatives of authors' societies and other copyright experts sometimes have different opinions about the necessity and optimal scope of "cultural" activities of authors' organizations.

As Jean-Alexis Ziegler puts it:

> Objectives of this nature have the double merit of enabling authors' societies to contribute to the development of the cultural life of a country and to enjoy a prestige which facilitate their actions in all fields.[16]

He mentions two examples: encouraging and supporting great creators "whose talent, although it goes to their credit, is too often inadequately recompensed," and giving donations and awarding prizes for cultural and artistic events.

However, that is only one dimension of cultural functions. There is another important aspect too: the promotion of dissemination of protected works in the country concerned and abroad. That is a sort of agency activity undertaken by certain authors' organizations (mainly in socialist and developing countries).

The role of authors' societies in the field of culture was a special theme of the 1982 Rome Congress of CISAC on the basis of two reports. The first was prepared by Eduardo de Filippo, the second written by Boris Pankin and presented, commented and completed by Konstantin Dolgov, the new president of the Soviet Copyright Organization (VAAP). After the report many participants took part in the discussion.[17]

It was mainly the Pankin-Dolgov report which dealt with the question of promotion activities. It emphasized that distribution and dissemination of his work is in the interest of the author, and that such activities of authors' societies should be accepted and even encouraged. And it referred to one more factor:

> If we consider the practice, traditions and legislative provisions of the countries where societies of authors are not actively involved in the promotion of their members' works we can see that in these countries the dissemination of works is carried out by publishers who gain profit from this activity in the form of the publisher's share retained from the copyright royalties due for any use of the work. Participation of the publisher in the author's income resulting from the exploitation of his work is legally excluded in the USSR.[18]

The report drew the attention to the special situation in developing countries, where such promotion activity is indispensable for trying to improve the generally very negative balance in the exchange of cultural values. (The Model Statutes for Institutions

[16] *Ibid.*, p. 8.

[17] 33rd Congress, Rome. Report of the Congress published by the Secretariat General of CISAC, pp. 212 to 219 and 225 to 227.

[18] *Ibid.*, p. 217.

Administering Authors' Rights seem to have been based on the same considerations, because both models mention in Article 3 the activities "to promote the dissemination of national works" in the country and abroad among the functions of the organizations.)

ad *(c)* The objectives of a social nature are fairly clear. Many societies have welfare funds, pension schemes and other social services in favor of their members.

The additional functions mentioned in the three categories above, in principle at least, are not incompatible with the basic objective of authors' societies, which is nothing else but the protection and administration of authors' rights, and many of them may even be very useful from the viewpoint of those fundamental tasks. However, it is completely obvious that any of those activities should be abandoned by an authors' society if there is the danger that it may get in conflict in practice with the interests of authors and the most efficient possible protection and administration of their rights.

There are several possible sources of conflict. For example: the costs of such additional functions may mean too big a burden for the authors' royalties. The expenses may not be distributed proportionately among different groups of authors. Authors may not agree with those functions, they have no influence on them and so on, and so on.

We should not forget that authors' rights are rights of individual authors (with some unlucky exceptions). We have to take it into account when we study the acceptability of additional functions. Those functions are acceptable on the basis of the international conventions and national laws, only if the following conditions are met:

— They do not unnecessarily increase the expenses of the administration of rights. (For example ARTISJUS, the Hungarian authors' society has undertaken agency activity on condition that the Ministry of Culture compensate its deficit in that field in the form of a subsidy.)

— If such functions mean additional financial burden on the income of authors or they may get in any other manner in conflict with authors' interests, they cannot be undertaken but with the approval of all the authors concerned. If the activities concern the royalties of foreign authors as well, their agreement is also necessary — for example through their own national societies. (Public performance rights societies conclude — in general — such recriprocal representation contracts under which each of them is entitled to deduct from the sums collected by it on behalf of the co-contracting society 10%, which can be allocated for national cultural and social purposes, but that is the upper limit.)

— The expenses emerging with those functions should be allocated fairly and proportionately among different groups of authors.

(7) This article is part of a series of studies to be published by WIPO. The other authors are to deal with such problems of collective administration as the relationship between authors and their societies, the relationship between authors' organizations and users, state control, anti-trust and consumer aspects, technical questions of administration, the special problems of developing countries, etc. So, even if I have touched on many of those further important questions when studying the general objectives, functions and organizational forms of collective administration, it would go beyond the scope of this article if I went into detail about them. Instead, I shall sum up briefly what principles should be taken into consideration and what conditions should be met — in my view — in the ever more important field of collective administration of authors' rights:

(a) Collective administration of authors' rights is the best solution in the case of mass secondary uses of protected works. It should be applied wherever possible instead of non-voluntary licenses.

(b) Governments should encourage the establishment of collective administration systems where it is necessary for the avoidance of non-voluntary licenses. They should apply the principles of anti-trust legislation in an appropriate, flexible way in this field, taking into account that collective administration (including blanket licensing) is the only chance for authors to counterbalance the power of big and strong mass media user-organizations.

(c) Copyright law can provide for collective administration as a condition of exercising certain rights when it is inevitable. However, in the field of exclusive rights it should leave the authors' rights of disposal as intact as possible (for example, in the case of "extended collective administration" it should leave the way open for non-members to choose another form of administration or another organization).

(d) Full collective administration includes authorization for users, control of uses, collection of royalties and their distribution among right owners, when exclusive rights are involved. However, even if authors' rights are restricted to a right to remuneration, collective administration is preferable as far as negotiation, collection and distribution are concerned.

(e) Collective administration systems should guarantee equal treatment in all respects for all right owners (including foreign ones).

(f) Collective administration of rights should not mean the collectivization of rights and authors' fees themselves. The income should be distributed

among individual right owners whose works have been used.

(g) Collective administration of authors' rights should be carried out by non–profit–making organizations, which can deduct only the expenses necessary for the correct functioning of the collective system.

(h) An organization fulfilling the tasks of collective administration can also undertake other functions in connection with authors' rights and interests. However, no function is acceptable if it may get in conflict with authors' interests involved by collective administration. Any expenses beyond the circle mentioned in point *(g)* above are allowed only with the approval of the authors (both national and foreign ones). It covers the so–called cultural and social functions as well.

(i) It depends on the concrete social, economic, cultural and legal conditions, whether an overall authors' organization or separate societies of different kinds of authors are more recommendable. However, in the majority of cases a centralized organization dealing with the protection of all authors' rights — or at least a great number of them — has a better chance for a really efficient administration. If there are parallel societies, close cooperation is necessary between them, while in the case of overall, centralized organizations guarantees are needed for equal treatment of all groups of authors.

(j) Corporate copyright owners may set up separate collective administration organizations. However, such organizations should restrict their activities to their rights enjoyed in close connection with their original business purposes and should not try to take over the administration of rights belonging to authors. The dominance of authors should be preserved in the system of copyright administration.

(k) It depends also on the social, economic, cultural and legal structure of the country concerned, whether a private society or a public or semi–public organization is a better solution. (In developing countries, in the stage of establishing copyright infrastructure public or semi–public organizations are recommendable.) Both in private and in public or semi–public organizations the autonomy of authors in deciding about the most important questions of collective administration should be guaranteed.

Summa summarum, collective administration of authors' rights may become a crucial chance for defending and developing the international copyright protection system in the circumstances of galloping technological development. Taking into account its increasing importance, much more attention should be paid to it, at both national and international levels. Guarantees should be worked out and applied for the correct functioning of such collective systems and for making sure that they will not lead to a disguised version of non–voluntary licensing or to the collectivization of authors' rights and royalties themselves. Much depends on it from the viewpoint of the future of copyright. So we should succeed in this none too easy undertaking. If necessary, even against wind and tide.

Activities of Other Organizations

International Association for the Protection of Industrial Property (AIPPI)

Executive Committee

(Rio de Janeiro, May 12 to 18, 1985)

NOTE*

Introduction

The Executive Committee of the International Association for the Protection of Industrial Property (AIPPI) met in Rio de Janeiro (Brazil) from May 12 to 18, 1985. Approximately 300 participants from about 40 countries participated in the meeting.

The World Intellectual Property Organization (WIPO) was represented by its Director General, Dr. Arpad Bogsch, accompanied by Deputy Director General Dr. Klaus Pfanner. The Director General gave a speech at the opening ceremony on May 12, 1985, during which he outlined the topical activities of WIPO.

In the field of the law of copyright, the questions considered by the Executive Committee included the protection of computer software. In connection with those questions, the Executive Committee adopted various resolutions and observations; those concerning the protection of computer software and integrated circuits are reproduced below; the others are published in the review *Industrial Property* (September 1985 issue).

Resolutions and Observations Adopted

QUESTION 57

Protection of Computer Software and Integrated Circuits

A. Computer Software

I. AIPPI *takes note* of the increasing tendency to protect computer software by the existing copyright systems.

AIPPI has therefore *studied* the problems which arise by applying these systems of copyright protection to computer software, and more especially to computer programs.

1. Elements of Computer Software

Computer software comprises:

— functional analysis of the given problem;
— detailed operational specifications;
— the program itself, which can be in the form of "source code" or in the form of "object code";
— auxiliary documentation, facilitating comprehension and use of the program.

AIPPI *is of the opinion* that, except for algorithms *per se* and for the functional analysis insofar as it is only an abstract idea, all these elements of computer software may be protected by the national and international copyright systems. However, they only benefit from this protection if they satisfy conditions imposed by the national copyright laws, and notably if they possess a certain degree of originality.

But, as a result of these national requirements, a certain number of programs are not protected by the copyright laws.

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* Prepared by the International Bureau of WIPO.

AIPPI *is of the opinion* that unpublished computer software should also be able to benefit from this protection.

2. Nature of the Right

According to the rules of the international Conventions (Article IV*bis*, Universal Copyright Convention (UCC); Article 8 *et seq.*, Berne Convention), AIPPI *is of the opinion* that the author or proprietor or successor in title of a program benefits from an *exclusive right to authorize* use of his program: this being a simple right to prevent copying. This right does not prohibit the independent creation of a program; it can be compared to the Anglo-Saxon "copyright" rather than to the author's rights.

On the other hand, the author or proprietor or successor in title has the right to decide and to determine the conditions in which the program can be divulged.

3. Scope of Protection; Prohibited Acts

(a) In accordance with copyright principles:

— *Copying* of a program is prohibited. The identity of two programs leads to the presumption that the second program has been copied from the first. Proof that the second program has been created independently from the first can be established by any available means, particularly when the first program has not been published.

— Copying is equally prohibited whether in an identical or substantial manner.

(b) AIPPI *is of the opinion* that according to the Berne Convention and to Article IV*bis* of the UCC, a program is an *adaptation* or an *improvement* of an earlier program as long as essential features of the earlier program are still recognizable in the adapted or improved program. Use and exploitation of the adapted or improved program remain dependent upon the rights of the author or proprietor of the original program.

AIPPI, however, *is of the opinion* that the author or proprietor of a program should not be entitled to prohibit adaptation or improvement of his program by a user who has received the software legitimately for his own needs.

(c) AIPPI *is of the opinion* that:

The rules of Article V(2) of the UCC on *compulsory licenses for translations* of works in a foreign language do not apply to programs.

Indeed, the notion of "translation" as traditionally understood in this international convention does not seem to be applicable to the different operations involving programs.

If the possibility of compiling a source code into an object code, or vice versa, or if the possibility of rewriting a program written in one language (for example Basic) into another language (for example Pascal) is considered to be a translation within the meaning of the UCC, such a compulsory license risks ruining the fundamental interests of authors and proprietors of computer programs.

(d) (i) Any kind of *use* or *copying* of a program (including storing, storage, loading, and running), whatever the means or media used, must have been authorized by the author or his successor in title.

These forms or means of use or copying should be capable of being freely agreed upon by contract.

The user of a program must always be allowed to make copies for safety reasons (back-up copies).

(ii) The scope of protection conferred on the author or proprietor of a program afforded by the international copyright treaties is not certain.

AIPPI *believes* that national legislation should ensure the grant of this scope of protection for the benefit of the author or proprietor of a program, as it has the ability to do according to the international conventions.

4. Moral rights ("Droit moral")

Unlike the UCC, Article 6bis of the Berne Convention requires the member countries (which notably do not include the United States of America and the Soviet Union) to safeguard certain moral rights of the author, even if the author has assigned all his pecuniary rights.

There are two kinds of moral rights:

(i) the right to claim authorship of the work ("paternity"),

(ii) the right to oppose any modification prejudicial to his honor or reputation.

(i) Having regard to the peculiar nature of software, and in particular of programs, which differ from other literary and scientific works, the *paternity right* should be regulated along the following lines:

(a) The author should retain the right to prevent false attribution of paternity. It must also be possible to invoke these authorship rights against third parties.

(b) However, the paternity right should not carry with it the right to require that the name of the author or authors must appear on every sample of the software.

(ii) AIPPI *notes* that there is little likelihood that modifications of software and especially of programs would be capable of prejudicing the *honor* or *reputation* of its author.

Consequently, AIPPI *is of the opinion* that there is no need to modify Article 6bis of the Berne Convention which can only be applicable in exceptional cases, where the provision would then be justified. In these circumstances, the application of Article 6bis (second sentence) does not seem to constitute an obstacle to effective software protection.

5. Duration

AIPPI *notes* that Article 7(1) of the Berne Convention sets the duration of protection as the lifetime of the author plus 50 years after his death.

AIPPI *is of the opinion* that such a duration is not very appropriate in the field of computer software, and that it might be necessary to provide a shorter duration. One possible solution would be to insert into the Berne Convention a rule similar to that of Article 7(4), which already provides a reduced term of protection for other works such as photographic works and works of applied art.

6. Formalities

Taking into account that, contrary to the UCC, Article 5(2) of the Berne Convention requires its member countries (which notably do not include the United States of America and the Soviet Union) to grant protection *without any formalities*, AIPPI *accepts* that a program should be protected as of its creation. The author or proprietor then has to *prove* by any available means the date of creation and contents of his program.

AIPPI *notes* that despite certain practical difficulties, a *deposit* of the program, even if optional and non-official, could facilitate proof of the creation of the program.

II. Conclusion

In conclusion, AIPPI *notes* that the application of national or international legislation in the field of copyright seems to allow inexpensive and *immediate protection* of programs, which is necessary to safeguard the interests of the authors of computer programs.

But AIPPI *considers* that the study of the consequences of the application of that legislation to computer programs has shown the necessity to clarify and to adapt the national copyright laws and the two international copyright conventions.

AIPPI *is of the opinion* that while an adequate interpretation of copyright laws continues to provide for protection of computer programs, it is necessary to *improve* the conditions of protection of computer software, perhaps by way of a special regime or specific rules, and that these conditions will be specified by further experience and technical evolution in this field.

Consequently, AIPPI *decides* to continue the *study*, without excluding the possibility of setting up a specific system (notably one that excludes authors' rights [*droit d'auteur*]), of

— the protection of computer programs,
— the protection of the other elements of computer software.

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International Copyright Society (INTERGU)

X^th^ Congress

(Munich, June 8 to 11, 1985)

The International Copyright Society (INTERGU) held in Munich, from June 8 to 11, 1985, its Xth Congress with the general topic "Copyright and the New Media." Around 160 lawyers from 28 countries attended the Congress.

At the end of their deliberations, the participants adopted the following resolution:

1. INTERGU is strongly in favor of retaining the basic copyright system by virtue of which the author is entitled to the exclusive and sole right in his work, and rejects all attempts to introduce compulsory and statutory licenses. The continuing free flow of information is guaranteed by the fact that authors assign their rights to licensing organizations which provide for an unrestricted dissemination and an adequate remuneration.

INTERGU rejects attempts to use copyright remuneration for general purposes incumbent upon the State.

2. INTERGU recommends copyright protection for computer programs and protection against technical innovations with the aid of which works protected by copyright may be stored and retrieved. Manufacturers of devices and systems suitable for the reproduction of intellectual works should be aware of their responsibility to the authors and of the necessity of an adequate remuneration.

3. INTERGU demands guaranteed protection for intellectual property, in particular with regard to the distribution of broadcasts, i.e. radio and television programs, via cable networks. The authors of the distributed works are in favor of the free flow of information but insist on an adequate remuneration based on their exclusive rights. All countries are called upon to support free agreements between authors and their licensing organizations on the one hand and the cable distributors on the other.

In this connection, INTERGU recommends the ratification and application by all States of the Satellites Convention (Brussels, 1974). It is in the interest of all States to secure, in their copyright laws, an adequate and effective protection for all programs broadcast by any kind of satellite transmission.

In the case of direct broadcasting satellites, consideration has to be given to the legal systems of all States in which the satellite signal is transmitted and can be received.

4. In view of the fact that some countries have enacted stricter legislation to prevent "piracy," the fight against it urgently calls for closer international cooperation.

5. In order to achieve the necessary harmonization of copyright laws, INTERGU invites all personalities in political and public life to establish contacts with noted authors in order to provide a forum for a fruitful dialogue and thus intensify international cooperation in this legal field. In this respect, bilateral agreements have proved to be especially suitable. Attempts which a priori enforce a joint action are likely to lead to promising results.

National Copyright Meetings

National Seminar on Copyright

(Cotonou, September 2 to 6, 1985)

Note

A National Seminar on Copyright, organized by the Government of the People's Republic of Benin in cooperation with WIPO, was held in Cotonou from September 2 to 6, 1985. It brought together 70 participants from socio–professional circles directly or indirectly involved in copyright matters — civil servants from political, administrative and university bodies, authors, composers, writers, architects, performers, persons responsible for cultural activities, publishers, producers of phonograms, delegates from various users' associations, and also the national broadcasting organization. Information on the participants is given at the end of this Note. The Beninese Copyright Office (BUBEDRA) (*Bureau béninois du droit d'auteur*) made the organizational arrangements for the meeting.

The Seminar was opened by Mr. Ousmane Batoko, Minister for Culture, Youth and Sport, who also declared the work of the session closed. At the opening and closing ceremonies, speeches were delivered on behalf of the Director General of WIPO by Mr. Claude Masouyé, Director of the Public Information and Copyright Department. The representative of the United Nations Development Programme (UNDP) was also present.

The discussions were presided over by Mr. Ben–Youssef Saïbou, Director of the Beninese Copyright Office. As planned in the program, 10 lectures were given on different aspects of copyright and neighboring rights; each was followed by fruitful question–and–answer exchanges between participants and lecturers.

The Seminar, which was the first meeting of its kind to be organized in Benin, adopted conclusions and recommendations which are reproduced below.

At the end of their deliberations, the participants in the Seminar,

(1) Express their deep gratitude to the World Intellectual Property Organization for having included in its program of activities the organization of this Seminar, which has afforded a better understanding of copyright in the People's Republic of Benin;

(2) Address their warm thanks to the delegation of the World Intellectual Property Organization for its excellent contribution to the Cotonou Seminar in the form of the lectures given, information provided and documents distributed;

(3) Also convey their heartfelt thanks to the Director General of the Copyright Office of the Ivory Coast for the valuable information he has provided on the experience of the Ivory Coast in administration and management in the copyright field;

(4) Commend the Beninese Copyright Office for its excellent preparation of the Seminar and the efficiency of the organizational arrangements, which made it possible for the work of the Seminar to take place in an atmosphere of mutual understanding and open debate;

(5) Express their warmest gratitude to the Government of the People's Republic of Benin for having allowed and facilitated the effective organization of its first National Seminar on Copyright;

(6) Recommend:

(a) that all possible legal–technical assistance be provided by the World Intellectual Property Organization for the proper operation of the Beninese Copyright Office and the safeguarding of the interests of intellectual creators;

(b) that the World Intellectual Property Organization offer increased training opportunities in the copyright field for the staff of the Beninese Copyright Office, and that it consider the possibility of planning a training program over three years from 1986;

(c) that the World Intellectual Property Organization publish in the form of a booklet Law No. 84–008 of March 15, 1984, on the Protection of Copyright in the People's Republic of Benin, with a view to its dissemination;

(d) that the International Confederation of Societies of Authors and Composers (CISAC) expedite the arrangements for helping in the provision of adequate technical material in its assistance program for Benin;

(e) that CISAC find an authors' society of a developing country to sponsor the Beninese Copyright Office;

(f) that the International Federation of Phonogram and Videogram Producers (IFPI) and CISAC organize a subregional seminar in an African country on the fight against piracy of sound and/or audiovisual recordings, seeking WIPO's cooperation in this matter;

(g) that the Government of the People's Republic of Benin promote the effective functioning of the Beninese Copyright Office by adopting the decree which would lay down the competence, organization and operation of that Office;

(h) that the fight against piracy of artistic and literary works in the People's Republic of Benin be sustained and systematic;

(i) that the Minister for Culture, Youth and Sport and the Minister for Finance submit for adoption by the National Executive Council a draft decree regulating the importation of any material support of literary and artistic works into the People's Republic of Benin;

(j) that "days" devoted to copyright be organized in the provinces at regular intervals to promote a better knowledge of the copyright concept;

(k) that the Minister for Intermediate and Higher Education envisage the inclusion of copyright in the syllabi of the National University of Benin.

Participants

I. Beninese Copyright Office (BUBEDRA)

M. Ben-Youssef Saïbou, Directeur
M. Michel Winsalas, Chef, Service de la documentation et de la répartition
M. Samuel Ahokpa, Chef, Service juridique et de la coopération
M. Fabien Fayomi, Chef, Service de la perception et de la comptabilité
M. Pierre Dazogbo, Chef, Secrétariat administratif
M. Philippe Towanou, Chef, Division projet et information
M. Michel Ahovo, Chef, Division perception et comptabilité

II. Representatives of National Bodies and Organizations

Association des musiciens et chanteurs du Bénin
Union nationale des chanteurs et compositeurs traditionnels du Bénin
Association des écrivains et critiques littéraires
Association béninoise des écrivains en langues nationales
Association des producteurs et distributeurs d'oeuvres musicales
Ordre des architectes
Office béninois des arts
Office national du tourisme et de l'hôtellerie

Ministère de la culture, de la jeunesse et des sports :
Directions de la culture populaire, des loisirs, des archives nationales, de la Bibliothèque nationale, de l'alphabétisation et de la presse rurale, ainsi que plusieurs directions provinciales
Ministère des enseignements moyens et supérieurs :
Institut national de formation et de recherche en éducation
Ministère de l'information et des communications :
Office national d'édition, de presse et d'imprimerie
Ministère des finances et de l'économie :
Centre national de propriété industrielle, Direction des douanes

ainsi que diverses structures politiques rattachées à la Présidence de la République

III. World Intellectual Property Organization (WIPO)

Mr. Claude Masouyé, Director, Public Information and Copyright Department
Mr. Ibrahima Thiam, Director, Development Cooperation and External Relations Bureau for Africa and Western Asia

Invited Expert

M. Adolphe Baby, Directeur, Bureau ivoirien du droit d'auteur (BURIDA)

National Workshop on Copyright

(Zomba, Malawi, April 1 to 4, 1985)

Note of the Editor

In the June 1985 issue of this review was published a Note on the proceedings at a National Workshop on Copyright held in Zomba, Malawi, from April 1 to 4, 1985. Annexed to the Note (pages 233 and 234) was set out in full the text of nine resolutions and recommendations adopted by the Workshop.

One of the recommendations was that the Malawi Ministry of Education and Culture should appoint a Commission "to enquire into the question of royalties which may have accrued to local performing artists from the Performing Right Society of London, and that measures be taken to correct the present deplorable situation affecting local performing artists."

We have been asked by the Performing Right Society Ltd. of the United Kingdom (PRS) to point out that the PRS has no responsibilities whatever in relation to the protection of the rights of performing artists, its role being limited to the administration of the rights of composers and authors of musical works, and further that it was not the intention of the recommendation to express any criticism of the PRS.

Book Reviews

The Economic Importance of Copyright, by *Jennifer Phillips.* One volume of 38 pages. The Common Law Institute of Intellectual Property Limited (CLIP), London, 1985.

The aim of this study — in the author's words, "to estimate the importance to the U.K. economy of those industries and professions which are copyright–based in the sense they are, directly or indirectly, dependent on copyright protection for their commercial success" — is difficult to fulfill to the entire satisfaction of either economist or copyright specialist.

The problem, broadly speaking, is twofold: first, it is one of definition and selection of the range of economic activity to be covered, and subsequently, it is a problem of methodology, of what statistical material to use and how to present it as a ratio of total economic activity in the United Kingdom. The author, an applied economist who graduated from the London School of Economics, commendably admits to certain difficulties early on in the work. She states that the decision to include an industry in her findings is "a subjective appreciation that the absence of copyright protection would have a significant impact on a particular industry's performance," and that exclusion is achieved where necessary by "deducting an appropriate [sic] amount" from the value of the output of the industry concerned: she gives as an example that, in the publishing industry, retailing is included but paper production is excluded. Certain items are excluded from the global statistical findings, but figures for them are given separately in this study: they are, industries which are indirectly but substantially dependent on copyright protection (such as musical instruments, and consumer goods connected with photography, cinema, television and other home entertainments), industries defined as having less substantial dependence on copyright (such as advertising, architecture, jewellery and furniture), industries based on purely functional "industrial designs" (such as motor car parts), and the entire computer software industry.

The final selection of "copyright industries" quantified for the purposes of a statistical comparison with the GDP or Gross Domestic Product includes items under Literature (printing, publishing, retailing, libraries, authors' royalties), Music (printing and publishing, composers' royalties, performing musicians' fees, retailing, collecting societies), Sound Recordings (gramophone records, audio tapes, retailing), Film and Video (film production and distribution, cinemas, video), Broadcasting (radio and television) and Theatre (actors). For each industry included in these statistics, three figures are expressed — the GVA or Gross Value Added (the contribution of a particular activity in terms of staff costs and profits before tax, which directly contributes to the global figure for GDP or Gross Domestic Product), the GO or Gross Output (which is GVA plus other connected inputs such as raw materials, rents and rates) and employment (reflecting staff costs separately).

Even after crossing these bridges of definition, selection and statistical methodology, there remain formidable obstacles, and certain approximations are inevitable. When the reader finds, in the lucid foreword to this work by Stephen Stewart, Chairman of the Common Law Institute of Intellectual Property (CLIP), which has published this work, that the chosen "copyright industries," representing 2.6% of the GDP for 1982, exceed in size "the motor car and food manufacturing industries and approximately equal the chemical and man–made fibre industries" (the corresponding statistics are provided within the study itself), he is perhaps already aware of the impossibility of making precise comparisons. The author herself draws attention to such imprecision in statistical science, a field generally presumed to be precise. A good example is that in quantifying authors' royalties she states that "the number of authors is impossible to estimate," and admits to several assumptions, such as "8% was the assumed level of royalties" as a kind of statistical average between less and more, and "it was assumed that all text books and technical and scientific books have authors entitled to copyright payments, but that only half of fiction, classics and children's books do," and "GVA has been assumed to be 80% of GO."

This is not to detract from the undoubted usefulness of the study. On the contrary, the *un*assuming, rational approach of the author, the appropriate slimness of the volume, and the unpretentious presentation of the text seem to indicate that the author sees her work in a proper perspective. Works of this kind can be quickly out of date or superseded, and therefore a pontifical, definitive tone is clearly inappropriate. They are pointers or indications in a certain direction — in this case the increasing economic importance of copyright — based activities, showing a corresponding need for the improvement of intellectual property systems. Their value is enhanced by recurrent comparative studies made on the same basis: in this connection, it is interesting to note that studies in two common law countries, the United States of America and Canada, based on similar (but not identical) methods, yielded the percentage ratios of 2% of GDP in the United States of America (1954 data) and 2.1% in Canada (1971 data). (A study on Sweden in 1978 showed 6.6%, but apparently covered a wider field and drew on more detailed statistics.) Providing the imponderable and interpretive elements of such studies are borne in mind, this work is an enlightening contribution to the study of the economic aspects of copyright.

A.S.

Calendar of Meetings

WIPO Meetings

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

1985

November 4 to 30 (Plovdiv) — WIPO/Bulgaria: World Exhibition of Young Inventors and International Seminar on Inventiveness for Development Purposes (November 12 to 15)

November 18 to 22 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning

November 25 to December 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information

November 26 to 29 (Geneva) — Committee of Experts on Intellectual Property in Respect of Integrated Circuits

December 2 to 6 (Paris) — Committee of Governmental Experts on Model Provisions for National Laws on Publishing Contracts for Literary Works (convened jointly with Unesco)

December 3 to 6 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property

December 11 to 13 (Geneva) — Committee of Experts on the International Registration of Marks

UPOV Meetings

1985

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

1986

February 1 (Paris) — International Literary and Artistic Association (ALAI) — Executive Committee

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

May 6 to 8 (Brussels) — International Confederation of Societies of Authors and Composers (CISAC) — Legal and Legislation Committee

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

October 12 to 18 (Madrid) — International Confederation of Societies of Authors and Composers (CISAC) — Congress