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Studies

Copyright and Data Bases: a Worry or a Challenge?

Milagros del CORRAL BELTRÁN*

When computer technology burst in on the cultural and scientific life of the more advanced societies, there emerged a whole range of imponderables of highly varied character, and the never quite limpid waters of copyright were once again stirred up. More than 15 years have already passed since the publication of the work of Professor Ulmer, which was embarked on under the auspices of WIPO and Unesco, and during that time legislation, judges and experts at both the national and the international level have been endeavoring to analyze the impact of the new technology in this legal area by means of a dissection down to the last details of its diverse and to some extent unforeseeable implications.

Attempts were made to reply to the wealth of problems that arose as a result of the rapid progress of technology. The main difficulty undoubtedly lay in finding the best way of adapting time-honored legal concepts to a phenomenon that was in a constant and dizzying state of flux and affected something as sensitive as information itself, precisely at a time when that same information had become the very hinge of modern civilization, responsible for considerable annual movements of capital, and when for governments it had taken on the dual identity of a strategic asset and a public asset.

While there is no doubt, after the interminable meetings of recent years, that the controversy on the protection of computer programs has in a certain number of countries, at least provisionally, met with a more or less acceptable and agreed legal solution, and that one can now already speak of the existence of a refuge to which the other countries can resort when their national requirements dictate, the same cannot be said of data bases. And it need not be at all idle to ask why.

Indeed, any alert mind closely following the literature on the subject or attending national and international meetings devoted to it could observe, by comparing their content with the initial work of the 1970's, how little progress we have made in this area in spite of the increasing development of the data base field: for the last five years it has shown a sustained annual growth of 20%, achieving quite impressive transaction figures in spite of the legal uncertainty surrounding it.

The ever-understandable fear of change has manifested itself in the field that we are concerned with as a fear of weakening the protection of traditional intellectual works and, even more serious, as a panic reaction to an intuitive feeling that any legal adjustment to protect this new category of works is liable to undermine seriously the very philosophy of copyright; there is also the certainly arguable suspicion that technology in general and data bases in particular are leading us towards a new legal conception based more on economic than on personalistic factors. This explains why analyses have preferred to concentrate on ensuring that there is protection for the preexisting works against this new form of exploitation, on researching the technical *modus operandi* for data bases in order to pinpoint the acts that have to be given protection, and on finding legal concepts for them that are likely to win general acceptance. The controversy surrounding "bibliographic references versus full text," the question of abstracts and their potential as substitutes for consultation of the preexisting original work, the possibility of applying to data bases the provisions governing the right of quotation, the problems arising from the use of descriptors or, conversely, from the syntactic permutations of natural language, all this in the course of a few famous disputes which, like *New York Times* v. *Roxbury Data Interface*, *Kipling* v. *G.B. Putnam*, *Williams* v. *Wilkins* in the United States of America, or the more recent *Le Monde* v. *Microfor* in France, have caused reams of literature to be written in many countries. I consider it pointless to enlarge on it here—preferring to direct the reader to the bibliography—precisely because I feel we have reached the point at which the international community is poised to take a new step forward in its search for applicable legal solutions that might perhaps have been less elusive today if the protection of scientific works, which is also to be found in the very definition of the Berne Convention and among the first articles in practically all national legislation, had attained a sufficient degree of legal development instead of more or less surreptitiously merging with the category of literary works.

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Can Data Bases Be Copyright Works?

As a general rule, copyright laws protect "compilations" of elements insofar as the selection and arrangement of those elements, and the method or structure according to which they are presented possess sufficient originality for a new work and consequently a new intellectual property right to result. This is not confined to the case in which the compilations contain unprotected or public domain material, hut includes compilations of material protected under Article 2(5) of the Berne Convention, which provides:

> Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

It seems easy to deduce from this union principle that data bases are protected as original compilations since the simple fact of a machine being required to decipher them does not appear to be a sufficient reason for excluding them.

Be as it may, acknowledgment of their eligibility for protection at the outset provides a convenient point of departure. As Baumgarten rightly points out, it remains to he seen just how much protection will be afforded them hy copyright, and how hroad that protection will be. For if the doctrinal hasis for the protection of compilations is selection, what is one to do with the data base whose main value or *raison d'être* is precisely its exhaustive coverage of a particular subject matter? Then again, if we use the originality of the arrangement of the data as our criterion, what do we do when that "originality" is determined mainly by certain technical necessities regarding the location of the information to ensure its eventual rapid retrieval? And we still have not mentioned the latest developments in artificial intelligence or so–called "expert systems" capable of manipulating, rearranging and also altering preexisting material until a new, different result is produced in which it may even be impossihle to recognize the hasic data used. The matter at issue is undoubtedly closer to an intellectual effort leading to the achievement of a scientific result than it is to literary creation in the strict sense. We are all aware that in a scientific work raw information is of more interest than the manner of its presentation. Perhaps then it is appropriate to recall here the so–called "form theory," according to which the ideas, facts or events recounted in the work and making up its substance are not, as such, eligible for copyright, the purpose of which is the protection of the whole constituted by the inner form (individual comhination or arrangement of contents) and the outer form (form of expression determined by words, pictures, sounds, etc.).

But what if, quite apart from there being no real selection of the data, or insufficient creative originality in their arrangement, the input data prove to he in the puhlic domain? Let us imagine the case, which moreover need hardly be a fiction, of a data base consisting of the ISBN[1] codes of a country—exhaustive inasmuch as it includes the country's entire hook production—whose structural arrangement is determined by technical factors governing the retrieval program, and with bibliographic entries that merely reproduce the usual catalog data according to international cataloguing standards. If we abide by the above and conform to the spirit of the prevailing conception of copyright, such a data hase would not he eligihle for protection. However, would it not then risk being freely copied and suhjected to re–working and adaptation to accommodate specialized hihliographies and catalogs on either conventional or computerized media, which themselves do qualify for protection at least on the grounds of originality of selection? And, taking the same example, who would risk the effort and investment that such a data hase entails without the slightest prior assurance of legal protection against private copying or, even worse, organized computer piracy? Clearly, such data hases do require protection and have just as good qualifications for it as producers of phonograms or broadcasting organizations had hefore them. Perhaps the time has already come for an exploration of the options available under the Rome Convention, or for consideration of the possibility of a specific convention on the suhject.

Data Bases, an Exercise in Casuistry

Nevertheless, it is going to he a difficult matter to deal uniformly with the legal aspects of all data hases. Data hases may and indeed do exist that are absolutely original and unquestionahly conform to the criteria laid down by copyright for the grant of protection, therehy qualifying to receive the same treatment as a conventional collective work. (It should he mentioned that, hy their very nature, data hases are practically always collective works, in view of the fact that a variety of collahorative work and considerahle technical and organizational resources are involved in making them; the prohlems of salaried authors, commissioned works, etc., are the same as for any conventional work having the same characteristics, so that national legislation would not encounter any serious implementation difficulties in this respect.)

Alongside the ahove, there are also so–called derived data hases, which in turn may constitute elec-

[1] International Standard Book Number.

tronic versions of one or more works. This is the case of electronic encyclopaedias, whose invasion of the market we are witnessing at the present time, and which for instance enable any home computer owner, with a CD–ROM[2] package of modest proportions, to exploit the full potential of a 20–volume encyclopaedia, thanks to the combinatorial capability of computer technology. Has the owner of the rights in the encyclopaedia actually created a new work in this case, or has he contented himself with merely issuing the same encyclopaedia in a contemporary medium? For the data hase to be considered a new work, is it the different medium that is important, or its increased value as a result of new and better access facilities? Of course, the question is not likely to become complex until the hasic encyclopaedia marketed in CD–ROM form is completed, as it soon will be according to certain publishers' announcements, with new elements such as music, moving pictures, etc. Will it then be an audiovisual work in the eyes of the law, or will it continue to be a data base? Alternatively, will it constitute a new edition of the encyclopaedia, revised and brought up to date with respect to the illustrations? In our opinion—which is based on the conviction that electronics will become, for a given category of books, not a suhstitute medium hut certainly a widely used alternative medium—the solution of the specific problems that this type of electronic publication will raise at the outset for the general public has to be found hy contractual means. We are not concerned here with remote, on–line access, neither is the traditional pattern of exploitation and marketing of the work heing changed. It will therefore be sufficient for authors and puhlishers to provide in transfer or assignment contracts for the precautionary inclusion of derived rights; for authors and publishers are hoth equally interested in achieving maximum dissemination for the work, making use to that end of whatever exploitation possibilities may be offered by current technology, and, of course, in fighting against the unlawful reproduction which is the other side of the coin, the adverse effect of the new technology.

With regard to reference data bases—those of hibliographic character, directories, etc.—we have already seen, in the example of the ISBN, how the immense majority of these data bases have to be given protection by way of neighboring rights, except where, if they are accompanied hy original abstracts, specific descriptors, etc., they show sufficient originality to qualify for copyright protection. Nevertheless, even though the question of abstracts has been amply covered by legal writers, and there is a case law, I feel bound to make some comments on the subject. It happens that reference data bases which include abstracts and/or quotations from the preexisting work tend to be necessarily of a highly specialized scientific character. Recognition of the right to make ahstracts, which is always subject to certain interpretative limitations pertaining to the indicative character of the abstract, to the fact that it should not contain substantial parts of the works concerned and to the fact that reading it should not obviate consultation of the original work—so as not to harm the rights of its owner with competitive acts that constitute lost commercial opportunities—can in fact give the courts a great deal of work. For while it is true that the abstract in the data base serves the purpose of accelerating the initial selection or sorting of documents retrieved that in principle have a bearing on the suhject matter, it is nonetheless true that, between two ahstracts, there can be a whole range of nuances that could eventually blur the frontier of legality to a dangerous degree. The same thing happens with the inclusion of fragments by way of quotation. In the strictly literary field, no one would dare argue that an ahstract consisting of a few lines or the short quotation of a fragment could replace the reading of a magazine article, to say nothing of a book. But what happens in the scientific field? What happens is that the extraction of the findings of an experiment or of specific digitized data can actually make the reading of the entire work unnecessary. We have already mentioned how, with regard to science, there is greater interest in raw data, in results, than in the formal presentation of those data. Conversely, a bad abstract that detracts from the interest of the article or work in question is sufficient to dissuade an incalculable number of data base users from reading it, as they would then discard it out of hand. And under those circumstances, are we in the field of unprotected ideas or in that of the exception to the right of quotation?

In our analysis of this casuistic problem we would mention, last but not least, comprehensive or full–text data bases which, because they emhody complete texts or very extensive portions of preexisting works, in any case require authorization from the owners.[3] Here, we do not come up against fundamental prohlems with respect to the protection of the data base in itself; there will certainly be original selection and arrangement, and such a data hase will in reality be an electronic anthology of preexisting works or adaptations of such works. In that case, the basic problem lies in the speed of updating, which tends to be slowed by the need to obtain

[2] Compact disk–read only memory.

[3] See points 1, 2a and 3 of the Recommendations of the WIPO/Unesco Second Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works (Paris, June 7 to 11, 1982), in *Copyright*, 1982, pp. 245–246.

case–by–case authorization from the owners. While this type of data base has not become widespread on account of the high cost of storage, the outlook has now changed radically with the latest devclopments in memory capacity. Accordingly, it seems necessary to promote the creation of collective management bodies which group publishers and can function as recognized representatives in the negotiation of blanket licenses with the creator of the data base, offering him the most extensive "directory" possible. This course of action is undoubtedly better than the introduction of legal licenses which leave no scope for negotiation, and consequently deprive the owner of any possibility of monitoring the exploitation of his work. In addition, owing to the similarity of this institution to that of controlling reproduction for private use, it would not be difficult for established reproduction rights organizations to take on the role of collective license negotiators for the inclusion of material in data bases and for the authorization of the photocopies that serve their photodocumentation services. It would be most unfortunate if individual interests were to cause any deferment of such agreements. That could create a situation where governments, for the sake of the public interest and in the face of the urgent need to facilitate on–line access to information, might eventually yield to pressure and introduce legal licenses, thereby upsetting the whole copyright system, which would inevitably be implicated on account of the typically transnational character of the use of data bases.

Other Questions To Be Settled

As indicated at the beginning, the questions that require clarification are still many, both at the national and at the international level. They range from matters of pure form concerning registration in those countries that have an international property registry, such as the way of effecting the deposit of copies or the place in which the circled © symbol denoting authorship is to be placed, to matters of greater moment such as the date that has to be considered the publication date for the purposes of calculating the term of protection, not to mention the term itself.

Solutions have also to be found to fundamental questions concerning proof in the case of plagiarism, how to settle the all–too–frequent cases of data bases being "cracked," or whether the same data or data packages can be protected in different data bases. Moreover, it seems equally obvious that the introduction of standard formats and cataloguing principles could lead to a situation where two independently created data bases are virtually identical.

Then, there are questions of "fair use" in relation to data bases. What data retrieval can constitute infringement? And, while on the subject of output, how is one to determine the legality or illegality of temporary inputs for the purpose of adjustment and adaptation, where the operator's own machine is used off–linc to avoid wasting connection and computer time? How far can private copying go and still be considered admissible?

In addition, there is also a palpable need for some degrec of harmonization in the contractual relations between the various operators in the chain of production and distribution of data bases within the area of concern of the European Communities.

As we have frequently mentioned on other occasions, we arc faced not only with a new exploitation of protected works—although that too is true—but also with the emergence of new vehicles for works whose rapid developmcnt and unforeseeable future bring on a definite fecling of dizziness. It is essential to get down to work, however, and by means of imaginative formulas to work out adcquate solutions for the protection of these new categories of works, without weakening—at the same time—the protection of other creations. In that casc the traditional protagonists of copyright—the authors and thc publishers—have to contend on the one hand with the computer ogre and on the other hand with the demands of a society fully aware of its right to information. If copyright does not succeed in finding ways of preserving the ever–delicate balance that has to characterize the dissemination of the work created, its very own survival could be at stake. There is work for all: lawyers, specialists, national legislation and international bodies. Without any doubt the recommendations of the WIPO–Unesco Second Committee of Governmental Experts of 1982 will turn out, when the time comes, to have been more fundamental than we thought. Unfortunately, however, they are still a long way off.

(WIPO translation)

Bibliography

Baumgarten, Jon A.: *Copyright Protection of Software and Data Bases.* Amsterdam, International Group of Scientific, Technical and Medical Publishers (STM), 1985, 20 p.

Bradley, Clive: *Control and Ownership of Electronic Systems.* Paper presented to the International Publishers Association (IPA) Congress, Mexico City, 1984.

Catala, Pierre: *La "propriété" de l'information.* Paris, Dalloz–Sirey, 1984, 97 p.

Corral Beltrán, Milagros del: *Problemática de la propiedad intelectual de las bases de datos. Bases de datos restringidas versus bases de datos de acceso generalizado.* In "Revista Española de la Documentación Cientifica" 5, 1982, No. 3, pp. 245–266.

— *Data Bases and Intellectual Property.* In "Copyright Bulletin" (Unesco), 1983, Vol. XVII, No. 4, pp. 8–15.

— *New Technology, New Copyright? The Latin Legol Approoch.* In "Internationales Urheberrrechts–Symposium" (International Copyright Symposium), Munich, J. Schweitzer Verlag, 1986, pp. 195–215.

De Faultrier, J.: *Droit d'outeur et droit de reproduction. Evolution récente et débat outour de l'affaire Microfor/Le Monde.* Documentaliste–Science de l'Information, 22, 1985, 2, p. 43.

Delgado, Antonio: *Las bases de dotos y el derecho de propiedad intelectuol vigente en Espoño.* In "Bases de datos: retos, oportunidades, esperanzas," Madrid, FUINCA, 1985, pp. 159–174.

GFFIL: *Les relotions controctuelles des producteurs de bases et banques de données : problèmes juridiques.* Paris, Dalloz, 1986.

Groupement français des producteurs de bases et banques de données: *Réflexions sur les problèmes juridiques rencontrés par les producteurs de bases et banques de données : droit d'outeur.* Orléans, 1984.

Hunter, Karen A.: *Software, Electronic Dota Bases and Copyright: on American Perspective.* In "Internationales Urheberrechts–Symposium" (International Copyright Symposium), Munich, J. Scbweitzer Verlag, 1986, pp. 162–174.

IRPI: *Colloque sur les banques de données, droit d'outeur et droits voisins.* Paris, 1986 (at the press).

Keplinger, Michael: *Copyright Computer Programs ond Data Bases.* In International CODATA Conference VII, Kyoto, 1980. Data for science and technology, edited by Phyllis S. Glaeser, Oxford, Pergamon Press, 1981, pp. 586–589.

Kerever, André: *Legol Data Bonks ond Copyright in Fronce.* In "Copyright," 1981, pp. 317–324.

Le Stanc, Christian: *Dato Bonks ond Copyright: the Case Microfor v. Le Monde.* In "European Intellectual Property Review," 1985, Vol. 12, pp. 345–349.

Mignot, H.: *Banques de données et droit d'outeur.* In "La Télématique," Ghent, Ed. Story Scientia, 1985, Vol. II, p. 147.

Muñoz Contreras, José: *Posibles extremos ombiguos de las relociones contractuoles entre distribuidores, creadores y utilizodores de bases de dotos.* In "Distribución y comercialización de bases de datos." Madrid, FUINCA, 1982, pp. 149–164.

Neal, Peyton R. and Slowinski, Francis Hill: *The Chonging Law on Proprietary Protection for Computer Data Bases.* In International On–Line Information Meeting IV, London, 1980. Oxford, Learned Information, 1981, pp. 409–420.

Palmer, J.: *Copyright ond Computer Dota Bases.* In IIC 1983, Vol. I4, p. 190.

Schricker, Gerhard: *Neue Technologie, neues Urheberrecht.* In "Internationales Urheberrechts–Symposium" (International Copyright Symposium), Munich, J. Schweitzer Verlag, 1986, pp. 216–227.

Spoor, J.H.: *Banques de données et droit d'auteur.* In "Droit de l'informatique," 1984, No. 2, p. 14.

Trubkin, Loene: *The Copyright Quondory for Dato Base Publishers.* In International On–Line Information Meeting III, London, 1979. Oxford, Learned Information, 1980, pp. 25–34.

Ubertazzi, L.C.: *Copyright Protection of Computer Doto Bases in Itoly.* In I.C.C. I6, 1985, No. 6, pp. 725–733.

Ulmer, Eugen: *Copyright Problems Arising from the Computer Storage ond Retrievol of Protected Works.* In "Copyright," 1972, pp. 37–59.

— *Copyright Problems Arising from the Use of Copyright Moteriols in Automotic Informotion ond Documentation Systems.* In "Copyright," 1978, pp. 66–70.

Vivant, Michel: *Les flux tronsfrontières de données ou regard du droit européen.* In " IDATE Bulletin," 1985, 21, p. 364.

WIPO/Unesco: *Report of the Working Group on Copyright Problems Arising from the Use of Computers,* Geneva, 1979. In "Copyright," 1979, pp. I86–190.

— *Report of the Second Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creotion of Works,* Paris, 1982. In "Copyright," 1982, pp. 239–247.

Correspondence

Letter from Austria

Robert DITTRICH*

I. Legislation

1. The 1980 Amending Law introduced into Austrian copyright legislation a provision on what is known as private tape recording (paragraphs 5 to 7 of Article 42, in conjunction with the cross-references), on which I reported in detail on pages 81 *et seq.* of *Copyright* 1981. I may briefly recapitulate what was said:

(a) The new paragraph (5) of Article 42 gives the author and—as a result of the new references inserted in Articles 69(3), 74(7) and 76(4)—the owners of neighboring rights (with the exception of broadcasting organizations) a claim to equitable compensation from the person who first distributes the recording medium within the country by way of trade and for payment. It is a condition that the nature of the work be such that it is likely to be copied for personal use by recording on a video or audio medium. Additionally, it must either have been broadcast or recorded on a video or audio medium manufactured for commercial purposes. Copying for personal use is only to be expected for certain types of works, for instance for all musical works and for certain works of literature, that is to say, as things currently stand, not for dictionaries or computer programs (even if, as is my view, these are held to be protectable in principle). The possibility that other types of work may be copied in future for personal use remains open. Video and audio recording mediums are understood by the Copyright Act (Article 15(2)) as devices serving for repeated reproduction for the eye or for the ear. The claim of remuneration is on the person who first distributes by way of trade and for payment blank video and audio recording mediums suitable for such copies—known in the Law as recording material; it therefore does not extend to private importing and free distribution or to the wholesale and retail trades. The liability to pay is borne by the domestic importers or manufacturers. However, there is an important restriction in that the recording medium must be suitable for private copying. Suitability—as the commentary to the Government Bill for the 1980 Amending Law[1] expressly states—concerns not only technical feasibility, but also the economic expediency; this means that, for the moment, magnetizable recording mediums alone are concerned by this ruling; for instance, in the case of home films with a magnetic sound track, only the value of the track is taken into account. Video and audio recording mediums that are not suitable for copying for private use, such as tape cassettes for dictating machines, or are not used for that purpose, like those sold by the importer or domestic manufacturer directly to certain large-scale users such as the record industry, recording studios or the Austrian Broadcasting Organization are not covered by the proposed ruling. Any other solution would be unreasonable since the present Copyright Law already covers reproduction for purposes other than private use.

Proforma recorded mediums come within this ruling where they are "intended" to be rerecorded for private use.[2]

(b) These provisions entered into force on January 1, 1981, in respect of audio recording mediums and on July 1, 1982, for audiovisual recording mediums.

(c) Article II(6) of the 1980 Copyright Amending Law required those collecting societies that asserted the compensation claims introduced by it in respect of private rerecording on tape or simultaneous, full and unchanged rebroadcasting of foreign broadcasts to "introduce social welfare schemes for their members, insofar as they are natural persons, and for their families." Collecting societies that distribute the equitable compensation for private tape recording "shall, in doing so, pay the greater part of the remuneration towards the social welfare scheme."

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[1] 385 in the annexes to the Verbalm Minutes of the National Council, 15th Legislature, p. 13.

[2] Comments on the Government Bill for the Copyright Amendment Law 1980, p. 13.

2. The Judicial Committee of the National Council was of the opinion that the compensation should "currently" not exceed an annual ten million schillings for all earners of rights together.[3] However, it would not have been feasible to include in the Law itself a provision that the total proceeds may not exceed that amount since, indeed, the amount per item of recording medium would have to be laid down and it would only be possible to determine subsequently on the basis of sales trends whether and to what extent the original calculation of the total proceeds was correct or not. The word "currently" used in this connection cannot refer to the time the Law was adopted nor to the calendar year in which that adoption fell since the provisions did not enter into force until January 1, 1981, for audio mediums and July 1, 1982, for audiovisual mediums. In my view, the word "currently" refers to the year 1981.

In the meantime, revenue (for all owners of rights together) has grown considerably. The rounded-off amounts were:

1981	6.5 million sch. (audio portion only, since the provisions on audiovisual mediums—as already mentioned—did not come into force until July 1, 1982)
1982	13.4 million sch.—audio portion
	3.7 million sch.—video portion
1983	15.2 million sch.—audio portion
	13.4 million sch.—video portion
1984	15.2 million sch.—audio portion
	21.2 million sch.—video portion
1985	15.6 million sch.—audio portion
	34.6 million sch.—video portion
1986	8.2 million sch.—audio portion
(first 6 months)	23.0 million sch.—video portion

3. The provision in Article II(6) of the 1980 Copyright Amending Law, of which the content is given above at item 1*(c)*, has raised numerous questions, one of which has occupied and still occupies the courts, that is to say whether the total revenue in each case of an individual collecting society constitutes the basis for calculation when determining the "greater part" or only the portion concerning domestic natural persons. This situation has led to all three political parties represented in the National Council during the past legislature introducing a joint initiative, followed by a unanimous vote in the National Council. This has amended the wording of the provision quoted above as follows:

Collecting societies (paragraphs (1)[4] and (1a)[5]) may set up institutions for

(a) social purposes and

(b) cultural purposes

in respect of their beneficiaries and the members of their families.

Collecting societies that distribute equitable remuneration under paragraph (1), item 2,[6] shall set up institutions under item *(a)*, except where their beneficiaries are exclusively broadcasting organizations. Collecting societies that distribute equitable remuneration under paragraph (1), item 1,[7] shall set up institutions under items *(a)* and *(b)* and shall transfer to them the greater part of the overall revenue from such remuneration, less the relevant administrative costs.

The intention of the legislative bodies was that this new wording should simply constitute a clarification of the lawmaker's original purpose.[8] As a result, they held it to be "justified and logical" for this statutory provision to be promulgated with retroactive effect. It therefore entered into force with retroactive effect to July 23, 1980, the day on which the 1980 Copyright Amending Law had entered into force. However, this does not apply to claims in respect of which action was pending before a domestic court prior to July 1, 1986, the day on which the Judicial Committee of the National Council adopted its decision; it is a general principle of constitutional law that there should be no interference in pending actions.[9]

The report by the Judicial Committee of the National Council contains a lengthy commentary on this text, which is extensively reproduced below:

(a) The first sentence creates the statutory basis for the practice, approved by the drafters of the law on collecting societies in the commentary thereon, of setting up, within the framework of private autonomy, institutions serving social

[3] "Report and Motion" of the Judicial Committee, 922 in the annexes to the Verbatim Minutes of the National Council, 15th Legislature, p. 1.

[4] The reference to paragraph (1) means that the collecting societies covered are those that levy the equitable remuneration from what is known as private tape recording and from simultaneous, complete and unchanged retransmission of foreign broadcasts of works and of performances protected by neighboring rights, by means of cables.

[5] The reference to paragraph (1a)—only introduced in the 1986 Amending Law (see *Copyright*, February 1987, insert *Laws and Treaties*, text 1–01)—extends the provision to collecting societies that did not hitherto fall within the scope of the Law on Collecting Societies and which exploit rights in works and neighboring rights within the meaning of the Copyright Act in that they issue to users against payment the authorization required for their exploitation or assert claims other than those already referred to in the Copyright Act.

[6] The reference means that equitable remuneration from the simultaneous, complete and unchanged retransmission of foreign broadcasts and of the subject matter of neighboring rights by means of cables is concerned.

[7] The reference means that remuneration from what is known as private tape recording is concerned.

[8] Report of the Judicial Committee, 1055 in the annexes to the Verbatim Minutes of the National Council, 16th Legislature, p. 2.

[9] Report of the Judicial Committee on the Amending Law 1980, p. 5.

(and cultural) purposes in respect of the beneficiaries and their dependants. No obligation to do so is to be found in this first sentence.

(b) The Law intentionally speaks of "institutions" in order to cover not only those having separate legal personality from the collecting society, particularly subsidiary societies, but also a simple specific accounting item in the collecting society's bookkeeping, and indeed all conceivable solutions between the two.

(c) The second and third sentences, on the other hand, lay down obligations for the collecting societies. These obligations, however, are neither such as may be claimed by a member before an ordinary court or in an administrative procedure nor such as may be enforced by the threat of penal action; compliance is merely subject to supervision by the State Commissioner and his deputy and can be enforced only by the Federal Minister for Education, Art and Sport through application of the sanctions laid down in the Law on Collecting Societies. The collecting societies are given a civil law entitlement to make deductions in respect of the institutions serving social or cultural purposes; no changes to the representation contracts are necessary. It is to be assumed, as a principle, that the lawmaker has no intention of establishing provisions that are neither binding nor can be implemented.

(d) "Social purposes" may be understood as assistance to individuals in a material emergency and also as support given to all or a major part of the beneficiaries in matters of common interest. From these subcategories of social purposes there already emerges an order of priorities in the use of funds. The first priority is enjoyed in this context by the classical cases of emergency, that is to say assistance to the aged, to widows and orphans, medical insurance and aid in special emergencies such as those due to illness or accident, and in the financing of legal advice. This also includes, however, benefits such as the age shares that have been paid out by AKM *(Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger)* since 1899. Additionally included are also all those measures that provide assistance to the beneficiaries as a category, e.g. financing of test cases, contributions to representative bodies, payments to institutions that act, in accordance with their statutes, in the interests of the beneficiaries as a category, and the financing of publications that promote the economic interests of the beneficiaries represented by the collecting society. That is to say, "social purposes" in this context can and must be understood as anything liable to improve the situation of the beneficiaries.

They do not include the collecting and administrative costs of the collecting society itself, although a reduction in those costs would of course help to increase the revenue of the beneficiaries.

(e) The term "cultural purposes" covers in particular all kinds of promotion for young talents, that is to say, for instance, grants, scholarships, the arrangement of public performances and the purchase of instruments for a youth orchestra. The general purpose is to promote artistic creation in Austria within the field of activity of each individual collecting society. Support for publishing (books, notes, records and so on) culturally valuable works by Austrian authors is therefore admissible. However, in no event may subsidies to ailing enterprises be justified under the heading of "cultural purposes." As already mentioned, the execution of these cultural activities is also subject to supervision by the State Commissioner for the collecting society, who will ensure that the funds available are used in an appropriate way.

(f) Where funds are insufficient, an order of priority may be laid down. Under the second sentence, revenue from the retransmission of foreign broadcasts by means of cable obliges all approved collecting societies, with the exception of the *Verwertungsgesellschaft Rundfunk*, to set up institutions for social purposes, with the collecting society being left to decide from which source such institutions are to be funded. The exception for the *VG Rundfunk*, which already existed, is maintained only in respect of claims deriving from cable retransmission.

(g) The third sentence requires that, in the case of revenue from the levy on blank cassettes, the greater part be transferred to such institutions. Contrary to the second sentence, therefore, it is not only said that an institution has to be set up, but also with what it is to be set up. These two sentences in conjunction lead to the conclusion that a collecting society that asserts both types of the claims involved may fulfill its obligations under the second sentence if it simply transfers the greater part of its revenue from the blank cassette levy to its institutions that serve social and cultural purposes. Where a collecting society sets up institutions for social and cultural purposes, it may administer these institutions jointly.

(h) The third sentence underlines the lawmaker's aim, from the very beginning, that the revenue from the blank cassette levy should serve to finance social and cultural institutions in favor of the beneficiaries, who are nationals in the great majority of cases. It is made clear that the "greater part" is to be taken from the *overall* revenue, that is to say also from that part relating to the beneficiaries of foreign collecting societies or to foreign beneficiaries.

(i) The term *Angehörige* (members of their families or employees) is likewise not defined, but is nevertheless to be extensively interpreted in the case of both natural and legal persons. It thus refers not only to natural persons, but equally to legal persons in order that they also, or the natural persons named by them, may participate in the relevant measures taken in the social and cultural area to the extent defined, particularly in the promotion of projects or in the constitution of funds for promoting projects. It is thus possible to assist the proprietor of a one-man enterprise just as it is possible to introduce a system whereby legal persons may name one or more natural persons who may receive money from the institutions that serve social or cultural purposes.

4. Basically, the following additional changes were made:

(a) The practical field of application of the Law on Collecting Societies—as already implicitly mentioned in footnote 5 in a somewhat simplified manner—was extended to all enterprises that

...collectively

1. exploit rights in works and neighboring rights within the meaning of the Copyright Act, in that they issue to users against payment the authorizations required for their exploitation, or

2. assert claims under the Copyright Act.

(b) All collecting societies (and their "institutions") are exempted from all taxation governed by federal law in respect of revenue, profit and assets when acting within the framework of the Law on Collecting Societies. It has also been specified that gifts and donations made by the collecting societies (or their institutions) for the social and cultural purposes referred to in Article II(6) of the Copyright Amending Law 1980 are exempted from taxation on gifts.[10]

[10] *Ibid.*, pp. 3 *et seq.*

5. All the associations and organizations representing the interests of owners of rights stated in writing to the Federal Minister for Justice, as part of the preparatory work, that they held the tabled legislation to be in their interest and expressed their support.[11]

II. Case Law

Case law in respect of the Austrian Copyright Act has undergone considerable development during the past few years. Numerous important points of law, which are also of interest for non–Austrian copyright specialists, have been decided by the Supreme Court.

1. The concept of a work

(a) An "intellectual production" as referred to in Article 1 of the Copyright Act is to be understood as the result, perceivable to the outside world, of giving shape to a specific conceptual matter; fortuitous products, that is to say those that do not derive from human activity directed at giving shape to matter, are therefore not protected.[12]

(b) Whether the result of such shaping serves for edification, instruction, entertainment or advertising or whether its creator has produced it for the simple pleasure of creating, without any specific purpose, is of no consequence. The concept of a work is neutral with regard to purpose.[13]

(c) The degree of aesthetic, artistic or scientific value is without significance from a legal point of view. Copyright protection is also afforded to a bad novel, a scientific treatise that contains untenable propositions or indeed works of literature that are crude, in bad taste, repulsive, disgusting or which contain perversions.[14]

(d) The protected elements of a work of literature comprise not only the concept (sequence of ideas and the order of their execution) and the wording but also the fable springing from the writer's fantasy.[15]

(e) Originality is what is lacking in an "everyday product," that is to say an object that anyone could just as well put together. The individual, original production must therefore distinguish itself from that which is everyday, ordinary and commonplace.[16] Individuality means that personal characteristics are apparent in the creation of the work. Lectures and speeches differ from remarks made in a conversation in their linguistic form or in the processing of the ideas just as literary treatises differ from everyday correspondence.[17]

(f) The above also applies, particularly, to diaries. Unseen, it is not possible to assume that a diary, even of a well–known author, is a work.[18]

(g) "Statistical uniqueness," as introduced by Kummer as a significant characteristic of a work eligible for copyright protection, cannot be applied as a criterion for protection independently of the individuality of the work. Even if the laws of probability say that, for instance, a sequence of 70 words cannot be written in the same way by two different authors, copyright protection can nevertheless only be afforded such a text if it contains individual, original features. In each individual case, the actual text must constitute the basis of examination, and not statistical principles, to determine whether the result of human creation consisting of words has an individual nature and is thus a work of literature.[19]

(h) The method of creation is not protected; likewise, new modes of creation, such as plays for radio or television, are not protected. Thus, inventions, teachings, methods and systems cannot constitute works.[20]

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[11] Report of the Judicial Committee on the Amending Law 1986, p. 2.

[12] Supreme Court, March 2, 1982, *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht* (ÖBl), 1982, p. 164 = Decisions of the Austrian Supreme Court in civil (and administration of justice) matters (SZ), Vol. 55, No. 25 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 86 (Dittrich, in agreement).

[13] Supreme Court, May 30, 1972, ÖBl 1972, p. 157 = *Juristische Blätter* (JBL), 1973, p. 41 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 59 = *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler und Auslandsteil* (GRUR Int.), 1973, p. 204; Supreme Court, March 2, 1982, ÖBl 1982, p. 164 = SZ Vol. 55, No. 25 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 86; Supreme Court, July 10, 1984, ÖBl 1985, p. 24 = GRUR Int. 1985, p. 684.

[14] Supreme Court, March 2, 1982, ÖBl 1982, p. 164 = SZ Vol. 55, No. 25 (Pfersmann, in agreement, in *Österreichische Juristen Zeitung*, 1986, p. 33 at J(b)) = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 86.

[15] Supreme Court, March 2, 1982, ÖBl 1982, p. 164 = SZ Vol. 55, No. 25 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 86; Supreme Court, May 12, 1983, ÖBl 1983, p. 173 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 91.

[16] Supreme Court, March 2, 1982, ÖBl 1982, p. 164 = SZ Vol. 55, No. 25 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 86; *inter alia*.

[17] Supreme Court, December 10, 1985, ÖBl 1986, p. 27 = *Medien und Recht* (MR), 1986, Vol. 2, p. 20 (Walter, critically) = *Evidenzblatt der Rechtsmittelentscheidungen* (EvBl), 1986, No. 120 = GRUR Int. 1986, p. 486.

[18] Supreme Court, December 10, 1985, ÖBl 1986, p. 27; = MR 1986, No. 2, p. 20 (Walter, critically) = EvBl 1986, No. 120 = GRUR Int. 1986, p. 486.

[19] Supreme Court, December 10, 1985, ÖBl 1986, p. 27 = MR 1986, Vol. 2, p. 20 (Walter, critically) = EvBl 1986, No. 120 = GRUR Int. 1986, p. 486.

[20] Supreme Court, June 29, 1982, ÖBl 1983, p. 59 = SZ Vol. 55, No. 92 = GRUR Int. 1983, p. 310; *Archiv für Urheber–, Film–, Funk– und Theaterrecht* (UFITA), 1983, Vol. 96, p. 340 = Schulze, *Rechtsprechung zum Urheberrecht*, Ausland Österreich No. 88.

(i) A new technical solution is not eligible for copyright protection. The question whether a work combines both technology and art, thus constituting a work of art within the meaning of the Copyright Act, can only be answered by ascertaining to what extent the elements of form that are used are technical requirements and to what extent they have been chosen for reasons of taste, beauty or aesthetics. That is to say, it must be decided whether the form is to be attributed to the technician or to the artist. The choice of a cubic form for a tubular steel chair without back legs, fabricated from a single length of tubing, does not suffice alone to recognize the chair as a work of art; the geometric form in itself is indeed common property.

Where the aim is to produce a perfect utilitarian form, which is always obtained when the designer or development engineer works logically and precisely, priority is then naturally given to a technically and functionally determined design. The numerous other possibilities for a special aesthetic shape beyond the application of technical principles are greatly restricted by the austere shape which the creator has wittingly imposed on himself. A school of art which intentionally rejects all those elements of design that do not derive from function automatically has available less aesthetic possibilities of shape than do other schools. However, the fewer design possibilities that are open to him, the less the creator's individuality can be incorporated in a work and its protection therefore becomes weaker.

In the particular case in point—concerning a chair by Mart Stam, that is described in a number of relevant works on applied art and in encyclopaedias—measurements have shown that it comprised a great number of deviations from strict geometrical precision: for instance, the angle of the backrest, the length of the runners and various other elements. In architecture, which frequently employs the basic geometric forms, such deviations are quite the order of the day. They are indeed necessary to enhance the expression of such basic geometric forms and thus make them perceivable and lend them extra effect. The laws of proportion in all styles of construction contain many studies of this aspect. It was not the technical solution that caused excitement when the work was first shown, but the aesthetic principle. The court therefore quite rightly held that it was protected by copyright.[21]

(j) Whether a work falls within Article 1 of the Copyright Act may generally be assessed on the circumstances prevailing at the time of its creation. However, when answering the question whether a new product constitutes a prohibited reproduction of a work of applied art, the developments that have taken place since that time may also be of significance.[22]

(k) Works of commercial art which satisfy the requirements of Article 1(1) of the Copyright Act may also claim copyright protection in addition to protection as industrial designs. Likewise, one and the same utilitarian article may enjoy both protection as a work of art under copyright and patent protection.[23]

2. The concept of broadcasting and of communication to the public

(a) Article 17(1) of the Copyright Act affords the author an exclusive right to "broadcast the work by radio or any similar method." A broadcast is

> ...any activity by means of which the delivery or performance of a work of literature, of music or cinematography or a work of the visual arts, is made perceivable by means of electromagnetic waves to anyone within the range of those waves using suitable reception equipment. Whether or not the broadcast is in fact received plays of course no part; it suffices that the possibility of so doing has been given.[24]

According to Article 17(2) of the Copyright Act there is assimilation to a broadcast if the work is made perceivable to the "national public" from a location in Austria or abroad in a way similar to broadcasting but with the aid of cables. Under Article 59a(1) of the Copyright Act foreign broadcasts of works may be used for simultaneous retransmission, complete and unchanged, by means of cables; however, equitable remuneration is due to the author. It follows from this provision that rebroadcasting (by means of wires) must have been preceded by an "upstream" broadcast which is used for the retransmission. In the Sky Channel case, the program is in fact put together by the British firm of Satellite TV Ltd (SATV) by acquiring ready-made tapes—mostly of American origin. The program is then transmitted by means of automatically controlled tape machines located in London via cable to the Post Office Tower in London. Once the signals have been encoded—to prevent unauthorized reception of the program—they are beamed by means of radio waves to the European Communications Satellite (ECS) 1 in geostationary orbit at a distance of some 36,000 kilometers above the equator. From this satellite, which is basically aimed at central Europe, the signals are received by the European postal administrations and other authorized undertakings—but exclusively the Post and Telegraph Directorate in Austria—in possession of a decoder.

[21] Supreme Court, July 10, 1984, ÖBl 1985, p. 24 = GRUR Int. 1985, p. 684.

[22] See footnote 21.

[23] See footnote 21.

[24] Comments on the original Act, reproduced in Peter, *Das österreichische Urheberrecht*, p. 512.

After decoding, the Post and Telegraph Directorate in Vienna transmits the signals to the defendants which then feed them into the cable network which they operate. It would be technically feasible for an individual to receive the encoded Sky Channel program signals, using appropriately dimensioned aerials, and to convert them into images and sounds using a decoder provided by SATV. This is the way in which the Sky Channel program is received via ECS 1 in Britain itself and then, after decoding is fed integrally—that is to say simultaneously, unchanged and complete—into the cable network.

In the case in point, the prerequisite of an "upstream" broadcast is not met since the program compiled by SATV is transmitted to ECS 1 without it having been previously made perceivable to the "public." From a copyright point of view, therefore, the originating cable installations perform an act of "broadcasting" and not of "rebroadcasting." Therefore, the statutory license under Article 59a of the Copyright Act does not apply.[25]

In my view, it would be pure speculation to interpret this decision as a precedent for other types of cases.

(b) Article 17(1) of the Copyright Act affords to the author—as already mentioned—the exclusive right to broadcast the work by radio or any similar method (e.g. using laser or gamma rays). The "publicness" of such reproduction of a work is not explicitly mentioned in Article 17(1) of the Copyright Act. Nonetheless, the effect of the Article is that acts of broadcasting are public by definition and that wireless broadcasts are aimed at every person, within the range of the carrier waves, who makes use of the corresponding receiving apparatus. In the case of the dissemination of works by means of wire, placed on the same footing by Article 17(2) of the Copyright Act, the transmission of a work is, by definition, not unrestricted as in wireless broadcasting. Apart from that difference, however, broadcasting by wire in its successive typical forms (theaterphone, cable radio, and now cable television) also addresses an "extended" public. The public nature of delivery, performance and exhibition based on Article 18 of the Copyright Act is altogether inapplicable for making a distinction between copyrighted broadcasts by wire and acts not subject to copyright, such as simple reception by means of cables. This is why the Supreme Court has attempted to obtain a differentiation by using a different concept of publicness: public nature is given in those cases where there exists the possibility of connecting a receiver for a circle of persons in no way determined beforehand and not connected with each other by any private or personal relationships or by physical vicinity.

The public nature of wired broadcasting depends not only on the presence of a multiplicity of reception installations but also on the area involved. The fact that a work may be perceived by the public in a way similar to broadcasting, from a location situated in Austria or abroad, but with the help of cables, must be interpreted with due consideration to its inherent context, based on the understanding of the notion of broadcasting. The past lawmaker had in mind the fact that, prior to the advent of wireless broadcasting, various European cities already possessed installations by means of which subscribers could receive opera and concert performances over the telephone network (known as "theaterphone"). "Such transmissions"—as is said literally in the explanatory comments[26]—"are similar to broadcasting since they enable each user of a connected receiving installation to hear the performance diffused by means of the telephone wires." This similarity justifies such systems being put on the same copyright footing as radio. The past lawmaker therefore had the image of a "network of reception installations"[27] whose broad effect was comparable with that of radio. The fact that Article 17(2) of the Copyright Act speaks of a work being made perceivable from a location in Austria or abroad (!) supports the idea that it is not only the multiplicity of receiving installations that counts but also the fact that the geographical area of coverage is not too narrow. The lawmaker has therefore obviously not thought of reception in individual, large buildings, despite the fact that a hospital complex, for instance, is quite comparable with a local community. The similarity between broadcasting and radio by wire referred to by the legislator is therefore to be found not (only) in the fact that reception takes place within the private sphere and better reception is possible for every user of a connected receiving installation, but above all in the fact that wired radio is also intended for a broad public (with a certain geographical area of coverage).

A further argument in favor of a specific concept of publicness in broadcasting law is constituted by the need to distinguish between the right of broadcasting and the use of a broadcast for public repro-

[25] Supreme Court, February 4, 1986, ÖBl 1986, p. 53 = MR 1986, Vol. 2, p. 16 (Korn, in agreement; Waller, in agreement) = EvBl 1986, No. 370 = JBl 1986, p. 320 = *Recht der Wirtschaft* (RdW), 1986, p. 177 = GRUR Int. 1986, p. 464 = *Zeitschrift für Urheber- und Medienrecht* (ZUM), 1986, p. 285 (first-instance decision published in MR 1985, Vol. 3, Archiv, p. 14 = ZUM 1985, p. 331; second-instance decision published in MR 1985, Vol. 2, Archiv, p. 14 (Korn)) = ZUM 1985, p. 566 = GRUR Int. 1985, p. 690.

[26] Reproduced in Peter, *op.cit.*, pp. 512 *et seq.*

[27] Taken from Dittrich, "Hotel-Video aus urheberrechtlicher Sicht," *Rundfunkrecht*, 1984, p. 30.

duction of a broadcast work by means of loudspeakers or other technical devices, as well as the public reproduction, by such means, of the delivery, performance or exhibition of a work in a place other than that (theater, hall, square, garden or the like) in which they occur (Article 18(3) of the Copyright Act). The fact that the author must give his consent not only to the broadcast, but also to its public reproduction by means of loudspeakers (or other technical devices) can only be derived from a differing concept of publicness in Articles 17 and 18 of the Copyright Act. The legislator obviously assumed that the public reproduction of a broadcast by means of loudspeakers, and so on, reached a further circle of listeners or viewers (beyond that to which the work had been made accessible by the broadcast itself) for which special remuneration had to be paid to the author.

However, if the right of broadcasting by wire demands the perceivability of a work for a "broad public" as in a geographical area of coverage that extends beyond individual buildings or connected groups of buildings, then the transmission of video films from a hotel facility to the individual rooms in the hotel is not subject to the right of broadcasting by wire that is the preserve of the author; a differentiation of the concept of broadcasting by wire depending on the source of the program cannot be entertained since Article 17(2) of the Copyright Act makes no difference between original and retransmitted wire broadcasts. The latter are simply subjected, in part, to a special ruling in Article 17(3) of the Copyright Act.[28]

(c) According to the opinion of the Supreme Court, however, the transmission of (film) works from a central hotel video facility over wires to the rooms occupied by the hotel guests constitutes a public performance within the meaning of Article 18 of the Copyright Act. For reproduction to be public within the meaning of Article 18 of the Copyright Act it suffices for it to be intended for a multiplicity of persons the circle of which is not specifically defined and who are not connected by mutual relationships or by personal relationships to the organizer, and in cases of doubt exceptions to the author's exclusive right of performance are to be interpreted restrictively. In the case in point, the circle of persons to which the performances were addressed was basically defined—if one disregards the visitors whom hotel guests receive in their rooms and who cannot be verified, although according to the plaintiffs such persons played a considerable part in the consumption of video films. However, as a rule, reciprocal personal relationships between the hotel guests are lacking and therefore a further question must be asked as to whether the spatial dispersion of the consumers of the works, which is typical of the right of broadcasting, but not however of the right of performance, may oppose the assumption of public performance which would doubtlessly exist if the video films were shown in community rooms within a hotel accessible to all or even to hotel guests only.

In order to achieve its objective of affording authors the exclusive exploitation of their works within the limits set out by their interests which are worthy of protection, copyright law addresses not the enjoyment of the works (consumption of works), which extensively takes place (particularly in the case of broadcasts) in the private sphere, but the communication of works (copying and dissemination, broadcasting, public reproduction). It therefore affords the author no direct claim against the user (consumer) of the work, but only against the exploiter (mostly commercial) of the work who then charges the remuneration due to the author to the consumers through the fees that they pay (purchase price, admission, radio license, etc.). The modes of exploitation reserved to the author by copyright law therefore constitute nothing more than a cascade system which indirectly reaches the final consumer. This means that the author's remuneration charged to the final consumer in respect of the enjoyment of the work by a large circle of persons is not contained in the selling price of the copy. The commercial acquisition of a copy gives no entitlement to perform a work publicly with the aid of that copy. The concept of publicness under Article 18 of the Copyright Act is also to be viewed in that context of logic. The criteria it contains are intended to define the circle of persons in respect of which the author has already received remuneration. Where such is not the case, a public reproduction is involved. If these relationships between communication of a work and remuneration of the author are taken as a basis, then the spatial commonality of the circle of persons to whom enjoyment of the work is afforded does not play a decisive part in the concept of "public performance" within the meaning of Article 18 of the Copyright Act. This apparent additional element has arisen only as a result of the fact that the direct perception of typical categories of works (works of literature, dramatic works, musical works) by a multiplicity of persons requires as a rule that an audience be assembled in one and the same place and it is only since the advent of today's recording and transmission mediums—Article 18(2) of the Copyright Act speaks of "recordings of images or

[28] Supreme Court, June 17, 1986, ÖBl 1986, p. 132 = MR 1986, Vol. 4, p. 20 (Walter, critically) = JBl 1986, p. 655 (Scolik) = RdW 1986, p. 340 (summary only, with note by Holeschofsky) = GRUR Int. 1986, p. 728 (Hodik), second-instance decision published in MR 1986, Vol. 1, p. 21; first-instance decision published in MR 1985, Vol. 3, Archiv, p. 12.

sounds"—that indirect performance has become possible. Although the audience is still, in most cases, assembled in one place, this sbould not obscure the fact that it is the public nature of access to the work and not access to the common locatioo that is of importaoce. If the communication of the work to a circle of persons is not specifically defined and not linked by reciprocal personal relatiooships that is tbe decisive element, theo the fact that the individual hotel guest enjoys the work io a private sphere in oo way cbanges the public nature of the reproduction. A dissective interpretation, whicb views eojoyment of the work by the individual hotel guest in his own room as tbe essential element, diverts attentioo from the fact tbat a work is simultaneously communicated, that is to say made perceivable, to a multiplicity of hotel guests, wbo certainly constitute a public circle of persons, and it makes oo differeoce theo whether the individual hotel guest makes use or oot of the possibility offered to him to enjoy tbe work.[29]

(d) This legal view does not mean that the transmission of radio broadcasts by means of a broadcasting relay system—whicb does not constitute a new broadcast uoder Article 17(3)(1) of the Copyright Act—is now to be beld a public performance within the meaning of Article 18 of the Copyright Act, sioce the esseotial element is the composition of a circle of persons to whom a work is made perceivable and not the fact that the work is enjoyed at a common location. Since tbe purpose of Articles 17 and 18 of the Copyright Act is to cover all stages in the exploitatioo of a copyrighted work by broadcasting (by wire) and by the use of a broadcast for public reproductioo, the decisive factor for the public oature of tbe reproduction under Article 18 of the Copyright Act is the fact that the work is made perceivable to ao additional circle of listeoers or viewers beyond that circle of persons typically reached in the private spbere by direct reception; the remuneration obtained by the author for grantiog tbe right of broadcasting does not cover the additional communication of the work. Therefore, if the work is made available to an additiooal circle of persons, tbe author can then require remuneration irrespective of the fact whether enjoyment of the work by the additional circle of recipieots takes place in the private sphere or in a commoo locatioo (e.g. in those places referred to by Article 18(3) of the Copyright Act). Applying these principles, the transmission of broadcasts by means of a broadcasting relay system is not subject to Article 18 of the Copyright Act sioce it does not reacb a new circle of listeners or viewers, but simply facilitates reception of the broadcast for the circle already taken into account when paying remuneration for the right of broadcasting. That is indeed why the lawmaker did not hold the retransmission of a broadcast by means of a relay system towards its subsidiary installations as a new broadcast or as an act of exploitation involving copyright. The transmission of (film) works from a central hotel video installation via cable to the individual hotel rooms, oo the other hand, nevertheless constitutes public reproduction within the meaning of Article 18(1) of the Copyright Act.[30]

3. Transfer of the author's moral rights

According to Article 23(3) of the Copyright Act, copyright is inalienable, except for the cases referred to in Article 23(1) and (2). However, under Article 24 of the Copyright Act, the autbor may permit others to use the work in one or more of the exploitation modes reserved to him by Articles 14 to 18 (license to use); he may also grant someone else the exclusive right to perform such acts (right to use). License to use and right to use thus extend, according to the wording of the law, only to those modes of exploitation referred to io Articles 14 to 18 of the Copyright Act, but not to the rights under Articles 19 to 21, which govern the protectioo of tbe author's moral interests. The task of a collecting society is to grant in its own name to interested parties licenses to use oo the basis of the exclusive right to use transferred to them by the authors, to supervise those uses, to collect the relevant fees in trust for the authors and to take action against any infringements of copyright. The basis for the legal relationships between the authors and the collecting societies is, as a rule, a *sui generis* contractual relatiooship in respect of the administration and utilization of the exploitation rights, known as a "represeotation cootract." However, in order to carry out this task the collecting societies must also be entitled to administer as appropriate those rights that protect tbe moral interests of the authors when they grant licenses to use. The administration of the rights under Articles 19 to 21 of the Copyright Act tbat serve to protect the moral interests of tbe authors is, in any event, assignable to the collecting societies in those cases where they are necessary for the efficient exercise of tbe assigned utilization rights.

As far as the designation of the autbor in accordance with Article 20 of the Copyright Act is concemed, the collecting societies may only grant liceoses to use under the designatioo that bas been specified by the author. The designation of author in no way constitutes a separable part of the utilization contract. It is directly related to the exploitation

[29] See footnote 28.

[30] See footnote 28.

right that has been assigned and the collecting societies must therefore be entitled to act against infringements in their own name. Thus, for instance, action in respect of such infringements does not constitute the exercise of an assigned right to take legal action without the existence of substantive legal relationships, which is unknown in Austrian law; the chosen designation of author in fact constitutes a part of the rights to use afforded by the author to the collecting society.[31]

III. Collective Agreements

The Arbitration Board of the Federal Ministry of Justice has laid down in an Order of August 6, 1982,[32] that the remuneration for all claims of all persons entitled to remuneration for the simultaneous, complete and unchanged retransmission of foreign broadcasts by means of cables in accordance with Article 59a of the Copyright Act shall be three schillings per participant and month, plus turnover tax, with effect from April 5, 1982. This Order was rescinded as of January 1, 1984, following the conclusion of a collective agreement.[33] The collective agreement is worded as follows[34]:

Collective Agreement
Under Articles 6 et seq.
of the Law on Collecting Societies
BGBl. No. 1936/112

Concluded between each of the collecting societies named below, on the one hand, and the Federal Chamber of Commerce, Federal Section for Trade, General Association for Trade, bereinafter referred to as "the Association," on the other:

1. Verwertungsgesellschaft Rundfunk (VG–Rundfunk).
2. Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (AKM) reg. GenmbH.
3. Staatlich genebmigte literarische Verwertungsgsellschaft (LVG) reg. GenmbH.
4. Literar–Mechana Wahrnehmungsgesellschaft für Urheberrechte Gesellschaft m.b.H.
5. Verwertungsgesellschaft Bildender Künstler Österreichs (VBK).
6. Verwertungsgesellschaft Audiovisuelle Medien (VAM).
7. LSG Wahrnehmung von Leistungsschutzrechten Gesellschaft m.b.H.
8. OESTIG—Österreichische Interpretengesellschaft.

The purpose of this collective agreement is to regulate the amount and distribution of remuneration to be paid by persons who currently or in future retransmit foreign broadcasts (television and/or radio) to subscribers within the meaning of Articles 17 and 59a of the Copyright Act and, in conjunction therewith, under Articles 57(2), 74(7), 76(6) and 76a(5) of the Copyright Act, to persons entitled under Article 59a of the Copyright Act and, in conjunction therewith, Articles 67(2), 74(7), 76(6) and 76a(5) of the Copyright Act.

The remuneration for tbe retransmission of foreign broadcasts within the meaning of Article 59a of the Copyright Act, which are not transmitted by satellite, shall be for each subscriber and for each month:

VG–Rundfunk	3,1902 S
AKM	1,9266 S
LVG	0,1794 S
Literar–Mechana	1,0764 S
VBK	0,0624 S
VAM	0,9126 S
LSG	0,3276 S
OESTIG	0,1248 S
	7,80 S

The above-mentioned amounts of remuneration shall be subject for the year 1984 to a reduction of 25%, for the year 1985 to a reduction of 17% and for the year 1986 to a reduction of 8%, whereby the following amounts in schillings shall apply in the event of disparity in the calculation:

	1984	1985	1986
VG–Rundfunk	2,39265	2,6585	2,9448
AKM	1,44495	1,6055	1,7784
LVG	0,13455	0,1495	0,1656
Literar–Mechana	0,8073	0,8970	0,9936
VBK	0,0468	0,052	0,0576
VAM	0,68445	0,7605	0,8424
LSG	0,2457	0.273	0,3024
OESTIG	0,0936	0,104	0,1152
	5,85	6,50	7,20

All the above-mentioned amounts shall be subject to a turnover tax.

The value of all the above-mentioned amounts shall be guaranteed in accordance with the consumer price index 1976 (first comparative month: January 1984).

The text of the collective agreement shall be available for inspection to each of the contracting parties; copies may also be obtained.

Vienna, December 7, 1984.

(WIPO translation)

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[31] Supreme Court, July 1, 1986, ÖBl 1986, p. 162 = MR 1986, Vol. 5, p. 14 (Walter) = JBl 1986, p. 780.

[32] *Wiener Zeitung* of October 14, 1982 (printing error corrigendum in *Wiener Zeitung* of December 2, 1982) = *Rundfunkrecht*, 1983, p. 19; UFITA 1984, Vol. 98, p. 150 (with a note in respect of claims under Article 76(3) of the Copyright Act).

[33] Promulgation on January 24, 1985, in *Wiener Zeitung* of February 1, 1985.

[34] *Wiener Zeitung* of December 13, 1984.

Activities of Other Organizations

International Literary and Artistic Association (ALAI)

Executive Committee

(Paris, January 24, 1987)

The Executive Committee of the International Literary and Artistic Association (ALAI) met on January 24, 1987, in the Conference Room of the SNAC *(Syndicat national des auteurs et compositeurs)* in Paris, under the chairmanship of Professor Georges Koumantos (Greece), President of ALAI. WIPO was represented by Mr. Henry Olsson, Director, Copyright and Public Information Department. The Committee took note of reports on past and planned activities of ALAI and discussed various questions related to those subjects. Furthermore, the Committee discussed the copyright questions contained in the draft Directive "The Community's Broadcasting Policy," which the Commission of the European Communities had submitted to the Council of Ministers on April 30, 1986. As a result of the discussion, the Executive Commitee adopted the following resolution:

Resolution

The Executive Committee of ALAI,

Having examined the draft EEC Directive of April 30, 1986, relating to the Green Paper "Television Without Frontiers,"

Recalling that it has already taken a stand concerning the Green Paper at its meeting of January 12, 1985,

Without prejudice to the questions arising from the quantitative and qualitative limitations provided for in the draft Directive,

Notes with satisfaction that the above-mentioned draft gives preference to contractual solutions,

Suggests that every regulation, even in the form of a recommendation, of transmission by cable of broadcast programs should be deferred so as to permit not only a more in-depth study of the problems in question but also a more far-reaching concertation between the interested parties within the Common Market with a view to arriving at contractual solutions,

Considers that the Belgian and Dutch examples prove that such solutions are practicable and that a system of non-voluntary licenses is not indispensable in the field of cable television,

Recommends consequently the deletion from the draft Directive of all recourse to a non-voluntary license,

Suggests that the Community authorities revert to the solution that they have themselves envisaged as an alternative in the Green Paper, which consists in providing, in order to facilitate the conclusion of contracts by cable transmission enterprises, that the authors' right to authorize cable transmission of their works could be exercised only through collecting societies grouping authors.

Books and Articles

Book Review

Merchandising and Sponsorship in the Music Business. One volume of 120 pages. Maklu Publishers, Apeldoorn – Antwerp, 1986.

Limitation of Free Bargaining and Sanctity of Contracts with Performing Artists and Composers. One volume of 121 pages. Maklu Publishers, Apeldoorn – Antwerp, 1987.

Organized since 1977 within the framework of MIDEM *(Marché international du disque et de l'édition musicale)* in Cannes, the meetings of the International Association of Entertainment Lawyers (IAEL) provide a platform for discussions and exchange of views on current legal problems related to the music business. They give specialized copyright and entertainment lawyers from all parts of the world an opportunity to be kept informed of new legal developments, such as new legislation or recent case law in various countries.

The meetings take place in January and last for one day. In 1986, the topic covered was "Merchandising and Sponsorship in the Music Business"; in 1987, the subject was "Limitation of Free Bargaining and Sanctity of Contracts with Performing Artists and Composers." After each meeting, a book is published, containing reports presented at the meeting by legal practitioners or experts in copyright and entertainment law.

The reports in 1986 were written by specialists from the United States of America (Lee Phillips and Michael Sukin), the United Kingdom (Julian Turton), Canada (Richard Hahn), the Federal Republic of Germany (Günther Poll), Benelux (Jules Stuyck) and France (Olivier Carmet and Brian Lewis). In 1987, the reports were prepared by specialists from the United States of America (Alvin Deutsch and Michael Sukin), the United Kingdom (David Lester), France (André Schmidt and Louis Bernard Buchman), the Federal Republic of Germany (Udo Freiherr von Stein) and the Netherlands (Reinier de Jonge and Arend Jan van der Marel). The editor of both volumes was David Peeperkorn (Netherlands, Chairman of IAEL) who also published in the 1986 volume a "General View" and in the 1987 volume a "General Report," a kind of introduction to and summary of the reports.

With regard to the first meeting, dealing with merchandising and sponsorship in the music business, the reports offer interesting and practical information which may be useful in the day–to–day running of business within the merchandising field. The reports also attempt to define the meaning of merchandising.

In addition, the reports for this meeting deal with five major specific subject matters. The first report discusses the "right of publicity," the second concentrates on the right to privacy and the right "to license publicly recognizable properties," the third analyzes the classical means of protection offered by copyright, the fourth deals with laws of trademark and service marks and finally, the fifth discusses various actions based on "passing off" and on unfair competition.

As far as the meeting of 1987 is concerned, the reports have adopted a more general approach, insofar as they deal with the validity and enforceability of contracts with artists, and the implications of the failure of such contracts. All the reports stress the importance of free negotiations which is a basic principle prevailing in national laws analyzed by them. The general report gives a summary of the various approaches and solutions outlined by the speakers at the meeting.

Both publications illustrate well that the annual IAEL meetings at MIDEM provide a good opportunity for participants to compare national legislation and practice. The meetings can thus contribute to the solution of a number of legal and practical problems in this important field full of ever new copyright and neighboring rights questions.

P.C.M.

Calendar of Meetings

WIPO Meetings

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

1987

June 4 and 5 (Ithaca) — Symposium on the Protection of Biotechnological Inventions

June 11 to 19 (Washington) — Permanent Committee on Patent Information (PCPI): Working Groops on Special Questions and on Planning

June 15 and 16 (Geneva) — Symposium on Effective Protection of Industrial Property Rights

June 22 to 26 (Geneva) — Madrid Union: Working Group on Links Between the Madrid Agreement and the Proposed (European) Community Trade Mark

June 22 to 30 (Geneva) — Berne Union: Executive Committee (Extraordinary Session) (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

June 29 to July 3 (Geneva) — Committee of Experts on Biotechnological Inventions and Industrial Property (Third Session)

July 1 to 3 (Geneva) — Rome Convention: Intergovernmental Committee (Ordinary Session) (convened jointly with ILO and Unesco)

September 2 to 4 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Patent Information for Developing Countries

September 7 to 11 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

September 14 to 19 and 22 (Geneva) — Consultative Meeting on the Revision of the Paris Convention (Fourth Session)

September 21 to 30 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Bodapest, TRT, Vienna and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union): Ordinary Sessions

October 5 to 9 (Geneva) — Committee of Governmental Experts on Works of Applied Art (convened jointly with Unesco)

November 2 to 6 (Geneva) — Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Fourth Session)

November 23 to December 4 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information

December 3 and 4 (Geneva) — Joint Unesco–WIPO Consultative Committee on the Access by Developing Coontries to Works Protected by Copyright (convened jointly with Unesco)

December 7 to 11 (Geneva) — Committee of Governmental Experts on the Printed Word (convened jointly with Unesco)

UPOV Meetings

1987

June 2 to 4 (Bamberg) — Technical Working Party for Vegetables

June 10 to 12 (Copenhagen) — Technical Working Party on Automation and Compoter Programs

June 17 and 18 (Geneva) — Administrative and Legal Committee

Jone 23 to 25 (Geneva) — Technical Working Party for Agricultural Crops

October 13 and 14 (Geneva) — Technical Committee

October 15 and 16 (Geneva) — Administrative and Legal Committee

October 17 (Geneva) — Subgroup on Biotechnology

October 19 (Geneva) — Consultative Committee

October 20 and 23 (Geneva) — Council

October 21 and 22 (Geneva) — Meeting with International Organizations

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

Non-Governmental Organizations

1987

June 1 and 2 (Sorrento) — International Literary and Artistic Association (ALAI): Study Session

July 20 to 22 (Cambridge) — International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting

1988

June 12 to 17 (London) — International Publishers Association (IPA): Congress