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# Copyright

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## Notifications Concerning Treaties

### Rome Convention

#### Ratification

#### FRANCE

The Secretary-General of the United Nations, in a letter dated May 27, 1987, informed the Director General of the World Intellectual Property Organization that the Government of France deposited, on April 3, 1987, its instrument of ratification of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), done at Rome on October 26, 1961.

The instrument of ratification contains the following reservations:

*(Original: French)*

*Article 5.* The Government of the French Republic declares, in conformity with Article 5, paragraph 3 of the Con-

vention, concerning the protection of phonograms, that it rejects the criterion of first publication in favor of the criterion of first fixation.

*Article 12.* The Government of the French Republic declares, first, that it will not apply the provisions of this Article to all phonograms the producer of which is not a national of a Contracting State, in conformity with the provisions of Article 16, paragraph 1(a)(iii) of this Convention.

Secondly, the Government of the French Republic declares that, with regard to phonograms the producer of which is a national of another Contracting State, it will limit the extent and duration of the protection provided in this Article (Article 12), to those which the latter Contracting State grants to phonograms first fixed by French nationals.

In accordance with Article 25.2, the Convention will enter into force, with respect to France, on July 3, 1987.

## WIPO Meetings

### Dramatic, Choreographic and Musical Works

#### Preparatory Document for and Report of the WIPO/Unesco Committee of Governmental Experts

(Paris, May 11 to 15, 1987)

*Editor's Note.* What is published in the following on this Committee of Experts consists of the text of the preparatory document (hereinafter referred to as "the memorandum of the Secretariats") that the International Bureau of WIPO and the Secretariat of Unesco have prepared for the Committee of Experts and the report on the discussions and conclusions of the Committee of Experts (hereinafter referred to as "the report of the Committee of Experts").

The memorandum of the Secretariats is printed in Roman characters (the "principles" in bold type), whereas the report of the Committee of Experts is printed in italics.

The memorandum of the Secretariats was published on March 6, 1987, under the title "Questions

Concerning the Protection of Copyright and the Rights of Performers in Respect of Dramatic, Choreographic and Musical Works"; it has the document number UNESCO/WIPO/CGE/DCM/3.

The report of the Committee of Experts was adopted by the Committee of Experts on May 15, 1987; it has the document number UNESCO WIPO/CGE/DCM/4.

The paragraphs in both documents have numbers. Each paragraph number of the report of the Committee of Experts is, in the following, preceded by the word "Report," so as to make the distinction between the two sets of paragraphs easier.

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## I. INTRODUCTION

1. The Committee of Governmental Experts for which the present document has been prepared is being convened by virtue of decisions made by the Governing Bodies of Unesco and WIPO responsible for establishing the programs of the two organizations (see in particular, as far as Unesco is concerned, Approved Programme and Budget for 1986-1987 (23 C/5 Approved), paragraph 15115, and as far as WIPO is concerned, document AB/XVI/2; Annex A, items PRG.04(7) and (8) and document AB/XVI/23, paragraph 105).

2. Those decisions provide for a new approach regarding copyright questions of topical interest in the 1986-1987 biennium. Whereas the discussions in the 1984-1985 biennium concentrated on the *new uses* (mainly, cable television, private copying, rental and lending, direct broadcast satellites) affecting the owners or other beneficiaries of copyright and the so-called neighboring rights, the specific questions to be discussed in the 1986-1987 biennium are grouped according to the main *categories of works*. In connection with each category, all the various new uses of works of that category, and the interests of all the various owners and beneficiaries of copyright and so-called neighboring rights in such works are considered. Virtually all main categories of works will be covered, so that, by the end of the biennium, a global review will have been carried out of the current situation in all the fields of copyright and the so-called neighboring rights.

3. According to the decisions mentioned above, the Secretariats of WIPO and Unesco have to prepare, convene and service meetings of committees of governmental ex-

perts on the following eight categories of works: printed word, audiovisual works, phonograms, works of visual art, works of architecture, works of applied art, dramatic and choreographic works, musical works.

4. The Committee of Governmental Experts, for which the present document has been prepared, is invited to deal with two of the eight categories of works, namely, dramatic and choreographic works on the one hand and musical works on the other.

5. The purpose of this document is to summarize and discuss the various copyright and so-called neighboring rights issues in relation to dramatic, choreographic and musical works for the purpose of arriving at certain "principles" which, together with the comments, could serve as a guidance for governments when they have to deal with those issues. It should be stressed that the "principles"—neither as proposed nor as they might emerge as the result of the deliberations of the Committee of Governmental Experts—have or will have any binding force on anyone. They are merely intended to indicate directions which seem to be reasonable in the search of solutions which, by safeguarding the rights of the authors and other holders of rights in literary and artistic works and other intellectual creations protected by copyright or so-called neighboring rights, give them a fair treatment and promote creative activity eminently necessary for safeguarding the cultural identity of every nation. At the same time, the proposed solutions should be of a nature that facilitates, from both the creators' and the users' viewpoint, the use of protected works, performances, etc.

6. The principles proposed are believed to provide for an efficient and appropriate protection of intellectual

property rights in respect of the various types of uses of dramatic, choreographic and musical works. Dealing with those uses seems to be particularly timely since in today's media environment the interests of the persons engaged in intellectual creativity are often neglected in connection with the uses of their creations by new technological means and in the name of the necessity of "free access." It should be stressed that everything that is desirable cannot be obtained free of charge and without regard for the interest of those who create or own the goods that the public wishes to enjoy.

7. The Committee of Governmental Experts for which the present document has been prepared is the fourth in the series of meetings mentioned in paragraphs 2 and 3 above. During these meetings, new uses and other new technological developments are discussed in detail in connection with those categories of works where such new uses and other developments are most typical. The documents on other categories of works—for the sake of avoiding repetition—usually simply refer to the documents which contain detailed analyses on those questions.

8. In respect of the categories of works covered by the present document there is from a practical point of view only one previous meeting whose results are relevant: namely the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms which was held in Paris in June 1986. The results of that meeting have been taken into account in two ways: firstly, this document, in connection with audiovisual works and phonograms, only deals with the copyright and so-called neighboring rights questions which refer to the inclusion of dramatic, choreographic and musical works into such productions but, in general, does not deal with the questions concerning the utilization of audiovisual works and phonograms. In relation to those questions the document prepared for the Committee of Governmental Experts on Audiovisual Works and Phonograms and the results of the discussions at the meeting of that Committee are applicable. Secondly, in the case of certain questions—such as piracy, home taping, rental and public lending, cable distribution and satellite broadcasting—that were discussed in detail at the above-mentioned meeting (because they concern audiovisual works and phonograms most typically), this document only discusses some aspects of those questions that are specific for dramatic, choreographic and musical works; as regards other aspects of those questions this document simply declares that the relevant principles contained in the document on audiovisual works and phonograms should be applied *mutatis mutandis*.

9. There is an important common feature of the categories of works covered by this document, namely that they can become available to the public—at least in their full esthetic functions—only if they are performed by performing artists. This very important role of performers makes it necessary to deal with performers' rights with great attention in this document. It should also be taken into account that performers sometimes interpret works in a creative way and this element raises specific questions concerning the borderline between protection under copyright and under so-called neighboring rights.

10. At the same time, it follows from the direct or *mutatis mutandis* applicability of the working document for and the results of the Committee of Governmental Experts on Audiovisual Works and Phonograms mentioned in paragraph 8 above that in the framework of this document there is no need to deal with the other two categories of so-called neighboring rights (the rights of phonogram producers and of broadcasting organizations).

11. In spite of the similarities mentioned in paragraph 9 above, dramatic and choreographic works, on the one hand, and musical works, on the other, are dealt with in the present document separately—and in that way in keeping with the programs of WIPO and Unesco referred to in paragraph 1 above—because their creation, performance and utilization raise questions which are different in respect of these categories of works.

*Report 1. In pursuance of the decisions adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-third session and by the Governing Bodies of the World Intellectual Property Organization (WIPO) at their fifteenth series of meetings in October 1985, the Directors General of Unesco and WIPO jointly convened a Committee of Governmental Experts on Dramatic, Choreographic and Musical Works at the headquarters of Unesco in Paris from May 11 to 15, 1987.*

*Report 2. The purpose of the meeting was to discuss the various copyright issues arising in relation to dramatic, choreographic and musical works with a view to devising certain "principles" which, together with comments, could afford guidance to governments when they had to deal with those issues.*

*Report 3. Experts from the following 41 States attended the meeting: Bangladesh, Bolivia, Brazil, Burundi, Cameroon, Canada, China, Colombia, Costa Rica, Côte d'Ivoire, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Guatemala, Guinea, Holy See, Hungary, India, Italy, Jordan, Kenya, Lebanon, Mexico, Morocco, Panama, Portugal, Saudi Arabia, Soviet Union, Spain, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, United Kingdom, United States of America, Yemen.*

*Report 4. A representative of the African National Congress (ANC) attended the meeting as an observer.*

*Report 5. One intergovernmental organization—the Arab Educational, Cultural and Scientific Organization (ALECSO)—also attended the meeting.*

*Report 6. Also participating in the meeting were observers from 13 international non-governmental*

organizations: Broadcasting Organizations of the Non-Aligned Countries (BONAC), European Broadcasting Union (EBU), International Bureau of Societies Administering Recording and Mechanical Reproduction Rights (BIEM), International Confederation of Free Trade Unions (ICFTU), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Actors (FIA), International Federation of Musicians (FIM), International Federation of Phonogram and Videogram Producers (IFPI), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), International Theatre Institute (ITI), Max Planck Institute for Foreign and International Patent, Copyright, and Competition Law.

Report 7. The list of participants follows this report.

Report 8. Mr. Michel de Bonnecorse, Deputy Director-General of Unesco, opened the meeting and welcomed the participants on behalf of Unesco. Dr. Arpad Bogsch, Director General of WIPO, welcomed the participants on behalf of WIPO.

Report 9. Mr. Jukka Liedes (Finland) was unanimously elected Chairman of the meeting.

Report 10. The Committee adopted the Rules of Procedure contained in document UNESCO/WIPO/CGE/DCM/2 Prov. It was decided that the Committee should elect two Vice-Chairmen and that the tasks of the Rapporteur should be fulfilled by the Secretariat.

Report 11. Mr. György Boytha (Hungary) and Mr. Adolfo Loredó Hill (Mexico) were unanimously elected Vice-Chairmen of the meeting.

Report 12. The provisional agenda of the meeting of the Committee, as appearing in document UNESCO/WIPO/CGE/DCM/1 Prov., was adopted.

Report 13. Discussions were based on the Memorandum on Questions Concerning the Protection of Copyright and the Rights of Performers in Respect of Dramatic, Choreographic and Musical Works prepared by the Secretariats (document UNESCO/WIPO/CGE/DCM/3).

Report 14. The participants who took the floor in the general discussion congratulated the Secretariats for the excellent quality of the document. They expressed their approval, in general, of the principles and comments contained in the document and said

that they would make comments only on specific issues.

Report 15. One delegation raised the question of the nature of the "principles" suggested in the document and their relations to the obligations under the copyright conventions. It suggested that the word "shall" should be used instead of the word "should" in certain principles to indicate that such principles reflected what was in fact obligations under the international conventions.

Report 16. The Secretariats said that, as indicated in paragraph 5 of the document, the principles, as proposed to or as emerging from the discussions of the Committee of Experts, could not be binding on any country, since international obligations could only result from treaties and not from committees of experts. That was why the expression "should" rather than the expression "shall" was used in the wording of the proposed principles. The Secretariats added that the purpose of the series of meetings, of which the present meeting was one, was not to modify existing international obligations. The purpose of such meetings was: first, to create an international awareness of the topical issues of copyright law, particularly issues caused by technological development, and secondly, that when countries wished to modernize their copyright legislation, they could do so in the light of what they had learned through participation in the exchange of views that took place between experts from a great number of countries on the basis of working documents prepared by the Secretariats.

Report 17. Another delegation said that certain characteristics of the document should be observed which followed from its objectives: the set of principles should extend to questions of the exercise of rights not only in the field of collective administration of rights in musical works, but also as regards the rights in dramatic and choreographic works. In addition to the problem of remuneration also such further questions should be dealt with as, for instance, the scope of rights necessary for the user to make the work available to the public. No revision of the copyright conventions was in sight, therefore, the correct interpretation of their provisions under the changing circumstances was particularly important. An agreement was necessary about some basic principles, for instance, about the implications of the concept of authors' rights which were conceived under the conventions as right to authorize a certain use of a work rather than a mere right to use the work. It should be clarified whether it was necessary to assign the right of authorization to the user or if it was enough for him to obtain the necessary exclusive right to use the work by virtue of an authorization based on the author's right. The delegation referred

to the fact that 120 copyright laws contained more or less detailed provisions on authors' contracts and suggested that some guiding principles should also be elaborated in this field, in consideration of the largely varying national solutions.

*Report 18.* Still another delegation stated that, while, in general, in agreement with the suggestions of the document, it felt that the questions of exercising rights, such as the calculation of remunerations and collective administration should not be dealt with in principles intended as guidance for legislators. The solution of those questions should, generally, be left to negotiations between the parties concerned. Even if in certain countries, legislative measures were found desirable, those measures would necessarily differ from country to country. Therefore, it would not be realistic to try to establish generally acceptable norms in this field.

*Report 19.* An observer from an international non-governmental organization, while appreciating that the document emphasized the outstanding role of performers in respect of dramatic, choreographic and musical works, stated, with reference to paragraph 9, that performers always performed works in a creative way and that there was no need and no basis for a categorization of performers in this context.

## II. DRAMATIC AND CHOREOGRAPHIC WORKS

### Creations To Be Protected as Dramatic and Choreographic Works

12. It was as early as in the original 1886 text of the Berne Convention that "dramatic and dramatico-musical works" were mentioned in the non-exhaustive list of works to be protected by the Convention as "literary and artistic works" (Article 4). "Choreographic works and entertainments in dumb show" were included in the non-exhaustive list at the 1908 Berlin revision conference (Article 2), with the condition, however, that for them to enjoy protection, the "acting form" had to be fixed in writing or otherwise. That condition was maintained in the subsequent Acts of the Berne Convention and it was only abolished at the 1967 Stockholm revision conference. This condition was not an exception to the rule of protection without formality, but was inserted more because fixation was considered necessary for evidentiary purposes. It was thought that only a hallet notation or similar fixation allowed one to clearly identify a dance to be protected. Cinematographic films allowed easy and reliable fixation. At the same time, the possibility of including a choreographic or pantomimic work (the latter expression is used hereafter instead of "entertainment in dumb show") into a film and later in a television production as well as the possibility of its diffusion live by television raised other questions. Some countries found it necessary to protect choreo-

graphic and pantomimic works in respect of such uses irrespective of whether they had been previously fixed or not. Therefore, fixation as a necessary condition of the protection of such works was eliminated. It does not mean, however, that making protection conditional of fixation became incompatible with the Berne Convention, because the same Stockholm conference adopted a new paragraph (2) of Article 2 according to which it is "a matter for legislation in the countries of the Union to prescribe that works in general or any specific categories of works shall not be protected unless they have been fixed in some material form."

13. Article I of the Universal Copyright Convention contains a less detailed non-exhaustive list of protected works than the one contained in Article 2(1) of the Berne Convention. It only mentions "literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture." It seems to be a correct interpretation of this provision, however, that it covers all forms of theatrical works including dramatico-musical, choreographic and pantomimic works.

14. Several national laws do contain provisions by which the expression "dramatic works" is defined just in such a wide manner (that is, also to include choreographic and pantomimic works). Other laws use the expressions "dramatic and dramatico-musical works" on the one hand and "choreographic and pantomimic works" on the other side by side. Still other national laws apply a more general term such as "theatrical works," "theatrical or scenic works," "works created for stage" to cover both dramatic and dramatico-musical works and choreographic and pantomimic works as well as any other works created for stage.

15. In the present document, the expression "dramatic and choreographic works" is used in such a wide sense. It includes all works created for stage, such as dramatic works, dramatico-musical works (operas, operettas, musicals, etc.), choreographic works (ballets, etc.), pantomimes, etc. When it is not indicated otherwise in the document all the principles and comments are applicable to all those sub-categories of dramatic and choreographic works.

16. The first separate question that seems to concern only some of those sub-categories is just the question of fixation as a possible condition of the protection of such works. Some national laws have maintained that condition in the case of choreographic and pantomimic works, while in other national laws it does not exist. Therefore, in the following Principle DC1 the fixation as a condition of eligibility for protection is mentioned only as a possible option.

17. It is stated above that this question *seems* to concern only some sub-categories of dramatic and choreographic works. In certain national laws fixation as a condition of protection is mentioned only in the case of choreographic and pantomimic works. This does, however, not necessarily imply the *a contrario* conclusion that, as far as

dramatic and dramatico-musical works are concerned, also unfixed such works enjoy protection by such laws. These works are fixed as a rule nearly without any exception. It can, therefore, be taken for granted that in countries where choreographic works and pantomimes are only protected when they are fixed, fixation as a condition of protection is not mentioned explicitly in respect of dramatic and dramatico-musical works just because it is thought to follow from their very notion that they are fixed. Therefore, in Principle DC1 the possibility of prescribing fixation as a condition of eligibility for protection is provided for all dramatic and choreographic works and not only for some of the sub-categories covered by this expression.

18. On the basis of the foregoing, the following principle is offered for consideration:

**Principle DC1. (1) "Dramatic and choreographic works" mean all works created for stage, such as dramatic works, dramatico-musical works (operas, operettas, musicals, etc.), choreographic works (ballets, etc.) and pantomimes (entertainments in dumb show).**

**(2) Dramatic and choreographic works should be protected under the general rules of copyright law.**

**(3) The protection of dramatic and choreographic works may be restricted to works that are fixed in writing or in any other material form.**

19. The present document—like the other documents that have been produced so far concerning other categories of works (audiovisual works and phonograms, works of visual art, works of architecture) in the framework of the series of meetings of committees of governmental experts mentioned in paragraphs 2 and 3 above—does not cover all details of copyright protection (such as the term of protection, the question of formalities, the status of works created under employment contract, etc.). In those respects the general provisions of national laws should be applied in keeping with the international conventions to which the countries concerned are party. The present document only discusses questions which need particular consideration in the case of the categories of works covered by it.

*Report 20. In the course of the discussion, approval was expressed for the general approach outlined in this part of the document.*

*Report 21. Some delegations expressed doubts whether it was right to include in the definition of "dramatic and choreographic works" contained in Principle DC1(1), that they were created for stage. Some examples were mentioned (such as artistic gymnastics, figure skating, synchronized swimming) to indicate that certain borderline questions should be studied.*

*Report 22. One delegation was of the opinion that no substantive definition was necessary. It was enough to give a non-exhaustive list of the most typical dramatic and choreographic works, and the decision about certain disputed cases would be taken by the national legislator.*

*Report 23. Another delegation said that in Principle DC1(2) it was not enough to only refer to the general rules of copyright. There were some national laws which also contained certain specific provisions which were relevant in respect of dramatic and choreographic works; Principle DC1(2) should consequently refer to both general and relevant special provisions. The other possibility could be simply to state that dramatic and choreographic works are protected by copyright.*

### **Special Features of Dramatic and Choreographic Works and Performances of Such Works. The Impact of the New Technologies**

20. A dramatic work in the narrower sense of this expression (defined in the WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights as "a compilation of connected actions and discourses of one or usually more persons, to be performed on stage and reflecting reality through play") may be—and fairly frequently is—enjoyed in written form published in a book or otherwise. But even in the case of a dramatic work in such a form, it cannot be said that enjoying it through reading is its final purpose and original function. Its final purpose and original function is that it be performed on stage thus "reflecting reality through play."

21. The use of dramatic works in written form has so far been influenced by the new technologies only in one way, namely, that widespread reprography has also concerned published dramatic works. (The question of reprography will be dealt with in detail in the present series of meetings in the framework of the Committee of Governmental Experts on the Printed Word planned to be held in Geneva from December 7 to 11, 1987.) New technologies and certain social developments have on the other hand influenced the utilization of dramatic and choreographic works in their original functions—"to be performed on stage and reflecting reality through play"—in several important aspects.

22. The first and most obvious impact of the new technological developments is that theatrical performances—in addition to the audience present in the theater itself—may become available to an ever wider circle of people. The performances of such works were first transmitted live by radio and then by television and they could be included into cinematographic films and then in fixed television productions, and nowadays they can also be transmitted by satellites and by cable networks and recorded in audiovisual cassettes.

23. In addition to the above-mentioned direct impact of the new technologies, they also make their impact felt in a less direct way: audiovisual works can, by means of either theatrical presentation or television transmission or cable distribution or just by means of privately used videograms, fulfill practically the same functions as dramatic and choreographic works used to fulfill in the past: "reflecting reality through play." Those new developments have changed public behavior towards dramatic and choreographic works. The changes do not only mean that the demand for theatrical productions has decreased (it has in many countries, even if the decrease has not been as dramatic as was predicted at the advent of cinema and television), but rather that the functions of dramatic and choreographic works in relation to the public have changed. Similar developments have taken place—even if to lesser extent—as in the case of fine arts with the advent of photography. The direct reflection of reality as a function has been taken over by new forms of creation and traditional genres have turned towards more abstract means of expression. (That development was less significant in the case of those sub-categories of dramatic and choreographic works (such as operas, ballets, pantomimes) whose means of expression are necessarily of more abstract nature.)

24. The quest for new ways of expression has not only led to the creation of dramatic and choreographic works that contain a great number of new features but also to the transformation of the relationship between the written work and its performance and through that to the increased role of theater directors [*metteurs en scène*]. The latter development has been supported by the existence of directors of audiovisual works [*réalisateurs*] who have become the most decisive factor of the creation of such works. In the case of dramatic and choreographic works, this new role of directors—especially the fact that they tend to interpret those works in ever more liberal ways, sometimes not only leaving out some parts of them but also changing their order or even adding to them certain new elements—has led to conflicts of interests, strains and borderline questions between copyright and so-called neighboring rights which will be dealt with in the following chapter of the present document.

[Report 23bis. No particular comment was made in this respect.]

### The Authors of Dramatic and Choreographic Works. The Status of Theater Directors

25. Neither the Berne Convention nor the Universal Copyright Convention contains a direct definition of "author," but it is obvious on the basis of the context of the provisions of the two conventions that an "author" is a person who creates a work. The same applies to the concept "author" at the national level (another matter is that certain national laws use the technique of legal fiction and extend the scope of authorship to others than creators, for example employers, publishers of collective works, etc.).

26. If the author is the person who creates a work then, of course, it is the notion of work which determines who may qualify as author. The Berne Convention and the Universal Copyright Convention do not offer a definition of what a "work" is. They make it clear, however, that protected works should belong to the literary, scientific or artistic domain and they give a non-exhaustive list of the most typical and most frequent kinds of works. Some national laws follow the same method. In such cases, the context of the provisions—combined with the usual methods of interpretation—provide further elements of the notion of "work," viz. that only original intellectual creations are protected as works; ideas are not protected but only creations expressed in concrete reproducible form are; the quality of the creation is irrelevant for the protection, etc. National laws which offer more detailed elements for the definition of works lead to the same result as the above-mentioned interpretation. It is another problem that national laws vary significantly concerning the key notion of originality. In certain laws (first of all in the laws of countries with Anglo-Saxon legal traditions) originality is often equivalent to anything in a production that is not a result of an infringement (plagiarism) of a preexisting work; everything is protected in the field of literature, sciences and arts whose creation needs skill and labor. The national laws of other countries demand a comparatively high level of intellectual creativity as a condition of eligibility for protection.

27. From the viewpoint of the subject matter, it is particularly important that under the international copyright conventions and national copyright laws not only preexisting original works but also derivative works, such as translations, adaptations and arrangements, are protected (see Article 2(3) of the Berne Convention and Article IVbis.1 of the Universal Copyright Convention).

28. As is stated in Principle DC4 below, the authors of dramatic and choreographic works should enjoy the right of adaptation, that is it should be their exclusive right to authorize or prohibit adaptation of their works. Therefore, if an adaptation of a dramatic or choreographic work is created and used without the authorization of the author of that work, it is an infringement of the right of adaptation. It is important to state, however, that if the adaptation is of original nature the fact that it is the result of an infringement does not change its quality as a derivative work. Therefore, if the adaptation is used by a third person without the authorization of the person who created the adaptation, it is an infringement of the latter's copyright.

29. Creativity can be manifested not only in the form of the creation of original literary and artistic works but also in other forms. The basic purpose of certain types of works, such as, first of all, dramatic, choreographic and musical works, is that they be performed and made available to the public by means of performances. Those works—depending on the nature of the genres in question—allow more or less freedom for differing interpretations. Creativity may also be manifested in that field. There are brilliant artists who are able to reveal new esthetic qualities or to offer new interpretations of the works performed by them. It is, therefore, understandable that

the demand for an intellectual property type protection of such productions arose when the new technologies rendered their transmission and fixation possible. The first reaction was to try to turn to copyright as an existing protection system. There were some attempts in certain national laws, for example, at protecting performances as "adaptations." However, it became evident fairly soon that this was not an appropriate solution. A performance is a presentation of a work by action such as playing, reciting, singing or dancing and if this performance is of original nature its originality is manifested by the original interpretation of the work and not by the modifications which may have taken place by means of the performance. Therefore, there is no real basis to protect performances as derivative works. That was recognized fairly soon and after the failure in trying to use the umbrella of copyright, the protection of performances was established in the framework of the so-called neighboring rights.

30. The reference above to some basic principles of delimitation between authors and works, on the one hand, and performances and performers, on the other, is necessary first of all for clarifying the intellectual property status of theater directors. Are they performers or are they authors like their "colleagues," the directors of audiovisual works? The status of certain other contributors to theatrical productions such as those of the creators of sceneries (decorations) and costumes should also be clarified.

31. When theater directors claim that they are authors like directors of audiovisual works are, they claim nothing less than that the relationship between a dramatic or choreographic work and its theatrical production is the same as that between a scenario and the audiovisual work produced on the basis of it. Such an allegation, however, is hardly appropriate. An audiovisual work is not a presentation of a scenario but something which is of a completely new quality in relation to it. The creators of an audiovisual work—first of all the director—transform the scenario into another artistic language, into the language of images where dialogues and everything else that the scenario may contain are only mere contributions—maybe important ones—to a new artistic unity. An audiovisual work still does not exist in the stage of a scenario; it comes into existence by the activity of the director and the other contributors to its creation. In the case of dramatic and choreographic works, the situation is different. Those works do exist before they are staged. Dramatic works contain not only dialogues but—as a rule—a series of more or less detailed instructions concerning the scenery, the characteristics, costumes and movements of the actors, etc. It follows from the nature of dramatico-musical works (operas, operettas, etc.), choreographic works and pantomimes that their contents are determined by their creators (librettists, composers, choreographers, etc.) in an even more detailed manner.

32. The authors of dramatic and choreographic works create with the intention that those works be staged and performed in the form which the authors have given them. If their intention is realized, the contribution of a director could hardly be qualified as the creation of a new work (either an independent work of new quality or an adapta-

tion of the work staged and performed). What he produces is a performance of the work. The work may allow somewhat differing interpretations; however, if the director chooses one of the interpretations inherent in the work, he does not become the author of any independent or derivative work. Small changes, deletions, certain movements which are not mentioned or are differently described in the written version of the work, the actualization of the scenery or the costumes, some "gags," etc., may be parts of the contribution of the director, but, in general, it can hardly be said about them that they are new, original, creative elements and thus may qualify together as an adaptation.

33. Usually theater directors are ready to serve the works and to stage them in keeping with the intentions of their authors, and the question whether they themselves are authors does not emerge. Certain directors, however, have greater ambitions. They would like to simply use the work—what they sometimes call "raw material"—to produce something else. Their productions very frequently involve extensive deletions from the text, the leaving out of some roles, the change in order of parts, placing events into completely different circumstances than the ones described by the author and thus changing the meaning of the dialogues, adding new elements (even if not necessarily a new text but, for example, new designs of decorations and costumes, new movements, etc.) which lead to "interpretations" never intended by the author. *Summa summarum*, in such a case the dramatic or choreographic work is staged in a basically modified version.

34. Is the claim justified in such cases that the theatrical production is a new quality in relation to the dramatic or choreographic work and, consequently, that the theater director is the original author of the new creation (the same way as the director of an audiovisual work is not an "adaptor" of the scenario but an author of a work of new quality, that is the audiovisual work)? There is a test question: could the author of the original work himself delete certain parts of the text, leave out some roles, change the order of acts, give instructions for different scenery, costumes, movements of actors, etc.? The obvious answer is that he could. Consequently, a theatrical production in such a case is different from the original work not because theatrical productions represent a new quality of such works but simply because it is not the original work which has been put on stage but a modified version of it. A modified version of a work is an adaptation. Consequently, a director may enjoy copyright protection not because he is a director, but because he is an adaptor (unless the author recognizes the latter as coauthor).

35. In the case of a work in the public domain or an expression of folklore, an original adaptation is protected without any further condition (except that in countries where the "right of respect" extends in some form to works in the public domain, adaptations conflicting with such rights may qualify as infringements). The protection of such adaptations does not mean, of course, that the work in the public domain or the folklore expression can no longer be performed in its original form or in the form of other adaptations (provided, of course, that those adaptations are independent creations and not plagiarized from the previous one).

36. If the original work is still protected, the authorization of the original author is necessary for any adaptation. Without it, the adaptation and its performance is an infringement. If, however, an unauthorized adaptation is used by a user—for example, a theater—the lack of authorization from the original creator does not eliminate the user's copyright obligations towards the adaptor-director.

37. In the case of choreographic works and pantomimes, there may be different persons—different from the creators of the original choreography or the pantomimes and different from the directors of the productions—who give instructions concerning the elements of movement and direct the dancers and pantomime actors. Concerning their role and intellectual property status, the considerations about the role and status of directors apply *mutatis mutandis*. (That is, certain changes introduced by them may not go beyond the notion of performance while creative changes qualify as adaptations, except when they create completely new works where only some basic ideas are used from the preexisting works.)

38. Theatrical productions may have certain further contributors, such as those who prepare the sceneries (decorations) or costumes. If the sceneries and costumes are of original artistic nature they may enjoy protection as works of fine art. If the director gives only some general ideas about the scenery and costumes but does not take part in their creation, he cannot qualify as an author; if he participates in the creation itself he should also enjoy the protection of such works as author or coauthor.

39. On the basis of the foregoing considerations the following principle is suggested:

**Principle DC2. (1) The authors of dramatic and choreographic works are the persons (playwrights, composers, choreographers, etc.) whose creative contributions establish such works.**

**(2) Theatrical productions of dramatic and choreographic works should be considered as performances of such works and not works themselves. The directors of such productions should be protected as performers and not as authors. If the director modifies the work in an original manner, his contribution, in that respect, should be protected as an adaptation without prejudice to the copyright in the original work. The creation and use of such an adaptation is subject to the right of adaptation of the author of the original work according to Principle DC4(1)(iv). If, however, an adaptation is used which has been created without the authorization of the author of the original work, the lack of this authorization does not exempt the user from the obligation of full respect of the adaptor's copyright in the adaptation.**

**(3) Certain contributions to theatrical productions such as sceneries (decorations) and costumes may enjoy separate protection according to**

**the relevant copyright provisions, e.g. as works of fine art, if they are of original nature.**

*Report 24. Some delegations mentioned that the question of the protection of the right of theater directors was under consideration in their countries, and that the ideas and arguments contained in the document might be useful in that respect.*

*Report 25. Several participants expressed the view that it was not enough to protect theater directors as performing artists; very often they deserved protection also as authors. Some participants were of the opinion that directors could only enjoy copyright protection as adaptors or as coauthors, as it was suggested in the document. Some other participants said that they would find also an independent copyright protection of "scenic creations" justified, including the right of directors to have their names associated with a specific production. The latter participants stressed that the text of a dramatic work and the instructions by the author did not fully determine all aspects of the scenic version of the work; there was always more or less room for the director's creative contribution.*

*Report 26. One delegation drew attention to the fact that, in several countries, fixation was a pre-condition for copyright protection and stressed that, very frequently, the instructions given by theater directors were not in a fixed form.*

*Report 27. An observer from an international non-governmental organization said that it would be justified to grant the same copyright status to theater directors as to film directors.*

*Report 28. Several delegations gave examples to support that consideration should be given not only to the protection of the rights of theater directors but also to the protection of the authors' rights permitting to oppose certain modifications that were completely alien to their works and distorted the message they intended to communicate to the public. It was suggested that the questions of the protection of moral rights in works whose authors had died should be further studied.*

*Report 29. Several comments were made on the last sentence of Principle DC2(2).*

*Report 30. Some delegations expressed doubts whether the authors of unauthorized adaptations, who were infringers of the copyright in the original work, would really deserve copyright protection. One delegation estimated that this would be absolutely inequitable, and it proposed to delete this sentence.*

*This proposal was supported by an observer from an international organization.*

*Report 31. One delegation analyzed the legal status of unauthorized adaptations more in detail. It recognized that copyright laws and practices did not seem to explicitly deprive the maker of an unauthorized adaptation of copyright in his adaptation. However, it was possible to proceed to an injunction and to request the cessation of any infringing action. Originally, Article 6 of the 1886 Act of the Berne Convention provided that only "lawful translations" should be protected as original works. During the 1908 Berlin revision conference, it was held that the reproduction even of unlawful translations and adaptations should be prevented since it would cause additional harm to the author of the original work. Thus, according to the new text (now Article 2(3) of the Paris Act), any translations or adaptations or arrangements of music "shall be protected as original works without prejudice to the copyright in the original work." It appeared, however, that the recognition of the infringing adaptor's copyright necessarily involving also the right to authorize the performance of his unauthorized adaptation, would be prejudicial to the right of the author of the original work, and the user would become a contributory infringer. Altering or destroying any—material or immaterial—goods of another person without legal justification amounted to conversion prohibited under the law of torts. The infringing adaptor might only enjoy protection against reproduction or communication to the public of his adaptation, but he should not enjoy a right to authorize its use, which would follow from copyright. Thus, the last sentence of paragraph (2) should be either deleted or modified so that it would end by reading "...the lack of this authorization does not deprive the adaptor of the right to prevent the use of his adaptation by a third person and to acquire copyright in it if the author of the adapted work subsequently authorizes the adaptation."*

*Report 32. Several other delegations supported the statement included in the last sentence of Principle DC2(2). It was stressed that the author of an adaptation was an author even if the adaptation had not been authorized by the author of the original work. Not all infringements were committed willfully. No user could lawfully use an unauthorized adaptation without the authorization of the author of the original work. However, if the user had not sought or received authorization from the author of the original work and he still used the work in the adapted version, this did not mean that he did not, in using the adaptation without the adaptor's consent, infringe also the latter's copyright in his adaptation. The sentence under discussion and paragraph 36 connected*

*to it said no more than that. The modification proposed by the delegation mentioned in the preceding paragraph would not change the legal relationship between the adaptor and the actual user.*

*Report 33. An observer from an international non-governmental organization suggested that the question of the copyright status of theater directors and that of unauthorized adaptations should not be dealt with in the framework of specific principles but rather only in the commentary.*

### **Moral Rights in Dramatic and Choreographic Works**

40. Article 6<sup>bis</sup>(1) of the Berne Convention provides that "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." The Universal Copyright Convention contains no provisions concerning moral rights. It is desirable that such rights be guaranteed under national laws for authors, *inter alia*, for the authors of dramatic and choreographic works.

41. The right to claim authorship means, in practice, that the authorship of the creators of such works should be recognized and their names should be indicated on the copies of the written versions of those works (such as the published versions of dramatic works) on the playbills (programs) announcing theatrical performances, and they should also be mentioned—in a reasonable way—in connection with any utilization of the work (for example, by means of broadcasting).

42. National copyright laws differ to a large extent concerning the scope of the so-called "right of respect" on the basis of which the author can oppose modifications—or at least certain modifications—of his work. The above-quoted provision of the Berne Convention does not aim at prohibiting all kinds of changes but only such actions mentioned in the provision which would be prejudicial to the author's honor or reputation. Some copyright laws go much further, however, than the minimum protection of moral rights provided for by the above-quoted provision of the Berne Convention: sometimes authors can oppose, in principle, any modification of their works. In the case of theatrical presentations of dramatic and choreographic works, such an absolute moral right may come into conflict with the realities of the theater. It is a general practice that during the staging of a dramatic or choreographic work, the director and other contributors to the production make several minor modifications—some of them are described in paragraph 32 above—that do not amount to adaptations and do not distort the original work, but rather contribute to its fuller interpretation. The existence of the "right of respect" should not be an obstacle to making such modifications.

43. The following principle is suggested for the protection of moral rights:

**Principle DC3. (1)** Independently of the authors' economic rights and even after the transfer of the said rights, the authors of dramatic and choreographic works should have the right to

(i) claim authorship and have their names indicated on the copies of their works, on the playbills (programs) announcing theatrical performances and, as far as is practicable, mentioned in connection with any utilization of their works;

(ii) object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to their honor or reputation.

(2) The scope of modifications to which the author should have the right to object may be determined in a more extensive manner in national laws than is defined in paragraph (1)(ii) above; however, it should not extend to the possibility of objecting to modifications that are normally necessary for the staging of dramatic and choreographic works.

*Report 34.* One delegation proposed that the second part of the Principle DC3(2), starting with the word "however," should be deleted. It was right to make a reference to the possibility of a more generous protection of moral rights but it was not justified to restrict the freedom of national legislators in that respect. This delegation expressed the view that authors should have the right to object to any modifications and not only to those that might be prejudicial to their honor or reputation.

*Report 35.* Another delegation supported the proposal for the deletion of the second part of the paragraph because it felt that the expression "modifications that are normally necessary for the staging of dramatic and choreographic works" was not clear and could lead to extensive interpretations.

*Report 36.* Some other participants expressed hesitation concerning the above-mentioned proposal and found the approach of the document acceptable. They stressed that the principle should not suggest a more extensive protection of the moral rights than the one defined by Article 6<sup>bis</sup> of the Berne Convention. They found it appropriate that Principle DC3(2) referred to the possibility of extending the moral right so as to cover also a right to object to other modifications than those following from Article 6<sup>bis</sup> of the Berne Convention. They were, however, of the opinion that the second part of the paragraph—which limited the extension of such protection in recognizing other justified interests—was also

*necessary. It was suggested, in that context, that such modifications should be allowed "to which the author could not reasonably object." Furthermore, it was stressed that any substantial modification of the work would amount to an adaptation of the same work.*

#### Economic Rights in Dramatic and Choreographic Works

44. Dramatic and choreographic works are among those categories of works which may be used in the most varied ways where, consequently, nearly all economic rights under copyright law may come into play. A detailed analysis of the application of all those rights—with all the possible exceptions to them—would make the present document extremely voluminous. Therefore, the document first gives a comprehensive list of economic rights which could apply to dramatic and choreographic works without particular details. Then comes a discussion of those rights in a more detailed manner only insofar as the special features of dramatic and choreographic works and their utilization justify it.

45. The following principle on economic rights is offered for consideration:

**Principle DC4. (1)** The authors of dramatic and choreographic works should have the exclusive right to authorize at least the following acts:

(i) the reproduction of the written or otherwise fixed version of the work in any manner or form (right of reproduction);

(ii) the rental and public lending of the copies of the musical part of a dramatico-musical or choreographic work reproduced in the form of sheet music and the sound recordings containing a dramatic or choreographic work (right of rental and public lending);

(iii) the translation of the work (right of translation);

(iv) making adaptations, arrangements or similar alterations of the work (right of adaptation);

(v) the public performance of the work (right of public performance);

(vi) any communication to the public of the work including its communication by wire in a cable-originated program (right of communication to the public);

(vii) the broadcasting of the work, any communication to the public by wire (by cable), or by rebroadcasting, of the broadcast of the work, when this communication or rebroadcasting is made by an organization other than the original one, and the public communication by loudspeaker or any other analogous instrument trans-

mitting the broadcast of the work (right of broadcasting and related rights);

(viii) the cinematographic adaptation and reproduction of the work and the distribution of the work thus adapted or reproduced (cinematographic rights).

(2) The right of the authors of the dramatic and choreographic work to authorize the acts mentioned in paragraph (1) above should not be restricted but in the cases and to the extent allowed under the international copyright conventions.

46. The above-mentioned rights and the availability of limitations on them are regulated by Articles 8, 9, 10, 10<sup>bis</sup>, 11, 11<sup>bis</sup>, 12 and 14 of the Berne Convention. Articles I and IV<sup>bis</sup> of the Universal Copyright Convention do not contain such a detailed regulation of the rights of authors and the possible limitations on them. However, Article IV<sup>bis</sup>.2 stipulates in general form that any State whose domestic legislation provides for exceptions from the protection of the rights of reproduction, public performance and broadcasting shall nevertheless accord a reasonable degree of effective protection to each of those rights.

47. In addition to the basic principles of the protection of economic rights in dramatic and choreographic works mentioned in Principle DC4 above, the following comments and the consideration of the following more detailed principles seem to be desirable.

*Report 37. One delegation suggested that Principle DC4(1)(i) should be worded in a more general manner so as to cover also reproduction of protected non-fixed works.*

#### *The Right of Rental and Public Lending*

48. This right is discussed in detail in paragraphs 131 and 132 below in respect of musical works. The considerations discussed in these paragraphs apply *mutatis mutandis* to such rights in dramatic-musical and choreographic works.

*Report 38. Some participants supported Principle DC4(1)(ii) concerning rental and public lending. One delegation suggested that the scope of the principle should be widened so as to cover a general right of distribution.*

*Report 39. Some delegations said that in their countries there were doubts whether the recognition of a rental and/or public lending right was really justified. One delegation stressed that even if such a right were recognized it should be a mere right to remuneration rather than a right of authorization.*

*Report 40. Some participants drew attention to the difference in nature between rental which was a busi-*

*ness activity and public lending which was a service offered free of charge or at a nominal price. Some other participants said that the regulation of rights in relation to rental should also be differentiated according to the types of works involved. They referred to the rental of the music material of operas as one example where the recognition of a rental right seemed to be justified.*

*Report 41. One delegation stated that according to its national law a distinction was made between the copies produced exclusively for rental and those produced exclusively for sale. In the latter case, if the copies were sold the right of distribution was exhausted. Therefore, in that delegation view, the right of rental and public lending could not be applied in respect of those copies.*

#### *The Right of Public Performance*

49. Public performance is the original and most important way of communicating dramatic and choreographic works to the public.

50. As is explained in paragraph 23 above, the role of theatrical performances on stage has changed recently. They have lost their exclusive role in expressing reality through play and even their social and cultural functions have been transformed in certain aspects.

51. It was partly in connection with the above-mentioned developments that theatrical exploitation of works has become more difficult also from the viewpoint of economic considerations. Theaters are faced with a difficult choice when setting the price of tickets. Either they have high enough prices to cover all costs of a production and then may run the risk that many people cannot afford expensive tickets and the production fails because of lack of interest, or they set prices at a more reasonable level but then they cannot recover their expenses which can lead to the bankruptcy of the theater. Theaters can avoid such difficult situations in two ways. Either they do not take any risk and concentrate on certain popular works—sometimes in taking over successful productions from other theaters—or they cover their deficits from subsidies by the State or by private organizations. Subsidizing theaters from the public budget is a fairly widespread phenomenon in many countries which follows from the general cultural policy of those countries; they find subsidizing necessary for ensuring to the widest possible public the access to valuable theatrical productions.

52. Under the above-mentioned circumstances, there are two serious dangers menacing the real value of the economic rights of authors. The first is that for the sake of "easing the burdens of theaters" authors' fees are restricted by legal provisions. This does not necessarily mean a formalized compulsory licensing system because the authors can deny authorization if they find the limits defined by law unacceptable; nevertheless, such a system poses dangers to the exclusive nature of authors' rights. The

exclusive right to authorize performances is intended to be realized in practice by the means of free negotiations between users and authors. In the field of theatrical performances the problem—which is discussed in the part on musical works in this document—that may emerge in the case of the centralized administration of the non-theatrical performing rights in musical works does not exist. In the majority of cases individual authors conclude contracts with theaters even if such contracts may be based on guidelines provided by collective agreements or model contracts between authors' societies (or other similar organizations) and bodies representing theaters. Therefore, in general, there is no need to set up a special machinery (for example copyright tribunals) to eliminate the alleged danger of misusing the "monopolistic" situation of copyright owners.

53. A particularly dangerous version of legal limitations on the fees of authors of dramatic and choreographic works is that which follows the usual system of calculating such fees—on the basis of certain percentages of the box-office income—without taking into account the effect of subsidies. The price of the tickets is kept below their real value and the deficit is covered by subsidies. The result is that everybody is subsidized in the theater: the producer, the director, the actors, even the ushers; there is only one exception: the author. The author is not subsidized because his fees are calculated on the basis of the box-office income from the selling of the tickets below their real value. Such discrimination is unjustified. If theater productions are subsidized, authors should receive a reasonable share not only from the box-office income but also from the subsidy (or some other solution should be found, for example a matching increase of the percentage from the box-office income).

54. Another danger for unjustified restrictions of the authors' exclusive rights in dramatic and choreographic works is that free use is allowed in too wide a circle invoking that such works are performed without profit-making purposes. Authors' economic rights are linked to the use as such of their works and not to the profit-making use of them. If works are made available to the public free of charge, the author may be requested to authorize the performance without the obligation of payment. But it should be the author who decides about that; the non-profit nature of the production is not an acceptable basis for depriving him of his economic rights. At the Brussels (1948) and the Stockholm (1967) revision conferences of the Berne Convention, it was declared that certain "small exceptions" are allowed to national laws in the case of the right of public performance and certain exceptions are also possible on the basis of Article IVbis.2 of the Universal Copyright Convention. It follows, however, from the details of the above-mentioned declaration (only very few examples were mentioned) that a generalized exception for non-profit performances would be incompatible with the Berne Convention. It remains questionable whether such an exception would be compatible with Article IVbis.2 of the Universal Copyright Convention.

55. The following principle is offered for consideration:

**Principle DC5. (1)** The fees of the authors of dramatic and choreographic works for the authorization of public performance of such works should be determined on the basis of negotiations and they should be related to the real market value of the right of public performance. If such fees are calculated as a share from the income of the theater and the theater is subsidized, not only the box-office income but also the subsidies should be duly taken into account for the calculation of fees.

(2) Exceptions to the right of public performance may be allowed in certain specific cases (for example, in the case of the performance of a dramatic work by an amateur group of a school for an audience restricted to those who belong to the same school and, at most, to their closest relatives if there is no entry fee, the participants do not receive any payment and the performance does not serve profit even in an indirect way) but the mere non-profit nature of a performance should not be a basis for allowing, under the law, such performances of dramatic and choreographic works without the author's authorization.

*Report 42. One delegation expressed its support to Principle DC5(1), but suggested that further principles should be elaborated concerning the exercise of the rights mentioned in Principle DC4. The basic idea of freedom of contracts should be coupled with guarantees for the fundamental fairness of contracts which, in this field, should necessarily mean guarantees protecting individual authors as the economically weaker parties in contracts to be concluded with users. The notion of the "real market value" of authors rights should be more precisely defined considering also certain provisions existing in national copyright laws.*

*Report 43. Another delegation supported the view that the conditions of contracts should be dealt with in detail and mentioned the practice in its country where standard contracts regulated all the significant details of authors' contracts. Such standard contracts were obligatory to the extent that in individual contracts no stipulations could be used that were less favorable to authors. It referred to the conditions prevailing in countries with planned economy where such a detailed regulation was indispensable. It stressed, however, that in such countries the source, the nature and the purpose of subsidies were also different than in market economy countries. Therefore, the second sentence of Principle DC5(1) did not seem to be applicable in those countries; at least it could not be applied in its country. It suggested the deletion of that sentence. It added that the first sentence of Principle DC5(1) could also be applied only with*

some modifications. Negotiations should mean collective negotiations between the organizations representing authors, on the one hand, and users on the other, with the participation of the competent authorities. The last part of the first sentence after the word "negotiations" should be deleted.

*Report 44.* Several other delegations were of the opinion that after the word "negotiations" the rest of Principle DC5(1) should be deleted, but for another reason than the one referred to in the preceding paragraph. Those delegations supported the idea of freedom of contract and did not find that the problem of the participation of the authors should be settled by means of legislative intervention. In respect of the suggestion that principles should be worked out concerning the conditions of contracts, those delegations were not against certain studies to be made in the future; they expressed, however, doubts whether principles could be adopted in this respect which were more than some very few generalities, taking into account the differences in legal, economic and social systems.

*Report 45.* Several participants supported the ideas expressed in the second sentence of Principle DC5(1) concerning the need for the authors' participation in the subsidies. One delegation stated that it would seem preferable not to take into account the whole amount of the subsidy, but to use the form of a lump-sum payment to be agreed with the representatives of the authors.

*Report 46.* One delegation said that the wording of Principle DC5(2) was too restrictive and that a wider scope of free use should be provided for in favor of amateur groups.

*Report 47.* Another delegation was of the opinion that Principle DC5(2) was well balanced and that it offered a realistic example of possible free uses. It added that the most important element of the principle was its last part which made it clear that the mere non-profit nature of a performance should not be a basis in itself for allowing free use.

*Report 48.* An observer from an international non-governmental organization stated that, if an exception was allowed to the right of performance in favor of school groups, such an exception should be restricted to dramatic schools with respect to performances in the framework of educational activities of such schools.

### *The Right of Broadcasting*

56. Under Article 11<sup>bis</sup>(2) of the Berne Convention, the exclusive right of the author to authorize the broadcasting

of the work can be replaced by a non-voluntary licensing system. Without going into details of the considerations about such a system, it is important to state that it follows from the basic principles of copyright protection that such licensing should be avoided whenever possible and the exclusive nature of the right of broadcasting should be preserved. The application of compulsory licenses may only be justified when the broadcasting organizations use a great number of works, in the case of which individual exercise of rights is difficult or impossible, and there is no appropriate alternative available in the form of blanket licensing by collective administration bodies.

57. The broadcasting of dramatic and choreographic works can be easily authorized by individual contracts on the basis of the exclusive right of authors. Therefore there is no reason in the case of such works to introduce or apply a system of compulsory licenses. Such licenses could completely destroy the market for the theatrical performances of dramatic and choreographic works: if, for example, a local television station had the right to broadcast a theatrical production without the authorization of the author, it could lead to a drastic decrease in the audience and the number of subsequent performances; or, if the broadcast of the performance were made available to the public of another region where a theater planned to stage the same work, that theater would probably have to abandon that plan.

58. Therefore, the following principle is offered for consideration:

**Principle DC6.** Non-voluntary licenses, as a rule, should not be applied instead of the exclusive right of the authors to authorize the broadcasting of their dramatic and choreographic works.

[*Report 48bis.* No particular comment was made in this respect.]

### *Satellite Broadcasting and Cable Distribution*

59. The working document discussed by the Committee of Governmental Experts on Audiovisual Works and Phonograms, mentioned in paragraph 8, contained a detailed analysis of the protection of audiovisual works in connection with direct broadcasting by satellites, transmission by fixed-service satellites, cable distribution of cable-originated programs, the simultaneous and unchanged cable distribution of broadcast programs as well as the cable distribution of programs transmitted by fixed-service satellites. All what is contained about those uses in that document concerning audiovisual works (the principles as well as the comments) is applicable *mutatis mutandis* also in respect of dramatic and choreographic works.

[*Report 48ter.* No particular comment was made in this respect.]

## The Rights of Performers of Dramatic and Choreographic Works

60. According to Article 3(a) of the Rome Convention "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works."

61. It has been made clear in the General Report of the 1961 Diplomatic Conference which adopted the Rome Convention that the expression "literary and artistic works" mentioned in the above-quoted definition has the same meaning as in the Berne Convention and the Universal Copyright Convention and it includes in particular dramatic, choreographic and musical works. At the same time, it is without importance for the question of the protection of the rights of performers whether the work performed is or is not protected by copyright. (It should be added—even if it does not follow directly from the Rome Convention—that it is justified to grant the same protection to the performers of expressions of folklore.)

62. The English text of the Rome Convention only uses the word "performer," while in the French text the expression "*artiste interprète ou exécutant*" is used. The latter differentiates between "*artistes interprètes*" and "*artistes exécutants*." It is fairly clear that there are certain performing artists (such as conductors, directors, etc.) whose role is the interpretation of works and the giving of instructions to other artists who directly produce performances ("executing" the instructions of the author and/or the interpreting artist). In the case of other artists the elements of interpretation and the execution of instructions are represented in other proportions.

63. Above, in paragraph 29, it has been already discussed what decisive role performers play in relation to dramatic and choreographic works and why it is necessary to protect their rights even if not by copyright (which would be alien to the nature of their contributions) but under so-called neighboring rights.

64. In identifying the principles to be applied for the protection of the rights of performers of dramatic and choreographic works, it seems to be preferable not to use the provisions of the Rome Convention directly as a basis but rather the Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted by the Second Extraordinary Session of the Intergovernmental Committee of the Rome Convention held in Brussels in May 1974 (which is, naturally, based on the Rome Convention). The principles deal with the basic situations where the performers' authorization shall be required and contain statements on the interpretation of contracts.

65. With certain necessary minor changes, the relevant provisions of the Model Law are reproduced in the following principles:

**Principle DC7. (1)** At least in respect of the following acts no person should be entitled to do them without the authorization of the performers:

- (a) the broadcasting of their performance, except where the broadcast:
  - (i) is made from a fixation of the performance other than a fixation made according to Principle DC8(2); or
  - (ii) is a rebroadcast authorized by the organization initially broadcasting the performance;
- (b) the communication to the public of their performance, except where the communication:
  - (i) is made from a fixation of the performance; or
  - (ii) is made from a broadcast of the performance;
- (c) the fixation of their unfixed performance;
- (d) the reproduction of a fixation of their performance, in any of the following cases:
  - (i) where the performance was initially fixed without their authorization;
  - (ii) where the reproduction is made for purposes different from those for which the performers gave their authorization;
  - (iii) where the performance was initially fixed in accordance with Principle DC8 but the reproduction is made for purposes different from any of those referred to in that principle.

(2) In the absence of any contractual agreement to the contrary or of circumstances of employment from which the contrary would normally be inferred:

- (a) the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance;
- (b) the authorization to broadcast does not imply an authorization to fix the performance;
- (c) the authorization to broadcast and fix the performance does not imply an authorization to reproduce the fixation;
- (d) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast the performance from the fixation or any reproduction of such fixation.

**Principle DC8. (1)** Principle DC7(1) should not apply where the acts referred to in that principle are made for:

- (a) private use;
- (b) the reporting of current events, provided that no more than short excerpts of a performance are used;
- (c) use solely for the purposes of teaching or scientific research;
- (d) quotations in the form of short excerpts of a performance provided that such quotations are

compatible with fair practice and are justified by the informative purpose of such quotations;

(e) such other purposes as would constitute exceptions from the requirement of authorization in respect of works protected by copyright.

(2) The requirements for authorization under Principle DC7 for making fixations of performances and for reproducing such fixations, shall not apply where the fixation or reproduction is made by a broadcasting organization by means of its own facilities and for its own broadcasts, provided that:

(a) in respect of each broadcast of a fixation of a performance or of a reproduction thereof made under this subparagraph, the broadcasting organization has the right to broadcast the particular performance; and

(b) in respect of any fixation made under this subparagraph or any reproduction thereof, the fixation and any reproduction thereof, are destroyed within the same period as applies to fixations and reproductions of works protected by copyright, except for a single copy which may be preserved exclusively for archival purposes.

66. The terminology used in paragraph (1) of Principle DC7 parallels the wording of Article 7.1 of the Rome Convention as closely as possible. Except in certain cases of rebroadcasting and fixations for broadcasting purposes, where special considerations apply as described below, the minimum rights prescribed in Principle DC7(1) are the same as those explicitly mentioned in Article 7.1 of the Rome Convention. Thus, in general, the performer's rights with respect to broadcasting and public communication are limited to performances not already fixed or broadcast; his rights with respect to fixations are limited to unfixed performances; and his rights of reproduction from fixations are limited to the three situations specified in clauses (i), (ii) and (iii) of Article 7.1(c) of the Rome Convention.

67. Principle DC7 in speaking of the basic rights of performers of dramatic and choreographic works, uses similar phraseology as the Rome Convention uses with respect to phonogram producers and broadcasting organizations: without authorization, "no person should do" any of certain specified acts. It should be noted, however, that the language of the corresponding Articles in the Rome Convention is different; Article 7 gives performers "the possibility of preventing" certain acts, while Articles 10 and 13 refer to the rights of producers of phonograms and broadcasting organizations "to authorize or prohibit" certain acts, i.e. it provides for exclusive rights. The reason for this difference in the Convention was a wish to make it possible for certain countries to join the Convention. Those laws adopt a penal approach, under which certain unauthorized uses of performances constitute punishable offenses, though the performer is not granted an assignable property right. Principle DC7(1) is worded in such a way that it expresses the need for a high enough level of protec-

tion of performers rights, but still allows the penal approach to be adopted for the protection of those rights.

68. Paragraph 1 of Article 7 of the Rome Convention, in listing the minimum rights to be accorded to performers, does not include protection against rebroadcasting, fixation for broadcasting purposes, and the reproduction of such fixation for broadcasting purposes in the cases where the performer had consented to the broadcast. Under paragraph 2(1) of Article 7, these rights are made matters for each Contracting State to regulate under its domestic law. Principle DC7 deals with rebroadcasting in two related ways. Under paragraph (1)(a)(ii), performers should be given statutory protection against "pirate broadcasters"—that is, broadcasters who are rebroadcasting their live performance without authorization from the organization that initially broadcast the performance. Moreover, under paragraph (2)(a) of the same principle, it is made clear that a performer's authorization to a particular broadcasting organization to broadcast his live performance does not, without the performer's further consent, entitle that organization to license other broadcasters to broadcast the performance.

69. With respect to the problem of the so-called "ephemeral recordings" and other fixations for broadcasting purposes, the present document contains related provisions in Principle DC7(1)(a)(i), (2)(b) and (d), and Principle DC8(2). These provisions are all based on the approach that the relations between performers and broadcasting organizations with regard to the use of performances are essentially matters to be regulated by contract and that fixations made by broadcasters without authorization by the performers are allowed only in very limited cases.

70. The limitations on protection contained in Principle DC8 are parallel to those allowed in Article 15.1 of the Rome Convention. In addition, paragraph 2 of Article 15 allows Contracting States to provide the same kinds of limitations as they provide in their domestic laws "in connexion with the protection of copyright in literary and artistic works," on condition that "compulsory licences may be provided for only to the extent to which they are compatible with this Convention."

71. The questions of the protection of the rights of performers of dramatic and choreographic works in respect of using phonograms published for commercial purposes or reproduction of such phonograms are not discussed in the present document because those questions were covered by the document prepared for the discussion at the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms mentioned in paragraph 8 above. The principles and comments included in that document concerning the uses of audiovisual works and phonograms in connection with the new technologies apply directly to the rights of performers of dramatic and choreographic works included in audiovisual works and phonograms. Certain principles and comments apply *mutatis mutandis* also to the live performances of dramatic and choreographic works and the rights of performers concerned by them, such as the principles and comments on

piracy ("bootlegging," that is, the unauthorized recording of performances for commercial purposes which is particularly prejudicial to the basic rights and interests of performers), home taping (private reproduction of performances), satellite broadcasting and cable distribution.

72. Attention is also drawn to the Recommendation concerning the Status of the Artist adopted by the General Conference of Unesco at its 21st session in October 1986.

*Report 49.* One delegation stated its approval of Principle DC7 and suggested that the right of reproduction mentioned in paragraph (d) of that principle should apply also to cases where the initial fixation was made with their authorization and not only, as suggested in (i) of that paragraph, where the initial fixation was made without their authorization.

*Report 50.* Several participants spoke about the need for further studying the question of the application of the rights of performers in relation to certain uses, such as rebroadcasting, satellite broadcasting and cable distribution. Some delegations referred to their national laws where those questions either were already regulated or were under consideration.

*Report 51.* The question was raised whether direct broadcasting by satellites was covered by the notion of broadcasting and whether cable-originated programs were covered by the notion of communication to the public. The observer from one international non-governmental organization stressed that such was the case. It was furthermore questioned whether the notion of broadcasting covered also rebroadcasting. It was suggested that these questions should be made clear in the commentary.

*Report 52.* One delegation said that if a broadcast program was retransmitted with a certain delay because of the difference in time zones, the retransmission should still be deemed to be simultaneous rebroadcasting. Another delegation expressed its disagreement with that view and insisted that what was not in fact simultaneous should not be deemed to be simultaneous. Reference was in this context also made to the fact that deferred broadcasting necessitated a recording.

*Report 53.* One delegation suggested that certain basic notions, such as rebroadcasting, cable distribution, etc., should be defined so as to make the meaning of the suggested principles absolutely clear.

*Report 54.* Some participants proposed that the principles should be extended to cover also the moral rights of performers.

*Report 55.* One delegation drew attention to the fact that Principle DC8(1)(a) referred to the possibility of the same type of exception to the right of reproduction as the one which was allowed under Article 9(2) of the Berne Convention in respect of copyright. It suggested, therefore, that the application of such an exception should be made dependent on the same conditions that were defined by that Article of the Berne Convention, namely that some exceptions should be allowed only in certain special cases, and only if they did not conflict with a normal exploitation of the performance or otherwise would not unreasonably prejudice the performer's legitimate interests.

*Report 56.* An observer from an international non-governmental organization stressed that there was no need to differentiate between "artistes interprètes" and "artistes exécutants" as it was mentioned in paragraph 62 of the document. What was important was that the contributions of all performing artists necessarily contained creative elements.

*Report 57.* The same observer expressed the view that the rights of performers to control the use of their performances should be extended to all types of secondary uses of such performances.

*Report 58.* An observer from another international non-governmental organization emphasized that the Rome Convention and the Model Law mentioned in paragraph 64 of the document are the result of a delicate compromise between the various interested parties. A unilateral extension of performers' rights would seriously endanger this balance.

*Report 59.* An observer from still another international non-governmental organization suggested that a principle should be worked out to emphasize that no principle on the rights of performers should be applied in a way that would prejudice the legitimate interests of authors.

### **The Rights of the Producers of Theatrical Performances**

73. In paragraph 51 above, the present document refers to the economic problems with which theaters and other producers of theatrical productions are faced, while paragraph 57 deals with the question of compulsory licensing from the viewpoint of the rights and interests of authors. The lack of a right to oppose the broadcasting or other communication to the public of the performance can in certain cases seriously endanger the interests of producers (if the performance becomes available, for example, by means of television, many people who otherwise would come to the theater and buy tickets do not do so). In this field, the interests of the producers on the one hand and

those of the authors and performers on the other are, in general, common and the question of other uses of the performance may be—and frequently is—the subject of contracts between them. However, there may be situations where theater producers have a justified interest—independently of possible contractual stipulations—in being able to oppose the broadcasting or other communication of their theatrical performances at certain times or to a certain public, taking into account the need of recovering their investments.

74. Therefore, the following principle is offered for consideration:

**Principle DC9. Theaters and other producers of performances of dramatic and choreographic works should have the right to prevent**

(a) the broadcasting or other communication to the public, without their consent of such performances, except where the performance used in the broadcast or the public communication is itself already a broadcast performance or is made from a fixation;

(b) the fixation, without their consent, of the unfixed performance.

75. The above-mentioned right of theater producers does not supersede or replace the need for authorization by other contributors (authors, performers). It just means that in respect of certain uses *also* the authorization of the producer is required. Therefore, the question whether the producer could authorize such uses alone without the agreement of the authors and performers (an agreement which of course can be given also in contracts with the producers, including employment contracts) does not emerge.

*Report 60. Some participants were of the view that Principle DC9 was not necessary.*

*Report 61. Several delegations stressed that while the need for the recognition of special rights in favor of producers of theatrical performances could not be excluded, further studies would be necessary in this respect before formulating any principles on the issue. Among the possible subjects to be studied, the following were mentioned: the definition of such producers, the relationship of the rights of the owner of the theater building and the rights of the person who was the organizer and manager of the production, the relations to other rights involved in the production, the international implications, etc. Nevertheless, these delegations expressed doubts whether a separate principle about the rights of theater producers was really justified.*

*Report 62. One delegation fully supported Principle DC9 which, in its view, reflected reality and general practice. Theater producers, in general, had such rights based on the fact that they could control the*

*access to the venue where the performance took place and that they were able to determine certain conditions in that respect.*

### III. MUSICAL WORKS

#### Creations To Be Protected as Musical Works

76. The Berne Convention mentioned "musical compositions with or without words" already in its original 1886 text and the reference to these works has remained the same until the last 1971 Paris Act of the Convention (Article 2(1)). The Universal Copyright Convention also mentions musical works in the non-exhaustive list of works (Article I). At the level of national laws there is no doubt either about the copyright protection of musical works.

77. In conventions and national laws, there is no detailed definition of musical works. In copyright literature sometimes attempts are made at such definitions. For a long time melody, rhythm and harmony were said to be the necessary elements of musical works. New types of compositions, however, proved the necessity of a more general approach. The WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights, for example, contains the following definition: "Such works comprise all kinds of combinations of sounds (composition) with or without text (lyrics or libretto), to be performed by musical instruments and/or the human voice." That definition is general enough but we shall see in paragraphs 81 to 83 that even the performance by musical instruments and/or by human voice is not a necessary element of the notion of musical works (for example in the case of "concrete music," or "tape music").

78. Dramatic-musical works have two faces: they are dramatic works and at the same time musical works. Music is also an important element of choreographic works. The present document deals with dramatic-musical and choreographic works exclusively in part II under the title "Dramatic and Choreographic Works" because from the viewpoint of copyright and so-called neighboring rights what is primarily important is that they are created for stage. The present part III of the document on musical works only touches some borderline questions in respect of dramatic-musical and choreographic works (the delimitation of the so-called "small rights" and "grand rights"), otherwise it is restricted to non-dramatical musical works and to their performances.

79. Traditional musical works exist first in the form of scores (sheet music). Thus their protection does not raise any problem in countries where fixation is a condition of copyright protection. It happens, however, ever more frequently that musical works are not fixed in a visually perceivable manner and their fixation exists only in the form of sound recordings (different types of experimental music, certain kinds of popular music, etc.). Musical cre-

ations also exist even without any fixation whatsoever (jazz, concrete performed versions of aleatoric musical works (see paragraph 103), etc.). Therefore, in the interest of the widest possible protection of musical works it is an advantage if national laws do not make the protection of such works conditional upon their fixation, otherwise many of them remain unprotected. At least sound recording should be accepted as a form of fixation.

80. On the basis of the foregoing considerations, the following principle is suggested:

**Principle MW1. (1) "Musical works" mean all kinds of original combinations of sounds (compositions) with or without text (lyrics or libretto). In the context of the present document, however, dramatic and choreographic works with music (dramatico-musical works, etc.) are considered as dramatic and choreographic works (see Principle DC1) rather than musical works.**

**(2) Musical works should be protected under the general rules of copyright law.**

**(3) The protection of musical works may be restricted to works that are fixed in material form (scores, sound recordings, etc.); such a restriction, however, should be avoided as far as possible.**

81. Paragraph 19 above—about the fact that the present document does not cover all details of copyright protection—is valid also in respect of musical works. Consequently, this part of the document deals only with such copyright issues which are of special relevance for musical works and need particular consideration in this context.

*Report 63. Some delegations expressed their full support for Principle MW1.*

*Report 64. One delegation said that Principle MW1(2) either should also refer to the relevant specific provisions in copyright laws or it should only state that musical works "are" protected by copyright.*

*Report 65. One delegation referred to the copyright law of its country where fixation is a condition for copyright protection, and proposed that the last clause of Principle MW1(3) (from the words "such a restriction, however") should be deleted. Another delegation mentioned that under the copyright legislation of its country, protection is also restricted to works fixed in a material form. Certain new developments in the field of composition of music—that are also mentioned in the document—might, however, justify the reassessment of certain traditional provisions in that respect. Therefore, it did not oppose Principle MW1(3) in its present form.*

## **New Forms of Musical Composition. The Use of Computers and Other Equipment for the Creation of Musical Works**

82. "Experimental music," "concrete music," "tape music," "electroacoustic music," "synthetic music," "electronic music." A lot of expressions exist reflecting new trends in music. The present document is not intended to discuss the musicological aspects of those new kinds of musical works; it concentrates only on new developments that are relevant from the viewpoint of the protection of copyright and the rights of performers.

83. The first such development is that "experimental" musical works ("experimental" being an adjective to cover all the above-mentioned new categories of musical works) are very frequently created directly in the form of sound recordings. Certain elements of "concrete music" are recorded by microphone from natural sources and included directly into the sound recording constituting the composition. "Tape music" includes sounds produced by traditional musical instruments—sometimes together with natural sounds—manipulated electronically. "Electronic music" (that is, pure electronic music, because electronic processing is also involved in other kinds of experimental music) is composed of sounds of electronic origin produced by means of generators. The new kinds of musical compositions mentioned above exist only rarely in absolutely pure form. Musical elements created by means of those new methods of composition may form part of the same works and are frequently applied together with traditional musical elements.

84. All those new ways of composition (including the last-mentioned hybrid creations) are sometimes referred to jointly as "electroacoustic music" and have the common characteristic that, in general, they only exist in the form of sound recordings and, as a whole, they cannot be performed by traditional instruments. In addition to the question of fixation as a condition of protection—which was discussed in paragraph 78 above—interesting questions emerge in respect of the copyright and neighboring rights protection of such productions. For example, the question may be raised whether the person who creates a work directly on tape is only an author or at the same time—because he makes the work available in an audible manner—he is also a performing artist and/or a producer of a phonogram.

85. It happens frequently not only in respect of experimental music but also in more traditional fields of music composition that the person who creates the musical work sings and/or plays it at the same time (contemporary popular music provides many such examples) and that the work is only fixed in a sound recording. (It is another matter that such works can be performed subsequently—as a rule—independently of their first production in the form of a sound recording.) It is fairly obvious that in such a case the composer should enjoy protection as a performer already on the first occasion when he creates/performs the work and, if it is he who fixes the sounds of the performance, also as phonogram producer. It is highly probable that the same can be said about artists who produce

improvisations qualifying as protected musical works (see paragraphs 98 to 100) (what is actually questioned, in general, in respect of interpretations is not whether they are performances but rather whether they are creations eligible for copyright protection). An improvisation is one step closer to "tape music" because the work and its presentation in the form of sounds are frequently inseparable and the same work may not subsequently be made available to the public except if it has been recorded. One can say that there is no significant difference between the above-mentioned examples and an "electroacoustic" ("tape") music creation; consequently, the creator of such a piece of music is not only an author but also a performer.

86. The opposite view is, however, also justified. It can be said that "electroacoustic" music is created so directly and inseparably on tape that there is no room for interpretation or execution of anything; there is nothing to be performed. It is probable that the answer to the question, whether the creator of such music is also a performer differs from country to country according to the interpretation at the national level.

87. It is easier to answer the question whether the composer of "electroacoustic" music is also a phonogram producer. The answer does not depend on whether the production qualifies as a performance, because under Article 3(c) of the Rome Convention "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance *or other sounds*" (emphasis added). Therefore, if the author himself fixes the work on tape he also qualifies as phonogram producer.

88. The other characteristic of "experimental music" is the wide utilization of devices (synthesizers, computers) in the process of the creation of musical works.

89. A synthesizer can produce a given sound from its constituting elements (frequencies; intensities, durations, etc.). It follows from the notion of synthesis that it should be preceded by an analysis; that is, by the identification and study of the constituting elements. In the case of music it is done most frequently by producing a sonogram, a graphic image—a sort of "fingerprint"—of the sound. The analysis and then the synthesis of such sonograms is often facilitated by computers, the more so because the parameters of a sonogram can also be expressed numerically. Composers are thus able to use the identified constituting elements of music to create—by means of synthesizers and computers—new musical works. Different methods are used in the process of the creation of such "synthetic music." Optical signals—newly created "sonograms"—or other schematic drawings as well as numerical parameters can be converted into electroacoustic signals, that is into music directly recorded on tape. The expression of such music in scores (sheet music) is sometimes very difficult; there are no generally accepted standards for new types of music notations and even the best notations are hardly enough for the performance of such works.

90. Computers are used by composers also in other ways. They may help the creators in the development of an idea of composition, in the systematic exploration of a

range of possible combinations and structures and in studying the possible results and selecting from them. Computer programs are frequently used for the creation of musical works. They—as a rule—do not define a unique work but a series—a "family"—of works composed according to the same principles. For the production of a unique work, certain further input data are necessary which may be added simply by chance.

91. It does not seem necessary to suggest a particular regulation in regard of music created by means of computers and synthesizers. Nevertheless, the question of the ownership of copyright may arise, first of all in the case where works are directly created by means of computer programs. In this connection, it is useful, for the sake of clarification, to recall the results of the work of the Unesco/WIPO Committees of Governmental Experts that met to consider the copyright problems arising from the use of computers for access to or the creation of works (December 1980 and June 1982, both in Paris), and in particular the recommendation adopted by the second Committee of Experts.

92. As regards the use of computer systems for the creation of works, the recommendations which are relevant are the following (paragraphs 13 to 17 of Annex I of the report):

"13. These recommendations do not deal with or affect the protection of computer software or programs as such which may enjoy protection under national laws (e.g. copyright, patent, unfair competition or trade secrets).

"14. Where computer systems are used for the creation of works, States should basically consider them as a technical means used in the process of creation for achieving the results desired by human beings.

"15. In order to be eligible for copyright protection, the work produced with the help of computer systems must satisfy the general requirements for such protection established by the international conventions and national laws on copyright.

"16. In the case of works produced with the use of computer systems, the copyright owner in such works can basically only be the person or persons who produced the creative element without which the resulting work would not be entitled to copyright protection. Consequently, the programmer (the person who created the programs) could be recognized as coauthor only if he or she contributed to the work by such a creative effort.

"17. When a computer system is used in the case of commissioned works or in the case of works by a person or persons under an employment contract the matter of attribution of copyright ownership should be left to national legislation."

93. It seems to be useful to reproduce here two of the recommendations quoted above in a form adapted to musical works and referring not only to the use of computers but also to that of other equipment (first of all to synthesizers):

**Principle MW2.** When computer systems and/or other equipment (synthesizers, etc.) are used for the creation of musical works, such systems and equipment should be considered only as technical means in the process of creation for achieving the results desired by human beings.

**Principle MW3.** In the case of works produced with the use of computer systems and/or other equipment (synthesizers, etc.) the copyright owners in such works are the persons who produced the creative element without which the resulting works would not be entitled to copyright protection. Consequently, programmers (persons who created the programs for such systems) and technicians (sound engineers, etc.) can be recognized as coauthors (or single authors as the case may be) only if they contributed to the work by such a creative effort.

*Report 66.* Several participants expressed their full support for Principles MW2 and MW3.

*Report 67.* One delegation said that there were certain further questions emerging with the ever more rapid development of computer technology; for example, the question of the protection of translations prepared by computers. In that respect, another delegation referred to the copyright law of its country according to which slavish, literal translations were not protected, and expressed the view that computer-made translations should necessarily come under that category.

#### **Adaptations and Arrangements of Musical Works. Translations of the Texts of Musical Works**

94. According to Article 2(3) of the Berne Convention and Article IVbis.1 of the Universal Copyright Convention, certain derivative works, such as adaptations, arrangements and translations, are also protected by copyright without prejudice to the protection of copyright in the original works.

95. The words "adaptation" and "arrangement" are not used with a uniform meaning in national laws, in copyright literature and in practice. The WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights defines these two expressions as follows: "Adaptation: generally understood as the modification of a pre-existing work from one genre of work to another, such as cinematographic adaptations of novels or musical works. Adaptation may also consist in altering the work within the same genre to make it suitable for different conditions of exploitation ... Adaptation also involves the composition of the work, unlike translation, which transforms only the form of expression thereof." "Arrangement of music: generally

understood as meaning the adjustment of the form of expression of a musical work to special purposes, according to the requirement of a given orchestra or musical instrument or the actual range of a singer's voice, etc. It mostly consists of recordation or transportation in a different key and does not necessarily imply creation of a derivative work." According to the above-quoted definitions, "adaptation" means a more substantive modification of a work; in the case of a musical work, for example, a variation—which includes the modification of the melody line—may be qualified as adaptation; while "arrangement" is used for less important alterations, for example, for reorchestrations and transcriptions. Sometimes, however, the word "arrangement" has a wider meaning, practically as a synonym of "musical adaptation" to cover all kinds of alterations of musical works that may be protected as derivative works. The present document uses the words "adaptations" and "arrangements" side by side—as Article 2(3) of the Berne Convention does—and those two words jointly are intended to cover all alterations of musical works that may be protected as derivative works.

96. Adaptations and arrangements of musical works should be protected by copyright if they are of original nature. The notion of originality differs from country to country but the level of originality needed for protection should be the same regardless of whether the adaptation is based on a protected work or on a work in the public domain.

97. It is another matter that in the case of adaptations of works which are still protected, the adaptor and/or arranger cannot authorize the use of a derivative work alone without the authorization of the author of the original work. It should be added, however, as is discussed in paragraph 28 above, that if the adaptation is original in nature the fact that it is the result of an infringement does not change its character as a derivative work. Therefore, if the adaptation is used by a third person without the authorization of the adaptor, it is an infringement of the latter's copyright.

98. The following principle is offered for consideration:

**Principle MW4.** Adaptations and arrangements of musical works and the translations of the texts related to such works should be protected by copyright—without prejudice to the copyright in the original works—if they are original in nature. Such adaptations, arrangements and translations are subject to the right of adaptation and the right of translation, respectively, of the author of the original work according to Principle MW8(1)(iii) and (iv). If, however, an adaptation, an arrangement or a translation is used that has been created without the authorization of the author of the original work, this lack of authorization does not exempt the user from the obligation of full respect for the adaptor's copyright in the adaptation.

*Report 68. Some delegations expressed their agreement with the contents of Principle MW4.*

*Report 69. It was understood that opinions expressed by the participants in respect of the unauthorized adaptations of dramatic and choreographic works (Principle DC2(2), last sentence) were also relevant, mutatis mutandis, in respect of the unauthorized adaptations of musical works (Principle MW4, last sentence).*

*Report 70. One observer from an international non-governmental organization said that in the first sentence of Principle MW4, the original nature of adaptations and arrangements as a condition for copyright protection seemed to be a subjective criterion and that instead of such a qualitative notion, some quantitative elements should be applied, such as the proportion of the new contribution in relation to the original work.*

*Report 71. One delegation expressed its disagreement with the proposal mentioned in the preceding paragraph. It pointed out that originality—or as it is defined in its country, the existence of a personal, intellectual creation—was an inevitable condition for copyright protection. It stressed the necessity of the appreciation of certain qualitative features, without extending that appreciation to the merit of the work.*

### **Improvisations. Aleatoric Musical Works**

99. There are different kinds of musical improvisations from the viewpoint of copyright protection. There are improvisative elements that cannot be deemed original (for example, certain commonplace elements in popular music). They are simply parts of the performance of a musical work and are not protected by copyright. Some other improvisations are practically the variations of preexisting protected works and therefore—if they are really of original nature—can be protected as adaptations, subject to the right of adaptation of the author of the original work. It is also possible that the artist completely detaches himself from the preexisting work or uses his own musical motives; in such cases an improvisation of original nature may be protected as an independent original work.

100. There are two basic conditions for the protection of improvisations at the national level. The first is that only original creations are eligible for protection and the notion of originality differs from country to country. If an improvisation meets the conditions of originality in the country concerned, it would be unjustified not to grant copyright protection to it on the mere basis that it was not an author who created it but an artist whose main task is to perform the work. There is, furthermore, another condition for copyright protection in certain countries as is dis-

cussed in paragraph 16 above: the fixation of the work. The particularly high value of certain improvisations (for example, in the field of jazz) may serve as a further argument for the elimination of fixation as a condition for protection or, where such a condition exists, at least for the recognition of sound recordings as fixations.

101. Improvising artists, of course, should also be protected as performers.

102. The following principle is offered for consideration:

**Principle MW5. Musical improvisations may be protected—according to the level of their dependence on preexisting works—as adaptations or independent works provided that they are of an original nature. The protection of such improvisations may depend on their fixation according to Principle MW1(3). In respect of improvisations protected as adaptations, Principle MW4 also applies.**

103. Improvisations are special manifestations of the creativity of certain artists. Recently, a new form of musical composition has been developed: aleatoric music, where composers themselves offer possibilities to performers to provide creative contributions.

104. Aleatoric music is a form of music where the composer does not determine the musical work in its final form but leaves room for the creative initiative of performers which may be manifested in the choice among some alternatives, in repetitions, in the combination of certain elements, in determining the speed or intensity of music and even in finalizing the melodic line by means of improvisation according to certain more or less detailed parameters. The aleatoric composition is a kind of scenario to be finalized by somebody else.

105. In the case of aleatoric music, it could be considered that the composer includes in the work the authorization—and in a way the invitation—to performers to finalize his work or to modify it in certain respects. If the performer's contribution is of original nature, it may be protected—depending on its relationship to the existing elements of the work—as an adaptation or as part of a joint work (even if not at the same time, but as a matter of fact created jointly by the composer and the performing artist himself).

106. What is said in paragraph 99 above applies necessarily here, too. Consequently, it depends on the notion of originality prevailing in a national copyright system, whether contributions produced during the performance of aleatoric works can really enjoy copyright protection. Furthermore, the protection of such contributions may also be made conditional on their fixation.

107. National laws differ regarding the status of coauthors. In some countries coauthors—in certain cases, at least—cannot use their contributions separately. In the

case of the possible coauthorship of the composer and performer of an aleatoric musical work, such a rule should never be applied to the composer's contribution. It follows from the very nature of such "scenario"-works—and from the instructions of their composers—that they may be developed into several parallel concrete variations.

108. It goes without saying that the performer of an aleatoric work—in addition to the possible copyright protection—should also enjoy protection as a performer.

109. The principle suggested below has some common elements with Principle MW5 above, on musical improvisations:

**Principle MW6.** (1) Aleatoric musical works mean compositions where the composers leave room to the creative contributions of performers authorizing and inviting them to make certain choices (concerning the intensity, duration and other elements of sound or melodic units, the repetition or combination of some parts of the work, etc.) or finalizing the works in certain respects on the basis of parameters and instructions given by the composer.

(2) The contributions by performers to aleatoric works may be protected—according to the nature of their relations to the aleatoric works as created by the composers—as adaptations or as contributions to a joint work. The protection of such contributions may depend on their fixation according to Principle MW1(3).

*Report 72. In general, there was an agreement about Principles MW5 and MW6.*

*Report 73. One delegation underlined the possibility mentioned in Principle MW6(2) that the performer of an aleatoric work might qualify as a coauthor of the final version of the work because the work took its complete form only as the result of the contribution of the performer.*

*Report 74. One observer from an international non-governmental organization stressed that the performers of aleatoric works, even if they might enjoy copyright protection as adaptors or coauthors, should also be protected as performers.*

### Moral Rights in Musical Works

110. The considerations in paragraphs 40 to 42 concerning the moral rights in dramatic and choreographic works are also applicable, *mutatis mutandis*, in respect of musical works (with the obvious exception that the problem of changes made during the staging of dramatic and choreographic works does not emerge in respect of musical

works). Therefore, the application of the following principle is suggested:

**Principle MW7.** Independently of the authors' economic rights and even after the transfer of the said rights, the authors of musical works should have the right to

(i) claim authorship and have their names indicated on the copies of their works (including sound recordings) and, as far as is practicable, mentioned in connection with any utilization of their works;

(ii) object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to their honor or reputation.

111. In the case of popular music, it happens fairly frequently that only the name of the performer is mentioned, for example, in broadcast programs. The failure to indicate the names of the authors of the works performed in such cases is an infringement of the author's moral right mentioned in point (i) above.

112. In connection with the other moral right, the "right of respect" defined in point (ii) above, the following comment should be made: as mentioned in paragraph 42, the provision does not aim at prohibiting all kinds of changes of works but only such actions mentioned in the provision which would be prejudicial to the author's honor or reputation. If the author himself authorizes the use of his work on the basis of his exclusive right of authorization, he can take care of the protection of this moral right. In the case of the so-called "*petits droits*," uses of musical works (see the chapter entitled "Performing Rights" below), however, users receive blanket authorization for the use of—practically—the whole world repertoire. Individual authors are not in a position to take steps at the stage of authorization for the protection of their moral rights, but it does not mean that those rights do not enjoy full protection. A special case of the infringement of the author's "right of respect" may be the use of his work in a certain context (for example, in the framework of a pornographic production or for certain advertisements). It is obvious that the authors should have the right to object to such prejudicial uses even if they have taken place on the basis of blanket licensing.

*Report 75. Several participants expressed their agreement with Principle MW7(i) and, particularly, with the suggestion that the author's right to be named should only be applied "as far as it is practicable." At the same time, some of those participants pointed out that the obligation of mentioning the name of the author in broadcast programs was not practicable. Some other participants expressed other views; they stressed that in the case which was described in paragraph 111 of the document—namely, where the name of the performer is mentioned—some realistic solutions might, in general, be found for also mentioning the author's name. Fi-*

nally, it was agreed that the statement contained in paragraph 111 should be made more flexible; this can be attained, for example, by replacing the words "is an infringement" by the words "may be an infringement."

*Report 76.* Some participants emphasized the importance which the authors attach to their right to be named as authors in connection with their works.

*Report 77.* It was suggested that the questions of the exercise of the right to be named as author in broadcast programs should, preferably, be settled in agreements between authors' societies and broadcasters.

*Report 78.* Even if it was understood that the views expressed by the participants concerning the "right of respect" of authors of dramatic and choreographic works (Principle DC3(1)(ii) and (2)) were, in general, also relevant as regards authors of musical works (Principle MW7(ii)), some comments were repeated and certain questions were discussed again.

*Report 79.* Some participants proposed that the words "which would be prejudicial to their honor or reputation" should be deleted. In that way, it would be recognized that the author should always be able to decide about any modifications of his work, which in a way was an expression of his personality. One delegation put forward an alternative proposal according to which, instead of the deletion of the last clause of Principle MW7, a new paragraph should be added to this principle. This new paragraph should, *mutatis mutandis*, correspond to Principle DC3(2), except that—as it was proposed by the same delegation—its second part from the word "however" should be deleted.

*Report 80.* Some other participants disagreed with the proposals mentioned in the preceding paragraph. They stressed that the principle should not go beyond the minimum obligations required by Article 6<sup>bis</sup> of the Berne Convention.

### Economic Rights in Musical Works

113. Musical works are used in extremely varied ways and practically all economic rights under copyright law are applicable also with regard to such works, just as it is described in paragraph 44 above concerning dramatic and choreographic works. Therefore, this part of the document applies the same approach as the one explained in paragraph 44 above. It first only gives a comprehensive list of economic rights without particular details and after that it discusses those rights in a more detailed manner only

where the special features of musical works and their utilization justify it.

114. The following principle on economic rights is offered for consideration:

**Principle MW8. (1)** The authors of musical works should have the exclusive right to authorize at least the following acts:

(i) the reproduction of the work in any manner or form, particularly in the form of sheet music (score and printed text of the work) and in the form of sound recording (right of reproduction);

(ii) the rental and public lending of the copies of the work reproduced in the form of sheet music and in the form of sound recordings containing the work (right of rental and public lending);

(iii) the making of adaptations and arrangements of the work (right of adaptation);

(iv) the translation of the text of the musical work (right of translation);

(v) the public performance of the work (right of public performance);

(vi) any communication to the public of the work, including its communication by wire in a cable-originated program (right of communication to the public);

(vii) the broadcasting of the work, any communication to the public by wire (by cable), or by rebroadcasting, of the broadcast of the work, when this communication or rebroadcasting is made by an organization other than the original one, and the public communication by loudspeaker or any other analogous instrument transmitting the broadcast of the work (right of broadcasting and related rights);

(viii) the cinematographic adaptation and reproduction of the work and the distribution of the work thus adapted and reproduced (cinematographic rights).

(2) The exclusive right of the author of the musical work to authorize the acts mentioned in paragraph (1) above should not be restricted but in the cases and to the extent allowed under the international copyright conventions.

115. The above-mentioned rights and the availability of limitations on them are regulated by Articles 8, 9, 10, 10<sup>bis</sup>, 11, 11<sup>bis</sup>, 12, 13 and 14 of the Berne Convention. Article IV<sup>bis</sup> of the Universal Copyright Convention does not contain such a detailed regulation about the rights of authors and the possible limitations on them, but it provides in general form, as was mentioned in paragraph 46 above, that "a reasonable degree of effective protection" must be accorded under national legislation. There is one exception: the right of rental and public lending which may only flow from a fairly generous interpretation of the scope of the right of reproduction (Article 9 of the Berne

Convention, Article IVbis of the Universal Copyright Convention) (but it should be added that even if that interpretation is not accepted, the granting of such a right seems desirable at the national level for an adequate protection of authors' economic rights and interests).

116. In addition to the basic principles of the protection of economic rights in musical works mentioned in Principle MW8 above, the following comments and the consideration of the following more detailed principles seem to be desirable.

*Report 81. In general, there was an agreement about the catalog of rights included in Principle MW8.*

*Report 82. One delegation stressed that the rental and public lending rights in music should also be extended to music embodied in videograms, possibly by an interpretation of the notion of distribution mentioned in MW8(1)(viii), and videograms should also be considered in paragraph 132 of the document.*

#### *The Right of Reproduction in Respect of Sheet Music. Reprography*

117. Sheet music right (the right of reproduction in respect of the score and/or the lyrics of the musical work) may not apply to certain new kinds of popular music (because scores simply do not exist), but it is still an important element of the rights of the authors in other musical areas. In music publishing contracts, an agreed percentage of the actual sale price of the sheet music is determined as copyright payment to the author. Such rights are—as a rule—administered by the publisher.

118. The score is often indispensable for the performance of a musical work (at least in traditional musical areas, first of all in the field of serious music). The production of certain scores is very expensive. Thus, it is in the interest of music publishers that the work be performed as frequently as possible. They undertake, in general, agency activities for the promotion of the performances of musical works published by them and, on the basis of the publishing contracts, they receive a certain percentage from the performing rights and mechanical rights royalties.

119. The ever more sophisticated reprographic devices cause serious problems in the field of the exercise of reproduction and other rights in relation to sheet music. If expensive scores (such as complete orchestral sets) are not bought or rented but simply copied, the author's right of reproduction becomes seriously eroded and the music publishers cannot recover their investments.

120. In the present series of meetings of committees of governmental experts, the problems of reprography in general will be discussed by the Committee on the Printed Word mentioned in paragraph 21 above. There are, however, certain special considerations in respect of musical works. Article 9(2) of the Berne Convention provides that

no exception should be allowed to the right of reproduction if it would conflict with a normal exploitation of the work, or would unreasonably prejudice the legitimate interests of the author and Article IVbis of the Universal Copyright Convention states that exceptions should not conflict with the spirit and provisions of the Convention and that if exceptions are made the Contracting State should nevertheless grant "a reasonable degree of effective protection" to each of the rights to which exception has been made. Irrespective of the result of the forthcoming discussions on reprography the special situation of musical works in this regard would call for a special regulation. The following principle is offered for consideration:

**Principle MW9. The right of reproduction should not be restricted in respect of the reprographic reproduction of sheet music if such reproduction would directly or indirectly serve the public performance of the musical work concerned.**

121. It goes without saying that, otherwise, Principle MW8(2) applies also in respect of the reproduction (reprographic or other) of sheet music. For example, on the basis of Article 10(2) of the Berne Convention, short musical works or short excerpts of longer ones in the form of sheet music may be used by way of illustration for teaching provided that this is compatible with fair practice.

*Report 83. One delegation expressed its support for Principle MW9.*

*Report 84. At the question of an observer from an international non-governmental organization, it was clarified that—as was explained in paragraph 120 of the document—the problems of reprography would be discussed in detail by the Committee of Governmental Experts on the Printed Word. Principle MW9 would receive its full meaning only in the context of the results of the meeting of that Committee. In respect of reprographic reproduction, in some countries free use was allowed in certain cases, while in other countries, some type of non-voluntary licensing was applied. It would be further discussed in which cases such restrictions of the right of reproduction might be justified and in which cases it would be unacceptable. What Principle MW9 said in that respect was only that if, as regards reprography, any restriction of the right of reproduction (either as free use or on the basis of compulsory licensing) might be found justified by the forthcoming Committee on the Printed Word, those restrictions should not be applied to the reprographic reproduction of sheet music, at least not in the case mentioned in the principle (when the reproduction would directly or indirectly serve the public performance of the musical work concerned). It could be decided only on the basis of the results of the meeting of the Committee on the Printed Word whether other restrictions than the*

ones mentioned in paragraph 121 of the document were justified.

*The Right of Reproduction in Respect of Sound Recordings. Piracy. Home Taping*

122. The right to authorize the production of records and tapes—the so-called “mechanical rights”—is one of the most important rights of the owners of copyright in musical works. (“Mechanical rights” also cover the production of music boxes, piano rolls which were the first fields where these rights became important; the expression “mechanical rights” is actually from the era when only those uses existed.)

123. In many countries, mechanical rights are administered by authors’ societies which—on the basis of reciprocal agreements between each other—represent a very big percentage of the world repertoire. The practice of mechanical rights societies is partly different from that of the societies administering musical performing rights (for example—as a rule—reciprocal agreements do not allow deductions from the royalties for general cultural and social purposes as in the case of performing rights), otherwise, however, the principles and comments below on the collective administration of musical performing rights apply *mutatis mutandis* to the collective administration of “mechanical rights.”

124. According to Article 13(1) of the Berne Convention: “Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” Several countries apply—on the basis of this provision—compulsory licensing for “mechanical rights” in music (and it covers not only musical works in the meaning as this expression is used in this part of the document but also dramatico-musical works).

125. The above-quoted provision has existed in the Berne Convention, in more or less its present form, since the 1908 Berlin Act, though the 1967 Stockholm revision conference made an important amendment. Previously, each country of the Union had the power to provide for a system of compulsory licensing covering not only the recording but also the public performance of the works in question by means of using such records. It became clear with the increasing public use of records and by the fact that public performance by this means was almost invariably covered by contracts, that there was no longer any need for compulsion, and the scope of compulsory licensing could be confined to the act of recording. This was done in Stockholm in 1967.

126. Recently, it has been questioned at least in some industrialized countries whether the application of such compulsory licenses is really justified. The Government of the United Kingdom, for example, expressed its intention to abolish the statutory recording license system (which now exists under Section 8 of the 1956 Copyright Act) in the so-called White Paper (entitled “Intellectual Property and Innovation”) presented to Parliament in April 1986. The White Paper contains the following arguments in favor of the abolition of this system: “Statutory licensing systems conflict with the normal copyright principle that a copyright owner should be able to control the use made of his material, and can only be justified where there are special circumstances. The conditions which SRL [statutory recording license] was designed to meet have long since changed and the breakdown of the consensus in its favour strongly reinforces doubts expressed in the 1981 Green Paper. The principal danger cited by supporters of SRL—that without it large music publishing groups might restrict recording of their repertoire to in-house labels, thus depriving the public of the variety of versions it has come to expect—seems unlikely to occur on a significant scale. There is now a very large number of recording companies. Diversity is an established feature of the market and the success of a particular recording is not necessarily predictable. Publishing groups are thus unlikely to put their own commercial interests at risk by restricting exposure in this way. Nor does it seem reasonable to suppose, as has been suggested, that royalty rates would be raised to the point of creating widespread loss of sales and unemployment. The rights owners would damage their own interests by such action as much as those of the record companies.” Those arguments seem to be relevant in general and also in other countries having such compulsory license systems. Compulsory recording licenses were introduced to encourage the growth of the infant recording industry. That industry has grown up; the reasons for compulsory licensing seem to have lost their validity.

127. It is important to state that even if compulsory recording licenses are applied, they should not, in any circumstances, be prejudicial to the rights of authors to obtain equitable remuneration. Any remuneration can only be called equitable if it reflects the real market value of the rights involved. The market value of mechanical rights can be identified very easily on the basis of existing contracts in other countries between “mechanical rights” societies and phonogram producers.

128. On the basis of the foregoing considerations, the following principle is suggested:

**Principle MW10. (1) The application of compulsory licenses for the recording of musical works once the authors have already authorized their recording is not incompatible with the international copyright conventions; however, consideration should be given to their elimination in countries where the protection of the phonogram industries does not justify such licenses any more.**

**(2) In countries where compulsory licenses mentioned in paragraph (1) are applied, the re-**

**muneration of the authors should be fixed according to the full market value of the right of reproduction in this field.**

129. The problem of piracy of phonograms was discussed in detail at the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms mentioned in Paragraph 8. The principles and comments contained in the working document prepared for that meeting apply necessarily to musical works included in phonograms. A special form of piracy is "hootlegging" when live performances are recorded without authorization and included in phonograms produced for commercial purposes. The above-mentioned principles and comments on piracy of phonograms apply *mutatis mutandis* to such cases of unauthorized use.

130. Home taping, that is reproduction for private purposes, was also discussed in detail in respect of phonograms at the meeting and the working document mentioned in paragraph 129 and the principles and comments contained in that document also apply to musical works included in phonograms. Home taping can, however, be done not only on the basis of phonograms of musical works but also on the basis of e.g. a broadcast. The prejudice caused to authors by such private recordings also exists in such a case (such private recording decreases the market for the right of reproduction). Therefore the principles and comments mentioned above apply *mutatis mutandis* to such cases.

*Report 85. One delegation said that even if in its country compulsory licensing was applied for the recording of musical works, it found Principle MW10 acceptable because it referred to the need for considering the elimination of such licenses if the protection of the phonogram industries did not justify their application any more. The delegation added that in its country the application of compulsory licensing was still deemed to be justified for the protection of phonogram industries.*

*Report 86. One other delegation expressed the view that it did not find the notion of "full market value" used in Principle MW10(2) clear enough. It would be more appropriate to state that the remuneration should be calculated as a function of the reproduced copies and its level should correspond to the internationally established practice. Paragraph 127 referred to the existing contracts in other countries between "mechanical rights" societies and phonogram producers as a possible basis for identifying the market value of mechanical rights. It would be more accurate to refer to the internationally established usual level of remuneration than to the contracts themselves in which that level was applied.*

*Report 87. An observer from an international non-governmental organization disagreed with the statement mentioned in the previous paragraph ac-*

*ording to which the remuneration of the author should be calculated in function of the reproduced copies. It was an established international practice that royalties were calculated on the basis of the copies on sale and not on that of the copies manufactured. The observer referred to the fact that phonogram industries could live with the system of exclusive "mechanical rights," but emphasized the advantages of compulsory licensing from the viewpoint of protecting phonogram producers against excessive demands.*

### *The Right of Rental and Public Lending*

131. Music publishers frequently utilize their sheet music publications not by selling but by making them available for rental. This is the case first of all with the very expensive orchestral sets. If authors and—on the basis of their contracts with authors—publishers did not have the right of rental and public lending, one of the most essential ways of utilization of such works would not be covered by copyright. Such an absence of protection would not only lead to serious prejudice to authors' rights but would also completely destroy the market for music publishers and it would force them to give up the publishing of such material.

132. The need for a right of rental and public lending in regard of phonograms was discussed in detail by the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms mentioned in paragraph 8 above. The principles and comments contained in the working document prepared for that meeting apply directly to musical works included in phonograms and *mutatis mutandis* to the rental and public lending of sheet music. In fact, providing for an exclusive right in respect of rental and public lending is particularly important in the field of sheet music.

*Report 88. It was understood that the views expressed in the discussion on the questions of the right of rental and public lending in respect of dramatic and choreographic works were also relevant, mutatis mutandis, concerning such possible rights in musical works.*

*Report 89. One delegation repeated its earlier proposal also in this context, according to which the right of rental should also be explicitly recognized in respect of videograms.*

*Report 90. Another delegation stressed that the recognition of the right of rental was not equally justified in relation to all categories of works. It said that in its country, such a right was recognized in respect of sound recordings; at the same time, the legislators had not found it justified to extend the same right to videograms.*

*Report 91. Still another delegation insisted that as mentioned in paragraph 41, a distinction should be made between copies produced exclusively for rental and those produced exclusively for sale.*

*Report 92. Some participants suggested that a general right of distribution should be recognized to cover sale, importation, rental, lending, etc.*

### "Performing Rights"

133. The so-called "performing rights" are the most widely utilized rights in musical works and, consequently—besides "mechanical rights"—the most important economic rights of the authors of such works. This expression is used in connection with certain uses of non-dramatical musical works and in connection with the same non-theatrical uses of excerpts from dramatico-musical works (for example the public performance of an aria from an opera at a concert). The rights exercised in the above-mentioned scope of uses are frequently referred to as "*petits droits*" (in contrast with "*grands droits*," the latter meaning the rights involved in the full performances and other full utilizations of dramatico-musical works).

134. In the above-mentioned context, "performing rights" is used in practice to include not only the right of public performance but also the right of communication to the public and the right of broadcasting and related rights as defined in Principle MW8 above. For example the Model Contract of Reciprocal Representation between Public Performance Societies adopted by the International Confederation of Societies of Authors and Composers (CISAC) contains the following definition: "Under the terms of the present contract, the expression '*public performance*' includes all sounds and performances rendered audible to the public in any place whatever within the territories in which each of the contracting Societies operates, by any means and in any way whatever, whether the said means be already known and put to use or whether hereafter discovered and put to use during the period when this contract is in force. '*Public performance*' includes in particular performances provided by live means, instrumental or vocal; by mechanical means such as phonographic records, wires, tapes and sound tracks (magnetic or otherwise); by processes of projection (sound film), of diffusion and transmission (such as radio and television broadcasts, whether made directly or relayed, retransmitted, etc.) as well as by any process of wireless reception (radio and television receiving apparatus, telephonic reception, etc. and similar means and devices, etc.)."

135. The exercise of "performing rights" is, generally speaking, impossible on an individual basis. There is a large number of users using certain works virtually at the same time and a large number of works used by one and the same user. Consequently, authors are unable to control and authorize all uses of their works separately and it is not possible for users to search for each author every time they intend to use his works. Therefore, authors form authors' societies for the administration of such rights. Those societies conclude reciprocal contracts between

each other and are in the position to authorize the use of practically the whole world music repertoire by means of blanket licenses given to users. Authors' societies collect royalties from users and distribute them among authors.

136. Collective administration of musical performing rights implies great advantages for users also. They can easily and in an efficient way obtain the authorization for such uses of an exclusive repertoire. It is obvious that where such collective system exists no compulsory licensing is justified. Therefore, for example, no compulsory licenses should be applied in respect of broadcasting of musical works.

137. The collective administration of performing rights involves a wide range of legal and practical problems that cannot be all discussed in the framework of the present document. In the following paragraphs, only those questions are covered that should be discussed for outlining the conditions of an appropriate protection of the rights involved.

138. It should be borne in mind in regard of all aspects of the collective administration of performing rights that those rights are *exclusive rights* of the authors to authorize certain acts. There is no basis in the international conventions to restrict them, for example, by introducing in the framework of their collective administration conditions that would degenerate such administration to the level of compulsory licensing.

139. The exclusive nature of the rights involved imply certain particular considerations in respect of collective administration.

140. All decisions concerning any important aspects of the administration of such exclusive rights (such as the methods of collection and distribution of royalties, the tariff system, etc.) should be taken by the owners of those rights or bodies representing them. It means that even in organizations other than real authors' societies which administer performing rights (such as state copyright organizations which, in general, have many other functions) a special machinery should be applied for such decisions. All procedures according to which other persons or bodies could decide about the exercise of the performing rights than the authors or bodies composed of their representatives would be incompatible with the exclusive nature of those rights.

141. Authors represented by an authors' society (or other organization fulfilling the role of such a society) should be in the position to have regular, full and detailed information about all the activities of the society concerning the administration of their rights. Without it, no right to participate in the decisions about all important questions can be exercised appropriately.

142. Societies administering performing rights should be non-profit organizations. Nothing else can be deducted from the royalties collected by them than the actual expenses of the administration of the rights involved. Exceptions to that rule can only be made if the owners of rights

concerned have approved—directly or by means of bodies representing them—the deduction of some amounts for certain specific purposes (for example for cultural or social purposes). No deduction can be made from the royalties of owners of copyright who or whose representative bodies have not approved such deductions. Any deductions in excess of those necessary to cover the expenses of administration and the deductions explicitly approved by the owners of copyright or the bodies representing them would amount to depriving the copyright owners concerned of their royalties and such a practice would be in conflict with the basic principles of copyright protection.

143. Authors' societies may also undertake other activities than the administration of performing rights (for example, agency activities for the promotion of certain works in their repertoire or the administration of other rights). Such additional activities show very frequently significant deficits. The use of any amount from performing rights royalties for covering such deficits should be deemed as deductions on which the same considerations would apply as described in the preceding paragraph.

144. The full amount collected by the society for the use of performing rights—after the deductions of the expenses of administration and other potential deductions authorized according to the preceding paragraphs—should be distributed among individual owners of rights in proportion to the actual uses—as far as such uses can be identified—of their works.

145. Foreigners should enjoy the same treatment as the members of the society. In addition to the application of the same rules regarding decision-making, deductions and distribution, an equal treatment should necessarily involve the provision of full and transparent information on the activities of the societies concerned to the societies of other countries whose repertoire they administer on the basis of reciprocal agreements.

146. Tariffs for various uses should be established in a way which is not in conflict with the exclusive nature of such rights. If the authors' society and users cannot reach an agreement, an independent body should determine the tariffs to be applied according to their real market value.

147. The functions of collective administration of performing rights can only be fulfilled if such administration is centralized at the national level (with some exceptions, only one society exists in each country). Such societies should as far as possible be exempted from antitrust restrictions; the only guarantee that is necessary for avoiding the theoretical danger of misusing the exclusive position of such societies is the involvement of a copyright tribunal-type body in the disputes about tariffs and other conditions of blanket licensing.

148. The above-mentioned considerations are summarized in the following principle which is offered for consideration:

**Principle MW11. (1) In the context of the present principle**

(i) "performing rights" mean the right of public performance, as well as the right of communication to the public and the right of broadcasting and related rights as defined in Principle MW8(1) above, all in relation to the use of musical works and the non-theatrical use of excerpts from dramatico-musical works (in other words the so-called "petits droits");

(ii) "collective administration" means the administration of the above-mentioned rights by authors' societies or other organizations fulfilling the same functions (hereafter referred to as "authors' societies") on behalf and on the basis of the authorization of the authors who are their members or whom they represent according to reciprocal agreements with other (foreign) authors' societies; the functions involve the control and the issuing of blanket authorizations for use of the rights administered by them as well as the collection of royalties for such use and their distribution among the owners of rights whose works have been used under such blanket authorization.

(2) The collective administration of performing rights by authors' societies should be promoted. Such societies should as far as possible be exempted from restrictions under antitrust legislation. Measures to be applied for protecting users against potential misuse of a de facto monopolistic position of such societies should be restricted to the settling of disputes concerning the conditions of blanket authorizations (first of all about the tariffs to be applied) by an independent body in case the authors' society and users are unable to settle such disputes through free negotiations.

(3) Compulsory licenses, as a rule, should not be applied in respect of musical performing rights.

(4) The exclusive nature of musical performing rights should not be restricted in the framework of their collective administration. Therefore,

(i) all decisions concerning any important aspects of collective administration should be taken by the authors whose rights are involved or by bodies representing them;

(ii) the authors should receive regular, full and detailed information about all the activities of the authors' society that may concern the exercise of their rights;

(iii) the tariffs and other conditions for the blanket authorizations mentioned in paragraph (i)(b) should—wherever it is possible—be agreed on the basis of negotiations with users; in the case of failure to reach an agreement, the

independent body mentioned in paragraph (2) should decide, but it should establish the tariff according to the real market value of the right involved;

(iv) without the authorization of the authors concerned (given directly or by the bodies representing them according to point (i) above) no proportion of the royalties collected by the authors' society should be used for any other purposes (for example for cultural or social purposes, or for financing other activities) than the covering of the actual costs of administering performing rights in the musical works involved and the distribution of royalties among owners of copyright;

(v) the amounts of royalties collected for the blanket authorization for the use of performing rights—after the deduction of the actual costs of collective administration and other potential deductions that the owners of copyright may authorize according to point (iv) above—should be distributed among individual owners of copyright in proportion to the actual frequency of the use of their works.

(5) The members of foreign authors' societies represented by an authors' society in a certain country should enjoy the same treatment as the members of the authors' society concerned in keeping with paragraphs (1) to (4) of the present principle. Foreign authors' societies should receive regular, full and detailed information about all the activities of the authors' society representing their repertoire in a certain country that may concern the exercise of the rights of the members of such foreign authors' society.

*Report 93. Some delegations expressed their support for Principle MW11.*

*Report 94. One delegation suggested that in connection with the definition of performing rights, Principle MW11(1)(i) should explicitly refer to those subparagraphs of Principle MW8(1) which defined the right of public performance, the right of communication to the public and the right of broadcasting and related rights understood as performing rights.*

*Report 95. One delegation, while agreeing with the definition of "performing rights" and "collective administration," suggested that also the notion of "public performance" should be defined. It acknowledged that paragraph 134 of the document referred to a definition of "public performance" as applied by the member societies of CISAC but, perhaps, a more general approach would be necessary. The definition could, for example, take into account the following elements: performances in places open to the public;*

*performances in places which were not open to the general public, but where a substantive number of people was present; transmission to the places now mentioned; transmission to the public at large whether to the same or separate places, etc.*

*Report 96. Several delegations emphasized the importance of collective administration of rights which was, in general, applicable where the individual exercise of rights was impossible or impractical. One delegation added that authors' societies existed and were necessary also in other fields, where the rights could be, and were, exercised individually, as the societies would give assistance in representing the authors' collective interests in advising them about their rights and about the most appropriate exercise of those rights in undertaking certain elements of the administration of rights (for example, the collecting of royalties, etc.).*

*Report 97. One delegation and the observer from an international non-governmental organization expressed their disagreement with Principle MW11(2). They said that in case of disputes between authors' societies and users regarding tariffs or other conditions of their contracts, it should always be the courts which should decide and not copyright tribunals or other arbitration bodies. In their opinion a recourse to any system of obligatory arbitration should be avoided.*

*Report 98. The Secretariats stated in answer to the comments mentioned in the preceding paragraphs that Principle MW11(2) covered only the case of a possible misuse of a monopolistic situation.*

*Report 99. Some delegations informed the Committee about arbitration systems which were applied in their countries and which functioned, in general, to the satisfaction of both authors and users. Several participants were of the opinion that Principle MW11(2) was important and should be kept—even if with some modifications—in the set of principles.*

*Report 100. In respect of paragraphs (4) and (5) of the Principle, some delegations said that in their countries authors were not necessarily members of the collective administration bodies; they just gave authorization to those bodies for the administration of their rights.*

*Report 101. It was proposed that the adjective "blanket" should be deleted in relation to the authorization given by the authors' societies because other forms of authorization were also conceivable.*

*Report 102. One delegation mentioned that in its country, authors' societies were, in general,*

non-profit organizations, but this was not a condition of their existence.

*Report 103.* It was suggested that in paragraph (4)(v), criteria other than the frequency of the use of the works (such as the capacity of the place where the works were performed, the length of the works, the income related to the use of the works, etc.) should also be taken into account for the distribution of royalties.

*Report 104.* Several participants emphasized the importance of paragraph (5) which contained basic guarantees for the protection of the rights of foreign owners of rights.

*Report 105.* One delegation was of the opinion that what was contained in Principle MW11 should rather be part of the commentary. Another delegation suggested that only paragraphs (4) and (5) should be transferred into the commentary. An observer from an international non-governmental organization proposed the same concerning paragraph (2). Other participants were in favor of maintaining Principle MW11 in its present structure, even if with some modifications.

#### *Satellite Broadcasting and Cable Distribution*

149. The working document discussed by the Committee of Governmental Experts on Audiovisual Works and Phonograms mentioned in paragraph 8 contained a detailed analysis of the protection of phonograms in connection with direct broadcasting by satellites, transmission by fixed-service satellites, cable distribution of cable-originated programs, the simultaneous and unchanged cable distribution of broadcast programs as well as the cable distribution of programs transmitted by fixed-service satellites. All what is said about those types of use in that document concerning phonograms (the principles as well as the comments) is also directly applicable to musical works included in phonograms and *mutatis mutandis* to musical works used in the framework of such uses by means of live performances.

*Report 106.* No particular comment was made in this respect.

#### *"Synchronization Right"*

150. As it is mentioned in Principle MW8(1)(viii) above the authors of musical works also enjoy the right of cinematographic adaptation. In the case of musical works this means that producers cannot include such works in audiovisual works without the authorization of their authors. This right is called "synchronization right" in practice and it covers both specially commissioned and pre-existing musical works.

*Report 107.* No particular comment was made in this respect.

#### **The Rights of Performers of Musical Works**

151. Paragraphs 60 to 72 above apply *mutatis mutandis* also in respect of the performers of musical works. Consequently, Principle DC7 can be applied without changes to the performers of musical works:

**Principle MW12.** Principle DC7 is also applicable in regard of the performers of musical works.

152. As in the case of the performers of dramatic and choreographic works, the rights of performers of musical works in respect of using phonograms published for commercial purposes or reproduction of such phonograms are not discussed in the present document, because those questions were covered by the working document prepared for the meeting of Governmental Experts on Audiovisual Works and Phonograms mentioned in paragraph 8 above. The principles and comments included in that document concerning uses of phonograms in connection with the new technologies also apply directly to the rights of performers of musical works included in phonograms. Certain principles and comments contained in that document apply *mutatis mutandis* also to live performances of musical works and the right of performers concerned by them, such as the principles and comments on piracy ("bootlegging," that is the unauthorized recording of performances for commercial purposes is a form of piracy which is particularly prejudicial to the basic rights and interests of performers), home taping (private reproduction of performances), satellite broadcasting and cable distribution.

*Report 108.* It was understood that the comments made in respect of the rights of performers of dramatic and choreographic works were also relevant, *mutatis mutandis*, to the rights of performers of musical works.

#### **IV. MISCELLANEOUS**

##### **Conclusion**

*Report 109.* The Committee noted that the Secretariats would report on the results of the meetings to the next sessions of the Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention.

##### **Adoption of the Report and Closing of the Meeting**

*Report 110.* The Committee unanimously adopted this report and, after the usual thanks, the Chairman declared the meeting closed.

## V. LIST OF PARTICIPANTS

## I. States

Bangladesh: M.F. Amin. Bolivia: J. Aparicio Otero. Brazil: J. de Souza Rodrigues. Burundi: G. Ntagabo. Cameroon: H. Fouda. Canada: B. Couchman. China: Qi Yanfen. Colombia: F. Zapata López. Costa Rica: F. Ramirez-Barrantes; Y. Bourillon de Rickebusch. Côte d'Ivoire: E. Miezán Ezo. Denmark: L. Hersom. Egypt: A. El-Borai. Finland: J. Lieder; S. Lahtinen; T. Koskinen; P. Westman. France: M. Bouleau; M.-C. Rault. German Democratic Republic: W. Lange. Germany (Federal Republic of): M. Möller. Guatemala: G. Putzeys Alvarez; J.C. Castro Quiñones. Guinea: K. Condé. Holy See: L. Frana; R.V. Blaustein; M.-S. de Chalus. Hungary: G. Boytha. India: P. Singh. Italy: G. Catalini; M. Fabiani. Jordan: Z. Obiedat. Kenya: J. King'Arui. Lebanon: J. Sayegh. Mexico: A. Loredó Hill. Morocco: A. Badry. Panama: J. Patiño. Portugal: A. Gomes. Saudi Arabia: N. Kanan; M. Alwan. Soviet Union: M. Voronkova. Spain: E. de la Puente García; F. Aguilera Oribuel; F. Galindo Villoria. Sweden: A. Mörner; B. Rosén. Switzerland: A. Bauty. Thailand: S. Povatong; A. Otrakul-Sales. Togo: S. Zinsou; S. Gbodui; K. Grodoui. Tunisia: S. Zaouche. Turkey: C. Türkeröglü; H. Sezgin; N. Sümer. United Kingdom: D. Irving. United States of America: L. Flacks. Yemen: A. Saleh Sayyad.

## II. Observers

## (a) African Liberation Movements

African National Congress (ANC): T. Moema.

## (b) Intergovernmental Organizations

Arab Educational, Cultural and Scientific Organization (ALECSO): F. Ammar.

## (c) International Non-Governmental Organizations

Broadcasting Organizations of the Non-Aligned Countries (BONAC): R. Mihailović. European Broadcasting Union (EBU): M. Burnett. International Bureau of Societies Administering Recording and Mechanical Reproduction Rights (BIEM): J.-A. Ziegler. International Confederation of Free Trade Unions (ICFTU): J. Vertenelle. International Confederation of Societies of Authors and Composers (CISAC): J.-A. Ziegler; N. Ndiaye; J. Horovitz; R. Abrahams; T. Desurmont; P.-H. Larnauve. International Federation of Actors (FIA): Y. Burckhardt. International Federation of Musicians (FIM): Y. Burckhardt. International Federation of Phonogram and Videogram Producers (IFPI): G. Davies. International Literary and Artistic Association (ALAI): A. Françon; D. Gaudel. International Publishers Association (IPA): J.-A. Kouteboumow; D. Duclos; S. Wagner. International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU): J. Vertenelle. International Theatre Institute (ITI): A.-L. Perinetti. Max Planck Institute for Foreign and International Patent, Copyright and Competition Law: S. Schlatter-Krüger.

## III. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

M. de Bonnacorse (*Deputy Director-General*); T. Keller (*Assistant Director-General a.i., General Programmes and Programme Support Sector*); A. Amri (*Director a.i., Copyright Division*); E. Guerassimov (*Legal Officer, Copyright Division*).

World Intellectual Property Organization (WIPO)

A. Bogsch (*Director General*); H. Olsson (*Director, Copyright and Public Information Department*); M. Ficsor (*Director, Copyright Law Division*).

## Studies

### What About the Publisher's Rights?

Franca KLAVER\*

1. With the celebration of the centenary of the Berne Convention last year, thoughts inevitably turn to the past. The origin of copyright in its present form and scope, that is to say as a right of the author, dates only from the 18th century. The Act of Anne (1710) is generally taken as the first law on copyright in the modern sense of the term. Before that, the printing privileges granted by the authorities and used as a tool of censorship for the written word, powerful as it was, were given to the printers. In those days printers also acted as publishers and booksellers. They became the main entrepreneurs in the field of science and culture, and gradually made an art out of their profession, thus becoming wealthy and respected men in society.

Take Christoffel Plantijn for instance. Born in France where he learned the art of printing and bookbinding, he opened his own firm in Antwerp in 1555. With something like 20 printing presses running daily, he produced about 1,500 books which became famous for the quality of their text, typography and illustrations. His workshop, which employed some of the best craftsmen, became a meeting point of learned men who brought him their manuscripts and geographical charts. His reputation as a printer, publisher and bookseller reached far beyond his country, making it a center of international distribution of science and culture.

Plantijn was clearly more than a printer and bookseller. He was a kind of artist who was not satisfied merely to put books on the market. He wanted them to be beautiful, well written, intellectually stimulating and scientifically accurate. He selected his illustrators and typographers himself, thus exercising a decisive influence on new forms of typography. But perhaps his greatest quality was in choosing the people whom he permitted to gather around him while selecting their books for publishing.

Is this a picture of the modern publisher? Do his activities in any way correspond to those of the Renaissance figure of Christoffel Plantijn? Is he still

drinking his glass of wine quietly at the open fire of his sitting room, surrounded by his author friends talking about books and maps? Is the expression "a gentleman's profession," often applied to publishing in the past, still valid? Or is the publisher more like any other businessman, traveling around the world, attending book fairs and conferences, investigating markets, discussing prices, dealing with trade unions, reacting to the stock exchange, speaking to governments and international bodies likely to affect his activities?

It is difficult to answer this question with a simple "yes" or "no." This is because the publisher's profession has become extremely complex since the end of World War II. His firm may nowadays be very big, employing hundreds of people, or very small with only a few dedicated and hard-working enthusiasts doing the job. The variety of the publishing profession is one of its attractions, as is its freedom. In many countries, especially in the western world, publishers operate in a market economy and under a minimum of official restrictions, their activity being linked to the constitutional guarantee of free speech. Thus independence is assured, but so is risk. In a pluriform culture it is not easy to predict the fortune or misfortune of a book. Market research has therefore become one of the necessities for a publisher. With competition growing and economic crisis prevailing, the financial side of publishing demands special attention. New technology complicates the picture: not only are books produced, but knowledge can also be stored in databanks, which is of great interest to scientific publishers. In the literary field, a book may lend itself to additional uses such as film, television or video. A publisher who knows the market is also expected to explore these possibilities. While Plantijn handled the only mass medium of his time—the book—the modern publisher is operating in a world of various mass media; it is both in his own interests and in those of his authors to take account of that fact.

2. Copyright being what it is, a right of the author, who is deemed to be the true creator of a work, it is fair to ask: what about the publisher's right(s)? Does the modern publisher present any of

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\* Lawyer, Vreeland, Netherlands.

the characteristics of a (co)creator in the literary, scientific or artistic field, or is he merely the businessman who looks after the production, distribution and selling of the work? Does he just wait passively for an author to bring him a manuscript for publication, or does he take the initiative in selecting certain authors for certain publications? Does he care for the attractive presentation of texts and their scientific value, or does he just want to make money?

Surveying the present-day "information society," merely from the viewpoint of a consumer, it seems undeniable to me that the modern publisher—be his firm large or small—plays a very active part. There is a wide variety of books available on all kinds of subjects, often attractively presented, and offered at various prices. If not bought, books may be borrowed from libraries; specialized knowledge may be obtained from databanks. It is obvious that this could not possibly be the case if there was not a specialized class of people—the publishers and their staff—who looked after the content and quality of the product. Continuity is far better assured when the publication of a piece of writing takes the form of a book instead of a report, the so-called "gray literature," or that of a stenciled manuscript. Even if a book is sold on the second-hand market after a couple of years of normal exploitation, this still means that it will be available for a long time. But where, it may be asked, is the link with copyright?

3. Nowadays the publisher is still dependent on the copyright of the author for the exploitation of the work, at least in countries where legislation is based on the principles of the Berne Convention. By contract he must acquire the copyright or a license in order to bring the book onto the market. For further exploitation of the so-called secondary rights (translation, filming, broadcasting, exploitation in databanks, reprography, etc.) the author must grant him an additional license. In the case of copyright infringement, the publisher cannot go to court if he has not been given the author's permission to do so. In a recent case in the Netherlands, where a university was (at last!) sued for breach of copyright for making "readers" (compilations) out of scientific journals and textbooks and selling them to students, publishers first had to contact the authors of those publications, because most contracts did not explicitly grant the publisher the right to act against infringers. (Some of them refused, which shows that their interests may differ from those of the publisher.) In other words, unless the copyright has been transferred to him *in toto*, the publisher has to go back to the author in order to obtain permission for any further steps he may wish to take in the exploitation and defense of the work. In actual

practice, authors or their organizations usually transfer only those rights or license those acts which are needed immediately for exploitation, thus retaining all other rights for themselves. This attitude is perfectly legitimate and understandable, especially when one thinks of the new ways and means of exploitation that may arise. But the publisher is at a disadvantage when he intends to take full responsibility towards the author and the work, i.e. to promote the work actively throughout the whole spectrum of media outlets offered by the market.

There is also another aspect of the publisher's activity. As mentioned above, the publisher nowadays plays a substantial role in the actual creation of a work. Often it is the publisher who, having analyzed the demands of the market, decides what kind of publication will meet a particular need. It is the publisher and his staff who then conceive the work or series of works, their (teams of) authors and contributors, the outward appearance of the works, its title, its price, its various outlets and so on. Even in the strictest interpretation of copyright law there is little doubt that this involves coauthorship or collective authorship (cf. Article 2, paragraph (5) of the Berne Convention) on the part of the publisher.

Here too the publisher's contribution begins to present striking parallels with the activities of other producers in the information society, notably the film producer. The film producer often takes the initiative to make certain films, he selects scriptwriters, director and performers, and he has the final say on the content of the film. Like the film producer, the publisher decides on the financial investment and on the release and distribution of the work. He often operates in an international environment (e.g. the Frankfurt Book Fair), with a multiplicity of channels through which the work can be made available to the various segments of the public. Especially in the case of complicated and expensive works like encyclopedias, international coproductions of works on visual arts, dealings with electronic publishing and so on, which are likely to need a long time before there is any return on investment, the role of the publisher as the central figure for directing quality, shape, investment and output is entirely comparable to that of the film producer.<sup>1</sup> And when it comes to copyright infringement, it is undoubtedly the producer who has to take action in order to protect copyright against piracy. Although usually in the interests of the authors, it is not always certain that authors will cooperate in the lawsuit. They may be more interested in their notoriety.

4. During the Stockholm Conference on the revision of the Berne Convention, the role of the film

<sup>1</sup> "Film producer" can of course be taken in the sense of television or video producer as well.

producer as the central figure for the creation and exploitation of the film was taken fully into account. Ownership of copyright can be recognized by national legislation, and a "presumption of legitimation" works in his favor if there is no stipulation to the contrary (cf. Article 14<sup>bis</sup> of the Berne Convention, Paris Act, July 24, 1971).

It is evident that the publisher would be in a much better position if he, like the film producer, could exploit the work on the basis of such a "presumption of legitimation" or by virtue of a "neighboring right." Developments during the past few decades have shown a growing understanding in copyright circles of the producer's position. While the position of authors is fully respected by the existing copyright conventions, so that contracts can continue to be concluded on the basis of the exclusive right, it is increasingly being recognized that the producer also has a legitimate claim as far as exploitation and actions against infringement are concerned. Not only was the 1961 Rome Convention on neighboring rights [International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations] a symptom of such recognition, but one decade later the 1971 Geneva Convention [Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms] granted more extensive rights to the producer of phonograms. This thinking has been followed on the national level, countries granting neighboring rights to producers. Moreover, in the legal and administrative regulation of rights it was officially recognized that producers should have their share in payments made for secondary uses, such as royalties on the private use of blank or taped cassettes, the public lending right and payments made for reprography. Often this share is 50%, which means that authors and producers are deemed to contribute equally—though in different ways—to the success of the work.

It seems strange that publishers, who have the longest experience with the exploitation of works of the mind, have up to now done so little to improve their legal position on the national and international levels. Does this hint at the fact that publishing is still a "gentleman's profession," where contracts are

quietly concluded, with the publisher and the author seated in comfortable armchairs, sharing a glass of good wine? Where afterwards everything is left to the wisdom and good faith of the publisher? Or has the profession of the publisher become part of a more aggressive world, where organizations fight for the interests of their members, where contracts and deals often involve great financial risks, so that the conclusion of those deals cannot be left to amateurs?

One thing seems clear to me: while the publishing profession represents a guarantee of free speech and freedom of information in a pluriform world, it cannot be left to the publishers alone to defend their interests in the information society—they should be enabled to do so on the basis of a legally recognized position. The problems arising from complicated exploitation of works and in particular from an increasing and alarming amount of piracy make it essential that the publisher should be given a stronger position. This was also the conclusion arrived at by the International Copyright Symposium held last year by the International Publishers Association (IPA) at Heidelberg (April 24 and 25) to celebrate the centenary of the Berne Convention. I quote from the summary of the Symposium<sup>2</sup>:

The political purpose of this branch of law [copyright] is to stimulate primarily creation "at the source" where the *works* are created, and secondly industry at the market input side where the *products* are created. In consequence, copyright law can only be and should be in the future a balanced system of authors' rights for creators, neighboring rights for producers, combined with an elaborate system of positive contractual rules and, last but not least, a concept of rules for collecting societies.

If this is done we will be correcting a historical error: by making the author the central figure in creating works of the mind (and rightly so), the role of the publisher has been neglected. It is time for the publisher to be granted the rights which are his due.

<sup>2</sup> Summary of the Symposium, by Charles Clark, in *Internationales Urheberrechts-Symposium*, Schriften zum gewerblichen Rechtsschutz, Urheber- und Medienrecht (SGRUM), Munich, 1986, p. 233.

## Correspondence

### Letter from the USSR

#### New Developments in Soviet Copyright

E.P. GAVRILOV\*

This fourth "Letter"<sup>1</sup> deals with the following four questions: new bilateral copyright agreements of the USSR; new legislation; recent case law; developments in scientific life.

#### I. New Bilateral Copyright Agreements of the USSR

Today the USSR is bound in the copyright field by six bilateral agreements with socialist countries (Bulgaria, Cuba, Czechoslovakia, German Democratic Republic, Hungary and Poland) and two similar agreements with capitalist countries (Austria and Sweden).

The agreements with socialist countries are all of one type and are of great practical value both to the Soviet Union and to socialist sister countries. Indeed, it is they and not the Universal Copyright Convention (UCC) that determine the USSR's copyright relations with those countries.

The essential subject matter and content of these agreements are known to the foreign reader.<sup>2</sup> We shall not therefore analyze them again. We would simply mention that the "working agreements" concluded between the copyright societies of the countries concerned are of great importance to the interpretation and practical application of those agreements. From time to time the working agreements are revised and the new texts published.<sup>3</sup>

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<sup>1</sup> *Copyright*, 1976, pp. 96-111; 1979, pp. 318-326; 1984, pp. 237-245.

<sup>2</sup> *Ibid.*, 1979, pp. 319-321; E.P. Gavrilov, "Schutz der Urheberrechts von Bürgen anderer sozialistischer Länder in der UdSSR" [Protection in the USSR of Copyright Belonging to Citizens of Other Socialist Countries], in *Aktuelle Probleme des sozialistischen Urheberrechts. Berichte* [Actual Problems of Socialist Copyright. Communications], Humboldt University of Berlin, 16.84, Berlin, 1984, pp. 58-78.

<sup>3</sup> *Avtorskoye pravo. Sbornik normativnykh aktov* [Copyright. Collected Normative Acts], Moscow, 1985, pp. 80-127.

On December 16, 1981, the Soviet-Austrian Agreement on the Reciprocal Protection of Copyrights was signed, to come into effect on October 1, 1983.<sup>4</sup> It is the first bilateral copyright agreement that the USSR has ever signed with a capitalist State. It is of great political significance, because it serves to broaden cultural cooperation and exchange between the two countries. At the same time, it is of great interest from a legal point of view.

Of particular interest is Article 2 of the Agreement, which introduces the principle of applying the UCC to some "old" works; it does so only to a very limited extent, however.

Prior to the conclusion of this Agreement, of course, the mutual copyright relations of the USSR and Austria were governed by the Universal Copyright Convention, which had been applied in relations between the two countries since its entry into force for the Soviet Union on May 27, 1973. Pursuant to Article VII, the Convention does not apply to works or rights in works which at the moment of the Convention's entry into force "are permanently in the public domain" of the Contracting State in which protection is claimed.

As far as the USSR is concerned, Article VII of the Convention should be interpreted in relation to the Soviet legislation in force at the time of its accession to the Convention.

Article 97 of the Fundamentals of Civil Legislation of the USSR and the Union Republics provides that the copyright of foreign nationals is recognized:

(1) in works first published in the territory of the USSR, or not published but located within its territory in some tangible form—on the basis of Soviet legislation;

(2) in works first published or located in some tangible form in the territory of a foreign

<sup>4</sup> *Vedomosti Verkhovnogo Soveta SSSR* [Gazette of the USSR Supreme Soviet], 1983, No. 5, p. 687; see *Copyright*, 1983, pp. 280-283.

State—only on the basis of international agreements of the USSR.

The rules relating to published works are formulated in clear-cut terms: if the work was first published in the USSR, it is always protected; if it was first published abroad, it is not protected in the absence of an international treaty or agreement. The legal position of an unpublished work is not so clear, however. As we have tried to show in the past,<sup>5</sup> the legal status of an unpublished work by a foreign author that is located in Soviet territory undergoes change if it is first published abroad.

We believe that this is also true of an unpublished work by a foreign author located abroad: if such a work is first published in the USSR, it will enjoy Soviet copyright protection. This statement is borne out by current practice: not a single Soviet user organization has ever refused to pay royalties to foreign authors and protect their copyright, provided that their works have been first published in the USSR, even where they have been created abroad, in other words have existed in some material form abroad. This means that the unpublished works by foreign authors located abroad cannot be regarded in the USSR as works "permanently in the public domain." It follows from this that Soviet legislation does not attach legal importance (in this particular respect) to the matter of the territory in which and the time at which works have been created.<sup>6</sup>

It must be added to the foregoing that, before the USSR acceded to the UCC, Soviet legislation used only one broad concept of the publication of the work, which included public performance of a work and its broadcasting. It means that no foreign works first made public abroad before May 27, 1973 (that is, before the USSR acceded to the UCC) are subject to the Convention, since it has no retroactive force. In the USSR, those works "are permanently in the public domain" (according to Article VII of the UCC).

Since the USSR's accession to the Universal Copyright Convention, Soviet legislation has been using the narrow concept of publication that corresponds to the Convention's Article VI. This new concept is applied to works by foreign authors published abroad. In other cases Soviet legislation con-

tinues to use the former broad concept of publication.

Article 2 of the Soviet-Austrian Agreement provides for the mutual protection of works created before May 27, 1973, but not published on that date (the Agreement does, however, use the concept of publication to be found in Article VI of the UCC). Those works are in fact divided into the two categories of works not made public before May 27, 1973, and works publicly known before that date but not published.

As we have shown above, works in the first category enjoy copyright protection in the USSR on the basis of the Universal Convention as well. As for works in the second category, their legal protection in the territory of the USSR is determined by the Soviet-Austrian Agreement. This illustrates the retroactive force of the Agreement.

There is one exception to this rule, however: protection is not accorded if a work in the second category was published as an unprotected work in the territory of the other Contracting Party in terms of Article VI of the UCC before the Agreement came into force (i.e. before October 1, 1983).

This means in practice that a song composed by an Austrian composer and broadcast before May 27, 1973, but not published prior to that date, would enjoy no legal protection in the USSR if it was published in the Soviet Union before October 1983 in a collection of songs (together with the notes) without any recognition of the Austrian author's copyright (specifically, without a contract and without the payment of author's remuneration). But if that song was published in Austria or another country and not in the USSR before October 1, 1983, it nevertheless enjoys Soviet copyright protection.

Here is another example. Konstantin Simonov's work *Japan 46 — Diary Pages* was published in the USSR in 1976, or 30 years after it was created. It therefore qualifies for copyright protection in Austria on the basis of the Soviet-Austrian Agreement unless it was published in Austria before October 1, 1983, as an unprotected work.

To take yet another example. Stefan Zweig's *Rausch der Verwandlung* [Ecstasy of Transformation], first published in 1922, is devoid of legal protection in the USSR not because it was created before May 27, 1973 (the author died before that date), but because between his death (in 1942) and the use of the work in the USSR in 1985 by *Inostrannaya Literatura* [Foreign Literature] over 25 years elapsed, so that no works written by Stefan Zweig are protected by Soviet copyright any longer.

Let us now turn to the question of retroactive force in the Soviet-Swedish Agreement. The Agreement between the Government of the USSR and the Government of the Kingdom of Sweden on the

<sup>5</sup> *Copyright*, 1979, pp. 318-319.

<sup>6</sup> The various wordings of the different texts of Article VII of the Universal Copyright Convention do not cast doubt on this conclusion. There is however one different opinion on the matter, according to which the French text can lead to the conclusion that the Convention is not applicable to works created before it came into force (see Robert Diltrich, "Works in the Public Domain. Analysis of the Scope of Article VII of the Universal Copyright Convention," *Copyright Bulletin* (Unesco), 1985, Volume XIX, No. 4, pp. 8-13.

Reciprocal Protection of Copyright<sup>7</sup> was concluded on April 15, 1986, and came into force on May 1, 1986. Article 2 of this Agreement stipulates that each Contracting State applies the Universal Copyright Convention to works or rights in works created by nationals of the other Contracting State irrespective of the date of their creation or publication.

This provision is attributable to the fact that May 27, 1973, the date as from which both the USSR and Sweden were bound by the UCC, no longer has any legal significance (for the use of works after the Agreement's entry into force). Besides, this rule of the Agreement does not attach legal significance to the date of a work's creation or publication, so the rule on the retroactive force of the Agreement operates fully and without reservation: "old" works enjoy legal protection.

Several provisions of substantive law contained in the Soviet-Austrian and the Soviet-Swedish Agreements are formulated in an identical or more or less similar way.

In each Agreement Article 4 restricts the retroactive effect in two ways.

First, it stipulates that the Agreement does not cover those works whose terms of copyright protection have expired. It should be noted that neither bilateral agreement says anything about the possibility of applying the rule of a shorter term of protection, although it can in fact be applied (by virtue of paragraph 4 of Article IV of the Universal Convention), because both Agreements provide for application of the principles of the UCC between the parties concerned.

Secondly, retroactive effect is also restricted by the fact that legal protection extends only to those uses that occur after the Agreement comes into force. Thus "old" works are protected only for a "new" use. For example, the book written by A. Lindgren, *Pippi Longstocking*, which was published before May 27, 1973, and therefore is not within the scope of the Convention but governed by the Soviet-Swedish Agreement, is now used in the USSR by agreement with the author. The royalties will be paid only for uses of the book that occur after May 1, 1986.<sup>8</sup>

Article 9 of the Soviet-Austrian Agreement and Article 8 of the Soviet-Swedish Agreement, which are formulated in a similar way, are also of some interest. These Articles provide that the origin, content and cessation of copyright must be determined according to the legislation of the Contracting Party on whose territory it is used or infringed. These are

very important provisions. In particular, they limit the possibility of applying the rule written into Article 126 of the Fundamentals of Civil Legislation of the USSR and the Union Republics whereby a transaction may be related to the location of the owner of the rights or to the place in which the transaction itself took place. Thus, when the works of Austrian and Swedish authors that are subject to the operation of the bilateral Agreements or the Universal Convention are used on Soviet territory, the scope of copyright, including the scope of the right to remuneration, may be determined only by Soviet legislation.

A provision of great importance in both Agreements is Article 3, which states that the protection accorded by the UCC or by the bilateral Agreement also extends to the personal rights of authors (the Soviet-Swedish Agreement speaks of "the moral rights of authors and other right owners"). In the Soviet Union, the moral rights of authors include the right of authorship, the right to the author's name (the right to use a work under one's own name or a pseudonym or anonymously), the right to publish a work, the right to respect for the work (it is forbidden to change the title, to shift sections, to make abridgments or additions or to supply a preface, comments or illustrations without the author's consent). The moral rights of the author cannot be assigned to another person although of course the author usually exercises his right to publish his work not himself but with the help of a socialist organization.

Furthermore, the author's consent, given on conclusion of a contract, to his work being abridged or given a preface, illustrations, etc., cannot be withdrawn unilaterally (according to Article 480 of the Civil Code of the RSFSR<sup>9</sup> and to the relevant Articles of the Civil Codes of the other Union Republics). Thus such actions do not encroach upon the author's right to respect for his or her work.

Let us now consider two specific provisions of the Soviet-Swedish Agreement. The first relates to the subject matter of protection and the second to the beneficiaries of protection under the Agreement.

The preamble and some Articles of the Soviet-Swedish Agreement (Articles 1, 2, 6 and 8) say that the parties extend the legal protection provided by the Universal Copyright Convention not only to works of literature, science and art (regular definition of works protected by copyright), but also to photographs. Moreover, Articles 6 and 8 of the Agreement deal with works and (separately) with photographs. Here the question about the correlation of the two concepts arises. We maintain that

<sup>7</sup> *Sobraniye postanovlenii pravitelstva SSR* [Collected Decisions of the USSR Government], Section II, 1986, No. 15, paragraph 41; see *Copyright*, 1986, pp. 413-414.

<sup>8</sup> Similar provisions are to be found in all bilateral agreements concluded by the USSR with socialist countries.

<sup>9</sup> Hereinafter for the Civil Code of the RSFSR we shall use "Civil Code."

under Soviet legislation the concept "works of science, literature and art" covers photographs, so that the Soviet-Swedish Agreement does not require Soviet national legislation to be supplemented or changed. In fact, the subject matter of copyright, specified in Article 475 of the Civil Code, includes "photographs and works produced by processes analogous to photography." Soviet practice (which is consistent in this respect) applies this concept to photographs (negatives, prints, slides, etc.) of artistic character and also non-artistic photographs (of sports, etc.). Exceptions to this are photographs of paintings or of any other flat objects that do not require creativeness (although such photographs do need technical knowledge).

As for the beneficiaries of protection, the Soviet-Swedish Agreement extends its operation to authors who are nationals of the other Contracting State (Article 2). However, Article 11 of the Agreement explains that the term "nationals" means natural persons with their domicile in the territory of Sweden or the USSR, as the case may be. This considerably narrows the category of authors whose works are protected by the Soviet-Swedish Agreement. In the USSR, this protection is accorded neither to Swedish nationals permanently residing in other countries, including the Soviet Union, nor to legal persons (organizations) of Sweden, which could have some original copyright by virtue of Articles 485 and 486 of the Civil Code (copyright in a magazine as a whole, film, etc.).

It is our opinion however that this narrow interpretation of the "nationals" concept in Article 11 of the Soviet-Swedish Agreement refers only to the rule on retroactivity, that is, to the protection of "old" works, and not to the rules written into the Agreement (Articles 1, 3, 5, 6 and 8) concerning the protection of works under the Universal Copyright Convention.

## II. New National Legislation

On April 18, 1986, the Plenary Session of the Supreme Court of the USSR passed a ruling "On the Application of Legislation by the Courts in the Examination of Disputes Arising from Authors' Legal Relations."<sup>10</sup> This ruling includes many provisions contained in the earlier ruling that operated previously, which was passed by the Plenary Session of the Supreme Court of the USSR on December 19, 1967, "On the Examination by Courts of Disputes Arising from Copyright." The 1986 ruling has the following new provisions.

*Joint authorship and agreements between coauthors.* Joint authorship of scientific, literary and artistic works arises from the same basic condition that underlies individual authorship, namely creative work.

In principle, the existence of relations between coauthors does not presuppose agreement between them: mere agreement on a joint literary or other work or on the mode of use of a future work engenders neither authorship nor joint authorship of that work.

At the same time the joint authors of any work of joint authorship must always have an agreement on the mode of use of their work. This agreement may be oral or written, explicit or implicit; it may deal with a single use for a short time or with several uses during a long period. It does have to exist, however, for in its absence a work of joint authorship cannot be used at all.

These are the fundamental provisions on joint authorship and agreements between authors that are set forth in the second paragraph of Section 1 of the Plenary Session's ruling.

The Plenary Session's intimation that an agreement between authors may be reached at any stage in the creation of a work of joint authorship, and even after it has been created, is an extremely important novelty.

The ruling says that in some cases joint authorship may arise by operation of law even in the absence of an agreement between the authors to produce a work of joint authorship. In particular this will occur when the authors have created an "indivisible" work. This does not mean however that in such cases the authors need not conclude a special agreement on the mode of use of a work of this type.

*Copyright in collections of works.* In current legislation the copyright in collections of works is set out in somewhat unclear terms, so the directions contained in Section 2 of the ruling of the Plenary Session of the USSR Supreme Court on this matter are of particular importance.

The compiler of a collection of works possesses copyright in it. That copyright arises out of the work done by the compiler, which must be creative (Article 487 of the Civil Code mentions "independent treatment"). The compiler's creative work may consist either in the selection of material or in its arrangement and layout.

In the absence of creative work the compiler has no copyright. In principle the compiler's copyright is similar in its content and volume to the copyright of any other author. In this connection the ruling of the Plenary Session says that the compiler has the right to receive remuneration in the event of the reprinting of his collection and also of its publica-

<sup>10</sup> *Byuleten Verkhovnogo Suda SSSR* [Bulletin of the Supreme Court of the USSR], 1986, No. 3, p. 19.

tion in any other language. In providing a basis for this rule the Plenary Session referred to Article 479 of the Civil Code, which sets forth the author's basic rights. It is characteristic that the USSR Supreme Court's ruling makes no reference to Article 491 of the Civil Code (the right to remuneration for the use of his or her work translated into any other language). This is due to the fact that compilation is not literary work; it cannot be translated into any other language, and so any reference to Article 491 of the Civil Code would be inappropriate.

*Specific contract and provisions of the standard contract.* There are many cases in practice in which the specific contracts concluded with authors for the use of their works differ in some respects from the standard contracts.

In such circumstances, the nature of the difference takes on decisive importance. If a specific contract does not make the author's position less favorable than under the standard contract, the former is deemed to operate in full. If, however, departures from the terms of the standard contract put the author in a worse position than he would be under it, the less favorable terms become invalid and are replaced by those of the standard contract (Article 506 of the Civil Code).

The courts have no difficulty in applying these fundamental principles of the correlation between the specific author's contract and the standard contract. Meanwhile, many workers in publishing houses and other organizations that use authors' works hold the view that an author's contract that worsens the author's position in relation to the standard contract is valid until such time as it is disputed by the author or found invalid by a court. This view is absolutely wrong from the legal point of view; indeed, the provisions of a specific contract that worsen the author's position in relation to the standard contract are automatically invalid. This circumstance was emphatically highlighted in the ruling of the Plenary Session (third paragraph of Section 3), which said that the terms worsening the author's status were to be considered invalid "irrespective of whether or not appropriate claims were made."

*Intermediate translation.* When the above ruling was adopted by the Plenary Session of the Supreme Court of the USSR, the legislation of many Union Republics contained direct instructions concerning the protection of the rights of translators whose works (translations) were subsequently translated into another language. In such cases the first translation is considered "intermediate." By that time the legislation of the Ukraine, Kazakhstan, Latvia, Lithuania, Estonia and some other Union Republics had already provided instructions on legal protec-

tion for the rights of the authors of intermediate translations in the event of their use for publication or public performance. However, such instructions were not to be found in the legislation of all Union Republics, while court practice on the legal protection of intermediary translations was not consistent.

It is important to note in this connection that the ruling of the Plenary Session of the USSR Supreme Court indicates that copyright legislation protects the rights of the authors of intermediate translations (see also the subsection on "Intermediate translation" in the next section of this article).

### III. Court Decisions

Disagreements, conflicts and disputes between authors and user organizations over the use of scientific, literary and artistic works are a widespread phenomenon. As a general rule, they are due to lack of knowledge or understanding of the rules of current copyright legislation. In most cases such conflicts are settled amicably, but sometimes they come before the courts.

Every year Soviet courts hear from 300 to 350 civil actions on copyright.

The most interesting and intricate court decisions are published in the bulletins issued by the Supreme Courts of the Union Republics or reviewed in the annual legal surveys prepared by the VAAP [the USSR Copyright Agency], the journal *Sovetskaya Yustitsiya* [Soviet Justice] and other publications.

Our analysis below contains references to the Civil Code of the RSFSR; the Civil Codes of the other Union Republics have similar provisions.

*Copyright protected by the court.*<sup>11</sup> Author N. brought a civil action against the Rostov publishing house, demanding redress for copyright breaches and referring to the fact that the publishing house had not observed the contractual terms governing the publication of his book.

The people's judge of the October District People's Court of Rostov-on-Don rejected N.'s action on the ground that the authors' rights provided for in Article 480 of the Civil Code (the right to respect for the work) had not been violated, while the court had no jurisdiction over disputes involving numbers of copies printed and quality of production.

The Civil Division of the Rostov Regional Court upheld the ruling of the District People's Court.

The Presidium of the Rostov Regional Court sustained the protest lodged by a Deputy Chairman of the RSFSR Supreme Court demanding that the

<sup>11</sup> *Byulleten Verkhovnogo Suda SSSR* [Bulletin of the Supreme Court of the USSR], 1985, No. 4, p. 9.

lower courts' decisions be quashed and that the case be retried on the grounds given below.

Bearing in mind that author N.'s copyright had not actually been infringed, since the circumstances to which he referred were not a violation of his copyright and that Article 480 of the Civil Code did not provide for the protection of his copyright as specified in the claims, the people's judge, without hearing the case in court, had alone settled the dispute on its merits on the basis of substantive law and had thereby violated the requirements of Articles 14 and 50 of the Code of Civil Procedure of the RSFSR. In stating his claim N. cited, in addition to other arguments, one circumstance that according to Article 480 of the Civil Code forms part of the content of copyright, namely the abridgment of the book's text. The fact that the suit was brought on those grounds called for the hearing of the case on its merits.

The order refusing to accept N.'s statement of claim for consideration was countermanded.

*Genre (type) of a work.* On October 23, 1985, the Civil Division of the Moscow Regional Court handed down a first-instance ruling in a civil action brought by author B. against the *Yuridicheskaya Literatura* publishing house to recover author's remuneration.<sup>12</sup>

On July 20, 1982, the parties had concluded an author's contract for the publication of a popular science work. That same year the book was published in a total print run of 75,000 copies, and the author was paid appropriate remuneration (1,396 rubles). Thereupon the author went to court, insisting that the publishers should make a fresh account of the remuneration paid, and pay him an additional sum of 3,050 rubles. He alleged that his work belonged to the genre of fiction rather than to popular science.

The question of the genre to which the work belonged proved very intricate. For that reason the case was examined by various courts for a long time. The earlier decision taken by the District People's Court was quashed by a higher court after the publisher had lodged a cassation appeal.

The question of classifying a work in this or that genre is of legal importance, since Soviet legislation has different rates of remuneration for certain genres, as indeed in the case in point.

In conformity with Decision No. 243 taken by the Council of Ministers of the RSFSR of April 22, 1975, "On the rates of author's remuneration for the publication of scientific, literary and artistic works,"<sup>13</sup> author's remuneration for popular science

literature is paid at the rate of 100-300 rubles per author's sheet (40,000 characters) for the first edition (in the original language), the amount of royalty being independent of the size of the print run. On the basis of that rule, the parties to the contract settled on the rate of 200 rubles per author's sheet.

Works of pure literature are paid for according to different rules. The publication of a work of literature with a total print of 75,000 copies is regarded as a "mass edition" and is paid for at a rate of 300, 350 or 400 rubles per author's sheet. Moreover, since the first edition of the work was published in a "mass" printing, it must be paid for additionally at the "ordinary" publication rate (175, 200, 250, 300, 350 or 400 rubles per author's sheet). The author therefore believed that his work should be paid at the rate of 550 rubles per author's sheet (350 + 200 rubles).<sup>14</sup>

Disputes about the genre of works often arise between the contracting parties at a stage prior to conclusion of the author's contract. Such disputes usually deal with unpublished works, but they can also involve works published earlier (say, by other publishing houses, in other Union Republics or abroad). Sometimes such disputes arise after the conclusion of a commission contract, when the work is not yet in existence. In that case, if the author submits to the publisher a work of a genre other than that specified in his contract, appropriate changes are made to the contract or a new contract is concluded with the author. Naturally, the publisher has the right to cancel the contract and refuse to publish the author's work. In all such instances the work is considered a work of pure literature if the material is artistically presented; if on the other hand it is expressed in scientific concepts, the work in question is regarded as popular science literature.

The Regional Court ordered a literary appraisal. The experts came to the conclusion that the disputed work was a work of popular science literature and could not be classified as pure literature.

The court pointed out that the application submitted by the author to the publishing house indicated that the aim of his work was "to expand the legal knowledge of citizens." To achieve that aim, every chapter of the work was accompanied by legal reference matter as an integral part of the work. "This circumstance," it added, "testifies to the fact that in preparing his manuscript the author was aware of the terms of reference of *Yuridicheskaya*

<sup>12</sup> *Sovetskaya Yustitsia* [Soviet Justice], 1986, No. 9, pp. 10-11.

<sup>13</sup> *Sobranie postanovleny pravitelstva RSFSR* [Collected Decisions of the RSFSR Government], 1975, No. 9, p. 54.

<sup>14</sup> In this conflict the author's choice of "average" rates was not substantiated in any way. Although an "average" rate (200 rubles) had been fixed for the author's popular-science work, this does not mean that an equivalent "average" rate (350 rubles) should have been paid to him for the "mass" publication of his work of pure literature, as he believed.

*Literatura*, and had assigned to his work the purpose of explaining rules of law in the light of specific cases."<sup>15</sup>

The court's decision clearly reveals its recognition that the work had elements of popular science literature and elements of pure literature, in other words that it was mixed by nature. In that case, said the court, the law does not contain rules on payment for works of mixed character, so that such works must be paid for by agreement between the parties (Article 479 of the Civil Code).

Under those circumstances, the signing by the parties of the contract classifying the contentious work as popular science literature was a decisive factor (in addition to the experts' findings) that enabled the court to reject the suit. The court said in particular: "The parties were unanimous in their appraisal of the genre of the work because they wrote it into the publishing contract. It is therefore necessary to be guided by the contract for the payment of remuneration." It also indicated that the plaintiff had better legal training and substantial practical experience, and was therefore able to make a realistic evaluation of the contract terms and their implications at the time of signing the contract.

During the hearing of this case in the court the view was also expressed that there was no need to investigate the question of the work's genre in court, since the parties had concluded a contract in which they classified the work as popular science literature. That being the case, the parties need only be obliged to conform strictly to the contract. In the event the court rejected this approach.

Consequently, the question of a work's genre and the payment of remuneration for it under a contract must be settled not only on the basis of the contract but also in due consideration of other factual circumstances.

*Intermediate translation.* This problem, which is known to the reader,<sup>16</sup> has undergone a new development. The decision that was handed down in the civil action brought by author T. against the *Raduga* publishing house in September 1982, which did not recognize the author's copyright in the use of his translation for further translation was reversed on the intervention of the Public Prosecutor's Office of the RSFSR. The case was heard again on April 12, 1984, by the Lenin District People's Court of Moscow, which found that the person who translated the work from Lettish into Russian had the right to

receive remuneration when his translation was retranslated into English. The court referred to the general norms of Soviet legislation: Article 479 of the Civil Code (authors' rights) and Article 490 of the Civil Code (the translator's copyright in his or her own translation). The court rejected the arguments advanced by the *Raduga* publishing house to the effect that the Russian translation by translator T. had been used as auxiliary material, since it was clear from the records of the case that the person who translated the work into English did not know the Lettish language and for that reason translated entirely from Russian.

In those Union Republics where for certain uses of translations the law does not expressly indicate the rights of intermediate translators, the directions to be found in the Decision of the Plenary Session of the Supreme Court of the USSR of April 18, 1986 are of decisive importance today. Paragraph 4 of the Decision specifies that all the author's statutory rights belong also to the translator, and adds that

...without the translator's permission, any more than without the author's permission, the translation may not be used as an intermediate one for the purpose of retranslating the work into another language.

*Works created under a work contract.* According to Article 483 of the Civil Code, if the author has produced his work under contract by which he is bound to a scientific or other organization, he has copyright in the work, but the royalties for its use by the organization are paid only where they are expressly provided for by law. Consequently, the fact of categorizing works as "official" is important in determining the author's right to royalties: in many instances the author of an "official" work does not receive fees, because the work has been paid for under a work contract.

On April 3, 1984, the Brezhnev District People's Court of Moscow handed down a decision on a civil action brought by author A. against the *Nauka* publishing house, ordering the recovery of authors' fees for the benefit of the plaintiff.

In 1982, the publishing house issued a book Chapter IV of which had been written by the plaintiff in his free time, that is, not in connection with his duties, but he had not received author's fees for his work.

The defendant did not acknowledge the suit, claiming that the book had been issued in a small print run, that it had been unprofitable for the publishers and that it had been announced by the History Institute of the USSR Academy of Sciences as a planned scientific work (a variant of the work created under a work contract, and as such not subject to payment of an author's fee).

The History Institute was drawn into the case as a third party, and its representative explained that

<sup>15</sup> It seems to us that the Court did not attach prime importance to the purpose of this work, which alone could not determine its genre. For instance, both a scientific article and a poem could be dedicated to the struggle for peace.

<sup>16</sup> See "Letter from the USSR," *Copyright*, 1984, pp. 241-242.

author A., the plaintiff, worked in another organization, not at the Institute. It had been agreed that works incorporated in the book would be written by authors under a research plan. He added that he did not know whether the plaintiff's work had been included in that plan.

The organization in which the plaintiff worked submitted a written certificate to the effect that the work by author A. was not provided for in the plan.

The court found for the plaintiff, fixed the amount of remuneration and pointed out in its decision that the law provided an exhaustive list of grounds for the use of works without fees. The case in point did not figure in the list (in particular, the work was not an "official" work) so the *Nauka* publishing house was to pay remuneration for the use of the work.

*Questions of authorship and joint authorship.* On September 9, 1981, the Dzerzhinsky District People's Court of Moscow ruled on a civil action brought by author T. against the *Legkaya Industriya* publishing house for recognition of his authorship.

In 1978, the defendant issued a book entitled "Programmed Laser Cutting of Textile Fabrics." The plaintiff applied to the court for recognition of his authorship of Chapter 1, section 2.

The title page and the cover of the book did not name the authors, but the publisher's imprint said: "Authors B., M., S. and others." The introduction to the book noted that T. (the plaintiff in the case) had taken a direct part in working out the theory underlying some questions and in the relevant experimental research, and also added that he had written "material used in Chapter 1."

The publishing house refused to include the plaintiff among the authors, referring to the absence of a contract (the work had been created in the course of his duties at a research institute; no royalties had been paid to the authors and therefore no contract had been concluded with them).

The other authors of the book—a total of 12 persons—sent written statements in reply to the suit and asked the court to hear the dispute in their absence. The court cited the findings of the expert appraisal which had established that the text of the book on pp. 15–82 fully corresponded to the plaintiff's personal report on the subject of his research.

The court arrived at the conclusion that the plaintiff's authorship of section 2 of Chapter 1 of the book was confirmed by the letter sent by the other authors to the publishing house.

On those grounds the court handed down a decision to the effect that the plaintiff owned copyright in section 2 of Chapter 1 of the book.

Thus, the right of authorship *per se* was at issue in the above case. This right was not associated with

the right to remuneration: since the work was created in the course of official duty, fees were not paid to the authors (Article 483 of the Civil Code). Neither was the right of authorship associated with another personal non-property right—the right to a mention of the author's name, since the publishers' imprint indicating that B., M., S. and others were the authors of the book could quite well be interpreted to mean that the "others" included the plaintiff T.

It must also be noted here that the mention in the introduction to the book that T. (the plaintiff) had taken part in working out the theory underlying some questions dealt with in the book and in associated experimental research, did not suit the plaintiff, since it did not imply acknowledgment of authorship. It must also be pointed out that the mention that the plaintiff "has written material used in Chapter 1" does not give rise to any right of authorship either. The second mention means only that the authors of the book used the work of author T. in accordance with paragraph 1 of Article 492 of the Civil Code and had made a new, independently created work on the basis of it. As the law clearly states, no copyright in the new work accrued to the author of the original work.

The finding of the experts, namely that a large part of the book reproduced word for word the earlier report drawn up by the plaintiff on his scientific work was the decisive factor determining the court's decision that the plaintiff qualified for copyright.

This once again confirmed the rule that copyright serves to protect the form of a work and that it does not protect its content *per se*, regardless of the form of its expression.

The court's decision to recognize the plaintiff's copyright in a part of the published work had no implications for the defendant (the publishing house): no obligation to pay fees or indicate the plaintiff's name was imposed on it. As for plaintiff T., the court's decision is of great importance, for in future when the book is reprinted he will appear as a coauthor, he will be able to use the text on pp. 15–82 for a separate publication of his own, include the book in a list of his scientific works, etc.

Certain difficulties arise in courts when they deal with disputes about joint authorship in the event of the death of one of the authors.

In 1978, the *Voenizdat* publishing house issued a book entitled "From Stalingrad to Berlin" and indicated that Ch. was its author and P. was responsible for its literary editing.

Shortly thereafter Ch. died, but his book was reprinted in several places. The author of the literary editing of the manuscript did not receive any remuneration for the reprints, so he brought civil

actions, asserting his joint authorship of the book and claiming a share of the remuneration.

The general rule governing this type of action is set forth in Part VI of Decision No. 243 of the Council of Ministers of the RSFSR of April 22, 1975. It says:

Remuneration for the publication of a work created by two or several authors, including the specialist author, and the author who imparted literary form to the work, shall be paid according to the rates established by this Decision and shall be distributed between the coauthors by agreement.

Thus, the rule written into this Decision turns on the occurrence of joint authorship relations between the specialist author and the literary editor. That moreover was the position in the cases considered here, since Ch. and P. had concluded a joint authorship agreement on the distribution of fees between them for the publication of the book.

For this reason, when the *Sovietskaya Rossiya* publishing house concluded a contract for the reprinting of the book only with author Ch.'s heirs, who refused to acknowledge P. as a coauthor, the Lenin District People's Court of Moscow, in an action brought by P., found for his joint authorship of the work and therefore obliged the publishers to pay him the share of fees due to him as coauthor. The court also noted that, since Ch. had acknowledged P. as his coauthor during his lifetime, his heirs could not reverse that acknowledgment.

On the occasion of another reprinting of Ch.'s book in the Ukraine, the local publishing house suggested that P. should settle the question of joint authorship with the heirs of Ch., but was then compelled by a court decision to pay P. the share in the fees to which he was entitled.

It must be noted here that author P. could have proved his joint authorship rights in the work which was ascribed solely to author Ch. even if he had not had his agreement on joint authorship and the distribution of fees. But in that case he would have had to provide the court with evidence of his creative participation in the making of the work or request the court to obtain it. If the court is satisfied that the plaintiff is a coauthor, the amount or share of remuneration owed him must be established by expert opinion, provided only that the plaintiff and the heirs of the deceased coauthor have failed to agree on the distribution of fees.

The circumstances of the next case, which was examined by the Bauman District People's Court of Moscow on December 17, 1981, were very intricate and tangled. A certain K. brought an action against the *Moskovsky Rabochy* publishing house to have it recognize her authorship of a work and pay fees for

its publication. The court established and examined the following facts.

In 1961, the publishers had issued the collected stories of the deceased writer S. Sergeyev-Tsensky. Plaintiff K. asserted that she was the author of one of the stories included in the collection.

She had written it in 1943-1944, and in May 1944 had sent it to the editorial office of the magazine *Novy Mir*. The manuscript was entered in the records on May 8, 1944, and on May 19, 1944, was returned to K. with remarks and a letter from the then head of the magazine's prose section, Z. (since deceased).

In August 1976, the plaintiff by chance discovered her work in the collection of stories by Sergeyev-Tsensky.

The defendant did not acknowledge the suit and pointed out that the plaintiff had allowed the period of limitation to expire.

The court verified the evidence submitted by the plaintiff and satisfied itself that the remarks on the manuscript belonged to Z. and also that he had signed the letter with which it was returned to K.

It appointed literary experts, who arrived at the conclusion that the disputed work was not written by Sergeyev-Tsensky: his archives did not contain the manuscript of the story.

The court heard the opinion that the disputed manuscript (one copy of which remained in the journal's archives) could have found its way by chance into the archives of Sergeyev-Tsensky and been taken for his work.

The court recognized the plaintiff as the author of the work and calculated the fee due to her. She received 330 rubles, a sum reckoned on the basis of 250 rubles per author's sheet, the volume of the work being 1.32 author's sheets. It ruled that K. was the author of the work published in 1961 by the *Moskovsky Rabochy* publishing house, and ordered it to pay her the remuneration of 330 rubles.

The publishing house did not agree with this decision and lodged a cassation appeal. On January 20, 1982, the Division for Civil Cases of the Moscow City Court examined the publishing house's appeal against the decision of the District People's Court and left it unchanged. The Division noted that the decision of the People's Court was well-founded. K.'s authorship of the disputed work was confirmed by the expert opinion of the Union of Soviet Writers, by a member of the Commission for the Literary Estate of Sergeyev-Tsensky, by the Crimean regional branch of the Union of Ukrainian Writers, by literary critic and expert V. and by the director of the memorial museum of Sergeyev-Tsensky. In due consideration of all this evidence the court was right to conclude that the plaintiff was indeed the author of the work in question.

*The publishing contract concluded with an organization not entitled to issue publications.*<sup>17</sup> A certain L. brought a civil action against the Bryansk Regional Research Center for People's Art and Cultural Education, and claimed author's remuneration. She had concluded a contract with the Center for the publication of a collection of people's songs entitled "The Land of Bryansk." The collection was approved and went to press, but the Center's superior organization annulled the decision on its publication. L. went to court claiming remuneration according to the contract.

The Bryansk Regional Department of Culture brought a counter claim to have the contract declared invalid; contending that the Center had no right to engage in publishing and therefore could not conclude such a contract.

The Bryansk Regional Court disallowed the claim filed by L. and found for the Department. On March 30, 1983, the Division for Civil Cases of the Supreme Court of the RSFSR examined a cassation appeal and left the lower court's decision unchanged. It pointed out: "Under its Statute the Center has no right to publish works written by outside authors. Therefore, by virtue of Articles 48 and 50 of the Civil Code the transaction is null and void; and no one can receive payment for such a transaction. The plaintiff's arguments to the effect that a commission contract was concluded with her are unfounded." As is evident from the case, the contract was concluded to publish the ready-made manuscript and not to order a collection. In conclusion the Supreme Court of the RSFSR added: "The court had good reason to disallow the claim for the recovery of fees, since the contract was recognized as being invalid."

Analysis of this case shows that when concluding a contract the author must take account of the specific legal capacity of the organization that acts as the other party under the contract. For example, the author must know that an industrial enterprise has no right to engage in publishing, and for that reason any publishing contract concluded with such an enterprise is null and void.

However, when concluding a publishing contract with a publishing house, the author is not duty bound to verify whether the publishing house received from its superior body the right to publish works of a particular kind. For instance, the court may not recognize as void a contract concluded with a publishing house to publish a work on chemistry if the latter is responsible for the printing of works on physics.

*Changes in factual circumstances during the execution of an author's contract.* On September 10, 1985, the Lenin District People's Court of Moscow handed down a decision in a civil action brought in by authors K. and G. against the *Raduga* publishing house, who claimed author's fees.

On July 14, 1981, the parties concluded a contract for the publication of the unpublished work "Chess Mosaic" written in Russian. The work was to be translated into Dutch, Italian, Spanish and Swedish. The authors were to receive under the contract 100% remuneration for the original work, which at the time had not yet been published in Russian. The amount of remuneration stated in the contract was worked out on that basis. It had been concluded for a term of five years from the date of signature. In 1983, before *Raduga* issued the work, another publishing house—the Moscow State University Press—concluded a contract with the authors and published in Russian a book entitled "Inexhaustible Chess," which corresponded exactly to the work that the authors had submitted to *Raduga*. Under those circumstances *Raduga* refused to pay the plaintiffs the original remuneration indicated in the contract, while the plaintiffs held that the contract should be executed in full and went to court. The court disallowed the action and endorsed the publisher's argument to the effect that the publication of the work by the Moscow State University Press had changed the subject matter of the contract: from a manuscript the work had turned into a published work in the language of the original, in which case the authors should receive not all the remuneration specified in the contract but only 30% of it (according to Part VII of Decision No. 243 of the Council of Ministers of the RSFSR of April 22, 1975).

This court decision was left unchanged by the Division for Civil Cases of the Moscow City Court where the authors had lodged an appeal for cassation.

This judicial decision is of some interest on account of the following circumstances. Having undertaken the publication of their work in Russian, the authors did not break any terms of the contract they had concluded with the *Raduga* publishing house on the publication of their work in several foreign languages. That contract in no way affected the authors' right to have their work published in the original. Nevertheless this printing (which occurred before the work was published in foreign languages) changed the factual circumstances determining the conditions under which the contract was implemented, and the court took that fact into account when it set the amount of remuneration: the authors forfeited the right to receive fees for their manuscript, and could only receive the royalties stipu-

<sup>17</sup> *Byuleten Verkhovnogo Suda RSFSR* [Bulletin of the Supreme Court of the RSFSR], 1983, No. 10, pp. 12-13.

lated for the publication of a work already published.

*Changes in factual circumstances after the execution of an author's contract.* On October 30, 1984, the Central District People's Court of Kemerovo handed down a decision on the civil action brought by author M. against the Department of Culture of the Kemerovo Regional Executive Committee to recover 2,250 rubles.<sup>18</sup>

On February 15, 1982, the parties concluded a contract for the composition of an operetta providing for remuneration of 3,000 rubles. Under the contractual terms the author was paid an advance (25% of the total sum). The work was approved by the Artistic Council of a theater and the first performance took place on March 18, 1983.

The defendant refused to pay the balance of the remuneration payable under the contract, referring to the fact that the USSR Ministry of Culture had issued an order on July 6, 1983, prohibiting the conclusion of contracts for the composition of works intended for public performance with "non-professional composers"; the plaintiff was not a member of the USSR Union of Composers.

The court rejected the arguments of the defendant and ordered payment to the author of the remuneration claimed. It stated in its decision that: (1) the defendant's reference to the aforementioned order of the USSR Ministry of Culture was not well-founded, since the order had been issued after the conclusion of the author's contract, apart from which the court did not see in the order any prohibition on the conclusion of authors' contracts with composers who were not members of the USSR Union of Composers; (2) the operetta had been approved by the theater and the first performance had taken place.

The court's decision calls for some comment. Its contention that the order of the Ministry of Culture could not affect the contract because it was issued after its conclusion was not quite correct. Furthermore, the court departed from that position and made an analysis of the order. Its decision to find for the plaintiff was based on the fact that the work had actually been used, and on the fact that the Ministry's order was issued after the operetta's first performance and therefore did not affect the use of the work under the contract.

*Use of a work after the expiration of the contract.* On June 5, 1973, translator B. and the *Sovetsky Kompozitor* publishing house concluded a contract for the publication of the translation of a

book from Polish into Russian. On October 24, 1973, the translation was approved and its author received 60% of his fees.

The translation was not published during the period of the contract's validity (three years from its approval date, i.e. October 24, 1973), but the translator did not demand the balance of his fees (40%).

In September 1983, after the publishing house had paid the translator 40% of his fees under the contract, B. learned that the translation had been published. Considering that the 1983 publication had been issued without a contract, the translator went to court claiming that he should be paid fees at 100% of the applicable scale (regardless of the sum he had received under the contract).

The defendant did not acknowledge the suit, arguing that the translation could not be published because of its poor quality and that it had been edited. The publishing house also stated that the period of the contract's validity had continued after October 24, 1976, since the translator had not demanded the payment of the remaining 40% of his fees. Moreover, he had been informed of the continuation of work on the book, which, in the opinion of the defendant, was an act equivalent in effect to the conclusion of a new contract on the same terms.

For his part the plaintiff's representative asserted that the contract had been concluded for a definite term, and that after its expiration it had ceased to operate automatically. The translator had not signed the proofs of the book and had not concluded any new written contract. As for oral agreements, they could not be regarded as constituting an author's contract once the author had denied their existence (while Article 506 of the Civil Code does not expressly prohibit the conclusion of oral contracts with authors, it does contain a reference to Article 46 of the Civil Code, which prohibits recourse to testimonial evidence in a dispute over the existence of a contract). Consequently, in the plaintiff's opinion, the publication of the book in 1983 could not be covered by the contract whose validity had expired in 1976.

The court agreed with these arguments and ordered the publishing house to pay the translator royalties for the edition published outside the contract in 1983, regarded as the first publication of the translation.

This decision is important in terms of principle: the court acknowledged that an author's contract concluded for a definite term ceases to operate automatically on the expiration of the term. Moreover, the standard publishing contract for literary works expressly provides for its expiration after three years from the date of the work's acceptance. The prolongation of that term by agreement between the parties would have worsened the author's position in

<sup>18</sup> *Obzor pravovoi raboty sistemy VAAP za 1984 god* [Survey of the Legal Work of VAAP in 1984], Moscow, 1985, pp. 13-14.

relation to that under the standard contract, which is not permissible (Article 506 of the Civil Code). In other instances (when there are no standard contracts—when, for example, author's license contracts are concluded with foreigners) the parties may prolong the operation of a contract, but the prolongation must be drawn up formally like the principal contract.

It must be added that court practice on this question is not consistent. Sometimes courts discuss whether or not the parties have prolonged the author's contract by agreement between themselves (despite the existence of an express provision in the standard contract) and, once they establish that the contract in question has been prolonged, refuse to satisfy the relevant claims.

Some Soviet lawyers (e.g. V.A. Dosortsev) believe that the maximum period of validity of an author's contract for the transfer of a work for use (three years from the day of acceptance) follows from Article 509 of the Civil Code. Other lawyers (e.g. N.D. Seregin) hold that the publication of a work after the contract has expired constitutes a "delay in execution." In other words, the publication must be considered executed on the basis of the contract concerned. The latter view has been criticized by other writers, however.

*Impossibility of cancellation of the author's contract by one party only.* On January 11, 1983, the Frunze District People's Court of Moscow handed down a decision on a civil action filed by author P. against the *Sovetskii Khudozhnik* publishing house, seeking to have the cancellation of the contract by the publishing house declared invalid and to recover fees from it.

On December 26, 1979, the parties concluded a publishing contract for the reprinting of the plaintiff's work. On January 19, 1981, the author submitted his work to the publishers. The publishing house did not inform the author of the approval of his work during the statutory period and therefore the work was regarded as approved, in which case the author was entitled to 60% of his fees. However, on June 23, 1981, the publishing house informed the author that it was terminating the contract because it had received two unfavorable reviews and refused to pay him his fees. The court declared the unilateral cancellation of the contract by the publishers null and void and ordered them to pay 60% of the fees provided for in the contract (1,238 rubles).

Although the court made no reference to Article 169 of the Civil Code, it did in fact apply that provision: "Unilateral refusal to execute obligations and unilateral modification of the contract terms shall not be allowed, with the exception of cases provided for in the law." Consequently, the contract may cease to operate by virtue of a unilateral statement

by either party only where such a ground for the termination of the contract is expressly stated in the law (in a civil code, a standard contract, etc.), or if the parties have agreed (by means of a bilateral declaration of their intention) to terminate the contract when particular conditions arise.

*Amount of author's fees.* On October 9, 1985, the Smolny District People's Court of Leningrad handed down a decision in a civil action brought by R. against the Leningrad *Rosmonumentiskusstvo* specialized administration to recover author's remuneration.

On February 5, 1983, the parties had concluded a contract for the creation of a monument. Under the contract the sculptor was to receive 6,000 to 8,000 rubles in fees. In April 1983 the monument was approved by the Council of Art Experts of the RSFSR Ministry of Culture, which set the value of the work at 4,000 rubles. This sum was paid to the sculptor. R. went to court, claiming an additional 2,000 rubles (to bring the sum up to the minimum stipulated in the contract).

The court ordered the defendant to pay the 2,000 rubles on the following grounds:

- (1) the Council of Art Experts had not indicated that the work created was inadequate or unusable;
- (2) the Council's decisions on the amount of fees payable to the sculptor were by way of recommendations;
- (3) the amount of remuneration specified in the contract may be changed only by agreement between the parties.

*Determination of the amount of fees in the event of partial use of the work submitted under a contract.* Once a work has been submitted under a contract for its use and has been accepted by the contracting organization, the author has the right to receive the remuneration specified in the contract even if the organization uses that work not in full. This rule (based on Article 512 of the Civil Code) is supported by many court decisions.

The circumstances of the dispute between author D. and the *Sovremennik* publishing house were quite complex. The author went to court to recover 445 rubles from the publishing house. On May 24, 1984, the District People's Court found for D. only in part (in the amount of 27 rubles) and rejected his other demands. On June 12, 1984, the Division for Civil Cases of the Moscow City Court left the earlier decision unchanged, but then its decision was quashed on the intervention of the Moscow Prosecutor's Office and the case was reviewed. On May 20, 1985, the Frunze District People's Court of Moscow handed a decision finding for the plaintiff.

The circumstances of the case were as follows. On September 10, 1982, the parties had concluded a publishing contract for the publication of a verse

work by the plaintiff with a maximum of 1,400 lines. Before the conclusion of the contract the publishers approved the author's work, comprising of 1,200 lines, and on September 18, 1982, paid the author 60% of his fees on the basis of those 1,200 lines. Throughout the period of acceptance of the manuscript the publishing house did not inform the author in writing of its decision, and therefore the manuscript was considered approved. The publishers issued the work, which at that stage comprised 1,182 lines, and accordingly paid the author 100% of his fees.

The author demanded payment for 1,400 lines. He claimed that he did not see the proofs of his work until January 24, 1984, whereupon he discovered that his work had been arbitrarily shortened without his consent and without any explanation. Under those circumstances he did not sign the proofs.<sup>19</sup> He applied to the publishers in writing, objecting to the publication of the abridged work, and insisted on his right to the integrity of the work.

The court said that in that case the work would be considered approved in the amount in which the author had presented it to the publishers. It rejected the defendant's references, an oral agreement with the author on alterations to the work, indicating that they could not be taken into consideration as long as the agreement had not been drawn up in writing. It added that the absence of the written form deprived the parties of the right to use testimonial evidence in the event of dispute.

The court also rejected the publishers' argument that the author, having received 60% of his fees, had consented to the abridgment of his work. In fact he did not know that it had been shortened and could be expected to believe that the sums owed him would be paid later on; moreover, the publishing house had not sent the author an explanatory account of the payments made.

As for the publishers' approval of the work in the amount of 1,200 lines, that was an internal act of the publishing house that had no evidential force in law. Furthermore, the author had been completely unaware of the act.

An analysis of all the above circumstances enabled the court to find for the author and order payment to him of remuneration for 1,400 lines (after deduction of the sums paid earlier).

On June 4, 1985, the Lenin District People's Court of Moscow found for plaintiff B., who sued the *Sovetskaya Rossiya* publishing house for fees amounting to 520 rubles.

On February 6, 1980, the parties had concluded a contract for the preparation of a jubilee album on Kiev. Under the contract the author was to submit 110 slides and 30 black and white photographs. On April 24, 1981, the parties concluded an additional contract specifying the object of the main contract: the author was to provide 96 slides and 36 black and white photographs. The author fulfilled his obligation, but the publishers did not pay him for the work in full, on the ground that only 47 slides had actually been used in the album.

Having established that the author had submitted the work in the amounts specified in the additional contract, and that the publishers had approved the work in that form, the court ordered them to pay 520 rubles of fees by virtue of Articles 500, 508 and 512 of the Civil Code.

*Claim of repayment of fees paid under a contract.* The question of the return of a payment on account (advance) was examined by the court in an action brought by the *Progress* publishing house against authors K. and D. The Lenin District People's Court of Moscow ruled on this case on July 1, 1978.

The parties had concluded a contract for a mock-up of a photograph album, entitled "Bolshoi Theater of the USSR," and the authors had been paid an advance of 327 rubles.

The work was not submitted to the publishers during the period specified in the contract, so the *Progress* publishing house went to court and demanded repayment of the advance.

It based its claim on Article 511 of the Civil Code under which

...the author shall return any remuneration he has received under a contract ... if the contract is dissolved by the organization as a result of the author's failure, through his own fault, to transfer the work to the organization within the period specified in the contract.

The authors objected in court to the repayment of the advance, and asserted that their inability to submit the work within the time specified in the contract was due to the publishers, not to them. They explained in particular that they had been unable to produce the mock-up of the album because they had not been given the illustrations that were to be included in it. They had asked the publishers for them, but their request had not been met. They had not been given the textual material either. Yet, according to the conclusions of the chief artist of the Department of Literature and Art Criticism of the USSR State Committee for Publishing, Printing and Book Distribution no mock-up of an album could ever be made without a set of component materials (photographs and accompanying text).

Having established that there had been no fault on the part of the authors in their failure to submit

<sup>19</sup> Had he signed the proofs, that would have implied his consent to the abridgment; see "Letter from the USSR," *Copyright*, 1984 p. 245.

the work, the court disallowed the publishers' claim.

The question of repayment of previously paid fees was again dealt with in a case ruled upon by the Kirov District People's Court of Leningrad on February 28, 1985. In fact the court examined two civil actions, one filed by the Leningrad branch of the *Mashinostroenie* publishing house against author M. for repayment of fees and the other filed by M. against the publishers for the payment of fees. We shall now examine only some of the aspects of this case.

On February 4, 1980, the parties concluded a publishing contract for the publication of a work comprising 14 author's sheets.

The contract stated that "the manuscript has been presented." Thus, the period for the acceptance of the work ran from the date of signature of the contract. Usually, the period consists of 30 days plus four days per author's sheet, that is, for a work of 14 author's sheets, 86 days (30 + 4 x 14). So, under the contract the work was considered approved on May 3, 1980 (the period actually expired on May 1, but as May 1 and 2 are public holidays in the USSR the term was prolonged until the next working day).

During this time the author received no written communication from the publishers and therefore the work was considered "tacitly" accepted. Moreover, the author had received 60% of his fees (889 rubles) even before the period expired. Although that payment was not in itself proof of the acceptance of the work, it testified indirectly to a favorable assessment of the work by the publishers.

The publishing house went to court seeking repayment of the author's fees paid under the contract claiming that the sum had been improperly paid and that the author had not received any written communication of the publishers regarding their acceptance of the work in question.

The court rejected these arguments and said that the publishers had to prove the following in order to recover the fees:

— either that the author failed to submit his manuscript (there was a mention of its submission in the contract itself);

— or that the author failed to make corrections to the manuscript (but no such request was made in writing);

— or again that the author submitted his manuscript to another publishing house (which he did not in this case).

The court emphasized that it could not take into account the publishers' argument that the payment of 60% of the fees to the author was due to irregularities and negligence attributable to their employees, because this circumstance afforded no proof of fault on the part of the author.

The court therefore disallowed the publishers' claim for repayment of 60% of the author's fees.

On April 20, 1978, the Sovetsky District People's Court of Moscow handed down a decision in a civil action brought by the Odessa film studio against author L. seeking repayment of the fees paid under the author's contract.

On July 20, 1976, the parties concluded a scenario contract whereby the defendant undertook to write a script for a feature film in three parts. Pursuant to the contract the film studio paid the author 2,232 rubles, which it then asked the author to repay when he failed to submit the script within the contractual period.

The court established that the author had been ill between December 13, 1976, and May 27, 1977, and that the film studio had twice prolonged the contract for that reason. Furthermore, the defendant said that on March 10, 1977, at the request of the film studio, he had submitted a script for a feature film in four parts, which he then changed into a three-part film script. However, the plaintiff did not consider the script submitted and did not assess either its artistic value or its conformity with the agreed terms of reference.

The court noted that the submission of the script in four parts instead of three was not in itself a sufficient reason for cancelling the contract, because the plaintiff could consider the contents of three parts of the script submitted and make comments accordingly. It could also have cancelled the contract immediately on receipt of the four-part script, but failed to do so and instead engaged in correspondence with the author.

Having taken all these circumstances into account, the court did not find the author in any way at fault for the failure to submit the work (Article 511 of the Civil Code requires the author's fault to be established for repayment of fees to be claimed in such cases), and disallowed the claim filed by the film studio.

*Author's fees and prizes awarded by competition.* On September 16, 1985, the Smolny District People's Court of Leningrad handed down a decision on civil actions filed by three authors against the *Nevskie Zori* organization. The plaintiff demanded the payment of fees under their contract and also the prizes awarded them in a competition concerning the same work.

The circumstances of the case were as follows. On December 11, 1984, the parties concluded a contract for the acquisition by the organization of the scenario of a wedding ceremony that was to take place in the organization's wedding hall. The scenario had been accepted for use.

In addition, the plaintiffs were declared the winners of a competition to select the best scenario for

the wedding ceremony. The competition had been arranged by the organization (the defendant). The judges' panel awarded prizes to the plaintiffs for their work (the object of their dispute), which they had entered in the competition.

The defendant paid to the plaintiffs part of the fees but refused to pay other sums.

The court ordered the defendant to pay the plaintiffs the fees agreed upon in the contract and also the prizes awarded them in the competition.

This decision shows that author's fees and competition prizes for one and the same object are different types of remuneration and are to be paid independently of each other, even if the same organization as that which has paid or has to pay prize money in a competition uses the work (e.g. under an author's contract).

*The consequences of the conclusion by the author of two contracts of similar content.* On January 5, 1979, author G. and the Leningrad branch of the *Sovetsky Pisatel* publishing house concluded a contract under which the author was to create and submit a story for publication. The author turned over her work to the publishing house, which accepted it on November 7, 1979. After the signing of the contract the author was given an advance, and after the acceptance of her work 60% of the fees (less the advance), which amounted to 2,160 rubles. During the currency of the contract the author concluded a contract for the same work with another publishing house without the consent of *Sovetsky Pisatel*, whereupon the latter sued the author for repayment of the entire remuneration she had received. The case was heard by the Leningrad City Court acting in the first instance. On October 27, 1983, it ordered the repayment of 2,160 rubles by G. On January 4, 1984, the Division for Civil Cases of the Supreme Court of the RSFSR, with which the defendant had lodged a cassation appeal, examined the case and left the lower court's decision unchanged. The decision was published because of its importance with respect to principle.<sup>20</sup>

The rules underlying the above court decisions are to be found in Article 509 of the Civil Code. In fact they determine the contents of author's contracts for the transfer of works for use.

Article 509 of the Civil Code provides that under such a contract the author has no right, without the written consent of the other party, to hand over the work or part of it to a third party for use in the manner specified in the contract. The restriction operates for a period not exceeding three years from the

date of acceptance of a work by the contracting organization.

It follows from this provision that from the date of conclusion of the contract the author is under the obligation to hand over his or her work for use by the other contracting party alone, and may not pass it on to third parties (e.g. another publishing house). This is due to the fact that the use of a work by third parties during the contract's validity may damage the publishers' interests or those of the organization with which the contract has been concluded.

According to the spirit of the law this restriction also extends to the use of a work in a revised (adapted, transposed) form. Only in the event of the author creating a new, independent work (paragraph 1 of Article 492 of the Civil Code) on the basis of his work may the latter be transferred to any other person without anyone's authorization.

Furthermore, this restriction in principle concerns only use in the manner specified in the contract. For example, if a publishing contract has been concluded, the author is not bound to request the publishers' consent to have the same work adapted for the stage or read on the radio. However, according to Article 509 of the Civil Code, standard authors' contracts may provide for departures from this principle. On the one hand, they may specify that the author need not ask for such permission even if the work is used by the same method as was provided for in the contract. On the other hand, they may impose a ban on its use by any method other than that provided for in the contract. Both these departures from the basic rule are known to Soviet practice. For example, the standard publishing contract for a literary work specifies that the author who has concluded a contract for the publication of his work in book form may at the same time submit the same work to a magazine without requesting the publishers' consent, provided they are notified. On the contrary, under the standard contract for the composition of original music for a television film the composer has no right to authorize the publication and public performance of his work without the consent of the USSR State Committee for Radio and Television.

Article 509 of the Civil Code says that "the author may not, without the written agreement of the other party, transfer the work ... to third parties for use." What is meant by this formulation? The *de facto* transfer of a work or a definite legal action? In this context we must bear in mind that, in the absence of a contract, the transfer of a work to the publishers does not give rise to any civil obligations on the part of the latter (to consider a work, publish it, pay fees, etc.). As for the author, he does not receive any rights or obligations either (the right to demand the conclusion of a contract, the obligation to enter into contractual relations at the publishers'

<sup>20</sup> *Byulleten Verkhovnogo Suda RSFSR* [Bulletin of the Supreme Court of the RSFSR], 1984, No. 6, p. 2; see also *Soyetskaya Yustitsia* [Soviet Justice], 1985, No. 2, pp. 3-4.

request, etc.). Moreover, the concept "transfer of a work for use" is used in many provisions of the Civil Code (Articles 503, 508, 511) to mean an action performed under an author's contract for use, and ultimately the very object of contracts for the use of works. Thus Article 509 of the Civil Code also means by the transfer of a work for use an act that gives rise to legal consequences, namely the delivery of a work with simultaneous conclusion of a contract or even the mere initiation of contractual relations. This is borne out by judicial practice. In the aforementioned case the Supreme Court of the RSFSR expressly said: "Author G. had contractual relations with two publishing houses at once regarding one and the same work." This circumstance enabled the court to order the author to repay the fees she had already received.

Consequently, the author has no right either to transfer the work to third parties for use under a contract concluded with them, or even to conclude another contract concerning the same work.

According to Article 509 of the Civil Code, the author is under this obligation from the conclusion of the contract on the use of the work and throughout the entire period until the work is accepted, and then for three years after acceptance. Although the Article says that standard contracts may impose shorter periods for this restriction on the author's rights, those standard contracts now in force do not provide for such reduced terms. So in fact the restriction always operates during a period corresponding to the validity of the contract.

In the event of the termination of a contract ahead of time, the restriction automatically ceases to operate. In this connection, the cases in which the work is not used by the contracting organization during the period provided for in the law or the standard contract (under Article 510 of the Civil Code this period may not exceed two years from the date of acceptance of the work) are of great importance. In those cases the author has the right "to denounce the contract" (Article 512 of the Civil Code) and submit the work to another organization for use, in other words conclude a new contract with that organization. "Denouncing the contract" entails notification of the publishers by the author (in writing, of course, if the contract is in writing). However, conclusion of a new contract by the author before he has denounced the old one is an infringement of Article 509 of the Civil Code.

Article 511 of the Civil Code specifies the consequences of violation of this provision. It says:

The author shall return any remuneration received under a contract for the transfer of a work for use if the contract is terminated by the organization as a result of the author's having, through his or her fault, ... infringed the rules of Article 509 of this Code.

This provision requires no special interpretation. Let us note, however, that the obligation to return author's fees arises only where the contract is terminated.

It is impossible to terminate the contract if the organization concerned has already used the work, for example by publishing it. Neither is the contract terminated if, despite its breach by the author, the organization still wishes to make use of the work. In such cases the organization may not claim repayment of the remuneration it paid the author. Moreover, if the work is used, the remuneration must be paid to the author in full.

And still the organization is not without defense when faced with such an infringement of its rights. It may demand (under Articles 488 and 499 of the Civil Code) that the third party (for instance another publisher) do not use or stop using the work, and sue for damages from the third person in the event of loss.

The case considered above refers to author's contracts for the transfer of works for use. As is evident from this analysis, under current legislation these contracts are conceived as contracts for the grant of exclusive licenses.

The law contains no such references to the other type of author's contract (the author's license contract). In practice however they are also formulated as contracts for the grant of exclusive licenses.

*Statute-barring.* In the dispute between K. and the *Moskovsky Rabochy* publishing house discussed earlier (see subsection "Questions of authorship and joint authorship") the publishing house claimed that the plaintiff had allowed the statute-barring period to expire. In fact the publishers had indeed issued the work that was the subject of the dispute in 1961, whereas the plaintiff had not brought her action until 1977, 16 years later.

Admittedly, the plaintiff did state that she had learned by chance of the use of her work in August 1976, namely one year before the action was brought. Bearing that circumstance in mind, the District Court rejected the defendant's claim that the plaintiff had allowed the statute-barring period to lapse "since she had applied to the court in 1977."

The question of statute-barring was dealt with differently in the ruling of the Division for Civil Cases of the Moscow City Court on the cassation appeal lodged in the same case. The Division pointed out that "the publishers' reference to the lapse of the statute-barring period is irrelevant, since copyright is effective throughout the author's life."

Why, then, do these two judicial instances justify their findings in different ways when they agreed

that the plaintiff had not allowed the statute-barring period to lapse?

This is due to the fact that the two courts were referring to different aspects of the claim. The plaintiff was demanding: (1) recognition of her authorship of the work and (2) payment of remuneration by the publishers. So in fact two different questions were involved. Authorship is one of the personal moral rights recognized by civil law, and a claim for recognition of authorship may be filed regardless of the time that has passed since it was infringed.

On the other hand, the question of the payment of remuneration (the author's economic right) may as a general rule be the subject of court action during the three years after the right to institute such action came into being.

The next case also had to do with the statute-barring period.<sup>21</sup>

On December 6, 1983, the Krasnaya Presnya District People's Court of Moscow handed down a decision ordering the payment of fees. The circumstances of this case are as follows: on February 16, 1976, author E. and the *Iskusstvo* publishing house had concluded a commission contract for an article on art appreciation. The contract specified that the article was intended for publication in a collection. The author had submitted the commissioned work to the publishing house, which had not made any comments. It had failed to pay remuneration to the author, however, and had not used his work for reasons over which he had no control. On March 10, 1983, the publishers had sent the author a letter saying that they could not pay him his fees because they had not received other material for the collection and that they were cancelling the contract with him.

The author sued for payment of his fees. In court the publishing house argued that the author had allowed the statute-barring period to lapse.

Guided by Articles 83, 500 and 512 of the Civil Code, the court ordered payment by the defendant of 250 rubles of author's fees. On January 18, 1984, the Division for Civil Cases of the Moscow City Court heard the publishers' cassation appeal, but rejected it and left the lower court's decision unchanged.

The defendant (the publishing house) had claimed that the author's right to receive fees had arisen more than three years before the case went to court (the civil action was brought after March 10, 1983), so that the plaintiff had allowed the statute-barring period to lapse. The defendant's case was based on the following considerations.

The author's right to receive all of his fees under the standard publishing contract for literary works arises after the actual publication of a work (in the case in point the work was not published) or after the expiration of "the period envisaged for the publication of the work." That period is two years in the case of works exceeding 10 author's sheets and one year in the case of smaller works. It runs from the day the work is accepted. The work submitted to the publishers under a contract is considered accepted (unless it has been accepted earlier) after the expiration of the period of 30 days plus 4 days for each of the author's sheets constituting it.

The publishing house held that since the author's work was to have been published in a collection, all periods had to be calculated according to that collection (its volume was to have been 17 author's sheets). The author's work had been submitted to the publishing house on the conclusion of the contract, on February 16, 1976. The time limit for its acceptance expired after 30 days + 4 days x 17 author's sheets = 98 days, in other words on May 26, 1976. The time limit for publication expired after two years, on May 26, 1978. The statute-barring period (three years) expired on May 27, 1981.

This calculation is somewhat inaccurate. The subject matter of the contract is not the collection as a whole but the plaintiff's work consisting of one author's sheet. That work was submitted to the publishers on February 16, 1976. The time limit for its acceptance expired after 34 days following its submission, on March 21, 1976. The time limit for publication (one year) expired on March 21, 1977. That was the time at which the author acquired the right to receive fees and, in the event of their non-payment, the right to sue in court. So the author forfeited the right to receive fees on the statute-barring date of March 22, 1980.

Of course if the author does not know of the existence of his or her right to fees—which happens when the work is used without a contract being concluded—the statute-barring period starts at the moment he or she becomes aware of the existence of that right.

The letter sent by the publishers to the author on March 10, 1983, was the decisive factor that enabled the court to find for the plaintiff. The court concluded that this letter stopped the statute-barring period, and that the period for the institution of civil proceedings should run from March 10, 1983.

Under Article 86 of the Civil Code, on disputes in which one or both of the parties are natural persons, the statute-barring period is stopped by an act of the person under an obligation which testifies to his acknowledgment of a debt. The statute-barring period then restarts, and the time that elapsed before it stopped is not counted.

<sup>21</sup> *Sovetskaya Yustitsia* [Soviet Justice], 1985, No. 21, pp. 4-5.

But could the aforementioned letter really be considered an act testifying to the acknowledgment of a debt? In the letter the publishing house stated that it could not publish the collection for reasons beyond its control and therefore refused to pay the author his fees. So in fact that part of the letter was evidence of "non-acknowledgment" of the debt. However, the publishing house stated in the same letter that it was cancelling the contract with the author. That statement may be regarded as the recognition of certain obligations under the contract. It is immaterial here that "the statement was made by mistake," as the publishing house said in its cassation appeal.

Careful consideration of all the aspects of this case enables one to conclude that the court, having established some facts indicating that the author and the publishers were proceeding with preparations for the publication of the work even after the expiration of the contract, and, considering the personal and confidential character of the relations that develop in connection with the use of an author's work, also recognized that the reason for the statute-barring period being missed was a valid one and that the right infringed was deserving of protection (part 2 of Article 87 of the Civil Code).

The statute-barring period was the underlying reason for another dispute, between author P. and the *Izobrazitelnoe Iskusstvo* publishing house, being brought before the court. The publishing house did not expressly refuse to pay royalties, it just did not pay them, and the statute-barring period was coming to an end. For that reason the author was compelled to bring action in court, in the knowledge that the initiation of court proceedings stops the statute-barring period. It is likewise important not to allow the statute-barring period to expire before the action is brought.

The substance of the dispute between author P. and the *Izobrazitelnoe Iskusstvo* publishing house was as follows: the parties concluded a contract and the author submitted his work to the publishing house, which did not send the author its written reply concerning the work, so that it was considered accepted; however, when the period for the acceptance of the work by the publishing house expired, it received adverse criticism on the strength of which it denounced the contract and notified the author accordingly. Yet since neither the standard publishing contract for a literary work nor any other provisions of current legislation recognize such a ground for cancelling a contract when the work has been accepted, the Dzerzhinsky District People's Court of Moscow, which heard the case, found for the plaintiff and ordered the publishers to pay the fees.

*Inclusion in the contract of terms that place the author in a worse position than under the standard*

*publishing contract.* In the above dispute between author P. and *Izobrazitelnoe Iskusstvo* the defendant put forward another reason for non-payment of author's fees: the contract specified that the fees were to be paid to the author after its signing of the print order, so, since no print order had been signed for the work, the publishers believed that the author had no right to receive remuneration.

This reasoning is wrong, however, and was therefore rejected by the court. It pointed out that according to Article 506 of the Civil Code any terms of an author's contract that put him in a position less advantageous than that under the standard contract were invalid and replaced by the terms of the latter. The contract concluded by the parties to the present dispute had to be based on the terms of the standard publishing contract for a literary work. The latter provides in its paragraph 14 that fees are to be paid by the publisher at the following times: 60% (less any advance paid earlier) on acceptance of the manuscript; the balance after the print order has been signed for the last proof (in the case of a work of literature).

Therefore, by ordering the publishers to pay the author's fees, the court demonstrated that the inclusion in the contract of terms that put the author in a worse position than he would be under the relevant standard contract was inadmissible.

It is nevertheless quite a common practice that the courts often have to deal with, but they always declare it illegal.

For instance, the Scientific and Technical Information Board of the Microbiological Industry Department concluded a contract with author I. for the compilation of tables for computing wages and salaries, and wrote into it the condition that the work would be considered accepted if the author was given written approval on the title page by the management of the Labor and Wages Division and the Finance and Bookkeeping Division. So in fact the author was made responsible for obtaining a review of his work from higher bodies to which the publishers were subordinate, which put him in a less favorable position than was afforded by the standard contract. The People's Court that examined the case declared this condition contrary to Article 506 of the Civil Code, to the standard publishing contract and to the standard statute on the preparation of original manuscripts of non-periodical publications for the press, under which the obligation to obtain reviews is on the publishers. On those grounds, the court found for the author and ordered the payment of remuneration to him.<sup>22</sup>

<sup>22</sup> *Obzor proavovj raboty sistemy VAAP za 1981 god* [Survey of the Legal Work of VAAP in 1981], Moscow, 1982, p. 18.

#### IV. Scientific Life

During the period under review, scientific life was very interesting. Soviet copyright doctrine is turning up more and more new problems, and well-known provisions are being studied in a new way and more thoroughly, which enables different views to be expressed by lawyers on the interpretation of current legislation and on the drafting of new legislation for the future. All this testifies not to the weakness of Soviet copyright research, as some western lawyers maintain, but on the contrary to its strength. It is a token of Soviet copyright's ability to find a successful solution to these problems.

In addition to some textbooks on Soviet civil law (which contain sections on copyright) and to a large number of magazine articles, the following books on copyright have been published:

1. M.Y. Kirillova, *Razvitiye sovetskogo avtorskogo prava. Uchebnoe posobie*. [A Manual on The Development of Soviet Copyright], Sverdlovsk, 1982, 82 pages;

2. S.A. Chernysheva, *Pravovoye regulirovanie avtorskikh otnosheniy v kinematografii i televidenii* [Legal Regulation of Author's Relations in Cinema and Television], Moscow, 1984, 176 pages;

3. E.P. Gavrilov, *Sovetskoe avtorskoye pravo. Osnovniye polozeniya. Tendentsii razvitiya* [Soviet Copyright. Basic Provisions. Development Trends], Moscow, 1984, 222 pages;

4. V.A. Dosortsev, *Avtorskiye dela v sude. Nauchno-prakticheskiy kommentarii* [Copyright Cases in Court. Scientific and Practical Comments], Moscow, 1985, 175 pages;

5. I.V. Savelyeva, *Pravove regulirovanie otnoshenii v oblasti khudozhestvennogo tvorchestva* [Legal Regulation of Relations in the Sphere of Artistic Creation], Moscow, 1986, 141 pages.

Of great interest was the reprinting of a collection of normative acts on copyright (*Avtorskoye pravo. Sbornik normativnykh aktov*, Moscow, 1985, 352 pages; first edition came out in 1979).

The attention of the interested circles was drawn to the publication in Russian of Lynnette Owen's book, *A Guide to the Passage of Rights Between the United Kingdom and the Soviet Union: Spravochnik*

*po voprosam peredachi avtorskikh prav mezhdu Velikobritanii i SSSR*, Moscow, 1985, 160 pages.

Another very interesting development was the appearance in Russian of a newly translated periodical—*Bulleten po avtorskomu pravu* [Copyright Bulletin], which is published by the USSR Commission for Unesco, the USSR State Committee for Publishing, Printing and Book Distribution, and Unesco. This Bulletin is available to Soviet readers from volume XVIII (1984) onwards.

There have also been a number of theses on copyright worth mentioning during the period under review, including some interesting dissertations for the degree of Candidate of Law: E.A. Pavlova, *Copyright in Works of Fine Art* (Moscow, 1984); K.A. Pizuke, *Legal Regulation of Architectural Activity* (Leningrad, 1984); S.I. Rosina, *Copyright in Public Performance of Works* (Moscow, 1984); N.V. Zernin, *Juridical Facts in Copyright* (Sverdlovsk, 1984).

During the same period the author of this article defended his Doctor of Law thesis: *Basic Trends in the Development of Soviet Copyright* (Moscow, 1985).

Let us note in conclusion that on August 28, 1986, the USSR Supreme Soviet Presidium and the USSR Council of Ministers endorsed the 1986–1990 Plan for drafting legislative acts of the USSR and decisions of the Soviet Government and for submitting proposals for the improvement of USSR legislation.<sup>23</sup> Item 18 in this plan provides for the drafting, in the first half of 1990, of a Legislative Act on the Introduction of Amendments and Additions to the Fundamentals of Civil Legislation of the USSR and the Union Republics (the Fundamentals of course contain the main provisions of Soviet copyright). The organizations that are required to draft the Act include VAAP (the USSR Copyright Agency) which is a clear indication that the text will modify certain fundamental provisions of Soviet copyright. This will further intensify Soviet copyright research during the period prior to the adoption of the Act.

<sup>23</sup> *Vedomosti Verkhovnogo Soveta SSSR* [Gazette of the USSR Supreme Soviet], No. 37, p. 782.

## Calendar of Meetings

### WIPO Meetings

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

1987

- 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 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, Budapest, 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 Countries 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

- 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

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

**1988**

March 21 to 25 (Locarno) — International Copyright Society (INTERGU): Congress

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



