

Published monthly
Annual subscription:
145 Swiss francs
Each monthly issue:
15 Swiss francs

Copyright

23rd year — No. 10
October 1987

Monthly Review of the
World Intellectual Property Organization (WIPO)

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ISSN 0010-8626

Studies

Arena Rights

Legislative Problems Concerning Broadcasting of Large Shows (Sports or Other)

Antônio CHAVES*

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1. Sports: Social, Economic, Political and Legal Importance

In recent decades, sports activities, which had been the privilege of a very restricted number of people and had even been considered as private by certain individuals with many muscles but few brains, became an important part of the personal, family and educational life of millions of people. This is increasingly evident from the space and time devoted to them daily in the written press—newspapers—and the spoken press—radio and television.

Great sporting events and their transmission are not mere confrontations between teams, clubs or nations; they have become enormous, complex businesses, involving billions of dollars, teams of specialists and technicians, and arousing in all latitudes more than mere interest.

When the German Soccer Federation erected a building worth DM 5.0 million in the suburbs of Frankfurt merely to house the Organizing Committee for the World Cup, its goal was not only to show off the host country: it was a carefully planned investment of DM 20 million destined to bring a return of DM 80 million. It sold the television broadcasting rights to the Deutsches Olympisches Zentrum for DM 18 million and the latter resold them to 80 television stations for live and recorded broadcasting of 38 games.

Sport TV (with headquarters in Brussels), specialists in outdoor advertising at stadiums, bought the exclusive publicity rights for DM 20 million, seeking a return of DM 32 million on the daily sale at a price of DM 1.8 million of each 20 meters of outdoor space at nine stadiums.

The Olympic Publishing House of Munich made an advance payment of DM 600,000 to the Organizing Committee for publication of the official book of the World Cup, and four million copies of the first edition were printed. Five hundred thousand copies of the official program were sold at DM 5.00 each, of which 20 pfennigs went to the Organizing Committee.

In Brazil, the Federative Government only takes care of the general rules for sports. The States Governments are also passive in this respect. No sport facilities are available to the general public and schools are seldom well equipped. That is the sad picture we see in developing countries, and the reason for their frustration. Countries do not, as a whole, give sports the importance they merit.

Sport is therefore concentrated in the clubs, but—at least in Brazil—they do not have the conditions or the structure to be successful in international contests because the preparation of an athlete demands special training daily for at least five years.

Let us consider two worrying phenomena: on the one hand, the increase in population worldwide: where there were one billion people in 1930, this had doubled by 1960 and in 1987 there are five billion. On the other hand, rapidly growing urbanization, which means that in certain countries 80% of the population lives in cities. The more their claims for less hours of weekly labor are met, the more time they have for leisure. Weekends and holidays will be taken up with leisure activities and these, when well oriented, will ease tension and even constitute an element of contention for violence and criminality.

The governments of the Federal Republic of Germany, France, Italy, the United Kingdom, the United States of America, Japan, China and many Eastern European socialist countries spend

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large amounts of money on employing qualified coaches, building stadiums and sports facilities. This encourages the practice of sport in schools and at universities, as well as at industrial and commercial establishments. As for the great majority of countries in the southern hemisphere, Africa and Asia, they are just starting to shake off their lack of interest in this respect. They simply did not realize the enormous echo that a more active policy for intermingling and rapprochement of individuals in their societies would have. In addition, they would be able to collect more taxes, mostly from tickets for sporting events, not to mention their main obligation to satisfy popular aspirations.

There has been fantastic progress in communication techniques, particularly two outstanding manifestations: satellites and parabolic antennae. The problem has moved from the national to the international sphere and it demands a different mentality, attitude and view from those that existed 50 years ago.

J. Pereira explains the importance of adequate legal treatment of the question, showing how through movies, videotapes and videodiscs sports have become a powerful world industry. He writes:

Thus, the sportman has been transformed into an artist, a mass attraction and, consequently, a highly profitable commodity for those interested in his industrialization and merchandising. Therefore, it is more than fair that the law should protect the interests of the athlete, that is, of the artist "on the spot at the event," i.e., the arena, a place where he shows his skills.

In this case, if he is paid by the impresario-club for his activities, he should also be paid whenever his activities, in images registered by modern processes, are exhibited to a much larger audience. This should enable those who record the images to also make encouraging commercial profits.

2. "Arena Rights." Concept. Legal Nature

One of the most daring innovations of the Brazilian Copyright Law of 1973¹ concerns without any doubt "arena rights."

Arena is a Latin word meaning "sand"—a place covered by sand and, by extension, an amphitheater where gladiators fought with each other or faced wild beasts. In our days, among other meanings, it is a place of contests.

Avoiding the legal concept, which confers the arena right not on the individual but on the sports club to which he belongs, we can define it as a reflection of the right to one's own image, namely to prevent a third party from revealing it in conditions unfavorable to the reputation or honor of the

holder or taking advantage of it against the latter's will, with the exception of the cases expressly provided for in the law.

The original idea, contained in Article 191, first part, of the Barbosa-Chaves project, grants associations promoting any kind of sport the right to authorize and receive profits from broadcasting, rebroadcasting or fixation, by any process, of athletic events, assuring participants in the events and coaches a share of 10%, to be divided proportionately and equally in the form determined by the National Sports Council.

This proposal appears in the Copyright Law, largely inspired by the project. There are two Articles: one establishing the general rule, the other an exception.

This Law, concerning intellectual or artistic creativity, is not the best way of dealing with rights concerning the image of sportsmen, but it does have the merit of constituting an embryo for future development, particularly since performances by great athletes are very similar to those by great artists.

What is their legal nature?

Athletes are hardly covered by the Articles concerning performers included in Part V of the Brazilian Copyright Law as "Related Rights," since they do not perform literary or artistic works.

Article 9 of the Rome Convention gives a possibility for Contracting States to extend protection to artists who do not perform or execute literary or artistic works, that is, as stated by José de Oliveira Ascensão, to vaudeville and circus artists.

On the other hand, there is a fundamental difference in relation to the right to the image under which the athlete should be the exclusive judge of the use of this image. Walter Moraes sought to elude the obstacle, trying to remove the matter from the Copyright Law, considering that

... by confronting the Law and the principle of the right to the image, the rule of Article 100 has to be interpreted as a precept which imposes on the athlete legal representation in favor of the "entity."²

This approach is merely fiction and, therefore, useless. The "entity" is protected in the first place and the athlete merely participates; there is no representation since the entity's interest prevails.

The conclusion is that the beneficiary of protection is the person to whom Article 100 extends the right to authorize or prohibit the fixation, broadcasting or rebroadcasting, by any means or process, of a public sporting event where a fee is charged.

To say that this solution is a reflection of the right to one's own image is to recognize that it has a

¹ Law on the Rights of Authors and Other Provisions (No. 5.988, of December 14, 1973), in *Copyright*, 1974, pp. 181 *et seq.*

² "What is New With Regard to 'Related Rights' in Law No. 5.988?," in *Questões de Direitos de Autor* [Questions of Copyright], São Paulo, 1977, p. 16.

different nature—a conclusion also arrived at by the then Counselor Henri Jessen.³

Seemingly, the legislator merely considered the case of public performances where a fee is charged, excluding all the others as well as utilization of the athlete's image outside the event⁴:

I consider, therefore, that the Brazilian legislator meant exclusively the extremely relevant economic fact represented by sporting events, some of them expressed in millions of dollars, like the Olympic Games, Formula 1 car races, the World Cup and others, whose communication to the public represents a valuable and legally protectable act. Being an immaterial right, it was included among related rights in Law No. 5.988 of 1973, which does not appeal to me from the viewpoint of copyright. As a counselor, however, entrusted with the application of a law in force, I have to accept its existence, joining Counselor Dirceu de Oliveira e Silva's position and acknowledging in the "arena right" a new right, without any precedents, autonomous and independent, extended to the entity to which the athlete belongs and to the athlete—a member of a team to which are due 20% of the profits—who only has a pecuniary share.

Furthermore, I believe the spirit of the legislative act would be better situated among the principles against unjust enrichment, since free communication to the public of sporting events of great appeal would give broadcasting organizations a chance to earn considerable amounts in publicity, with no counterpart. It is only fair that the clubs promoting these events—spending enormous amounts to organize them—should be able to recover the high costs by negotiating, directly or through a delegation of the respective federations, their broadcasting by radio and television.

Following exactly this trend of thought, Edmundo Pizarro Dávila presented to the Peruvian Revision Committee on the Civil Code Project a draft suggesting to include in the Chapter on the Rights of Persons—not as a right of personality—a special chapter on copyright and related rights, certain of these related rights being "Stadium Rights."

As a result of the developments in techniques of broadcasting, rebroadcasting and recording sports performances for millions of spectators, a dramatic problem has arisen. As long as no specific laws are enacted or an indispensable international convention is not concluded, there is no alternative to placing the matter within the scope of related rights.

It must be recognized that, despite the doctrinal incongruities of the Brazilian law, it makes a pioneering proposal, a starting point, to be improved with time and development of the concept. Not only professional clubs would benefit, but also broadcasting of sports events would be freed from the old-fashioned concept of paid tickets, and more prestige would be given to the athlete's image.

3. Ownership of the Right

According to Article 100 of the Brazilian Copyright Law, stadium rights belong to the "organization to which an athlete belongs" and not to the athlete himself.

This solution is pragmatic. The consent of all the changing participants in a sports event would make any individual solution on behalf of each athlete very difficult. Moreover, the athlete would not even be able to participate on his own without his colleagues.

The legislator took this attitude in order to avoid possible difficulties prejudicial to television stations or cinematographic companies and, above all, in defense of public interest since many athletes take part in various sporting activities on more than one side.

It is in fact the sporting organization that presents the public event. Where collective sports are concerned (for example, football, basketball, etc.) matches are between clubs and not between athletes. Amateur sports are much more widespread; the Law only considers the professional athlete's activity.

Could the solution in Article 100 be the right one in destining 80% of the arena rights to the clubs to which the athletes belong, reserving merely the remainder for the athletes to be distributed in equal shares to those who took part in the event "unless otherwise agreed?"

In this way, emphasizes José Geraldo de Jacobina Rabello,

... the major part of the amount collected as arena rights would be kept by the athlete's organization and not by the athlete, unless either personally or through the Union he imposed a larger share of the fee for his authorization.

It is quite clear that athletes should not agree to a share smaller than the minimum established by the legislator, considering the objective of the Law that created the arena rights. The clubs already benefit from the distribution of profits from selling tickets for the event.

The participation of the organizations to which athletes belong in the arena rights will always raise the price of the fixation or broadcasting of the event. This might discourage the occasional interested party from recording or broadcasting the event.

The image—he concludes—is "generated" by the athlete and not by the organization to which he belongs. The athlete should be the recipient of the benefits brought by the arena right, a right not only of football players but of any athlete.

The Law does not make distinctions, as far as the nature of the sport is concerned. Now, all that matters is to await the results of the Law; the courts will probably have much to decide as regards its implementation.

Therefore, he states that television stations do not hold their own rights for the broadcasting of soccer matches.

³ In a vote on April 13, 1938, in Case No. 298/82 of the National Copyright Council.

⁴ *Ibid.*, footnote 3.

Soccer clubs are the ones to hold what American legal technique calls "arena rights," considering them as "property rights," on behalf of the impresario of public shows, of the owner, the lessee or the concessionaire of a sports field, of the promoter of a wrestling match or fight, giving a possibility to take action against non-authorized broadcasting.

4. Object of Protection

As Ascensão explains, one cannot even say that there is the likelihood of use of the event in question because the material support that incorporate the activity mentioned does not exist. In certain cases, there is no recording and still the performance is protected.

Not only is fixation protected, but also direct broadcasting and rebroadcasting. The same is true for performers. Broadcasting companies may prohibit the rebroadcasting, that is to say the direct use of their broadcasts made simultaneously with the reception of the rebroadcast program (therefore, without recording).

Ascensão emphasizes this, so that it is clear that the protection of these rights does not require any form of incorporating or materializing the protected activity. The protection of the related rights is a consequence of technical progress, which allows the widening of the circle of recipients and therefore requires new rules for protection. He adds:

This happens even when the sound of an event is broadcast simultaneously in a public place through loudspeakers or when a live show is broadcast. Consequently, protection does not necessarily imply a recording activity—to use the normal term—or fixation—to use the legal term—in order to reach the wider circle of technical processes.

After a series of considerations, he concludes that Brazilian law provided an important innovation. A new related right has been created. An activity that had so far been free became subject to the exclusive regime peculiar to intellectual rights.

Perhaps this presentation of the problem could be useful as far as legal systems—where the situation may be considered legislatively open—are concerned. In such cases there is no specific provision to cover the situation; only the Broadcasting Act provisions concerning the right to the image or any other special provision may apply.

In these countries, activities ascribed by Brazilian law to arena rights and of interest in the first place to broadcasting must be considered free. They are subject to limits derived from the right to the image, property rights, the authority that organized the event and to other origins, but nevertheless the principle of freedom may be applied to them.

5. Athletes' Participation in the Profits

The sole paragraph of Article 100 states:

Unless otherwise agreed, 20% of the fee for authorization shall be distributed equally among the athletes taking part in the event concerned.

Besides the fact that this participation is merely supplementary, thus making the Article aleatory, its application depends on the club's goodwill. The attribution of 20% of the "fee for authorization" is an open door to abuse. For example, organizations might establish two currency units as the "fee for authorization" and 20,000 as the expenses for moving technicians and equipment, workmanship and other operational costs.

In draft Law No. 4.467,⁵ Congressman Carlos Chiarelli suggests that four paragraphs should be added to Article 100 of Law No. 5.988, raising athletes' participation to 40%, to be distributed equally to their organizations.

It is necessary to determine the implications of the legal rule, which he does not believe is automatically applicable. Its theory is based on the neighboring rights approach which is typical for the "continental" (French, etc.) legal doctrine.

The question has unforeseen implications.

Why should not athletes also share a small percentage of the subsidies, support, incentives, contributions, grants, etc., provided by governmental or private sources? They are the ones whose performance is absolutely fundamental to the whole development of images and communications.

However, the most unexpected and deserving reflexion is the suggestion that they should also receive a small amount of the prizes drawn in the "sporting lottery." The enormous circulation of money in such lotteries would never be possible without the athlete's brave, and sometimes heroic, participation!

The idea was raised at the Copyright Symposium organized in Brasilia (from May 17 to 21, 1982) by the President of the Communications Committee of Congress, Edson Vidigal, and it was also supported by the football player, Emerson Leão, who asked whether it would not be a compensation to the athlete, for all he does for the lottery since he is the one who originates the image and should be the first to be taken into consideration.

Another idea was that athletes should have a right to participation in the sum received from the publicity on T-shirts.

Why not participation in all other publicity methods and the circulation of money we mentioned initially? Would it be perhaps too complicated? That is a good excuse for ... bad payers.

Anyway, what matters now is to establish a principle, to think about the subject, so that time may mature ideas and systems.

To repeat, the sole paragraph of Article 100 of Law No. 5.988 states that 20% of the fee for authorization shall be distributed equally among the ath-

⁵ DCN I, of May 7, 1981, p. 3085.

letes taking part in the event concerned, "unless otherwise agreed." This expression means a supplementary rule and reveals a lack of understanding between the sports organizations and the athletes and their teams who took part in the event.

However undeniable its importance, this problem has not yet encountered a satisfactory solution.

During an interview given to *Educação Física e Desportos* [Physical Education and Sports],⁶ José Carlos Costa Netto, the former President of the National Copyright Council (CNDA), recognized that the arena right had only been partially enforced. The authorizations directly given by clubs contain a rule that arena right is merely the right to authorize the direct broadcasting of the sports event.

One does not take into account mere fixation or rebroadcasting of events by means of videotapes or even simultaneous broadcasting to different places from the ones where the events take place.

If this happens on the soccer field, it is easy to imagine what would happen in other sporting activities where the situation is even more precarious.

On the other hand, the CNDA has no knowledge, so far, that even for direct broadcasts 20% of the amount charged by clubs is being distributed among the participating athletes. That is a total deficiency.

Major organizations grouping athletes for the collection, control and distribution of the 20% have more chance of controlling direct broadcasting and authorizing it than small clubs.

Therefore, arena rights are not being exercised completely, since there is no control over athletic associations, large or small, with regard to fixation, direct broadcasting to places other than where the event is being held and also in respect of rebroadcasting (on the basis of a videotape) of sporting events.

In broadcasting or rebroadcasting sports events, especially on television, stations make large profits from the programs, without extending participation to the clubs and athletes.

When asked in the same interview how the law could be enforced, the former President of CNDA declared that, with regard to the 20%, sports organizations had no means of organizing and maintaining their own individual system of collection, control and distribution. He recommended that, as in other areas, they should form a specific association to collect payments on the basis of the arena right.

This idea was accepted and on May 28, 1982, the *Associação Brasileira de Direito de Arena* (ABDA) [Brazilian Association for Arena Rights] was founded.

The story can thus be summarized.

On the basis of Articles 105, 115, 117(ii) and (iii) of the Brazilian Copyright Law, with more than 1,000 members suffering prejudice for lack of someone to defend their rights, the ABDA requested the CNDA for an operating authorization.

The application was filed with the Third Panel of Judges, who decided to postpone proceedings until a Special Committee, set up on November 17, 1982, could finalize its work by regulating Articles 100 and 101 of the Copyright Law, thus complying with a request made by the Ministry of Communications.

The ABDA then appealed to the Plenary Council.

The request for authorization was nevertheless rejected by plenary decision of the CNDA, approved by a majority vote, at the 31st extraordinary meeting and the decision was published in the *Diário Oficial da União* of November 1, 1983.

Finally, on November 17, 1983, the ABDA appealed to the Minister of Education, emphasizing the contradiction between the decision of the Third Panel and another decision by the Plenary itself which, on February 10, 1982, by a majority of votes had approved a legal opinion by Counselor Antônio Chaves (in Proc. 54/82), recognizing athletes and football referees as entitled to arena rights.

Why deny Brazilian athletes—he concludes—the sacred right to receive their share, even if the share conferred by the law is derisory, when they are the real *artists* of sporting events? How can one deny these athletes the possibility, guaranteed in the Constitution, of forming a non-profit-making association to defend their legitimate rights and to collect and distribute payments.

However, on March 9, 1984, the then Minister of Education rejected the appeal (*Diário Oficial da União* of March 12) with the sole inconsistent argument of the petitioner's lack of entitlement. Later, however, on December 12, 1986, the CNDA recognized the Association.

Case Law

The first time arena rights appeared in Brazil was in the judicial notice that the former Sociedade Esportiva Palestra Itália, today called Palmeiras, and Radio Cruzeiro do Sul S.A. sent to Radio Difusora São Paulo and seven other similar bodies. It appeared in *Revista Forense* No. 77/409, of February 8, 1939. S.E. Palestra Itália granted Radio Cruzeiro do Sul the exclusive right to broadcast an account of all games held in its "field," meaning also "the exclusive right to set up a commentary box, microphones and all necessary equipment." Radio Difusora, in defiance of this monopoly, intended to set up commentary boxes, towers, micro-

⁶ 1981, No. 47, pp. 11-12.

phones, telephones lines and accessory equipment so as to use them to broadcast an account of the games and, at the same time, exploit the corresponding commercial publicity. The notice says:

Those who do not acquire tickets for sporting contests or do not have authorization from the competent parties are not entitled to watch paying events. The same is true for radio stations which, without the necessary authorization, may not broadcast the games, *even outside the football field*. Such an attitude would be an abuse of rights and harm interests of an economic nature. It would also prejudice the right of exclusivity granted to Radio Cruzeiro do Sul S.A., since such exclusivity increases the value of commercial advertisements and slogans while broadcasting the commentary of football matches.

In the United States of America, a jurisprudential decision by the Federal Court of Pennsylvania recognized arena rights to an impresario of public shows—the owner and the lessee of a sports field—against unauthorized radio commentaries.

Samuel Spring, quoted by Hermano Duval,⁷ refers to the case, adding:

The owner of the arena, or a promoter as the lessee thereof, may be deemed to have property right to prevent the photographing of his structure for commercial publicity purposes. The Madison Square Garden case suggests this right. If the arena owner or lessee has this property right in the photographic publicity use of his property, he can split the right and by notice permit its reception and exhibition by some and deny it by others.

With the advent of television and, more specifically, with the use of communications satellites, protecting sports events so as to avoid unauthorized commercial exploitation became a more acute problem and was the justification for Article 100 of Law No. 5.988.

Jairzinho, the well-known soccer player of Botafogo and world champion, was taken by surprise when, reading a newspaper, he came upon his own full-length image, very prominently displayed, with the publicity caption of a certain commercial enterprise. Through an advertising company he had formerly authorized the use of his photo in an advertisement to be circulated by another industry. He therefore tried to find out whether the authorization included the second company and, when the answer was negative, he sued the latter demanding payment of the compensation he felt he had a right to.

The defense stressed two fundamental points: firstly, no legal impediment to using the player's photograph existed since he was a very well-known person in the sports world whose image belonged to the public domain. In this case, no right of modesty justified protection. If publicity was not illicit, no right to compensation could be claimed. Secondly, there was a contract with an advertising agency, so

responsibility belonged to the agency and not to the industry whose product was being advertised.

This second reasoning was not accepted by the Court, which opined that the interested party had concluded a written contract with the agency, including the use of the player's photograph, and its responsibility was therefore undeniable.

The Second Panel of civil judges of the Special Jurisdiction Appellate Court of the former State of Guanabara⁸ confirmed the right of a person whose name or image was used without his consent for any means of communication for propaganda purposes, to receive compensation amounting to the habitual remuneration in contracts of this kind.

Our sole objection concerns the words "habitual remuneration in contracts of this kind." Such sanctions are not only for purposes of compensation but also for deterrence.

Payment of the habitual remuneration means doing away with the interested party's consent and encourages offenders. If offenders are able to pay the amount and know that proceedings will always take one or two years, they will prefer not to conclude any agreement, hoping the interested party will ignore the violation or, if he is aware of it, be unwilling to face the drawbacks, costs and delays of a lawsuit. Payment of five or ten times more than the "habitual remuneration" would be an excellent dissuasive argument.

This was exactly the reasoning of Jair Ventura Filho (Jairzinho) when appealing against the decision in another case that caused Siemens of Brazil S.A. to pay him compensation of merely Cr\$ 11,000, which he asked to be raised to a minimum of Cr\$ 69,000, taking into consideration another contract with Alparbatas for local publicity. In the case of the defendant, there was proven *national* publicity, or maybe even worldwide publicity, and the compensation was therefore very low. In the case of Alparbatas, in particular, there was the parties' consent and as regards the defendant the plaintiff considered it to be a *desseisin*, liable to compensation four times greater than a conventional and lawful payment. Should this reasoning not be adopted, the average assessment was to be accepted, that is Cr\$ 171,000.

The judges of the Sixth Civil Panel of the Special Jurisdiction Appellate Court of Guanabara decided unanimously, in a decision of June 27, 1974,⁹ to fix compensation at Cr\$ 68,965.51.

The rapporteur of the case, Rui Domingues, declared:

To accept such a criterion would be to encourage piracy and banditism in the field of image exploitation. The heroes,

⁷ *Direitos Autorais nas Invenções Modernas*, Rio, Andes, 1956, p. 259.

⁸ Appeal No. 24.294, *Diário da Justiça*, January 14, 1974, p. 9.

⁹ *Revista Forense*, Vol. 250, p. 269.

the athletes, the world champions, would subsequently not even have the advantage of a contract to exploit their images and their names. It would be more advantageous to steal their images and names, since piracy only pays one sixth of the agreed price.

In any case, what is the athlete's performance contained in the contract with Alpargas? A pose of only a few seconds, with a maximum foreseen time of 30 seconds. From that pose, advertisements and movie pictures would be made. But the athlete's performance—as the expert calls it—contained in the contract is merely a 30-second pose.

The plaintiff was not consulted; nothing was mentioned about the quality of the advertised product. How then could compensation correspond to one sixth of that in the contract with Alpargas, which had the consent of the plaintiff?

The rapporteur went on saying:

The amount of the compensation is meager when one takes into consideration the fact that a football player represents one of the persons best appreciated by the public, particularly so in the case of a world champion, when compared to the millions who practice the sport worldwide. Football is the greatest olympic show on earth. If Pindar, the great Greek poet, celebrated in immortal verses the naked feet of those who ran in the memorable Greek contests, dedicating dozens of poems to perpetuate the names of the athletes, crowned not only by their physical triumph but also by their firm determination, then Jairzinho, world football champion, deserves no lesser respect.

6. Do Football Referees Participate in Arena Rights?

A literal interpretation of the Brazilian Copyright Law would perhaps lead to a negative answer, since Article 100 recognizes this prerogative to the "organization to which an athlete belongs."

The Law, therefore, does not consider it a right of the individual proper, but of the organization to whom he belongs and expressly for "fixation, transmission or retransmission, by any means or process, of a public sporting event for which a fee is charged for admittance."

The public sporting event from which the right derives includes all persons who appear in it as sportsmen, referees, linesmen, etc., whose image is related to the event, neither transitorily nor as a mere element of the decor.

If the unassailable role of these "leading artists" is accepted, there should be no obstacle to recognizing the rights of the other participants, among whom the central, indispensable and sometimes even revered figure of the referee stands out. To admit this is to accept a principle of justice.

It is a remarkable fact that referees sometimes play a more spectacular role in matches than the majority of the participants, becoming real attractions for the public who consider them as great artists in their field. How then can they be excluded from participating?

There is also another valid reason. The difficult wording of Article 100 will become more explicit if we resort to its original source, Article 191 of the Barbosa-Chaves project. It assures to "the other participants in the show and to the technicians" the prerogative of participation in the fees received, to be proportionately and equally divided in the manner determined by the National Sports Council.

No one can deny the referee the status of a technician, who is included in the event. This understanding is confirmed by the very legal definition of a professional athlete who, as we have already seen, is the person who, receiving fees under whatever title, makes sports his professional activity.

That is also Edmundo Pizarro Dávila's position. According to him, stadium rights protect not only professional sportsmen, but also those who act as professionals in shows, externalizing their special and inborn skills, knowledge and psychosomatic conditions, whose economic value they have the inalienable right to claim whenever their performances are economically exploited by a third party through the modern means of mass broadcasting.

7. Limitations

Article 101 of Law No. 5.988 exempts the application of Article 100, when fixing parts of the show, even when a fee for admittance is charged, as long as the parts do not exceed three minutes and they are exclusively for information purposes in the press, the cinema or on television.

It is difficult to find an example of fixation of an event for "the press," although it is easier with regard to the cinema or television. The press may not photograph or reproduce scenes fixed by photography, when they take more than three minutes of the event altogether, without the authorization of the CNDA or the sporting organization. The curious fact is that the Law did not extend this exception to radio stations, but only to television channels.

This exception echoes the principle of Article 10^{bis} of the Berne Convention, which does not consider as violations the broadcasting, cinematographic or television reporting of so-called "current events" complementing the news with the respective illustration.

Showing for 179 seconds or less would not constitute a violation of the right of arena. Nowadays, this time [three minutes] seems excessive since it is enough to present to a television audience of millions the most exciting moments of any game. Besides collecting enormous fees from the program's sponsors, does it not very often happen that the news is disseminated worldwide by special agencies—well remunerated of course—without the

participants receiving any fee for the later use of their participation?

If the showing takes less than three minutes, according to Article 101, the right of arena cannot be exercised and television sports news will be free from the range of that right.

A famous lawsuit took place in the United States of America. WESB Television from Hartford, a branch of CBS Television, wanted to show every evening, for about two minutes, moments from the 1981 World Skating Championships held in the town's Civic Center, considering that it had the right to cover an important event in the community. ABC paid US\$ 165,000 for the exclusive rights to television transmission and showed the finals to an audience of millions of people in the program *Wide World of Sports* over a weekend. WESB sued the local sponsors, demanding suspension of the prohibition against all television cameras, except those of ABC Television.

The District Court Judge, T. Emmet Clarie, decided that, contrary to newspaper and radio coverage, showing of the highlights to 300,000 WESB viewers in Connecticut and West Massachussetts would reduce the event's commercial value for ABC as an entertainment. The station, like the audience in general, would have an "offer of access to the event, if they complied with contract restrictions."

ABC then offered a compromise, allowing WESB and the other local stations to show parts of the preliminaries. WESB however rejected this offer, stating that it would be like covering a boxing match without showing the knockout, and they showed parts of the contest on March 3. Next day, their cameras were not allowed into the municipal stadium.

On March 6, Judge Clarie rejected WESB's request to be re-admitted to the contractual rights of ABC. As a precedent, it submitted a 1977 decision by the United States Supreme Court regarding a human cannon ball. By five votes to four, the Court held in that decision that Hugo Zacchini could sue an Ohio television station because it had broadcast his whole evolution through the air, lasting 15 seconds, without paying for the privilege. Three judges disagreed because in their opinion it was a public performance. It was informative and the broadcast was protected by the Constitution.

8. Term of Protection

The Brazilian Copyright Law considers arena rights to be related rights, including them in its text. Article 102 states:

The duration of the protection of related rights shall be 60 years from the first of January of the year following fixation, for phonograms, following transmission, for broadcasts of broadcasting organizations, and following the holding of the event in other cases.

This is not identical to the generally established provisions on *post mortem auctoris* protection of copyright. For economic rights, the term is for the author's lifetime (Article 42), and also for his children's, parents' or spouse's lifetime where these have been passed on to them by will, as a result of his death (paragraph (1)) and for 60 years following the author's death for his other successors (paragraph (2)). The term of protection of economic rights is 60 years for anonymous or pseudonymous works (Article 44) and for cinematographic, phonographic, photographic works and works of applied art (Article 45).

José de Oliveira Ascensão is right when he observes that in any case the term exceeds largely the minimum of 20 years established by Article 14 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. He adds:

This term is absurdly long, hampering rapprochement between private interest in protection and public interest in freedom, which is the ultimate aim of intellectual rights. The term is calculated from the date the event takes place. There is a difference of detail between the technique adopted by the Brazilian law and the Rome Convention for establishing the *terminus a quo*: the Brazilian law fixes it on January 1 of the year following the recording, while the Convention stipulates the end of the year of recording. Here, there is an incomprehensible variation of the pattern adopted in international conventions, which usually refer to January 1 of the following year, as does the Brazilian law.

9. Collection and Distribution of Royalties

On the occasion of a world football championship, all teams belonging to the countries selected start feverish preparations. The host country establishes a complex system, not only to offer excellent facilities to the delegations, but also to tourists, newspapermen and thousands of fans who arrive from all over. At the same time, radio and television companies worldwide contact the organizing committee to ensure the simultaneous radio and television broadcasting via satellite of all matches. Edmundo Pizarro Dávila estimates that these companies trade their direct or differed transmissions with the interested areas to a radio and television audience of more than two billion, but there are no estimates to calculate the billions of dollars that are at stake during the games, while referees whistle and football strategies and techniques are displayed:

And many ask themselves: from these millions, how much do the players responsible for the event receive? It is

true that in the world championships which take place every four years, the show is given by the national teams of the countries selected and the tickets have a logical and calculated destination, determined by the organizing country, under the control of the International Federation of Football Associations (FIFA)—a thing that does not happen with private clubs' teams.

How are royalties for the arena rights collected in Brazil? In a rather criticizable way, which does not seem strange if one thinks of the pioneer character of the provisions on which the right is based.

Article 115 of Law No. 5.988 determines that associations [of owners of copyright and of related rights] will set up a Central Collection and Distribution Bureau (ECAD)

...for the royalties deriving from public performance, notably by broadcasting and by cinematographic presentation, of musical and dramatico-musical compositions and phonograms.

Article 5 of the National Copyright Council (CNDA) Resolution No. 21 (of December 2, 1980) confers upon the ECAD the exclusive right to authorize the use of and to collect and distribute the rights pertaining to public performances, *including sporting events* and public sessions, even for broadcasting or cinematographic presentation under the terms of Article 73 of Law No. 5.988, by collecting through a bank or post office fees for copyright and related rights.

Article 2 of the CNDA Resolution, however, mentions the use of intellectual works other than musical works. After eliminating the argument that sports are not properly speaking intellectual works because Law No. 5.988 places them under the protection of related rights, we do not see why—and we have long held this opinion—the above-mentioned Bureau (ECAD) should not be able to collect royalties deriving from sports events where a fee is charged for admittance, subsequently handing them over to the sector's special organization.

If this does not occur, then that is another story.

Under the circumstances, we cannot agree with the eminent expert J. Pereira when he defends a contrary thesis.¹⁰ Football, bandball, tennis, motor racing, skating, skiing, hang gliding, surfing, when transmitted on television, certainly do constitute public performances.

It has always seemed absurd to establish and maintain the whole expensive apparatus of the CNDA and the ECAD (naturally at government expense and not at copyright expense) to exclusively look after rights in musical works, when so many other rights require attention and respect.

¹⁰ "Direito de Arena e Direitos Conexos" [Arena Rights and Related Rights], *O Estado de São Paulo*, April 23, 1983.

10. Radio Broadcasting of Sports Events

In view of the foregoing Article 5 of CNDA Resolution No. 21, it is impossible not to admit the acceptance of the possibility of "collecting and distributing royalties derived from public performance, including sporting events...even for broadcasting."

All doubt is removed when, under the terms of Article 73 of the Copyright Act, we find that:

No drama, tragedy, comedy, musical composition with or without words or work of similar character may, without the authorization of the author, be transmitted by radio, by loud-speaker system, by television or by any other similar means, or performed in public shows or events, for direct or indirect profit.

Royalties that might occasionally be paid to the sports announcers or commentators are another matter. This is only fair, because as happens with television, crowds are attracted by their commentaries, so much so that even inside football stadiums the more fanatical, while watching the match, follow it on the little transistor radio glued to their ears. The commentary helps them to understand the moves.

Clubs should not feel encouraged to use these rights—which will probably not be well accepted—since they need to be widely spread among the population. This is also another question.

11. Extent of Arena Rights

The Brazilian Copyright Law No. 5.988 was the first to grant the organization to which the athlete belongs the right to authorize or prohibit the fixation, transmission or retransmission, by any means or process, of a public sporting event for which a fee is charged for admittance.

The right of arena, listed as "stadium rights" (Articles 100 and 101) under Part V, "Related Rights" (Chapter IV), in Europe is nicknamed the "Pelé Law" and is more closely related to the athlete's right to his image than to copyright.

This institution should not be unduly criticized—it is still at the adolescent stage but it contains an innovatory idea well worth considering, which will be perfected with time while being put into practice.

We must accept the *fait accompli*, despite the many legal disputes about this matter. What must be done is to take a step forward, thinking of the indispensable revision of the articles which almost exclusively favor sports clubs when the real beneficiary should be the athlete.

What is the use of the provision contained in Article 100, that "20% of the fee for authorization

shall be distributed equally among the athletes taking part in the event concerned" when this depends on three fatal words "unless otherwise agreed?"

On the other hand, accepting the principle, there is no way to limit the law's protection of public sports events.

There are many other public manifestations of great beauty that attract much curiosity worldwide such as carnival parades (there are many lawsuits concerning them) bullfights, fairs, animal exhibits and contests, fashion shows, etc.

Thus the arena rights as they are now conceived might well in the future also find application in a number of other fields.

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Correspondence

Letter from Sweden

Karin HÖKBORG*

1. Introduction

The last "Letter from Sweden" was published in *Copyright* in January 1983 (pp. 22 to 35). It seems that the time is ripe for another one, not so much because four years have passed since then, but rather because some developments have taken place in Sweden in the field of copyright that might be of some general interest.

In the preceding "Letter" an exposé was given as to the Guidelines for the Revision of the Nordic Copyright Acts and the appointment of a Copyright Revision Committee in Sweden, its terms of reference, structure and working methods. In this field no major changes have taken place. The revision work moves on at a steady pace.

Reference was also made to the legislative results following the proposals from the Committee, up and until January 1, 1983. This "Letter" will then pick up from there. As far as legislation is concerned, it will deal with three major areas of copyright in which the impact of new and developing technologies has been felt, viz. (1) neighboring rights and questions relating to private copying and to videograms, (2) rebroadcasting of radio and television programs by cable or wireless means, and (3) copyright and computer technology.

Other legal developments in the copyright field will also be dealt with, for instance case law.

2. Revision Work and Legislation

The Swedish Copyright Revision Committee has continued its work under the relatively wide terms of reference from 1976, as described in the preceding "Letter." The work has been carried out in cooperation with the corresponding committees in the other Nordic countries. Even if it has not always been possible to maintain a complete coordination neither as regards the time for the publication of the reports nor as regards the solutions to different problems, the work still reflects a remark-

able degree of regional cooperation and harmonization in the field of copyright.

The Committee has submitted two reports with proposals for amendments to Swedish copyright law. The first one (SOU 1983:65) dealt with *neighboring rights*, the possibility to make *single copies of protected works for private use* and copyright questions concerning *videograms*. The second report (SOU 1985:51) dealt with *copyright and computer technology*, in particular the protection of computer programs and integrated circuits (semiconductor chips). It might be of some interest to mention here that both these reports have summaries in English. Following the normal procedure for committee reports, the proposals were sent for comments to a large number of public authorities and private organizations. On the basis of the proposals and the comments received, legislation has been passed on some proposals, while some are still being considered by the government.

On the subject of copyright, and in particular *cable television*, a memo on rebroadcasting of radio and television programs was elaborated within the Ministry of Justice (Ds Ju 1985:7), containing proposals for amendments to the Swedish copyright law. The same procedure was followed as for the two Committee reports and legislation has been adopted on the basis of the proposals and comments received.

Returning to the question of *neighboring rights*, it should be mentioned, as a point of departure, that certain considerations of a more basic and general nature were made in the legislative process, however not necessarily in each case leading to amendments of copyright law. As is already known, Swedish copyright law contains provisions on the rights granted to performers, phonogram producers and broadcasting organizations. It was considered whether the scope of the rights, as far as performing artists were concerned, should be extended from protection linked to the performance of a work to protection of the "artistic performance" as such. However, this idea was rejected, one of the main reasons being that such an extension would imply stricter conditions for protection, whereby some performers now enjoying protection would lose it.

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One consequence of this conclusion is that magicians, circus artists and other performers who do not perform works are still not given protection under these specific provisions.

As far as producers were concerned, it was found that the present protection for *inter alia* phonogram producers and broadcasting companies under the neighboring rights system should be maintained. As the producers of cinematographic works were lacking an independent right to control the reproduction of their work and as copying, especially of videograms, had become so much easier due to technical development, it was found that film and videogram producers needed a quick and effective way of taking action against unauthorized copying. It was considered that the possibilities for such action would increase with an independent right of the same kind as that already afforded the phonogram producers. Legislation was passed, reflecting these ideas, whereby producers of cinematographic works were put on an equal footing with phonogram producers in this respect.

In the context of producers' rights, it was also discussed whether producers of theater performances should be given a special right to authorize or prohibit the use of the performance. It was argued, for instance, that the technical development in the field of recording and reproduction had increased the possibilities for others to obtain and to use the result of the theater producers' work. However, the legislator did not find the arguments convincing enough, especially as there were other ways of prohibiting such recordings and as it was not possible to reach a Nordic consensus on such a special right.

When it comes to the use of recordings, a particular question was raised concerning the rights of performing artists. It was debated whether or not they should be afforded an exclusive right to control the use of their recordings. However, the introduction of such a right was considered a principally very important step, the consequences of which could not be envisaged at the time. Therefore, no amendment was introduced in this respect.

However, the right to remuneration when sound recordings are used in public was extended. Performing artists and phonogram producers already had a right to remuneration when their sound recordings were used in radio or television broadcasts. This right was now extended to recordings used in other public performances for commercial purposes. Before this amendment, Sweden was the only country in the context of the Rome Convention that granted such remuneration only for use of recordings in radio and television but not in other cases of public use. As a result of the new legislation, remuneration should now be paid to performers and phonogram producers also when sound re-

cordings are used, for instance in discotheques and jukeboxes, in hotels, restaurants and shops.

One important amendment in the field of neighboring rights concerned the period of protection. Under the earlier prevailing law, the period of protection was 25 years for all the categories of beneficiaries in the field of neighboring rights. That period has now been extended to 50 years. Again, the development of technology was quoted as a determining factor: 20–30 year old recordings could very well be rerecorded. The demand for new publication of older recordings was such that it was found reasonable that they should be protected against such use without consent from the performers appearing on the recording as well as from the producer of it. Some objections were raised, claiming that such an extension would increase the costs considerably for large users like the Swedish Broadcasting Corporation. However, these objections did not carry enough weight in comparison to the positive effects of an extension as far as performers and producers were concerned.

The criteria for the applicability of the provisions on neighboring rights were also amended to some extent. It would not be useful to go into detail here, but a few examples could be mentioned. For instance, the protection for performers, which earlier applied only to performances, sound recordings and radio and television broadcasts taking place in Sweden (or in other Rome Convention member States), was extended to performances by Swedish citizens or persons having their habitual residence in Sweden. The protection for broadcasting organizations was also extended, so that it now applies not only to broadcasts taking place in Sweden but also to broadcasts of organizations having their headquarters in Sweden.

However, the most important extension of protection in this field concerns producers, and in particular phonogram producers. After the amendments *all* sound recordings are protected, whatever their origin. The reason for such an extension of the protection was that it would be in line with the efforts of the Swedish authorities to effectively combat piracy in different forms. As was mentioned in the 1983 "Letter," legislation was passed in 1982 with the same aim, introducing stricter sanctions against copyright infringements.

The amendments concerning neighboring rights entered into force on July 1, 1986.¹ They are found in Articles 45–49 and 61 of the Act of 1960 (No. 729) on Copyright in Literary and Artistic Works.

As regards the possibility to make *single copies of protected works for private use*, the basic provi-

¹ See Swedish Statute Book, SFA 1986:367–369; also *Copyright*, 1986, pp. 415 *et seq.*

sion in the present copyright law states that it is permissible to make single copies for private use of works which have been disseminated to the public. Such copies may not be used for other purposes.

This possibility does not, however, extend to the construction of a work of architecture, nor to commissioning others to make useful articles or to copy the artistic work of another person by means of an artistic process.

The Revision Committee considered this provision in particular, in the light of the impact of new reproduction techniques, which among other things, makes it possible to make copies of a quality which was unknown at the time when the present Act on Copyright was introduced.

The Committee proposed that the right to make copies for private use should not apply to—in addition to the construction of works of architecture—(a) the direct reproduction of such copies of cinematographic works which are intended only for public showing in Sweden, and (b) the making of copies of a work of art by means of molding from an original or by use of other methods implying that the copy may be conceived as an original.

As regards the possibility to engage other persons for the making of copies, the Committee put forward some proposals for amendments. Thus it should not be permissible to have copies made of musical works or cinematographic works or works of applied art or—by means of an artistic process—other works of art. In order not to create obstacles for the exchange of information and the public discussion it was, however, proposed that it should always be permissible to engage other persons for the making of recordings of works which have been broadcast in radio or television, provided that the reproduction is made in order that private persons shall be able to keep themselves informed about and, for documentary purposes, maintain copies of interventions in public matters or other elements of the public debate.

The Committee also discussed the increasing use of tape and video recorders for the making of copies for private use. Such use was considered to have a negative effect on the possibility for the right holders to get a fair remuneration out of the use made of their works. Therefore the Committee proposed that a levy be put on blank tapes, discs and other devices suited for the making of private copies of protected works. The levy should be paid when the device was imported to Sweden or manufactured here. An organization representing the right owners should collect the expected income of this levy and divide and distribute the money between them. Since September 1, 1982, there is a tax on blank audio and video tapes. The Committee did not consider it to be its task to solve the prob-

lems concerning the coordination between the existing tax and the proposed levy.

These proposals from the Committee have not yet led to legislation. In the Parliament Bill (prop. 1985/86:79) dealing with the proposals in the Committee's report (SOU 1983:65) on neighboring rights, private use and videograms, it was submitted that the questions concerning private use were so closely related to questions regarding the copying for information purposes within authorities, organizations and other similar institutions, that they should be dealt with at the same time. As the Revision Committee was expected to submit proposals on "institutional" copying relatively soon, it was judged better to await these proposals before deciding upon legislation on private use. The same applied to the question of a levy on blank tapes. These conclusions in the Bill were accepted by Parliament.

A proposal from the Committee on, among other things, "institutional" copying is expected some time during the summer of 1987. It would then be possible, after the usual hearing period, to submit a Bill to Parliament in early 1988 concerning all three questions, i.e. private use, "institutional" copying and the levy question.

In Sweden, like in most other industrialized countries, *videograms* have become an important element in the media environment. The Swedish copyright law as it is now framed does not contain specific provisions on videograms, which are, generally speaking, to be considered as cinematographic works. In respect of such works, the basic approach under the law is that the author retains the so-called distribution right, i.e. the right to control all acts implying a distribution to the public. This means that an authorization from the author is necessary for all acts whereby a videogram is offered for sale, leasing or lending or similar acts directed towards the public. This applies not only the first time when the videogram is put on the market but also in respect of all subsequent acts of this kind. It goes without saying that this right is very important for the video market.

The Committee did not propose any changes in the basic approach to the distribution right but only some minor amendments. A distinction was made between videograms put on the market for sale and those put on the market for leasing or lending. Regarding the former category, it was proposed that the author should not be able to control the resale in general but only such resale as was made in the course of profit-making activities. The author would keep the distribution right as regards leasing and lending to the public. The author would also retain, as under present law, the full distribution right for videograms put on the market for other purposes than sale.

However, the just mentioned proposals from the Committee did not result in any amendments to Swedish copyright law. Reference was made to the development of the videogram market in Sweden and that it was still uncertain what direction it would take and that considerations were still going on as far as cultural policy in these matters was concerned. Consequently, what was said above about the distribution right of the author under the present system still applies.

Concurrently with the amendments on neighboring rights, new provisions were introduced concerning in particular *cable television*. For a long time cable television activities in Sweden have mainly consisted of distribution of television broadcasts by means of small community antennae systems, to which about 50% of the television households are connected. Only recently has a development started by which more extensive cable networks are being established for the purpose of distribution, in particular in the more densely populated areas, of television broadcasts from the neighboring Nordic countries and also of signals from communication satellites and direct broadcasting satellites. It is estimated that in 1987 around 200,000 households in Sweden will have access to cable television. Due to this development it was found necessary to introduce legislation as to the protection of copyright and neighboring rights in works and performances rebroadcast, for instance, by cable transmission. The amendments are published in the Swedish Statute Book, SFS 1986:367-368, the same as for neighboring rights. They entered into force on July 1, 1986.

The new legislation deals with the simultaneous and unchanged distribution by wireless means or by cable (retransmission) of protected works and performances. It does not deal with the distribution of signals from communication satellites.

In the elaboration of the new legislation account was taken of the contents of "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable."²

The prevailing system with regard to copyright is maintained, i.e. the right to retransmission is based on authorization from the right holders. In order to solve the practical problem of obtaining such authorization from all right holders concerned, a regime is established which is based on the so-called extended collective agreement effect. This means that if an agreement is concluded between, on the one hand, an organization grouping the majority of the Swedish right holders in a particular field and,

on the other hand, a distributor or an organization of distributors, the terms of that agreement are by means of the legislation made applicable also to right holders outside the contracting organization. Consequently the distributor is entitled to retransmit also works of such outside right holders, and these right holders are entitled to the same remuneration and other benefits as those who are members of the contracting organization. In order to safeguard the interests of the outside right holders, the legislation contains a provision according to which they are entitled to claim an individual remuneration for the retransmission which has taken place, if such claims are filed within three years from the end of the year in which the retransmission took place. In order to facilitate the practical operation of the system, the legislation provides that claims for remuneration must be forwarded through the contracting organizations. All claims also have to be submitted at the same time.

The same applies to the protection of performing artists. That means that the prevailing system is maintained, according to which authorization from the performing artist is required for a retransmission of broadcasts containing the artist's live performance. It also means that the extended collective agreement effect applies to the rights of performers as far as this retransmission is concerned.

As regards broadcasting organizations' rights in respect of retransmission of their broadcasts, the exclusive right applies. Thus there are no provisions on the extended collective agreement effect as far as they are concerned.

As has already been mentioned, performers and phonogram producers have no such exclusive rights when it comes to the use of their recordings. However, they have a right to remuneration when their recordings are used, for example in radio or television broadcasts. Through the new legislation this right was extended to cases when such broadcasts are being retransmitted in the described way.

Collective agreements have already been concluded as far as musical rights are concerned. Negotiations concerning the rights of other categories of right holders are underway.

As the new legislation applies also to retransmission by wireless means, it applies to the rebroadcasting in Sweden of television programs from Finland, which are presently taking place on a trial basis.

The other report from the Copyright Revision Committee mentioned above, regarding *copyright and computer technology*, dealt with three major issues, viz. (a) copyright problems relating to storage, retrieval and creation of works by means of computers, as well as the protection for data bases, (b) the protection of computer programs, and

² See *Copyright*, 1984, pp. 131 *et seq.*

(c) the protection of integrated circuits (semiconductor chips).

Concerning *storage and retrieval, etc., of works by means of computers ((a))*, the Committee did not find it necessary to propose any specific amendments or new provisions to copyright law. It subscribed to the view that input of protected material into a computer amounted to reproduction under copyright law and that data bases as such could be either compilations or a collection of information or other items structured in such a way as to make the base a protected work. Otherwise, it might enjoy protection under the special "catalogue" provision in the Swedish Act on Copyright. The Committee was also of the view that output of protected material from a computer amounts to an act of reproduction of the work if physical copies are produced, and to a type of public performance or public display if the output is shown on a screen available to the public under the criteria in this respect of the Act on Copyright.

Concerning the *protection of computer programs ((b))*, however, certain amendments were proposed to the Act on Copyright. As the Committee considered computer programs as a type of literary works under the Act which enjoy protection under that Act, if they are the result of an act of intellectual creativity, it proposed that for clarification purposes, computer programs as a category of protected works be specifically mentioned in the Act. It also proposed that private copying of computer programs be prohibited. Regard was also paid to the need for a program user to make certain copies or adaptations of the program user to make certain copies or adaptations of the program in the course of lawful use and to make copies necessary for the purpose of back-up and safeguarding. Furthermore, the Committee proposed that the authorization by the right holder should be required for rental or lending to the public of copies of computer programs in a machine-readable form. It also proposed that computer programs should enjoy copyright protection in cases where they are created within the framework of the activities of public authorities. Without a rule to this effect, works created by public authorities as a principle fall outside the scope of Swedish copyright protection.

Concerning finally the *protection of integrated circuits ((c))*, certain amendments were proposed to the Act on Copyright, whereby special protection for designs of integrated circuits was introduced. This special protection was to exist in addition to the copyright protection which might exist. It was a *sui generis*, formality-free, 10-year protection for a circuitry design against copying and against the transfer of it into material support in any form whatsoever and also against making the circuitry

design available to the public without the consent of the right holder.

The report has led to legislation as far as the protection of integrated circuits is concerned, although in a different form than proposed by the Committee. The other issues, among others the protection of computer programs, are still under consideration by the government.

On December 10, 1986, the Swedish Parliament adopted new legislation on the protection of integrated circuits, the Act on the Protection of the Layout-design of the Circuitry in Semiconductor Products. This Act entered into force on April 1, 1987.³

The new legislation is contained in a separate Act, and not as a section under the Act on Copyright as proposed in the Committee's report. The reasons for this different approach are found in the bill submitted to Parliament, prop. 1986/87:49 and could be summarized as follows.

It was found that integrated circuits under certain circumstances could be protected works under copyright law. However, it was unclear how far such protection would apply. This unsatisfactory situation could be clarified by the introduction of a specific form of protection for integrated circuits. The protection could then also be adapted to the particular circumstances applying to these products. At the same time it should be made clear that copyright protection would not apply any more for the circuitry design. The new legislation should consequently be given in a law separate from the Act on Copyright.

The subject matter for protection is the layout-design of the circuitry in a semiconductor product. This concept is intended to correspond basically to the concept "mask works" in the United States Semiconductor Chip Protection Act of 1984. The protection applies to the layout-design, i.e. the form, and not to ideas, concepts, algorithms, etc.

A certain degree of originality or creative effort is required for protection. This is indicated by the use of the word "created" in the Act. Such creation should be either the production of an entirely new and original design or a kind of compilation of elements from "libraries" of preexisting standardized design parts. No novelty criterion applies. Consequently, it could theoretically happen that identical or similar circuitry designs are created. This possibility is, however, considered as merely hypothetical because of the complexity of such designs.

The creator of the layout-design has the exclusive right to:

³ See Swedish Statute Book, SFS 1986:1425; also *Industrial Property*, October 1987, insert *Laws and Treaties*, text 1-003.

- (1) produce copies of the design;
- (2) transfer the design onto or into a material support; and
- (3) make the design available to the public by offering it for sale, leasing or lending or any other kind of distribution to the public of copies of the design or of products containing it.

The protection is automatic and does not require any registration or "mask work notice." The absence of formalities is not considered to weaken the protection in any way.

The period of protection is 10 years. The exclusive right of the creator subsists to the end of the 10th year after the year when the design was first commercially exploited. There are certain limitations to the exclusive rights of the creator. Copies may be made for the purpose of teaching on or analysis of the protected design. This corresponds to the provisions governing "reverse engineering" in the U.S. Act. In the Parliament Bill, it is stated that if a new layout-design is created by means of reverse engineering, the new layout-design may be used irrespective of the right of the design used for the reverse engineering, provided of course that the new design differs substantially from the one used for the analysis.

Another limitation to the exclusive right is that single copies may be made for private use. For practical, or rather technical purposes, this limitation might not presently be especially interesting, but at least it helps to avoid difficulties in distinguishing between a permitted making of copies for analysis and a prohibited making of copies for private use.

Copies produced under these limitations may not be used for other purposes.

Furthermore, there is a limitation to the distribution rights. Copies of a layout-design or of products containing such designs and which have been distributed to the public with the consent of the right holder may be further distributed to the public. The products referred to could be watches, minicalculators or larger products, for instance household appliances, containing a chip with the design. The limitation is a kind of "first sale" exhaustion of the distribution right. There is no requirement that the first distribution take place in Sweden.

The provisions on the transfer of rights have been patterned mainly on the provisions in the Act on Copyright. The same applies to the provisions on punishment and damages, as well as those on surrender and forfeiture of infringing copies. Briefly, this means that intentional or grossly negligent infringements may be punished by fines or imprisonment of up to two years. The same sanction applies in case of intentional or grossly negli-

gent import into Sweden for the purpose of distribution to the public, of copies of a design produced abroad under such circumstances that a similar production within Sweden would have been punishable. Attempts and planning of acts mentioned here are also subject to punishment. The public prosecutor may institute a criminal action for infringement if it is called for in the public interest. Compensation for damages shall be paid and this also in case of negligence. A court may order the destruction of infringing copies.

The Act applies to layout-designs created by Swedish nationals or by persons having their habitual residence in Sweden as well as to such designs first distributed in Sweden. On condition of reciprocity, the government may provide for the application of the Act also in relation to other countries.

Finally, the Act applies also to designs that have been created before the entry into force. By an amendment to the Act on Copyright,⁴ it is made clear that layout-designs in semiconductor products are not subject to copyright. That amendment entered into force at the same time as the Act on the Protection of the Layout-design of the Circuitry in Semiconductor Products, that is, April 1, 1987. The amendment, however, does not apply to designs created before the entry into force. This means that whatever protection a design might have had under the Act on Copyright remains, while designs created after April 1, 1987 are protected solely under the new Act.

3. Case Law

Court cases on copyright law are not all that numerous and those brought from the District Courts by way of the Courts of Appeal to the Supreme Court even fewer. However, since the 1983 "Letter" there are a few Supreme Court cases which might be of a more general interest and therefore should be mentioned in this context.

One such case was decided by the Supreme Court in 1984⁵ and dealt with the question on how to decide upon damages for willful infringement of copyright to musical works and accompanying texts, by offering for sale and selling unauthorized records, mostly so-called bootleg records.

The case was brought to court by the public prosecutor, i.e. as a criminal case under the provisions

⁴ Act Amending the Act of 1960 (No. 729) on Copyright in Literary and Artistic Works (No. 1426, of December 18, 1986), see *Copyright*, October 1987, insert *Laws and Treaties*, text 1-01.

⁵ *Nytt Juridiskt Arkiv* [Supreme Court Report], NJA 1984 p. 34.

in the Act on Copyright in Literary and Artistic Works. The defendants were charged with importing around 4,000 bootleg records into Sweden, offering them for sale here and, in fact, selling 1,865 of them for around 67,000 Skr (Swedish krone). The Nordic Copyright Bureau (NCB), as representative of the right owners, claimed damages: 9,600 Skr for non-payment of remunerations due to the right holders and 25,000 Skr in general damages. The defendants pleaded guilty to the criminal charge and agreed to pay the claimed remunerations but not the general damages. They argued that damage had not been proven and refused—in any case—to admit any sum as reasonable.

All three court instances found that NCB was entitled to general damages, the District Court setting the amount to 15,000 Skr, the Court of Appeal to 1,000 Skr and the Supreme Court to 15,000 Skr, the amount claimed there.

According to the Act on Copyright a person who exploits a work in violation of the Act shall pay such compensation to the right holder as will constitute reasonable remunerations for the exploitation. In case of willful or negligent infringement, the infringer shall also pay damages for losses other than lost remunerations, for mental suffering and for other injury, so-called general damages.

The Supreme Court stated, *inter alia*, that it must generally be considered that the sale of unauthorized records to the public causes disturbances in the marketing of authorized records and that such disturbances have negative effects on the sale of authorized records. Furthermore, the sale of illegal records was likely to subject the recorded works to "wear," which would negatively affect the sale of legally produced records with equivalent recordings, and which might also negatively affect the sale of other works by the authors concerned. With regard to bootlegged records in particular, the Court found it obvious that they often are of a lower quality than legal recordings and in some cases of sub-standard quality. Also, this circumstance was considered likely to have negative effects on the regular marketing of the works of the authors. Furthermore, the Court found that it must be presumed that bootlegged recordings have negative effects also with regard to the artists performing the recorded works, and that this leads to damaging effects for the authors as well.

The Court found that it must be presumed that offering for sale and selling illegally produced records—at least when it is not of an insignificant extent—as a rule leads to economic damage, over and above lost remunerations, for the authors whose works had been recorded. As the case concerned a relatively large number of records, the infringement must be considered to have caused economic damage to the authors in question. The

Court also found that compensation should be paid for nonpecuniary damage, caused by the unauthorized use of the works and the bad quality of the records. As there was no investigation regarding the size of the damage, nor could that he reasonably demanded, the damage would have to be estimated at a reasonable amount. What NCB claimed in the Supreme Court, 15,000 Skr, could not be considered to exceed such an estimated amount.

Another 1984 Supreme Court case⁶ dealt with the question of ephemeral recordings and copying for private use through an intermediary. The case was brought to court as a civil law case. The Swedish Broadcasting Corporation had, on request from a private person, made copies of recordings of musical works and sent them to the client. The recordings used were in the possession of the Corporation. One of them was an ephemeral recording. The question was raised whether the provisions on ephemeral recordings in the Act on Copyright prevented the copying of such recordings and if the copying could be regarded as reproduction for private use according to the same Act.

The Supreme Court found it irreconcilable with the aim of the provisions of the Act and with what had been expressed in the preparatory works to the legislation, that an ephemeral recording could be used for making copies to the public. Thus the Corporation had no right to produce the copy and send it to the person who had requested it.

The other question dealt with copying for private use through an intermediary. According to the Act on Copyright, § 11, a disseminated work may be reproduced in single copies for private use; such copies may not be used for other purposes. The Court stated that it is, furthermore, quite clear from the preparatory works to the legislation that it is permitted to have copies made through the intermediary of someone else. In such a case, the requesting party is considered as the reproducer and therefore carries the responsibility that the reproduction is lawful.

However, it was not all that clear who should provide the basic material for the reproduction. It should be acceptable, at least to a certain extent, that the intermediary provides the basic material, for instance, between family members and friends. Nevertheless, when the intermediary is someone who professionally assists the public with copying or similar reproduction, whether the aim of the activity is to make a profit or not, the provision must be presumed to imply that the basic material shall be furnished by the requesting party. A different approach would not be consistent with the fact that the requesting party is considered as the repro-

⁶ *Ibid.*, 1984, p. 304.

ducer and thus carries the responsibility that the reproduction is lawful. Furthermore, it would mean that copying for private use would be accepted to a degree that cannot reasonably be considered as consistent with the aim of the provision.

As the recording of which the copy was made was furnished by the Corporation, and as the copy was made in an organized and professional activity in which the Corporation assisted the public to make copies of such recordings, the provision on copying for private use did not apply. The Supreme Court thus found that the copyright of NCB had been infringed and that the Corporation should pay damages to NCB.

Perhaps it should be added that the case was decided by a vote of 3–2, one dissent concerning the motivation, the other concerning the conclusion.

In 1985 the Supreme Court decided the so-called manifesto case.⁷ The background was that a theater director had written a draft agreement, called a manifesto, common to all the employees at the theater, on the artistic aims of the theater. The manifesto was on several occasions read to the employees but was not distributed outside the theater. It was later published in full in a daily newspaper without authorization from the author. The case was brought to court by the public prosecutor, claiming willful or at least grossly negligent infringement.

The Supreme Court found that the manifesto should be considered as a literary work, that the theater director had copyright to it, that the required authorization for publication had not been obtained, that certain possible limitations to copyright did not apply and that it therefore seemed that all the objective prerequisites for criminal infringement to copyright were fulfilled. However, the question merited further discussion, i.e. the particular conflict of interests in the case: copyright versus freedom of expression. On the one hand, the copyright protection interest was not particularly strong—the manifesto was not written to satisfy the economic interests of the author and its content was known in a rather wide circle, although not published. On the other hand, there was a substantial public interest that the manifesto was published as an element of the news service and as a basis for the ongoing cultural debate on the theater, its aim and organization. In the Swedish Instrument of Government, one of the constitutional documents, it is stressed that particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political and cultural matters. Reasons could thus be found

to let copyright yield to the interest of freedom of expression. The Court then asked whether exceptions to the formally applicable provisions of the Act on Copyright could be established by court practice. It seemed difficult to state how far an exception to copyright, motivated by the freedom of expression interest, should carry and how the criteria for a non-punishable publication right should be formed. The Court stressed that it should be kept in mind that also the rights of authors to their works have the rank of constitutionally protected rights.

The Court concluded that for typical cases of such interest conflicts, the task of restricting the criminal liability for copyright infringement for the benefit of a conflicting freedom of expression interest should be reserved for the legislator. There could, however, be situations where the freedom of expression interest were so strong that the courts reasonably must take the responsibility for an acquittal, namely cases touching upon certain emergency situations which would lead to impunity according to the Criminal Code. The case in question was not considered as being of that latter kind. The Court found that the interest of giving the public correct information and continuing the debate on the theater could have been accomplished by an account of the ideas and facts of the manifesto that did not infringe upon the rights of the author. Furthermore, one should not neglect the legitimate wish of the author not to distribute a work that was at the drafting stage and that maybe did not do full justice to his ideas on the subject. Those responsible for the publication of the manifesto were thus found to be criminally liable for at least grossly negligent infringement. The Supreme Court was unanimous in its decision.

That was not the case in a 1986 Supreme Court decision which dealt with the question whether the playing of so-called demonstration music constituted copyright infringement.⁸ Smaller parts of musical works had been played in a radio shop for the purpose of demonstrating the quality of the appliances on sale—radios, televisions, tape recorders. The Court stated, after a reminder as to the constitutional rank of copyright, that there was very little room for the courts to interpret into the copyright law other limitations to the rights of authors than were mentioned in the Act on Copyright. It also found that there was no way of getting away from the fact that demonstration music includes use of a musical work, although with another purpose than the traditional one. The Court discussed whether the use of a work as demonstration music was so brief that it would be unreasonable to regard

⁷ *Ibid.*, 1985, p. 893.

⁸ Supreme Court Decision, DT 38.

it as a performance of a work. As it was clear from the preparatory works to the legislation that also the use of very small portions of a work could imply infringement and as it would be almost impossible to apply the legislation in practice, with a distinction between briefly played demonstration music and such music played a bit longer and therefore also serving the purpose of entertainment, the Court found that the defendant had had musical works performed. As it was done in a shop to which the public had access, it had been a public performance according to the Act on Copyright. The defendant was found guilty of negligent infringement of copyright and was to pay damages for lost compensation—125 Skr. The decision was split, 3–2. The dissenters did not find that demonstration music amounted to a performance of a work.

Leaving the field of Supreme Court case law, it seems appropriate to provide some additional information on another kind of court cases, the impact of which is probably just as important although not having been decided upon by the highest court. A few words on piracy, then.

As far as piracy in Sweden is concerned, there is hardly any piracy regarding phonograms while there is some activity in the field of film and video. According to reports from IFPI—Video of Sweden, the 1982 legislation with its stricter measures against piracy has contributed towards a generally speaking satisfactory situation in the legal field. In 1984–1985 the Swedish courts banded down 26 decisions concerning film and video pirates, of which four were sentenced to prison and 21 to other punishments, mostly fines, while one was acquitted. In 1985–1986 there were 31 decisions concerning film and video pirates, of which three were sentenced to prison and 27 to other punishments, mostly fines, while one was acquitted. In most cases damages were claimed and decided upon. In 1985 a total of approximately 2.8 million Skr was awarded, in 1986 a total of approximately 2.0 million Skr. It is still too early, of course, to say how much of this will in fact be collected.

4. Other Developments

As far as other developments in the field of copyright are concerned, it might be mentioned that Sweden continues its development cooperation activities. The background for these activities was given in the 1983 "Letter" and will therefore not be repeated here. These activities have been carried out in the form of training courses in copyright and neighboring rights for participants from developing countries. They have been sponsored by the Government of Sweden through its Ministry of Justice and WIPO. The Swedish International Develop-

ment Authority (SIDA) has to a large extent contributed towards the funding of these training courses. So far five such courses have been held, in close cooperation with among others the Swedish Performing Rights Society (STIM), the Swedish Artists' and Musicians' Interest Organization (SAMI) and the Swedish Group of the International Federation of Phonogram and Videogram Producers (IFPI). The latest one was held in Stockholm in August–September 1987 for two full weeks, dealing with the theoretical aspects of copyright law to some extent but mainly with the practical administration of copyright and neighboring rights in the musical field. Lectures were given by WIPO and Ministry of Justice officials, as well as by representatives of STIM, SAMI and IFPI. Visits were paid to these organizations and to the Swedish Broadcasting Corporation. During the visits to STIM and SAMI demonstrations were given as to the practical aspects of the administration of the rights and the collection and distribution of remuneration due to the right holders. The Government of Sweden paid the travel and subsistence costs for 10 participants from developing countries.

As before, the course was organized by WIPO in cooperation with the Government of Sweden. Many other similar courses are of course held in different parts of the world, whereby the Swedish contribution is put in its proper perspective as just one of an overall effort towards establishing the infrastructures necessary for the implementation of copyright and neighboring rights. It seems that as more and more developing countries are introducing new or amended legislation in this area, the need for know-how is accelerating with regard to the practical aspects of the administration of the rights afforded by legislation.

Another item that could be mentioned here is the fact that on April 15, 1986, Sweden concluded a bilateral Agreement with the Soviet Union on the Reciprocal Protection of Copyright.⁹

According to the Agreement each State shall, *inter alia*, extend its application of the Universal Copyright Convention (UCC) to works and photographic pictures by nationals of the other State, irrespective of the date of their creation or publication. All payments arising out of the application of the UCC or the Agreement shall be effected in freely convertible currency, and will be transferred to the country of origin of the author or other right owner, unless be indicates otherwise.

No amendments to Swedish copyright law were necessary as a result of the Agreement.

⁹ See *Copyright*, 1986, pp. 413 and 414.

5. Conclusions

Technological progress in recent years has brought with it, among other things, better equipment to reproduce protected material—photocopiers and tape recorders—to mention just those machines most frequently used by the public. Protected works can be easily copied, with a very good quality and to an extent not envisaged when the Swedish Act on Copyright in Literary and Artistic Works was introduced in 1960. New technology in the media field is increasing its impact upon the situation of authors and other right holders. This technological development has, together with the economic, cultural and social development, generally speaking made it increasingly difficult to find a suitable balance between the interests of authors and other right holders on one side and different conflicting interests on the other side.

It is against this background that the revision of

Swedish copyright law should be seen. This work continues at a steady pace. In the field of neighboring rights, the protection for the different categories of right holders has been extended, in time and in scope. New rules have been introduced with particular regard to cable television and to the layout-design of the circuitry in semiconductor products, the first category staying within the copyright system, the second one being taken out of it.

Waiting for a solution in the future are questions regarding the permissible extent of copying for private use, as well as the compensation for it, the borderline to copying for similar or other purposes in different institutions and how to solve the authorization questions, protection of computer programs, revision of the rights of photographers and the conflict between the constitutionally protected freedom of expression and copyright. Indeed a rather impressive task, but also very exciting, putting copyright in the mainstream of everyday modern life.

Books and Articles

Book Review

Banques de données et droit d'auteur. Le droit des affaires—Propriété intellectuelle. Publications de l'Institut de recherche en propriété intellectuelle Henri Desbois (IRPI). One volume of 180 pages. Librairies techniques, Tardy Quercy S.A., Cahors, 1987.

"Data banks and copyright" is the title chosen for this publication devoted to the contributions, the discussions and the final report presented at the Seminar held in Paris on November 27, 1986, by the Henri Desbois Intellectual Property Research Institute (IRPI).

This book, supplemented by a number of annexes, sets out the contributions of seven eminent specialists: "What is at Stake?—Some Aspects" by Mr. Jean Martin; "The Extent of

Copyright Protection: the Data Protected—the Processing of the Data" by Mr. Michel Vivant; "Administration and Exercise of Authors' Rights in Data Banks: Data Exploitation Modes" by Mr. Franck Cavanagh; "Copyright Protection or *sui generis* Protection" by Mr. André Kerever; "The Main Principles of Copyright in the EC Member States in Respect of Data Banks" by Mr. Franck Gotzen; "Data Banks and Copyright in the United States" by Mrs. Jane C. Ginsburg; "Community Law" by Mr. Bernhard Posner; and the final report by Mr. Pierre Catala.

The compilation of the papers and contributions contained in this work provides a valuable insight into the various aspects of the protection of data banks.

P.C.M.

Calendar of Meetings

WIPO Meetings

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

1987

- 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 2 to 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

1988

- June 7 to 9 (Edinburgh) — Technical Working Party on Automation and Computer Programs
- June 14 to 17 (Wageningen) — Technical Working Party for Vegetables
- June 20 to 24 (Melle) — Technical Working Party for Ornamental Plants and Forest Trees
- June 28 to July 1 (Hanover) — Technical Working Party for Fruit Crops, and Subgroups
- July 5 to 8 (Surgères) — Technical Working Party for Agricultural Crops

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

Non-Governmental Organizations

1988

- January 25 and 26 (Cannes) — International Association of Entertainment Lawyers: MIDEM International Lawyers Meeting
- March 21 to 25 (Locarno) — International Copyright Society (INTERGU): Congress
- May 9 to 11 (Tel Aviv) — International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislative Committee
- June 12 to 17 (Lodon) — International Publishers Association (IPA): Congress
- October 6 and 7 (Munich) — International Literary and Artistic Association (ALAI): Study Days
- November 14 to 20 (Buenos Aires) — International Confederation of Societies of Authors and Composers (CISAC): Congress

1989

- September 26 to 30 (Quebec) — International Literary and Artistic Association (ALAI): Congress

