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Copyright

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Notifications Concerning Treaties

WIPO Convention

Accessions

SWAZILAND

The Government of Swaziland deposited, on May 18, 1988, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO), signed at Stockholm on July 14, 1967.

Swaziland will belong to Class C for the purpose

of establishing its contribution towards the budget of the WIPO Conference.

The said Convention, as amended on October 2, 1979, will enter into force, with respect to Swaziland, on August 18, 1988.

WIPO Notification No. 142, of May 18, 1988.

TRINIDAD AND TOBAGO

The Government of Trinidad and Tobago deposited, on May 16, 1988, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO), signed at Stockholm on July 14, 1967.

The said Convention, as amended on October 2, 1979, will enter into force, with respect to Trinidad and Tobago, on August 16, 1988.

WIPO Notification No. 143, of May 16, 1988.

Madrid Convention

Accession

PERU

The Government of Peru deposited with the Secretary-General of the United Nations, on April 15, 1988, its instrument of accession to the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties (Madrid Convention), adopted at Madrid on December 13, 1979.

The Convention will enter into force three

months after the deposit of the tenth instrument of ratification, acceptance or accession. Such instruments have so far been deposited by four other States (Czechoslovakia, Egypt, India and Iraq).*

* See *Copyright*, 1981, p. 316; 1982, p. 102; 1983, p. 136; 1981, p. 268.

WIPO Meetings

Photographic Works

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

(Paris, April 18 to 22, 1988)

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

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

The memorandum of the Secretariats was published on December 14, 1987, under the title "Questions Concerning the Protection of Photographic Works"; it has the document number UNESCO/WIPO/CGE/PHW/3.

The report of the Committee of Experts was adopted by the Committee of Experts on April 22, 1988; it has the document number UNESCO/WIPO/CGE/PHW/4.

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

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Introduction

1. The Committee of Governmental Experts for which the present document has been prepared is being convened by virtue of decisions made by the Governing Bodies of Unesco and WIPO responsible for establishing the programs of the two Organizations (see in particular, as far as Unesco is concerned, Approved Programme and Budget for 1988-1989 (24C/5 Approved), paragraph 15115, and as far as WIPO is concerned, document AB/XVIII/2, Annex A, items PRG.03(4) and document AB/XVIII/14, paragraph 173).

2. Whereas the discussions in the 1984-85 biennium concentrated on *new uses* (mainly, cable television, private copying, rental and lending, direct broadcast satellites) affecting the owners or other beneficiaries of copyright and the so-called neighboring rights, the specific questions discussed in the 1986-87 biennium were grouped according to eight *categories of works*. In connection with each category, all the various new uses of works of that category, and the interests of all the various owners and beneficiaries of copyright and so-called neighboring rights in such works were considered.

3. The following categories were discussed within the framework of a series of meetings of committees of governmental experts in 1986 and 1987: the printed word, audiovisual works, phonograms, works of visual art, works of architecture, works of applied art, dramatic and choreographic works, musical works. One category of works, namely photographic works, was not covered by those meetings. The Committee of Governmental Experts, for which the present document has been prepared, is invited to deal with that latter category.

4. The purpose of this memorandum is to summarize and discuss various copyright issues in relation to photographic works for the purpose of arriving at certain "principles" which, together with the comments, could serve as a guidance for governments when they have to deal with those issues. It should be stressed that the principles—neither as proposed nor as they might emerge as the result of the deliberations of the Committee of Governmental Experts—have or will have any binding force on anyone. They are merely intended to indicate directions which seem to be reasonable in the search of solutions which, by safeguarding the rights of the authors and other

holders of rights, give them a fair treatment and promote creative activity. At the same time, the proposed solutions should be of a nature that facilitates, from both the creators' and the users' viewpoint, the use of protected works.

Report 1. In pursuance of the decisions adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-fourth session and by the Governing Bodies of the World Intellectual Property Organization (WIPO) at their sixteenth series of meetings in September-October 1987, the Directors General of Unesco and WIPO jointly convened a Committee of Governmental Experts on Photographic Works at Unesco headquarters from April 18 to 22, 1988.

Report 2. The purpose of the meeting was to discuss the various copyright issues arising in relation to photographic works with a view to suggesting certain "principles" which, together with comments, could offer guidance to governments when they had to deal with those issues.

Report 3. It was stressed that the principles have no binding force and their purpose was merely to indicate directions that seemed reasonable in the search for solutions which, by safeguarding the rights of authors and other owners of rights in photographic works, gave them fair treatment and promoted creative activity.

Report 4. Experts from the following 45 States attended the meeting: Algeria, Argentina, Barbados, Burundi, Byelorussian SSR, Cameroon, Chad, Chile, China, Congo, Côte d'Ivoire, Cuba, Denmark, Ecuador, Egypt, Finland, France, Gabon, Germany (Federal Republic of), Greece, Guinea, Holy See, Hungary, India, Italy, Japan, Jordan, Kuwait, Lebanon, Malta, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Panama, Soviet Union, Spain, Sweden, Thailand, Tunisia, United Republic of Tanzania, United States of America, Uruguay, Yemen.

Report 5. Five States attended the meeting as observers: Brazil, Costa Rica, German Democratic Republic, Philippines, Turkey.

Report 6. The Palestine Liberation Organization (PLO) also attended the meeting as an observer.

Report 7. Observers from four intergovernmental organizations: Agency for Cultural and Technical Co-operation (ACCT), Arab League Educational, Cultural and Scientific Organization (ALECSO), Commission of the European Communities (CEC), Council of Europe (CE) and from 14 international non-governmental organizations: International Association of Art (IAA), International Commission of Jurists (ICJ), International Confederation of Free Trade Unions (ICFTU), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Council on Archives (ICA), International Federation of Journalists (IFJ), International Federation of Newspaper Publishers (FIEJ), International Federation of Photographic Art (FIAP), International Literary and Artistic Association (ALAI), International Organization of Journalists (IOJ), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, participated in the meeting.

Report 8. The list of participants follows this report.

Report 9. Ms Marie-Claude Dock, Principal Director, Sector of Culture and Communication of Unesco, opened the meeting and welcomed the participants on behalf of Unesco. Mr. Mihály Ficsor, Director, Copyright Law Division of WIPO, greeted the participants on behalf of WIPO.

Report 10. Ms Margret Möller (Federal Republic of Germany) was unanimously elected Chairman of the meeting.

Report 11. The Committee adopted the Rules of Procedure contained in document UNESCO/WIPO/CGE/PIIW/2 Prov. It was decided that the Committee should elect two Vice-Chairmen and that the tasks of the Rapporteur should be fulfilled by the Secretariats. It was also agreed that, in accordance with the usual practice in meetings such as the present one, the report would be available only in English and French.

Report 12. Mr. Salah Abada (Algeria) and Mr. György Pálos (Hungary) were unanimously elected Vice-Chairmen of the meeting.

Report 13. The provisional agenda of the meeting of the Committee, as appearing in document UNESCO/WIPO/CGE/PHW/1 Prov., was adopted.

Report 14. Discussions were based on the memorandum on Questions Concerning the Protection of Photographic Works prepared by the Secretariats (document UNESCO/WIPO/CGE/PHW/3).

Report 15. All the delegates who took the floor appreciated the quality of the memorandum which, they felt, provided an excellent basis for the discussions concerning various copyright problems in relation to photographic works. Several delegations underlined the importance of granting an efficient protection for this category of works and welcomed the initiative of Unesco and WIPO to deal with the copyright questions related to this category of works practically, for the first time.

Report 16. Several delegations gave information about their national laws in respect of photographic works. Some other delegations referred to legislation under preparation and discussion in their countries and said that that was a further reason why they followed with great interest the discussions by the Committee.

Report 17. A number of participants stated that the question of originality, as a condition of the copyright protection of photographic works, was particularly important.

Report 18. Some participants found that the definition of photographic works offered by the document was too wide. They opposed the solution that a quasi presumption was suggested concerning the originality of all photographs in relation to which human beings could have any influence whatsoever.

Report 19. Some other participants were of the opinion that the approach followed by the memorandum was correct and it was necessary to avoid subjective value judgments as a basis for deciding about copyright eligibility of such works.

Report 20. Several participants made comments concerning the question of ownership of copyright in photographic works.

Report 21. One delegation said that the best solution would be to have a general principle along the lines of Principle PHW5 stating that it was always the author (that is, the creator of the photographic work) who should be recognized as the original owner of copyright. Some participants supported that statement.

Report 22. Certain other participants were of the view that the special situations existing in the case of works created by employed authors and of commissioned works should be also taken into account, which might justify differing principles.

Report 23. Some delegations suggested that the Committee should not try to suggest separate principles on the question of ownership of copyright in photographic works created under employment contracts or in commissioned photographic works, because the questions involved did not only concern that category of works but also other categories of works. It was suggested that the question of the protection of commissioned works should be studied separately in the framework of future programs of Unesco and WIPO covering all categories of works.

Report 24. Some participants referred to new techniques used for creation and adaptation of photographic works, such as the electronic manipulation of photographs, and suggested that such techniques should also be considered when dealing with the copyright question of photographic works.

The Development of the Provisions of the International Copyright Conventions Concerning the Protection of Photographic Works

5. National copyright laws do differ in many important aspects regarding the level and the conditions of the protection of photographic works. The development of the provisions of the Berne Convention and, later, of the Universal Copyright Convention, about the protection of such works, may offer some explanations to the present great variety of national solutions.

Berne Convention

6. It was as early as at the 1884 and 1885 diplomatic conferences which led to the adoption of the Berne Convention that the idea emerged that photographs should be included in the non-exhaustive list of literary and artistic works to be protected by the international copyright convention whose draft was then under discussion. No agreement was reached, however, about that proposal. At the 1886 Berne Diplomatic Conference, a compromise was adopted and the following statements were included in the Final Protocol of the original text of the Berne Convention:

"1.[1] As regards Article 4, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs engage to admit them to the benefits of the Convention concluded today, from the date of its coming into force. They shall, however, not be bound to protect the authors of such works further than is permitted by their own leg-

islation except in the case of international arrangements already existing, or which may hereafter be entered into by them.

[2] It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as provided for by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private agreements between owners of rights."

7. Paragraph [2] of point 1 of the Final Protocol quoted above seems to have been needless. The Report of the 1908 Berlin Diplomatic Conference, which later deleted this paragraph, correctly pointed out: "It should be noted at the outset that this last paragraph is totally unnecessary. A copyright work of art, such as a painting or a statue, cannot be reproduced by means of photography, any more so than by any other means, without the author's permission. If a sculptor has given a photographer the exclusive right to reproduce his statue, the photographer may take legal action against unauthorized photographs; he exercises a *derived right*, irrespective of the right he may have in his own name. This provision—maintained in 1896—was rightly considered to be superfluous."

8. The 1896 Paris Diplomatic Conference widened the basis of protection to photographic works and, at the same time, made it more uniform. National treatment was granted to photographs (except for the term of protection where reciprocity was applicable) irrespective of whether they were placed on the same footing as artistic works in the country concerned, or were rather protected by a special law. In addition, works produced by a process analogous to photography were separately mentioned as productions protected by copyright. The new text of paragraph [3] of point 1 of the Final Protocol reads as follows:

"Photographic works and works produced by an analogous process shall be admitted to the benefits of these provisions insofar as the laws of each State permit, and to the extent of the protection accorded by such laws to similar national works."

9. The Report of the Conference stressed that while granting national treatment, no country had to sacrifice its principles, and added that the most important thing was that some form of protection be granted; the exact nature of the protection was unimportant. Under the provision quoted above, those countries party to the Berne Convention whose legislation did not grant any protection to photographs, were not obliged to protect the photographs of other Union countries, but at the same time benefited from the protection which might have been granted in those other countries. It was, however, expected that all countries of the Berne Union would gradually protect photographic works. A *voeu* was adopted by the Conference stating that it was desirable that, in all countries of the Union, the law should protect photographic works and works produced by an analogous process and that the term of protection should be at least 15 years.

10. Furthermore, it was understood that the general principle of Article 2 applied to photographic works, namely that no compliance with the formalities necessary in the country where protection was sought was required; it was sufficient that the formalities in the countries of origin had been complied with. (An explicit provision to this effect was included in the Declaration of Interpretation, an authentic interpretation of the Convention adopted by the Conference.)

11. At the 1908 Berlin Diplomatic Conference, it was agreed that all countries of the Union should protect photographs, and the basic provision about the protection of such works (which until that time had only been part of the Final Protocol) was included in the text of the Convention. Article 3 reads as follows:

"This Convention shall apply to photographic works and to works produced by process analogous to photography. The contracting countries shall be bound to make provision for their protection."

12. It followed from the fact that photographs were covered by a separate provision of the Convention, and were not included in the non-exhaustive list of Article 2, that they were not deemed "literary and artistic works" proper under the Convention. Consequently, the provisions of the Convention referring to "literary and artistic works" did not apply to photographs. In those matters, the law of each country was relevant. The nature and duration of such protection could be determined freely by national laws.

13. Several delegations desired to provide in the Convention that photographic works should be protected for at least 15 years from the date of publication. No agreement was, however, obtained on that matter in view of existing wide divergencies. Article 7(3) provided that the term for such works should be governed by the law of the country where protection was claimed, but did not have to exceed the term fixed in the country of origin.

14. The 1928 Rome Diplomatic Conference did not change the text of the Berne Convention in respect of photographic works. It is interesting to note, however, that during the discussions at the Conference, attention was drawn to the fact that "merit and purposes" tended to become elements to which legislators and courts attached importance, thereby introducing criteria which were originally banned from use in determining eligibility of productions for protection under the Berne Convention. One delegation proposed to permit the criminal prosecution of any infringement only where the name of the author and the date of publication had been indicated on the photograph; however, the majority of delegations opposed such a measure, even in optional form. The question of the term of protection was discussed again, but no decision was taken.

15. At the 1948 Brussels Diplomatic Conference—as Marcel Plaisant, Rapporteur-General, put it in the General Report—photographs "reached the supreme rank of general protection." By this statement, he referred to the fact that "photographic works and works produced by a

process analogous to photography" were inserted in the non-exhaustive list of "literary and artistic works" in Article 2(1) of the Berne Convention, and Article 3 was deleted. The discussions in the Sub-committee on Photography and Cinematography, however, reflected that there was no general agreement on what kinds of photographs were covered by that "supreme rank of general protection." The Sub-committee discussed whether it should be specified in the text that only photographic works having the character of personal creations were protected. There was doubt as to the appropriateness of such a step. It was not the idea thus expressed which was opposed by the majority of delegations, but it seemed to them that a criterion, which applied to all productions protected by the Convention, should not be mentioned separately in connection with a particular category of works such as photographic works. The question arose, at that point of the discussions, whether it was thus not advisable to define the notion of literary or artistic works in more explicit terms, by means of a general provision. Such a more detailed definition, however, would have jeopardized the balance between the two major copyright systems, namely the "continental" and the "common law" systems which differed, *inter alia*, just in respect of the question of originality and "character of personal creation" as conditions of copyright eligibility. For example, the Delegation of the United Kingdom which expressed its opposition to the proposed detailed definition and observed that such a provision could lead to discrimination between works according to merit, which would be contrary to the spirit of the Convention.

16. The 1967 Stockholm Diplomatic Conference changed the wording of the relevant part of Article 2(1) of the Berne Convention. It replaced the expression "photographic works and works produced by a process analogous to photography" by the expression "photographic works to which are assimilated works expressed by a process analogous to photography." The modification of the wording widened the definition of such works. It is perhaps even more important that, by this modification, it was emphasized that the manner in which the work was expressed was the decisive factor in the definition rather than the nature of the technical process.

17. After so many discussions at various diplomatic conferences, at Stockholm an agreement was reached at last about the term of protection of photographic works. Article 7(4) provided as follows: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works ...; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."

18. The 1971 Paris Diplomatic Conference did not introduce further changes in the provisions of the Berne Convention on photographic works.

Universal Copyright Convention

19. Article 1 of the Universal Copyright Convention does not mention photographs in the non-exclusive list of

literary, scientific and artistic works in respect of which the Contracting States undertake "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors." Reference to photographic works is contained in Article IV of the Convention. It should be mentioned first of all that paragraph 2 of that Article provides that the term of protection cannot be less than 25 years after the death of the author; as an exception to this general rule, the term of protection may be limited, in certain cases, to 25 years from the date of the first publication or registration of the work. However, with regard to photographic works, paragraph 3 of Article IV stipulates as follows: "The provisions of paragraph 2 shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works." In other words, the State becoming a party to the Convention is not obliged to protect such works of its own nationals. If the protection is granted, then the same protection should be granted to photographic works of foreign authors.

20. As for the term of protection "in those Contracting States which protect photographic works" (these words make it particularly clear that no State is obliged to protect such works), the above-quoted paragraph prescribes that it "shall not be less than ten years." This provision does not establish the date from which the minimum term must be computed. The reason for this was mentioned in the Report of the Rapporteur-General: "The date of commencement of this term was not specified in the paragraph, having regard to the fact that some countries protect photographic works from the date of creation and not from the date of publication." Therefore, Contracting States are free to choose the commencement date. It may be the date of publication of photographic works, the making of a photograph, the death of the author, or some other date.

Report 25. No comments were made concerning this part of the memorandum.

The Definition of Photographic Works and General Considerations About Their Protection

Introductory Remarks

21. The international copyright conventions do not contain any explicit definitions of the concept of photographic works. This does not mean, however, that no elements are offered by the conventions for the definition of such works in national copyright laws.

22. The expression used in Article 2(1) of the Berne Convention ("photographic works to which are assimilated works expressed by a process analogous to photography") and the history of the development of the relevant provisions of the Convention, as discussed above, do offer certain indications for a definition of such works

(for example, in regard of the technological aspects and the type of expression involved). Furthermore, it seems to be obvious that as far as photographs are protected as a category of literary and artistic works, all the general considerations about the protection of such works necessarily apply.

23. In the following part of this memorandum, three major aspects of the definition of photographic works are discussed. First, the notions of photography and of processes analogous to photography, second, the problems of the general conditions of copyright eligibility in respect of photographic works and, third, the question of fixation and—in connection with that question—the delimitation between photographic works on the one hand and audio-visual works on the other.

The Concepts of Photography and of Processes Analogous to Photography

24. The word "photography" is composed of two elements of Greek origin: "photo" means "light" and "graphy" can be translated as "drawing," "engraving" or "writing." "Photographs" mean records of images produced on surfaces sensitive to light. Usually, but not necessarily, the image which is recorded is produced by means of lenses in a camera. When the sensitive material is exposed to the light forming the image, it undergoes changes in structure. In this way, a latent image is formed which becomes visible by development and permanent by fixation. Originally, all this involved chemical processes and, even now, that is still the typical way of producing latent pictures and of developing and fixing them. Recently, however, other processes have also appeared such as producing "electronic photographs."

25. With new developments, the quality of photographs is becoming ever more perfect and the means of expression of photographers ever richer, but all this does not concern, in itself, the notion and definition of photographic works. Such new methods as the use of electronic techniques may, however, raise some questions. One may ask, for example, whether the production of electronic images still qualifies as photography and whether it can be deemed a process analogous to photography or, yet again, whether it is even covered at all by the notion of photographic works.

26. Electronically produced pictures are made, for instance, by the so-called charge-coupled device (CCD) technique. Light is transformed by light-sensitive silicon chips into electronic charges which are amplified and transferred into a magnetic memory built into the camera or connected to it. The content of the memory is transformed into direct signals through a digital converter and the signals are fed into a computer system by means of which pictures can be produced. Such pictures are images recorded by means of action of light. Therefore, they are clearly covered by the notion of photographic works as used in the Berne Convention. The only question which may emerge is whether such pictures are photographic

works proper or rather works assimilated to photographic works (and expressed in a process analogous to photography). The answer depends on whether only those processes could be deemed photography which were known as such at the time of the inclusion of the expression concerned into the text of Article 2(1) of the Berne Convention (Stockholm, 1967) in which case every other method invented after that time could only be considered, at most, as a process *analogous* to photography even if it involved the recording of images of objects of reality produced through surfaces sensitive to light, or, such new picture-producing processes could still be deemed to be covered by the concept of photography (in which case the expression "process analogous to photography" would refer to something else). Both answers may be accepted as reasonable, but the latter answer seems to be more justified.

27. Where do processes analogous to photography start then? Probably, such fields as infrared "photography" and ultraviolet "photography" where invisible light is used, are in the border area between photography proper and processes analogous to photography, whereas radiography and other radiation recording techniques (such as X-ray radiography, gamma radiography, autoradiography)—which, in general, involve the recording of subsurface features of objects—are processes analogous to photography. Here, the source of the recording of images is not light but radiation, the techniques, however, are analogous to the techniques of photography. At the other end of the spectrum, there are then such picture-generating processes about which there could be serious doubts whether they are still analogous to photography or whether they are already beyond that category. The so-called nuclear magnetic resonance technique by means of which pictures are taken through scanning molecules, for example, in a human body that has been placed in a very powerful magnetic field (under the effect of that field, molecules emit radio signals which are recorded as a picture) or the techniques used for electronic microscopes are in that outer border area, although on the basis of an extensive interpretation of the term, they can still be deemed to be processes analogous to photography. In the case of sound-generated pictures ("sonar" pictures), it is even more difficult to speak about works produced by processes analogous to photography, but such an extreme interpretation of the notion of analogy cannot be excluded either; if this interpretation were to be accepted, its basis could be a possible principle that all processes which involve the recording of any pictures by means of capturing any waves by which light, radiation, magnetism, sound, etc., are spread can be deemed processes analogous to photography.

28. In the preceding paragraphs, this memorandum has dealt with the mainly technological aspect of the definition of photographic works. The description of the various new developments and borderline questions seemed necessary to outline an appropriate definition. Modern picture-producing techniques, however, do not raise significant legal problems. In respect of the concept of photographic works, it is rather the question of originality which involves the most serious and most numerous problems, both of theoretical and of practical nature.

The Problems of Copyright Eligibility of Photographic Works

29. Neither the Berne Convention nor the Universal Copyright Convention define the word "work." It is clear, however, from the general etymological meaning of the word and from the context in which it is used that "works" must be the result of intellectual creativity. Article 2(5) of the Berne Convention seems to confirm this interpretation in providing that "[c]ollections ... which ... constitute *intellectual creations*, shall be protected as such ..." [emphasis added]. It is another matter that, although the word "creations" offers some more substantive indications for the definition of "works," it also has to be interpreted and further defined. There is a fairly general agreement as to what "creations" (and, consequently, "works") do not include. First of all, "creations" do not include mere ideas or mere information as such. Copyright protection only exists if an idea has been fixed in a certain form, if a piece of information has been expressed in words, notes, pictures, etc. Furthermore, "creations" do not have to be novel, but they must be original.

30. Works must be original productions or, at least, must contain original elements; about this, there is still agreement. The point from where agreement ceases to exist, in legal theory and in national copyright laws, is the notion of originality. Under certain copyright laws—in general, under the copyright laws of countries with common law legal traditions—all productions in the literary and artistic domains that are the results of, at least, skill and labor, and are not mere copies of preexisting productions, qualify as works. In other countries, only those productions are recognized as original creations—and, consequently, as works—which clearly reflect the personality of their creators and which are the results of independent—and sometimes above-average—intellectual efforts. The international copyright conventions have always recognized the coexistence of such differing approaches, and the problems emerging from the differences in the interpretation of the notion of "works" have been left to national legislation.

31. The problems of differing concepts of originality have always been very strongly felt in respect of photographic works. As described in the preceding chapter of this memorandum, the question of originality of photographic works arose at several diplomatic conferences on the revision of the Berne Convention. The definitions of such works in national laws also differ to a large extent.

32. When the original artistic character of photographs was questioned, it was said that it was a machine and not a human being that produced the picture and that there was not sufficient room for creativity. In the early stages of development of photography and of international copyright protection (both of which took place in nearly the same period), a further source of doubt was that, for a while, it was traditional art (painting, drawing, etc.) whose artistic principles and values were taken into account when considering the eligibility of photographs for copyright protection and it was only later that the independent artistic laws and characteristics of photography were identified.

33. The national laws and/or courts of certain countries did recognize the originality and thus the copyright eligibility of, at least, certain photographs fairly early. The case of *Burrow-Gile's Lithographic Co. v. Sarony* is frequently referred to as one of the earliest examples of such recognition. In that case, the Supreme Court of the United States of America held photographs to constitute "writings" within the meaning of the "copyright clause" of the Constitution of that country as early as in 1884. The Court held that the portrait which was at issue in the case exhibited sufficient originality "by posing ... Oscar Wilde in front of the camera, selecting and arranging the costume, drapries, and other various accessories in the said photograph, arranging the subject so as to present graceful outlines, arranging the light and shade, suggesting and evoking the desired expression"

34. The Supreme Court declined to rule in the case mentioned above on the question of whether, in general, "ordinary photographs" exhibited sufficient originality or not, but the case law development that followed led to a legal situation which is now fairly typical in countries with common law traditions. That was expressed in the most eloquent way in another court decision which is also often quoted. Judge Learned Hand concluded in 1921 that "no photograph, however simple, can be unaffected by the personal influence of the author ..." and, by this, he stated that all independently produced photographs contained more or less originality sufficient to claim copyright protection (*Juveler's Circular Publishing Co. v. Keystone Publishing Co.*, 274 Fed. 932, 934 (S.D.N.Y.), affirmed 281 Fed. 83 (2d Cir. 1922)). Several copyright laws following the common law system contain provisions which make it clear that practically all independently created photographs enjoy copyright protection. For example, under the Copyright Statute of the United Kingdom, photographs are protected "irrespective of artistic quality" and such a provision, or one similar to it, can be found in many other copyright laws based on the common law legal approach. The language of those provisions also expresses the principle that no value judgment should be made as a condition of copyright eligibility.

35. In a number of countries with "continental" or "Roman" legal traditions, not all photographs are protected as works, but only those which pass a certain creative-step test. For example, the Brazilian Copyright Law provides that only those photographs enjoy copyright protection which, by reason of choice of subject and the conditions under which they are made, may be considered artistic creations. Other national laws do not indicate, in such a detailed manner, what criteria of copyright eligibility should be considered, but provide, in general, that only artistic photographs, or photographs of creative nature, enjoy copyright protection. In still other countries, copyright laws themselves do not contain any such special conditions in respect of photographic works, but certain photographs—about which the courts find that they do not exhibit sufficient creativity—are excluded from copyright protection within the framework of case law.

36. It is interesting how French legislation has developed in this field. The 1957 Copyright Law of France pro-

vided that only those photographs were protected by copyright which were of artistic or documentary character. The application of that provision led to a complex case law which sometimes involved certain subjective value judgments. That situation was criticized as a source of legal uncertainty and as being in conflict with the general principle expressed in Article 2 of the 1957 Law according to which all intellectual works were protected, irrespective of their genre, form of expression, merit or purpose. The Law of July 3, 1985, modified the provision of the 1957 Law concerning photographic works and extended copyright protection to all such works irrespective of their artistic or documentary character. It was stressed that photographs should be original to be protected, but their originality should be judged on the basis of the same criteria as the ones applied in respect of other categories of works.

37. There are certain African countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea, Senegal) which have adopted the solution of the 1957 French Copyright Law; under the copyright laws of those countries, photographic works are only protected if they are of an artistic or documentary character.

38. In some countries, photographs not qualifying as works fall into the public domain, while in several other countries (such as Austria, Federal Republic of Germany, Hungary, Italy), there is a safety net for such works: although they do not enjoy copyright protection, they are protected under special related rights systems (which, in general, involve less favorable conditions, shorter terms of protection and sometimes even some formalities). These related rights systems are briefly discussed in the last chapter of this memorandum.

39. There is a third—middle-of-the-road—solution which prevails in the Nordic countries. In Denmark, Finland, Norway and Sweden, photographic works are not protected under the provisions on authors' rights as other kinds of pictorial and graphic works are. The copyright legislations of those countries expressly exclude photographs from the application of the copyright laws; there are separate laws about the protection of photographs on the basis of which all photographs are protected, irrespective of their artistic character or purpose. The protection of photographs under the separate laws is, however, in keeping with the minimum standards established by the Berne Convention in respect of photographic works. In the last but one chapter of the present memorandum, the relationship between such special systems, on the one hand, and the copyright protection described in the memorandum, on the other, is discussed briefly.

40. There seems to be no reason to use other criteria in respect of the protection of photographic works than the ones applied, in general, when copyright eligibility of literary and artistic works is considered. As a result of a fairly long legal development, it is now clear (at least under the Berne Convention) that all photographs should be considered as works and protected by copyright. As in respect of all other productions in the literary and artistic domains, in respect of photographs also, there could be only one condition of copyright eligibility, namely, that

they should contain creative elements, that is, they should be original. The artistic value, the merit, the purpose, etc., of photographs should not be taken into account as criteria of eligibility for protection.

41. During the more than 100-year-long discussions on whether the copyright protection of photographs is justified or not, it has been proved in a convincing manner that there are a great number of elements of the picture-producing process in which originality—even if it is interpreted as an expression of the personality of the author—can be manifested in the field of photography. The choice of the subject of which, of the time when and of the angle from which the picture is taken as well as the composition of the photograph (several books have been written about the rich choice and the possible artistic effects of different ways of picture composition) are practically always present when a photograph is taken by a human being even if a "simple," "automatic" camera is used. In addition to this, there can be original elements in choosing certain technical means (lenses, filters, the types of sensitive material) as well as in the phase of the development of pictures and the final cutting of the picture, not to mention the fact that in many circumstances where that is possible photographers, before taking pictures, arrange the subject to be photographed in a special way, use special light effects, and make other artificial preparations serving the purposes of making the picture.

42. The rich personal choice at the stage of taking and composing photographs indicates that Judge Learned Hand (see paragraph 34 above) was basically right when he stated that "no photograph, however simple, can be unaffected by the personal influence of the author." This means that practically all photographs taken by human beings necessarily contain some elements of originality. If originality is present, there is no basis for saying that less originality still is not sufficient but a certain higher level of originality is needed for copyright eligibility. Only those photographs should be excluded from copyright protection in the case of which there is no room for personal choice and no possibility of influencing the composition of the picture to be taken (such as pictures taken by fully automatic traffic control cameras and, at least under certain laws, simple photocopies, photographs taken by coin-operated machines, etc.). Furthermore, it goes without saying that no photographs that are copies of preexisting photographs can be protected as original works.

The Question of Fixation. Delimitation Between Photographic Works and Cinematographic Works

43. At the 1967 Stockholm Diplomatic Conference, in Main Committee I, the Delegation of the United Kingdom proposed that in the non-exhaustive list of works in Article 2 of the Berne Convention, the reference to photographic works should contain a condition concerning fixation. The Committee did not adopt the proposal; not because it thought that fixation was not a condition, but rather because it considered that—as the report of the Committee put it—"a photographic work must by definition be fixed." The position of Main Committee I seems

to be correct. The very notion of *photography* involves that an image is produced on a surface sensitive to light or radiation and the result is necessarily a still picture as in the case of *graphic* works proper.

44. The fact that a photographic work necessarily involves fixation is in harmony with Article 2(2) of the Berne Convention which allows that "any specified categories of works shall not be protected unless they have been fixed in some material form." What the position of Main Committee I clearly implies is that if a picture produced on the basis of light or radiation effects is not fixed, then it is not a photograph; it may be some other work protected by copyright, but not a photograph because photographic works are, by definition, fixed.

45. Cinematographic works are composed of a series of photographs (and, if they are "audiovisual," also of a sound track). Before cinematography was recognized as an independent genre, attempts had been made to protect cinematographic films element by element and, *inter alia*, as a sequence of photographic works. It became clear fairly soon, however, that the essence of cinematographic films was just that when such series of related images were shown in succession, they imparted an impression of motion. From that is derived the expression "motion pictures" as a synonym of cinematographic works. It is evident that while cinematographic works are composed of still images which—when individually taken—qualify as photographs, they are, as to their artistic essence, not a simple sum of individual photographs but do represent a new quality. Therefore, a cinematographic work is protected as such and not, for instance, as a collection of photographic works.

46. It is another matter that if a portion of the sequence of pictures is used as a still picture, it has the quality of a photograph. Should such a still picture extracted from a cinematographic film be protected as a photographic work according to the provisions on such works or should it be considered as a part of the cinematographic work? The majority of national laws are silent about that question which is also only rarely considered in case law. National laws which do provide for the copyright status of photographs "extracted" from cinematographic films contain diametrically opposing provisions. The national laws of several countries with common law legal traditions (Australia, Bangladesh, India, Pakistan, United Kingdom, etc.) exclude photographs that are parts of cinematographic films from the definition of photographic works, while the copyright laws of some other countries (such as those of Italy and Portugal) expressly provide that photographs from cinematographic films must be deemed to be photographs.

47. Important arguments can be cited in favor of both solutions mentioned in the preceding paragraph. It can be said that when a still picture from a film is used (for example, when it is published in a magazine), it possesses all the qualities of a photographic work and, at the same time, in itself, it cannot have the effect (motion) which is the essence of cinematographic works. On the other hand, it cannot be denied that if such a photograph is used sep-

arately, one cannot ignore the fact that it is (or was) part of the cinematographic film. It is used not so much as an independent work, but rather as an element of the sequence of pictures composing the film. Under that theory, the owner of the copyright in the picture is the owner of the copyright in the cinematographic work, the duration of the protection of the picture is the duration of the protection of the cinematographic work and not of the photographic work and, generally, the law concerning cinematographic works is applicable.

Conclusions

48. On the basis of the above considerations, the following principles are proposed:

Principle PHW1. (1) Photographs are still pictures produced on surfaces sensitive to light [or other radiation] irrespective of the technical nature of the picture-taking process (chemical, electronic or other).

(2) All photographs that contain original elements should be protected by copyright as photographic works. All photographs should be considered as containing original elements and thus as being photographic works, except those in the case of which the person taking the photograph has no influence on the composition or other significant elements of the picture.

Principle PHW2. Alternative A: To photographs extracted from cinematographic works, the law concerning photographic works should apply.

Alternative B: To photographs extracted from cinematographic works, the law concerning cinematographic works should apply.

49. It should be noted that Principle PHW1 does not use the expressions "works assimilated to photographic works" or "works expressed by a process analogous to photography." The assimilation of such works is carried out in the definition itself. Consequently, the expression "photographic works" used in the present memorandum—as defined in Principle PHW1—also includes works expressed by a process analogous to photography. In the case of Principle PHW2, two alternatives are offered on the basis of the considerations discussed in paragraphs 46 and 47 above.

Report 26. Some delegations informed the Committee on the definition of photographs and photographic works, respectively, in their national laws.

Report 27. There was agreement that paragraph (1) of Principle PHW1 was acceptable as a technical definition; that is, not as a definition of photographic works but photographs in general. Some participants stressed that the definition had the advan-

tage of being general and was not attached to concrete techniques.

Report 28. The first sentence of paragraph (2) of Principle PHW1 was supported by all the participants who took the floor in the discussion. It was pointed out, however, that the concept of originality differed to a great extent at the national level.

Report 29. One delegation proposed that in paragraph (1) of Principle PHW1 the word "produced" should be replaced by the word "fixed," because, in certain cases, it was the phase of development where originality was manifested.

Report 30. A great number of comments were made in respect of the second sentence of paragraph (2) of Principle PHW1.

Report 31. Several participants supported the principle included in that sentence, stressing that it offered an objective basis for the delimitation between photographic works and photographs not eligible for copyright protection. Some delegations referred to the legislation and the case law of their countries which were in keeping with that principle.

Report 32. Several other participants opposed the sentence as it was worded in the memorandum because they considered it as a quasi presumption of originality of photographs. Some delegations referred to their national legislation and case law where the concept of originality was different from the one which was reflected in the second sentence of paragraph (2) of Principle PHW1, and emphasized that the same concept should prevail in respect of all categories of works.

Report 33. One delegation proposed that the second sentence of paragraph (2) of Principle PHW1 should be reworded: the principle should reflect that those photographs should be protected as photographic works in the case of which the person who took the picture had influence on the composition of the picture or on any other elements constituting intellectual creation. The delegation considered that, by means of such a wording, the quasi presumption of originality contained in that sentence could be avoided. Some other delegations supported that proposal.

Report 34. Another delegation proposed that the second sentence of paragraph (2) of Principle PHW1 should not refer to the influence of the person taking the photograph but to human influence, in general, because such a wording would cover better all cases where the copyright eligibility of photographs should be recognized. Several participants supported this proposal.

Report 35. Several participants proposed that the second sentence of paragraph (2) of Principle PIIW1 should be deleted from the text of the principle and the question of the interpretation of originality should be left to the commentary where the differing approaches at the national level were correctly analyzed.

Report 36. One delegation proposed that the second sentence of paragraph (2) of Principle PHW1 be put in brackets to express that it was not applicable in all countries.

Report 37. A separate discussion took place concerning the copyright status of photographs taken by satellites. Some participants were of the view that such photographs should also be protected as photographic works because human influence on significant elements of producing such photographs—through pre-programming of the picture-taking process and also in the phase of development—was present. Some delegations said that the concept of originality prevailing in their countries did not seem to cover such photographs; no human influence could be recognized in such cases and thus copyright protection was not justified. They added, however, that such photographs might deserve protection of a related rights nature.

Report 38. An observer from an international non-governmental organization raised the question of whether photographs taken of two-dimensional works of fine art with the purpose of as perfect a reproduction as possible of such works could be considered as separate works or not. The representative of the Secretariats considered that it was a question which could only be answered at the national level depending on the concept of originality prevailing in the country concerned.

Report 39. Some participants referred to national laws where photographs not qualifying as photographic works were protected by related rights. In that context reference was made also to computer-generated works.

Report 40. In respect of Principle PHW2, several participants were in favor of Alternative A, while several other participants were in favor of Alternative B. Finally, it was agreed that both alternatives should be retained reflecting the differing solutions at the national level.

Formalities as Conditions of Protection or as Sources of Prima Facie Evidence

50. There are several national copyright laws under which it is a condition of the protection of photographs

that the name of the author—and, under certain laws, also the year of the production or publication of the photograph—be indicated on the original and/or on the copies of the photograph.

51. Under Article 5(2) of the Berne Convention, the enjoyment and exercise of authors' rights shall not be subject to any formality. The indication of the name of the author and the place and year of the creation or publication of a work as a condition of copyright protection is a formality. In countries party to the Berne Convention, the protection of photographic works cannot be subject to such formalities. Such formalities do not seem to be justified in other countries either. Therefore, the following principle is proposed for consideration:

Principle PHW3. The copyright protection of photographic works should not be subject to any formalities (such as the indication of the name of the author and/or the year of the production or publication of the photograph on its copies as a condition of copyright protection).

52. It is another matter that the indication of certain data, such as those mentioned in the preceding paragraphs, may be useful for the identification of the author or of the year of the production or publication of the photograph (which latter data may be important for the calculation of the term of protection). In respect of photographs—in case of dispute—it may be fairly difficult to find out and prove such data; therefore, it seems to be justified to encourage authors to indicate those data on the copies of the photographic works. The indication of such data is promoted, and the establishment of the data concerned in possible legal proceedings is facilitated if the indication of such data is recognized as *prima facie* evidence, as proposed in the following principle:

Principle PHW4. In the absence of proof to the contrary, the person whose name and the year of the production or publication which are indicated on the original and/or on the copies of the photographic works should be presumed to be the author of the work and the year of the production or publication of the work, respectively. This principle should also be applicable if the name indicated is a pseudonym, where, under the circumstances, there is no doubt as to the identity of the author who uses that pseudonym.

53. Principle PHW4 is in keeping with Article 15(1) of the Berne Convention which provides as follows: "In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity."

Report 41. The participants who took the floor in the discussion expressed their agreement with Principle PHW3.

Report 42. Several participants were of the view that Principle PHW4 contained useful advice. Some delegations, however, were of the opinion that the principle should be restricted to the indication of the name of the author which was only covered by Article 15(1) of the Berne Convention and should not be extended to the indication of the year of the production or publication of the work; the latter question could be covered by the commentary.

*Report 43. One delegation proposed that the whole Principle PHW4 should be deleted and the question of the *prima facie* evidentiary value of the indication of certain data should be dealt with in the commentary.*

The Ownership of Copyright in Photographic Works

General Considerations

54. It follows from the general principles and provisions of the international copyright conventions that, as a rule, the author, that is, the person who creates the work, is the original owner of copyright.

55. National laws, in general, follow this principle in respect of photographic works as well. There are only three cases in which persons other than the creators of photographs are, in certain national laws, considered or designated as original owners of copyright, namely, first, the case of works created under employment contract; second, the case of commissioned works; and third, a special case in the legislation of certain common law countries which is described below.

56. The present memorandum does not discuss the ownership in works created under employment contract because the copyright problems raised in connection with such works are of a general nature and do not only concern photographic works but all categories of works created by employees. That is the reason why several participants in the meeting of the Committee of Governmental Experts on Works of Applied Art, in Geneva in October 1987, expressed the view that it was not appropriate to discuss the question of the protection of such works within the framework of meetings dealing with different categories of works.

57. The problems of commissioned photographs are discussed in a separate subchapter below.

58. The special provisions on the original ownership of copyright in photographic works which can be found in the copyright laws of certain countries following common

law traditions (Ireland, New Zealand, Sierra Leone, United Kingdom) are of more general nature. They concern all photographic works (other than photographs made by employed authors and commissioned photographs). Under the provisions mentioned above (which, otherwise, cannot be found in the copyright laws of the majority of common law countries either), "author" in relation to a photograph means the person who, at the time the photograph is taken, is the owner of the material on which it is taken. These provisions have been criticized both outside and inside the countries concerned as conflicting with certain basic principles of copyright and as attributing authorship on a basis which may be wholly irrelevant. For example, the so-called White Paper on "Intellectual Property and Innovation" presented to the Parliament in the United Kingdom in April 1986 stated as follows: "It is somewhat arbitrary and frequently inappropriate that the owner of the film should also own the copyright in a photograph on the film." The new Copyright Bill which is under discussion in the Parliament of the United Kingdom at the time of the preparation of this memorandum, accordingly, does not contain any separate provision on the ownership of copyright in photographic works and, thus, the general provision of the Bill under which the "author" is the person who has created the work, is applicable.

59. It is another matter that the ownership of the original of the photograph (for example, the negative) on the basis of which copies can be produced may be of special importance in respect of the exercise of economic rights which is discussed below in the chapter about such rights.

60. The following principle states something that is fairly evident in respect of the majority of categories of works. It seems to be necessary to simply underline that the solutions described in paragraph 58 above—according to which the owner of the photographic film is designated as the owner of the copyright—do not seem to be appropriate to mention in this context:

Principle PHW5. The author (that is, the creator) of a photographic work should be recognized as the original owner of copyright in such a work.

61. It goes without saying that exceptions may be provided for, particularly in two cases. The first is the original ownership of the person who has commissioned the photograph (this case is discussed below), and the second is the possible original ownership of the employer (first of all in countries with common law legal traditions). The latter case is not, for the reasons mentioned in paragraph 56, discussed in this memorandum.

Ownership of Copyright in Commissioned Photographic Works

62. Contrary to the problems of photographic works created by employees, it seems to be justified to discuss the questions of the copyright status of commissioned

photographs in the present memorandum. Of all categories of works, perhaps photographs are the ones which are most frequently created on commission. Therefore, it is not by chance that several national copyright laws contain special provisions concerning the ownership of copyright in commissioned photographs.

63. The provisions of national copyright laws on this subject differ to a large extent, and one can find examples of practically all imaginable solutions.

64. In a number of countries (for example, in France, Italy and several European socialist countries), the original ownership of copyright in commissioned works belongs to the author. That is the case in those countries where it is declared that the author is the original owner and there is no exception to this principle in respect of commissioned works.

65. There are some countries (for example, Congo, Mali, Portugal, Senegal) whose laws provide that copyright belongs originally to the author, but they make possible contractual stipulations to the contrary. This means that, by operation of a contract, copyright can be originally vested in the person who commissions the work.

66. In other countries (such as Cyprus, Kenya, Malawi, Malaysia, Malta, Nigeria, Sri Lanka, Zambia) the general rule is that copyright is vested in the author, but in the case of commissioned works, it is deemed to be transferred to the person who commissioned the work, subject to any agreement between the parties excluding or limiting such a transfer. This means that while in the countries mentioned in the preceding paragraph the lack of contractual stipulations to the contrary means that the author is the original owner of copyright; in the countries mentioned in this paragraph, if the contract is silent about this question, the copyright in the commissioned work is vested in the person who commissioned it.

67. There are national laws (such as the Copyright Law of Ecuador) where in principle the author remains the original owner, but this ownership is restricted to a large extent by a *cessio legis* type provision under which the person who commissioned the work has the exclusive right to use the work within the limits of the means of dissemination for which it was commissioned.

68. The Copyright Law of the Philippines contains a unique, middle-of-the-road solution. It provides that the author and the person who commissioned the work are the joint owners of copyright in the work.

69. The copyright laws of several countries (such as Canada, Denmark, Finland, India, Ireland, Israel, Norway, Pakistan, Singapore, Sweden, Trinidad and Tobago, United Kingdom, United States of America, Uruguay) provide that the person who commissioned the photographic work is the original owner of copyright (sometimes with a condition that this applies unless otherwise expressly provided for in a contract). In respect of the United States of America, it should be noted that this rule applies only in respect of commissioned photographs

which are covered by the definition of "works made for hire" (last paragraph of section 101 of the 1976 Copyright Act).

70. It is understandable that the copyright laws of several countries contain specific provisions on the copyright status of commissioned photographs and that such specific provisions provide for the original ownership of the persons who commissioned such photographs. In general, the purpose of commissioning photographs is obviously more than just to have copies of such photographs, it is rather to be in the exclusive position to use the photographs for all possible purposes. Furthermore, the persons who commission such works often determine the objects of which photographs are to be taken as well as certain details of the photographs and thus they also have an influence on the nature and artistic features of such works. It is realistic for national laws to recognize the special status of commissioned photographs when they provide for the ownership and exercise of copyright. For the recognition of this special status, the following two alternatives are proposed:

Principle PHW6. Alternative A: In respect of photographic works created on commission, the person who commissioned the work should have an exclusive license to use the work for all purposes which could reasonably be said to have been within the contemplation of the parties at the moment of commissioning.

Alternative B: In respect of photographic works created on commission, unless otherwise provided in contract, the person who commissioned the work should be recognized as original owner of economic rights (see Principle PHW8) in such a work.

71. The two alternatives above seem to correspond to the two basic trends which can be deduced from the various national solutions described above (which two trends otherwise also exist in respect of works created by employed authors). The meaning of Alternative A can only be fully appreciated if it is read together with Principle PHW5 which latter states that the author is the original owner of copyright, while Alternative B is just one of the possible exceptions to Principle PHW5, as mentioned in paragraph 61 above. Both alternatives leave open the question of the exercise of moral rights. In the case of Alternative B, which is based on what could be called the common law approach, a further provision may be found necessary in national laws under which, in the case of commissioned photographs, it should be deemed, unless otherwise provided in contract, that the author has agreed not to his moral rights (at least his right to be named on the copies of the photograph or in connection with such copies).

Report 44. Several participants expressed their full support for Principle PHW5.

Report 45. Other participants drew attention to what was described in paragraph 55 of the memo-

randum in respect of possible exceptions to this principle and suggested that, for the sake of avoiding misunderstandings, the text of Principle PIIW5 should also refer to the possibility of exceptions. It was proposed, as a solution, to insert the words "as a rule" into the text of the principle. As another solution, it was suggested that the principle should simply state that exceptions were possible.

Report 46. In respect of Principle PHW6, some participants expressed their preference for Alternative A, while other participants were in favor of Alternative B.

Report 47. Some participants drew attention to the last phrase of Alternative A and said that a more objective basis should be found than the contemplation of the parties at the moment of commissioning the work.

Report 48. One delegation proposed that, instead of the phrase mentioned in the previous paragraph above, Alternative A should simply refer to the purposes for which the photographic work had been commissioned. The delegation noted that it was important to define what was meant by "commissioned works" because, depending on the actual influence of the commissioner of the commissioned work both Alternative A and Alternative B could be acceptable.

Report 49. An observer from an international non-governmental organization stressed that it was not sufficient to take into account the contemplation of the parties at the moment of commissioning the work. The right of the commissioner to use the work should be interpreted in a more flexible way, taking into account any new conditions and circumstances (including new technologies) concerning the possible utilization of the work.

Report 50. One delegation drew attention to the fact that in the French version of Alternative B, the word "convention" is used instead of the word "contrat" (contract) which appeared in the English version. While the word "convention" corresponded, in a certain sense, to the meaning of the word "contract," it might be misunderstood. Therefore, the delegation suggested that, in the French version, the word "contrat" should be used. This proposal was supported by some other participants.

Report 51. Several participants said that they did not agree either with Alternative A or with Alternative B of Principle PHW6.

Report 52. One delegation suggested that an Alternative C should be added to the two alternatives con-

tained in the memorandum, which should read as follows: "In respect of photographic works created on commission, the author (that is, the creator) of the photographic work, unless otherwise provided in the contract, should be recognized as the original owner of economic rights." Some participants supported this proposal.

Report 53. Several participants stressed that Principle PHW6 only concerned economic rights and it should be considered as leaving moral rights or authors intact. In that context, one delegation opposed the statement included in the last sentence of paragraph 71 of the memorandum.

Report 54. Several participants stressed that there was a close relationship between Principles PHW5 and PHW6 which should be further emphasized.

Report 55. One delegation proposed that it should be made clear that, while Principle PHW5 covered a question which should be settled in all national laws, Principle PHW6 dealt with a question in respect of which it was not necessary to offer a regulation at the national level; it was only intended to States which wished to do so.

Report 56. Some delegations informed the Committee on the legal situation in their countries. One delegation stated that the last sentence of paragraph 69 of the memorandum did not reflect precisely the legal situation in its country. The concept of "works made for hire" did not cover commissioned photographic works, in general, but only those which had been commissioned for certain purposes, such as for collective works (encyclopedias, etc.), for works used for instructional activities and for newspapers and magazines.

Report 57. One delegation said that, in its view, it was pointless to offer separate principles in respect of commissioned photographic works, because the same or similar questions emerged with regard to other categories of commissioned works (such as works of fine art and works of architecture). The delegation was of the view that if the questions of the protection of commissioned works were dealt with, then they should include all kinds of protected works. Some other participants supported that comment.

Report 58. The same delegation stressed that not only the recognition of the basic rights of authors was important, but also the conditions of the exercise of those rights, and first of all, the conditions to be applicable in contracts. The delegation said that it would be useful to deal with the questions of authors' contracts also at the international level.

Report 59. One delegation pointed out that, while a possible future meeting about the copyright questions of works created by employees and of commissioned works could not lead to the adoption of principles which were acceptable for all the States, it would be necessary and useful to deal with, at least, the international private law problems arising from the fact that, in certain countries, it was the author who was recognized as original owner of copyright, while, in certain other countries, it was the employer or the commissioner who enjoyed such a status. Several other participants supported that comment.

Report 60. Some participants expressed the view that Principle PHW6 should be deleted and the questions of the protection of commissioned photographic works should only be dealt with in the comments.

Report 61. An observer from an international non-governmental organization expressed the view that in certain situations, the commissioner could also be recognized as a coauthor of the work.

Moral Rights in Photographic Works

72. Moral rights are the expression of the close and intimate link which exists between the author and his creation, which may be more or less the expression of his personality.

73. Article 6^{bi}(1) of the Berne Convention provides that "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." This provision also covers photographic works.

74. In the light of the foregoing, the principle governing moral rights in photographic works might be the following:

Principle PHW7. *Independently of the author's economic rights, and even after the transfer of the said rights and/or after the alienation of the copy of the photographic works, the author should have the right to*

(i) *claim authorship and have his name indicated in connection with any public use of his work;*

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

Report 62. Several participants pointed out that Principle PHW7 was along the lines of Article 6^{bi} of the Berne Convention and, as such, represented a minimum standard for the protection of moral rights.

Report 63. Some delegations added that, in their national laws, some other moral rights were also granted (such as the right to make the work public, the right of withdrawal) and said that the minimum standard nature of the principle should be further emphasized.

Report 64. An observer from an international non-governmental organization stressed that, in the case of new technologies which permitted the manipulation and combination of pictures, particular attention should be paid to the fullest respect of moral rights.

Report 65. One delegation pointed out that, in the French version of the opening part of Principle PHW7, it should be made clear that not only copies produced on the basis of the original support of the work but also the original support itself was meant. This comment was supported by an observer from an international non-governmental organization.

Report 66. One delegation proposed that point (i) of Principle PHW7 should be worded in a more flexible manner to make it clear that the obligation to indicate the author's name did not cover cases where it would be unreasonable to meet such an obligation. Some other participants supported this proposal.

Economic Rights in Photographic Works

75. The international copyright conventions do not provide for specific limitations on the economic rights in respect of photographic works. Therefore, all economic rights granted to the authors of literary and artistic works should also be enjoyed by the authors of photographic works.

76. The following principle—formulated in accordance with the more detailed provisions of the Berne Convention—is offered for consideration:

Principle PHW8. (1) *The owner of copyright in a photographic work should have the exclusive right to authorize at least the following acts:*

(i) *the reproduction of the work in any manner or form (including storage of the work in a computer);*

(ii) *the display of the work to the public on a screen (insofar as such display is not recognized as a reproduction of the work);*

- (iii) the public exhibition of the work;
- (iv) the making of adaptations of the work;
- (v) any communication to the public of the work (including its communication by wire in a cable-originated program);
- (vi) the broadcasting of the work; any communication to the public by wire (by cable), or by rebroadcasting, of the broadcast of the work, when this communication or rebroadcasting is made by an organization other than the original one;
- (vii) the inclusion of the (preexisting) work into an audiovisual work.

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

77. The legal basis of the economic rights and the possible limitations to them as well as the questions raised by new technologies in relation to those rights and limitations were discussed in detail at the meetings of the committees of governmental experts dealing with the eight categories of works mentioned in paragraph 3 above. For example, the questions of cable distribution and the application of broadcasting right in the case of satellite broadcasting were discussed at the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms in Paris in June 1986, the recognition of the right of exhibition was considered at the meeting of the Committee of Governmental Experts on Works of Visual Art in Paris in December 1986, while the problems of reprography (in respect of the possible restrictions of the right of reproduction), of the storage in and the retrieval from computer systems of works and of the display of works on a screen will have been dealt with—by the time of the meeting of the Committee for which the present memorandum has been prepared—by the Committee of Governmental Experts on the Printed Word (to take place after the writing of the present memorandum, in Geneva in December 1987).

78. The present memorandum does not contain separate principles about two economic rights (neither of which is of the nature of an exclusive right), namely, public lending right and the *droit de suite*.

79. As far as public lending right is concerned, its application might generally emerge only in respect of books containing pictures. Photographs, as such (i.e., in isolation), however, in general, are not covered by such a right under national legislation (the legislation of the Federal Republic of Germany seeming to be the only exception). If this right—which would, otherwise, be justified in respect of valuable albums and, perhaps, also in respect of at least certain cases of illustrations—is granted also in respect of photographs, the considerations reflected in the chapter on public lending right in the working document prepared for the Committee of Governmental Experts on the Printed Word are applicable *mutatis mutandis*.

80. The lack of any principle about the *droit de suite* is not simply because its application seems to be atypical in respect of photographic works, but rather because its recognition cannot be recommended at all in the field of such works. Article 14^{1c}(1) of the Berne Convention only provides for the *droit de suite* in respect of original works of art and original manuscripts of writers and composers. According to the generally accepted interpretation, "works of art" in this context means works of art proper, that is, drawings, paintings, statues, engravings and the like, and do not include photographic works in the case of which the original copy (the negative) plays a role which is different from that of the original works of art mentioned above. No national laws grant the *droit de suite* to the authors of photographs.

Report 67. Some delegations stated explicitly that they agreed with Principle PHW8.

Report 68. One delegation, while supporting Principle PHW8, referred to the right of display mentioned in point (ii) of paragraph (1) of Principle PHW8 for which the international copyright conventions did not provide explicitly. Therefore, there were no provisions in the conventions concerning the possible exceptions to that right and, thus, paragraph (2) of the principle did not refer to any exception either. The delegation informed the Committee that, in the national law of its country, there was a particular exception to the right of display of the author of a photograph. The lawful owner of a copy of a photograph had the right to display or otherwise exhibit that copy publicly without the authorization of the author.

Report 69. The representative of the Secretariats informed the Committee that the new version of principles included in the memorandum prepared for the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works to be held in Geneva in June–July 1988 which was under distribution, did contain an exception, in respect of works of fine art, to which the delegation referred in respect of photographic works.

Report 70. One delegation proposed that the opening part of paragraph (1) of Principle PHW8 be worded as follows: "The owner of copyright in a photographic work should have the exclusive right to authorize any form of exploitation of his work presently known or to be invented in future. In accordance with the provisions of the Berne Convention, he should have the exclusive right to authorize at least the following acts ... etc."

Report 71. One delegation informed the Committee that, in its country, public lending right also covered photographic works.

Report 72. Some participants pointed out that, in addition to authors' rights, the personality rights of those persons whose photographs were taken should also be considered. Certain delegations referred to the legal situation in their countries.

The Role of the Ownership of the Original Copy of a Photographic Work

81. In the case of works of visual art (paintings, sculptures, etc.), particularly if only one single original copy of such a work exists, the ownership of the original copy is of legal and practical importance.

82. The ownership of such a single original copy means that the owner, whether he is the artist himself or another person, from a practical point of view is in an exclusive position to make the copy of the work of visual art available for any utilization. When the author transfers the ownership of such a single copy, he does so in realizing that in practice this other person will find himself in such an exclusive position. The manner of enjoyment and exercise of copyright in the work, in the case of the transfer of the only existing copy, is a question of contract. If, however, the contract does not include any particular stipulations in this respect, one has to rely on an interpretation of this silence.

83. The working document prepared for the meeting of the Committee of Governmental Experts on Works of Visual Art (Paris, December 1986) offered two alternatives to solve the problem of the silence of the contract concerning the enjoyment and exercise of copyright in case of the transfer of ownership in the single original copy. The first alternative—which corresponded to the traditional legal approach to this question—was that, in such a case, the economic rights should remain with the author; consequently, the owner of the copy, as well as any third person, should obtain an authorization from the author (or from his heir) for any further utilization of the work. The second alternative—which followed the trend of general practice in certain countries—was based on another possible interpretation of the silence of the contract, namely that, in transferring the only original copy the author accepts implicitly that it is the new owner of the copy who is authorized to exercise, at least, certain rights.

84. In the case of photographic works, at least as far as the present widespread "traditional" picture-producing processes are concerned, there are also original "copies" (negatives, etc.) which play a decisive role in the production of further copies (positives, etc.). Although the development of reprography makes the direct (positive from positive) reproduction of photographs possible in ever more perfect quality, the production of copies of photographs is still done normally on the basis of original copies (negatives). While, in respect of works of visual art, it is only a trend, in certain countries, that the transfer

of the single original copy implicitly includes the transfer of the exercise of certain economic rights to the new owner of the copy, in the field of photographic works such an interpretation of the legal consequences of the transfer of the original copy seems to be much more than a mere trend. The simultaneous transfer of, at least, certain economic rights is generally accepted in such cases as a reality in the face of which any declaration that, at least, certain of the author's economic rights are not transferred by the transfer of the ownership in the "material support" would be pointless and unrealistic. Therefore, the following principle is suggested (in two alternatives which differ in respect of whether all economic rights are considered to be transferred or only those which are indispensable for the transferee's usual activity):

Principle PHW9. Alternative A: The transfer of the ownership in the original copy (for example, the negative) of a photographic work should, unless otherwise provided in contract, be considered to involve the simultaneous transfer of the economic rights (see Principle PHW8) in the work.

Alternative B: The transfer of the ownership in the original copy (for example, the negative) of a photographic work should, unless otherwise provided in contract, be considered to involve the simultaneous transfer of those economic rights in the work which are indispensable for the transferee's usual activity.

Report 73. Several participants stated that they opposed Alternative A of Principle PHW9 as not being in accordance with their national legislation.

Report 74. Some participants said that they did not agree with Alternative B of Principle PHW9 for the same reasons.

Report 75. Some other participants declared that Alternative B was acceptable to them. One delegation, however, proposed that Alternative B should only provide for the transfer of non-exclusive economic rights.

Report 76. One delegation proposed that a new Alternative C should be added to Principle PHW9 "according to which the author retained his economic rights in his work when the original copy (for example, the negative) was transferred to another person, unless otherwise provided in contract." Some participants supported this proposal, while certain other participants opposed it.

Report 77. Some participants expressed the view that they did not consider Principle PHW9 necessary because they were of the view that it was more appropriate to settle this question in contracts.

The Term of Protection of Photographic Works

85. As discussed in the chapter on the development of the provisions of the international copyright conventions, the term of protection is one of the rare questions about which both the Berne Convention and the Universal Copyright Convention contain specific provisions in respect of photographic works.

86. Article 7(4) of the Berne Convention provides as follows: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works ...; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."

87. Article IV.3 of the Universal Copyright Convention provides, as has been noted in paragraph 20 above, that the term of protection of photographic works must not be less than 10 years. However, this provision, for the reasons mentioned in the said paragraph, does not stipulate the date from which the term of protection must be computed.

88. The provisions of national laws on the term of protection of photographic works vary from country to country. In some countries, the term is calculated from the making of the photograph, in other countries from its publication, in still other countries from the death of the author, and the term of protection itself differs to a large extent. Furthermore, there are countries where the copyright law does not provide for a specific term of protection in respect of photographic works; therefore, the general terms of protection are applicable to such works as well.

89. The widely differing lengths of the term of protection of photographs at the national level may raise practical problems in relation to the administration of rights in such works. A further complicating factor is that, under the international copyright conventions, and in cases where the national law provides for more than the minimum term, the principle of comparison of terms may be applied. Under that principle, one has to know when the protection expires in two countries: in the country of origin of the work and in the country in which protection is claimed. The latter principle, in itself, seems to justify that attempts should be made to try to harmonize the terms of protection.

90. In trying to harmonize the terms of protection of photographic works, two elements should be considered: the starting point of the term and the duration.

91. It is often not easy to determine with precision the date on which a photograph was made, particularly if it has to be found out several years later. The system of calculation based on publication does not allow the term of protection to be known in advance as it may not occur until long after the photograph was taken and may even never take place.

92. There is only one solid basis for the calculation of the term of protection of photographic works, namely, the year of the death of the author as in respect of other categories of works.

93. When it comes to the duration of protection, it should be taken into account that there are extremely valuable photographic works of outstanding photographers in respect of which probably no one feels that a shorter duration is justified (the more so because with the improvement of technology, photographs preserve their quality and can be used for a much longer period than before). It is, however, true that there are also photographs of a lower quality and of a less marked originality. However, lower quality productions may be found in all and any categories of works. The difference in quality is not a real problem. More valuable works are generally used for a longer period, and there a longer term of protection can hardly be opposed. On the other hand, if a work is used for a long period and if users want to use just that work, why could that fact not be interpreted as proof that, after all, that work has some particular value?

94. The assimilation of the term of protection of photographic works to the general term of protection would seem to be the most justified solution on the basis of the considerations mentioned above. It should, however, be taken into account that, in respect of such works, the Berne Convention defines the minimum term in 25 years to be calculated from the date of making of the photograph and that under the Universal Copyright Convention, 25 years after the author's death is the general minimum term of protection. Therefore, that minimum duration is suggested in the following principle:

Principle PHW10. The term of protection of photographic works should, as a rule, be at least the life of the author and 25 years after his death.

Report 78. Several participants expressed their support for Principle PHW10 as a compromise among the various provisions of the international copyright conventions and national laws. Some participants, however, insisted that they considered that photographic works should be protected under the same conditions and for the same term of protection as other categories of works.

Report 79. Some delegations informed the Committee about provisions in their legislation concerning the term of protection of photographic works. Some of them said that their national laws provided for a term of protection shorter than 25 years after the author's death. Other delegations stated that, under their national laws, the term of protection was longer than 25 years after the author's death.

Report 80. One delegation drew attention to the French version of Principle PHW10 which was

worded in a negative way—unlike the English version—which could be interpreted as a kind of criticism towards States where the term of protection was shorter. The delegation proposed that the French version of the principle should read as follows: "La durée de protection des œuvres photographiques devrait, en règle générale, comprendre la vie de l'auteur et, au moins, 25 années après sa mort." It was stated that the English version could remain unchanged. Some other delegations supported the above-mentioned proposal.

Report 81. One delegation suggested that Principle PHW10 should only provide for the term of protection of economic rights since, in its opinion, moral rights should be granted perpetual protection which was the case in many countries. Another delegation opposed this proposal and referred to the national laws of certain other countries, including its own, where moral rights were protected for the same term of protection as economic rights were.

The Protection of Photographs—Including Photographic Works—Outside the Scope of the Copyright Law

95. As described in paragraph 39 above, there are national legislations which do not protect photographs within the framework of copyright law proper, but protect such works outside the scope of the copyright laws providing for the protection of literary and artistic works. (This way of regulation is similar to the one which was applied in the earlier Acts of the Berne Convention where photographs were not included in the notion and definition of literary and artistic works.) Such solution exists for the time being in four Nordic countries: Denmark, Finland, Norway and Sweden under which all photographs, regardless of originality, are protected.

96. The 1971 Paris Act of the Berne Convention to which all the four Nordic countries are party contains the obligation that photographic works should be protected as a category of literary and artistic works. The question then arises if the solution mentioned in the preceding paragraphs is compatible with the Berne Convention. It is obvious that at least a part of the photographs protected under such specific systems are to be considered as photographic works because they are of original character on the basis of any strict criteria of originality. Those works, however, are not identified as a distinct group; they are included in the general category of photographs, together with other photographs, which may not qualify as works because they might not pass a strict creative-step test. This means that such countries should meet the obligations under the international copyright conventions and, particularly under the Berne Convention in respect of all photographs covered by such a special protection system and should grant national treatment to all such photographs originating in other countries of the Berne Union

so as to avoid conflict with the Convention. The legislations of the above-mentioned countries meet those conditions and, consequently, are compatible with the Berne Convention.

Related Right Type Protection of Photographs Not Qualifying as Photographic Works

97. It is suggested in paragraphs 40 to 42 and Principle PHW1(2) above, that practically all photographs should be protected as photographic works except those where the persons who produce them do not have any influence whatsoever on the composition and the artistic and other substantial features of such photographs. Nevertheless, as mentioned in paragraph 38 above, there are some countries where a fairly strict originality test is applied on the basis of which certain photographs (although not falling into the category described above because the influence of the maker of the photograph on the composition, etc., is not excluded) do not qualify as works, but they are protected within the framework of a related right type protection system (which includes, in general, a lower level of protection with fewer rights, with shorter terms of protection, with formalities, etc.).

98. The differences between various national laws, in respect of the notion of originality, have been known and accepted by the members of the Berne Union from the very foundation of the Union. Therefore, it cannot be said that the national legislations mentioned in the preceding paragraph would be in conflict with the Berne Convention, provided that, for photographic works with sufficient originality, they grant at least the minimum protection provided for in that Convention. All the countries in question do so provide.

Report 82. Some delegations confirmed that the analysis given in paragraphs 95 to 98 of the memorandum was correct.

Report 83. One delegation, while not questioning the correct nature of the above-mentioned analysis, expressed its regret that certain photographs, which, in its view, would deserve copyright protection, enjoyed only related right type protection in some countries.

Conclusion

Report 84. The Committee noted that the results of the meeting would be taken into account in the preparation of the working document for the meeting of the WIPO/Unesco Committee of Governmental Experts in the Evaluation and Synthesis of Principles on Various Categories of Works, which will be held in Geneva from June 27 to July 1, 1988.

Adoption of the Report and Closing of the Meeting

Report 85. The Chairman having had to leave the meeting, the closing session was chaired by Mr. György Pálos, Vice-Chairman of the Committee.

Report 86. The present report was unanimously adopted and, after the usual expressions of thanks, the acting Chairman declared the meeting closed.

LIST OF PARTICIPANTS

I. States

Algeria: S. Abada; N. Gaouaou. Argentina: G.H. Peiretti; S.M. Peláez Ayerra. Barbados: D. Newton. Burundi: D. Misago. Byelorussian SSR: V. Kolbassine; O. Laptenok; A. Néverko. Cameroon: E. Ndjiki-Nya. Chad: B. Touade. Chile: F. Urrutia. China: Linghan Gao; Shugao Ren. Congo: D. Ganga Bidie; A. Biaoquila. Côte d'Ivoire: E.M. Ezo. Cuba: N.J. Valdés Duarte. Denmark: L. Hersom. Ecuador: M. Carbo Benites. Egypt: M.S. Salem. Finland: J. Liedes; H. Wager; K. Nordberg; R. Oesch. France: R. Lecat; L. Fournier; A. de Gouvion Saint-Cyr; A. Grimot; M.M. Ippolito; P. Hamon; C. Helft; I. Jammes. Gabon: P.M. Dong; P.E. Ango-Bic; R. Duboze. Germany (Federal Republic of): M. Möller. Greece: A. Miliadou; H. Zaphiriou. Guinea: A. Camara; H. Soumah. Holy See: R.-V. Blaustein; P. Brun. Hungary: G. Pálos; J. Batta. India: A. Ghose; P. Singh. Italy: G. Catalini. Japan: Y. Oyama; M. Inoue. Jordan: Z. Obiedat. Kuwait: S.H. Al-Nesef; M.M. Mansour. Lebanon: J. Sayegh. Malta: Y. de Barro. Mexico: G. Ugarte de Bernard. Morocco: A. Lahmili. Netherlands: L.M.A. Verschuur-de Sonnaville. Nigeria: R.A.E. Nkanga. Pakistan: N.A. Naik; M.H. Shaukat. Panama: J. Patiño. Soviet Union: A.V. Tourkine. Spain: E. de la Puente Garcia. Sweden: K. Hökborg; G. Lundin; B. Rosén. Thailand: S. Povatong. Tunisia: A. Ben Jeddou; S. Zaouche. United Republic of Tanzania: J.A.T. Muwovo. United States of America: R. Oman; H.J. Winter; H. Oler; L. Flaeck. Uruguay: G.C. Santos-Granada. Yemen: A.S. Sayyad.

II. Observers

(a) States

Brazil: J.C. de Souza-Gomes; J. de Souza Rodrigues. Costa Rica: J.A. Rodriguez Bolaños; I. Leiva de Billault. German

Democratic Republic: A. Greim. Philippines: D. Macalintal; D. Ongpin-Macdonald. Turkey: A. Ulusan.

(b) Palestine Liberation Organization (PLO)

K. Hakim.

(c) Intergovernmental Organizations

Agency for Cultural and Technical Co-operation (ACCT); A. Touré. Arab League Educational, Cultural and Scientific Organization (ALECSO); A. Derradji. Commission of the European Communities (CEC); P. Kern. Council of Europe (CE); G. Brianzoni.

(d) International Non-Governmental Organizations

International Association of Art (IAA); A. Parinaud; P. Legros. International Commission of Jurists (ICJ); D. Bécourt. International Confederation of Free Trade Unions (ICFTU); P. Raterron. International Confederation of Societies of Authors and Composers (CISAC); N. Ndiaye; G. Pfennig. International Copyright Society (INTERGU); R. Talon. International Council on Archives (ICA); M. Quétin. International Federation of Journalists (IFJ); S.O. Gronsund; J.-K. Sogaard. International Federation of Newspaper Publishers (FIEJ); F. Leth-Larsen; B.E. Lindskog; D. Seligsohn. International Federation of Photographic Art (FIAP); J.-G. Seckler. International Literary and Artistic Association (ALAI); A. Françon; D. Gaudel; W. Duchemin. International Organization of Journalists (IOJ); S. Gautier. International Publishers Association (IPA); J.-A. Koutchoumow; C. Clark; S. Wagner. International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU); P. Raterron. Max Planck Institute for Foreign and International Patent, Copyright and Competition Law; S. von Lewinski.

VI. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

M.-C. Dock (Principal Director, Sector of Culture and Communication); E. Guerassimov (Legal Officer, Copyright Division, Sector of Culture and Communication).

World Intellectual Property Organization (WIPO)

M. Ficsor (Director, Copyright Law Division); P. Masouyé (Legal Officer, Copyright Law Division).

Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers)

(Lima, April 21 to 23, 1988)

The Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers) was held in Lima, from April 21 to 23, 1988. It was organized by WIPO, the Government of Peru through the National Library of Peru, and the *Pontificia Universidad Católica del Perú*. About 560 persons from a number of Latin American countries participated in the Congress, among them a number of magistrates from Peru. WIPO was represented by Mr. Henry Olsson, Director, Copyright and Public Information Department, and Mr. Carlos Fernández-Ballesteros, Senior Counsellor, Development Cooperation and External Relations Bureau for Latin America and the Caribbean.

The Congress was opened by the First Vice-President of the Republic, Dr. Luis Alberto Sánchez. The President of the Republic was represented by the Minister of Justice, Dr. Camilo Carrillo. The

inaugural speech, under the title "WIPO and the International Conventions on Copyright and Neighboring Rights," was delivered by a WIPO official. The discussions at the Congress were based on 12 lectures presented by outstanding specialists mostly from Latin America. In addition, a roundtable discussion took place on "The Future of Copyright in Latin America." The inaugural speech as well as most of the lectures and interventions in the roundtable discussions are published in a book which is reviewed on page 301.

The presentation of the various papers was followed by an interesting and lively debate. The Congress proved to be a useful opportunity for an exchange of information and for discussions about the development of copyright and neighboring rights in general and about the current situation and future prospects in Latin America in particular.

Studies

The Copyright Aspects of Parodies and Similar Works

André FRANÇON*

Parody is a type of work that is highly appreciated in our day and age. It constitutes an agreeable manner in which to demonstrate that the mind remains lucid and is not dazzled by the work of someone else to the extent of uncritical devotion. The parodist writes a satirical version of a work which is not his own, to the great amusement of the public. The approach remains the same whatever the type of work parodied even if the word parody is mostly used where the target work is musical and the tendency is to speak of a pastiche where the work is literary and a caricature where it is artistic.¹

The lawfulness of these practices from the copyright point of view would seem to have been accepted in all countries despite the fact that the international copyright conventions have remained silent on this aspect and very few national laws address the problem.² In those countries in which the legislator has remained silent when dealing with copyright, the legal writers and the courts have to make good this failing. In the English-speaking countries, in particular, the lawfulness of parody is held to derive from the principle of fair use. In other words, to make a parody of a work constitutes fair use and may therefore be carried out without requiring authorization from the author of such work.

In practice, this kind of mockery affects only successful works and, indeed, the authors of such works may consider those activities as a tangible proof of that success. This compensates for the fact that creators are obliged to accept an amputation of their literary property.

However, the work involved must constitute a true parody. As an exception to the author's monopoly in respect of the work on which the parodist exercises his art, parody must obey to a strict definition as is appropriate to an exception. We shall, therefore, first have to detail the concept of lawful parody (I).

Once that has been done, it will be still necessary to determine the legal status of parody and to ascertain, in particular, whether the parodied author has no option but to accept the situation or whether he possesses as an author certain prerogatives of which he may avail himself against the parodist (II).

I. The Concept of Lawful Parody

This concept of parody may be held to comprise a material element (A) and a moral element (B). We shall take a look at them one after the other.

A. The Material Element of Parody

The relationship between the parody and the parodied work has to be defined. We are obliged to admit, it would seem, that such relationship exists in the case of a parody (a), but that they must remain enclosed within certain limits if the act is to remain lawful (b).

(a) It is the very nature of a parody that it should have links with the parodied work. The aim of the parodist is to raise a laugh at the cost of the author. It is therefore essential that the public to whom the parody is presented should realize its intent. Obviously, the public will only be aware of that fact if the work put before it is such that it suggests to the public the link with the work that is parodied.

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¹ Such is, at least, the traditional view of legal writers in France (see Desbois, *Le droit d'auteur en France*, third edition, No. 255, p. 323). However, this point of view would not seem to be shared by the Supreme Court of Appeal (*Cour de cassation*). In a decision of January 12, 1988 (see D. 1988 *Informations rapides*, p. 31), the Court would appear to wish to reserve the term "pastiche" for those cases in which an author attempts simply to imitate the type of works of another author and uses the words "parody" or "caricature" for those cases in which the later author makes fun, by mocking it, of the specific work of another creator, whether it be literary, artistic or musical.

² See Colombet, *Major Principles of Copyright and Neighboring Rights in the World. A Comparative Law Approach*, published by Unesco, Paris, 1987, p. 52.

The obviousness of this link will, of course, vary depending on the circumstances.³ It can be that the parody does not aim at a specific work of an author, but at his whole production.⁴ In such cases, before carrying out his parody, the parodist will have already analyzed the whole of the author's past and forgotten production. In so doing, he will have noted that the author in question was generally attracted to certain topics or certain regions or certain figures or that he had certain stylistic idiosyncrasies. After having assembled these various features, the parodist will create a work "in the style of" which cannot be associated with any specific work by his predecessor, but which nevertheless will bear a certain "family likeness," albeit that of a somewhat mocking relative, to the author's work as a whole.

This first type of parody is obviously lawful. It simply makes use of ideas taken from an author's previous works. Such ideas are freely available. Copyright protects a creation of form but not a type of work. The parodist's activities will in no event meet with an obstacle derived from the literary property of the parodied author.

However, parody may adopt a different approach. Here, it is a specific work of an author that is taken as his target by the parodist and that work is perfectly recognizable in the finished parody.⁵ For example, in a case heard by French courts some time ago already, the parody concerned the well-known opera *Carmen*. The parodist had concocted a comical version of this tragedy. He had made use of part of the music composed by Bizet and the words he had added told the story of a man whose aversion to bovines had driven him away from his profession as toreador.⁶ In this hypothesis and from a purely legal point of view, the parody represented an adaptation of the opera. Since it concerned a work protected by copyright, the authorization of the opera's author would have been necessary. Nevertheless, it was held to have been lawfully produced, despite the lack of such consent, since the Court accepted its quality as a parody.

(b) However, for a parody to exist within the meaning of literary property, it is not sufficient for the second work to *suggest* that it is a usual production of an author or a specific work of that author.

³ See Berenboom, "La parodie," *Revue de droit intellectuel*, March-April 1984, p. 76.

⁴ This would seem to be the case when the French Supreme Court of Appeal speaks of *pastiche*, see footnote 1 above.

⁵ In the above-mentioned decision of January 12, 1988, the Supreme Court of Appeal went so far as to say that a parody, which it contrasted with a *pastiche*, must "enable the parodied work to be identified at once."

⁶ Trib. com. Seine, June 26, 1934, *Gazette du Palais*, 1934 2 594.

It is essential that the work *may not be confused* with the usual production of the parodied author nor with one of his specific works. In order to provoke laughter a fairly strong accent must be placed on the characteristics of the previous work to ensure that the public immediately realizes that it is faced not with a new work by the same author but with the parody of such a work. To avoid misleading the public, the parodist may also make use of the effects of contrast. For example, a character from the work of a previous author may find himself in a situation, in a parody, in which his creator had never before placed him in a past work nor indeed would have ever thought of placing him in a future work in view of the extreme unlikelihood of meeting him in the surroundings in which he has been placed by the parodist.⁷

In this way, although the public recognizes the previous work from which the parodist has taken his inspiration, it is also fully aware that it is not the same work and that the two works are not by the same author.

From what has been said above, we may deduce that a parodist may only be allowed to borrow in part from a previous work.⁸ In opposing this point of view, Mr. Schmidt⁹ cited the case of a "chansonnier" who sings new words to the entire music of a song written by someone else. Despite the extent of the borrowing, this is still a parody.

In fact, all depends on what is understood by *complete reproduction*. In the view of the author, complete reproduction of a song is only involved if *both* the music *and* the words are utilized. Where the *music alone* is adopted and is accompanied by new words, this no longer constitutes a full reproduction. I am quite happy to accept that chansonniers are parodists. However, this is only, in my view, because they do no more than reproduce in part the song that is parodied. This view was confirmed by the French courts in a recent case concerning the popular imitator, now deceased, Thierry Le Luron who had taken the music of the well-known song by Charles Trenet *Douce France* and had written a new version with the title *Douces Transes* in which he related the unsuccessful efforts undertaken by Trenet to be elected to the *Académie française*. The publisher (and not the composer) instituted infringement proceedings against Thierry Le Luron who, in his defense, pleaded parody.¹⁰

⁷ See Edelman, *Le personnage et son double*, D. 1980, Chr. p. 225.

⁸ See J.C.P. 1971, II, 16646.

⁹ See *Revue internationale du droit d'auteur* (RIDA), July 1975, p. 94.

¹⁰ See Paris, October 15, 1985, RIDA No. 129, July 1986, p. 152 and comments by Colombe D.S. 1986, *Informations rapides*, p. 185, and on the appeal, Civ. 1 January 11, 1988, *Informations rapides*, p. 31.

A further problem arises in respect of the material element of parody. Since parody is only lawful where there exists no risk of it being confused with the parodied work does this not necessarily mean that it must represent a work of a different type? In other words, although one may well accept that a tragedy could be the subject of a comical parody, may one conceive of a comic work that is parodied in a secondary work which itself is comical? Does the fact that both the parody and the parodied work belong to the same type not automatically involve a risk of confusion? It is true that such risk is greater than when the two works belong to different categories. This is not inevitable, however, since even in such cases the parodist has means at his command to make his work fundamentally different from that of his predecessor. This is what happens, for instance, where the parody consists in taking a well-known figure with certain elements of character given to him by his creator which are then carefully removed to be replaced by diametrically opposed characteristics. It may then be claimed that the lawfulness of the parody derives from the fact that the character has been "inverted." For instance, in the initial work the hero is a person of courage and sociability whom the parodist transforms into a scowling coward. The physical appearance and name, basically unchanged, of the character, will enable the public to recognize him in the secondary work, but his unexpected behavior will show the public that the work is a parody.¹¹

B. The Moral Element of Parody

A parody is simply intended to provoke laughter. The parodist may not use this effect to cause harm to the author of the parodied work. Two solutions therefore appear *a contrario*. The first is that the so-called parodist would be committing an offense if, instead of attempting to amuse the public at the cost of someone else, he was seeking to cause confusion between his work and that of the original author in order to attract the latter's habitual public. In such case, he cannot claim to be a parodist. He must simply be regarded as an infringer.¹²

A second solution also derives from the fact that, in order to be lawful, a parody must aim at producing a comic effect. Indeed, it loses its immunity if its author makes allusions in his parody that may damage the honor or reputation of the person thus

parodied. The parody is then no longer "in compliance with the rules of the art."¹³ In the English-speaking countries, one would say that such use made of the work of someone else is no longer "fair." The author of the initial work is justified in protesting against such practice. However, it would seem that in some cases his action must rely not on a violation of his copyright, but in fact on infringement of his personal rights.¹⁴ Does this mean that, where a parody is lawful, it completely disarms the copyright of the parodied author? This question causes us to reflect on the legal situation as regards parody.

II. The Situation of Lawful Parody

Let us assume that we are faced with a lawful parody. Where it is original, the parodist may claim copyright protection for that work and here I see no particular problem. However, it is much more problematic to determine what may be the situation of the *author of the parodied work* where such work is still protected by literary property at the time the parody is made. Such a case raises a two-fold question. Firstly, whether the author of the parodied work may rely on his economic rights (A). Secondly, does he have the possibility of asserting his moral rights (B).

A. In the field of *economic rights*, the situation would seem clear since the very principle of the theory of parody is that the parodist may indulge in his art without need to obtain authorization from the author of the parodied work. It was feared that, if such authorization had to be obtained, it would be refused by an all too conceited author.

Consequently, it seems preferable to state that no authorization was necessary and that there is, in this respect, an exception to the author's monopoly to exploit the work.

In respect of a lawful parody, therefore, the author of the parodied work cannot complain that it has been made without his consent. Logically, therefore, he should not be able to claim remuneration in respect of that parody made without his knowledge.

Nevertheless, it has been maintained that in such cases the author of a parodied work was entitled to a royalty. Mr. Schmidt has written on this subject¹⁵:

Let us suggest acceptance that once the moral condition, the will to provoke laughter that constitutes the stum-

¹¹ See Trib. gr. inst. Paris 13, January 1977, RIDA, April 1977, p. 107 and Paris, February 14, 1980, D. 1981, *Informations rapides*, p. 6; note by Colombet.

¹² See Trib. gr. inst. Paris, January 9, 1970, J.C.P. 1970, II, 16645, together with my note.

¹³ Article 41(4) of the 1957 French Law on Intellectual Property.

¹⁴ See Colombet, *op. cit.*, *loc. cit.*

¹⁵ RIDA, July 1975, p. 94.

bling-block of parody, has been fulfilled, the legal authorization covers the parody, whatever the extent of borrowings from the antecedent work.

However, from the economic standpoint, the parodist and the original author ought to conclude an agreement to share the receipts from the parody, exactly as in the case of adaptations: failing any agreement out of court, the tribunals would arbitrate what proceeds from the derived work should go to each.¹⁶

It is difficult to go along with this point of view. I have already mentioned my feelings (see I.B above) as regards the possible extent of borrowing from the preceding work if a parody is to be lawful. As long as this condition is satisfied, the parodist is currently free to employ parody gratuitously. Should this situation be changed? If such were intended, it is hard to conceive a reform consisting in stipulating that the parody would henceforth be subject to the exclusive right of the author of the parodied work. The likelihood of the original author refusing the risk of being laughed at would be too great. Obviously, from a legal point of view, nothing prevents the legislator from introducing a system of non-voluntary licensing for parody under which the parodist would maintain his freedom to make parodies, but would then be required to pay compensation to the author of the parodied work as a counterpart.

However, apart from the fact that it would surely not be an easy task to settle the amount of remuneration to be paid, one may also well ask whether such a non-voluntary license would be really appropriate. Obviously, as a justification, it is claimed that parodies made for commercial reasons,¹⁷ may constitute a considerable source of revenue for the parodist. Since this source is in fact, more or less, the parodied work whose celebrity is exploited by the parodist, it has been claimed that it would be equitable for the author of the parodied work to share in such revenue. The fact of subjecting parody to a system of non-voluntary licensing would nevertheless be likely to restrain its exercise to some extent in view of the financial burden placed on the parodist. Since the institution of parody constitutes one form of the freedom to criticize, would it not be better to leave it untrammeled as is presently the case?

B. Does the fact that the author of the parodied work is without any monetary right in the case of a parody mean that he is also deprived of his moral rights? At first view, one could be tempted to say

that the question is an unnecessary one since a parodied author who protested against parody on the basis of his moral rights would doubtlessly be judged too susceptible by public opinion. It is nevertheless important to see whether an author who is displeased by the parody made of his work may invoke his moral rights.

From that point of view, it may be observed that a parody will of necessity distort the work on which it is based and that, on the other hand, since a parody will resemble the parodied work, there is an inherent risk that the public will attribute to the author of the parodied work the secondary work which has in fact been made by the parodist. Can the author of a parodied work invoke his right to respect in the first hypothesis or his right of authorship in the second? Such would not seem to be the case.

(a) To begin with, distortion of a parodied work by the parodist is inherent in the very nature of parody. The author of the parodied work cannot therefore rely on his *right to respect* in order to oppose the parody. His complaint would only be admissible where the parodist had attacked his own person in a way likely to damage his honor or reputation. However, in such case, the parody would no longer be lawful since it would not be "in compliance with the rules of the art." The author of the parodied work would then indeed be able to institute proceedings against the parodist. However, it would then involve a violation of personality rights rather than an infringement of the moral rights which he would advance.¹⁸

(b) Secondly, if an author passes off his work as that of one of his colleagues, the latter may indeed take action. It is nevertheless generally accepted that it is on the basis of his rights in his name and not on that of his *right of authorship* that he should institute proceedings. Moreover, if the public is genuinely mistaken in a given case as to the authorship of a parody it is because the author of the latter has not sufficiently differentiated it from the preceding work. It would therefore no longer constitute a lawful parody and the action of the parodied author would be justified on the grounds of infringement.

Finally, one may maintain that where a parody is lawful it deprives the author of the parodied work of both his moral rights and his economic rights.

¹⁶ See also, in agreement, Marina Ristich de Groote, "Characters in Intellectual Works. The French Legal Approach," RIDA, October 1986, No. 130, p. 63.

¹⁷ See Gerald Bigle, *Droits dérivés, licensing et character merchandising*.

¹⁸ See the above-cited decision of the French Supreme Court of Appeal on January 12, 1988.

It would therefore seem that parody is a subtle art. Although it certainly constitutes an important aspect of critical freedom and must, for that reason, be maintained, it is difficult to practice. Its aim must be to provoke mirth at the cost of the author, but can only do so by remaining so close to the parodied work that the parodist runs the continual

risk of an action for infringement where his parody does not succeed in amusing his contemporaries. This goes to prove the truth of Dorante's famous words in *La Critique de l'Ecole des femmes*: "It is indeed a strange undertaking to make honest people laugh."

(WIPO translation)

Correspondence

Letter from Norway

Birger Stuevold LASSEN*

1. The Background

1.1 The principal Norwegian Act in the field of copyright law is still the Act on copyright in literary, scientific or artistic works, of May 12, 1961 (Copyright Act 1961), which has not been subjected to important amendments.¹ The main rules of this Act correspond rather closely to those of the Danish and Swedish Copyright Acts, which have been reviewed in this journal by Torben Lund and Torwald Hesser.² The Act is supplemented by a special Act of 1955, which prolongs the term of protection of works by authors deceased before the end of 1955 from 50 to 56 years *post mortem auctoris*, in order to compensate for losses sustained during World War II.³

The Copyright Act 1961 does not protect photographs. Such protection is regulated in a separate Act, the Act on Rights in Photographs of June 17,

1960.⁴ Other neighboring rights, such as broadcasting organizations' rights in their broadcasts and the reproduction rights of phonogram producers are, however, regulated in the fifth chapter of the Copyright Act.

1.2 As far as performing artists are concerned, Norwegian legislation has established a two-track system. The performance of a literary or artistic work may not without the consent of the performer be recorded, filmed, broadcast or otherwise made available by technical means to a wider audience than the one before which he performs. Nor may recordings of his performance be rerecorded or otherwise reproduced without his consent until 25 years have elapsed from the year of the first recording. With regard to secondary use of the recordings or of broadcast performances—in broadcasts, restaurants, discotheques, supermarkets, etc.—the performing artist has, however, no individual rights at all. For such use payment is due to the Performers' Fund, according to the provisions of the Performers' Fund Act of 1956. This Act is based on collectivist principles and the Fund operates partly as a social security system, partly as a source of financing for "free groups," etc. However, the phonogram producers have a statutory claim to a certain part of the fees paid to the Fund.

Similar collectivist systems operate with regard to payment of a percentage of the purchase price when works of art are resold and with regard to compensation paid to authors for the public lending of library books. Instead of a *droit de suite* system with individual rights for the artist and his heirs, the Visual Arts Fund Act of 1948 established a system with a three percent tax to be paid into a Visual Arts Fund. The Fund's income is used mainly for the benefit of old artists. Compensation for the public lending of library books is paid directly out of the Treasury, but in other respects the system is similar. The library compensation was introduced in the Library Act of 1947 and is today,

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¹ An English translation was published in *Le Droit d'Auteur (Copyright)*, 1962, pp. 106 to 112. Later revisions have not been published in this review, apart from the short 1977 amendment, in *Copyright*, 1979, p. 305.

² See Torben Lund, "Lettre du Danemark," in *Le Droit d'Auteur*, 1961, pp. 341 to 345, and Torwald Hesser, "La nouvelle législation suédoise sur le droit d'auteur," *ibid.*, 1961, pp. 191 to 202. A broad and instructive review of the Swedish Act has been given also by Svante Bergström, "The New Swedish Copyright Legislation," in *EBU Review*, 1961, No. 68B, pp. 18 *et seq.* and No. 69B, pp. 64 *et seq.*

For a brief survey of the Norwegian Act, see Birger Stuevold Lassen, "Norwegian Copyright Law Revision," in *Bulletin of the Copyright Society of the USA*, 1961-62, No. 9, pp. 307 *et seq.* The provisions on the author's *droit d'accès* and his right to be notified in advance if circumstances necessitate the destruction of the original copy of his work, which are without parallel in the Danish and Swedish Acts, are discussed by Birger Stuevold Lassen, "Letter from Norway," in *Le Droit d'Auteur (Copyright)*, 1963, pp. 216 to 223.

³ A French translation of the Act on Prolongation was published in *Le Droit d'Auteur*, 1956, pp. 118 and 119. Some aspects of the Act are discussed by B.S. Lassen, "Lettre de Norvège," *ibid.*, 1961, pp. 76 to 82. The supplementary prolongations mentioned in B.S. Lassen's "Letter from Norway," (see footnote 2 above) were short-lived moratoriums which have long since lost interest.

⁴ An English translation of the Act was published in *Le Droit d'Auteur (Copyright)*, 1963, pp. 31 and 32.

in a somewhat modified form, regulated in the Library Compensation Act of 1987.⁵

1.3 An evaluation of the legislation mentioned under 1.2 above must be made against the right background, i.e. the society in which it is intended to function. With a small population, well-scattered in a sizable country, anxiety for the future of the national culture is natural and well-founded. The Norwegian language is not only the tool of Norwegian writers, it is also a barrier between them and non-Norwegian readers, and a very decisive factor in the calculations of Norwegian publishing houses. Music and pictorial arts, however, know no national bounds—in principle. In fact, though, it may be different. And as far as art is international, a small cultural society risks losing its greatest artists to the world outside, while the lesser, but nevertheless important artists, risk suffocation under the flow of imports.

This was the situation during the years right after World War II when the first of the collectivist acts was passed and it is not very different today. However, in latter years there has been an inclination to seek other ways, to stimulate and preserve national culture by means other than by systems more or less related to copyright legislation. There has been a clear tendency to aim more directly at the target. Considerably greater sums are paid from the Treasury and from other public sources, as direct economic support, to individual writers and other artists, to groups of artists and entire parts of the national population of artists, and to cultural activities involving the employment of artists. The artists themselves have demanded remuneration for the work accomplished rather than public support, a fact which has entailed increased appropriations to pay for work which artists have so far done free of charge and has engendered more active efforts to create new jobs and commissions for artists. There has, on the whole, been a clear tendency to seek solutions to the cultural problems, the employment problems and the social problems of artists in a perspective of cultural policy, employment policy and social security policy.

Seen from an economic point of view, such solutions may function as supplements—some of which are essential—to the legal protection under copyright law. To some they may even appear as appro-

priate alternatives to such protection. But of course, where foreign authors or performers are concerned, such solutions offer neither supplements nor alternatives to Norwegian copyright law protection. It is essential, therefore, to maintain the high level of protection of the Norwegian Copyright Act and ensure that the measures of cultural, employment and social security policies remain supplements only, and never become alternatives, to a solid copyright protection.

1.4 The most important of these measures are those granting direct economic support to writers, composers and other artists. Originally such support was granted in the form of artists' salaries. This was a permanent annual salary which clearly bore the mark of an honorary salary and was granted to particularly prominent artists only—Henrik Ibsen from 1866 and Edvard Grieg from 1874—to mention two of the very first recipients of such payment. Travel grants also came into use quite early. It has probably always been true that one of the most important means of making people stay in their own country is to give them the opportunity to get away from it now and then.

In 1963, the system of artists' salaries was replaced by a system of three-year scholarships and permanent scholarships to older artists of merit. The latter grants were rather like pensions and the economic circumstances of the recipient probably carried at least as much weight as his artistic merits when the money was allotted.

During the 1970s, the system was revised once again and a new system based on the concept of guaranteed minimum income (*garanti-inntekt*) was introduced in 1977. The guaranteed minimum income may be granted to Norwegian⁶ creative and performing artists whose artistic activity over some years has been of high quality. Even though the system has been designed primarily for the benefit of artists who have no permanent income of an appreciable size, the grants are to be made exclusively on the basis of artistic considerations. The artist's own income is deducted according to special rules, intended to stimulate the artist's efforts to provide his own income. Therefore, there are a number of holders of guaranteed minimum income who for several years have not cashed any part of the granted guaranteed income—and maybe never will. But the granted guaranteed minimum income remains valid, functioning as a safety net in case

⁵ The collectivist systems have been discussed by B.S. Lassen, "Lettre de Norvège," (see footnote 3 above). A broader discussion in a perspective of principles, by B.S. Lassen, is found in "Collectivism and Individual Rights in Norwegian Copyright Law," *Scandinavian Studies in Law*, VII, 1963, pp. 79 *et seq.* This discussion is pursued further by Seve Ljungman, "The function of Copyright in the Present-Day Society," in *Revue internationale du droit d'auteur* (RIDA), LXXXVIII, 1976, pp. 51 *et seq.*

⁶ "Norwegian" does not necessarily mean a Norwegian citizen. The guaranteed minimum income may also be—and has been—awarded to foreign artists who have taken up residence in this country and work here under such conditions that, culturally, it is natural to reckon them among Norwegian artists.

the holder's own income should fail for a year or two. The guaranteed minimum income is withdrawn if the holder ceases to be a working artist, otherwise it remains in force until he receives his old age pension. It is linked to the State wage scale and the amount for 1987 is 90,863 Norwegian krone (NKR). In 1987, the system comprised more than 450 artists of all categories.

In addition to the guaranteed minimum incomes, the State also grants three-year scholarships, travel grants, *vikarstipend* ("substitute grants," designed to provide an artist employed in a non-artistic occupation with the opportunity to devote himself entirely to his art for a shorter period), establishing grants (a contribution to the setting-up of a workshop or for the purchase of an instrument), materials grants (contributions to pictorial artists and craftsmen to enable them to buy colors, canvas, etc.), and permanent scholarships to older artists of merit.

The total amount of the State appropriations for guaranteed minimum incomes and artists' grants is quite considerable and the systems are of great importance to the standard of living of many artists—especially pictorial artists.

1.5 Another measure also of considerable significance to the economic situation of Norwegian writers and other artists is the establishment of the Norwegian Cultural Fund (*Norsk kulturfond*) in 1964. Originally, this Fund was financed by means of a purchase tax on the weekly press, but now the means are appropriated directly in the State budget. The primary goal is to support Norwegian literature, arts and culture. The support of Norwegian literature comes mainly from the so-called purchasing system, under which the Fund buys about 1,000 copies of every new Norwegian work of fiction. The copies are presented as gifts to Norwegian libraries. This system has been of invaluable significance when it comes to maintaining the diversity of new Norwegian fiction and has led to a flourishing—some would say also rather unintended—growth, especially in the case of Norwegian poetry. Inasmuch as the system guarantees that the publishers sell at least 1,000 copies, it has of course also helped to keep the price of these books down. The Norwegian Cultural Fund also contributes to a higher royalty to Norwegian authors of fiction. But not only Norwegian literature benefits from the Fund. The publication of translations of foreign literature of quality is, in many cases, made possible thanks only to direct contributions from the Fund. Contributions are also made to the visual arts, music, etc.

1.6 However, the most characteristic feature of Norwegian cultural policy today is the comprehensive

system of agreements which has been established during the last decade between the State and the artists' organizations. In 1978, an agreement was established on general rules concerning procedure of negotiations, mediation, etc., between the State and the artists' organizations, the so-called *Regelverksavtalen*. This gives the artists' organizations a right to negotiate similar to that of trade unions. The right to negotiate applies not only to questions of compensation for the use of works or performances in which the authors or performing artists have rights according to the law, but also to claims for compensation for such uses of works or performances which, according to the Copyright Act, can take place free of charge. Furthermore, it applies to the substance of rules and guidelines for State scholarships and the system of guaranteed minimum income.

The right to negotiate implies partly that the artists may demand that the State enter into negotiations with them and partly that, if the negotiations do not lead to an agreement, they may demand mediation by the Government Mediator according to the rules otherwise applying to labor disputes. However, neither party can claim an arbitration award in order to force an agreement or to stipulate a compensation amount. Disputed issues within the framework of concluded agreements can, however, be resolved by arbitration on the demand of one of the parties.

On the basis of this system of rules, a large number of agreements have been concluded concerning big and small problems. Examples are an agreement on regulations for the guaranteed minimum income system and agreements on compensation for library lending, on compensation for the performance of musical works in connection with church services and on compensation to pictorial artists and photographers when they make copies of their works available to State and State-supported exhibitions.

In one case, the right of negotiations is not only anchored in the *Regelverksavtalen*, but directly authorized by law. In its section 3, the Library Compensation Act lays down that the rate of compensation for library lending shall be fixed following negotiations with a joint organization, approved by the Ministry of Cultural and Scientific Affairs, of the Norwegian authors involved. If negotiation and mediation fail to produce a result, it is assumed that the rates of compensation will be fixed by the Parliament.

1.7 To many Norwegian authors, the importance of the systems mentioned here equals that of their rights under the Copyright Act. This is especially the case with pictorial artists and craftsmen, some of whom had been living under conditions bordering on poverty, and who for obvious reasons

have not been able to gain so much from their copyright as have successful writers and composers. The writers have exclusive rights of reproduction and the composers have exclusive rights of public performance. A corresponding position for the authors of visual arts would be an exclusive right of exhibition of their works which, however, the law denies them in most respects but in 1986 the authors of visual arts obtained a promise of a system of exhibition compensation from the State, paid collectively, to commence in 1988. It is very likely, however, that here an agreement will not be deemed to be sufficient (see below under 2.10).

2. Legislation

2.1 As already indicated, the Copyright Act 1961 has so far on the whole remained unchanged. Some provisions of minor importance have, however, been revised and a few new rules have been added.

Thus, in 1970, section 10 was amended in connection with the passing of the new Registered Designs Act of 1970, which abandoned the previous system under which the registration of a work of art as an industrial design to a large extent entailed loss of copyright protection for the work.

In 1974, a few minor amendments were made in order to harmonize the Act with the Paris text of the Berne Convention. The Paris text on substance has not, however, been acceded to by Norway, as the Government has wanted maximum clearance for the revision of the copyright legislation, which has now been under preparation for a decade (see below under 2.5).

Amendments in 1977 (see footnote 1 above) and 1979 concerned mere details.

In 1985, a new section 45a was added concerning the protection of broadcasts. However, these rules were virtually the same as provisions that had been given already in 1968, in regulations under section 45(4), which were now repealed.

At the same time a new section 20a was incorporated in order to simplify the procedure for undertaking lawful retransmission, primarily transmission by cable, of broadcasts. This provision is of a kind which in Scandinavia is called (collective) agreement license (or referred to as rules on extended collective agreement effect). Such rules combine most of the advantages of a compulsory license for the users with preservation and strengthening of the negotiating position of the authors' organizations. From a practical point of view, an agreement license is a compulsory license, with one important modification: it comes into force only when the user has concluded an agreement concern-

ing the kind of use in question with a representative Norwegian organization of holders of copyright in works of the type in question. This gives the Norwegian copyright holders' organization an extremely strong bargaining power as breach of the negotiations entails immediate suspension of the license, not only for the works belonging to the members, but for all protected works of the kind concerned. Non-members and non-Norwegian holders of rights are safeguarded by the fact that they will be entitled to the same remuneration as the strong Norwegian organizations obtain for their members.

The rules of section 20a are equally applicable to performances by performing artists which are parts of a broadcast.

The agreement license according to section 20a may only come into force on the basis of an agreement with a joint organization, approved by the Ministry of Cultural and Scientific Affairs, which represents the holders of authors' and performing artists' rights. The approved organization is *Norwaco*, which represents all categories of right holders concerned.

In contrast with what is laid down in section 20 on agreement licenses regarding the right of the Norwegian Broadcasting Corporation (*Norsk Riks-kringkasting*) to broadcast published works, the strong negotiating position of the holders of rights is subject to a time limit according to section 20a. If an agreement has not been concluded within six months of the initiation of negotiations, or if negotiations for an agreement are refused, either party may demand that permission and conditions for retransmission be stipulated by a special Board (*Nemnda til behandling av tvister vedrørende videreføring av kringkastingsprogram*). This Board may also permit or set conditions for retransmission of broadcasts if efforts to come to terms with the broadcasting organization in question fail, according to rules in section 45a(4).

2.2 The Act on Rights in Photographs has been amended along with the Copyright Act.

The term of protection for photographs, which had been 15 years *post mortem auctoris* since 1910, would not in all situations comply with the Paris text minimum of 25 years from the year of the making of the photograph. The provisions on the term of protection were, therefore, amended in 1974, but it was decided to limit the amendment to what was strictly necessary: the main rule is still 15 years *post mortem auctoris*, but with the addition "always provided that protection shall not cease until 25 years have elapsed after the year in which the photograph was made."

In 1985, an amendment to section 8 introduced a compulsory license for simultaneous and un-

changed retransmission of photographic pictures which lawfully form part of a television broadcast. Thus, for photographs, there is no parallel to the Copyright Act (section 20a) agreement license, but an ordinary compulsory license. However, section 20a of the Copyright Act applies to the procedure for compensation through negotiations with the joint organization and, if necessary, a decision by the special Board (see above under 2.1).

2.3 Among new Acts outside the field of the Copyright Act and the Act on Rights in Photographs, the Library Compensation Act of 1987 has already been mentioned (see above under 1.2).

More important is the Provisional Act on Photocopying, etc., of Protected Works for Educational Purposes, of June 8, 1979. As schools and other educational institutions gradually acquired modern photocopying equipment, illegal copying of protected works began to increase. It is probably no exaggeration to say that one was soon faced with unrestrained illegal photocopying of protected works, undertaken by the teachers and librarians at State and local educational institutions. In an effort to come to grips with the situation, the Act of 1979 introduced an agreement license (see above under 2.1) for photocopying in the educational sector.

For the use for educational purposes, the Act permits, without the consent of the author or the photographer, the making of photocopies of published works and photographs, provided an agreement exists with a representative organization of Norwegian authors in the field concerned or with a representative organization of Norwegian photographers, respectively. The agreement may contain provisions to the effect that the compensation shall not be distributed to the individual holders of rights, but be earmarked for collective purposes, including such uses as grants to authors and photographers, regardless of the use made of their works. On account of this rule, the Act was originally made applicable only to works and photographs of Norwegian origin. This scope of application was sufficient to solve the photocopying problems in schools, but was obviously insufficient for the universities and academies.

After the establishment of cooperation between the Reprographic Reproduction Rights Organization of Norway (Kopinor)—the umbrella body of organizations of copyright holders—and its sister organizations in certain other countries, the scope of the Act on Photocopying was extended. From 1985 the provisions of the Act apply also to works and photographs that are entitled to protection under the Berne Convention or the Universal Copyright Convention. The regulations pertaining to the scope of application also grant foreign right holders the right to claim individual compensation from

the organization which through an agreement under the Act has received the collective compensation. Then, in 1986, Kopinor concluded an agreement with the State on photocopying within all Norwegian educational institutions at university or academy level which are run by or receive support from the State or municipalities. In this agreement Kopinor undertakes to cover claims from individual Norwegian and foreign holders of rights not comprised by Kopinor's powers.

The compatibility of the Act on Photocopying with Norway's obligations under the international conventions may be a moot point. The rationale appears to be that it seems neither feasible to put a permanent end to the photocopying activities, nor to administer the rights and distribute compensation on an individual basis; hence it is preferable through collective agreements to gain some control over the activities and obtain compensation, albeit it is allotted to collective uses. What is clear, however, is that the Act—as a consequence of the agreements on photocopying in schools and universities—has resulted in substantial annual transfers from the State to the authors as compensation for activities that had been going on for years in flagrant breach of the law.

2.4 The copyright organizations affected had also hoped for legislation imposing levies on blank tapes, etc., as compensation for losses incurred, especially for composers, through private rerecording of records and tapes. Their hopes failed inasmuch as they got the levy, but not the money. The levy, which was introduced in 1982, goes into the Treasury. Part of the yield, however, goes into a Fund (*Norsk kassettavgiftsfond*), which is administered in consultation with the composers' and artists' organizations.

2.5 The fact that no essential changes have taken place as regards the Copyright Act and the Act on Rights in Photographs is not due to lack of efforts. A copyright law commission—*Opphavsrattslovutvalget*—chaired by Supreme Court Justice Vera Holmøy was set up in 1977 to report on a revision of the law of copyright and rights in photographs. The commission is expected to finish its work sometime in 1988.

So far, the *Opphavsrattslovutvalget* has submitted no less than five reports.

2.6 The first one (NOU⁷ 1983:35) concentrated on reproduction for private use, videogram issues, the rules on the protection of performing artists and the rules on penalties, etc., for infringement.

⁷ *Norges offentlige utredninger* [Norwegian Official Reports].

This report contains rather extensive and valuable discussions on a number of issues. It is, therefore, a very useful source of information about Norwegian copyright law. However, the report does not submit particularly significant proposals for amendments. Apart from a proposal to prolong the term of protection for performing artists from 25 to 50 years and a proposal to raise the maximum penalty for infringement of copyright and rights in photographs from three months imprisonment to three years imprisonment, the proposals aimed rather at an adjustment of rules in order to meet new technology or a changed media world. In some cases it was also a question of making good original defects, such as the lack of a possibility of awarding damages for infringement of rights in photographs in cases where there has been no pecuniary loss.

The report was, on the whole, well received. However, its views with regard to the rights of performing artists met with heavy opposition—quite surprising, considering the views expressed during the hearings. These indicated a reasonable degree of contentment with the fund system in the field of secondary use (see above under 1.2). But now the report was severely criticized because it proposed to retain the system, with only minor adjustments.

Confronted with this situation, the Ministry of Cultural and Scientific Affairs appointed Professor Birger Stuevold Lassen [the author of this "Letter"] to report again, on a free basis, on the question of individual rights or a collective system. The report (NOU 1985:30) presents bills for legislation on payment for secondary use in four alternative versions, one with individual rights only, one with a purely collective system and two based on mixed systems. The two mixed system bills establish individual rights in such cases where individual redistribution is feasible in practice (that means, on the whole, individual rights as far as broadcasting is concerned), whereas non-redistributable fees go into the Performers' Fund. The report concludes that, under specified circumstances, one of the two mixed system bills would probably be preferable. When it comes to choosing between these two, the report states that the choice must probably depend more on opinions on cultural policy than on a professionally based evaluation, and desists from advising the Ministry.

2.7 The second report from the *Opphavsrettslovutvalget* (NOU 1985:6) was on copyright in works made by employees—an issue to which the Commission had been requested to give priority. The report gives an exposition of the present Norwegian law in this field, which is unwritten, in general and in particular with regard to works of the employees of the Norwegian Broadcasting Corporation. The report's conclusion is to propose no legis-

lation on the subject. The Commission's view is that general rules on these questions would have to be very general indeed and rather vague in their wording, and would, therefore, hardly offer clearer or more predictable answers than the existing, unwritten law. The special problems concerning the works of the Norwegian Broadcasting Corporation employees would probably, according to the Commission, be best resolved through agreements between the Corporation and the employees' unions.

2.8 The third report (NOU 1986:18) dealt with copyright and electronic data processing. The most significant part of this report is a proposal for a new section 43a, instituting protection for the design of integrated circuits, with a term of protection of 10 years from the year when the design was first marketed.

2.9 The fourth report (NOU 1987:16) deals with rights in photographs and is probably the most radical of the *Opphavsrettslovutvalget's* reports.

It proposes to abandon the more than 100-year old Norwegian principle of denying photographs protection under the Copyright Act. According to the proposal, photographs which result from an original and creative effort are to be protected under the Copyright Act as works of art. The *Opphavsrettslovutvalget* presupposes that relatively few photographs can be said to result from such efforts. That might, of course, turn out to be a valid prediction, but there seems to be room for grave doubts on that matter.

Another important amendment proposed concerns the term of protection. The Commission proposes a term of 50 years after the year of the making of the photograph. The (relatively few?) photographs to be protected as works of art, however, will have a term of protection of 50 years *post mortem auctoris*. If both proposals are adopted, there will probably be much doubt and maybe also a number of disputes about photographs which are still protected if they can be said to result from an original and creative effort, but are in the public domain if they are merely good photographs.

The report also discusses the question whether protection of photographs should still be regulated in a separate act or governed by provisions to be entered in the Copyright Act's Chapter 5 on neighboring rights. The *Opphavsrettslovutvalget* recommends a separate act, but has also drafted an alternative bill with provisions to be incorporated in the Copyright Act.

2.10 The fifth report from the *Opphavsrettslovutvalget* (NOU 1987:28), submitted in November 1987, is concerned with works of pictorial art and works of architecture.

A principal feature in this report is a proposal for a separate act on compensation from the State for public exhibition of copies of works of art, applied art and photography⁸ not owned by the artist himself.⁹ Apart from the fact that it concerns works of art, the proposed act offers few points of resemblance with copyright law and should be viewed in the perspective of cultural policy. Compensation is to be granted in the form of annual appropriations in the Budget, without any bearing on such circumstances as for instance whether the exhibited works are still protected or in the public domain. The compensation shall not be paid to the individual artists whose works are in fact exhibited or to their heirs, but shall be shared out to funds administered by the artists' organizations. The act shall apply only to Norwegian works—the significance of this restriction is somewhat diffuse, but there seems to be an idea that the copies compensated for shall be counted before the sum to be paid is fixed. The report proposes a statutory right of negotiation for the artists' organizations, mainly on the same lines as in the Library Compensation Act of 1987 (see above under 1.6), but goes one step further: it is proposed that either party should have the right to demand stipulation of the compensation by arbitration, should negotiations and mediation fail to produce results.

The report also discusses the question of introducing a *droit de suite* system in Norway, but concludes that the existing system of a tax to be paid to the Visual Arts' Fund (see above under 1.2) has been a success and should be maintained. This means that there will not be room for a *droit de suite*.

Amendment is proposed of the rules on the author's *droit d'accès*, which was an innovation brought by the Copyright Act 1961.¹⁰ After the death of the author, it is proposed, his heirs shall be permitted to file claims for access to copies of his works and the Ministry of Cultural and Scientific Affairs shall have the power to take action to provide access for a third party, if this is considered to be in the public interest. A simplification is proposed for the procedure for filing claims for access.

⁸ At this point, the bill must be read against the background of the proposal in NOU 1987:16 (see above under 2.9) that some photographs are to be protected as works of art. The new report suggests, however, that photographs resulting from original and creative efforts shall be included in the exhibition compensation arrangement, even if the proposal to make them works of art is turned down.

⁹ Compensation for the lending of the artist's own copies of his works for certain public exhibitions is paid according to rates set in agreement concluded under the *Regelverksavtalen* (see above under 1.6).

¹⁰ See above under 1.1 and footnote 2.

As regards works of architecture, the report finds no need for amendments.

2.11 On the whole, the proposals presented by the *Opphavsrettslorutvalget* have not been very controversial. It is expected that they will, by and large, be reflected in the parliamentary bill which will probably be submitted in 1988.

3. Court Decisions

3.1 Judicial decisions in the field of copyright law are few. This does not mean that contested issues do not arise in this field. The reason is probably rather that the disputes are very often about matters of trifling economic importance. The parties, therefore, see no advantage in taking the issue to court, but seek other ways of resolving the conflict—for instance by conciliation.

3.2 However, the insignificant value of the direct object of the dispute does not always keep the parties from taking the matter to court. In 1985, a case came before the Supreme Court where the plaintiff claimed the sum of eight kroner and 50 øre (i.e. a little less than two Swiss francs). The claim was contested by the defendant who was unwilling to pay anything at all and declared that under no circumstances should the Supreme Court award the plaintiff more than six kroner and 50 øre. A unanimous Supreme Court held for the plaintiff.¹¹

The case was about a claim for royalties on 10 records, produced in the United States of America under a so-called "Harry Fox license" and imported into Norway. The question was whether such import could be undertaken without the consent of the copyright holder and payment of royalties to him, or whether the import was in contravention of section 54(2) of the Copyright Act 1961, which penalizes import into Norway of copies of a work for general distribution, if the copies in question could not have been lawfully produced in Norway. It was evident that, according to Norwegian law, production of the records would have required the consent of the copyright holder. The question was then whether the Harry Fox license could be considered as such consent, or whether it should be considered an arrangement governed by the compulsory license rules of the United States copyright legislation. As Norway has no parallel to the United States' compulsory license for the production of records, the latter alternative would mean that the records could not have been lawfully produced in Norway.

The Supreme Court pointed out that, when deciding this question, a concrete assessment of the

¹¹ *Norsk Retstidende*, 1985, p. 883.

character of the license had to be undertaken. The Court could not join in the opinion of the defendant that, taking into account the function and the wording of Harry Fox licenses in general, they must be regarded as voluntary agreements. It attached considerable weight to the fact that the conduct of the parties had as its background the provisions on compulsory licenses in the United States copyright legislation. According to these provisions, the Harry Fox Agency Inc., as representative of the holders of copyrights, was not in a position to prevent the producers of records from obtaining a compulsory license. Consequently, the statutory rates of payment for compulsory licenses would in practice constitute the maximum amount of compensation attainable for the copyright holder. True, the compulsory license provisions did not demand that the copyright holder should expressly admit that he agreed that the statutory conditions for a compulsory license were met. This had, however, become usual in the case of Harry Fox licenses and the Court considered this usage a rational and businesslike procedure. The fact that this procedure led to a wording of the licenses which made them resemble contracts, could not imply that they lost their character of compulsory licenses. In the licenses concerning the 10 records in question, the only deviations from the statutory regulations concerned a detail in the system of reporting and payment and an exemption from the duty to give notice of intention to obtain a compulsory license. The Court characterized these deviations as small, and found that, when assessed in conjunction with the license in its entirety, they could not result in the license losing its character of compulsory license. The import into Norway was, therefore, illegal and consequently, so was the sale of the records in Norway.

The defendant did not contest that the standard Norwegian royalty for the 10 records amounted to NKR 8.50. He maintained, however, that deduction must be made by NKR 2.- which corresponded to the sum paid for the Harry Fox license in the United States. However, the Supreme Court found that there was no evidence that the copyright holder had actually received his two kroner for the Harry Fox license, and accordingly gave judgment for the entire amount of NKR 8.50. The defendant also had to pay the plaintiff's costs, amounting to quite a different figure.

3.3 The distinction between private and public performance was discussed in a decision by the Board for disputes regarding communication to the public of radio and television broadcasts (see above under 2.1). The case concerned transmissions of Swedish television broadcasts by means of community antennas and cable to housing associations and

had been brought against, *inter alia*, two housing associations with 28 and 36 connected dwellings, respectively.

The Board considered it obvious that the distinction could not be made by stipulating a fixed number of households as a limit, above which transmission always implied communication to the public.

The Board pointed out that a housing association with 35 dwellings would have about 100-150 "inhabitants." To this should be added a number of guests, etc., so that the total number of potential viewers might exceed 150. One must also take into consideration that the use might be very extensive. Two Swedish television programs were transmitted, each for six to seven hours a day. The Board was, therefore, of the opinion that in the event of transmission by cable to a housing association of 35 dwellings or more, there would be a very strong presumption that this constituted communication to the public. Only very special circumstances in a particular case might justify a different conclusion.

On the other hand, in a housing association of 15 dwellings or less, the normal number of "inhabitants" would not exceed 50 or 60. In such cases, the Board believed, a sense of community was bound to develop, greatly surpassing that which necessarily follows from the form of habitation as such. Even if social companionship or ties of friendship in the literal sense did not come to include all the inhabitants, it must be assumed that there would be extensive social contact. Such contact would especially occur in connection with, for instance, care of the children, various kinds of mutual assistance, etc. In such circumstances it would be natural to look upon the dwellers as a private circle, much in the same way as one looks upon a school class. There probably might exist housing associations of only 15 dwellings or less where at any rate some of the dwellers "kept aloof," so that the picture would be different from that outlined by the Board. But the Board believed that there was a strong presumption that the Board's picture was the correct one. Therefore, quite extraordinary circumstances would have to be demonstrated if a housing association of only 15 households or less were to be considered as something else than a private circle.

In cases of between 15 and 35 connected dwellings, one would have a grey zone, where the number of connected households alone could not form the basis for conclusions as to whether a transmission constituted communication to the public or not. With a few more than 15 or a few less than 35, it might still be said that the one or the other alternative was more likely, but there would be a rather broad middle zone where the number of connected dwellings would not even give an indication as to

the answer. In such cases one would have to make a closer study of the conditions in the housing association in question: How "close" was the social life, what kinds of contact did the dwellers have in their everyday life? What kind of community spirit existed, what other forms of contact were there that might create such ties of friendship or companionship as to make the dwellers constitute a private circle?¹²

Against the background of this decision and an attached arbitral decision, the two main organizations for the holders of copyrights and neighboring rights and the housing associations, *Norwaco* (see above under 2.1) and *Norske Boligbyggelags Landsforbund* (NBBL), entered into an agreement stating that the cable networks of housing associations shall be considered to undertake communication to the public provided there are more than 25 connected households.

3.4 The question of publishers' protection for the typeface of a book was one of the issues in an arbitration case on the distribution of compensation for photocopying between the different organizations of holders of rights. The arbitration court stated that a publishing firm wanting to publish a work which was in the public domain could not do so by producing a photographic reprint of an edition which another publisher had produced and still had in stock. In the opinion of the arbitration court, such conduct must clearly be described as an act of unfair competition in contravention of section 1 of the Act of June 16, 1972. According to the circumstances, one might arrive at the same conclusion also in a case where the product copied was no longer kept in stock.

The arbitration court finds that this must apply also where the competitive use of the photographic reprint is not quite so direct. An example is where the publishing firm A issues a comprehensive anthology of works in the public domain, meant for use in universities and colleges, but which contains some works that will be useful also to secondary schools. However, A has not made any efforts to market the anthology in the schools. Publisher B discovers this niche and offers to the schools special prints of these selections, collected or separately. Normally, B must be allowed to do so, provided the works are set up in new type for printing. However, in the opinion of the arbitration court, it would also be contrary to the concept of fair competition if B were to produce his copies by mere photographing of the typeface set up and paid for by A, and in this way cut down his printing costs. Such production would be a slavish copy involving exploitation of A's work and investments, and the publishing houses are in a general situation of competition. The decisive point, therefore, cannot be that B's product aims at a sector of the market

which A does not (yet) exploit. The solution will be even more obvious if it can be proved that B's activities have a negative influence on the sale of A's edition.¹³

3.5 One of the matters reported on in my 1963 "Letter" was the ban on the sale of posthumous prints of one of Nikolai Astrup's wood engravings.¹⁴ The ban was founded on the grounds that Astrup's wood engraving was in color while the reprints were in black and white, taken only from the "key-plate." The new prints appeared therefore, it was held, as mere fragments of the original work and could not correctly express the artist's intentions. The use of only one of the set of plates caused an alteration of the composition of the work as well as a change of color. As I mentioned in my report, there had, however, been some doubts as to whether Astrup himself had not made some black and white prints of the work in question.

After new information had come to light, the case was again submitted to the permanent Council of Experts established by section 53 of the Copyright Act 1961. The Council now found that there had probably never existed more than one plate of the wood engraving in question, and that the colored prints had been made directly by painting on the plate and/or painting on black and white prints. Furthermore, the Council found that in 1928, in the spring, following Astrup's death, there existed a black and white print of the engraving. The Council concluded that the ban on the posthumous black and white prints on two points were based on a false factual basis. A further study of the prints also revealed marked discrepancies between the colored version and the black and white version, something which must be the result of deliberate actions by Astrup himself. The Council deemed it most likely that Astrup had regarded the black and white wood engraving as a separate work which was not identical to the colored engraving.

Under these circumstances the ban was clearly unfounded, and was lifted.¹⁵

3.6 In the field of photography, the most important court decisions have been concerned with protection of privacy, i.e. the rules on publication of photographs of living persons without the consent of the person portrayed.

Section 15 of the Act on Rights in Photographs of 1960¹⁶ states:

¹³ Arbitral decision by B.S. Lassen, Harald Bjelke and Erik Samuelsen of January 14, 1985, in the case of Kopinor (see above under 2.3) on behalf of i.a. *Den norske Forleggerforening* v. i.a. *Den norske Forfatterforening*, published by Kopinor, Oslo, 1985.

¹⁴ In *Le Droit d'Auteur (Copyright)*, 1963, pp. 216 to 223 (mention of the Astrup case is on pp. 221 et seq.).

¹⁵ The decision is reported in *NIR Nordiskt Immateriellt Rättsskydd*, 1983, pp. 150 et seq.

¹⁶ See footnote 4 above.

¹² Decision by *Nemnda til behandling av tvister redrorende videresending av kringkastingsprogram* of March 31, 1987, in the case of *Norwaco et al. v. Borettslaget Østre Lier et al.*, by A/L *Norske Boligbyggelags Landsforbund* (NBBL).

Even when, under this Act, the copyright in portrait photographs is held by a third party, such a photograph may not be reproduced, exhibited publicly or made accessible to the public in any other way without the consent of the person portrayed. The photographer may however exhibit the photograph for purposes of advertisement in connection with his business, unless the person portrayed has prohibited such exhibition.

The following photographs may be reproduced and publicly exhibited without the consent of the person portrayed:

- (1) pictures of current and general interest;
- (2) pictures in which the person portrayed is merely incidental to the other matter;
- (3) pictures of assemblies, open-air processions, or occasions and events of general interest.

Unlike the protection of the photographs, this protection of the persons portrayed is not extended to foreign citizens from countries which have adhered to the Berne Convention or the Universal Copyright Convention, but applies only to "the picture of a person being, or having been, either a Norwegian citizen or a resident in this country."¹⁷

Contravention of section 15 is punishable according to section 16 of the Act, also where the guilty party has only been negligent. Moreover, the duty of care may be rather strict, as is evidenced by a Supreme Court decision of 1983,¹⁸ where an advertising consultant was sentenced to a fine of NKR 500.

A freelance photographer associated with the newspaper *Morgenavisen* had taken a picture of a family enjoying the sunshine during their Easter holidays in the mountains. The family consented to the picture being used in the newspaper illustrating an article on "Easter in the Mountains and Holiday Pleasures." The advertising consultant later used the picture in an advertisement for a photographic laboratory concerning developing and copying of "Easter holiday pictures." He came into possession of a copy of the picture by asking a file keeper in *Morgenavisen* for a picture that he could use in such an advertisement. The advertising consultant asked the keeper of the files if it was okay for him to use the picture in the advertisement and the file keeper answered in the affirmative. No special questions were asked whether the persons portrayed had consented, nor did the file keeper say anything in particular about this.

The spokesman for the Supreme Court majority, Justice Vera Holmøy, stated *inter alia*:

I suppose the basic principle must be that portrayed persons may give a rather general consent in advance to such use

of a photograph as is mentioned in section 15, and that they may also authorize a third party to consent on their behalf. For those who engage in professional distribution of photographs, it will probably be of considerable practical significance to control both the right in the photograph and the right to consent on behalf of the persons portrayed. However, inherent in such advance consents or the right for somebody else to give the necessary consents, there may be some more or less comprehensive limitations. This may be practical, especially with regard to the use for advertising purposes.

It is, furthermore, my opinion that one should be careful in assuming that portrayed persons have given their consent in advance or have given somebody else the right to consent in accordance with section 15. Such assumptions will tend to undermine the protection of privacy under section 15. In this connection it should also be kept in mind that the persons who are being portrayed will often know nothing about their rights under section 15. Those who use photographs professionally must, on the other hand, be presumed to know about the rule in section 15, so that they can establish routines ensuring that consent is given.

I believe that anyone who intends to use a picture portraying a person for some definite purpose, has not shown such care as is demanded by section 16, together with section 15 of the Act on Rights in Photographs, by asking the holder of the right in the photograph a generally worded question, as to whether it is in order. The natural interpretation of an answer in the affirmative to such a question must be that it refers only to the right in the photograph. In my opinion, the assessment will be the same where such a question is put to a newspaper, unless the person asking has reason to believe that the newspaper has set up special routines to ensure that consent according to section 15 has been given. Accordingly, one cannot assume that newspapers in general have secured the consent of portrayed persons with regard to the photos in their files. There are no special circumstances in this case that should give the convicted person reason to believe that the persons portrayed had consented. In the case of a professional advertising consultant, special demands must be made on the degree of care to be shown, *inter alia* because many people do not want their portraits used in advertising...

Two of the five Supreme Court Justices found that the majority's demands on care were too strict and that the advertising consultant's conduct was defensible.

Another recent Supreme Court decision concerned section 15(1), about photographs of current and general public interest.¹⁹

In 1980, Mr. B had been sentenced to eight years imprisonment for crimes in connection with drugs. In April 1982, he started a hunger strike as a protest against the conditions of his imprisonment. At the beginning of June 1982, he appeared before the Oslo City Court to testify in another big drugs case. As he entered the courthouse, he covered his head with his jacket to avoid being photographed. A photographer from the newspaper *Verdens Gang* tried to take a picture of him by pushing his camera inside B's jacket. B's reaction was to kick at the photographer, and a fight started. On the same day, B was also photographed while standing in the courthouse backyard, outside the waiting cells. In

¹⁷ Royal Decree of April 10, 1964, as amended by Royal Decree of August 31, 1973, section 8(2). The rules of the Act on Rights in Photographs on protection of a person's own likeness are, however, supplemented by unwritten law on a general right of privacy, which, according to circumstances, may protect also a foreign citizen's own likeness.

¹⁸ *Norsk Retstidende*, 1983, p. 637.

¹⁹ Supreme Court decision of September 17, 1987, in case No. 103B/1987, *B. v. Verdens Gang*.

these pictures he appeared in full length with his face turned to the photographer and handcuffed. The pictures were taken through a toilet window in the courthouse.

An item in *Verdens Gang* on June 3, 1982, reported on the fight with the photographer. There were three photos of the fight, but in these B could not be recognized. However, the newspaper also printed two of the pictures taken of B in the backyard. One of these pictures was also used by *Verdens Gang* on September 23, 1983, in a report on an action in support of B among the prisoners of S district prison. The same picture, but now cut down so as to show only his face, was used in another feature of the prisoners' action the next day.

A unanimous Supreme Court found that *Verdens Gang* had violated B's right under section 15, as the exemption in section 15(1) was not applicable. The criterion of current interest involved a time limit: if a person in a certain situation or during a certain period of time had to put up with being portrayed, he might later be entitled to protection against the publicity involved in a further portrayal. Here not only the lapse of time would be of significance, but also the present situation of the person concerned. Moreover, the current and general public interest must also include an interest in the particular picture in question. Consequently, it must be assessed what story the picture told and how relevant this was to the current situation. Moreover, additional factors would have to be considered in the assessment to be undertaken, *inter alia* the strength of the arguments for publication, the means by which the picture had been obtained, the way in which it was used and the portrayed person's attitude to being depicted.

No doubt B was well-known after the coverage in the mass media in connection with his sentence, the security measures implemented to prevent his escape, and because of his hunger strike. Both because of his hunger strike and because of his testifying in a big drugs case, it was fair enough that his name should be singled out for publication.

The question whether it was also justified to publish a picture of him must depend on a concrete assessment. Being depicted during imprisonment might involve a heavy strain for prison inmates. Whatever the circumstances, *Verdens Gang* could not be justified in publishing the pictures taken in the backyard. They showed B handcuffed, and especially one of the pictures, which was taken rather close, gave an impression of B and his situation that was bound to affect the readers deeply.

It must also be taken into account that the photographs were taken in a clandestine way from a

window in the courthouse, and that B objected to being portrayed in the newspaper. According to the wording of section 15(1), these factors were not decisive, but they must nevertheless be included in the total assessment to be made.

Attention must also be paid to the way in which the photographs were actually used. The most offensive picture from the backyard was used together with three photographs taken during the fight on B's arrival at the courthouse. The heading read "Kicks at VG [Verdens Gang] photographer," and a description followed of B's violent reaction—but without anything being said about the provocative conduct of the photographer. One failed to see that the invoked public interest in information had been adequately served by the telling of the story in this way.

In the report of September 23, 1983, on the prisoners' action, *Verdens Gang* again used the most offensive picture from the courthouse backyard. Section 15(1) could not justify this use of the picture either. Again due account must be given to the story told by the picture, the way in which it had been obtained and B's objection to being depicted. Besides, the picture might give the impression that it showed B in a current situation.

The use of the picture the next day was of a somewhat different character, as it showed B's face only. Under the circumstances, the Supreme Court found it unnecessary to decide whether this use of the picture was in itself justifiable.

Verdicts by the Press Council (*Pressens Faglige Utvalg*) held against *Verdens Gang* on all the three incidents. This showed that in the opinion of the Press Council, there were no strong arguments for publication. This assessment also carried weight in the determination of the scope of section 15(1).

This decision is of interest in all the three incidents. This showed that in the opinion of the Press Council, there were no strong arguments for publication. This assessment also carried weight in the determination of the scope of section 15(1).

This decision is of interest also as regards the determination of damages to B. According to section 17 of the Act on Rights in Photographs, the injured party can, in the event of violation of the Act, demand as *minimum* damages "the net profit derived from the unlawful acts." This provision is in conformity with a corresponding provision in the Copyright Act 1961, section 55, which makes it clear, however, that the rule applies only to infringement of copyrights or neighboring rights, and not to violation of the rule in this Act's section 2(4) on protection of a person's own likeness. However, the Supreme Court found no basis for a corresponding restrictive construction of the clear word-

ing of section 17 of the Act on Rights in Photographs.²⁰

The Supreme Court passed lightly over the actual stipulation of the amount of the damages. It

²⁰ The Supreme Court's attitude on this point should perhaps be viewed taking into consideration that the Act on Rights in Photographs does not provide any possibility of awarding damages in cases where there has been no pecuniary loss. Amendments on this point have been proposed in NOU 1983:35 (see above under 2.6).

was pointed out that such use of photographs as *Verdens Gang* was guilty of had a sales-promoting effect and influenced the profits of the newspaper. This fact was considered to give sufficient grounds for acknowledging that B had a pecuniary claim under section 17. However, the amount could not be determined by any kind of business analysis; "it must therefore be fixed by assessment, and it should in conformity with the plea [of B] be set at 10,000 kroner."

Activities of Other Organizations

International Copyright Society (INTERGU)

XIth Congress

(Locarno, March 21 to 25, 1988)

The International Copyright Society (INTERGU) held its XIth Congress in Locarno from March 21 to 25, 1988.

The Congress was attended by nearly 100 participants from 35 countries. WIPO was represented by Mr. Mihály Ficsor, Director, Copyright Law Division.

The discussions were presided over by Professor Erich Schulze, President of INTERGU, and their general topic was "Copyright Without Frontiers" in the framework of which invited speakers reported about recent copyright developments in the various regions of the world. Invited speakers were—in the order of the presentation of their reports—Professor Otto-Friedrich Freiherr von Gamm (Federal Republic of Germany), Professor Zheng Cheng-si (China), Mr. Shimpei Matsuoka (Japan), Professor James Lahore (Australia), Professor Nébila Mezghani (Tunisia), Dr. György Boytha (Hungary), Mr. Jack Black (United Kingdom), Professor Dr. Gerhard Reischl (Federal Republic of Germany), Mrs. Dorothy Schrader (United States of America), Dr. Hilda Retondo (Argentina).

At the end of their deliberations, the participants adopted five resolutions. Resolutions II to IV cover copyright questions of particular countries, while resolutions I and V are of a more general nature.

Resolution I states that INTERGU

Recognizes the importance of concerted action of all organizations, institutions and individuals concerned with the protection of the rights of authors of works of intellectual property at a time of mounting pressures resulting from new forms of use of musical, literary and artistic works and technological innovations in the broadest sense of the word.

Urges governments of all countries signatories to the international copyright conventions to take steps to bring national legislations in harmony with technological developments and international copyright conventions in order to secure the need for adequate protection of works of intellectual property and guarantee fair compensation,

Reaffirms, on the one hand, its deep commitment to the principle of national treatment of all rights of authors of works of intellectual property as the only valid principle governing the proper protection and remuneration for the use of such works and, on the other hand, understands the recourse to reciprocity in cases where economical hardship may result from a strict application of the principle of national treatment,

Recommends that WIPO and all organizations and institutions entrusted with the administration of authors' rights join in the effort to achieve the same levels of protection accorded to works of intellectual property by national legislation and international treaties and agreements, thus ensuring that these keep pace with all new forms of use of such works by means hitherto known or yet to be discovered and developed.

Resolution V deals with the copyright situation in developing countries. According to it, INTERGU

Welcomes all activities whatsoever aimed at promoting cultural life in developing countries, arousing or strengthening appreciation for the rights and interests of authors of works of intellectual property and improving national copyright laws,

Invites all organizations, institutions and individuals concerned with the protection of authors' rights, in particular WIPO and Unesco, to make the cultural and copyright cause of the developing countries their own and to vigorously support the same in a suitable manner, for instance by offering training facilities and courses, by providing professorships at universities, by means of cultural agreements and cultural exchange programs, by assistance in arranging for use of works, etc.

Books and Articles

Book Review

III Congreso Internacional sobre la Protección de los Derechos Intelectuales (del Autor, el Artista y el Productor). One volume of 249 pages. WIPO, Biblioteca Nacional del Perú and Pontificia Universidad Católica del Perú, Lima, 1988.

This volume contains the Spanish texts of the lectures and statements presented at the Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers) which was held in Lima (Peru) in April 1988.

The lectures were: "WIPO and the International Conventions on Copyright and Neighboring Rights" by an official of WIPO; "Copyright and the Right to Culture" by Dr. Ricardo Antequera Parilli (Venezuela); "The Intellectual Work as a Product of the Mind, and Copyright" by Dr. Edmundo Pizarro Dávila (Peru); "Protection of Computer Programs and of Data Bases" by Dr. Carlos Alberto Villalba (Argentina); "Collection and Distribution of Remunerations" (two lectures, namely "Authors' Societies" by Sr. Martín Marizcurrena Oroño (Uruguay) and "International Relations" by Dr. Ulrich Uchtenhagen (Switzerland)); "Piracy of Writings and Reprography" by Dra. Delia Lipszyc (Argentina);

"Piracy of Phonograms" by Dr. Henry Jessen (Brazil); "Piracy of Videograms" by Dr. James Bartolomé (United States of America); "Emission, Reception and Distribution of Programme-Carrying Signals Through Satellites, and Cable Distribution" by Lic. Carlos Corrales (Costa Rica); and "Procedural Protection of Intellectual Property" (two lectures by Peruvian specialists, namely "Penal Aspects" by Dr. Guillermo Bracamonte Ortiz, and "Administrative Aspects" by Sr. Carlos Puntriano Figari).

In the book are also included five statements prepared for a roundtable discussion held during the Congress on "The Future of Copyright in Latin America," by Dr. Jean-Alexis Ziegler (France), Dr. Robert Abrahams (United Kingdom), Dr. Fernando Zapata López (Colombia), Lic. Gabriel Larrea Richerand (Mexico) and Dr. Juan Luis Avendaño (Peru).

The lectures and the statements provide a comprehensive overview of such copyright and neighboring rights questions which are of specific importance in Latin America. The lectures included in the book deal, however, also with topics which are of general interest and the book is, therefore, useful not only to readers in Latin America, but also to interested persons outside that region.

H.O.

Calendar of Meetings

WIPO Meetings

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

1988

June 27 to July 1 (Geneva)

Committee of Governmental Experts for the Synthesis of Principles Concerning the Copyright Protection of Various Categories of Works (convened jointly with Unesco)

The Committee will re-examine the principles of protection worked out for eight categories of works during the 1986-87 biennium (printed word, audiovisual works, phonograms, works of fine art, works of architecture, works of applied art, dramatic and choreographic works, musical works) and for photographic works in 1988.

Invitations: States members of WIPO, Unesco or the United Nations and, as observers, certain organizations.

September 12 to 19 (Geneva)

IPC (International Patent Classification) Committee of Experts (Seventeenth Session)

The Committee will adopt the final amendments, as well as the revised Guide, to the fourth edition of the International Patent Classification (IPC) and decide on the policy for the revision work during the next (sixth) revision period (1989-93).

Invitations: States members of the IPC Union and, as observers, certain organizations.

September 14 to 16 (Geneva)

WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property

The Forum will consider the impact of new technology on intellectual property law, with special emphasis on biotechnology, computer technology, the new technology for the recording of sounds and images, new broadcasting technology (for instance by direct broadcasting satellite) and new technology for transmission of programs by cable.

Invitations: States members of WIPO, the Paris Union or the Berne Union, certain organizations and the general public.

September 19 to 23 (Geneva)

Consultative Meeting on the Revision of the Paris Convention (Fifth Session)

The meeting will deal with Articles 5A (Patents and Utility Models: Importation of Articles: Failure to Work or Insufficient Working; Compulsory Licenses), 5*Quater* (Patents: Importation of Products Manufactured by a Process Patented in the Importing Country) and 10*Quater* (Geographical Indications and Trademarks, etc.), and possibly other Articles on the program of the Diplomatic Conference.

Invitations: Selected governments. No observers.

September 22 and 23 (Geneva)

Permanent Committee on Industrial Property Information (PCIPI) (Second Session)

The Committee will review the work done on the tasks of the program during the first nine months of 1988. It will start to work on the elaboration of a medium-term program for the PCIPI and of a global policy for, and the orientation of, the work of the PCIPI during the 1990-91 biennium.

Invitations: States and organizations members of the Committee and, as observers, certain other States and organizations.

September 26 to October 3 (Geneva)

Governing Bodies of WIPO and of Some of the Unions Administered by WIPO (Nineteenth Series of Meetings)

The WIPO General Assembly will consider the establishment of an International Register of Audiovisual Works. The WIPO Coordination Committee and the Executive Committees of the Paris and Berne Unions will, *inter alia*, review and evaluate activities undertaken since July 1987 and prepare the draft agendas of the 1989 ordinary sessions of the WIPO General Assembly and the Assemblies of the Paris and Berne Unions.

Invitations: As members or observers (depending on the body), States members of WIPO, the Paris Union or the Berne Union and, as observers, certain organizations.

October 24 to 28 (Geneva)	Committee of Experts on Biotechnological Inventions and Industrial Property (Fourth Session)
	<p>The Committee will examine possible solutions concerning industrial property protection of biotechnological inventions.</p>
	<p><i>Invitations:</i> States members of WIPO or the United Nations and, as observers, certain organizations.</p>
November 7 to 22 (Geneva)	Committee of Experts on Intellectual Property in Respect of Integrated Circuits (Fourth Session)
	<p>The Committee will examine a revised version of the draft Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits and studies on the specific points identified by developing countries.</p>
	<p><i>Invitations:</i> States members of WIPO or the Paris Union and, as observers, other States members of the Berne Union, as well as intergovernmental and non-governmental organizations.</p>
November 7 to 22 (Geneva)	Preparatory Meeting for the Diplomatic Conference on the Adoption of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits
	<p>The Preparatory Meeting will decide what substantive documents should be submitted to the Diplomatic Conference—scheduled to be held in Washington in May 1989—and which States and organizations should be invited to the Diplomatic Conference. The Preparatory Meeting will establish draft Rules of Procedure of the Diplomatic Conference.</p>
	<p><i>Invitations:</i> States members of WIPO or the Paris Union and, as observers, intergovernmental organizations.</p>
November 28 to December 2 (Geneva)	Committee of Experts on Model Provisions for Legislations in the Field of Copyright
	<p>The Committee will work out standards in the field of literary and artistic works for the purposes of national legislation on the basis of the Berne Convention for the Protection of Literary and Artistic Works.</p>
	<p><i>Invitations:</i> States members of the Berne Union or WIPO and, as observers, certain organizations.</p>
December 5 to 9 (Geneva)	Madrid Union: Preparatory Committee for the Diplomatic Conference for the Adoption of Protocols to the Madrid Agreement
	<p>This Committee will make preparations for the diplomatic conference scheduled for 1989 (establishment of the list of States and organizations to be invited, the draft agenda, the draft rules of procedure, etc.).</p>
	<p><i>Invitations:</i> States members of the Madrid Union and Denmark, Greece, Ireland and the United Kingdom.</p>
December 12 to 16 (Geneva)	Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Fifth Session; Second Part)
	<p>The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.</p>
	<p><i>Invitations:</i> States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.</p>
December 12 to 16 (Geneva)	Executive Coordination Committee of the PCIPI (Permanent Committee on Industrial Property Information) (Third Session)
	<p>The Committee will review the progress made in carrying out tasks of the Permanent Program on Industrial Property Information for the 1988-89 biennium. It will consider the recommendations of the PCIPI Working Groups and review their mandates.</p>
	<p><i>Invitations:</i> States and organizations members of the Executive Coordination Committee and, as observers, certain organizations.</p>
December 19 (Geneva)	Information Meeting for Non-Governmental Organizations on Intellectual Property
	<p>Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright and their comments on the same will be invited and heard.</p>
	<p><i>Invitations:</i> International non-governmental organizations having observer status with WIPO.</p>

1989**May 8 to 26 (Washington)****Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits**

The Diplomatic Conference will negotiate and adopt a Treaty on the protection of layout-designs of integrated circuits. The negotiations will be based on a draft Treaty prepared by the International Bureau. The Treaty is intended to provide for national treatment and to establish certain standards in respect of the protection of layout-designs of integrated circuits.

Invitations: States members of WIPO or the Paris Union or certain organizations.

UPOV Meetings

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

1988**October 17 (Geneva)****Consultative Committee (Thirty-eighth Session)**

The Committee will prepare the twenty-second ordinary session of the Council.
Invitations: Member States of UPOV.

October 18 and 19 (Geneva)**Council (Twenty-second Ordinary Session)**

The Council will examine the accounts of the 1986-87 biennium, the reports on the activities of UPOV in 1987 and the first part of 1988 and specify certain details of the work for 1988 and 1989.

Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

Other Meetings in the Fields of Copyright and/or Neighboring Rights**Non-Governmental Organizations****1988****July 24 to 27 (Washington)**

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting

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.

