

Published monthly
Annual subscription:
160 Swiss francs
Each monthly issue:
16 Swiss francs

Copyright

25th year – No. 3
March 1989

Monthly Review of the
World Intellectual Property Organization (WIPO)

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ISSN 0010-8626

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Studies

The Public Interest in Collective Administration of Rights

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1. Introduction

Much debate has centered on the issue of collective administration of copyrights and related rights¹ in recent years. Indeed, in this review alone, authors have written on topics including the development and objectives of collective licensing bodies, the variety of rights that require collective administration, the technical problems involved in connection with distribution schemes, as well as specific questions relating to collective administration such as its relationship with competition law, and its position in developing countries. The role and practices of collective licensing bodies was also studied in depth at the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights, held in May 1986.²

Whilst such widespread interest reflects the growing importance of centralized administration in the intellectual property field, little has been said specifically on the question of whether the very existence of collective licensing bodies is in the public interest; that it is, is implicit in the debate. It is this issue to which I shall turn my attention in this article.

Collective administration of copyrights and related rights operates worldwide. Although the precise nature, representation and practices of collective licensing bodies vary from country to country, collective administration of copyrights by licensing bodies is standard practice in all industrialized countries and the vast majority of developing coun-

tries which have copyright or related rights legislation. Moreover, such bodies are not the preserve of market economy countries; they are also considered desirable in the socialist countries.

Amongst developing countries, collective administration societies have been in operation for many years, in a number of countries in Africa, in India and in the majority of Latin American States. However, in most of these countries, it is used mainly in relation to the rights of composers and authors although an increasing number are being established to represent, for example, producers of phonograms and performers. Such organizations can function very efficiently a relatively short time after their establishment. This is evident from the example of Trinidad and Tobago, where a licensing body COTT (Copyright Organisation of Trinidad and Tobago) is working most effectively only five years after its creation. A similar success has been achieved in Hong Kong with CASH (Composers and Authors Society of Hong Kong).

The establishment of the first collective licensing body predates the adoption of the Berne Convention for the Protection of Literary and Artistic Works in 1886. SACEM (Society of Authors, Composers and Music Publishers), the French society representing authors and composers, was established in France in 1852 to administer public performance rights. Following the adoption of the Berne Convention, which recognized the public performance right as a principal feature of the protection to be afforded to all authors from the Berne Union countries, it became apparent to authors in many other countries that, in practice, it was impossible to safeguard such a right on an individual basis. The need for collective licensing bodies was soon felt, therefore, in every country in Europe and led to the establishment of more such bodies representing, in the first place, authors and composers. Following the recognition of performance rights in sound recordings, collective licensing bodies representing producers of phonograms and/or performers have been set up in the great majority of countries which recognize these rights and now exist in over 30 countries.

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¹ Throughout this paper, the word copyright is used in its widest sense as a generic term to describe the various systems of law which protect authors and other right owners such as performers, producers of phonograms and broadcasting organizations. The term "related" rights is used in preference to that of "neighboring" rights, which is, of course, widely used. As a matter of language, the writer has consistently preferred the term related rights.

² See generally the report of the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights (Geneva, May 12 to 14, 1986), in *Copyright*, 1986, pp. 196-201.

In principle, any category of right owner may exercise rights, collectively and in practice they do; thus, in the majority of countries which have copyright and related rights legislation, several collective licensing bodies exist representing and administering the rights of various right owners. To take the example of the United Kingdom, the following such bodies exist: the Performing Right Society Ltd (PRS) (public performance, broadcasting and cable distribution rights of composers, authors and music publishers); the Mechanical Copyright Society Ltd (MCPS) (recording rights of composers, authors and music publishers); the Design and Artists Copyright Society Ltd (DACs) (copyrights generally); the Authors' Lending and Copyright Society Ltd (ALCS) (off-air recording right, photocopying and public lending rights of authors); the Copyright Licensing Agency Ltd (CLA) (photocopying rights of authors and publishers); the Publishers' Licensing Society (photocopying rights of publishers); the Phonographic Performance Ltd (PPL) (public performance, broadcasting and cable distribution rights of producers of phonograms); and the Video Performance Ltd (VPL) (public performance, broadcasting and cable distribution rights of producers of music videos).

The multiplicity of societies in the United Kingdom is not unique. A similar situation exists in many other countries, both industrialized and developing.

Irrespective of political regime, the fact that these collective organizations are so widespread is a strong indication that they are generally recognized as being the best means of, on the one hand, protecting the right owners' interests, whilst facilitating the ease of access of copyright protected works to the consumer, on the other. Moreover, with the rapid tide of technical advance, which provides new ways of exploiting protected works, copyrights and related rights are being continuously undermined and eroded, both at the national and international levels. Given the emergence of secondary mass usage by means of reprography, private copying of sound and audiovisual recordings, satellite broadcasting, cable distribution, rental of phonograms and videograms, and computer storage of protected works, the need for collective licensing bodies has become even more acute. It would be idealistic and impracticable to expect owners of exclusive rights to be able to control such exploitation on an individual basis; hence the proliferation of collective administration organizations. For as technology progresses and protected works are made increasingly accessible, the need for effective protection of the rights of authors and other right owners grows. After all, without such organizations, most authors, producers, performers and other individual right owners would be hard-pressed to

administer the multiple burdens of monitoring, licensing, collecting and distributing fees themselves. These burdens would divert their attention from their primary work of composing, writing, editing, producing, broadcasting, promoting, etc., which would inevitably lead to a dearth in creativity to the ultimate detriment of the public at large.

The potential conflict between the public interest and the monopolistic nature of collective administration bodies has already been widely discussed and evidence of this is shown in the wealth of literature to be found on the subject, and in substantive case law. Case reports contain exhaustive examination of the question whether the operation of such organizations is contrary to the public interest by reason of incompatibility with, for example, the antitrust laws in the United States of America, or competition law in the European Community. Decisions such as that of *Broadcast Music Inc., et al. v. Columbia Broadcasting System Inc., et al.* (No. 77-1578), the most recent American case; and the cases of *GEMA I and II*,³ *GVL v. Commission of the European Communities*,⁴ *G. Basset v. SACEM*⁵ in Europe, all confirm that it is generally accepted that the public good is best served by means of collective administration of right owners' interests. The case law illustrates that the collectivization of these activities is not per se considered to be unlawful. However, in general, government policies tend to reflect the view that such administrative bodies should not have unfettered powers. This is a view shared by the judiciary and it is considered that they should operate within certain restraints, usually set down by national legislatures, such as subordination to antitrust law or supervision by special tribunals. It is the precise ambit of these powers, and the exact nature of proper constraints which have fueled the most recent debates in Australia, Canada, the United States of America and the United Kingdom.

By their very nature, such corporate monopolies must expect to face challenge from time to time to demonstrate that their continuing existence and the practices they employ are in the public interest. The discrete monopoly, that is the individual copyright, too must be weighed in the balance against the claims for free access to cultural works by consumers and would-be exploiters.

Most writers on the subject of collective administration organizations recognize that such bodies are the most effective means of administering and protecting the interests of composers, authors, pub-

³ 71/224/EEC [1971] C.M.L.R. D35; [1971] J.O.L. 134/15.

⁴ 72/268/EEC [1972] C.M.L.R. D115.

⁵ Case 7/82, March 2, 1983.

⁶ Case 402/85, April 9, 1987.

lishers, producers, etc., whilst providing the consumer with ready access to copyright protected works. Few, however, have actually questioned the very fact of their existence.

The need for, and desirability of, collective licensing bodies was recently put in issue in proceedings before the Monopolies and Mergers' Commission (MMC) in the United Kingdom. The MMC investigates complaints of potential abuse on the part of monopolistic or quasi-monopolistic organizations and during 1988 was called upon to review the activities of the collective licensing body, Phonogram Performance Ltd (PPL). It was suggested to the MMC that the collective exercise of rights of itself acts against the public interest, in that it allegedly removes competition, leads to prices higher than would prevail in conditions of normal competition, results in undesirable control by the collective licensing body over the way in which its members conduct their businesses and, finally, it compels the user to purchase a blanket license for the whole of the society's repertoire, whatever his needs.

The putting in question of the very existence of collective administration of rights is an issue of major importance for all right owners and requires due consideration. The novelty of the argument and the seriousness of the consequences if it were to be admitted have prompted this article, the aim of which is to show that collective administration is in the public interest.

My line of argument to support the notion that collective administration, per se, is justified, will take the following direction. If copyright itself is a just and proper concept, then its efficient administration must undoubtedly be in the interest of the public. I hope to demonstrate that collective administration bodies provide the most effective way of administering copyrights and related rights, that there is no better alternative, and consequently that such bodies benefit right owners and users alike.

Meanwhile, support for this thesis has emerged from the findings of the UK Monopolies and Mergers' Commission report on collective licensing of public performance and broadcasting rights in sound recordings, published in December 1988 (HMSO Cm 530) since this article was first written. The Commission's main conclusion was that collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from abusing their monopoly unfairly. This conclusion was reached on the ground that the convenience offered by collective licensing bodies to both the owner and the user of copyright is unlikely to be matched by any other means. Moreover, it took the view that smaller record companies and individual copyright owners would be at a serious disadvantage, in a totally free market, in

negotiating and subsequently enforcing their rights.

2. The Link Between Public Interest and the Copyright System

The concept of "*pro bono publico*" is Roman: according to Cicero "The good of the people is the chief law."⁷

However, whether a particular act is "in the public interest" is probably not susceptible to any objective tests. Inherent in the noble motive of the public good is the notion that the needs of the majority override those of the individual, and that the citizen should relinquish any thoughts of self-interest in favor of the common good of society as a whole. As Milton said:

That grounded maxim so rife and celebrated in the mouths of wisest men; that to the public good private respects must yield.⁸

The public interest aspect of the collective administration of copyright derives from the public interest aspect of the copyright system itself. Justice O'Connor, in a majority decision of the Supreme Court of the United States of America, recognized copyright as being:

...the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the incentive to create and disseminate ideas.⁹

If it is accepted that creating is worthwhile, be it art, music, literature or other work and that the fruits of such labor enrich our lives, then they deserve to be paid for when exploited. Remunerating a gifted creator for the use of his work enables him to continue working. After all, in Dr. Johnson's view, "no man but a blockhead ever wrote except for money."¹⁰ Copyright provides a means of giving creators what is properly due to them, thereby stimulating cultural activity which cannot be other than for the common good.

National laws are only enacted if they are "in the public interest," or at least it must be assumed that the enacting body so regards them.

The exclusive rights which are granted by national copyright, patent, trademark and design laws are granted because it is in the public interest to grant them.¹¹

⁷ De Legibus III.iii.8.

⁸ Samson Agonistes, line 865.

⁹ *Harper and Row, Publishers, Inc. v. Nation Enterprises*, US 1055 Ct. 2218, 2230 (1985).

¹⁰ *Boswell: Life of Johnson*, (L.F. Powell's revision of G.B. Hill's edition), p. 19, April 5, 1776.

¹¹ *Whitford Report*, Chairman, The Honourable Mr. Justice Whitford: "Copyright and Design Law, Report of the Committee to Consider the Law on Copyright and Designs (UK)," London, HMSO, March 1977, (Cmd 6732), para. 84.

The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated and the least objectionable way of remunerating them is by means of copyright.¹²

Almost all countries have enacted copyright laws, and of the remainder some are currently giving the future implementation of such legislation serious consideration. China is an important example. This confirms the fact that there is virtually universal agreement that the copyright system is indeed in the public interest. For only with protection of artistic expression can there be freedom and encouragement to *create* protected works of art, literature and music.¹³

The importance of copyright and patent law for society in general was recognized in the United States of America, as long ago as the Founding Fathers, who deemed it worthy of a special mention in the U.S. Constitution "to promote the progress of science and the useful arts." More recently in the 20th century, many nations have confirmed their approval of affording right owners protection by signing the Universal Declaration of Human Rights (United Nations, 1948) and/or the International Covenant on Human Rights (League of Nations, 1919). These two documents provide for authors' rights, *inter alia*, in Article 27(2) of the former, and Article 15(1) of the latter. These reflect the commonly held view that the copyright system has a significant part to play in stimulating worldwide cultural activities for the mutual benefit of those who create, and those who enjoy the fruits of that labor.

3. Public Interest and Collective Administration

Collective administration of copyrights and related rights serves two principal purposes:

(i) to enable right owners to enforce and administer their copyrights effectively and cheaply, and

(ii) to provide a service to users by facilitating access to copyright works and making it possible for users to comply with their obligations under the law to obtain licenses for the use of copyright works.

Given that the copyright system is accepted as being in the public interest, its collective administration must be in the public interest also if it is demonstrated that it makes the copyright

system more efficient and effective *for the benefit of the public*. After all, an effective system will not only encourage creativity, but will also make copyright protected works available to the widest possible audience. In many cases, the public interest will not be served properly unless there is collective administration:

In many a field of use the exclusive right would be a legal futility if there were no collective administration to implement it to a sensible degree and in a sensible matter, itself governed by more or less appropriate national legislation...

The exclusive rights of authors tend more and more to lose their economic value, or become less valuable, if they are not collectively administered, with the varying degree of effect that this has on their exclusiveness.¹⁴

Indeed, the Mexican Copyright Law of 1963 specifically recognizes that collective licensing is in the interest of the public. Article 93 provides that:

The societies of authors of various kinds, established in accordance with this Law, shall be regarded as being in the public interest and shall have the quality of legal entities and individual patrimony...

In 1985, the Australian Trade Practices Commission had to decide whether to allow the Phonographic Performance Company of Australia Ltd (PPCA) to become the collective licensing body representing copyright owners in sound recordings throughout Australia. The Commission concluded that there was public benefit in terms of efficiencies and cost savings and that such benefit outweighed any detriment to competition. Since this collective arrangement was justified on "public benefit" grounds, it was found to be eligible for exemption from the Trade Practices Act of 1974. Similar reasoning is equally applicable to other right owners' organizations, irrespective of the particular type of interest they represent, be it on behalf of composers, authors, publishers, artists, record or film producers.

The very fact that collective administration of copyrights has become standard practice in all developed countries and the vast majority of developing countries which have copyright or related rights legislation is in itself evidence that such a method of organization serves society well. The existence of such bodies is not only of benefit to their members; they also serve the interests of users by facilitating their access to works and by minimizing the number of persons with whom they must negotiate licensing contracts.

In most countries in recent years a development in the field of copyright protection has been the creation of organisations to control the exercise of copyright and in particular of performing rights. Such organisations either acquire copyrights from their members or act as agents on behalf of their

¹² T. Macaulay, from a speech delivered in the House of Commons of the United Kingdom on February 5, 1841, reprinted in *T. Macaulay Prose and Poetry*, G. Young, ed., 1952, pp. 733-734.

¹³ In this article, where reference is made to works, this includes *all* works protected by copyright.

¹⁴ Gunnar Karnell, "The Relations Between Authors and Organizations Administering Their Rights," in *Copyright*, 1986, p. 50.

members to enforce copyrights. They issue licences to persons owning places of public entertainment or desirous of giving public entertainments, and they appoint inspectors to see that unauthorised performances of works controlled by them do not take place. In the last resort they enforce the rights of their members by legal action. From the point of view of composers of music and owners of musical copyright the system has great advantages, in that no individual composer or copyright owner can, in practice, secure adequate protection for his work, or deal with the very large number of persons and bodies desirous of exploiting such works. On the other hand, the system has considerable advantages, from the point of view of the public and those giving entertainments, in that licences can be obtained from a single organisation, whereas, without such a system, it would be necessary to obtain individual licences from a large number of owners of copyright, and the delay and inconvenience, and the risk of performing music without having obtained a licence from the person entitled to give one, would greatly add to the difficulty and expense of performing music in public on any substantial scale.¹⁵

Technical progress is such that in the modern world there exist innumerable possibilities for the exploitation of protected works. Such technology, whilst facilitating access to works by the consumer, has increased the difficulties of enforcing exclusive rights. Collective administration provides the only practical means for right owners to safeguard their rights and, in particular, those new rights introduced to enable right owners to control new methods of exploitation of their works. Indeed, the copyright legislation of Austria, the Federal Republic of Germany, France and Spain all state that some rights may only be exercised by such means.

In many circumstances, collective organisations provide the only practical means for copyright owners to enforce their rights. In addition to performing rights for musical works, collectives may play a useful role in relation to such existing or potential copyright uses of works as the cable rediffusion of broadcasts, public lending and commercial renting, the use of home taping devices to record audiovisual works and sound recordings, performing rights for sound recordings and photocopying of written material by libraries, educational institutions and other large scale uses. With respect to these and other uses, collectives enable copyright owners to monitor the use of their works, to collect and distribute royalties, and to bring actions for infringement. Such collective organisations may also serve the interests of users by facilitating their access to works and by minimising the number of persons to whom they must make copyright payments.¹⁶

For example, in the record industry, licensing by individual record companies would be impossible in practice, both for record producers and users. With individual licensing, main users such as broadcasters would be inclined to contact only the few major companies with large repertoire. This would be detrimental to the small record companies which would, in practice, be denied access to a

market and to the source of revenue offered by broadcasting and public performance. Small and independent record companies tend to provide opportunities for new and untried artists and often concentrate their efforts in producing specialist repertoire. Collective licensing ensures that they have a share of the performance and broadcast markets and the same level of remuneration as their more powerful rivals. If the repertoire of small companies was denied access to these markets, this would be contrary to the interests of consumers who would be faced with a lesser choice of music on radio and television, and in venues where music is publicly performed. Individual licensing would, moreover, lead many thousands of minor public performance users and, no doubt, some broadcasting organizations, to neglect to ask for any license for the use of sound recordings and would lead, therefore, to widespread infringement of copyright of sound recordings.

These problems, of course, are resolved by the blanket licensing feature of collective administration. In the United Kingdom, PPL's blanket license system was established as much in response to the requirements of users as in the interests of its members. It reflects the fact that most users want a blanket license and any attempt to be selective as to repertoire licensed would lead to increased administrative costs without producing a material saving in license fee. The blanket license therefore developed out of the practical situation in the market place. Most users want unplanned, rapid and indemnified access to any and all of the repertoire of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in the light of the resources of single composers. Indeed, the Supreme Court of the United States of America in *Broadcast Music Inc., et al. v. Columbia Broadcasting System Inc., et al.* (No. 77-1578), recognized that the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants. Blanket licensing therefore provides an effective means of facilitating access for the would-be exploiter whilst ensuring that right owners interests are easily policed.

With the advent of transfrontier satellite and cable broadcasting, in both radio and television, the practical need for an international approach to the collective administration of licenses in broadcasting is becoming increasingly acute. Pan-European licenses for the satellite transmission of music video programs are already in place and radio satellite operators are now also seeking licensing arrangements. The speed and extent of the increase in transfrontier satellite operations threatens to disrupt the fine balance copyright legislation main-

¹⁵ Copinger and Skone James on Copyright, 12th edition, 1980, para. 1251.

¹⁶ Department of Communications Task Force on Copyright, Revision of the Copyright Law of Canada, revised edition, January 14, 1983, p. 138.

tains between right users and right owners. Such instability could render existing legislation ineffective and be to the detriment of all concerned. As a representative of the European Broadcasting Union, in a statement made to the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights in 1986, said:

...experience over the years has amply demonstrated the essential role played by collecting societies in the practical administration of copyrights and neighboring rights. In fact, broadcasters would find it impossible to operate without collecting societies, *particularly in the field of music*. It is indispensable for the broadcaster, as user of musical works and *sound recordings*, to know that a collecting society is in the position to clear any of the rights within both its national and foreign repertoires, thanks to contracts of mutual representation. In such cases, the *individual clearance of rights by the broadcaster would be completely impracticable* because of the sheer volume of work involved. On the other side, the role of collecting societies is to ensure that the right owner is fairly remunerated for the various uses of his material, which he would find impossible or impracticable to administer himself¹⁷ (emphasis added).

Although particular mention is given to the use and administration of musical works in broadcasting, it should be recognized that both television and radio often incorporate other types of work. For example, when a literary work such as a play or book is broadcast copyright may exist not only in the book itself, but also as a separate entity, in the script of the adaptation. Thus, the views expressed above are applicable to all copyright protected material.

Satellite broadcasting aptly illustrates the significant part technological advance has played, and indeed continues to play in reducing the distance between nations. By facilitating the exploitation of protected works beyond the divides of national frontiers, new technology has precipitated the need for increased efficiency in the administration of copyrights on an international level. The part played by the reciprocal protection afforded to nationals of the member States of the international conventions for copyright and related rights is crucial, providing as it does the basis for a fairly comprehensive network of links between national collective licensing bodies. The conventions include, *inter alia*: the Berne Convention (1886), the Universal Copyright Convention (1952) and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). These protect foreign right owners by providing for national treatment which means that each country affords the same protection to foreign nationals as it does to its own.

International agreements providing for protection of foreign right owners and for efficient admin-

istration of their rights outside their country of origin are in the public interest since they enable the copyright system, *per se*, to operate effectively beyond the confines of individual States. It is an additional advantage for both users and right holders that collective licensing bodies exist in most countries party to the conventions. Thus, one collecting society in any given country is able to represent both foreign and national right owners within a territory, whilst at the same time, a right owner will be able to exercise his right and receive royalties even when his work is used abroad. If foreign works are not protected in a particular country, there is undoubtedly an incentive for users to exploit unprotected foreign works to the probable detriment of national works. This practice can lead to a decrease in national right owners' income, and to access by consumers to national copyright material being restricted, both of which ultimately threaten the very cultural identity of the particular nation concerned. It is the richness and variety of culture, reflected in literary, musical and artistic works which the copyright system aims to encourage and preserve for the public good.

In addition to the international conventions, a significant role is played by organizations which coordinate the efforts of national collective licensing bodies on an international basis. Such organizations include, *inter alia*: the International Confederation of Societies of Authors and Composers (CISAC), the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), the International Federation of Musicians (FIM), the International Federation of Actors (FIA), and the International Federation of Phonogram and Videogram Producers (IFPI). These organizations can initiate change in the international fora by advocating improvements to current copyright laws, and by calling for the introduction of such legislation where it does not already exist. The resources at their disposal enable them to advise on the organization and effective functioning of collective licensing bodies, and to instigate actions for infringement of copyrights on a far broader scale than might otherwise be economically viable. It has already been shown that the copyright system, *per se*, is deemed to be in the public interest. Any coordination, therefore, which makes that system more enforceable and efficient, must be of benefit to the international community.

In short then, collective administration of copyright is in the public interest inasmuch as it makes the copyright system more effective and efficient, promotes the dissemination of copyright protected works, and that it tends to enlarge rather than restrict the choice of works available to the public. Furthermore, it tends to prevent the price paid by

¹⁷ Statement by Mr. Werner Rumphorst, EBU, to the WIPO International Forum on the Collective Administration of Copyrights and Neighboring Rights (Geneva, 1986).

consumers for the use of copyright material from being higher than it need, or should be. This is achieved by, for example, eliminating both the costs of negotiating on an individual basis, and the duplication of administration costs which would be incurred if the rights in each work were to be administered separately rather than collectively. It is thus economically expedient for creators and consumers alike that the financial expenses of negotiation, supervision and collection should be shared. Moreover, from a practical point of view, collective licensing is essential: right owners cannot be in an indefinite number of places at the same time exercising individual rights over each of their works and foreign right owners would be unable to exercise their right outside their country of origin without extreme expense and difficulty; similarly, it facilitates access to works by users for whom it would be impossible to get permission from every individual right owner.

A secondary function collective administration provides or can provide is a valuable public archive and documentation service. For example, the records of composers' societies such as the Society of Authors, Composers and Music Publishers (SACEM) in France or the Performing Right Society (PRS) in the United Kingdom, contain an immense amount of information about the world's repertoire of music which can, subject to certain confidentiality considerations, be made available to the public.

It has been seen that it is in the interest of the right owner, the user and the public that rights should be administered collectively. The question arises whether collective administration is best carried out by a monopoly; moreover, collective administration may not be in the public interest if there is no mechanism for ensuring that monopolistic collective agencies do not abuse their position.

4. Monopoly Power and Collective Administration

Any collective licensing body, by its nature and as a matter of fact, will be in a dominant position because it will represent the rights of a majority of a particular category of right owners, both national and foreign, in any given territory. Some copyright laws, Argentina and Brazil, for example, not only require the formation of collective licensing bodies but also state that these must be monopolies. The Brazilian law provides for one statutory monopoly—the Central Collection and Distribution Bureau (ECAD)—to administer the public performance and broadcasting rights of *all* copyright and related rights owners.¹⁸ However, collective admin-

istration may not be in the public interest if there is no mechanism for ensuring that monopolistic collecting agencies do not abuse this position. Such bodies have on occasion been attacked by users on the grounds that they are monopolies and abuse their monopoly position. In all these cases, the *de facto* monopolistic character of collective licensing bodies has been considered justified. Nevertheless, to ensure against abuse of monopoly it has become generally accepted that some measure of public control over the activities of such organizations is necessary in the public interest; and that

...it is better to accept the usefulness, in the public interest, of the fact of monopoly but to control it in other ways.¹⁹

In many countries, therefore, collective licensing bodies are subject to some form of supervision; such supervision may be exercised by a government department, as for example, Austria, Canada and Denmark, or by the ordinary courts as in France. Elsewhere, governments have opted to establish, as is the case in the United Kingdom, some form of compulsory arbitration or specialist tribunal having jurisdiction to review the activities of collective licensing bodies and power to determine the rates charged and to grant licenses.

Indeed it was as a natural corollary of growth and comprehensiveness of collective licensing bodies that complaints about abuse of monopoly rights began to surface in the United Kingdom in the 1950s. The result was the establishment in 1956 in the United Kingdom of the Performing Right Tribunal (PRT). In 1969, Australia followed the United Kingdom example by the subsequent creation of its Copyright Tribunal under the 1968 Copyright Act.

For the purpose of increased efficiency, the UK Copyright, Designs and Patents Act, which was enacted in 1988, extends the powers of the PRT to cover *all* forms of collective copyright licensing.

This supports the view that the PRT acts as a sufficient safeguard of the public interest. Since it will be empowered to monitor the activities of monopolistic or quasi-monopolistic collective licensing bodies in relation to all types of works, be they of an artistic, literary or musical nature, its supervision will be far more wide-ranging than at present.

In the Federal Republic of Germany, collective licensing bodies are specifically exempted from the German antitrust law, in recognition of the fact that the very nature of a collective licensing body is by necessity a monopoly. In order to avoid any abuse of this monopoly, a special arbitration body (*Schiedsstelle*) was established to control the activi-

¹⁸ The Law on the Rights of Authors and Other Provisions, No. 5988, of December 14, 1973, as amended, Article 115.

¹⁹ Wallace, in *International Review of Industrial Property and Copyright Law* (IIC), 1973, Vol. 4, p. 382.

ties of collective licensing bodies and to settle any conflicts which might arise between them and users. The Canadian Government has also recognized the need to exempt collective licensing bodies from certain provisions of its Competition Act. In his presentation of the Copyright Amendment Bill to Parliament, in 1987, the Minister of Communications stated:

Certain classes of copyright owners who want to form collectives have been reluctant to do so for fear of prosecution under the Competition Act. To provide encouragement, the proposed law sets up a system of voluntary submission to regulatory review.

Therefore, the law, which has subsequently been adopted, provides that the Competition Act does not apply in respect of any royalties or related terms and conditions arising under an agreement submitted for review.²⁰

Mention has already been made concerning the United States of America, where the courts have made an exhaustive examination of the collective administration of copyrights and have concluded that such administration is neither per se contrary to antitrust legislation, nor against the interests of the public. However, the American situation is something of an anomaly as far as collective administration of public performance and broadcasting rights of authors in music is concerned. As a general rule, only one collective licensing body represents each category of right owner, or grouping of right owners, and manifestly competition does not exist. In the United States, three organizations are engaged in the collective administration of these rights, namely: the American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music Inc. (BMI) and SESAC. A similar position is to be found in Australia where there are four collecting or licensing organizations: the Australasian Performing Right Association (APRA); the Australian Music Publishers Association Ltd (AMPAL); the Copyright Agency Ltd (CAL) and the Phonographic Performance Company of Australia (PPCA).

The question arises then, whether a multiplicity of collective licensing bodies, each controlling the repertoire of a limited number of right owners of any one category, would be desirable and therefore in the public interest. Since some of these organizations are in fact carrying out an identical function, it is likely that distinct savings in administration costs would be achieved if common operations replaced the present duplicated ones. A U.S. Court decision confirmed this view:

It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.²¹

There is, therefore, a powerful argument that a single organization operates the most efficient system. It is free from the necessity of expenditure on competitive activities thereby making significant savings to the benefit of both right owners and right users. The suggestion that the competition between these operations offering different repertoires will give the users a wider choice is illusory since users in fact require a license from each and every such organization.

In relation to the European Community, both the Commission and the Court acknowledge the factual dependence of a right holder upon a collective licensing body. However, they have made clear that, if the collective licensing body has a dominant position, it should not impose obligations on its members which are not absolutely necessary for the attainment of the object of collective licensing and which encroach unfairly upon a member's freedom to exercise his copyright. Such obligations would constitute a breach of Article 86 of the EC Treaty. The Court established the practical justification for collective licensing bodies in the *BRT v. SABAM* case finding that, in practice, right holders cannot avoid joining such a body.²²

The Advocate-General, Mr. Mayras, stated in his opinion in this case:

The result of this situation is that no composer, author or music publisher can in practice avoid the obligation to have recourse to SABAM's services in order to exercise his rights: Exploitation of his rights by the individual concerned is in fact impracticable, as it presupposes very substantial resources and would undoubtedly entail enormous expense...

In fact, an author or composer, and even a publisher of musical material—unless, in respect of this last case, it is a very powerful undertaking—has not, in practice, the power to exercise his rights himself. He does not have at his disposal the means to supervise the different uses which can be made of his work. In addition, some exploiters occupy such a strong position on the market that it enables them completely to control authors and composers by requiring the assignment of some of their works, especially those which are very successful and whose exploitation is particularly profitable. The Commission has itself recognized the danger in this situation and has admitted that the fact of being bound to an association such as SABAM ensures the necessary protection for those concerned.

This opinion was confirmed subsequently by the Court.

For this appraisal account must be taken of all other relevant interests, for the purpose of ensuring a balance between the requirement of maximum freedom for authors, compos-

²⁰ Published "information," Government of Canada, Amendment of the Copyright Bill, May 1987, No. 19225612E, and see Section 50.5(3) of the Copyright Act 1988.

²¹ *Twentieth Century Music Corp. v. Aitken*, 422 US 151, 162 (1975).

²² Case 127/73 *BRT v. SABAM* [1974] ECR 1974, pp. 323, 324.

ers and publishers to dispose of their works and that of the effective management of their rights by an undertaking which in practice they cannot avoid joining.

The European Commission's acceptance of the practical need for collective licensing in the SABAM case cited above, and later in the GEMA cases, I and II, reflects the generally held view that:

Only through collecting societies can the copyright holders obtain the fair compensation due for their intellectual labor.²³

5. Conclusion

The very efficiency which collective administration brings to the copyright system is the key to encouraging creative effort. Copyright legislation gives effect to a public policy of encouraging the creation of literary, dramatic, musical, artistic and other works. Creativity is encouraged if created work is adequately protected by the law. Only if copyright legislation is truly effective and enforceable will it safeguard creativity by nurturing creators on the one hand, whilst at the same time facil-

itating public access to their works on the other. The protection copyright law affords creators' works will become increasingly important as creators find broad openings not only in the greater cultural demand resulting from the wider access to education, and the extension of leisure time, but also in the continuing development of the media. If "the noblest motive is in the public good,"²⁴ then the efficient management of copyrights must be in the interest of the public. It encourages artistic endeavor and ensures that there will continue to be a constant supply of works of art, literature and music, worthy of copyright protection for the erudition and enjoyment of future generations.

The writer subscribes, therefore, to the view expressed at the International Forum on the Collective Administration of Copyrights and Neighboring Rights, organized by WIPO in Geneva from May 12 to 14, 1986, where a declaration was adopted by the participants to the effect that:

...the collective administration of authors' rights and of neighboring rights renders great services—if it is not, in certain circumstances, outright indispensable—to both the right holders and the users;

...the establishment of collective administration systems should be encouraged wherever individual licensing is not practicable...

²³ GEMA Statutes—OJ 1982 L94/12 [1982] 2 C.M.L.R. 482.

²⁴ Sir Richard Steele, in *The Spectator*, No. 200.

Correspondence

Letter from the Republic of Korea

CHANG In Suk*

Introduction

More than one year has passed since the new Copyright Act came into force on July 1, 1987.¹ The new Act is the result of strenuous efforts to keep up with current trends of copyright laws and treaties in the world. It demonstrates a fundamental change in the Republic of Korea's copyright laws and regulations.

On account of new legislation, remarkable developments have been made in the copyright field. With more powerful copyright in their hands, authors are placed in a stronger position in concluding contracts and, fortunately or not, copyright disputes have become a nationwide phenomenon.

The new Copyright Act consisting of 103 articles and supplementary provisions is intended, above all, to reconcile conflicting interests between copyright owners and users.

Article 1 confirms the fundamental goal of copyright law by referring both to the protection of authors' rights and neighboring rights and to the promotion of uses of works. To achieve this goal, the new Act has a variety of rules. This "Letter" is designed to take a glance at these rules.

The Government of the Republic of Korea started in 1976 to work on the revision of the outdated Copyright Act which was promulgated in 1957. After a long period of preparation and study, in 1984 the administration drafted an amendment to the old Act and submitted it to the National Assembly. The amended bill which had been a subject of detailed discussion among copyright circles was discarded, however, due to the termination of the session of the Assembly in the same year. It was not until 1986 that another bill was introduced on the agenda of the National Assembly. It was promulgated on December 31, 1986.

The old Copyright Act could not apply to current situations. First, it did not provide authors with adequate protection from copyright infringe-

ments. The term of protection was limited, in principle, to 30 years after the death of the author and 10 years after the making with respect to photographic works. One of the most notorious cases was found in a provision of Article 64. This Article said, under the heading of "Acts of non-infringement," that, among other things, broadcasters who used phonograms and sound-recording tapes for broadcasting were not regarded as infringing the rights of the producers of the phonograms or tapes. This provision was interpreted so that even authors of musical works incorporated in the phonograms or tapes could not claim copyright protection and remuneration.

Second, the old Copyright Act had provisions dealing exclusively with works of authorship. Authors of cinematographic and photographic works could claim copyright protection, not to mention those of literary and artistic works including dramatic, dramatico-musical and musical works. Musicians, singers and directors, too, could claim authorship under the old Act. However, the old Act did not mention further how this provision would bear fruit. This imperfection led to a situation in which no one apparently claimed authorship. Phonograms and sound-recording tapes were included in the category of works, while broadcasting was not.

Third, the old Act did not consider seriously the general interest of the public. No reference was made to it. As stipulated in Article 1, the old Act was seemingly aimed at enhancing the protection of authors' copyright in the literary and artistic works. Consequently, it could be presumed that, if an author was not satisfied with a proposal made by another party, the latter could not use the author's work at all. Nonetheless, it did not preclude a broadcasting organization from making use of a statutory license: when it could not receive a license to use a work which was deemed necessary for the purpose of the public interest, it could broadcast the work with equitable compensation. More provisions of a similar character existed, but they were too vague and abstract to be applied. As has been seen, broadcasting organizations were not pleased with the absence of their neighboring

* Chairman, Copyright Deliberation and Conciliation Committee, Seoul.

¹ See *Copyright*, July-August 1988, insert *Laws and Treaties*, Text 1-01.

rights, but they were with the provision of statutory license and, more importantly, with the provision of "acts of non-infringement." Authors and copyright owners had more obstacles in their way to claiming protection under the old Act.

Works of Authorship

Copyright exists in works of authorship ranging from literary works to computer programs. No discrimination is made against, or in favor of, foreigners if they are nationals of one of the States parties to international conventions to which the Republic of Korea has acceded, or will accede (Article 3(1)). However, no foreign works published before the international conventions concerned with them come into force in respect of the Republic of Korea can be given copyright protection. The Copyright Act grants protection to works first published in the Republic of Korea, including simultaneous publications within 30 days, as well as to works of foreigners who have their habitual residence in the Republic of Korea (Article 3(2)). The principle of national treatment is, however, limited by the rule of reciprocity (Article 3(3)).

Pursuant to Article 4, nine categories of works are protected:

1. literary and oral works (novels, poems, theses, lectures, speeches, scenarios, etc.);
2. musical works;
3. dramatic works (dramas, choreographic works, pantomimes, etc.);
4. works of art (paintings, calligraphic works, designs, sculptures, works of artistic craftsmanship, works of applied art, etc.);
5. works of architecture (buildings, models, or plans for architecture, etc.);
6. photographic works (photographs and other analogous works);
7. cinematographic works;
8. graphic and plastic works (maps, charts, plans, sketches, models, etc.); and
9. computer programs.

Protection of one type of work differs, in its scope and content, from protection of another type because of its intrinsic characteristics. Musical works cannot be protected under the right of exhibition. Photographic works can by no means be given protection under the right of performance, since they cannot be performed on stage. The Copyright Act does not concern itself with the respective characteristics of each work, but with certain categories of works. Special reference is made to works of art, works of architecture and photographic works in several articles. Cinematographic works are dealt with under a separate heading. The Copyright Act refers, as mentioned above, to computer

programs as one of the works subject to copyright protection. Article 4(2), however, says that necessary matters for the protection of computer programs are to be prescribed in a special law, viz., the Computer Program Protection Act,² promulgated on the same date as the Copyright Act. This special Act is at variance with the Copyright Act to some extent in that it is made in consideration of the special nature of computer programs.

Copyright protection extends to derivative works such as translations, transformations, adaptations and dramatizations (Article 5) as well as to compilations (Article 6). Derivative works comprise musical arrangements, dramatic adaptations and other possible forms of alteration. They can in no way affect authors' rights in their original works (Article 5(2)). A compilation, including a collection of works or an anthology, is eligible for protection as a derivative work, should it be proven to be original in choice or arrangement. However, the Copyright Act provides it independently, because the originality of compilation resides in composition, not in expression.

Article 7 gives a list of works not eligible for copyright:

1. laws and regulations;
2. notices, notifications, directions and other analogous announcements of the State or local autonomous bodies;
3. judgments, decisions, orders or rulings of courts or resolutions, decisions, etc., made in the course of administrative appeal procedures or other similar procedures;
4. compilations or translations as referred to in Subparagraphs 1 to 3 prepared by the State or local autonomous bodies;
5. current news reports merely transmitting facts; and
6. speeches delivered in public in courts, the National Assembly or local councils.

It is in the public interest to exclude these works from copyright protection, leaving them in the public domain. It cannot, however, be lightly presumed from this provision that compilations or translations of these works made by others, not by the State or local autonomous bodies, are not protected either.

Copyright

Authors whose names appear on original works or their copies are entitled to moral rights as well as economic rights (Articles 8 and 10). Authorship of works in the name of the employer, which are the same in substance as collective works, is to be at-

² *Ibid.*, September 1988, Text 2-01.

tributed to the employer (Article 9). Formalities are not a necessary requirement for the existence or exercise of copyright (Article 10(2)).

The Copyright Act refers to (i) the right of disclosure; (ii) the right to claim authorship; and (iii) the right of integrity (Articles 11 to 13). These moral rights are attached to an author's person and are independent of economic rights to the extent that they survive economic rights and no one can make use of works prejudicial to an author's honor or reputation.

Authors can enjoy economic rights including (i) the right of reproduction; (ii) the right of public performance; (iii) the right of broadcasting; (iv) the right of exhibition; (v) the right of distribution; and (vi) the right of production of derivative works (Articles 16 to 21).

The right of public performance applies to dramatic, dramatico-musical and musical works as well as to literary works. And authors of works of art, works of architecture or photographic works have the exclusive right to exhibit their original works or copies of them.

Copyright ownership may be, in whole or in part, transferred through assignment or license. This is relevant only with respect to economic rights (Articles 41 and 42). The Copyright Act thus specifically refers to assignment of economic rights and license of economic rights. A license can be exclusive or non-exclusive, subject to a contract which will define the means and the terms and conditions of utilization.

Limitation of Copyright

The Copyright Act does not exempt economic rights from restrictions on them. There are certain cases where the exclusive right of the author in his work is limited: free use and statutory license. The introduction of free use into copyright law is intended, as obvious, not to discourage free flow of information for the benefit of the general public. Although free in monetary terms, a reproduction or other uses, however, should not unreasonably prejudice the legitimate interests of the owner of economic rights and should not be greater than justified by the purpose.

There are 12 cases which limit the owner of economic rights:

1. Reproduction for judicial proceedings and reproduction by the executive or the legislative of materials used for their own purposes (Article 22).
2. Inclusion of a disclosed work in textbooks in which the Minister of Education has copyright or the publication of which is approved by the Minister of Education for the purpose of teaching at high schools or their equivalents or at lower levels of schools (Article 23(1)).
3. Use for current news reports of works which may be seen or heard in the course of such reports (Article 24).
4. Quotation in accordance with fair practice (Article 25).
5. Non-profit-making public performance or broadcasting which is to be made with no admission fee and no payment made to performers (Article 26).
6. Reproduction for private use (Article 27).
7. Reproduction in libraries or other information centers of the same character, necessary to provide a user with part of a copy or to provide other libraries with copies of works which are out of stock (Article 28).
8. Reproduction necessary for entrance examinations or other examinations, provided that it is to be justified by their purpose (Article 29).
9. Reproduction for the blind (Article 30).
10. Ephemeral recording by a broadcasting organization by means of its own facilities for its own broadcasts. Such a recording should not be contrary to the intention of the owner of the broadcasting right nor kept for more than one year from the date of the recording except that certain recordings may be preserved in archives because of their documentary character (Article 31).
11. Exhibition of original artistic, photographic works or works of architecture with the consent of the owners. The exhibition of these original works in streets, parks or buildings requires the authorization of the owner of copyright. They may, once exhibited in public, be reproduced by any means, but a building may not be reproduced in another building nor a sculpture or painting in another. Reproduction may be made in brochures or pamphlets for the purpose of introduction or explanation. A commissioned portrait may not be exhibited or reproduced without the consent of the commissioner (Article 32).
12. Translation, arrangement or alteration of works, if any (Article 33).

Statutory license may be given to users or user organizations under special circumstances. The term "statutory license" referred to in the Copyright Act does not remain in the narrow sense. It also covers certain cases of compulsory license. Whether legal or compulsory, the following cases fall within the context of non-voluntary license.

First, educational institutions referred to in the Education Act can reproduce or broadcast, for the purpose of teaching, a disclosed work (Article

23(2)). In this case, a payment to the copyright owner or a deposit is necessary (Article 23(3)).

Second, anyone who has tried to contact the copyright owner in vain may be granted a legal license with respect to a disclosed work. A deposit with the permission of the Minister of Culture and Information is required to make use of the work (Article 47).

Third, if a broadcasting organization which intends to broadcast for the public interest cannot come to an agreement with a copyright owner, it may do so, provided that it has to pay compensation to the copyright owner or put a deposit, with the permission of the Minister of Culture and Information (Article 48).

Fourth, those who intend to translate and publish a work should obtain the permission of the Minister of Culture and Information and provide for a payment to the owner of the translation right or a deposit, if (i) a translation of the work has not been made public after the expiration of seven years from the publication of the work or the translation, though made public, has been out of stock; and (ii) with respect to the work, no affirmative results have been achieved after negotiation with the owner of the translation right or the translation license could not be awarded because no contact was made available with the owner in spite of sincere efforts to make contact (Article 49).

Fifth, a phonogram producer who intends to record works incorporated in a phonogram may be given permission to do so on condition that (i) the phonogram was produced first in the Republic of Korea and has been sold for three years after production; (ii) the negotiation between the producer and the copyright owner could not bear fruit with respect to terms and conditions including royalty payment; and (iii) the producer has to pay compensation or put a deposit (Article 50).

Term of Copyright

Economic rights expire 50 years after the author's death. If a work is made public fewer than 10 years before the expiration of 50 years *post mortem auctoris*, its protection lasts for 10 years after its disclosure. With respect to works of joint authorship, the term of protection continues until 50 years after the death of the last survivor (Article 36).

A work may be made public anonymously or under a pseudonym. The term of protection is, in this case, 50 years from its first disclosure unless its author has been known (Article 37).

Another exception to the norm of 50 years *post mortem auctoris* is found as regards a work in the name of the employer. The protection of that work exists for 50 years from its first disclosure. If the work is not made public within the period of 10

years after its creation, it is protected for 50 years from its creation (Article 38).

The term of protection begins to run on the first of January of the year following the event concerned, whether the author's death or first publication, as the case may be (Article 40).

Publication Right

The publication right is said to be one of the distinctive characteristics of the Republic of Korea's Copyright Act. It is designed to protect book publishers who have invested a large sum of money. Publishers want to make sure that others do not interrupt their business and affect their reasonable return on investment. Thus the Act provides that the owner of the publication right, once authorized by the owner of the reproduction right to publish a work in the form of writing or painting, has the exclusive right to publish the work in its original form (Article 54).

The owner of the publication right is obliged to publish the work within a nine-month period from the date of receiving the manuscript and to continue publishing it in conformity with fair practice in the field of publication business (Article 55). Conversely, the owner of the reproduction right, such as an author, is entitled to certain rights in return for authorization to publish his work. An author may revise, add or delete, his work to a reasonable degree, when a later edition is published. This right parallels the duty on the part of the owner of the publication right to inform the author of republication in order to give the author an opportunity of revision (Article 56).

The publication right, unless otherwise agreed between the parties, exists for three years from first publication. Nonetheless, if the author dies during the period, the owner of the reproduction right may include the work in a collection or compilation or publish separately the work which is a part of a collection or compilation (Article 57).

The owner of the reproduction right may demand the owner of the publication right to fulfill the latter's obligation referred to earlier with respect to Article 55, if the latter has failed to do so. Then he may notify the latter to terminate the publication right in case of failure on the latter's part. Moreover, he may notify the owner of the publication right of the termination, if it is clear that it is impossible to publish the work. The termination of the publication right does not affect the right to claim restitution or damages (Article 58).

Neighboring Rights

The Copyright Act makes a distinction between copyright *in stricto sensu* and neighboring rights. Neighboring rights are to performers, phonogram

producers and broadcasters what copyright is to authors. Performers are a subject of neighboring rights because of their performances, i.e., interpretations of a work. It should be pointed out, however, that a performance is meant to express something, whether a work or not, by acting, dancing, playing, singing or by other methods of artistic skill (Article 2). Thus, performers such as variety or circus artists enjoy the same rights as singers or actors. In addition, the concept of performers is wider than that recognized in other legislations, including performers as referred to above as well as directors who control and supervise performances.

Performances protected under the Copyright Act consist of (i) performances presented not only by nationals of the Republic of Korea but also by foreign legal entities having their headquarters in the Republic of Korea; (ii) performances which are fixed on a phonogram protected in the Republic of Korea; or (iii) performances which take place through broadcasting protected in the Republic of Korea (Article 61).

Performers, first of all, enjoy an exclusive right to record or photograph their performances (Article 63). Second, they have the right of broadcasting. However, where they grant authorization to record their performances, they cannot prohibit broadcasting organizations from broadcasting their performances (Article 64). And broadcasting organizations should pay reasonable compensation for broadcasting made from a phonogram offered for sale (Article 65).

Phonograms protected under the Copyright Act include (i) phonograms produced by nationals of the Republic of Korea; (ii) phonograms first fixed in the Republic of Korea; or (iii) phonograms protected in accordance with a treaty to which the Republic of Korea is a party (Article 61).

Phonogram producers have an exclusive right to reproduce and distribute phonograms (Article 67). However, they cannot prohibit a broadcasting organization from using commercial phonograms for broadcasting but can claim reasonable compensation (Article 68).

A broadcast is also a subject matter of neighboring rights. It is protected in the Republic of Korea if one of the following conditions is met: (i) the broadcast is transmitted by broadcasting organizations which are nationals of the Republic of Korea; or (ii) the broadcast is transmitted by means of broadcasting facilities situated in the Republic of Korea (Article 61).

Broadcasting organizations enjoy an exclusive right of reproduction and simultaneous broadcasting (Article 69).

Neighboring rights exist for 20 years from the time of performance, fixation of a phonogram or broadcasting (Article 70).

Special Rules for Cinematographic Works

The Copyright Act provides for special provisions for cinematographic works under a separate heading with four articles. It is, however, understood that these provisions are incorporated in the Act to protect producers of cinematographic works, not authors. When the producers have been granted authorization to cinematize a work, they are regarded as having rights of an exclusive character to adapt an original work or to reproduce and distribute, or screen publicly a cinematographic work. Broadcasting organizations can only broadcast the work intended solely for broadcasting, unless otherwise agreed with the owner of economic rights (Article 74(1)). These rights are of paramount importance to the film producer in that, once he has been authorized to adapt an original work and make a cinematographic work, he wants to be assured of his financial success, uninterrupted by others during a certain period. The exclusive rights of the film producer expire five years after his receiving authorization to produce the cinematographic work (Article 74(2)). After the expiration of five years, the owner of economic rights may authorize another producer to cinematize the same original work.

Those who have agreed to contribute to cinematographic works, although presumed to be authors, cannot make use of these works by themselves but have to concede that the rights necessary for the exploitation of these works are transferred to film producers. Performers cannot claim neighboring rights of their own, if they have agreed to participate in the making of a film. Neighboring rights are also subject to transfer (Article 75).

Collecting Societies and Copyright Agencies

Copyright can be administered by a collecting society. The Copyright Act lays down a rule that a collecting society should receive government approval (Article 78).

The government can control collecting societies as well as copyright agencies in a way that it can direct them to report their activities for promoting the protection of authors' interests (Article 79). It may suspend their activities, if they carry on their business in breach of certain provisions of the Copyright Act. Even government approval might be withdrawn in extreme cases (Article 80).

Copyright Deliberation and Conciliation Committee

The Copyright Deliberation and Conciliation Committee is a new establishment in the Republic

of Korea. It consists of 15 to 20 members including university professors, government officials, lawyers and other experts interested in copyright and neighboring rights (Article 81).

The Copyright Act has a chapter entitled "Deliberation on Copyrights and Conciliation of Disputes" which deals with the Committee's organization and functions, as well as other matters concerned with the conciliation of disputes.

It has three main functions: the settlement of disputes (conciliation), deliberation and information service. It is of significance to copyright areas that disputes with respect to copyright can be settled through the intervention of a third party like this Committee, since the dispute settlement could be made possible only by recourse to the court of justice whose procedures are time-consuming and unsuitable for such types of disputes.

From the viewpoint of parties to a dispute, it is certainly convenient that an objective third-party solution may accommodate their respective arguments. Conciliation on its part has several merits: it is cheap and speedy and it makes it possible for the parties to have an opportunity to narrow their differences of opinion. However, it has a critical shortcoming by its nature. It comes to naught, if the parties are unsatisfied with the solution.

The Committee is also responsible for deliberating on the following matters (Article 82):

1. criteria of compensation when statutory license is issued in accordance with Articles 23(3), 47(1), 48, 49(1) and 50;
2. rate or amount of fees for the copyright administration or agency; and
3. other matters referred to it by the Minister of Culture and Information or by three or more Committee members.

Although not prescribed in the Copyright Act but stated in its working rules, it has a duty to provide copyright information services.

Remedies for Copyright Infringement

The owner of copyright or other rights protected under the Copyright Act may claim prohibition of further infringement and, in case of imminent threat to a copyright or a neighboring right, either prevention of infringement or security for damages without proving an intention or negligence on the part of the infringing party (Article 91(1)). In the case of the former, he can also ask for the destruction of infringing copies (Article 91(2)).

Furthermore, general principles of civil law apply to copyright infringement: claim for damages and for unjust enrichment. The Copyright Act specifically refers to a claim for damages. With intent or by negligence, any person who infringes copy-

right or other rights has to pay compensation for damages. The amount of compensation is presumed to be profits received by the infringing party. This amount may be increased by the addition of the profits which would have been made without infringement (Article 93). Special reference is made to phonograms and publications: when it is difficult to calculate the number of infringing copies, it is presumed to be 10,000 and 5,000 copies respectively (Article 94).

One of the following acts is considered an infringement: (i) for the purpose of distribution in the Republic of Korea, an importation of goods which would constitute an infringement, if they were made in the Republic of Korea; and (ii) a distribution of goods made by an infringement (including those goods referred to as above) of which the distributor has knowledge (Article 92).

Moral rights can be protected in another way where an author makes a claim for the restoration of his reputation which can be replaced by a claim for damages. This measure is directed against any infringement of moral rights by a person guilty of intent or negligence (Article 95).

The Copyright Act provides for the punishment of copyright infringement, although criminal sanctions would, as civil law claims, not become widespread. Several provisions are, in this regard, found in the Act.

The most severe penalty provided for in the Copyright Act is imposed upon a person who (i) has infringed upon economic or other property rights protected under the Copyright Act; (ii) has infringed upon the author's moral rights and damaged his reputation; or (iii) has made a false registration of copyright, neighboring rights and publication rights. He is punishable by imprisonment of not more than three years or a fine of not more than three million won (Article 98).

Any person who has committed one of the following crimes is liable for a period of imprisonment up to one year or a fine of up to one million won: (i) a crime to make public a work on which the name of a person which is not the name of the author appears; (ii) a crime which has violated an obligation not to use a work prejudicial to the author's moral rights even after his death; (iii) a crime to run a collecting society or a copyright agency without government approval; or (iv) a crime which has infringed intentionally or by negligence upon economic rights (Article 99).

Failure to indicate sources is liable for a fine of up to one million won (Article 100).

Infringing copies are subject to confiscation (Article 101).

Last, but not least, it has to be pointed out that prosecution can be brought against the infringing party only at the request of the victim. Exceptions

to this procedural rule apply to the following offenses: that of false registration and those specified in Article 99 except the fourth one (Article 102).

Conclusion

The Republic of Korea is now a party to the Universal Copyright Convention to which it acceded on July 1, 1987. During a period of more than one year, it has witnessed several developments. These developments can be seen in three aspects.

First of all, more people are involved or interested in copyright and neighboring rights. Newspaper articles deal with copyright issues more frequently. Recently, a lot of seminars and lectures on copyright have been held by the administration and other relevant organizations. Particular reference should be made to a seminar on the legal status of writers who went across the 38th parallel, a dividing line drawn in 1945 between the North and the South, and have been domiciled in North Korea [the Democratic People's Republic of Korea] since then. This seminar, held in summer 1988, centered on the critical question: can they claim authorship with respect to writings made before 1945 and thus receive any benefit arising from copyright?

Second, it should be pointed out that the Copyright Act established the Copyright Deliberation and Conciliation Committee. As has been mentioned earlier, it has several functions. An outstand-

ing example: in June and August 1988, it settled by conciliation long-standing disputes which originated from different views on royalty payment between, on the one hand, the Korea Music Copyright Association and, on the other, two major broadcasting organizations: the Korea Broadcasting System and the Munhwa Broadcasting Corporation.

Third, collecting societies and copyright agencies have become a major domain of concern in the Copyright Act. The Korea Music Copyright Association administers the great bulk of the repertoire of copyright music under the trust agreement. Two more societies are expected to get government approval: the Korean Society of Authors with respect to literary works, and the Korean Radio and Television Writers' Association with respect to literary works used for broadcasting.

The number of international copyright contracts made by the Republic of Korea's copyright agencies was reported to amount to 406 in one year to June 1988, although the majority of them were concluded directly by book publishers. Of these, 55 contracts were concluded with respect to literary works and the rest with respect to photographic works. Those copyright agencies exported 13 translation license (four of them being in more than 10 volumes) and imported 42. As of June 1988, there existed 25 copyright agencies. But only a few are active. They represent authors and advise them on selling their works and negotiating business contracts.

Activities of Other Organizations

International Literary and Artistic Association (ALAI)

Executive Committee

(Paris, January 28, 1989)

The Executive Committee of the International Literary and Artistic Association (ALAI) met in Paris on January 28, 1989, under the chairmanship of Professor Georges Koumantos (Greece), President of ALAI. WIPO was represented by Dr. Mihály Ficsor, Director, Copyright Law Division. The Committee took note of reports on past and planned activities of ALAI and discussed various ques-

tions related to those subjects, particularly the preparation of the next Congress of ALAI to be held in Quebec, Canada (September 26 to 30, 1989).

Furthermore, the Committee discussed the questions of the recognition of a right to control the utilization of copies of literary and artistic works and adopted the following resolution:

Resolution

The Executive Committee of ALAI

Notes that urgent problems now arise from the exploitation of copies of works that have been lawfully put on the market, particularly as a result of the public lending and rental of works and of sound and audiovisual recordings;

Reaffirms in that respect the principle that an author should be entitled to authorize any form of exploitation of his work;

Considers that an appropriate legal means to implement this principle would be to acknowledge, as an integral part of the exclusive right afforded to authors, the power to authorize the use of copies of a work where such use goes beyond the limits of private use (right of purpose);

Expresses the wish that, in those countries where the right of distribution can be exhausted, the effects thereof should be restricted, in particular, by affording to authors a right of lending and rental in respect of books and of sound and audiovisual recordings.

Calendar of Meetings

WIPO Meetings

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

1989

April 3 to 7 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (Eighth Session)

The Committee will review and evaluate the activities undertaken under the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights since the Committee's last session (March 1987) and make recommendations on the future orientation of the said Program.

Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

April 10 to 21 (Geneva)

Diplomatic Conference for the Conclusion of a Treaty on the International Registration of Audiovisual Works

The Diplomatic Conference will negotiate and should adopt a Treaty on the international registration of audiovisual works and Regulations under that Treaty.

Invitations: States members of WIPO and, as observers, States members of the United Nations not members of WIPO and certain organizations.

April 24 to 28 (Geneva)

Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Sixth Session)

The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.

Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

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 should adopt a Treaty on the protection of layout-designs of integrated circuits.

Invitations: States members of WIPO or the Paris or Berne Unions and, as observers, States members of the United Nations not members of WIPO or the Paris or Berne Unions and certain organizations.

May 29 to June 2 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Industrial Property (Thirteenth Session)

The Committee will review and evaluate the activities undertaken under the WIPO Permanent Program for Development Cooperation Related to Industrial Property since the Committee's last session (May 1988) and make recommendations on the future orientation of the said Program.

Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

June 12 to 28 (Madrid)

Diplomatic Conference for the Conclusion of a Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks

The Diplomatic Conference will negotiate and should adopt a Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.

Invitations: States members of the Madrid Union, Denmark, Greece, Ireland, the United Kingdom and, as observers, the other States members of the Paris Union as well as certain organizations.

- June 26 to July 3 (Paris)** **Berne Union for the Protection of Literary and Artistic Works: Executive Committee (Extraordinary Session)** (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)
The Committee will mainly review the activities undertaken and the meetings held since the Committee's last session (June 1987) as far as substantive issues of copyright protection are concerned.
Invitations: States members of the Executive Committee of the Berne Union and, as observers, other States party to the Berne Convention and certain organizations.
- July 5 to 7 (Geneva)** **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: Intergovernmental Committee (Ordinary Session)** (convened jointly with ILO and Unesco)
The Committee will review the status of the international protection of neighboring rights under the Rome Convention.
Invitations: States members of the Intergovernmental Committee and, as observers, other States members of the United Nations and certain organizations.
- September 25 to October 4 (Geneva)** **Governing Bodies of WIPO and the Unions Administered by WIPO (Twentieth Series of Meetings)**
All the Governing Bodies of WIPO and the Unions administered by WIPO meet in ordinary sessions every two years in odd-numbered years.
In the sessions in 1989, the Governing Bodies will, *inter alia*, review and evaluate activities undertaken since July 1988, and consider and adopt the draft program and budget for the 1990-91 biennium.
Invitations: States members of WIPO and the Unions and, as observers, other States members of the United Nations and certain organizations.
- September 26 (Geneva)** **Permanent Committee on Industrial Property Information (PCIPI) (Second Session)**
The Committee will discuss its main activities and plans for the future.
Invitations: States and organizations members of the Committee and, as observers, certain other States and organizations.
- October 9 to 13 (Moscow)** **International Forum on the Role of Industrial Property in Economic Cooperation Arrangements** (organized jointly with the State Committee for Inventions and Discoveries of the Soviet Union)
The Forum will deal with questions of industrial property in joint ventures among enterprises in industrialized and developing countries having different economic and social systems, and other cooperative economic arrangements, particularly in the field of the transfer of high technology, trade in goods bearing trademarks and franchizing of services.
Invitations: The Forum will be open to the public. Participants, other than representatives of governments, will be requested to pay a registration fee.
- November 1 and 2 (Beijing)** **Worldwide Symposium on the International Patent System in the 21st Century** (organized jointly with the Chinese Patent Office)
The Symposium will be conducted in three half-day sessions, each dealing with one of the following three topics: internationalization of the patent system; computerization of the patent system; patent documentation, search and examination.
Invitations: States members of WIPO, certain intergovernmental organizations and non-governmental organizations having observer status in WIPO.
- November 6 to 10 (Geneva)** **Committee of Experts on Model Provisions for Legislation in the Field of Copyright (Second Session)**
The Committee will continue to consider proposed 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.
Invitations: States members of the Berne Union or WIPO and, as observers, certain organizations.
- November 13 to 24 (Geneva)** **Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Seventh Session)**
The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

UPOV Meetings

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

1989

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| April 14 (Geneva) | <p>Consultative Committee (Thirty-ninth Session)</p> <p>The Committee will mainly discuss the outcome of the twenty-fourth session (April 10 to 13) of the Administrative and Legal Committee and prepare the meeting with international organizations.</p> <p><i>Invitations:</i> Member States of UPOV.</p> |
| October 16 (Geneva) | <p>Consultative Committee (Fortieth Session)</p> <p>The Committee will prepare the twenty-third ordinary session of the Council.</p> <p><i>Invitations:</i> Member States of UPOV.</p> |
| October 17 and 18 (Geneva) | <p>Council (Twenty-third Ordinary Session)</p> <p>The Council will examine the program and budget for the 1990-91 biennium, the reports on the activities of UPOV in 1988 and the first part of 1989.</p> <p><i>Invitations:</i> Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.</p> |

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

Non-Governmental Organizations

1989

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| May 24 to 26 (Ixtapa Zihuatanejo) | International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislation Committee |
| July 10 to 12 (Geneva) | International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting |
| September 21 to 23 (Corfu) | International Federation of Musicians (FIM): Congress |
| September 26 to 30 (Quebec) | International Literary and Artistic Association (ALAI): Congress |
| October 17 to 20 (Rome) | International Federation of Reproduction Rights Organisations (IFRRO): Annual General Meeting |

