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Activities of the International Bureau

The World Intellectual Property Organization in 1988*

Copyright and Neighboring Rights Activities

I. Information Concerning Intellectual Property

Objective

The objective is to increase and spread knowledge about the doctrine, legislation, frequency of use, and practical administration of intellectual property. Such knowledge is useful, if not essential, to all those concerned with the maintenance and development of intellectual property.

Activities

The periodicals *Copyright* and *Le Droit d'auteur* and *Industrial Property* and *La Propriété industrielle* continued to be published each month.

Collection of Intellectual Property Laws and Treaties. WIPO continued to keep up to date its collection of the texts of intellectual property laws and regulations of all countries and of treaties dealing with intellectual property, both in their original languages and in English and French translations. The most important texts were published in the above-mentioned four periodicals.

Public Information. Lectures on WIPO and its activities, in general or related to particular topics, were given by WIPO officials, often in conjunction with visits by organized groups to WIPO headquar-

* This article is the second part of a report on the main activities of WIPO in general and in the fields of copyright and neighboring rights in particular. Activities in the field of industrial property are covered in a corresponding report in the review *Industrial Property*.

The first part dealt with the activities of WIPO as such and with development cooperation activities in the fields of copyright and neighboring rights (see *Copyright*, 1989, pp. 103 to 117). The second part deals with other activities in those fields.

ters. Such groups included, in particular, groups of diplomats and university students from various countries.

Interviews were given by the Director General and WIPO officials to newspaper and radio correspondents. WIPO officials participated in the regular press briefings held at the United Nations Office in Geneva.

Four issues of the *WIPO Newsletter* were published in May, August, October and December in Arabic, English, French, Portuguese, Russian and Spanish.

New editions of the *WIPO General Information* brochure were issued in June in Chinese, English, French and Spanish.

The International Bureau issued regularly to governments and agencies an annotated list of selected forthcoming WIPO meetings. Six such lists were issued in the period under review.

II. Intellectual Property Matters of Topical Interest

Objective

The objective is to increase awareness of problems of great actuality ("matters of current or topical interest") in the protection of intellectual property rights and to contribute to their solution by ways and means that are as good and as rapid as possible.

Activities

In September, a *Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property* was held at WIPO headquarters. The Forum was attended by nearly 300 persons. They included participants designated by governments, officials from developing countries who had taken

part or would be taking part in seminars and training courses organized by WIPO just before or after the Forum, representatives of international and national non-governmental organizations and members of the public.

The Forum examined the interrelationship of advanced or new technologies and the law of intellectual property, and dealt, in particular, with the following technologies: biotechnology; computer technology (including microchips, computer programs and the use of computers in creating, storing or recording information, sounds and images); new techniques of reproduction and communication (especially reprography and the transmission of audio and visual programs by satellite and by cable).

The discussions in the Forum were preceded by two keynote speeches, one delivered by a leading scientist in the field of biotechnology and the other delivered by a business personality from the communications industry. Each of the keynote speeches was followed by presentations, made by 20 panelists, who were divided into five panels. Each panel was led by a moderator (a member of the staff of the International Bureau of WIPO) and each panel dealt with one of the topics or with one of the subjects mentioned in connection with the topics referred to. The panelists were leading legal specialists and included government officials, professors and practitioners in the various fields of intellectual property.

The keynote speakers and the panelists came from the following countries: Argentina, Austria, Brazil, Cameroon, Costa Rica, Czechoslovakia, France, Germany (Federal Republic of), Hungary, India, Italy, Japan, Norway, Soviet Union, Tunisia, United Kingdom, United States of America.

As pointed out by the Director General in his message to the Forum, the meaningfulness and the viability of intellectual property are conditioned by its response to the changing demands of society and to the role of advanced or new technologies in meeting those demands.

The Forum provided an opportunity to improve understanding of the complex matters involved. It enabled participants from governments to become aware of what was occurring and was being planned in the various countries and, in particular, to have the benefit of the views of business leaders, scientists, researchers and legal specialists.

In April, a *Committee of Experts on Measures Against Counterfeiting and Piracy* met in Geneva. The following 51 States were represented at the session: Afghanistan, Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burundi, Canada, China, Colombia, Congo, Côte d'Ivoire, Cuha, Democratic People's Republic of Korea,

Denmark, Egypt, Finland, France, Germany (Federal Republic of), Honduras, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Mexico, Morocco, Netherlands, Norway, Pakistan, Panama, Portugal, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, Togo, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Yemen, Yugoslavia, Zaire. In addition, representatives of seven intergovernmental organizations (General Agreement on Tariffs and Trade (GATT), International Labour Organisation (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), Commission of the European Communities (CEC), Customs Co-operation Council (CCC), International Criminal Police Organization (INTERPOL), Organization of African Unity (OAU)), took part in the session as observers, as did representatives of 30 non-governmental organizations (American Bar Association (ABA), Asian Patent Attorneys Association (APAA), Brazilian Association of Industrial Property (ABPI), Bundesverband der Deutschen Industrie e.V. (BDI), Centre for International Industrial Property Studies (CEIPI), Chartered Institute of Patent Agents (CIPA), Committee Against Counterfeiting (COLC International), Committee of National Institutes of Patent Agents (CNIPA), Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (DVGR), European Association of Industries of Branded Products (AIM), European Broadcasting Union (EBU), European Communities Trade Mark Practitioners' Association (ECTA), European Council of Chemical Manufacturers' Federations (CEFIC), International Association for the Protection of Industrial Property (AIPPI), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Industrial Property Attorneys (FICPI), International Federation of Phonogram and Videogram Producers (IFPI), International Federation of Translators (FIT), International League for Competition Law (LIDC), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU/FIET), Licensing Executives Society (International) (LES), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Trade Marks, Patents and Designs Federation (TMPDF), Union of Industries of the European Community (UNICE)).

The International Bureau had prepared two documents, entitled "Model Provisions for National Laws" and "Provisions in the Paris, Berne and Neighboring Rights Conventions," respectively. During a general discussion, wide support was expressed concerning WIPO's initiative to combat counterfeiting and piracy and to establish model provisions, which could serve as a basis for preparing national laws in this area. The Committee of Experts also considered the specific issues dealt with in the "Model Provisions for National Laws" and made suggestions for their improvement. However, due to lack of time, the Committee of Experts could not study the significance of the Paris and Berne Conventions in the fields of counterfeiting and piracy.

Also in April, a *Committee of Governmental Experts on Photographic Works* convened by WIPO and Unesco met in Paris. Experts from the following 45 countries 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. Five States attended the meeting as observers: Brazil, Costa Rica, German Democratic Republic, Philippines, Turkey. The Palestine Liberation Organization (PLO) also attended the meeting as an observer. Furthermore, observers from four intergovernmental organizations (Agency for Cultural and Technical Co-operation (ACCT), Arab League, Educational, Cultural and Scientific Organization (ALECSO), CEC, Council of Europe (CE)) and from 14 international non-governmental organizations (CISAC, International Association of Art (IAA), International Commission of Jurists (ICJ), International Confederation of Free Trade Unions (ICFTU), International Council on Archives (ICA), International Federation of Journalists (IFJ), International Federation of Newspaper Publishers (FIEJ), International Federation of Photographic Art (FIAP), INTERGU, International Literary and Artistic Association (ALAI), International Organization of Journalists (IOJ), IPA, ISETU/FIET, Max Planck Institute) participated in the meeting.

Discussions were based on the memorandum on questions concerning the protection of photographic works prepared by the International Bureau of WIPO and the Secretariat of Unesco. The memorandum contained draft "principles" on the protection of photographic works which—together with

the comments on them—were intended to offer guidance to national legislatures. The memorandum and the principles covered the following questions: the development of the provisions of the international copyright conventions concerning the protection of photographic works; the definition of photographic works and general considerations about their protection; formalities as conditions of protection or as sources of *prima facie* evidence; the ownership of copyright in photographic works; moral rights in photographic works; economic rights in photographic works; the role of the ownership of the original copy of a photographic work; the term of protection of photographic works; the protection of photographs—including photographic works—outside the scope of copyright law; related right-type protection of photographs not qualifying as photographic works.

After a full discussion of the memorandum, 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 on the Evaluation and Synthesis of Principles on Various Categories of Works to be held in Geneva in June and July 1988.

In June and July, a *Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works*, convened by WIPO and Unesco, met in Geneva. Experts from the following 40 States attended the meeting: Algeria, Argentina, Australia, Austria, Brazil, Cameroon, Canada, Czechoslovakia, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Guatemala, Guinea, Hungary, India, Israel, Italy, Japan, Kuwait, Mexico, Morocco, Netherlands, Norway, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, United Kingdom, United States of America, Uruguay, Yemen, Zaire. The PLO attended the meeting as an observer. Observers from six intergovernmental organizations (GATT, ILO, Arab Bureau of Education for the Gulf States (ABEGS), CEC, European Free Trade Association (EFTA), League of Arab States (LAS)) and 24 international non-governmental organizations (ALAI, Association for the International Collective Management of Audiovisual Works (AGICOA), BIEM, CISAC, EBU, European Tape Industry Council (ETIC), FIAD, FIAPF, FIEJ, FIT, ICC, ICFTU, IFPI, INTERGU, International Alliance for Distribution by Cable (AID), International Catholic Organization for Cinema and Audiovisual (OCIC), International Federation of Actors (FIA), International Federation of Musicians (FIM), International Group of Scientific, Technical and Medical Publishers

(STM), IPA, ISETU/FIET, Max Planck Institute, UNICE, World Crafts Council (WCC)) also participated in the meeting.

The purpose of the meeting was to discuss an evaluation and synthesis of the "principles" in respect of the following nine categories of works which had been discussed by Committees of Governmental Experts in the 1986-87 biennium on: audiovisual works, phonograms, works of architecture, works of fine art, dramatic and choreographic works, musical works, works of applied art and the printed word, and, in April 1988, on photographic works.

The principles were intended to serve as guidance for governments when they had to deal with the various copyright and neighboring rights issues in relation to the above-mentioned categories of works. It was understood that the principles had no binding force and that their purpose was merely to indicate solutions which seemed to be reasonable in the search for solutions.

The discussions took place on the basis of a memorandum entitled "Evaluation and Synthesis of Principles on the Protection of Copyright and Neighboring Rights in Respect of Various Categories of Works," prepared by the Secretariats of WIPO and Unesco.

In the general debate a number of delegations stressed that the principles and comments included in the memorandum provided very useful guidance for national legislators.

After the general debate the Committee discussed in detail the principles and the comments to them in respect of the nine categories of works, covering virtually all important copyright and neighboring rights aspects relating to such works.

The Committee noted that the Secretariats would report on the result of the meeting to the next sessions of the Executive Committee of the Berne Union and the Intergovernmental Committee established under the Universal Copyright Convention and that, as far as WIPO was concerned, the result of the discussion on the principles would be considered in the future work on model provisions for national legislation.

Cooperation in the Preparations of the Uruguay Round of Negotiations of GATT as Far as Intellectual Property Is Concerned. In February and May, the Director General convened informal information meetings at WIPO headquarters for officials of the Permanent Missions in Geneva for the purpose of giving information on intellectual property matters of possible relevance to the Uruguay Round of the GATT negotiations.

III. Setting of Norms in the Field of Intellectual Property, Particularly Under the Paris and Berne Conventions

Objective

The objective is to make the protection of intellectual property rights more effective throughout the world. "More effective" means that the norms (standards) of protection are raised, where necessary, to the required level and that the enforcement of the intellectual property rights will be easier and the sanctions for infringement stricter. This objective may be achieved by creating new treaty obligations or by persuasion. This item proposes the creation of new treaty obligations by work on the draft of two "harmonization" treaties in the field of industrial property (one on patents and one on trademarks) and by the conclusion of a treaty on the protection of intellectual property rights in integrated circuits. As far as action by persuasion is concerned, this item proposes that guidelines or model provisions for legislations be prepared on selected questions of industrial property (not covered by the harmonization treaties) and in the entire field of copyright. Naturally, effective enforcement is also a subject matter for the treaties and guidelines or model provisions mentioned in this item.

Activities

In January, the International Bureau held consultations with experts from seven developing countries on questions concerning *intellectual property in respect of integrated circuits*: Argentina, Brazil, China, Egypt, Ghana, India, Indonesia.

In May, a *Consultative Meeting of Experts from Developing Countries on Integrated Circuits* took place in Geneva. Experts from the following 25 States participated in the Consultative Meeting: Angola, Argentina, Brazil, Cameroon, China, Colombia, Cuba, Egypt, Ghana, India, Indonesia, Madagascar, Mexico, Morocco, Pakistan, Panama, Peru, Philippines, Republic of Korea, Tunisia, United Arab Emirates, Uruguay, Venezuela, Viet Nam, Zaire.

Discussions were based on the comments received from the Governments of Argentina, Australia, Bulgaria, Canada, Denmark, Finland, Ghana, Hungary, India, Japan, the Philippines, Portugal, the Soviet Union, Spain, Sweden, Switzerland and Viet Nam on seven studies and analyses dealing with legal matters in relation to the protection of intellectual property in respect of integrated circuits, prepared by the International Bureau.

The Consultative Meeting identified the following six points as deserving further consideration and study: (i) object of protection; (ii) compulsory licenses; (iii) full disclosure; first commercial exploitation; (iv) term of protection; (v) extension to articles containing integrated circuits; use in good faith; (vi) "preferential treatment" for developing countries.

In May and June, a *Review Meeting on the Progress of the Preparatory Work for the Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits* took place in Geneva. The following 45 States were represented at the said Meeting: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Côte d'Ivoire, Cuba, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Madagascar, Mexico, Morocco, Netherlands, New Zealand, Panama, Peru, Poland, Portugal, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, Tunisia, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yugoslavia.

The Review Meeting decided that the International Bureau should prepare for the fourth session of the Committee of Experts on Intellectual Property in Respect of Integrated Circuits in November 1988 one or several documents dealing with the six points identified by the Consultative Meeting of Experts from Developing Countries on Integrated Circuits. The Review Meeting also decided that for the fourth session of the Committee of Experts a revised version of the draft Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits with explanatory notes should be prepared by the International Bureau.

Finally, it was decided that the Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits would take place in Washington, in May 1989.

In November, the *Committee of Experts on Intellectual Property in Respect of Integrated Circuits* held its fourth session in Geneva. The following 61 States were represented at the session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Libya, Luxembourg, Madagascar, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Senegal, Soviet Union, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia. In addition, representatives of the CEC, LAS, OAU and SELA participated in the Preparatory Meeting as observers.

Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, Zimbabwe. In addition, representatives of the United Nations, CEC, LAS, the Latin American Economic System (SELA), OAU and the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), and of 12 non-governmental organizations (AIPPI, Committee of National Institutes of Patent Agents (CNIPA), Computer and Business Equipment Manufacturers Association (CBEMA), European Electronic Component Manufacturers Association (EECA), FICPI, ICC, International Patent and Trademark Association (IPTA), IPA, Max Planck Institute, Semiconductor Industry Association (SIA), UNICE, Union of European Practitioners in Industrial Property (UEPIP)) participated as observers.

The Committee of Experts thoroughly discussed three documents respectively entitled "Draft Treaty with Explanatory Notes," "The Six Points Identified by the May 24 to 27, 1988, Consultative Meeting of Experts from Developing Countries," both prepared by the International Bureau, and "Draft Codicil to the Berne Convention for the Protection of Integrated Circuit Designs," presented by India, as well as a number of documents containing proposed amendments to the draft Treaty.

Also in November, simultaneously with the fourth session of the Committee of Experts on Intellectual Property in Respect of Integrated Circuits, a *Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits* was held in Geneva. The following 60 States were represented at the Preparatory Meeting: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Cuba, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Libya, Luxembourg, Madagascar, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Senegal, Soviet Union, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia. In addition, representatives of the CEC, LAS, OAU and SELA participated in the Preparatory Meeting as observers.

The discussions of the Preparatory Meeting were based on a Memorandum of the Director General

entitled "Preparations for the Diplomatic Conference." The following matters were discussed at the Preparatory Meeting: substantive documents to be submitted to the Diplomatic Conference; States and Organizations to be invited to the Diplomatic Conference; date and venue of the Diplomatic Conference; draft Rules of Procedure of the Diplomatic Conference; wording of the invitations to the Diplomatic Conference; and draft Agenda of the Diplomatic Conference.

It was decided by the Preparatory Meeting that the Diplomatic Conference would be held from May 8 to 26, 1989, in Washington.

In March, a *Committee of Experts on the Establishment of an International Register of Audiovisual Works* met in Geneva. Experts from the following 36 countries attended the meeting: Argentina, Austria, Brazil, Burundi, Canada, China, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Guinea, Hungary, India, Italy, Japan, Lebanon, Mexico, Morocco, Netherlands, Norway, Philippines, Portugal, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, Thailand, Turkey, United Arab Emirates, United Kingdom, United States of America, Uruguay, Yemen, Zaire. Nine international non-governmental organizations (AGICOA, ALAI, BIEM, CISAC, FIAD, FIAPF, IFPI, INTERGU, International Association of Audio-Visual Writers and Directors (AIDAA)) were represented by observers.

Discussions were based on a memorandum prepared by the International Bureau entitled "Establishment of an International Register of Audiovisual Works." The memorandum contained a draft treaty and draft regulations thereunder.

All the participants who took the floor in the general discussion expressed their interest in the establishment of an International Register of Audiovisual Works and supported the efforts made in that direction. It was generally underlined that such a Register would be very useful in the fight against piracy and would serve valuable information purposes.

After the general discussion, the Committee discussed in detail the draft treaty, the draft regulations and the application forms attached to them. Several comments and suggestions were made in respect of certain points.

Following the conclusion of the discussion on the draft treaty and the draft regulations, the Delegation of Austria made a statement. The delegation reiterated the great importance it attached to the establishment of the International Register and to the conclusion of a treaty. In order to contribute to an early establishment of the Register, the Government of Austria would be prepared to undertake

every effort to make the prefinancing of the Register possible and proposed that the Register be located in Vienna. It said that the details of the proposal for such arrangements could be worked out between its government and the Director General of WIPO, for discussion among the interested States at a later stage.

The Chairman summarized the discussions and proposed the adoption of the following conclusions:

"The Committee of Experts on the Establishment of an International Register of Audiovisual Works (WIPO, Geneva, March 7 to 11, 1988) is of the opinion that the establishment of an International Register of Audiovisual Works to be administered by WIPO and based on a multilateral treaty open for all States members of WIPO is highly desirable and urgent. Such a Register would enhance cultural creative activity, increase legal security, facilitate the international flow of audiovisual works, and it would be a deterrent to piracy.

"The Committee of Experts recommends that a Diplomatic Conference for the adoption of the said Treaty should be convened as soon as possible. The draft of the Treaty and its accompanying Regulations should generally follow the drafts that the International Bureau has submitted to the Committee of Experts, taking into account the views expressed at the discussions of the Committee of Experts, including, in particular, the need for the establishment of a consultative committee of interested international non-governmental organizations.

"The Committee of Experts recommends that the International Bureau prepare a memorandum on the question of financing of the Register until the Register becomes self-supporting. The said memorandum should also deal with the generous offer of the Government of Austria to secure such financing provided the Register is located in Vienna. Any other offers for financing and other financing solutions should also be covered in the memorandum. The memorandum should be submitted to the September 1988 sessions of the competent Governing Bodies."

After statements, expressly accepting the proposed conclusions, made by the Delegations of Argentina, Austria, Finland, France, Guinea, Hungary, Italy, Morocco, the Netherlands, Norway, Portugal, the Republic of Korea, Spain and the United States of America, the Committee adopted these conclusions.

The Delegation of Switzerland stated that while it was ready to support the objectives expressed in the conclusions, it did not necessarily agree with all of the conclusions.

The Chairman said, and the Director General of WIPO agreed, that at least one further preparatory meeting would take place before the Diplomatic Conference.

In April, May, June and November, the Director General, accompanied by WIPO officials, had talks in Vienna with the representatives of the Government of Austria about the details of the Austrian proposal mentioned above and about the financial and legal conditions of the possible locating of the International Register in Vienna.

In June, the Director General and WIPO officials had discussions with representatives of the International Federation of Film Producers Associations (FIAPF) concerning the Regulations of the proposed International Register.

In November and December, the *Committee of Experts for the Preparation of the Diplomatic Conference for the Conclusion of a Treaty on the International Registration of Audiovisual Works* met in Geneva. Experts from the following 30 countries attended the meeting: Algeria, Austria, Bulgaria, Canada, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, France, German Democratic Republic, Germany (Federal Republic of), Greece, Hungary, India, Italy, Japan, Madagascar, Mexico, Norway, Poland, Portugal, Republic of Korea, Spain, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Zaire. Afghanistan attended the meeting as an observer. Representatives of one intergovernmental organization (CEC) and nine international non-governmental organizations (AGICOA, BIEM, CISAC, EBU, FIAD, FIAPF, ICC, IFPI, ISETU/FIET) also participated as observers.

The discussions were based on a document prepared by the International Bureau containing a draft of the Treaty on the International Registration of Audiovisual Works and the draft of the Regulations to that Treaty, both with explanatory notes. The Committee also established the draft of the Agenda and the Rules of Procedure of the Diplomatic Conference which, from April 10 to 21 1989, will be held in Geneva to adopt the said Treaty and Regulations.

In the general discussion, the great majority of the delegations and representatives of international non-governmental organizations expressed great interest in, and fully supported, the establishment of the proposed WIPO International Register of Audiovisual Works, although some of them referred to certain details in respect of which they intended to make comments. Reference was made to the fact that such a Register would be a useful source of information, would increase the security

of transactions of rights in audiovisual works all over the world and would assist in combating piracy of such works.

The Committee of Experts then discussed in detail, and agreed upon certain changes to be made in, the draft Treaty and the draft Regulations.

IV. Cooperation with States and International Organizations in Matters Concerning Copyright and Neighboring Rights

Objective

The objective is to ensure that, through regular contacts between WIPO on the one hand and the governments of States and organizations on the other, there should be full awareness of what is being done and planned on either side in order mutually to inspire more and more useful activities, to combine forces whenever possible and to avoid unnecessary duplication.

Activities

WIPO continued to cooperate with States, with intergovernmental organizations and with international and national non-governmental organizations.

States

France. In March, the Director General received the visit of a delegation of the Conseil national du patronat français (CNPF).

Germany (Federal Republic of). In December, a Deputy Director General and another WIPO official had discussions in Bonn with government officials on questions concerning the implementation of the newly concluded Funds-in-Trust Arrangement between WIPO and the Federal Republic of Germany for the period 1989-91.

Soviet Union. In February, April and June, a Deputy Director General had discussions with government officials in Moscow on development cooperation matters and other questions of mutual interest, including the organization of the Training Course on Patent Information held in Moscow in June and July.

In September, at the invitation of the Chairman of the Copyright Agency of the USSR (VAAP), the Director General, a Deputy Director General and another WIPO official had discussions with govern-

ment officials in Moscow on development cooperation matters and other questions of mutual interest in the fields of industrial property and copyright.

Spain. In May, two WIPO officials undertook a mission to Madrid to discuss the joint WIPO/Spain development cooperation program for Latin American countries.

United States of America. In November, the Director General and a WIPO official attended, in Los Angeles, the ceremony at which the President of the United States of America signed the Berne Convention Implementation Act of 1988.

Yugoslavia. In October, a National Seminar on Industrial Designs was organized by WIPO in cooperation with the Federal Patent Office, in Belgrade. Some 50 participants from interested government departments, the design industry, the legal profession and other related circles took part in the Seminar. Lectures were given by WIPO consultants from France, Switzerland and Yugoslavia, and by a WIPO official. The Seminar was funded by the United Nations Development Programme (UNDP)-financed country project.

Intergovernmental Organizations

Commission of the European Communities (CEC). In October and December, a WIPO official participated in the hearings of the CEC on the protection of computer programs and the private reproduction of audiovisual works, respectively, in Brussels.

Council of Europe (CE). In May, a WIPO official participated in a Colloquium on Piracy of Audiovisual Works, in Strasbourg (France), in the framework of the European Cinema and Television Year 1988.

In October, a WIPO official participated in a meeting of the Committee of Legal Experts in the Media Field of the Council of Europe in Strasbourg. The Committee discussed, *inter alia*, legal questions relating to reprography and satellite broadcasting.

League of Arab States (LAS). In June and July, a WIPO official participated in the second general meeting between representatives of the United Nations system and the LAS, in Geneva.

Organization of the Islamic Conference (OIC). In July, a WIPO official participated in the third general meeting on cooperation between the United Nations and the OIC, in Geneva.

Other Organizations

In December, an informal meeting with *non-governmental organizations* was organized by WIPO in Geneva. The activities of 1988 were reviewed and plans for 1989 were discussed.

Chamber of Commerce of Grenoble. In October, a WIPO official participated, in Grenoble (France), in the framework of an international exhibition of high technology "TEC-88," in a roundtable on the protection of designs, organized by the Chamber of Commerce of Grenoble.

Frankfurt Book Fair. In October, a WIPO official participated at the annual Book Fair, in Frankfurt (Federal Republic of Germany).

German Association for Industrial Property and Copyright Law (GRUR). In May, a WIPO official participated in the annual meeting of GRUR, in Hamburg (Federal Republic of Germany).

Hague Conference on Private International Law. In May, the Director General received the visit of the Secretary General and other officials of the Hague Conference on Private International Law and discussed matters of common interest.

In October, a WIPO official participated in The Hague in a meeting of the Special Commission of the Hague Conference on Private International Law.

Institut für gewerblichen Rechtsschutz (INGRES). In June, a WIPO official participated in the General Assembly of INGRES, in Zurich (Switzerland).

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP). In July, a WIPO official participated in the seventh annual meeting of ATRIP, which took place in Washington.

International Chamber of Commerce (ICC). In May and October, a WIPO official participated in meetings of the Commission on Intellectual and Industrial Property of the ICC, in Paris.

International Confederation of Societies of Authors and Composers (CISAC). In May, a WIPO official participated in a meeting of the Legal and Legislation Committee of CISAC, in Jerusalem.

In November, two WIPO officials participated in the 32nd Congress of CISAC in Buenos Aires.

International Copyright Society (INTERGU). In March, a WIPO official participated in the XIth Congress of INTERGU, in Locarno (Switzerland).

International Council on Archives (ICA). In August, a WIPO official participated in Paris in the 11th session of ICA.

International Development Law Institute (IDLI). In January, a WIPO official attended a Seminar on Transfer of Technology, Know-How and Licensing Agreements, organized by IDLI, in Rome.

International Literary and Artistic Association (ALAI). In January, a WIPO official participated in a meeting of the Executive Committee of ALAI, in Paris.

In October, a WIPO official attended the meeting of the Executive Committee and Study Days of ALAI in Munich.

International Publishers Association (IPA). In June, a Deputy Director General and another

WIPO official participated in the 23rd Congress of the IPA, in London.

Max Planck Institute for Foreign and International Patent, Copyright and Competition Law. In July, a WIPO official participated, in Ringberg (Federal Republic of Germany), in a Symposium on New Tendencies in International Protection of Intellectual Property, organized by the Max Planck Institute.

University of Grenoble. In June, a WIPO official participated in an International Colloquium on the Protection of Industrial Design Creations within the EEC, in Grenoble, organized by the University Center for Teaching and Research in Industrial Property (CUERPI), of the University of Grenoble.

WIPO Meetings

Committee of Experts on Model Provisions for Legislation in the Field of Copyright

First Session

(Geneva, February 20 to March 3, 1989)

NOTE*

Introduction

Convened by the Director General of the World Intellectual Property Organization (WIPO), a Committee of Experts on Model Provisions for Legislation in the Field of Copyright (hereinafter referred to as "the Committee") met in Geneva from February 20 to March 3, 1989.

Experts from the following 49 States attended the meeting: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Brazil, Cameroon, Canada, Chile, China, Czechoslovakia, Denmark, Egypt, El Salvador, Finland, France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Guinea, Honduras, Hungary, India, Israel, Italy, Japan, Lebanon, Mexico, Morocco, Netherlands, Norway, Poland, Portugal, Republic of Korea, Saudi Arabia, Soviet Union, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Yugoslavia.

Representatives of five intergovernmental organizations and 27 non-governmental organizations attended the meeting as observers. The list of participants follows this note.

The Director General opened the meeting and welcomed the participants. He said that the meeting, in addition to working on the draft model provisions, would be useful for identifying the questions with which the studies for the establishment of a possible protocol to the Berne Convention should deal. He then read, from the draft program for 1990-91, the following passage:

"The International Bureau will prepare, convene and service a committee of governmental experts in one or more meetings in order to

examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content, with a view to submitting for adoption the draft of such a protocol to a diplomatic conference after 1991. The protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies.

"The need for such an exercise lies in the fact that there are certain questions in respect of which professional circles have no uniform views and, what is of particular concern in international relations, even governments which legislated or plan to legislate on such questions seem to interpret their obligations under the Berne Convention differently. Such discrepancies in views already surfaced, or are likely to surface in the near future, in respect of certain subject matters of protection (e.g., computer programs, phonograms, computer-generated works), certain rights (e.g., right of rental, public lending right, right of distribution of copies of any kind of works, right of display), the applicability of the minima (no formalities, term of protection, etc.) and the obligation of granting national treatment (without reciprocity) to foreigners. In this connection, it will also be examined whether countries whose national law protects subject matters as works under their copyright law, or recognize the protection of certain rights in their copyright law, may refuse the application of the minima or the granting of national treatment to foreigners or make the protection of foreign works or the application of certain rights to foreigners dependent on reciprocity." (AB/XX/2 prov., Annex A, pages 16 and 17, PRG.02(2).)

* Prepared by the International Bureau.

The Director General observed that the draft program was a proposal that the Assembly of the Berne Union would consider in September 1989.

Mr. Jukka Liedes (Finland) was unanimously elected Chairman, and Messrs. György Boytha (Hungary) and Abderraouf Kandil (Morocco) were unanimously elected Vice-Chairmen of the Committee.

The Memorandum Prepared by the International Bureau

Discussions were based on the memorandum prepared by the International Bureau entitled "Draft Model Provisions for Legislation in the Field of Copyright" (document CE/MPC/I/2-I to III) as well as on the "Corrigendum to Document CE/MPC/I/2-II" prepared by the International Bureau (document CE/MPC/I/2-II Corr.).

The memorandum has been prepared in accordance with the approved program and budget of WIPO for the 1988-89 biennium, and more precisely under item PRG.04 entitled "Setting of Norms in the Field of Intellectual Property Particularly Under the Paris and Berne Conventions" which describes, *inter alia*, the objective and the expected results of such norm-setting as well as the nature and form of the norms to be proposed.

In respect of the objective of norm-setting, the program contains the following statement:

"The objective is to make the protection of intellectual rights more effective throughout the world. 'More effective' means that the norms (standards) of protection are raised, where necessary, to the required level and that the enforcement of the intellectual property rights will be easier and the sanctions for infringement stricter. This objective may be achieved by creating new treaty obligations or by persuasion. This item proposes the creation of new treaty obligations by work on the draft of two 'harmonization' treaties in the field of industrial property (one on patents and one on trademarks) and by the conclusion of a treaty on the protection of intellectual property rights in integrated circuits. As far as action by persuasion is concerned, this item proposes that guidelines or model provisions for legislation be prepared on selected questions of industrial property (not covered by the harmonization treaties) and in the entire field of copyright. Naturally, effective enforcement is also a subject matter for the treaties and guidelines or model provisions mentioned in this item."

Concerning the expected results, the program states, *inter alia*, the following:

"It is expected that the guidelines or model provisions will inspire and influence governments and legislators to improve their intellectual property laws and opt for solutions that will increase the degree of similarity among legislations whenever the special interests of a country do not require different solutions."

Finally, as regards the nature and form of the norms to be proposed, the program states as follows:

"The norms (standards) will take the form of guidelines or model provisions for national or regional legislations and, in respect of questions for which the conclusion of a multilateral treaty has serious chances of being successful, the norms (standards) will take the form of draft treaties. Guidelines are indications of how to achieve certain objectives, and 'model' provisions are mere examples ('models'). Either may or may not be followed by legislators. Neither creates obligations for anyone"

"In the field of literary and artistic works, uniform solutions, in the form of guidelines or model provisions for legislations, will be proposed Such proposals will be partly based on the principles worked out for nine categories of works The guidelines or model provisions will strictly conform to the letter and spirit of the Berne Convention."

The reference to "principles worked out for nine categories of works" mentioned in the above-quoted part of the program means the principles—accompanied by comments—discussed at a series of meetings of committees of governmental experts on various categories of works which were convened jointly with Unesco in the 1986-87 biennium and in the first half of 1988. The principles and comments discussed by the various committees of governmental experts were reviewed and completed by the Committee of Governmental Experts on the Evaluation and Synthesis on Various Categories of Works in Geneva in June-July 1988.

As the program of WIPO for the 1988-89 biennium states, the draft model provisions contained in the memorandum are "partly based on the principles worked out for [the] nine categories of works." Only partly, for three reasons. Firstly, because, although the principles and the comments accompanying them offer a fairly detailed inventory of copyright problems concerning the nine categories of works and of the possible solutions to those problems, certain copyright questions have not been discussed at those meetings, questions which, in the framework of the present draft model provisions, have to be covered (such as the protection of computer programs, the ownership of copyright, the legal status of works created by employed

authors, the rules of transfer and licenses). Secondly, the principles on various categories of works were based on both the Berne Convention and the Universal Copyright Convention and, although the minimum standards of the Berne Convention were generally accepted as decisive, the principles did not always reflect fully what would be the optimum solution to be applied in copyright laws of countries party to the Berne Convention. Thirdly, certain differences do follow from the very fact that the purpose, the nature and the structure of the principles, on the one hand, and the purpose, the nature and the structure of the model provisions, on the other, do differ.

Although the relevant part of the program only mentions the principles on various categories of works, it goes without saying that the International Bureau has also taken into account the results of all other WIPO activities that seemed relevant for the draft model provisions. Thus, the documents of the meetings on copyright questions in relation to various new uses of works (such as reproduction for private purposes, rental and lending, storage in and retrieval from computer systems, cable television, satellite broadcasting) which took place in the 1982-83 and the 1984-85 program periods have also been utilized. Furthermore, the results of certain other meetings held in the same program periods and dealing with various questions relevant from the viewpoint of the present draft model provisions (such as the protection of computer programs, the protection of the expressions of folklore, the legal status of works created by employed authors, the questions of publishing contracts, the means of combating piracy) have also been utilized. Finally, the provisions of the Tunis Model Law on Copyright for Developing Countries adopted in Tunis in March 1976, with the assistance of WIPO and Unesco, have also been taken into account.

The memorandum is composed of three parts: Part I consists of introductory statements, Part II contains the draft model provisions themselves, Part III includes the comments on the draft model provisions.

The draft model provisions contain 11 chapters and two annexes which are the following: Chapter I: Definitions, Chapter II: Subject Matter of Protection, Chapter III: Rights Protected, Chapter IV: Limitations on Economic Rights, Chapter V: Duration of Protection, Chapter VI: Ownership of Rights, Chapter VII: Transfer of Rights, Licenses, Waiving the Exercise of Moral Rights, Chapter VIII: Collective Administration of Economic Rights, Chapter IX: Obligations Concerning Equipment Used for Acts Covered by Protection, Chapter X: Measures, Remedies and Sanctions in Case of Piracy and Other Infringements,

Chapter XI: Final Provisions; Annex A: Non-Voluntary Translation Licenses, Annex B: Non-Voluntary Reproduction Licenses.

Discussion of the Memorandum

All the participants who took the floor in the general discussion stressed the importance of the model provisions for the promotion of an effective and balanced copyright protection and praised the high quality of the memorandum prepared by the International Bureau. Several participants, at the same time, stated that they would make comments and proposals concerning certain details.

Several delegations welcomed the idea of the proposed protocol to the Berne Convention and stressed that the discussion on the draft model provisions could also be useful for the preparation of such a protocol.

In the section by section discussions, a number of comments were made which are reflected in a summary manner in the report adopted by the Committee (document CE/MPC/I/3).

The most animated discussions took place concerning the notions of "works" and "author," the protection of computer programs, the protection of phonograms, and the scope of various limitations.

In the discussions on the notions of "work" and "author," the various interventions reflected the well-known differences between the so-called "continental" approach and the so-called "Anglo-American" approach which were also reflected in Part III of the memorandum in the comments on the model provisions which concerned the notions of "work" and "author" (and in relation with the latter the questions of the ownership of rights).

In respect of computer programs three delegations expressed doubts whether copyright protection of computer programs was an appropriate solution and, thus, whether any provisions on such a protection would be justified in the model provisions.

Against the copyright protection of computer programs, the following main arguments were formulated: Computer programs are not covered by the Berne Convention; they are of a technical and utilitarian character and cannot be considered to belong to the literary and artistic domain. In general, they lack originality and are composed of mere subroutine elements. The basic provisions of copyright protection do not suit the protection of computer programs; for example, the 50-year term of protection after the author's death is unrealistic; computer programs become obsolete within a much shorter period. In many countries, it has not yet been decided which is the best system for the protection of computer programs. Even in countries

which recognize copyright protection, there are also cases where computer programs are protected by patents. At the level of WIPO, no meetings have dealt with this question recently. The WIPO Model Provisions on the Protection of Computer Programs adopted in 1977 should be considered to continue to prevail and those Model Provisions outlined a *sui generis* system.

Eighteen delegations, as well as observers from five international non-governmental organizations, supported the inclusion of provisions in the model provisions on the copyright protection of computer programs.

In favor of the copyright protection of computer programs, the following main arguments were formulated: Although computer programs are not mentioned in the non-exhaustive list of literary and artistic works contained in Article 2(1) of the Berne Convention, this does not mean that they are not covered by the Convention; because the list is non-exhaustive, what is important is that such programs correspond to the notion of literary and artistic works. Computer programs are writings, although certain elements of them might come under other categories mentioned in the non-exhaustive list of works (such as drawings, etc.), and thus, they clearly belong to the literary and artistic domain as outlined in the Berne Convention. The great majority of computer programs contain clear creative elements and, therefore, they are original works. The fact that certain genre-specific provisions might be considered necessary is not an argument against the recognition of computer programs as literary and artistic works; such genre-specific provisions exist also in respect of other categories of works clearly covered by the Berne Convention (such as audiovisual works). The alleged problem of the long term of protection is of an academic nature; there are a number of other categories of literary and artistic works which may become obsolete within a much shorter period than 50 years after the author's death which should be considered nothing else but an upper limit. In the overwhelming majority of countries whose legislation or courts have decided on the protection of computer programs, copyright protection has been chosen. The patent protection of computer programs is another possibility, that is not, however, a serious alternative because it cannot cover more than a very small percentage of computer programs. The 1977 WIPO Model Provisions did not outline either a *sui generis* system or a copyright system; they only identified the most important provisions to be applied which were of copyright nature and the commentary to the Model Provisions explains that those provisions can also be implemented in the framework of copyright laws. Just that latter solution has been accepted and has become nearly exclusive. Various WIPO meet-

ings have identified that clear and unmistakable trend; for example, the meeting of the WIPO/Unesco Group of Experts on the Copyright Aspects of the Protection of Computer Software held in Geneva in February-March 1985, as well as the extraordinary sessions of the Executive Committee of the Berne Union held in Paris in June 1985 and in Geneva in June 1987.

Concerning sound recordings, seven delegations, as well as observers from three international non-governmental organizations, proposed that such recordings should be included in the non-exhaustive list of literary and artistic works in Section 3(1), at least in square brackets. One delegation said that, even if its country did not recognize sound recordings as works, it was acceptable for it to include sound recordings in the non-exclusive list of works in Section 3(1) in square brackets as one of the possible options.

In favor of the inclusion of sound recordings in Section 3(1), the following main arguments were formulated: The list of works included in Article 2(1) of the Berne Convention is not of an exclusive nature; countries party to the Convention are free to protect productions other than the ones mentioned in the list that, in their view, correspond to the notion of literary and artistic works. The production of sound recordings, under the circumstances of the present modern technologies, as a rule, does correspond to the notion of the authorship of original literary and artistic works. More than 40 countries do actually protect sound recordings as works and about 12 countries do protect sound recordings as literary and artistic works within the meaning of "works" under the Berne Convention. Such a protection is not against but rather in favor of the interests of the authors of works embodied in sound recordings and of the performers of such works; an effective protection of phonogram producers is indispensable for the fight against piracy and against other serious infringements. The Berne Convention does not exclude such a protection by member countries and the protection of sound recordings as literary and artistic works could not weaken the Convention which has been adopted to fit all the various types of national laws including those which only protect sound recordings (or as the Convention puts it "phonograms") by neighboring rights. The Phonograms Convention goes even further; it explicitly mentions the copyright protection of phonograms as one of the four possible ways of implementing the Convention. Under such circumstances, it is justified to mention sound recordings, at least in square brackets indicating—as also explained in the commentary—that that is only one of the possible options at the national level, an option that is exercised by the national legislation of many of

those countries which produce the greatest number of sound recordings.

Eight delegations, as well as observers from five international non-governmental organizations, opposed the proposal that sound recordings should be included in Section 3(1) even in square brackets. One delegation stated that although it supported the extension of the model provisions to the so-called neighboring rights, it was hesitant on the inclusion of sound recordings in the list of literary and artistic works, while an observer from an international non-governmental organization stated that she did not agree that sound recordings or broadcasts were protected as literary and artistic works under the Berne Convention but if sound recordings were to be recognized as such works, the recognition of broadcasts as such works would equally be justified.

Against the inclusion of sound recordings in Section 3(1), the following main arguments were formulated: The Berne Convention only protects the intellectual creators of literary and artistic works as authors; there is no exception to that basic principle in the case of cinematographic works either, because although the Convention leaves national laws free to recognize "makers" of such works as original owners of copyright, makers are not referred to as "authors" in the Convention. The language of the provision of the Convention on the original ownership of film "makers," makes it clear that it is an exception to the general principle. If also other works were intended to be covered, further exceptions would be needed; no such exceptions exist, however, and particularly not in respect of sound recordings. It is possible that sound engineers or other physical persons produce creative elements during the production of sound recordings; if that is the case, they may be protected as authors, but that has nothing to do with the protection of phonogram producers as such. Those who allege that more than 40 countries protect sound recordings by copyright forget that copyright is used in differing meanings in various countries and that it may and does cover many productions other than literary and artistic works which have nothing to do with the Berne Convention. It is true that countries party to the Berne Convention are free to extend the list of literary and artistic works but such an extension necessarily involves the obligation to apply the principle of national treatment and the minimum provisions of the Convention. This is, however, in general, not the case in the countries concerned, therefore, it is doubtful that there is real copyright protection in the sense in which this protection exists under the Berne Convention even in the 12 countries to which reference has been made as countries where sound recordings allegedly are protected as literary and artistic

works; some of them do not grant minimum protection under the Convention—for example, they do not grant the right of public performance and/or the right of broadcasting prescribed by the Convention which they enjoyed in other countries under neighboring rights—and some of them do not grant national treatment. The reference, in the Phonograms Convention, to "copyright" protection of phonograms should also be interpreted in the light of the double meaning of the word "copyright"; it is used there in the wider meaning and not in the meaning according to the Berne Convention. The international classification is clear: the Berne Convention does not cover sound recordings; the international instrument which serves the protection of sound recordings is the Rome Convention. WIPO, which administers both Conventions, should follow that international classification. The transfer of the protection of phonogram producers under the umbrella of the Berne Convention would also upset the delicate balance of interests between the three categories protected by the Rome Convention. It was further said that phonogram producers did also combat piracy successfully in those countries where they enjoyed neighboring rights. In any case, they generally have the authors' rights transferred to them, so that, on the grounds of those rights, they can also combat piracy.

In the framework of the discussions on limitations, the greatest number of comments were made on the draft model provisions on non-voluntary licenses. Several participants expressed their strong opposition to non-voluntary licenses even in cases where such licenses were compatible with the Berne Convention. Reference was made to the memorandum which also stressed that such licenses were not recommended in general, but only in exceptional cases and, as a rule, only in developing countries where they might be needed at the stage of the establishment of a national copyright infrastructure. It was suggested that the presentation of the sub-chapter on the possibility of non-voluntary licenses should be brought into better harmony with the commentary. The possibility was mentioned that Sections 23, 24, 26 and 27 (on non-voluntary licenses for reprographic reproduction for internal purposes, for recording musical works, for broadcasting and for communication by cable of works broadcast, respectively) should be put in an annex. It was also pointed out, however, that such systems were in force not only in developing countries, but also in certain developed countries. Therefore, some delegations were in favor of the maintenance of the relevant provisions in square brackets.

The Committee discussed eight of the 11 chapters. In respect of the remaining three chapters (Chapter VII: Transfer of Rights, Licenses, Waiv-

ing the Exercise of Moral Rights, Chapter IX: Obligations Concerning Equipment Used for Acts Covered by Protection, Chapter XI: Final Provisions) and of the two Annexes, the discussion will take place at the second session of the Committee (to be held in Geneva from November 6 to 10, 1989).

LIST OF PARTICIPANTS

I. States

Algeria: S. Abada; N. Mokrani. **Angola:** P. Gonçalves; M. Alberto. **Argentina:** G.H. Peiretti; A. Trombetta; M.A. Emery. **Australia:** R. Burns. **Austria:** T.M. Baier; C. Thun-Hohenstein. **Bangladesh:** M.I. Talukdar; A.A. Khan. **Brazil:** P. de Almeida. **Cameroon:** H. Fouda. **Canada:** J. Daniel; J. Gero. **Chile:** J. Acuña. **China:** Shen Rengan; Gao Hang. **Czechoslovakia:** J. Karhanová; N. Puchalová; M. Jelinck. **Denmark:** J. Nørup-Nielsen; P. Schønning. **Egypt:** N. Gabr. **El Salvador:** C.A. Barahona. **Finland:** J. Liedes; H. Wager; T. Koskinen; S. Lahtinen. **France:** A. Kerever; G. Valter; R. Lecat; S. Sayanoff-Levy; L.-G. Fournier; N. Renaudin; H. Ladsous; C. Cor. **German Democratic Republic:** A. Henselmann. **Germany (Federal Republic of):** M. Möller. **Ghana:** M. Abdullah. **Greece:** A. Cambitsis. **Guinea:** M.C. Souarc. **Honduras:** N. Valenzuela. **Hungary:** Gy. Boytha. **India:** L. Puri. **Israel:** M. Gabay; R. Walden. **Italy:** G. Aversa. **Japan:** Y. Oyama; M. Kilani. **Lebanon:** H. Hamdan. **Mexico:** J.M. Morfin Patraca; G.E. Larrea Richerand; A. Fuchs. **Morocco:** A. Kandil; A. El Hajjami; A. Bendaoud. **Netherlands:** L.M.A. Verschuur-de Sonnaville. **Norway:** H.M. Soenneland; J. Holland. **Poland:** T. Drozdowska. **Portugal:** J.A. Lourenço; A.Q. Ferreira. **Republic of Korea:** T.-C. Choi. **Saudi Arabia:** M. Alkhudair. **Soviet Union:** M. Voronkova. **Spain:** M. Pérez del Arco; E. de la Puente García; J. Navarro González; L. Martínez Gamica. **Sweden:** K. Hökborg; A. Mömer; B. Rosén. **Switzerland:** C. Govoni. **Thailand:** S. Suntavaruk; W. Setsuwan. **Tunisia:** H. Tebourbi. **Turkey:** A. Algan. **United Kingdom:** D. Irving. **United Republic of Tanzania:** K.J. Suedi. **United States of America:** R. Oman; D. Schrader; L. Flacks; R.C. Owens; E. Simon; J. Baumgarten. **Uruguay:** R. González Arenas. **Yugoslavia:** R. Tesić.

II. Intergovernmental Organizations

International Labour Organisation (ILO): C. Paoli-Pelvey. **United Nations Educational, Scientific and Cultural Organization (UNESCO):** E. Guerassimov. **Commission of the European Communities (CEC):** B. Posner; C. Bail; A. Staines; B. Czarnota; J. Breuls. **General Agreement on Tariffs and Trade (GATT):** A.T. Otten. **Organization of African Unity (OAU):** M.H. Tunis.

III. International Non-Governmental Organizations

Computer and Business Equipment Manufacturers Association (CBEMA): O.R. Smoot. **Educators' Ad Hoc Committee on Copyright Law (ECCL):** A.W. Steinhilber. **European Association of Manufacturers of Business Machines and Data Processing Equipment (EUROBIT):** M. Kindermann. **European Broadcasting Union (EBU):** M. Burnctt. **European Federation of Agents of Industry in Industrial Property (FEMIP):** M. Kindermann. **European Tape Industry Council (ETIC):** W.H. Andriessen; N.J. Forwood; C. Jaschek. **Information Industry Association (IIA):** M.D. Goldberg. **International Alliance for Distribution by Cable (AID):** G. Morcau; P.A.C. Kokken. **International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP):** A. Dietz. **International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM):** A. Vacher-Desvemaïs. **International Chamber of Commerce (ICC):** J.M.W. Buraas; N. Alterman. **International Confederation of Societies of Authors and Composers (CISAC):** J. Corbet; J.-A. Ziegler; R. Abrahams; A. Delgado. **International Copyright Society (INTERGU):** U. Uchtenhagen. **International Federation of Associations of Film Distributors (FIAD):** G. Grégoire. **International Federation of Film Producers Associations (FIAPF):** A. Brisson; A. Chaubeau; N. Alterman. **International Federation of Musicians (FIM):** J. Morton; Y. Burckhardt. **International Federation of Newspaper Publishers (FIEJ):** F. Leth-Larsen; T. Balding; B.E. Lindskog; N.W. Walker; D. Seligsohn. **International Federation of Phonogram and Videogram Producers (IFPI):** I. Thomas; G. Davies; D. De Freitas; N. Turkewitz. **International Federation of Translators (FIT):** J. Pienkos. **International Group of Scientific, Technical and Medical Publishers (STM):** P. Nijhoff Asser. **International League on Competition Law (LIDC):** A. Françon; J. Guyet; E. Martin-Achard. **International Literary and Artistic Association (ALAI):** H. Cohen Jchoram; A. Françon. **International Music Council (IMC):** I. Thomas; G. Davies; D. De Freitas; N. Turkewitz. **International Publishers Association (IPA):** J.A. Koutchoumow; A.L. Sellier; C. Clark; E. Fennessy; S. Wagner. **International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU/FIET):** J.W. Wilson. **Max Planck Institute for Foreign and International Patent, Copyright and Competition Law:** A. Dietz. **Union of Industrial and Employers' Confederations of Europe (UNICE):** M. Kindermann.

IV. Officers

Chairman: J. Liedes (Finland). **Vice-Chairmen:** Gy. Boytha (Hungary); A. Kandil (Morocco). **Secretary:** M. Ficsor (WIPO).

V. International Bureau of the World Intellectual Property Organization (WIPO)

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

Studies

Copyright and Neighboring Rights Protection in the Japanese Record Rental Industry

Shimpei MATSUOKA*

Record Rentals Prior to Amendment of the Copyright Law

Japan's first record rental shop was founded by three college students in Mitaka, Tokyo, in June 1980. The three students originally intended to rent LPs (long-playing records) and cassette tapes to fellow students. The typical LP at that time sold for 2,800 yen retail, while the rental shop charged 200 yen for overnight use. The students thought that many high-school and college students would have a strong interest in listening to new recorded music, but had a limited amount of allowance money to purchase the rather expensive LPs.

This rental shop was an immediate hit. By the end of the summer, several shops, almost all of which were founded by college students or young people, made their appearance in Tokyo. Some of these stores even started to make franchise arrangements with the original shop to learn its methods of operation and also began to establish a joint stocking system to improve the supply of products.

By the end of 1980, there were approximately 30 rental shops operating in Japan. The rise of this new type of business was both welcomed and criticized. Initially, many people had thought that record rental shops, being an experiment by young students, would never grow into a real business. However, more and more new shops began to open week after week. While a certain number of rental shops went out of business within a very short period, other shops continued to grow.

The Japan Phonograph Record Association (JPRA), which saw the record rental business as a challenge to the established record distribution system, first of all to its member manufacturers and associated dealers, made an announcement in February 1981. JPRA's announcement mentioned that the rental of phonorecords and prerecorded tapes could encourage people to make private recordings on blank cassettes and might affect the

sale of legitimate products. However, at this point in time, not many people, including those inside the traditional record industry, had really felt the threat of this new business. Only a limited number of record store owners whose shops were located very close to the newly opened rental shops were upset at seeing the lines of teenagers in the rental shops. Some dealers and wholesalers, from whom rental shops purchased products, were very happy to sell quantities of records and tapes to the new customers at the normal selling price.

In February 1981, JPRA also visited the Commissioner of Cultural Affairs in the Ministry of Education to urge the amendment of the Copyright Law. JPRA sought changes which would give record manufacturers distribution rights or public lending rights for phonorecords they manufactured, so that the manufacturers and producers could control the products in the rental shops.

By the summer of 1981, it was clear to everybody that record rentals were here to stay. It was impossible to determine how many customers of rental shops would have purchased records through retail stores if the rental business had not existed. Of course, even the most pessimistic record manufacturer could not insist that lost record sales equaled the number of rented records. Since a large portion of the rental customers were young people without enough allowance money to purchase as many LPs as they rented, it was not easy to estimate the effect of rentals on actual sales. Indeed, to some degree, the rental shops created additional customers for phonorecords. Nevertheless, nobody can deny that the rental business had taken away a certain number of customers from record shops.

Incidentally, the sales of phonorecords, which reached an all-time high in 1980, showed an unexpected decline in late spring of 1981. For the first time since the end of World War II, retail record shops had to face the fact that neither the number of discs nor the amount of sales would reach the previous year's figures. Although prerecorded tapes were still showing growth, mostly because of the success of "Walkman" tape players, which were

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introduced in late 1979, aggregate sales for recorded materials still could not surpass sales for the previous year.

Now, not only record manufacturers but also retail record stores realized the importance of the record rental business for the future of the phonorecord industry. JPRA took the lead in producing publicity as well as in making appeals to the ministries, to members of the Diet, and to the general public. JPRA insisted that the existence of the record rental business would hurt the record industry and would eventually create a rather dangerous situation for the creative viability of the Japanese music industry.

In October 1981, all of the 13 companies belonging to JPRA petitioned the Tokyo District Court for an order which would immediately prohibit lending of records listed in the catalogs of the 13 companies. They insisted that the record rental business infringed their exclusive right to reproduce phonorecords under the provisions of the Japanese Copyright Law. However, at this point, even these manufacturers realized that the legal grounds for their case were not strong enough to assure success in court. Nevertheless, they decided that the court suit was the best way to publicize the danger then facing the manufacturers, retail stores and, very likely, the entire Japanese music industry.

While JPRA and a majority of the retail record shops were trying to stop the record rental business, there were still a number of wholesalers and retail sellers who were supplying phonorecords and tapes to the rental shops. Manufacturers were quite embarrassed and very angry at this betrayal and had decided to stop shipments of products to certain sellers if there was some evidence that the sellers were supplying records to rental shops. A record wholesaler, whose record shipment was stopped in spite of the existence of a sales contract, sued in Tokyo District Court for an injunction against the record manufacturers based on the Fair Trade Regulations. The Japanese Fair Trade Commission showed strong interest in the case and unofficially announced that it would watch the court proceedings with great interest.

By the end of 1981, it was estimated that the number of record rental shops had exceeded 1,000. Having realized the difficulty in restricting the activity of rental shops without appropriate legislation, JPRA decided to put every effort into obtaining either a revision of the Copyright Law or the creation of some other type of legal restriction. JPRA and retail stores made repeated appeals to members of the Japanese Diet, certain members of which gradually began to show interest in the record rental problem.

In March 1982, the Liberal Democratic Party set up a committee to investigate the record rental

problem. The committee acted with great speed. After several hearings involving both the record manufacturers and the rental operators, the committee drafted a law to regulate the activity of the record rental business.

The new law gave the right to license record rentals to the copyright and neighboring rights owners, with a reasonable license fee to be paid by the rental operators. The committee realized that amending the Copyright Law itself would take a lengthy period for pursuing the necessary procedures within the government. Therefore, the new law was independently introduced into the Diet by members of the House. Such a procedure is rather rare in Japan's current law-making process. The first draft of the law was introduced on August 13, 1982, with the title "Law Related to the Rights of Authors and Related Right Owners Regarding the Public Lending of Commercial Records." It took more than 15 months before the law was actually passed by both Houses, with several changes being made during the Diet deliberations.

The law was drafted with the basic intent of creating terms mutually agreeable to both the record industry and the rental shops. While the politicians were sympathetic to record manufacturers and retail shops because of their loss of profits, they also listened to the voice of young people who had welcomed the opportunity to obtain music recordings through rental shops at the lower rental fees. From the time it was drafted until now, the law's basic philosophy has been to legitimize the existence of the record rental business while giving limited control to the copyright and related rights owners. This policy has been respected throughout the discussions on the record rental problem.

Besides the basic problem presented by the record rental business, another major problem has existed since the initial appearance of the rental shops. Since many customers of rental shops borrow records to make private copies on personally owned tape recorders, some rental shops began to rent the use of high-speed semiprofessional tape recorders located on the premises as an extra service. A customer selects an LP, pays the rental fee, purchases a blank cassette at the shop, and then makes a copy of the record in the store, returning the LP probably half an hour later. While Japanese copyright law permits an individual to make private copies for the non-commercial use of copyrighted materials, it was felt that the offering of additional services, such as the use of high-speed tape machines and other equipment, should not be regarded as an exercise of fair use. In a number of cities record manufacturers began to seek damages or injunctions against several of the rental shops that had offered such recording facilities on their premises. While litigation on the legality of the

rental business itself was progressing very slowly, manufacturers found that district courts were willing to respond quickly to these cases by ordering injunctions against the further use of high-speed dubbing machines in the rental shops.

In comparison with the quick action of record manufacturers and JPRA, the Japanese Society for Rights of Authors, Composers and Publishers (JASRAC) had to take a rather cautious attitude in facing the rental shops. Since JASRAC is the only organization with the government's permission to license and collect fees for music copyrights in Japan, it is expected to act carefully, particularly in regard to litigation. Traditionally, JASRAC had taken cases to court only when copyright infringement was clear. However, largely because of the repeated litigation by JPRA as well as by authors and publishers, JASRAC finally decided in August 1982 to sue the original and most successful rental shop for copyright infringement. At the same time, JASRAC also joined JPRA in lobbying the Agency for Cultural Affairs and key Diet members for early amendment of the Copyright Law itself.

Although it was regarded as only a matter of time before the Diet would approve the law regulating rental shops, no actual solution was found during 1982. The number of rental shops reached around 1,700 by the end of that year.

In January 1983, the Agency for Cultural Affairs, which is responsible for submitting any amendment to the Copyright Law in Japan, asked the Copyright Council to discuss the record rental problem. A subcommittee of the Council was assigned to study the matter and to propose any legal solution, including revision of the law if necessary. In September, the subcommittee published its conclusions, recommending amendment of the Copyright Law to give copyright owners public lending rights as an independent right. Based on this recommendation the Agency for Cultural Affairs immediately began to prepare drafts of the amended law. At the end of November the draft of the amendment was published for review by interested parties. The Agency announced that they planned to submit the amendment to the Diet in the spring of 1984.

Meanwhile, the law to regulate the activity of record rental shops, which was introduced by House members in the summer of the previous year, finally reached the last stage of consideration in the Diet. Because the Copyright Law amendment, which would be submitted to the Diet the following year, gave copyright and neighboring rights owners better protection than the new law would provide, Diet members agreed to make their law an interim law pending approval of the amendment to the Copyright Law. The "Law to Take an Interim Measure for the Protection of the Rights of

Authors, etc. with Respect to the Lending of Commercial Phonograms to the Public" passed the Diet on November 28, 1983, and was promulgated on December 2, 1983.¹ The effective date of entry into force of this Law was six months after its promulgation, that is June 2, 1984.

On March 20, 1984, the Japanese Government submitted its amendments to the Copyright Law to the Diet. After one and a half month, the amendment was passed, with the effective date of January 1, 1985.

After the Diet's passage of the Interim Law, JPRA, JASRAC and GEIDANKYO (the Japan Council of Performers' Organizations, which protects the rights of performers of phonorecords in Japan) started to negotiate the terms for licensing rentals with an association of rental shops. In March 1982 rental shops had first organized an association through which shop operators met to exchange information and discuss mutual problems. In April 1984 they reorganized the association and incorporated it into a juridical person in order to give the association the power to negotiate with right owners. The negotiations which were lengthy were more or less focused on the amount of fees to be paid by rental shops to right owners. JASRAC reached an agreement first, while JPRA and GEIDANKYO finalized agreements after more than one year of negotiations.

In 1985, approximately five years after the first appearance of record rentals, an orderly system for the record rental business was finally established.

1984 Amendment of the Copyright Law

Since it was completely revised in 1970, the Japanese Copyright Law has been amended repeatedly to deal with changes or developments affecting copyrights. The 1984 amendment² passed by the Diet created a lending right on the one hand and limited reproduction for private use (fair use) on the other. The details of the amendment are as follows.

Copyright Lending Right

The newly added Article 26bis states:

Right of Lending

Article 26bis. The author shall have the exclusive right to offer his work (except a cinematographic work) to the public by lending copies of the work (excluding copies of a cinematographic work in the case of a work reproduced in the cinematographic work).

¹ See *Copyright*, 1984, pp. 285-286.

² Law for Partial Amendments to the Copyright Law (No. 46, of May 25, 1984), *ibid.*, 1985, pp. 249-252.

"Lending" is usually regarded as an act permitting others to use what one owns by a transfer of possession with a retention of ownership. However, under this definition the Copyright Law could be evaded by use of the pretext that ownership of an object had been transferred to another. With this in mind, the amended Copyright Law newly defined "lending" as including any act giving rise to the same right of use as lending itself, regardless of how the transaction was accomplished (Article 2, paragraph (8)). Thus, if, for example, a shop gives a customer a phonorecord in exchange for money equivalent to its retail price, and uses a "Transfer with Repurchase Agreement" which provides that when the record is returned within three days the shop will repay the money to the customer less an amount equivalent to a rental fee, this transaction is regarded as a "lending."

At the time of the 1985 Copyright Law amendment, only record rentals were posing serious problems. However, anticipating similar problems in other fields, the lending right was, as a general rule, established for all protected works. Accordingly, renting of personal computer programs, which is increasingly popular, is now covered by the lending right.

However, the rental of books and magazines (excluding sheet music) was specifically excluded from the lending right's coverage for the time being (Supplementary Provisions, Article 4*bis*). In Japan, book rentals have an over 100-year-long history without restraint and have been actually decreasing year by year. As a matter of fact, the economic interests of copyright owners are probably not unduly injured by such a service. If book rental services become seriously harmful to the economic interests of copyright owners, this provision probably will be discarded.

Motion picture films, for which distribution rights have already been sanctioned (Article 26), are also excluded from the scope of the lending right. On the other hand, video rentals are covered by this provision on distribution rights.

While the lending right is clearly defined in the Copyright Law, lending for non-profit purposes without any payment by borrowers, such as lending by public libraries, does not require the permission of the copyright owner (Article 38, paragraph (3)). The "non-profit" concept requires that the lending not be even indirectly involved in profit-making (lending for use in a commercial advertisement is regarded as a profit-making activity).

Consistent with this limitation on lending rights, film distribution rights have also been limited regarding similar activities. Non-profit audiovisual educational institutions and other organizations specified by Cabinet Order can offer the public free lending services of videotapes, video discs and

films without getting the permission of copyright owners (Article 38, paragraph (4)). However, in view of the fact that this limitation was introduced into a field where distribution rights were previously observed, such lending institutions are specifically limited, and some compensation must be paid.

Performers and Record Producers' Rights Related to Public Lending

Record rental services also affect the economic interests of performers and record producers. It would have been unfair if these parties were excluded from participating in the economic benefits accruing from record rentals. Against such a background some rights were granted to performers and producers of phonograms regarding record rentals (Articles 95*bis* and 97*bis*).

However, the substance of performers' and producers' rights is considerably different from the author's right (the copyright itself). The author's lending right is characterized as the "right of authorization" (i.e., the right to decide whether to authorize use or not), whereas performers' and record producers' rights are exercised under a dual system of rights. For these parties the right of authorization exists for only a short period after release of the commercial phonogram, with only the right to claim compensation existing thereafter. This dual system was devised after giving comprehensive consideration to the difference between the law's treatment of neighboring rights and the copyright itself, the competitive business situation of rental shops and retail stores, the efficiency of fee collections, and other matters. It is expected that performers and record producers will be satisfied with being able to exercise the right of authorization for an initial period, during which competition between rentals and sales is stiff and could affect the economic interests of performers and producers of phonograms arising from record sales. Thereafter, to avoid a conflict with the copyright holder, performers and producers are only permitted to exercise their right to compensation.

As specified by Cabinet Order, for rentals of commercial phonograms to the public the right of authorization (lending right) is to be exercised within a limited period after the first domestic sale of a commercial phonogram. Originally, this period ranged from one month to one year according to Cabinet Order, but is now set at one year. This right is integrated within the framework of the neighboring rights (Article 89, paragraph (5)), and therefore an unauthorized rental constitutes an infringement of the neighboring rights, thus subject to injunction, compensation for damage, and imposition of a penalty.

After expiration of the period during which authorization is required, rental operators are still required to pay due compensation to the performer and record manufacturer. This right to claim compensation, similar to the right to claim compensation for the secondary use of commercial phonograms for broadcasting (Articles 95 and 97), is an obligatory right, but is not enforceable by injunction or penalty even in the absence of payment.

The date of the first domestic sale of a commercial record means the first day of sale of any medium (tape, disc, or otherwise) that contains the exact same artistic material. In other words, release of a single will not affect the release of an LP in which many titles from previously released singles are included. The singles and the LP are regarded as different commercial records.

While theoretically each performer and producer may exercise the right of authorization, the law provides that the right to compensation is to be exercised through organizations designated by the Commissioner of the Agency for Cultural Affairs, as in the case of secondary usage in broadcasting. When an association which has a sizable number of professional performers as its members is designated, performers get payments only through the organization. The amount of compensation is decided annually by negotiations between the designated organization and record rental shops or the latter's association. Should they not come to agreement, they may ask for arbitration by the Commissioner of the Agency for Cultural Affairs. The same system is applied to record producers.

The right of authorization is to be exercised by individual right owners. However, royalties are to be collected by the same associations that deal with the right to compensation.

Amendments Regarding Reproduction for Private Use

Article 30 of the Copyright Law permits an individual to reproduce a protected work by himself for his own use or for the use of a limited circle of individuals, such as a family or the like (private use). This provision is established against the background that not only is reproduction for private use usually minimal in scale, but also because such use within the home could not practically be made subject to copyright law. Accordingly, an individual is permitted to make a reproduction by himself for his own use, but may not have others make reproductions on commission.

However, some rental shops started to provide dubbing machines for the convenience of the public, thus inducing customers to make reproductions by themselves. Although these shops tried to avoid

infringement of the Copyright Law by not offering to make the recordings themselves, this situation caused a different type of bulk reproduction to take place under the pretext of private use.

To provide better protection to copyright owners against these excessive practices, Article 30 was amended so that reproduction by means of an automatic reproduction machine, installed for the purpose of public use, would not be regarded as reproduction for private use as provided for in Article 30.

A machine installed for the purpose of public use includes not only a machine installed by a copy shop, but also machines installed by public libraries and the like.

Under this amendment, reproduction for private use by means of such a reproduction machine now constitutes copyright infringement, if done without the authorization of the copyright owner. However, reproduction by an individual using such a machine, as compared to the persons who try to make a profit by inducing the general public to make mass reproductions, should not be regarded as deserving a penalty. Accordingly, such an individual user should only be subject to a civil action, and not be penalized as a copyright infringer under the provisions of Article 119 as amended.

On the other hand, to give due protection for the rights of authors, it was considered necessary to hold such rental shops directly responsible for permitting copyright infringement through the offering of machines for reproduction. Article 119 on copyright infringement was therefore amended to impose copyright infringement penalties on persons who, in the course of their profit-making business, let others use such machines for illegal reproduction.

Although machines for reprographic reproduction were widely available to the public, collective administration of copyrights in this field had not been established. Under such circumstances, it would have only created confusion if reprographic copy machines were treated in the same manner as audio recording machines. Consequently, reprographic reproduction machines were excluded from the amendment's purview (Supplementary Provisions, Article 4*bis*). If and when a collective administration scheme is established in the field of reprographic reproduction, this provision is expected to be discarded.

Collection of Fees From Record Rentals

After proclamation of the amendment to the Copyright Law, the Commissioner of the Agency for Cultural Affairs designated JPRA and GEIDANKYO as the organizations eligible to

collect remunerations from rental shops on behalf of record producers and performers respectively. Since then, three organizations—JASRAC, JPRA and GEIDANKYO—have made separate agreements with record rental shops, establishing different fee scales as well as different collection systems. The following is a summary of the activity of each organization up to the last fiscal year.

1. JASRAC

JASRAC contracts with each individual record rental shop. Through its nationwide network of branch offices, JASRAC collected fees from almost 3,000 shops in fiscal 1987 (through March 1988) for a total amount of 2,083,902,392 yen. Fees collected are based on JASRAC's printed tariffs. Rental shops may choose to pay either on a per rental basis or on a monthly basis. In actuality, all the legitimate shops in the rental business have concluded contracts and have paid fees on a monthly basis. If a shop is a member of the Rental Association, there is a 20% reduction from the fee charged to non-members, since the Association has been very cooperative in encouraging member shops to conduct their business in a legal manner. The current tariffs are as follows:

	<i>Average number of rentals per month</i>	<i>Fee per month (in yen)</i>
up to	2,500	64,000
	2,500 – 3,000	84,000
	3,000 – 4,000	108,000
	4,000 – 5,000	144,000
	5,000 – 6,000	176,000
	6,000 – 7,000	200,000
	7,000 – 8,000	224,000
	8,000 – 9,000	256,000
	9,000 – 10,000	288,000
	10,000 – 11,000	320,000
	over 11,000	320,000 + 32,000/1,000 rentals

2. GEIDANKYO

GEIDANKYO, which is not an organization that administers rights and does not maintain a special section to handle licensing and fee collection as its main business, has no system like JASRAC's to establish direct contact with Japan's numerous rental shops. As a result, its licensing and collection activities are done through the Rental Association. The Rental Association makes reports on its member shops, collects fees based on the agreed tariffs, and then pays these fees to

GEIDANKYO. In fiscal 1987 (through March 1988), GEIDANKYO received 832,356,874 yen. The current fee scale for monthly payments is as follows:

	<i>Average number of rentals per month</i>	<i>Fee per month (in yen)</i>
up to	500	16,000
	500 – 750	20,000
	750 – 1,000	28,000
	1,000 – 1,250	37,000
	1,250 – 1,500	45,000
	1,500 – 2,000	57,000
	2,000 – 2,500	73,000
	2,500 – 3,000	89,000
	3,000 – 3,500	106,000
	3,500 – 4,000	122,000
	4,000 – 4,500	138,000
	4,500 – 5,000	171,000
	over 5,000	171,000 + 16,000/500 rentals

3. JPRA and Record Producers

The system used by JPRA and the record producers for licensing rentals and collecting fees is slightly complicated. While performers, through GEIDANKYO, had not actually exercised their licensing privilege, even for the new issues, record producers, who had strongly opposed the rental business from the beginning, tried to get the most out of the new privilege. When the Diet created the first record rental law in December 1983, it also approved a very unique supplementary resolution. The resolution stated that licensing rights should only be exercised in the context of a fair fee arrangement so that the conflicting parties could establish order among themselves. The true purpose of such a supplementary resolution was to permit rental shops to lend any record without the consent of the right owners as long as the appropriate fee was paid. In September of the same year, the first report of the Committee of the Copyright Council mentioned that it would be appropriate to give licensing power to the copyright owners, but only the right to remuneration should be given to the neighboring rights owners. Because of strong opposition from the record industry, the final draft of the amendment included licensing rights for neighboring rights owners for a limited period. However, the drafters as well as Diet members agreed that the licensing clause would only act as a means for enforcing fair payments by the rental shops. At the time of the establishment of the 1984 amendment, it was more or less commonly agreed that record producers and performers would never actually forbid the rental of any record.

JPRA was not fully satisfied with such a vague solution but had to agree to license everything at the start of the new system. After more than 40 negotiation sessions with the Rental Association, JPRA signed a special one-year renewable agreement. The agreement provided that each record producer could specify no more than 20% of his new recordings as records that could not be rented. However, rental shops could actually lend all such prohibited records by paying an additional 100 yen per lending! For the non-prohibited records, JPRA applied a monthly fee schedule which was exactly the same as the one used by GEIDANKYO.

Because record manufacturers had a sales network covering the entire country, they could directly negotiate with each rental shop for the rental of the special prohibited records, while the other fee payments were handled through JPRA. After expiration of the initial agreement described above, CBS/Sony went to court asking for authorization to exercise the licensing power contained in the amended Copyright Law. After judgment was rendered by the Tokyo District Court on November 20, 1986, both CBS/Sony and the Rental Association appealed to Tokyo High Court and are awaiting the final decision in this case (see discussion below). However, since the suit was brought, record manufacturers have not collected any special fee for new releases, insisting that they did not grant licenses giving permission to lend these prohibited records.

On the other hand, with the introduction of CDs (compact discs), the manufacturers entered into an arrangement for collecting additional special fees using the record distribution system. Under this arrangement, rental shops can only lend CDs which bear special markings. Certain record distributors appointed by the manufacturers sell these special CDs at a price which includes an additional 560 yen over the regular CD price. Initially, the appointed distributors directly remitted the CD surcharges to the record manufacturers. However, because JPRA is the only collection fee body for record producers designated by the Commissioner of the Agency for Cultural Affairs, record manufacturers changed the payment system in 1987. Thus, since October of 1987, CD surcharges borne by the appointed record distributors have been channelled through JPRA. JPRA's total collections for fiscal 1987 (through March 1988) amounted to 1,484,000,000 yen which reflects one year's collection of the regular monthly fees and a half year of CD surcharges.

From the foregoing we can safely say that from April 1987 to March 1988, record rentals paid roughly five billion yen to copyright owners and neighboring rights owners.

The distribution of the fees collected by the three organizations has been done with the help of sampling data compiled by JASRAC. For their own administration and control of their lending business, most rental shops have opted to use small computers. Consequently, with the assistance of the Rental Association, it is not difficult for JASRAC to obtain complete lending information for any month from almost any rental shop. By taking statistically approved samples of such lending information, fairly accurate estimates of nationwide rentals for each phonorecord or tape can be obtained. This information is filed according to the catalog numbers assigned by each manufacturer. JASRAC then reports its figures by author, JPRA by record producer, and GEIDANKYO by performer.

The Record Rental Business Today

JPRA made an extensive study of the record rental business in February 1988. The report of the study provides a clear picture of the record rental business at present.

There are over 4,000 record rental shops in Japan. After the number of shops reached 1,500 in 1983, growth slowed until June 1985, when JPRA and the Rental Association reached an agreement under the new copyright system. Since then, the business activity of rental shops under legal authorization has rapidly increased, with the number of shops doubling in less than three years. It seems that the business will show further expansion at least for the next couple of years. The Rental Association estimates that the total number of rental shops will exceed 6,000 within the next two years, surpassing the number of regular record shops.

Over 90% of such shops have contracted with JPRA and engage in the rental business by making payments to right owners. Almost all the shops are handling CDs, while less than 7% of the shops handle music tapes. More than one fourth of the rental shops only handle CDs. It is quite apparent that CDs are now the main products of the record rental business.

The typical lending fee is 250 to 300 yen per CD for a one-day rental, and 300 to 350 yen per CD for overnight use. The average shop inventory by type of product is: 3,076 LPs, 1,217 singles, 903 cassettes and 1,701 CDs.

Over 20% of the rental shops also sell used records. After a few rentals, shops offer discs at a discount depending on the amount of scratches and other damage. Even JPRA could not trace the size of the resale business for used rental products. With the wider lending of CDs, it may be possible that rental shops will expand their business in this field also.

Problems Still To Be Settled

Disputes Between JPRA and Rental Shops

As discussed above, in May 1986 CBS/Sony asked the Tokyo District Court for an immediate injunction prohibiting the rental of certain new titles in the CBS/Sony catalog by three rental shops. The Tokyo District Court ordered only a portion of the relief sought by CBS/Sony. Although CBS/Sony had joined with other record manufacturers in the agreement with the Rental Association permitting the lending of "prohibited titles" with the payment of an additional 100 yen per rental, CBS/Sony argued that the agreement had been terminated at the end of April 1986, since CBS/Sony had not consented to extend its terms. The Rental Association insisted that the agreement should be interpreted as having been renewed automatically.

The Court's order determined that only a very limited number of titles from the CBS/Sony catalog could be considered prohibited titles. Furthermore, the Court ordered that two thirds of those prohibited titles could not be regarded as deserving a complete ban on record rentals by CBS/Sony.

The Court's decision was reasoned more or less on the basis of the prior business situation during which all parties seemed content with the established surcharge system for prohibited titles. Both CBS/Sony and the Association were unsatisfied with the order and appealed. Meanwhile, other record manufacturers, fearing the impact of the

CBS/Sony decision on their licensing rights, jointly asked the Tokyo District Court for an injunction regarding the handling of certain new issues in their catalogs. Altogether, quite a few cases are presently pending in the Court and it may take some time before a decision is reached in any of these cases.

Protection of Foreign Neighboring Rights

Japan has not yet adhered to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which gives general protection to foreign performers. Thus, only records produced by Japanese nationals and/or composed of sounds first fixed in Japan can enjoy the benefits of the domestic laws regarding neighboring rights. Therefore, foreign neighboring rights owners—record producers and performers—are excluded from the legal or financial rewards derived from record rentals.

To rectify the situation, JPRA and GEIDANKYO have advocated that Japan join the Rome Convention as soon as possible. On the other hand, those in the rental business have shown strong resistance. Rental shops have insisted that they would not agree to giving any rights to foreign right owners besides the right to receive fair remuneration. If foreign neighboring rights owners also take a firm stance on banning the lending of some of their recordings, further confusion might be created.

Calendar of Meetings

WIPO Meetings

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

1989

- 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

October 16 (Geneva)

Consultative Committee (Fortieth Session)

The Committee will prepare the twenty-third ordinary session of the Council.

Invitations: Member States of UPOV.

October 17 and 18 (Geneva)

Council (Twenty-third Ordinary Session)

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.

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

1989

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

