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Copyright

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Contents

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Notifications Concerning Treaties

Treaty on the International Registration of Audiovisual Works

Signatory States

By the date until which it was open for signature (that is, December 31, 1989), the following States had signed the Treaty on the International Registration of Audiovisual Works, adopted at Geneva on April 18, 1989:

- Austria, Burkina Faso, Chile, France, Guinea, Hungary, India, the United States of America, on April 20, 1989;
- Philippines, on April 25, 1989; Senegal, on May 2, 1989; Egypt, on May 3, 1989; Mexico, on July 6, 1989; Brazil, on December 7, 1989; Canada, on December 21, 1989; Greece, Poland and Yugoslavia, on December 29, 1989.

(Total: 17 States)

According to Article 11(1)(i) of the said Treaty, any State which has signed it may become party to the Treaty if that State deposits an instrument of ratification, acceptance or approval of the Treaty. According to Article 11(1)(ii) of the said Treaty, any State member of the World Intellectual Property Organization (WIPO) which has not signed the Treaty may become party to it if the said State deposits an instrument of accession to the Treaty.

Instruments of ratification, acceptance, approval or accession must be deposited with the Director General of WIPO.

IRAW Notification No. 1, of January 17, 1990.

Correspondence

Letter from the Federal Republic of Germany

The Development of Copyright Between 1984 and the Beginning of 1989

Adolf DIETZ*

(First Part)

A. LEGISLATION, DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT AND LITERATURE ON COPYRIGHT

I. Legislative Developments

(1) As already touched upon in my preceding "Letter from the Federal Republic of Germany"[1] a further significant reform took place in German copyright law during the period under review,[2] that is to say the Law Amending Provisions in the Field of Copyright of June 24, 1985.[3] However, this reform not only brought about changes in the German Copyright Law,[4] but also significant amendments to the Law on the Administration of Copyright and Related Rights,[5] frequently referred to in practice as the "Administration Law" or "Collecting Society Law." The fact that both laws were amended at the same time is a clear pointer that the law of collecting societies constitutes an area of copyright law of considerable and growing significance; it is not possible to understand the reality and the economic significance of copyright law for the parties concerned without examining this particular area.

(2) The individual features of the 1985 copyright law reform have been reported on in detail in the literature, as also in this review.[6] I shall therefore only mention the most important aspects of the reform in this "Letter"; these are unquestionably to be found in the area of reproduction for private purposes (Articles 53 and 54 of the Copyright Law). To begin with, what is known as the "appliance levy," that has existed since 1965 in respect of private recording on video and audio mediums, was supplemented by what is referred to as the "cassette levy" which, just as the appliance levy, is to be paid by the manufacturers and importers. The rates for this levy were directly laid down by the lawmaker in an annex to Article 54(4) of the Copyright Law: 2.50 DM for each audio recording ap-

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[1] Cf. *Copyright*, 1984, pp. 426 *et seq.* (first part) and pp. 457 *et seq.* (second part).

For most of the abbreviations, particularly those in the footnotes, used in this "Letter," see *Copyright*, 1980, p. 85. The following additional abbreviations are used: AfP = Archiv für Presserecht; BGBl. = Bundesgesetzblatt; CR = Computer und Recht; NJW-RR = Neue Juristische Wochenschrift, Rechtsprechungs-Report (Zivilrecht); RDV = Recht der Datenverarbeitung; ZUM = Zeitschrift für Urheber- und Medienrecht.

[2] Following on from the previous "Letter," the present report concerns the period starting with the beginning of 1984; however, it was not possible to avoid including a number of court decisions of earlier date on account of their delayed publication, as is often the case with court decisions.

[3] BGBl. 1985 I, p. 1137; English version in *Copyright*, 1985, pp. 368 *et seq.* A minor change (in Article 110) was also made to the penal procedure in the "First Law to Improve the Situation of the Injured Party in Penal Procedures (Law for the Protection of Victims)" of December 18, 1986, BGBl. 1986 I, p. 2496 and p. 2500.

[4] Of September 9, 1965, BGBl. 1965 I, p. 1273 (with subsequent amendments).

[5] Also of September 9, 1965, BGBl. 1965 I, p. 1294.

[6] Cf. Möller, "The Reform of the Copyright Law of the Federal Republic of Germany," *Copyright*, 1986, pp. 271 *et seq.*; Flechsig, "The German Law of 24 June 1985 on Copyright," RIDA 1986, No. 129 (July), pp. 76 *et seq.*; Nordemann, "Die Urheberrechtsreform 1985," GRUR 1985, pp. 837 *et seq.*

In respect of the special aspects of the reform, cf. also Betten, "Copyright Protection of Computer Programs in the Federal Republic of Germany," *Copyright*, 1986, pp. 352 *et seq.*; Burger, "The New Photocopy Remuneration Provisions in the Federal Republic of Germany and Their Application to Foreign Authors Under International Copyright Law," IIC 1988, pp. 319 *et seq.* (Part One) and pp. 488 *et seq.* (Part Two), as also Möller, "Copyright and the New Technologies—The German Federal Republic's Solution?" *European Intellectual Property Review*, 1988, Vol. 10, pp. 42 *et seq.*; likewise, "Collective Administration of Copyrights and Neighboring Rights. The Experience in the Federal Republic of Germany," *Copyright*, 1988, pp. 482 *et seq.*

pliance; 18 DM for each video recording appliance; 0.12 DM for each hour of playing time of audio mediums and 0.17 DM for each hour of playing time for video mediums.

(3) Secondly, in the case of the provisions on photocopying, that is to say what is known as the reprography problem, a feature of the reform is the introduction for the first time of an appliance levy; in view of the fact that the physical medium is paper it would indeed not have been possible to supplement this levy with a corresponding material levy. This has been replaced by what is known as the "operator levy." This concerns those institutions (such as schools, universities, research institutes, public libraries and also what are known as "copy shops") held by the legislator to represent "large-scale copiers." Unfortunately, the ruling in this case constitutes a political compromise in various respects, which exempts from the operator levy certain important areas such as public administration and commercial undertakings. Nevertheless, these areas are covered by the appliance levy in just the same way as all other areas.

(4) In this case again, the lawmaker saw fit to lay down the rates of remuneration himself in the above-mentioned annex to Article 54(4) of the Copyright Law: the appliance levy varies, depending on the capacity of the photocopying apparatus, between 75 DM and 600 DM and the operator levy amounts to 0.02 DM for each A4 copy (0.05 DM in the case of copies from approved school books). The fact that the lawmaker has himself laid down the rates of remuneration, as in the case of the appliance and cassette levies in respect of private audio and video recording, results from unsatisfactory experience with the earlier ruling for the appliance levy under Article 53(5) of the Copyright Law in its previous version. Under that previous version, a percentage was laid down that was *not to exceed* 5% of the manufacturers' proceeds from sale; numerous disputes arose as to what the percentage was to be in specific cases, as to who the manufacturer was within the meaning of those provisions and as to how his proceeds of sale were to be determined.[7]

(5) The fact that the remuneration has been laid down as absolute amounts by the statutes of course involves a risk of devaluation through inflation. Primarily for that reason, the Bundestag adopted a motion for a resolution,[8] when voting on the 1985 reform law, in which the Federal Government is invited, *inter alia*, to submit a report every three years following entry into force of the Law on the "development of copyright remuneration under Article 54 of the Copyright Law taking into particular account whether the proceeds of remuneration are held equitable within the meaning of Article 54 of the Copyright Law" together with a report on "the impact of technical developments on copyright and neighboring rights and where necessary to propose suitable measures to safeguard the economic substance of intellectual property." It would seem that the Federal Government is currently (early 1989) occupied with finalizing the initial report due in 1988. It was not as yet available at the time this "Letter" was being written.

(6) The Bundestag also invited the Federal Government in the same resolution to conduct a study of the economic significance of copyright. This study, with which the IFO Institute (Institute for Economic Research) in Munich was entrusted, is likewise not as yet available. I may also mention, so as not to omit anything, that the Bundestag also invited the Federal Government to additionally examine "whether a neighboring right in favor of sound engineers should also be introduced" and "whether changes in copyright contract law were advisable in respect of contracts with broadcasting organizations." These two apparently subordinate questions bear witness to the awareness of the Bundestag that an up-to-date copyright law is in need of continuous improvement and supplementing, not only, as in 1985, in the part that affords the right and in respect of the laws of collecting societies, but also in the field of neighboring rights (performance rights) and of copyright contract law. Only a well-devised ruling, striking an intelligent balance between the interests involved in all four areas (the "magic rectangle") of contemporary copyright law, can provide effective protection for authors and for their successors in title, as for the owners of neighboring rights, not only as regards the legal aspect but also from an economic point of view.

(7) Other individual features of the copyright reform of 1985 are the introduction of copyright

[7] The following decisions were taken in this field, but as a result of the legislative amendment they are of no significance for the future: BGH—I ZR 96/83—of November 29, 1984, Schu BGHZ 324 (Movsessian) = GRUR 1985, 280; BGH—I ZR 58/83—of November 29, 1984, Schu BGHZ 325 (Movsessian) = GRUR 1985, 284; BGH—I ZR 64/83—of December 13, 1984, Schu BGHZ 326 (Movsessian) = GRUR 1985, 287; BGH—I ZR 162/83—of February 14, 1985, Schu BGHZ 326 (Movsessian) = GRUR 1985, 531; BGH—I ZR 137/84—of June 26, 1986, NJW-RR 1986, 1441; OLG Hamburg—3 U 239/83—of July 5, 1984, FuR 1984, 597; OLG Hamburg—3 U 161/84—of February 14, 1985, ZUM 1986, 402. Cf. in this respect the previous "Letter," *loc. cit.* (footnote 1 above, paragraphs 93 *et seq.*

[8] Bundestags-Drucksache 10/3360; reproduced in Fromm/Nordemann, *Urheberrecht. Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrnehmungsgesetz*, continued by Nordemann/Vinck/Hertin, 7th edition, Stuttgart, etc., 1988, p. 497.

protection for *computer programs* (Article 2(1), item 1, of the Copyright Law); the exclusion of "*insignificant adaptations* of a non-protected musical work" from copyright protection (Article 3, second sentence); a redraft of the provisions on the permissibility of public communication with or without equitable remuneration (Article 52)[9]; extension of the protection of *photographic works* to the generally accepted term of 70 years *post mortem auctoris* and in the case of *simple photographs*, where they "constitute documents of current events," to 50 years after their publication or manufacture (Article 72). The present ruling on the term of protection for photographic works and photographs, with its three-way distinction, would not appear convincing. Indeed, it would have been better and simpler to adopt a uniform term of 50 years from manufacture. Particular importance for the effective prevention of piracy is furthermore assumed by the *increased severity of the penal sanctions* laid down for copyright infringement where done on a commercial basis achieved by the insertion of an Article 108a into the 1985 Copyright Law.

(8) As regards the Copyright Administration Law, I may emphasize the new ruling on the arbitration procedure (Articles 14 *et seq.*). The Arbitration Board is constituted (as hitherto), at the German Patent Office, as the supervising authority for collecting societies. The most important aspect of this new ruling is the extension of jurisdiction for the Arbitration Board to all disputes with collecting societies in respect of the utilization of protected works, that is to say not only for disputes between collecting societies and associations of users or broadcasting organizations, as was hitherto the case. On the basis of the recast Article 15 of the Copyright Administration Law, the Federal Minister for Justice has since, that is to say on December 20, 1985, issued a new Ordinance on the Arbitration Board for Copyright Disputes[10] that entered into force on January 1, 1986.

(9) The Arbitration Board reaches its decisions in accordance with Article 14a of the Copyright Administration Law by proposing a "settlement proposal" that is deemed to have been accepted if no opposition is received within one month. One may fairly claim that the settlement proposals that have since been made by the Arbitration Board[11] have already enormously enriched German copyright practice and have contributed to the internal construction of the law of collecting societies in their relationship to the users of works. Mention should also be made in this context of the amendment to Article 13(3) in which it is now prescribed more clearly than in the previous ruling that the basis of calculation for the schedule of charges to be drawn up by the collecting societies is to be the "pecuniary advantages" obtained from exploitation. This ruling has likewise already had significant effects.[12]

(10) A significant improvement to the legal situation of the collecting societies also results from the introduction of Article 13b. Beyond the so-called "GEMA presumption"[13] that has long been recognized in jurisprudence, the new provision contains a special statutory presumption of the specific entitlement (entitlement to take action) of a collecting society in certain cases of the assertion of the right to information and of remuneration rights that can only be asserted by a collecting society under the statutory arrangements. A further ruling, and one which is more of a disadvantage to the collecting societies, is contained, on the other hand, in the new provision of Article 13a (previously Article 16); this provision is a direct consequence of the already-mentioned exclusion of "insignificant adaptations of a non-protected musical work" from copyright protection (second sentence of Article 3 of the Copyright Law) for the field of the collecting societies and releases, in such cases, the promoters of musical events from their obligation to communicate to the collecting society lists of the works that are used. GEMA (Musical Performing and Mechanical Reproduction Rights Society) has since endeavored to contest this ruling (unhappy for it) before the Federal Constitutional Court since it has led to friction between GEMA and folk music circles in Bavaria. However, GEMA's constitutional petition was held inadmissible on the grounds that the matter had first to be examined as a question of interpretation by the civil courts.[14] I shall return in more detail to this decision of the Constitutional Court subsequently.

(11) Before that, however, I may mention that during the reporting period the German lawmaker has also been active in fringe areas of copyright. This concerns, firstly, an extremely important amendment to designs law, as far as procedure is concerned, as a result of the centralization of the

[9] See details in paragraphs 109 *et seq.*

[10] BGBl. 1985 I, p. 2543; reproduced in Fromm/Nordemann, *loc. cit.*, p. 491; also in Hillig, *Urheber- und Verlagsrecht*. Text edition with detailed introduction, 4th edition (October 1, 1988), p. 171.

[11] Cf. details in paragraphs 196 *et seq.* [second part, *Copyright*, March 1990].

[12] Cf. paragraph 198 [*ibid.*].

[13] See preceding "Leller," *loc. cit.* (footnote 1), paragraphs 154 *et seq.* and paragraphs 177 *et seq.* [*ibid.*].

[14] BVerfG—1 BvR 777/85; 882/85 and 1239/85—of October 11, 1988, ZUM 1989, 183; for a parallel decision taken on the same day in respect of Article 52 of the Copyright Law, see footnote 176 below.

registration procedure in the Amending Law of December 18, 1986,[15] although this left substantive designs law basically unchanged (apart from extension of the maximum term of protection to 20 years); thus, the traditional principle applied in German copyright law of the *cumul restreint* as between copyright protection and designs protection remained unaffected. Secondly, legislative activity concerned ratification of the Additional Protocol of March 21, 1983, to the Protocol of January 22, 1965, to the European Convention for the Protection of Television Broadcasts, effected by the Law of December 11, 1984.[16] Together with the ratifications by the other member States of the Agreement, this ratification meant that the European Convention for the Protection of Television Broadcasts is also open until the end of 1989 to those States that are not at the same time contracting parties to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. This Additional Protocol has further extended to the end of 1989 the time limit originally extending to the end of 1974 and then subsequently to the end of 1984.

II. Decisions of the Federal Constitutional Court

(12) The German Federal Constitutional Court again had numerous opportunities during recent years to express itself directly or, at least, indirectly on important matters of copyright. Mention must first be given to the decision referred to above[17] in which constitutional petitions against individual points of law in the 1985 reform law were held inadmissible in some cases and unfounded in others. The Federal Constitutional Court explicitly stated, in particular, that the already-mentioned rates for the "cassette levy" of 0.12 DM per hour for audio mediums and 0.17 DM per hour for video mediums under the annex to Article 54(4) of the Copyright Law were not in themselves unconstitutional nor in their relationship to each other.

(13) As with all decisions of the Federal Constitutional Court, this decision given at the end of 1988 and dealing with focal matters of the 1985 copyright law amendment, contains important fundamental considerations that are worth publicizing at international level. To begin with, I would emphasize the confirmation that the economic rights of the author in his work are subject to the guarantee of property under Article 14 of the German Basic Law; however, that does not guarantee every conceivable possibility of exploitation. In fact, the legislator is simply committed to ensuring equitable remuneration appropriate to the nature and social significance of the right. When determining what is to be deemed appropriate, the lawmaker has a fairly large degree of liberty, in any event as regards the question as to how the provisions on remuneration are to be formulated in detail.

(14) A further extremely important finding by the Constitutional Court is that it is admissible to burden the private user of copyright *indirectly*, since such users are difficult to reach directly, in that the industrial appliances required for making private copies are subjected to levies, which are then passed on. The Federal Constitutional Court explicitly stated that it was perfectly admissible for the producers of unrecorded cassettes to be made liable in addition to the manufacturers of appliances. The appropriation of the copyright performances of others is directly occasioned by the appliance manufacturers and the producers of unrecorded cassettes. The legislator's task is held to be to objectively and practicably shape the "four-sided interests of authors, the appliance industry, the unrecorded cassette producers and the users of works." It is to be hoped that these clearly expressed considerations of the Federal Constitutional Court will mean that the continuing and repeated pressure of the appliance manufacturers, and more particularly of the cassette manufacturers, against this important provision in the copyright reform will gradually cease.

(15) The broadcasting organizations also attempted to remove from the reform law of 1985 a provision that was to their disadvantage by filing a constitutional petition. It concerned a change in Article 87(3) of the Copyright Law that, although only of an editorial nature, nevertheless made it clear that the broadcasting organizations, as owners of a special neighboring right, were to continue to be excluded from participation in the claims to remuneration from the appliance and cassette levy as previously from the appliance levy. The Federal Constitutional Court declared this petition to be inadmissible[18] since the broadcasting institutes could not rely on constitutional protection in respect of the (secondary) exploitation of their broadcasts. It was stated that protection under constitutional law did not extend to individual forms of financing.

(16) In addition to these decisions that directly concerned the 1985 reform law, the Federal Consti-

[15] BGBl. 1986 I, p. 2501.

[16] BGBl. 1984 II, p. 1014.

[17] Cf. footnote 14 above; for a parallel decision on Article 52 of the Copyright Law, cf. also footnote 176 below.

[18] BVerfG—1 BvR 686/86—of March 23, 1988, ZUM 1988, 296.

tutional Court also took a stance on copyright or at least on the legal position of authors in the economic and social area, in further decisions. One of those decisions, which will be dealt with in greater detail below,[19] concerned the interpretation of the provisions on the rental and lending of reprographic reproductions under Article 27 of the Copyright Law; according to that decision, the provision of newspapers and periodicals in hairdressers' shops and in doctors' waiting rooms is not subject to Article 27.

(17) A further decision, which may also prove applicable to copyright,[20] concerned the conflict between artistic freedom and personality rights, particularly in the case of defamatory caricatures. The Federal Constitutional Court stressed that, although it is in fact impossible to generally define art, the constitutional guarantee of artistic freedom nevertheless demanded that its area of protection be determined in the material application of law. It is therefore not prohibited, but indeed constitutionally necessary, that basic requirements in respect of artistic activity be laid down. However, all that is permissible and indeed necessary is simply to distinguish between what is art and what is not; to ascertain its level, that is to say to differentiate between "high level" and "low level," between "good" and "bad" art (which would then be not eligible or less eligible for protection) would, on the other hand, amount to constitutionally inadmissible controls on content.

(18) I may finally mention a decision[21] which reaches far beyond copyright law in view of its fundamental considerations on the legal situation of authors and artists in both economic and social respects, but nevertheless is of considerable importance also for the basic principles of the copyright system. The matter involved was whether the "artist's welfare insurance charge" provided for in what is known as the "artist's welfare insurance law" of 1981[22] was constitutional. This is a charge that is levied, practically as an employer's contribution, from professional marketers of art and writing that is intended for the old age and welfare insurance of independent artists and writers in need of welfare protection; the latter pay only half the contribution as do employees. It was claimed by the petitioners (music publishers, school book publishers, phonogram manufacturers, newspaper publishers, theatrical publishers, press concerns, advertising agencies, book publishers, theater and concert promoters and the owners of art galleries and art dealers) that the obligation placed on them to pay the artist's welfare charge was unconstitutional.

(19) In a most comprehensive statement of reasons, the Federal Constitutional Court came to the following conclusions, in which this artist's welfare insurance charge was held constitutional in its essential aspects:

> The burdening of the marketer with the artist's welfare charge to finance a part of the costs of welfare insurance for independent artists and writers is justified by the special relationship that has grown up historically between independent artists and writers, on one hand, and the marketers on the other hand. This relationship possesses a specific character that goes beyond a simple reciprocal interdependence such as that which may exist between producers and traders or between manufacturers and consumers. Artists and writers produce non-representable, that is to say highly personal, works that need a special kind of marketing in order to reach their public, that is to say their consumers. This relationship possesses certain symbiotic characteristics; it represents a special area of cultural development that has given rise to special responsibility of the marketers for the social security of the—typically economically weaker—independent artists and writers, *similar to that of the employer for his employees.*

(20) These important considerations expressed by the Federal Constitutional Court are also relevant to copyright, and particularly to copyright contract law. It would seem to me therefore that any idea of including independent artists and writers, or authors, where these are not already in a work or service relationship, in an incomprehensibly wide-ranging concept of entrepreneur has thus been deprived of any basis. Admittedly, the Federal Constitutional Court has once more expressly undertaken such a construction in a decision regarding cartel supervision of collecting societies[23] to be discussed below.

III. Literature

(21) On April 26, 1988, German copyright science lost its grand old man in the person of that great scholar Eugen Ulmer, who would have celebrated his 85th birthday on June 26, 1988. A commemoration was held on January 27, 1989, in the assembly hall of the Bavarian Academy of Science in Munich at which were gathered in his honor numerous friends and students of Professor Ulmer from home and abroad.[24] It is no coincidence and

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[19] Cf. paragraph 103 and footnote 164 below.

[20] BVerfG—1 BvR 313/85—of June 3, 1987, NJW 1987, 2661.

[21] BVerfG—2 BvR 909/82 *inter alia*—of April 8, 1987, BVerfGE 75,108 = ZUM 1987, 574.

[22] Law on the Welfare Insurance of Self-Employed Artists and Writers of July 27, 1981, BGBl. 1981 I, p. 705.

[23] Cf. paragraph 169 and footnote 268 [second part, *Copyright*, March 1990].

[24] The speeches made by Beier, Fikentscher, Krieger and Schricker at this commemoration are included, together with a bibliography of Ulmer's publications by Kolle/Nordemann, are included in a publication by the Max Planck Institute *Eugen Ulmer zum Gedächtnis* (Weinheim 1989). Cf. also the joint obituaries by Beier and Schricker in GRUR 1988, p. 411, GRUR Int. 1988, p. 465 and IIC 1988, Vol. 19, No. 3, p. I, together with the obituary by Loewenheim, UFITA 1988, Vol. 109, p. 7.

indeed reflects the international standing of Eugen Ulmer that amongst his final works were those devoted to the relationship of the Federal Republic of Germany to the Berne Union.[25]

(22) It is unfortunately not possible within the scope of this "Letter" to look in detail at the extremely rich copyright literature published in the Federal Republic of Germany in the form of text books, commentaries, monographs and studies; I would nevertheless like to give a few references. I may mention, to begin with, that a new joint commentary on copyright law was brought out in 1987 under the editorship of G. Schricker.[26] Partly as a result of the copyright reform of 1985, the tried and trusted *Commentary on the Copyright Law* by Fromm and Nordemann[27] was published in its sixth edition in 1986 and then, following rapidly thereon, in 1988 in a seventh edition. The commentary on German copyright law in the light of international law and Community law in the EC member States by Mestmäcker and Schulze,[28] which appears in looseleaf form, likewise continued. The well-known text book by H. Hubmann, *Copyright and Publishing Law*, appeared in a sixth edition in 1987 to incorporate the outcome of the Copyright Law reform in 1985. In addition to that, Professor Hubmann was honored on the occasion of his 70th birthday by a voluminous *Festschrift* containing numerous contributions on personality rights and copyright.[29]

(23) Finally, I may mention a further looseleaf collection, that is to say, *Copyright Sources*,[30] of which the objective is to publish the copyright laws of important States (total of 34 at present) in addition to German copyright law in bilingual collections of texts (original together with a German translation), in conjunction with a systematic introduction to the law. It may be further mentioned that the text edition of copyright and publishing law[31] edited in paperback form by Hillig is now available in its fourth edition, 1988. In addition to the basic texts of German copyright given in their legislative form, it also contains numerous further provisions in the field of copyright contract law and of the law of collecting societies, in particular the standard contracts and authors' tariff contracts and the statutes, with the permission of the supervisory body (the German Patent Office) of all nine collecting societies operating in the Federal Republic of Germany. These collecting societies have furthermore published for the first time in the *Bundesanzeiger* (Federal Gazette) in respect of the 1987 exercise a detailed situation report as now required by company law,[32] giving not only a statement of accounts together with profit-and-loss accounting for 1987, but also detailed explanations on the development of their activities and of their results.

(24) A series of interesting studies on copyright, in the form of monographs, has appeared, mostly within various copyright publication series, for instance in the copyright treatises of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich,[33] the series published by UFITA[34] and the papers on industrial property, copyright and media law

[25] Cf. Ulmer, "The Federal Republic of Germany and the Berne Union," *Copyright*, 1986, pp. 83 *et seq.*; dillo, "Hundert Jahre Berner Konvention," in: *Internationales Urheberrechts-Symposium* (International Copyright Symposium) (Heidelberg, April 24–25, 1986), Munich, 1986, pp. 33 *et seq.* (*Schriften zum gewerblichen Rechtsschutz, Urheber- und Medienrecht*—SCRUM, Vol. 15).

[26] Cf. Schricker (Ed.), *Urheberrecht*. Commentary by Dietz, Gerstenberg, Hass, Katzenberger, Krüger, Loewenheim, Melichar, Reinbothe, Rojahn, Schricker, v. Ungern-Sternberg, Vogel and Wild, Munich, 1987.

[27] Cf. footnote 8 above.

[28] 10. Ergänzungslieferung, Frankfurt/Main, 1986.

[29] Cf. Forkel/Kraft (Ed.), *Beiträge zum Schutz der Persönlichkeit und ihrer schöpferischen Leistungen. Festschrift für Heinrich Hubmann Zum 70*, Geburtstag, Frankfurt/Main, 1985.

[30] Founded by Möhring/Schulze/Ulmer/Zweigert; now edited by Katzenberger/Schricker/Schulze/Zweigert; Stand: 23. Lieferung (October 1988), Neuwied/Frankfurt/Main.

[31] Cf. footnote 10 above.

[32] For GEMA see *Bundesanzeiger* (BAnz) No. 144 of August 5, 1988, Beilage pp. 3800 *et seq.*; for *Verwertungsgesellschaft Wort* (VG Wort) see BAnz No. 133 of July 21, 1988, Beilage p. 2994; for *Verwertungsgesellschaft Bild/Kunst* (VG Bild/Kunst) see BAnz No. 168 of September 8, 1988, Beilage p. 5794; for *Gesellschaft zur Verwertung von Leistungsschutzrechten* (GVL) see BAnz No. 164 of September 2, 1988, Beilage pp. 5453 *et seq.*; for *Verwertungsgesellschaft Musikedition* (VG Musikedition) see BAnz No. 141 of August 2, 1988, Beilage p. 3528; for *Verwertungsgesellschaft der Film- und Fernsehproduzenten* (VFF) see BAnz No. 204 of October 28, 1988, Beilage p. 9079; for *Verwertungsgesellschaft für Nutzungsrechte an Filmwerken* (VGF) see BAnz No. 206 of November 3, 1988, Beilage pp. 9224 *et seq.*; for *Gesellschaft zur Wahrnehmung von Film- und Fernsehrechten* (GWFF) see BAnz No. 195 of October 15, 1988, Beilage pp. 8192 *et seq.*

[33] Published during the report period: Heft 22: Schneider, *Softwarenutzungsverträge im Spannungsfeld von Urheber- und Kartellrecht*, 1988.

[34] In the series, now edited by NOMOS in Baden-Baden, the following volumes appeared during the report period, insofar as they concern copyright subjects: Vol. 72: Lütje, *Die Rechte der Mitwirkenden am Filmwerk*, 1987; Vol. 73: Stolz, *Die Rechte der Sendeunternehmen nach dem Urheberrechtsgesetz und ihre Wahrnehmung*, 1987; Vol. 74: Mielke, *Urheberrechtsfragen der Videogramme*, 1987; Vol. 75: Schweizerische Vereinigung für Urheberrecht (Ed.), *Urheberrecht und kulturelle Entwicklung*, 1987; Vol. 77: Rehbinder, *Beiträge zum Film- und Medienrecht*, 1988; Vol. 82: Rascher, *Für ein Urheberrecht des Bühnenregisseurs*, 1989.

(SGRUM).[35] Mention must also be made of a strongly committed voice, and one that is close to the Federal Ministry of Justice, in the discussions on the copyright Green Paper[36] presented in 1988 by the EC Commission[37]; its advantage is to have presented a number of weighty arguments from the German point of view in the general clash between the "*droit d'auteur*" concept and the "copyright" concept of copyright theory.

(25) Finally, mention must be made of what is certainly the most complete documentation on copyright and neighboring rights in the field of case law, constituted by the looseleaf collection of decisions edited by E. Schulze under the title of *Copyright Case Law*.[38] The most important decisions in copyright matters are additionally published in the specialized journals, such as GRUR, GRUR Int., IIC, ZUM, UFITA, and frequently also in the German legal periodicals, e.g. the NJW or the JZ.[39] We may now take a look, with the necessary brevity, but also as completely as possible, at the numerous court decisions published during the report period.

B. CASE LAW

(26) The subdivision of contemporary copyright law into four subsystems of an overall system, as already touched upon, that is to say into substantive copyright law (including limitations on copyright), copyright contract law, the law of collecting societies and that of neighboring rights, is increasingly to be found in case law also. This is reflected in the more than 200 decisions analyzed in this "Letter" that have been taken by the higher courts, particularly the Federal Court (BGH) and by the lower instances, that is to say the district courts (AG), provincial courts (LG) and the provincial high courts (OLG) or, in the case of Berlin, the Chamber Court (KG) that is equivalent to a provincial high court, together with the already-mentioned fundamental decisions of the Federal Constitutional Court. German copyright law in all its aspects has therefore again been considerably enriched through all these decisions.

I. Substantive Copyright Law and Limitations on Copyright

1. Categories of Works and the Scope of Copyright Protection

(a) Eligibility of Individual Works

(aa) Literary and Scientific Works

(27) Works of literature, science and art may only enjoy copyright protection if they constitute "personal intellectual creations" in accordance with Article 2(2) of the Copyright Law. This criterion of eligibility continues to play an important part in German case law; there must exist a certain degree of "creative content" that lifts the work concerned above that which is simply average or simply the routine work of a craftsman. Numerous decisions by the Federal Court, as also by the lower instances, have addressed this problem. To sum up, we may indeed state that in the case of scientific and technical works, that are just as eligible for copyright protection as other works, in principle, particularly severe criteria are applied; in other cases, however, the Federal Court has indeed criticized the fact that the lower instances have applied excessively stringent requirements.

(28) Apart from the Federal Court decision on the copyright protection of computer programs,[40] to be dealt with below, reference is first made to that same Court's decision in the "Tendering Documents" case[41] which concerned the unauthorized communication of tendering documents for the construction of a pipeline. The Federal Court concurred with the lower instances that the tendering documents, that basically contained technical descriptions for manufacture and rules for technical acts, were not eligible for protection. Since neither the technical teaching nor the technical concept were covered by protection, personal intellectual creation in scientific literature had to be expressed in the individual representation itself, that is to say in the creation of form. The Federal Court held that this derived from the nature of copyright protection and from its demarcation with respect to technical

[35] The following volumes devoted to copyright appeared during the report period: Vol. 14: Ruete, *Copyright, "geistiges Eigentum" und britische Verwertungsgesellschaften*, 1986; Vol. 15: International Publishers Association/Association of the German Book Trade (Börsenverein des Deutschen Buchhandels) (Ed.), *Internationales Urheberrechts-Symposium* (International Copyright Symposium) (Heidelberg, April 24–25, 1986), Munich, 1986.

[36] Cf. Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*. Commission document COM (88) 172 final, Brussels, of June 7, 1988. Versions exist, as usual, in all EC languages.

[37] Cf. Möller, *Urheberrecht oder Copyright?/Author's Right or Copyright?/Droit d'auteur ou Copyright?*, Berlin, 1988 (trilingual edition by Internationale Gesellschaft für Urheberrecht).

[38] Status: January 1988; published in Munich.

[39] For the abbreviations, cf. footnote 1 above.

[40] Cf. paragraph 38 and footnote 60.

[41] BGH—I ZR 32/82—of March 29, 1984, Schu BGHZ 318 (Seydel) = GRUR 1984, 659 (Rojahn) = FuR 1984, 458 = UFITA 1984, Vol. 98, p. 230 = IIC 1985, 258.

property rights. The technical intellectual content of a work—the technical teaching as such—cannot therefore be eligible for copyright protection and cannot constitute the basis for copyrightability of works of writing in which that technical teaching is contained. Since the tendering documentation concerned was characterized by a compilation of factual technical data, technical descriptions and instructions, their arrangement was determined by the nature of the subject and therefore did not involve individual creative intellectual form.

(29) In the "Trademark Lexicons" case,[42] on the other hand, the Federal Court adopted a less stringent stance. The trademark lexicons involved provide trademark specialists with information on the current legal status of trademarks on the basis of official trademark gazettes. The Federal Court quashed the decision of the lower instance and referred the case back for reconsideration. Although it also pointed out that, in the case of scientific and technical works, an intellectual, creative content constituted by the intellectual structure and representation of the content is practically inapplicable and that, as a rule, only the form and nature of the collection, division and arrangement of the material can be taken into consideration for copyright eligibility, the Federal Court, without giving any final decision in the matter and not without expressing a certain degree of skepticism, required of the substantive instance that it examine once more whether the concept of the trademark lexicons was not in fact eligible for copyright protection as regards material form and individual structure.

(30) In the "Attorney's Submission" case,[43] the Federal Court likewise first pointed out that attorneys' written submissions basically belong to the field of (legal) science and not to literature and that consequently the general considerations in respect of scientific works were once more applicable. However, since only a 10-page extract of the submission, which comprised a total of 122 pages, was submitted to the Federal Court, it was unable to decide itself whether or not any individual characteristics were to be recognized in the selection, arrangement, division and representation of the legal matter.

(31) The Federal Court expressed itself more positively in the "AOK Information Leaflet" case,[44] in which the lower instance (OLG Celle) had refused copyright for an "employers' information leaflet" in which the most important regulations for the deduction of social security contributions had been compiled. The Court had taken that decision, however, not for lack of protectability, but because it had assumed that it constituted an official work (Article 5(2) of the Copyright Law) which was therefore not protected. The Federal Court stressed in this case that the lower instance had correctly identified a personal intellectual creation in the special form and manner of the collection, division, arrangement and explanation of the regulations that were most important for employers.

(32) Such works containing regulations or contracts were also the subject of copyright assessment by the courts in further cases during the report period. For instance, the LG Cologne[45] afforded copyright protection, in the "Contract Text" case, to contractual texts and forms that had been developed and compiled for the purposes of a specific type of savings investment constituted by real estate funds. However, the Court held—incorrectly in my opinion—that these constituted "illustrations of a scientific or technical nature" under Article 2(1), item 7, of the Copyright Law although, at least in the case of the contractual works in written form, these constituted works of writing under Article 2(1), item 1. Admittedly, this distinction had no effect on the final result. In a similar way—not altogether correctly as regards the statutory classification—the LG Hamburg[46] afforded copyright protection to a form, drawn up by lawyers, for the articles of association of a savings investment scheme. Finally, the LG Munich[47] also—this time with a correct classification under Article 2(1), item 1—afforded copyright protection to an advertising brochure for a building scheme on the grounds that the authors had not simply communicated facts, but had also produced a text formulated as a personal intellectual creation.

(33) Copyright protection was refused, on the other hand, by the OLG Celle[48] in a case which concerned the journalistic exploitation of tape recordings of the meeting of a town council. It did not,

[42] BGH—I ZR 71/85—of March 12, 1987, GRUR 1987, 704 (Loewenheim) = ZUM 1987, 525; previous instance: OLG Munich—6 U 5170/83—of March 7, 1985, *Medien und Recht*, 1986, No. 1, p. 36; see also OLG Munich—6 U 4990/85—of February 13, 1986, ZUM 1986, 292.

[43] BGH—I ZR 213/83—of April 17, 1986, Schu BGHZ 345 (Seydel) = GRUR 1986, 739 (Wild) = ZUM 1986, 539 = IIC 1988, 854 (Wild). For this case, see the preceding "Letter," *loc. cit.* (footnote 1 above) paragraph 8, footnote 19.

[44] BGH—I ZR 145/84—of October 9, 1986, Schu BGHZ 355 (Seydel) = GRUR 1987, 166 = ZUM 1987, 458.

[45] LG Cologne—28 O 291/86—of November 21, 1986, GRUR 1987, 905.

[46] LG Hamburg—74 O 283/85—of June 4, 1986, GRUR 1987, 167.

[47] LG Munich I—21 S. 20913/83—of July 13, 1984, GRUR 1984, 737.

[48] OLG Celle—13 U 13/85—of July 10, 1985, Schu OLGZ 282 (Ridder).

however, concern copyrighted works of literature (speechcs) since there was a lack of the necessary unified form and also the necessary relationship to literature, science and art. Copyright protection was also refused by the OLG Hamburg[49] in a case in which a competitor of the publisher of "specialized tclephone directories" had used a nomenclature that was comparable in structure and wording and had becn taken in part at least from that publication. It was the vicw of the Court that the necessary individual nature was lacking since the arrangement involved was in fact no more that would be crcated by an avcrage drafter. The basic division of the nomenclature according to alphabetical order and by professional and product designations was likewise determined by the practical needs of users.

(34) The OLG Düsseldorf[50] likewise refused copyright, in the "Catalog Photographs" case for the wording accompanying photographs of goods in a catalog of car accessories since it simply comprised, in cach case, a sales description of the represented article, containing fcw elements and lacking in any originality, that was also dictated by the actual properties of the product. In a similar case, thc OLG Frankfurt[51] also refused copyright. The case concerned the slogan "the most exciting event of the year" that had been created, together with an illustration, for the 1986 World Football Championship. In the above-mentioned "Catalog Pbotographs" case, the OLG Düsseldorf had indeed also not taken solely the text of the catalog into account, but equally the combination of words and text as also thc catalog as a whole when refusing copyright protection on the grounds that the skill of the catalog designer had not notably exceeded the simple level of a craftsman's work.

(bb) Illustrations of a Scientific or Technical Nature

(35) The actual field of application of Article 2(1), item 7, of the Copyright Law is explicitly dcfined in the provision as drawings, plans, maps, sketches, tables and plastic representations. During the report period, a number of important decisions have also been taken in this field. For instance, the Federal Court confirmed eligibility for protection in the "Electrode Factory" case[52] of documentation for the construction of a welding electrode factory, constituted by drawings, plans, lists, machine plans, production schemes and the like, in agreement with the lower instance. However, great importance is to be attached to a further statement by the Federal Court that, in the case of technical illustrations under Article 2(1), item 7, there can be no protection against the three-dimensional reproduction of drawings. Such protection in fact relies on the special form of representation and therefore prevents only a representational copy of tbe drawings, but not, however, their transformation into practical reality by utilizing the represented technical knowledge. However, protection against copying is available where the disputed drawings are also protected as plans for an architectural work under Article 2(1), item 4, of the Copyright Law. That question had therefore to be further clarified by the substantive instance. This example furtber demonstrates that the item of the list of works given in Article 2(1) under which a specific form is to be classified is not without significance.

(36) In the "Advertising Maps" case, the Federal Court[53] did not go along with the grounds on which the lower instance had refused copyright for colored town maps. It held that a too stringent yardstick had been applied to assess the necessary creative nature of town maps. The fact that in his representation the author endeavors to satisfy the necessary cartographical purpose does not in itself mean that protectability is excluded. Illustrations of a scientific and technical nature under Article 2(1), item 7, enjoy protection under copyright legislation despite the fact tbat they generally serve a given practical purpose that restricts the possibilities of an individual form of representation. It was therefore not appropriate to deny eligibility for protection simply from that point of view. However, it was the view of the Federal Court that a lesser degree of individuality also meant a correspondingly narrower area of protection for the work concerned. The Federal Court similarly required renewed examination in the "Topographical Maps" case[54] and explicitly referred to the decision cited above.

(37) With explicit reference to that same decision of the Federal Court, the OLG Frankfurt[55] also afforded copyright in tbe "Town Maps" case. It identified the specific characteristics of the map as its color design, its flexible scales and a flowing projection to obtain an individual deformation in the

[49] OLG Hamburg—3 U 76/87—of April 14, 1988, ZUM 1989, 43.

[50] OLG Düsseldorf—20 U 166/87—of March 22, 1988, GRUR 1988, 541.

[51] OLG Frankfurt—6 W 134/86—of August 4, 1986, Schu OLGZ 288 (Movsessian) = GRUR 1987, 44.

[52] BGH—I ZR 85/82—of May 10, 1984, Schu BGHZ 331 (Seydel) = GRUR 1985, 129 = FuR 1984, 652 = IIC 1986, 430.

[53] BGH—I ZR 160/84—of November 20, 1986, GRUR 1987, 360 = ZUM 1987, 335.

[54] BGH—I ZR 232/85—of July 2, 1987, GRUR 1988, 33 = ZUM 1987, 634.

[55] OLG Frankfurt—6 U 108/87—of May 19, 1988, GRUR 1988, 816 = ZUM 1988, 578.

areas of dense construction and in similar elements. Finally, a further two decisions by provincial courts should be mentioned, in which copyright was likewise confirmed: the "Emil" case[56] in respect of advertising matter in which a workman is represented as a kind of cartoon figure in conjunction with a logo and accompanying wording and the "Illness on Prescription" case[57] concerning a periodically published market report containing statistics on diagnosis and therapy applied by doctors in the Federal Republic and statistics on the pharmaceuticals bought in by public pharmacies.

(cc) Computer Programs and Video Games

(38) Already in the previous "Letter"[58] I reported on the initial and altogether controversial phase in the debate and in the case law on the legal protection of computer programs in the Federal Republic of Germany. This phase has now reached its provisional conclusion, firstly in the explicit inclusion, already mentioned,[59] of computer programs in the list of protected works (Article 2(1), item 1, of the Copyright Law) and secondly in the first truly relevant decision by the Federal Court in the "Collection Program" case,[60] that had only preceded the Amending Law of June 24, 1985, by a short head. Since this decision anticipated the explicit statutory ruling to a certain extent, in that it already assumed the basic protectability of computer programs as works of writing, the legislative ruling must therefore be considered basically as the explicit fixation of an already existing legal situation. This again means, however, that the basic declarations made by the Federal Court in this decision and, in particular, its very restrictive stance, are still to be regarded as setting the direction.

(39) Since the Federal Court decision in the "Collection Program" case has already been described and reported on in numerous publications, including *Copyright*,[61] I should simply like to mention here that the Federal Court itself did not take a final position on the eligibility for protection of the computer program involved (intended for collection purposes in the commercial recovery of unpaid commitments), but after quashing the decision, sent the lower instance back to the workbench. From the point of view of theory, it is regrettable that no final decision was in fact taken since the parties agreed on a settlement.[62] The repeatedly cited central principles of the Federal Court decision reiterate the principles for the copyright assessment of scientific and technical works already expressed in the decision in the "Tendering Documentation" case[63] and draw the consequence that it is alone the form and nature of the collection, division and arrangement of the material that are to be considered in view of copyright protection of computer programs and their preliminary stages. There exists in that area sufficient room for individual, creative solutions in all three development phases, that is to say problem analysis, data flowchart and program flowchart, as also in the actual encoding. There is no requirement for an aesthetic content that would appeal to any sense of beauty.

(40) The question of a sufficient degree of individual creation is to be judged by the overall intellectual and creative impression given by the material form in an overall comparison with already existing forms. The basis is given by already known programs and by the results of work in the individual development stages with their respective known and usual configurations, systems, structural and divisional principles. Designs that do not depart from those elements therefore do not possess a sufficient degree of creative individuality. Furthermore, the skill of an average designer, that is to say that which is purely the craftsman's work, the mechanically performed technical sequencing and compilation of material is fully excluded from any protection. The lower limit of copyright eligibility is to be found at a point where the design activity expressed in the selection, collection, arrangement and division of information and instructions manifestly exceeds that of the general average skill.

(41) This highly restrictive stance by the Federal Court was preceded by a number of decisions by lower instance courts in which copyright protection for computer programs was indeed afforded in most cases, but had also been refused in specific cases. Such protection was refused by the OLG Hamm[64] in a case concerning a program pack-

[56] LG Oldenburg—5 S 205/87—of June 4, 1987, GRUR 1987, 636.

[57] LG Frankfurt—2/6 O 239/86—of October 15, 1986, GRUR 1987, 168.

[58] Cf. *loc. cit.* (footnote 1 above), paragraphs 12 *et seq.*

[59] Cf. paragraph 7 above.

[60] BGH—I ZR 52/83—of May 9, 1985, BGHZ 94, 276 = Schu BGHZ 330 (Schulze) = GRUR 1985, 1041 = ZUM 1986, 39 = IIC 1986, 681. For the lower instances (LG Mannheim and OLG Karlsruhe) cf. the preceding "Letter," *loc. cit.* (footnote 1 above), footnotes 25 and 27.

[61] Cf., for instance, Bellen, *loc. cit.* (footnote 6 above) or, comparatively, Kindermann, "The International Copyright of Computer Software—History, Status and Developments," *Copyright*, 1988, pp. 201 *et seq.*, particularly pp. 205 *et seq.* Cf. in general also Lehmann (Ed.) *Rechtsschutz und Verwertung von Computerprogrammen*, Cologne, 1988, likewise, *Der Rechtsschutz von Computerprogrammen in Deutschland*, NJW 1988, pp. 2419 *et seq.* (with numerous other references).

[62] Cf. the corresponding reference in Sieber, CR 1986, 699.

[63] Cf. footnote 41 above.

[64] OLG Hamm—4 U 30/84—of January 17, 1985, CR 1986, 809.

age for a "motor vehicle industry solution"; protection was refused in this case on the grounds that it was not sufficient to substantiate the eligible features to make a simple statement that a lifetime's experience in the motor vehicle and garage industry had been incorporated in a source program by means of problem analysis and encoding. Copyright protection was confirmed, on the other hand, in the "Glass Cutting Program" case heard by the OLG Nuremberg[65] in respect of a program for optimizing the cutting of sheet glass. The Court based its findings on the report of an expert and noted that the necessary representation or substantiation of a copyrighted program had its limit at that point at which full disclosure could lead to impairment of the right.

(42) The OLG Frankfurt[66] likewise afforded protection in the case of computer programs for general construction calculations, holding that the requirement for personal creative activity was not to be placed at too high a level. Protection was to be given not only to the works of great masters who left their unmistakable mark on their works, but also to those creations that contained a relatively low level of intellectual accomplishment but yet still bore individual characteristics without, however, clearly identifying their authors. An interesting point in this decision by the OLG Frankfurt is that the Federal Court refused to review the finding in its decision of September 26, 1985,[67] since it had "no fundamental significance." The LG Düsseldorf[68] also afforded copyright protection, in a decision that lay in the period preceding the "Collection Program" decision, in respect of a software copying program (word processing program) since its authors had devised, in a creative manner, a particularly efficient and attractive solution.

(43) However, the consequences of the Federal Court's stringent criteria became painfully obvious in the numerous decisions of lower instances taken subsequent to the "Collection Program" decision of the Federal Court such as, for instance, the decision of the OLG Karlsruhe[69] in the case concerning applications programs for specific types of hardware. This was an accelerated procedure in respect of the permissibility of what is known as the customer warning, whereby a customer of the defendant had been advised of an alleged infringement of copyright by the defendant. The OLG Karlsruhe explicitly referred to the collection program decision and its grounds of judgment and based itself on the fact that the eligibility of the program concerned had not been convincingly presented, despite submission of expert opinions (opposed by counter opinions, however), in the accelerated proceedings. Rapid decisions in the case of alleged copyright infringement concerning programs are therefore difficult to obtain since the necessary proof of eligibility for protection required for a successful infringement action is not at all easy to provide even in ordinary proceedings. This is also shown by a decision of the LG Braunschweig[70] in which protection was refused to a computer program (a training program in data processing) in view of failure to prove eligibility and in which reference was also made to the grounds given by the Federal Court. The LG Munich,[71] on the other hand, accepted the justification of protectability in an accelerated proceeding in respect of the distribution of diskette programs. It was obvious to the Court that the production of that type of operating program was considerably more complicated than that of a user program since the command structure in such case did not result automatically from the given problem.

(44) The OLG Munich,[72] again explicitly referring to the Federal Court's grounds, held that a high level of individuality and creative step had to be demanded of data processing programs, that the party concerned had not substantiated his claims and that, in particular, no expert opinion had been presented. Although, in this specific case, the question in fact remained unanswered, since the infringement proceedings were rejected on other grounds, all these decisions by the lower instance courts demonstrate a logical application of the principles set out by the Federal Court.

(45) An interesting distinction between applications programs and operating programs was made by the LG Bielefeld[73] in a decision that was explicitly based on the legislative amendment in 1985. It was held that the special demands in respect of copyright protection established by the jurisprudence of the Federal Court were only relevant in the area of applications programs. In the case of

[65] OLG Nuremberg—3 U 652/83—of May 8, 1984, GRUR 1984, 736.

[66] OLG Frankfurt—14 U 188/81—of November 6, 1984, GRUR 1985, 1049.

[67] Cf. the editor's note in GRUR 1985, 1052.

[68] LG Düsseldorf—12 O 403/84—of October 24, 1984, CR 1986, 133 (Smid).

[69] OLG Karlsruhe—6 U 9/87—of May 27, 1987, CR 1987, 763.

[70] LG Braunschweig—9 O 58/85—of November 5, 1985, CR 1986, 805.

[71] LG Munich I—7 O 12031/85—of August 29, 1985, NJW-RR 1986, 129 = IIC 1986, 691.

[72] OLG Munich—29 U 2036/87—of January 14, 1988, RDV 1988, 87.

[73] LG Bielefeld—20 O 412/84—of April 18, 1986, CR 1986, 444 (Kindermann).

operating programs, on the other hand, these always constituted complex programs that more than satisfied the requirements established for applications programs. The Provincial Labor Court of Munich[74] also assumed, without giving grounds, that computer programs were eligible for copyright protection, in a dispute between an employer and an employee in respect of a graphics design program. That applied especially to a complex and valuable program such as the concerned operating system for a university computer installation.

(46) Special problems arise as regards the protectability of *video games* since these are in fact based on computer programs, that is to say on game programs. In such cases, the courts are helped in their assessment of protectability in many cases by reference to the protection of cinematographic works or of what are known as sequences of images, that are protected by Article 95 of the Copyright Law as neighboring rights. The OLG Karlsruhe,[75] however, refused copyright in the "Atari Games Cassettes" case on the grounds of failure to present evidence, despite the fact that the parties no longer disputed copyrightability. The decision on eligibility did not depend on the attitude of the parties to the proceedings. Nothing had been presented to illustrate the stage of development of the games program in which a work of individual creation was evident. The Court did not entertain the question of cinematographic work protection. In a later decision, on the other hand, the same Court[76] confirmed copyright protection in the "1942 Video Game" case with explicit reference to the aspect of a sequence of images under Article 95. It was held that the viewer could see a sequence of images and sounds on the screen of the machine that was in operation and in which the deck was incorporated; it was therefore a sequence of images and sounds within the meaning of Article 95. The manufacturing process was of no account in that case. The programmed film enjoyed protection in the same way as a cartoon film or a film made by means of a camera. The fact that the player was given the possibility of intervening in the action of the game and to change the sequence of images and sounds in no way opposed copyright protection. The sequence of images and sounds that was changed by such intervention was not a new film that was "produced" by the player, since all conceivable changes were preprogrammed.

(47) The LG Hanover[77] acted similarly in judging a case of the bootlegging of computer games by American software manufacturers; it based itself altogether on the protection of sequences of images under Article 95 of the Copyright Law and, just as the OLG Karlsruhe, did not consider whether the computer games constituted cinematographic works within the meaning of Article 2(1), item 6. The matter of protection for computer programs was not addressed. The AG Hamburg,[78] on the other hand, adopted a Solomonic solution in criminal proceedings that likewise concerned the prohibited sale of bootleg copies of computer games. It stated that, as a general rule, the computer programs concerned were eligible for copyright protection, but that, on the other hand, they could also enjoy protection as cinematographic works.

(dd) Cinematographic Works

(48) The protection of cinematographic works in the true sense was the subject of a number of decisions. Mention must first be made of a decision by the Federal Court[79] in the "Film Director" case which concerned the eligibility for copyright protection of a television feature. The works concerned were cultural and documentary films, that is to say in one of the two cases it was an exact, documentary and informative representation of a heart operation and in the other a representation of the political, social, economic and cultural aspects of present-day Greece, taking the example of an ordinary girl. The Federal Court stated in its grounds that protection as a cinematographic work can also be afforded to a film the aim of which is to present true events in images. It is a requisite that the film should not simply constitute a series of simple schematic images but that it should represent the result of individual creative work in the selection, arrangement and collecting of the material and in the nature of the compilation of the individual sequence of images. The existence of such elements is then individually analyzed and confirmed by the Federal Court. It is not the least significant aspect of this decision that under the specific circumstances copyright protection was explicitly afforded to the film director. As a result of this finding as to the copyright of the film director, the Federal Court, however, refused him parallel protection as

[74] LAG Munich— 4 Sa 28/86—of May 16, 1986, CR 1987, 509.

[75] OLG Karlsruhe—6 U 269/83—of March 14, 1984, GRUR Int. 1984, 521.

[76] OLG Karlsruhe—6 U 267/85—of September 24, 1986, CR 1986, 723.

[77] LG Hanover—18 O 12/87—of June 3, 1987, GRUR 1987, 635.

[78] AG Hamburg—132h-183/86—of February 27, 1987, CR 1987, 601.

[79] BGH—I ZR 147/81—of November 24, 1983, BGHZ 90, 219 = Schu BGHZ 339 (Müller) = GRUR 1984, 730 (Schricker) = FuR 1984, 454 = UFITA 1985, Vol. 99, p. 268 = IIC 1985, 119.

a performer which the plaintiff had in fact wished to obtain in the case in point in view of the payments to be expected from GVL, the neighboring rights collecting society. Where the creative shaping of a film and the artistic performance of the director are inseparably joined, that is to say they represent a single indivisible act, there can be no scope for simultaneous copyright and neighboring rights protection for one and the same act.

(49) In the "Film Quotation" case, in which the focus lay on the matter of the permissibility of quotations from cinematographic works, the Federal Court[80] similarly confirmed the copyright eligibility of a television series since that series did not consist in a simple succession of film extracts, but indeed was based on an independent concept under which the topic was primarily represented by commentaries and interviews.

(50) The enormous scope of today's film and video production was also obvious in the decision of the OLG Hamburg[81] in the "Video Intim" case in which the films concerned were pornographic films. The Court held that such films were not usually personal intellectual creations. They showed sexual practices in a primitive manner. They were not generally determined by the individual views and creativeness of their author. Protection as cinematographic works under Article 2(2) of the Copyright Law was therefore refused. The videotapes nevertheless enjoyed neighboring rights protection, i.e. under the right in favor of film manufacturers under Articles 94 and 95 of the Copyright Law. Such was also indeed afforded to simple sequences of images and sequences of images and sounds that were not protected as cinematographic works.

(ee) Works of Music

(51) Despite the great economic importance of musical works within the copyright system, the matter of the eligibility of musical works for protection during the report period in fact confirmed, basically, only what is known as the rigid protection of melodies (Article 24(2) of the Copyright Law). In two decisions in the problematic area of adaptation or free use, the Federal Court was required to deal with questions of true or only apparent identity of melodies in pieces of entertainment music and thereby to subsidiarily examine the question of eligibility for protection. In the "Fantasy" case,[82] the Federal Court came to the conclusion that the overall sequence of sounds of the chorus of the disputed pop song was protected. Referring to previous jurisprudence, it was repeated that musical works did not have to satisfy particularly high requirements in respect of creative individuality.

(52) However, where—as in the case in point—the concern is not for copyright protection for the complete song, but for protection for the melody contained in the song, the individual aesthetic content must be expressed in the melody itself, that is to say in a complete and ordered sequence of sounds. Where the creative individuality is relatively low, however, this means that the scope of protection is narrowly defined with a result that the alleged infringing borrowing from the melody of the chorus by a competitor was finally rejected. The same grounds were repeated by the Federal Court in the decision[83] taken on the same day in the "Little Peace" case; with the difference that the court of appeal, in the view of the Federal Court, had in that case not reached adequate factual findings on the question whether the disputed melody itself was protectable as a part of the pop song. The Federal Court was therefore unable to take a final decision in that case, which was referred back to the preceding instance.

(ff) Works of Architecture

(53) In the question of eligibility for protection of building plans or of works of construction, the decisions published during the report period concerned exclusively utilitarian buildings, particularly housing. Nevertheless, copyright was confirmed in all cases, with one exception, or was at least held to be possible. This applied, in particular, to the "Preliminary Design II" case heard by the Federal Court.[84] The lower instance had found for the ineligibility for protection in respect of the disputed preliminary design of a detached house. The Federal Court, however, came to the opposite conclusion, with very detailed grounds, and criticized, in particular the lower instance's view that it did not suffice for copyright protection that the individual creative effort was shown in one part of the building project only, that is to say only in the layout of the ground floor, and not in the overall

[80] BGH—I ZR 189/84—of December 4, 1986, BGHZ 99, 162 = Schu BGHZ 357 (Nordemann) = GRUR 1987, 362 = ZUM 1987, 242; previous instance: OLG Munich—6 U 5269/83—of October 4, 1984, FuR 1985, 113. As regards film quotations see paragraph 127 below.

[81] OLG Hamburg—3 U 28/84—of May 10, 1984, GRUR 1984, 663 = FuR 1984, 661 = UFITA 1985, Vol. 100, p. 250.

[82] BGH—I ZR 143/86—of February 3, 1988, GRUR 1988, 810 (Schricker) = ZUM 1988, 534.

[83] BGH—I ZR 142/86—of February 3, 1988, GRUR 1988, 812 (Schricker) = ZUM 1988, 571.

[84] BGH—I ZR 198/85—of December 10, 1987, GRUR 1988, 533 = ZUM 1988, 245.

preliminary design. Indeed, parts of a work could also enjoy copyright protection insofar as they satisfied as such the copyright requirements. The Federal Court further pointed out that technical drawings, that in fact enjoy protection under Article 2(1), item 7, of the Copyright Law, can be simultaneously claimed where they also satisfy the requirements as sketches for architectural works under Article 2(1), item 4.

(54) The OLG Munich[85] confirmed the protectability as a work of architecture, in a similarly detailed manner, in the case of the design for a residential development, explicitly trusting its own aesthetic impression and making do without the opinion of an expert. In a further case,[86] this same Court referred to the above decision and gave detailed grounds for its finding that the relevant plans for terraced and two-storey houses were eligible for protection as works of architecture under Article 2(1), item 4. In a similar way, although in accelerated proceedings (petition for an injunction), the OLG Frankfurt[87] gave grounds for affording copyright protection to an administrative building; however, the Court did not feel obliged to give a final judgment.

(55) The OLG Karlsruhe,[88] on the other hand, refused copyright in a case involving architects' plans for building a small apartment house since those plans were protectable neither as works of architecture under Article 2(1), item 4, nor as illustrations of a technical nature under Article 2(1), item 7, of the Copyright Law. The prerequisite for copyright protection was personal individual creation within the meaning of Article 2(2), even in the case of buildings and their preparatory planning, which went beyond the solution of a specialized technical problem by applying the relevant technical means. Copyright protection is therefore not applicable to run-of-the-mill housing and comparable utilitarian constructions.

(gg) Works of Art and of Applied Art

(56) It is one of the facts of day-to-day practice in the field of copyright that disputes do not generally concern the great works of art, but mostly designs in the field of utilitarian art and which frequently occupy the lowest level of copyright eligibility. However, one spectacular case of "pure art" was heard by the LG Düsseldorf[89] in respect of a "Grease Corner" created by Joseph Beuys. In such cases, there is quite a real danger that the enthusiasm shown by the art world will not be shared by lawyers. However, the LG Düsseldorf referred to an "internationally recognized" work of art and left no doubt as to the fact that "Grease Corners" by Beuys constituted works of art within the meaning of copyright law. The actual crux of the dispute between a student of Beuys and the Düsseldorf Academy, however, lay in the field of civil law and its provisions on donations and property rights.

(57) A number of other decisions were also taken in the field of serious art. This description certainly also applies to the "Oberammergau Passion Play I" case[90]; that case concerned stage sets for the passion play, that is to say the stage representation of Christ's Passion that takes place every 10 years in the Upper Bavarian town of Oberammergau as the result of an ancient vow. The dispute in fact concerned—as will be described in detail[91]—the question whether the scenery had been changed in an unacceptable manner, or indeed disfigured, in subsequent performances, but it had first to be decided whether it was eligible for protection. The scenery concerned was held by the Federal Court to constitute a creation of artistic value as regards the design of the overall scenic space in each case, in the arrangement of the individual sets in respect of each other and in the uniform effect of style expressed in the design concept. These characteristics clearly went beyond the simple arrangement of movable elements and props as more or less predetermined by the sequence of action or the stage directions for the individual scenes. The Federal Court expressly added that the view could not be adopted that naturalistic designs were basically ineligible for protection as works of art.

(58) Reference was already made in the preceding "Letter"[92] to the "Happening" case in which a "happening" recorded on video film was afforded copyright protection as a work of art by the KG Berlin. That decision was confirmed by the Federal Court.[93] It was immaterial, in the view of the Federal Court, whether the happening was considered a work of art within the meaning of Article

[85] OLG Munich—29 U 3498/85—of September 18, 1986, GRUR 1987, 290 = ZUM 1987, 300.

[86] OLG Munich—29 U 5865/86—of December 17, 1987, ZUM 1989, 89.

[87] OLG Frankfurt—6 U 69/85—of October 24, 1985, Schu OLGZ 286 (Gerstenberg) = GRUR 1986, 244 = ZUM 1986, 397.

[88] OLG Karlsruhe—6 U 242/83—of February 27, 1985, Schu OLGZ 285 (Gerstenberg) = GRUR 1985, 534.

[89] LG Düsseldorf—2 O 222/87—of December 16, 1987, NJW 1988, 345.

[90] BGH—I ZR 104/83—of November 28, 1985, Schu BGHZ 341 (Ladeur) = GRUR 1986, 458 = ZUM 1986, 346.

[91] Cf. paragraph 86 below.

[92] *Loc. cit.* (footnote 1 above), paragraph 31 and footnote 52.

[93] BGH—I ZR 179/82—of February 6, 1985, Schu BGHZ 327 (Ladeur) = GRUR 1985, 529 (Jacobs) = ZUM 1985, 369.

2(1), item 4, of the Copyright Law, as a kind of living picture, or whether it was to be regarded as a kind of stage work in view of the invention of the sequences of the action and its choreography. Whether or not a work qualified for copyright protection did not depend on its ready classification in one of the types of artistic works listed in Article 2(1) of the Copyright Law. This was already clear from the fact that the list in Article 2(1) simply contained examples. The view was further upheld that the professor who had rehearsed and executed the happening was the sole author since the idea, the choreography and the instructions for the happening all came from him alone.

(59) Finally, a case heard by the LG Hamburg[94] may also be considered one of serious art since it concerned a work of art bearing the designation "neon precinct" that had been installed for a number of weeks on the Hamburg Alster (a tributary of the Elbe that has been widened to form a kind of lake). Copyright protection as a work of art under Article 2(1), item 4, was again recognized in this case, although it must be admitted that the Court did not take too much trouble with the grounds.

(60) In the field of *applied or utilitarian art*, mention must first be made of a decision by the Federal Court[95] in the "Crystal Figurines" case in which the copyrightability of such figurines in the field of glassware and decorative articles was stressed and the all too-severe view of the lower instance was criticized. It was stated, in particular, that in the case of the animal figurines made of crystal glass, the material constituted a determining element and the important factor was the overall impression that was obtained from the shape in conjunction with the light and color effect of the material. The Federal Court, however, left the final judgment on protectability to the lower instance, on the basis of the principles it had established.

(61) Likewise, in the "Miner's Figurine" case heard by the OLG Saarbrücken,[96] copyright eligibility was confirmed with a detailed, and indeed pedantic, statement of grounds; it was immaterial whether the work concerned had been created for practical purposes or solely for the sake of the physical object. On the other hand, the OLG Schleswig[97] was unable to discover sufficient grounds for copyright protection, in the "Clay Figurine" case, for affording protection to the relevant animal figurines of clay or for the groups of animals arranged on clay tiles, although this case was in fact heard in accelerated proceedings.

(62) Mention was already made in the preceding "Letter"[98] to the effect that in the area of utilitarian art the Federal Court had developed a certain "weakness" for various designs of chairs. This again proved to be the case in a hard fought legal dispute as to copyright protection of "Le Corbusier" furniture. The somewhat audacious grounds given by the lower instance, the OLG Stuttgart,[99] in its decision that the chairs concerned, although eligible for design protection, were not suitable for copyright since, despite the high level of design quality, the purchasers' intent was to buy a chair not a work of art, was vehemently rejected by the Federal Court.[100] Here again, the Federal Court criticized the lower instance's excessively severe view and explicitly pointed out that copyright protection for chairs was to be assessed without taking into account whether the reproductions of such models were bought as works of art or simply for practical use. In parallel proceedings with other parties in respect of the same objects (Le Corbusier furniture) heard by the OLG Frankfurt,[101] with previous knowledge of the Federal Court decision, the Court logically recognized that these furniture models constituted works of art. The chair concerned in the proceedings was held to represent a "cubic item of furniture with an optically compact effect, of which the form language was most closely related to Le Corbusier's architecture." The logic of rationalism was expressed by the paradoxical contrast between the enormous leather cushion and its apparently dainty frame.

(63) A whole series of interesting decisions were taken, with a varying outcome, in the field of *commercial art*, particularly that of advertising art, which showed that copyright protection is not easy to obtain in this field. The Federal Court[102] itself found, accessorily, in the "Tourism Brochure" case in respect of advertising brochures and leaflets for tourism, that at least the cover page was in each case eligible for copyright protection. The decision basically concerned matters of contract law, but nevertheless did hold that the artistic content of advertising brochures lay at the lower limit of pro-

[94] LG Hamburg—36 C 305/87—of June 24, 1988, AfP 1988, 381 (Ehrhardt-Renken).

[95] BGH—I ZR 99/86—of April 14, 1988, GRUR 1988, 690 (G. Schulze).

[96] OLG Saarbrücken—1 U 124/85—of December 18, 1985, Schu OLGZ 287 (Nordemann) = GRUR 1986, 310.

[97] OLG Schleswig—6 U 64/84—of February 12, 1985, Schu OLGZ 274 (Gerstenberg) = GRUR 1985, 289.

[98] *Loc. cit.* (footnote 1 above), paragraph 28.

[99] OLG Stuttgart—4 U 82/84—of November 28, 1984, NJW 1985, 1650.

[100] BGH—I ZR 15/85—of December 10, 1986, GRUR 1987, 903.

[101] OLG Frankfurt—6 U 13/86—of June 4, 1987, GRUR 1988, 302 = ZUM 1987, 586.

[102] BGH—I ZR 25/85—of February 26, 1987, GRUR 1988, 300 = ZUM 1987, 524.

tectability and, consequently, no very high amount of compensation could be involved. In the "Shirtdress" case, however, the Federal Court[103] held that the threshold of copyright had not been crossed in the case of a dress bearing a large-scale pattern of squares. It upheld the view of the lower instance that, although no excessive demands on copyrightability should be placed, nevertheless a combination of known elements, determined by fashion, was not to be regarded as a copyrightable work even if the result was tasteful, individual and successful. The judgment by the previous instance was nevertheless quashed since the Federal Court considered that it had unrightly also refused protection under competition law for the copying of fashion novelties.

(64) An interesting case of commercial art that transpired to be non-protectable concerned the ARD logo that is seen an incalculable number of times by viewers of channel one on German television between programs and when programs are announced. This logo is a figure one in a special form that is composed of nine subdivisions carried out in a specific way and intended to provide a new corporate identity for the organizations grouped together within the ARD (Association of German Broadcasting Organizations). Since it constituted a product not comprising the creative individuality that was necessary for a work of art and did not clearly exceed that which is ordinary and usual in the trade and that a designer with average skills could equally produce, copyright was refused by the OLG Cologne[104] with a very detailed statement of grounds. The outcome was that the advertising agency concerned, from which at least a part of the concept originated, was unable to assert copyright claims for the use of the logo.

(65) The LG Oldenburg[105] likewise held to be non-protectable an item of commercial art in which the words "price hammer" in capitals were shown in conjunction with a pictorial representation of a hammer. In a further case, the same Court[106] confirmed copyright protection for the pictorial design of an advertisement. It concerned an assembled representation of a mountainous and wooded landscape into which extended an oversized power saw and in which the purpose of the power saw was suggested to the observer by the cut timber that was visible at the forefront of the landscape. However, the sketched illustrations in the instructions for use, on the other hand, judged in the same decision, were refused copyright protection as had already been the wording of the instructions themselves. As far as the photographs used in the instructions were concerned, a neighboring right under Article 72 of the Copyright Law is conceivable under what is known as simple photography.

(66) Protection was also refused in a case heard by the LG Berlin[107] in dealing with what are known as videotex graphics with the title *Winter Landscape*. The graphics comprised a pictorial representation of a village church and of two different types of house. The view of the LG was that these subjects were lacking in any special intellectual concept in their creative form beyond the level normally feasible in the videotex medium. The limited number of picture dots for each character means that narrow limits are imposed on the design and this necessarily brings with it a certain degree of abstraction of the subject. The definition of known graphic elements into character spaces does not constitute a protectable performance.

(67) In a further case, heard by the LG Munich,[108] which centered on the question whether the design of a special postage stamp to mark the 500th anniversary of the Michelstadt town hall constituted a non-protectable official work, copyright protection under Article 2(1), item 4, of the Copyright Law was afforded without debate.

(hh) Works of Photography

(68) It is characteristic of German copyright law in the field of photography that, in addition to photographic works (including works produced by processes analogous to photography) governed by Article 2(1), item 5, there exists a further neighboring right for what are known simply as "photographs" and for products created by a process analogous to photography. The differences in the provisions under Article 72(3) are essentially to be found only in the term of protection.[109] In many cases where the necessary level of creation is lacking it is still possible to fall back on the neighboring right under Article 72. This is shown in a case heard by the OLG Hamburg[110] concerning the photograph

[103] BGH—I ZR 158/81—of November 10, 1983, GRUR 1984, 453 (Jacobs).

[104] OLG Cologne—6 U 199/85—of September 19, 1986, GRUR 1986, 889 (see also reference in GRUR 1987, 905) = ZUM 1987, 247.

[105] LG Oldenburg—5 O 3691/85—of July 3, 1986, GRUR 1987, 235.

[106] LG Oldenburg—5 O 466/88—of September 22, 1988, GRUR 1989, 49.

[107] LG Berlin—16 O 72/86—of May 6, 1986, CR 1987, 584 (von Lindstow).

[108] LG Munich I—21 S 20861/86—of March 10, 1987, GRUR 1987, 436; see also paragraph 76 below.

[109] Cf. paragraph 7 above.

[110] OLG Hamburg—3 U 79/86—of January 8, 1987, AfP 1987, 691.

of a well-known composer and conductor taken by a professional photographer and then used without the photographer's consent on posters. The Court afforded protection, but at the same time noted, with a reference to protection under Article 72(1) of the Copyright Law, that it was not necessary to consider whether the photograph constituted a photographic work under Article 2(1), item 5, or simply an "ordinary" photograph. The LG Nuremberg-Fürth[111] acted in an even more drastic way in the case of unauthorized use of a photograph belonging to a press agency in assuming protectability (Articles 2(1), item 5, and 72 of the Copyright Law) without giving further consideration to the question of which of the two possibilities was relevant. Finally, protection was also afforded under Article 72 for the instructions for use of a power saw in the already mentioned case heard by the LG Oldenburg.[112]

(69) Even the protection under Article 72 cannot be afforded in the case of simple reproductions of photographs (photograph copies), as decided by the OLG Cologne.[113] It was the explicit view of the Court that such simple copies of photographs are not covered by the scope of Article 72. They are in fact reproductions within the meaning of Article 16 of the Copyright Law. In the case in point, one of two competing manufacturers of Bible editions had made use of various copper engravings from an old 17th century edition of the Bible (Merian Bible), previously given to him for another purpose, for a further Bible edition by means of film exposures made over various intermediate (positive and negative) stages.

(70) A boundary case between works of art (Article 2(1), item 4) and photographic works (Article 2(1), item 5) was dealt with by the OLG Koblenz.[114] The proceedings concerned alienated representations of buildings in the town of Trier for which photographs had been used as the working basis. It was the view of the Court that the results of the individual transformations could not be regarded as photographic works. The alienation in fact consisted in the arbitrary composition of very differing elements in which the original subjects simply represented a component of the overall work and essentially assumed a subsidiary position.

[111] LG Nuremberg-Fürth—3 O 1372/87—of October 14, 1987, GRUR 1988, 817.

[112] Cf. footnote 106 above.

[113] OLG Cologne—6 U 56/85—of July 19, 1985, Schu OLGZ 275 (Gerstenberg) = GRUR 1987, 42 = ZUM 1987, 93.

[114] OLG Koblenz—6 U 1334/85—of December 18, 1986, GRUR 1987, 435.

(ii) Copyright Protection of Titles

(71) The difficulty of obtaining copyright protection for titles—compared with competition law protection for titles under Article 16 of the Law on Unfair Competition—is shown, for instance, by the case heard by the Federal Court[115] with the designation *Gift Texts* used as a subtitle for three volumes of poetry. The Federal Court itself points out, in refusing copyright protection, that it has so far left unanswered the question of affording copyright protection at all to a title as a component of an overall work. A condition for so doing would, in any event, be that the title also represented a personal intellectual creation as an element of the work. Nothing contrary to that view is to be found in Article 39 of the Copyright Law under which the prohibition of modifications extends on principle to all titles of works irrespective of whether they possess individual creative features or not. This ruling in fact concerns only what is known as inner protection for titles, that is to say the author's right, deriving from personality right, to the maintenance and integrity of the title when the work is exploited. As a consolation for the publisher concerned, the lower instance was, however, required to reexamine the matter of competition law protection for the title on the basis of the highly detailed considerations given by the Federal Court.

(72) The OLG Munich[116] also refused copyright protection, in what might be considered a rather curious case, for the designation of the cartoon figure *Asterix* which bad also been used as the designation for a pea variety. Competition law protection for the title was also refused in this case. On the other hand, the KG Berlin[117] left the question of copyright protection unanswered in a case of unauthorized utilization of the title "too true to be good," since the claim to an injunction could already be derived from Article 16 of the Copyright Law. It was held to concern a witty reversal of a popular saying that was also used in other languages. The title therefore possessed the necessary distinctiveness to give it originality.

(b) Collections

(73) The provision on collections in Article 4 of the Copyright Law has the advantage (also as regards the ever more important matter of the protection of data banks) that it explicitly provides for

[115] BGH—I ZR 211/86—of June 15, 1988, NJW 1989, 391.

[116] OLG Munich—6 W 3085/84—of April 11, 1985, ZUM 1985, 572.

[117] KG Berlin—5 U 5790/82—of March 23, 1984, FuR 1984, 529.

protection not only of collections of works but also of collections of other contributions. This enabled the OLG Frankfurt[118] to assume the existence of a protected collection within the meaning of Article 4 in the case of a collection of laws in respect of pharmacies and pharmaceuticals despite the fact that laws as such constitute official works under Article 5(1) and therefore do not enjoy copyright.

(74) In the above-mentioned "Photograph Copies" case, on the other hand, the OLG Cologne[119] refused protection under Article 4 since, in the case in point, which was that of the production of the "Merian Bible," the arrangement of copperplate engravings and Bible text on the pages did not constitute an individual intellectual creation that went beyond the skill of an average designer of illustrated Bibles. Thus, an individual intellectual creation must also exist in the selection or arrangement of collections. In this particular case, protection under Article 3 (adaptations) was not considered since the production of the copies did not involve any redesign of a model taken from the original that would be necessary for an adaptation. The collection of a number of original works does not involve the adaptation of the individual works. Competition law protection was also refused in this case.

(c) Official Works

(75) A series of interesting decisions have had to do with the interpretation of the expression "official works"; under Article 5(1) of the Copyright Law, acts, regulations and decisions and also, under paragraph (2), "other official works published in the official interest for public information" are excluded from copyright protection. These—in some respects quite stringent—provisions have to be interpreted very carefully by the courts in the light of the interests at stake. In one ruling of considerable significance, the KG Berlin[120] held that the DIN standards that have been introduced are actually to be regarded as official works within the meaning of Article 5(1). In the case in point the DIN standards concerned featured in a series of ministerial enactments of various Federal *Länder*, partly in the form of direct reproduction in an appendix to the enactment concerned, partly in the form of references.

(76) Even the already mentioned decision of the LG Munich I[121] on the copyright protection of a postage stamp design eventually resulted in the stamp concerned, which in itself was eligible for protection, losing that protection on account of its inclusion in the official bulletin of the Federal Minister of Posts and Telecommunications, by operation of Article 5(1) of the Copyright Law. Even though the Court was aware that Article 5, being an exceptional provision that did not just restrict but actually excluded the protection of the author's rights, was to be interpreted narrowly, and that there was no question of applying it to comparable official works other than those listed, it saw no other possible solution for the officially-announced stamp, in view of the ostensible purpose of the Law. Apart from that, it could not for the purposes of Article 5 make any distinction between an official work made by a private person (in the case in point an outside designer) and one made by a staff member of an authority.

(77) On the other hand, in terms of a Federal Court decision that has already been mentioned,[122] Article 5(1) of the Copyright Law is not applicable to attorneys' submissions, even where they have become part of official records. According to Article 5(1), while judicial and administrative rulings are to be considered official works in the public domain, that does not apply to the actual records, including their entire contents.

(78) The application of Article 5(2) of the Copyright Law ("other official works") was ruled out by the Federal Court in two other rulings that have likewise been already mentioned. One of them[123] involved information leaflets for employers on matters concerning social security, which General Social Security Offices (AOKs) made available to the employers concerned. While the Federal Court held that such AOKs were also to be regarded as official bodies for the purposes of Article 5(2), as they also included public corporations, the provisions of Article 5(2), the effect of which was to rule out copyright protection of any kind, had in principle to be interpreted narrowly. The Federal Court further held that the deciding consideration in its refusal of an official work was the fact that there had been no contractual relations between the AOKs and the two authors of the information leaflet, and that the information leaflets were in fact purchased by the AOKs from the publisher who produced them. Only the outer cover of the work, which mentioned neither the authors nor the pub-

[118] OLG Frankfurt—6 U 30/84—of January 10, 1985, GRUR 1986, 242 = ZUM 1986, 348; see also paragraph 159 [second part, *Copyright*, March 1990].

[119] Cf. footnote 113 above.

[120] KG Berlin—5 U 4528/86—of January 12, 1988, GRUR 1988, 450.

[121] Cf. footnote 108 above.

[122] Cf. footnote 43 above.

[123] Cf. footnote 44 above.

lisher but merely gave the title "Your Social Security," made it, in the view of the Federal Court, into something that was not necessarily an official work. In the other case, "Topographical Maps," the Federal Court[124] again refused to allow the application of Article 5(2) of the Copyright Law with a specific reference to the ruling just mentioned on the AOK information leaflets, as the map in question had not been published "in the official interest for public information": the matter of official interest had to be determined, depending on the nature and significance of the information, by whether or not the reproduction or other exploitation of the work that imparted the information made it freely available to all. In the case of official maps this was held to be consistently not the case.

(d) Adaptation and Fair Use

(79) The Copyright Law deals with the adaptation concept not only in Article 3, but also in Article 23, which makes the publication or exploitation of an adaptation dependent on the consent of the author. Article 24, on the other hand, provides that such consent may be dispensed with in the case of an independent work created by the fair use of the work of another person. Yet Article 24(2) itself makes an exception to the principle of fair use in the case of a musical work where a melody has been recognizably borrowed from the work. In the Federal Court rulings already mentioned in connection with the "Fantasy"[125] and "A Little Peace"[126] cases, the interpretation of this provision, which is not convincing in every respect, played an important part. The issue turned on the protection of melodies and the borrowing of melodies. In both cases the published rulings compare sample passages of the music involved, so that the musically enlightened reader can gain an impression for himself.

(80) In the view of the Federal Court there were no relevant similarities between the melodies in the "Fantasy" case, so that the question of unintentional borrowing of melodies, and the question of connected proof of general impression and its possible invalidation, no longer arose at all. The similarities that did exist were actually outside the creative field, and this was shown in detail by the Federal Court. As the protection of the melody concerned was in any event of very small scope on account of its negligible creative content, the infringement action had to be dismissed as unfounded, in spite of the so–called "strict" protection of melodies under Article 24(2) of the Copyright Law, for want of an offending act. This was not true of "A Little Peace," however. Here the Federal Court dismissed the finding of the lower court to the effect that both the melodies concerned were the result of an accidentally duplicated creative act. Although the Federal Court did not itself hand down a final judgment, it instructed the lower court specifically, as is customary in such cases, first to test the similarities between the melodies concerned and then the proof of general impression and its possible invalidation. In particular, there would be a case of melody borrowing with copyright relevance if the second composer—believing that he was creating a melody of his own—unwittingly drew on earlier melodies that might have lingered in his memory.

(81) In the relatively unusual "Helicopter with Ladies" case judged by the LG Munich I,[127] a dividing line had to be drawn between free adaptation (Article 23) and fair use (Article 24) in the case of an oil painting made from photographs in an attempt to achieve photographic realism, with the relation between photograph and oil painting as the reference. At the outset the Court allowed the painter an element of personal artistic expression, so the matter at issue was not simply the reproduction of the photographs, but whether or not an independent work had been created. The Court regarded it as adaptation, however, not as fair use, both concepts having been thoroughly analyzed. In the interest of adequate copyright protection, it said, the criterion used to judge whether a work of three–dimensional art was an unauthorized copy or whether it had been created by fair use of a model should not be too lax. Apart from that, on account of the wording of Article 23(1) of the Copyright Law, it was not the actual creation of the oil painting from the two photographic models that required authorization, but rather its publication and exploitation.

2. Protection of the Author's Moral Rights

(a) Right of Publication

(82) In its already much–mentioned ruling in the "Attorney's Submission" case, the Federal Court[128] made a few short but telling statements on the author's moral rights, and especially on the right of dissemination, expressly provided for in Article 12 of the Copyright Law. This right of dis-

[124] Cf. footnote 54 above.
[125] Cf. footnote 82 above.
[126] Cf. footnote 83 above.
[127] LG Munich—21 O 17164/85—of November 29, 1985, GRUR 1988, 36.
[128] Cf. footnotes 43 and 122 above.

semination belongs also to the attorney in relation to his submission; one cannot after all expect him to have assigned that right wholesale to his client. Neither should the submission be regarded as published as soon as it has been filed with the Public Prosecutor's Office. This question is determined rather by the rule written into Article 6(1): where the contents of an official record are made accessible to a group of persons sworn to professional secrecy, that cannot be described as dissemination.

(83) The Berlin Chamber Court (KG)[129] made an important ruling on the right of dissemination in connection with cinematographic works. The question was whether the director of a feature film could demand to be given the opportunity, before the release of the film, to declare the master copy free of defects. That right was conferred on the director by Article 12 of the Copyright Law; it included the power to decide when a work was to be declared completed, and the director's right to approve the film followed from that. Even the special provisions on cinematographic works in Articles 88 *et seq.* were held to be compatible with this line of reasoning. The latter provisions were more concerned with exploitation rights, so that Article 12, being the expression of a moral right of the author and therefore on a different plane, was not invalidated. Even Article 93, which amended and restricted the moral right to integrity under Article 14, was not considered a valid argument against the film director's right of approval. As moreover there was a lack of references to determine how far Article 12 should be amended by contractual arrangements, the Court left unanswered the question of the limits within which the right of dissemination under Article 12 was assignable, and indeed whether it could be taken from the director at all by contractual means.

(b) Recognition of Authorship and the Obligation to Mention the Source

(84) The author's right to have his authorship recognized, provided for in Article 13 of the Copyright Law, was the subject of a ruling of the OLG Karlsruhe[130] in the "Egerland Book" case. The ruling shows that this right can also play a part in the relations between two or more coauthors—or two or more joint publishers, as the case may be—of an anthology. The Court held that the author had the right under Article 13 to have a mention of his authorship included. In the case of joint authorship that right accrued to each coauthor individually, yet the exercise of the right was a collective matter insofar as the joint work was directly involved rather than the personal concerns of one coauthor exclusively. Nevertheless the action of one such coauthor failed in the case in point in that he wanted to assert his right against one of the other coauthors and not against all of them at the same time. One thing that is still unclear, however, is the Court's assumption that in the case of the publishers of the so-called *Egerland Anthology* the authors were to be considered coauthors in terms of Article 70 of the Copyright Law (authors of scientific editions), and not for instance coauthors of a collective work in terms of Article 4. Another ruling of the LG Munich I,[131] which we shall be going into later, shows that the question of the naming of names in the "indication of sources" can also play a part in connection with the limitations on copyright, and especially the right of quotation under Article 51.

(85) One interesting borderline case between *general* moral rights and the recognition of authorship was ruled upon by the OLG Schleswig.[132] The case involved a legal dispute over the authenticity of two watercolors by the German expressionist Emil Nolde, which allegedly had been signed by the painter. They were submitted to the director of the Emil Nolde Foundation for authentication, but were declared counterfeit by him and thereupon not returned. By virtue of a power of attorney given by the painter's widow, the Foundation asserted against the owner's demand that they be returned the painter's moral right, which was supposedly prejudiced by the existence of the counterfeits and the risk of their being circulated in the art trade. The Court had to concern itself among other things with the problem of the protection of moral rights *post mortem* and, in its finding, held that there was no legal basis for the Foundation's claim. The set of problems involved in this case is interesting, because it shows that, in the case of the faking of works of this kind, it is not so much a problem of the author's own moral rights but rather one of general moral rights. It is not so much a matter of attributing the work to its true author as of suppressing an alien intellectual creation.

(c) Protection of the Integrity of the Work and Prohibition of Alteration

(86) Protection against distortion and other mutilation of a work is dealt with in Article 14 of

[129] KG Berlin—5 U 580/85—of October 25, 1985, Schu KGZ 86 (Movsessian).

[130] OLG Karlsruhe—6 U 301/83—of June 27, 1984, GRUR 1984, 812.

[131] Cf. paragraph 128 below, footnote 205.

[132] OLG Schleswig—4 U 227/85—of May 13, 1987, 516 (see also p. 707).

the Copyright Law; this is conditioned however by the statutory provision prohibiting modifications in Article 39, and the special provision on protection against distortion in connection with cinematographic works in Article 93. The second Federal Court ruling in the "Oberammergau Passion Play" case[133] concerned itself almost exclusively witb problems arising from alterations and therefore with moral rights issues. In fact the matter had already been touched upon in the preceding Federal Court ruling[134] in the same case. It was a question of whether alterations to the scenery and its use for the current performances of the passion plays were permissible in copyright terms. At first, with reference to the particular circumstances of the tradition of the Oberammergau passion plays, the Federal Court pointed to the fact that the already-deceased designer of the scenery, who was also the original stage manager, had tacitly accorded the right of alteration for later performances, or alternatively a right of adaptation under Article 23 of the Copyright Law. However, an alteration that is required by the adaptation agreed upon or to which the author has expressly agreed cannot normally prejudice any of the latter's interests within the meaning of Article 14. In other respects the author's own interests are the deciding factor, even after his death; his interests are represented by his legal successors, and none of the plaintiff's personal interests—that is, interests not deriving from the legal succession—are to be taken into consideration. At the same time, however, it should be borne in mind that any relevant interests of the author are unlikely to carry as much weight years or decades after his death as they did during his lifetime. In the end the heirs of the set designer concerned were denied protection under Article 14.

(87) The connection between Article 14 (protection of the integrity of the work) and Article 39 (prohibition of alteration in copyright licensing) has been demonstrated in other cases, including one judged by the OLG Frankfurt[135] involving the alteration of the roof design of an administrative building. The Court pointed to the conflict between two absolute rights, that of the owner of the building on the one hand and that of the author on tbe other, which would have to be resolved by means of a balancing of interests, and stated the criteria applicable to the comparison involved. With regard to the need for rectification of the roof design, it found for the interests of the owner as a result of the comparison. In another case, which basically concerned withdrawal from a music publishing contract, the KG Berlin[136] decided that the music publisher's accentuation of the notes in a manner contrary to the composer's conceptions came into the category of alterations that the plaintiff could not in good faith refuse, as provided in Article 39(2).

(88) The OLG Frankfurt,[137] in a summary proceeding claiming unauthorized alterations to the script and score of an opera, also refused to grant the injunction applied for to stop the performance of the opera, in this case also with a reference to the economic and intellectual prejudice to both the opera itself and the performers involved in the production. Finally, the LG Düsseldorf[138] was not prepared to look on the mere playing of a piece of music as accompaniment to a promotional broadcast as an (unauthorized) alteration of tbe musical work, in a ruling of somewhat questionable validity.

(89) The question of alteration and distortion is particularly relevant in the field of *cinematographic works*, because in the case of such works Article 93 of the Copyright Law restricts the basic protection against distortion provided for in Article 14. With regard to the production and exploitation of the cinematographic work, only *gross* distortions or other gross impairments of tbe cinematographic work can be prohibited. The reason for this provision is of course the considerable financial commitment and risk taken on by the film producer. The OLG Munich[139] bad a difficult judgment to make with regard to the filming of the book *The Never-Ending Story* by the noted German writer Michael Ende. The Court explained, albeit witb what appears to be excessive detail in view of the outcome, why in tbe case in point there had been a gross distortion of the original work, particularly in the closing scene. Even though it further ruled that the right to oppose distortions and other impairments was unrenounceable, the eventual outcome, in view of the circumstances of the case and the conduct of the parties, was tbat protection bad to be denied. In particular, the author of a work that was filmed could not retrospectively object to certain characteristics of the film that he had until then consistently accepted. Finally, consideration had also to

[133] BGH—1 ZR 15/87—of October 13, 1988, GRUR 1989, 106 (Loewenheim) = ZUM 1989, 84.

[134] Cf. footnote 90 above.

[135] Cf. footnote 87 above.

[136] KG Berlin—5 U 2928/83—of March 29, 1985, ZUM 1986, 470; cf. in that connection paragraph 155 [second part, *Copyright*, March 1990].

[137] OLG Frankfurt—6 W 1/89—of January 5, 1989, NJW 1989, 408.

[138] LG Düsseldorf—12 0 438/83—of February 13, 1985, ZUM 1986, 158; see also in that connection paragraph 192 [second part, *Copyright*, March 1990].

[139] OLG Munich—29 U 2114/85—of August 1, 1985, GRUR 1986, 460 = ZUM 1986, 476.

be given to the economic consequences of the stopping of the film, and to the fact that the writer had withdrawn his name and publicly dissociated himself from the production.

(90) The question of the permissibility of alterations also comes up frequently in connection with *computer programs*. The practical purpose of a computer program, which often requires adaptation to the corporate circumstances of the user concerned, can in itself be a decisive criterion in the balancing of interests that has to be done. The OLG Munich[140] expressly acknowledged that fact: a software supplier's express exclusion from the guarantee of cases in which the client independently interfered with the software was by no means to be perceived as a prohibition on alteration, but simply as an exclusion from the coverage of the guarantee. The LG Bielefeld[141] likewise ruled that there were no moral rights implications in the exploitation of programmed functions of an installation that had not yet been officially "switched on."

3. The Author's Exploitation Rights and Remuneration Rights, and Their Statutory Limitations

(a) Right of Reproduction

(91) The author's right of reproduction, defined in Article 16 of the Copyright Law, is in some ways the cornerstone of the whole copyright protection structure, and yet it seems so self-evident that it is seldom involved in problems. On one occasion when it was, namely in the "Preliminary Design II" case which we have already mentioned, the Federal Court[142] had to rule on the infringement of a protected preliminary design by the unauthorized building of a private house to that design. It found that the right of reproduction under Article 16(1) of the Copyright Law had indeed been infringed, in spite of certain departures from the original plans. The right of reproduction is violated not only by identical (or virtually identical) copying: the author's right of prohibition extends also to alterations that represent a substantial departure from the original work, but still do not embody any original creative expression and therefore—in spite of their having been made—do not remove the copy from the scope of protection of the original.

(92) One might of course have hoped for a clear statement on the part of the Federal Court—which evidently had done no more than compare two designs—to the effect that three-dimensional building from an architect's plans was in itself a violation of the right of reproduction embodied in the two-dimensional preliminary designs. However, the fact that, in the specific case of works of architecture and the plans for such works, the right to build is included in the protection, as opposed to illustrations of a scientific or technical nature in Article 2 (1), item 7 (which are protected only in their two-dimensional form), had admittedly been pointed out by the Federal Court[143] in the already mentioned "Electrode Factory" case, just as it had, with equal clarity, by the OLG Munich[144] in its ruling in the "Residential Development" case, likewise already mentioned.

(b) The Right of Distribution and its Exhaustion

(aa) Influence of European Law, and Distribution Abroad

(93) The author's right of distribution, which is provided for in Article 17 of the Copyright Law as a special right alongside the right of reproduction, is exhausted under Article 17(2) on the first sale of copies of the work. The question of exhaustion also has a Community law dimension. In our previous "Letter"[145] we gave an account of how the German courts reacted to the well-known European Court ruling[146] in the "Differences in Fees" case. In the light of the provisions of EC law, the European Court had ruled that the further distribution of physical copies within the European Community was permissible when the copies had been put into circulation by the owner of the copyright or with his consent in any EC member State. For its part the German Federal Court in the "Differences in Fees III" ruling,[147] also reported on at that time, had attempted to achieve a further degree of latitude to accommodate the case in which the records concerned, inasmuch as their movement was purely an internal movement within a company, may not have been put into circulation at all. In the "Differences in Fees IV" ruling, however, the Federal Court[148] confirmed the OLG Frankfurt ruling, also

[140] OLG Munich—13 U 2458/86—of October 27, 1987, CR 1988, 378 (Chrocziel).

[141] Cf. footnote 73 above and paragraph 107 below.

[142] Cf. footnote 84 above.

[143] Cf. footnote 52 above.

[144] Cf. footnote 85 above.

[145] *Loc. cit.* (footnote 1 above), paragraphs 64 *et seq.*

[146] EuGH, January 20, 1981 (related affairs 55/80 and 57/80), EuGH Slg. 1981, 147 = Schu EuGH 2 (Schulze) = GRUR Int. 1981, 229.

[147] *Loc. cit.* (footnote 1 above), paragraph 65 and footnote 107.

[148] BGH—I ZR 153/83—of February 20, 1986, Schu BGHZ 342 (Mestmäcker) = GRUR 1986, 668 (Kühn) = GRUR Int. 1986, 724 (Hodik) = ZUM 1986, 533.

mentioned in our previous "Letter,"[149] to the effect that in the case concerned it was not a question of a mere movement of goods within the company, in which case one could have said that the merchandise had not yet started to be freely traded, in other words had not yet come on to the (common) market. This applied especially where the domestic company bought in goods from the foreign market which were being freely traded there by the sister company and were therefore accessible to third parties. It was thus eventually ruled that the further distribution in Germany of records originating in the United Kingdom was permissible according to the principles of Community law.

(94) These now well-established principles of the application of Community law were completed with another permutation, provided by the KG Berlin.[150] This case involved a legal act of distribution in France for which no remuneration at all had been paid, so that there could be no talk later of payment of a mere "royalty difference." With reference to the case law of the European Court as well as the German Federal Court, the KG Berlin nevertheless found that the mere fact of licensed distribution in France (and then only in the form of export business) was sufficient to make further distribution in Germany permissible.

(95) The European Court ruling mentioned admittedly had the further consequence of record importers, who previously had meekly paid the royalty difference charged by GEMA, now attempting to obtain *refunds* on the grounds of unauthorized enrichment. This issue was the subject of a legal dispute ruled upon by the OLG Munich[151] and thereafter by the Federal Court.[152] However, while the OLG Munich found for the refund claim, because the amount had been paid without any legal justification, its ruling was quashed by the Federal Court and referred back for retrial because it had not made a sufficient examination of whether GEMA's enrichment from the royalty payments had not later disappeared. This applied especially to GEMA's objection that it could no longer demand back amounts collected by it which it had long since distributed among entitled parties within the country and also to foreign collecting societies.

(96) For another thing the Federal Court,[153] and also the OLG Karlsruhe[154] which expressly referred to it, lent weight to the argument—with regard to records and video games respectively—that authorized distribution in a non-EC country, when the rights have been transferred with a mere territorial restriction to the country in question, does not exhaust the German right of distribution. The mere *declaration*, without further proof, of the lawful distribution of the physical embodiments of the work (records in the case in point) in an EC member State, and of procurement from a dealer who has not been identified in greater detail, is thus not sufficient justification for sweeping aside the principles of Community law.

(97) Another thing that is interesting for the interpretation of the right of distribution and its exhaustion is the Federal Court's finding that the rules established by the European Court on the free movement of goods had nothing really to do with foreign exhaustion of the domestic right of distribution. It is more a question of a simple obstacle to implementation in the case of the provisions of the EEC Treaty that override national law; basically there is no exhaustion of the domestic right of distribution in the case of distribution abroad when the licenses granted for the countries of exportation have been restricted to the territory of those countries. As this Federal Court ruling, called "Record Importation II," also shows, all these principles are valid not only for copyright but also for the neighboring rights enjoyed by producers of phonograms. Indeed the Federal Court goes so far as to rule out domestic exhaustion even where the territorial distribution, restricted to foreign countries, is effected by the holder of rights himself, except where such personal distribution abroad takes place without any reservation whatever, so that importation into the country, and consequently the exercise of the domestic right of distribution, would appear to be authorized by implication.

(98) Further confirmation of these principles was given in the Federal Court ruling in "Record Importation III."[155] This case involved the distribution of records in the United States of America and also to some extent in Denmark, and once again no proof was given of any legal act of distribution. In this ruling the Federal Court pointed out that it was usual in the phonogram industry for only territorially restricted and not worldwide licenses to be

[149] *Loc. cit.* (footnote 1 above), paragraph 66 and footnote 108.

[150] KG Berlin—5 U 2018/83—of September 17, 1985, Schu KGZ 85 (Mestmäcker).

[151] OLG Munich—6 U 4882/84 and 2825/85—of February 27, 1986, ZUM 1987, 193.

[152] BGH—I ZR 79/86—of April 28, 1988, GRUR 1988, 606 = ZUM 1988, 30.

[153] BGH—I ZR 166/82—of March 21, 1985, Schu BGHZ 329 (Hubmann) = GRUR 1985, 924 = GRUR Int. 1985, 760 = ZUM 1985, 505 = IIC 1986, 259.

[154] Cf. footnote 76 above.

[155] BGH—I ZR 164/85—of October 28, 1987, GRUR 1988, 373 = ZUM 1988, 410.

granted to phonogram producers, a circumstance that had to do with the standard contracts used by GEMA and the other collecting societies tied to each other by virtue of their affiliation to the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM).

(bb) Distribution Concept

(99) The concept of the right of distribution under Article 17(1) of the Copyright Law has also had to be clarified in individual cases. Thus it was that the Federal Court,[156] in the already mentioned "Electrode Factory" case, held that the passing on of planning documents in connection with the soliciting of tenders constituted an act of distribution in the manner in which they were put into circulation. This was not altered by the fact that the handing over of the drawings occurred only in connection with an individual commercial act. Distribution to an indeterminate group of potential contractors, which could not reasonably take place in a general way, but rather in the form of individual contacts, already made the distribution public. The KG Berlin[157] likewise, in a case involving unauthorized bronze castings of a sculpture made after the death of the sculptor and painter Ernst Barlach, held that the mere passing on, or repurchase as the case might be, of unauthorized castings violated the copyright owners' right of distribution.

(100) It has also been found, in both civil[158] and criminal[159] proceedings involving pirate copies of computer games, that the mere circulation of a catalog mentioning the computer games concerned constitutes an offer to the public within the meaning of Article 17(1) of the Copyright Law, and therefore an act of distribution. The OLG Munich,[160] on the other hand, in one particular case where the defendant had marketed used computers, denied on factual grounds, with regard to the corporate software involved, that an offer to the public and consequently an act of exploitation had taken place, but in doing so it pointed out that the question of the scope of the exhaustion principle needed to be fully clarified as far as the sale of software products was concerned. This question was not at issue in the case in point, however.

(c) The Right to Hire and Lend Copies of Works (Lending Right)

(aa) Laying Out of Newspapers and Magazines

(101) The exhaustion of the right of distribution under Article 17(2) of the Copyright Law involves a measure of risk for the copyright owner in view of the spread of the commercial hiring of copies of works, particularly in the phonogram and videogram trade. Some mitigation of this risk is to be found in Article 27 of the Copyright Law, which grants at least a right to remuneration in the case of commercial hiring or lending by public collections. Claims of remuneration can only be asserted through a collecting society.

(102) In our previous "Letter,"[161] we mentioned that the Bild/Kunst collecting society had attempted, in two actions brought against hairdressing salons on the one hand and dentists on the other, to impose this right to remuneration also in connection with the practice of providing newspapers and magazines in waiting rooms, offices and elsewhere, for the use of customers or patients. Its demands were startlingly unsuccessful: at the outset the Federal Court refused in two rulings[162] to regard the laying out of newspapers and magazines as a form of lending, affording entitlement to remuneration under Article 27(1) of the Copyright Law. In both rulings, which have large areas of similarity, the Federal Court refers to the legal precedents concerning Article 27, from which it emerges that all the legislation had in mind was the liability for remuneration of libraries and comparable collections, and intended only to cover them. Their point of departure clearly had been that the author qualified for an additional share in further distribution where that further distribution led to particularly intensive exploitation of the work and where the users consequently tended to be lost as potential purchasers of legitimate copies of the work.

(103) As already mentioned,[163] eventually even the constitutional petition filed by Bild/Kunst against these two Federal Court rulings, while declared formally admissible by the Federal Constitutional Court[164] (which in itself appears significant), was found to be substantively groundless. Copy-

[156] Cf. footnotes 52 and 143 above.

[157] KG Berlin—5 U 4072/81—of December 11, 1984, ZUM 1987, 293.

[158] LG Hanover, *loc. cit.* (footnote 77 above); also LG Hanover—18 O 58/87—of October 28, 1987, CR 1988, 826.

[159] LG Wuppertal—26 Ns 24 Js 538/84—67/86 VI—of November 28, 1986, CR 1987, 599.

[160] OLG Munich—29 U 2036/87—of January 14, 1988, RDV 1988, 87.

[161] *Loc. cit.* (footnote 1 above), paragraphs 70 *et seq.*

[162] BGH—I ZR 65/82—of June 28, 1984, BGHZ 92, 54 = Schu BGHZ 321 (Nordemann) = GRUR 1985, 134 (Loewenheim) and BGH—I ZR 84/82—of June 28, 1984, Schu BGHZ 322 (Nordemann) = GRUR 1985, 131 (Loewenheim) = FuR 1984, 647.

[163] Cf. paragraph 16 above.

[164] BVerfG—I BvR 1611/84 and I BvR 1669/84—of November 4, 1987, BVerfGE 77, 263 = GRUR 1988, 687 = ZUM 1988, 234.

right is indeed property within the meaning of Article 14 of the Basic Law of the Federal Republic of Germany; that conforms to the fundamental principle according to which the material result of creative activity accrues to its author under private law, making him free to dispose of it on his own responsihility. Yet this fundamental attribution of the material element of copyright does not mean that every imaginable form of exploitation is therehy constitutionally assured. In particular, the author has no constitutionally guaranteed right to he paid remuneration in every instance of lending.

(bb) Record and Video Lending Rights, and the Effect of Exhaustion

(104) In our previous "Letter"[165] we mentioned the controversial development of German case law on the question whether the wording of a contract could circumvent the effect of exhaustion under Article 17(2) of the Copyright Law and thereby "rescue" a rental right, especially for records and videograms, even after the disposal of the physical ohject. The Federal Court removed all grounds for speculation in this area with its "Record Rental" ruling.[166] It found for those courts that worked on the premise that the effect of exhaustion under Article 17(2) could not he removed hy a particular wording of the contract; the principle of exhaustion of the right of distribution, which amounted to a general rule of law applicable to the right of distribution of the phonogram producer, implied that the owner of the right used, and in so doing used up, the exclusive right of distribution accorded him by the law through his personal act of exploitation, so that any specific subsequent exploitation was no longer covered hy the protection. When, as in this case, records were sold once with the consent of the producer, further distrihution in the form of rental hecame *ipso facto* permissible. The exhaustion of the right of distribution is determined solely hy the question whether or not the owner of the right has consented to the distrihution *by means of sale.* The consent does not need to extend to the form and manner of the suhsequent use, be it rental or lending. For by the very fact of sale the entitled party relinquishes his control over the copy of the work; it then hecomes free for any form of subsequent distribution. Its release serves users' and the general public's interest in keeping published works marketable. The possiblility of once again restricting the effect of exhaustion arhitrarily hy means of a unilateral declaration would be at variance with the principle of exhaustion and its essential purpose.

(105) The only (contractual) restriction that can affect the onset of exhaustion is therefore the kind that relates to the *manner of putting into circulation*; for in the event of failure to heed this restriction the work concerned has not been put into circulation with the consent of the entitled party. On the other hand it is not possihle to effect the material separation of the rental right from the right of distribution and make it an exception to the exhaustion rule, for then it would be not a question of the permissihle limitation of the content of the right of distrihution itself, hut the *form and manner of further distribution.* Any reservation that relates not to the distribution but rather to the *later use* of the copies of the work, must therefore be disregarded. This then is a clear rejection hy German case law of the concept of a "right of destination." The Federal Court also rejected the contention that the fact of record producers being granted no share, in connection with the protection of performances under Article 85 of the Copyright Law, in remuneration claims under Article 27 of the same Law, called for a different ruling.[167] The person entitled to protection of the performance had to accept the legislators' decision that he should not be included among those entitled to remuneration under Article 27.

(106) Moreover the Federal Court[168] confirmed its finding—albeit in the form of an *obiter dictum*—in connection with videocassettes in the "Video Film Show" case. It ruled that exhaustion, which under Article 17(2) of the Copyright Law occurred basically on the sale of an original or copy, applied merely to the further distribution of the physical copy of the video film. Showing it in public did not come under the heading of further distrihution. What is meant by distrihution and further distrihution has to he worked out from Article 17 of the Copyright Law. The puhlic communication of the work, and indeed such other forms of exploitation as are not to be treated as distribution, likewise remain unaffected hy exhaustion in the copyright sense as a result of an act of distribution.

(107) The Federal Court's clarification of the contentious matters arising from Article 17 of the Copyright Law will have left some courts vindicated and others proved wrong. The former group

[165] *Loc. cit.* (footnote 1 above), paragraphs 72 *et seq.*

[166] BGH—I ZR 208/83—of March 6, 1986, Schu BGHZ 344 (Reichardt) = GRUR 1986, 736 (Hubmann) = ZUM 1986, 678 = IIC 1987, 834.

[167] On this point the phonogram producers lodged an appeal with the Federal Constitutional Court, claiming the unconstitutionality of the Federal Court decision. The appeal is still pending.

[168] BGH—I ZR 22/84—of May 15, 1986, GRUR 1986, 742 = ZUM 1986, 543.

includes the OLG Saarbrücken[169] and the OLG Hamm[170] which, with regard to exhaustion, declared permissible the further rental by the acquirer of program cassettes for TV video games, and also the LG Bielefeld,[171] which ruled in favor of a special case of distribution of a computer installation which included its operating system. The second group includes the OLG Karlsruhe[172] and the OLG Frankfurt,[173] which were still working on the assumption that, in the case of video games (TV games) and the associated operating programs respectively, exhaustion under Article 17(2) of the Copyright Law could at least be restricted by means of an express reservation vis-à-vis the acquirer, which admittedly was eventually found to be missing in both the cases ruled upon.

(cc) Remuneration Claims in the Case of Rental of Copies of a Work

(108) In the case of the subsequent rental of legally-acquired copies of a work, there still subsists in favor of the copyright owner (but not the producer of phonograms and videograms) at least a right to remuneration under Article 27 of the Copyright Law. It is therefore understandable that there should be a desire, on the copyright side at least, to assert this claim. GEMA, being dependent on its intermediary work in the assertion of such claims, has in a number of cases attempted, on the basis of a rapidly drawn-up tariff, to introduce the highest possible royalties. In any event, GEMA was accorded a claim, in two rulings,[174] on the video clubs and video businesses concerned regarding information on how many videocassettes and phonograms were kept in stock for rental and lending: the relevant tariff provides for monthly lump sums, the amount of which is determined in each case by the total stocks of videocassettes and phonograms available for rental.

(d) The Right of Communication to the Public

(109) The right of communication to the public, which is provided for in general terms in Article 15(2) of the Copyright Law, with additional details in Articles 19 to 22, has to be considered in conjunction with the limiting provisions in Article 52. The latter Article was changed by the amending legislation of 1985, as already mentioned.[175] The essential purpose of the change was to comply with the requirements arising out of an earlier ruling of the Federal Constitutional Court.[176] Although the scope of the public communication permissible without authorization was not actually limited as compared with the previous legislation, the author is now granted a general claim to remuneration (albeit with some important, expressly stated exceptions). According to the wording of the Law, those exceptions apply to events organized by the Youth Welfare Service, the Social Welfare Service, the Old Persons' Welfare Service and the Prisoners' Welfare Service and to school events, on condition that in accordance with their social or educational purpose they are only accessible to a specifically limited circle of persons. The effect of these exceptions is that the earlier case law on the subject[177] is no longer entirely relevant. This applies also to the Federal Court ruling[178] in the "Detention Centers" case, which was handed down in accordance with the earlier law. As in the lower court decisions, it was again ruled that the reproduction of musical works with the aid of radio and television receivers or tape recorders and comparable apparatus in the recreation rooms of prisons and detention centers constituted a public communication that was not covered by the exception under Article 52 of the Copyright Law (old version).

(110) As universities, unlike schools, are not covered by the new provisions of Article 52, the earlier case law continues to have a measure of influence. This was already true of the case ruled upon by the OLG Koblenz,[179] in which a university sued GEMA for damages for the public communication of musical works in connection with courses, more specifically in the field of study of the institute of music concerned and as accompaniment to gymnastic and sporting events. The Court ruled that events occurring in universities were not cov-

[169] OLG Saarbrücken—1 U 35/84—of August 29, 1984, ZUM 1984, 508.

[170] OLG Hamm—4 U 425/83—of November 8, 1984, Schu OLGZ 272 (Krüger-Nieland).

[171] Cf. footnotes 73 and 141 above.

[172] Cf. footnote 75 above.

[173] OLG Frankfurt—6 W 33/84—of July 12, 1984, FuR 1984, 527.

[174] OLG Oldenburg—1 U 19/87—of June 18, 1987, ZUM 1987, 637 and OLG Düsseldorf—20 U 4/87—of July 30, 1987, GRUR 1987, 907 = ZUM 1989, 35; see also paragraph 177 [second part, *Copyright*, March 1990].

[175] Cf. paragraph 7 above.

[176] Cf. the previous "Letter," *loc. cit.* (footnote 1 above), paragraph 4, footnote 8. In a sequel to this ruling the Federal Constitutional Court has in the meantime established the compatibility of the new Article 52 with the Basic Law (Article 14), at least regarding events connected with prisoner welfare; it has however dismissed a farther-reaching constitutional petition directed against the entire coverage of the new Article 52; cf. BVerfG—1 BvR 743/86, of October 11, 1988, GRUR 1989, 193.

[177] Cf., for instance, the previous "Letter," *loc. cit.* (footnote 1 above), paragraphs 90 *et seq.* In this respect cf. also the new BVerfG ruling mentioned in footnote 176.

[178] BGH—I ZR 57/82—of June 7, 1984, Schu BGHZ 320 (Reichardt) = GRUR 1984, 734 = IIC 1985, 502.

[179] OLG Koblenz—6 U 606/83—of August 7, 1986, NJW-RR 1987, 699.

ercd by the exception written into Article 52 of the Copyright Law (new version), which was to be interprctcd restrictively, and awarded the damages.

(111) The OLG Munich[180] likewise ordered the operator of a dancing school, in which dance music was played with the aid of phonograms, to pay royaltics according to the GEMA tariff. The Court rcferred to the earlier case law and found that communication to thc public had occurred on account of the participation of 20 to 40 persons in the dancing classes, and the fact that they hardly became personally acquainted at all. Neither was there any pcrsonal bond between the students and the organizcrs. The samc considerations apply to performanccs of music in connection with graduation dances. According to thc same reasoning the OLG Frankfurt[181] held that the public was present in the case of the organization of "adult" dancing classes, and that a violation of the right of public communication had therefore been committed, rightly pointing out that the Amending Law of 1985 had in that respect effected no change in the legal situation. The public character of the relevant communication and consequently the infringement of copyright was also established by the Federal Court[182] in the already-mentioned "Video Film Show" case, in which videocassettes were played in the bar of a club. The vidcocassettes were actually marked with a noticc to the effect. that their use was permitted only for private purposes (to the exclusion of any form of gainful exploitation).

(e) Cable Television

(112) In our previous "Letter"[183] we already mentioned that the Federal Court had denied cable rights in one special case, involving cable television installations in the lec of a high-rise building, on the grounds of unusual and questionable extension of the cxhaustion of copyright concept. In a second model action on the beginning of which we also reported in our previous "Letter"[184] and which concerned a lcgitimate cable television installation in the Bavarian town of Kaufbeuren, the Federal Court[185] has in the meantime made the first application, in conformity with the lower court decision,[186] of cable rights as a subsidiary instance of the right of broadcasting under Article 20 of the Copyright Law. Admittedly, the special circumstances of this case were that the cable installation served not only for the distribution of a series of foreign radio and television programs or alternatively outside programs not intended for Bavaria, but also for the reception of the usual local programs. The Federal Court thus had ample opportunity to state its position on the matter of the relevance of the service area criterion. However, as this "multi-stage" action at the outset involved only a demand for information, the Federal Court—like the lower court—left the question open and ruled that there was in any case infringement of the right of broadcasting in those cases in which the German Post Office, as the operator of the cable installations, had relayed radio broadcasts that had been made by broadcasting organizations whose legal service area did not include the area corresponding to the town of Kaufbeuren.

(113) The Federal Court expressly stated that the operation of wide-band cable installations was covered by the right of broadcasting under Article 20 of the Copyright Law and, with respect to the relaying of foreign broadcasts, by Article $11^{bis}(1)(ii)$ of the Berne Convention. For the rest, it pointed out, significantly, that for broadcasts picked up outside the service area the exhaustion principle was not applicable. However, the actual way in which this question is discussed leads one to fear that the Federal Court could, in the case of relaying within the service area, refer back to the exhaustion principle worked out by itself in its first cable ruling.[187] For it indicates that it intends to abide by a general exhaustion principle which is also applicable in the field of the non-material reproduction of works and the right of broadcasting. With regard to the right of broadcasting, exhaustion can be regarded as having occurred when the author, by means of the consent to the broadcast given to the original broadcasting organization, has made his work available not only for the technical processes associated with a particular broadcast, but for the purpose-dictated circle of recipients of such a broadcast.

(114) Even the argument of alleged double charging, which the Federal Court describes as an assessment of equity and declares irrelevant in the casc of the broadcasts of foreign broadcasting organizations, for which no broadcasting royalties have

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[180] OLG Munich—6 U 4440/84—of November 28, 1985, Schu OLGZ 283 (Ladeur) = ZUM 1986, 482.

[181] OLG Frankfurt—6 U 43/85—of March 20, 1986, ZUM 1987. 91.

[182] Cf. footnote 168 above.

[183] *Loc. cit.* (foolnote 1 above), paragraphs 78 *et seq.* and foolnote 128.

[184] *Loc. cit.*, foolnote 129.

[185] BGH—1 ZR 117/85—of June 4, 1987, GRUR 1988, 206 (Sack) = ZUM 1988, 35 (Gounalakis), pp. 20 *et seq.* In general see also Schricker, *Urheberrechtliche Probleme des Kabelrundfunks*, Baden-Baden, 1986, and Gounalakis, *Kabelfernsehen im Spannungsfeld von Urheberrecht und Verbraucherschutz*, Baden-Baden, 1989.

[186] OLG Munich—6 U 2385/84—of April 18, 1985, GRUR 1985, 537 = ZUM 1985, 376.

[187] Cf. reference in foolnote 183 above.

been paid, seems in its view, in the case of broadcasts picked up out of the service area, to be not entirely irrelevant at the outset. In view of the impending overall contractual solution, however, this in our opinion would be close to undesirable discrimination against the owners of the rights in domestic programs, if they were to be excluded from any share in royalties.

(f) Privileged Treatment of Collections for School Use and of Radio Broadcasts for Schools

(115) Article 46 of the Copyright Law allows the reproduction and distribution of specific types of published works in connection with collections for school use. A legal license requires the payment of equitable remuneration for this privilege, however. In this connection the AG Munich[188] has ruled, in the case of a collection of songs, that the equitability of remuneration is to be assumed when a standard accounting system which is generally accepted in the business sectors concerned is laid down.

(116) Privileged treatment of school activities is also to be found in Article 47, which the 1985 Amending Law extended to the detriment of authors; now state provincial film services or comparable public bodies, among others, are allowed to record school broadcasts. Nevertheless the Federal Court decision in the "School Broadcast" case[189] is still significant even since the amendment of the Law, because Article 47 requires records of school broadcasts to be made by the schools or, where applicable, by the other privileged institutions themselves. It therefore continues to be not permissible—as in the case ruled upon by the Federal Court—for the broadcasting organization simply to reproduce educational tapes made available to it. The deferred communication of school broadcasts, intended by the legislators to serve the purpose of educational simplification, is not allowed to take place without any restriction and with the aid of all technical means and facilities. A centrally organized service providing the broadcasting organizations' educational tapes, which makes technically high-quality reproduction possible and places schools in a position to refer to copies of the school broadcast as they would to archives, can no longer be reconciled with the quite understandable interests of the author. Even the agreement of the broadcasting organization concerned was irrelevant, because it did not itself have the required right of reproduction.

[188] AG Munich—10 C 45135/84—of May 25, 1984, ZUM 1985, 518.

[189] BGH—I ZR 24/83—of April 18, 1985, Schu BGHZ 347 (Schricker) = GRUR 1985, 874 = ZUM 1985, 437.

(g) Restrictions in Favor of Freedom of Reporting and Quotation, and the Limitations Thereon

(aa) Freedom of Reporting

(117) Article 50 of the Copyright Law allows, for the purposes of visual and sound reporting by the media, the inclusion of works that become perceptible in the course of the events that are being reported, albeit only "insofar as their inclusion is justified by the purpose of the report." This provision is also applicable under Article 84 to the neighboring rights accruing to performers. In one case already reported on in the previous "Letter,"[190] the OLG Frankfurt[191] confirmed the ruling of the lower court to the effect that the complete broadcasting of an entire ceremony on the occasion of the reopening of the Old Opera House in Frankfurt, including the musical works played, was no longer covered by Article 50. The uniqueness of the event that was being reported did not justify making of the musical works played by the performers into a part of the reporting of the occasion without any remuneration being paid.

(118) A case ruled upon by the OLG Stuttgart,[192] on the other hand, turned on how long the interval between the event concerned and the report might be for it still to be a current event within the meaning of Article 50. In this case a trade union journal had, in the course of a pay dispute, printed a picture taken from one of the newspaper advertisements of the employers which was more than eight months old. The OLG Stuttgart declared Article 50 to be a legislative limitation of two situations enjoying fundamental legal protection, namely on the one hand copyright as a property right and on the other hand the freedom of the press. It considered the printing of the photograph permissible because the view in question, in relation to the pay dispute and the related action of the employers, was an important part of the event and in the course of it became perceptible. The time connection required by Article 50 between the event and the report thus regained its topical validity.

(119) The LG Oldenburg[193] also found that the conditions of Article 50 of the Copyright Law were fulfilled in the case of an advertising poster that had been used as a mock-up for the title page of a

[190] *Loc. cit.* (footnote 1 above), paragraph 86 and footnote 137.

[191] OLG Frankfurt—6 U 142/83—of September 20, 1984, Schu OLGZ 269 (Gerstenberg) = GRUR 1985, 380 = ZUM 1985, 214.

[192] OLG Stuttgart—4 U 77/85—of November 13, 1985, Schu OLGZ 277 (Gerstenberg).

[193] LG Oldenburg—5 O 3250/85—of July 10, 1986, AfP 1988, 84.

special newspaper supplement on a city festival. Alongside leading articles on the subject of the festival, the special supplement also contained the program and a large number of advertisements. However, the Court's contention that Article 50 did not require the works concerned to be communicated in connection with the actual current event, and therefore that they could serve as background to another event, is suspect.

(120) The Federal Court[194] on the other hand, in "Reproduction of Song Text I," declared the printing of one verse, and the more so all five verses of the famous song *Lili Marlene* to be not permissible. The printing occurred in journals available to the public in connection with two reports, one on a film and the other on an event in honor of the life of the best-known singer of the song. Article 50 of the Copyright Law was not applicable in the case in point, as the text of the song had not actually become perceptible in the course of the current event being reported on, namely the announcement of the filming of the story of the singer and the erection of a plaque in her memory.

(121) In the already-mentioned "Neon Precinct" case the LG Hamburg[195] had rejected the application of Article 50 of the Copyright Law, again with a reference to the exceptional character of the provision. In this case a photograph of the artistic creation concerned in the Hamburg Alster had been included in a book entitled *Hamburg 86—Portrait of a World City*; while topicality could be accepted in the case of a monthly journal, the publication in book form of documentary material relating to a year, even if it gave an account of current events, could not be perceived as the actual reporting of current events. Furthermore, the Court also rejected a reference to Article 59 of the Copyright Law, which in quite general terms, in other words without restriction to the media, allows works permanently placed on public ways, streets or places to be exploited, *inter alia*, by means of photographs or cinematography. As the work of art in question had been installed only for a limited period of time, the decisive condition of permanent location was not met.

(122) Article 59 of the Copyright Law was moreover quoted as evidence[196] that the *owner* of a building (not protected by copyright) could not assert any more rights than accrued to a copyright owner. The depiction of the outward appearance of the gable front of a house and its subsequent reproduction on postcards was therefore permissible. Conversely, the OLG Munich[197] prohibited a professional photographer from taking photographs of the inside and outside of a clinic, involving entry into the property, for the purpose of subsequent sale in the form of picture postcards. The photographer had claimed application of Article 59(1) of the Copyright Law, which however specifically presupposed permanent location on a *public street*. He could on the other hand exploit photographs that could be taken without entering the property.

(123) Two more cases involving the limitations on copyright should be mentioned in this connection. The OLG Munich[198] had denied the applicability of Article 57 of the Copyright Law (accessory works of secondary importance) in one case in which pictures by an artist were shown in furniture catalogs as part of "residential landscapes." The LG Wuppertal[199] had to rule on a case involving Article 60 of the Copyright Law, which allows the person ordering a portrait, or as the case may be the person portrayed, to reproduce and distribute the portrait under certain conditions. The person ordering a photographic portrait cannot derive from that provision any claim to have the negatives of the photographic work surrendered or assigned to him.

(bb) Freedom of Quotation

(124) A number of rulings have had to test the limits of the freedom of quotation provided for in Article 51 of the Copyright Law. In the case we have just mentioned, "Reproduction of Song Text I," which involved the permissibility of the reprinting of verses of the song *Lili Marlene*, the Federal Court[200] rejected the claim of a so-called "minor" quotation (Article 51, item 2), because the "quotation purpose" was lacking. The text of the song (its first verse) had not served as a reference or as a discussion basis for independent considerations in the article concerned, the purpose of which had been to report on the commemorative event. Indeed it was simply reprinted at the end of the text underneath the portrait of the writer of the text.

[194] BGH—1 ZR 70/82—of March 7, 1985, Schu BGHZ 340 (Reichardt) = GRUR 1987, 34 = ZUM 1985, 435; cf. also the later ruling on the "Reproduction of Song Text II" damages: BGH—1 ZR 159/84—of July 3, 1986, GRUR 1987, 36 = ZUM 1986, 683.

[195] Cf. footnote 94 above.

[196] LG Freiburg—3 S 234/84—of January 17, 1985, Schu LGZ 199 (Nordemann) = GRUR 1985, 544.

[197] OLG Munich—6 U 3911/85—of December 4, 1986, AfP 1988, 45.

[198] OLG Munich—6 U 4132/87—of June 9, 1988, NJW 1989, 404.

[199] LG Wuppertal—8 S 116/80—of October 5, 1988, GRUR 1989, 54.

[200] Cf. footnote 194 above.

(125) In an already mentioned case ruled upon by the KG Berlin,[201] which involved a broadcast profile of a celebrated actor and the quotations from a publication used during it, the application of Article 51, item 2, was likewise refused, because quotations are admissible only as evidence. A quotation ceases to be evidence, however, when it is intended to round off, complete or otherwise add to a work that otherwise would remain an unfinished shape. The Federal Court[202] had to deal with the right of quotation at a considerably more fundamental level in the "Christian Spirit" case. Here the question was how much material from talks that a supposed medium had given on her communication with the hereafter could be used as quotations in a critical, scientific work on religion. As the book did not confine itself merely to reproducing passages from elsewhere, but arranged and systematically presented the text in the wider context of an investigation into a particular spiritual trend, it did not represent a mere collection of quotations. Even the term "passages" of a work in Article 51, item 2, did not mean that just one or two main sentences would be considered minor quotations. No arithmetical criteria could be laid down for the assessment of substantive content. In any event, even relatively long quoted passages constituting a substantial part of the work quoted may still be within the bounds of freedom of quotation insofar as they serve the purpose of the intellectual investigation.

(126) The likewise already-mentioned "Illness on Prescription" case,[203] on the other hand, lacked one important condition of the right of quotation, which requires the quoted work to be a work that has *appeared* in the case of the so-called scientific major quotation (Article 51, item 1), and a *published* work in the case of the minor quotation (Article 51, item 2). In the case in point the market reports drawn up by the market research agency concerned were circulated to clients under so-called subscription contracts which prohibited the clients from passing them on to third parties. In terms of Article 15(3) of the Copyright Law, according to the LG Frankfurt, there was no publication precisely because the persons involved formed a clearly defined group of persons personally connected with the market research agency.

(127) An important clarification was made by the Federal Court[204] in the "Film Quotation" case in which it allowed, as the lower court had, film quotations in cinematographic works. This case had involved a television series entitled *Laterna Teutonica*, concerned with the development of sound films in Germany. The first part (transmission time 43 minutes) contained excerpts from old feature films, including two excerpts from *Girls in Uniform* with a total duration of 5½ minutes. Article 51, item 2, of the Copyright Law is not directly applicable, not even on account of the fact that cinematographic works, regarded as whole works, always embody spoken works; such a contention would not be consistent with the independent character of cinematographic works. Yet the fact of Article 51 being an exceptional provision to be interpreted restrictively does not generally rule out application *by analogy* where there is a loophole in the Law, and the sense and purpose of the exceptional provision seem to dictate such an analogy. The general interest in the furtherance of cultural life, which the Law sets out to serve, applies as much to cinematographic works as to spoken works; with regard to cinematographic works of scientific character that is expressly stated in the Law (Article 51, item 1). Both the work doing the quoting and the quoted work can therefore also be cinematographic works.

(128) Even the LG Munich,[205] albeit by a somewhat different route (direct application of Article 51, item 2), had considered permissible the incorporation of a photograph in a television broadcast, which showed first part of the picture and then for a short time the whole picture. As far as the complete photograph was concerned, its inclusion was looked upon as a permissible "small major quotation," because the quotation purpose could only be fulfilled by means of the communication of the whole picture. Although Article 63 of the Copyright Law under normal circumstances requires the mention of the source for the right of quotation, that requirement did not apply in the case in point, because it was not customary to specify the source of borrowed pictorial material in connection with television broadcasts of the type in question.

(h) Reproduction for Private Use

(129) We mentioned at the beginning[206] that the provisions in Articles 53 and 54 of the Copyright Law concerning reproduction for private and other personal purposes had been decisively improved by the 1985 Amending Law. The essence of the improvement consists in the fact that, in the case of private sound and visual recordings, the

[201] Cf. footnote 117 above.

[202] BGH—I ZR 28/83—of May 23, 1985, Schu BGHZ 348 (Schricker) = GRUR 1986, 59 (Abels) = ZUM 1986, 141.

[203] Cf. footnote 57 above.

[204] Cf. footnote 80 above.

[205] LG Munich—21 S 11870/83—of October 18, 1983, UFITA 1985, Vol. 100, p. 292 = FuR 1984, 475.

[206] Cf. paragraphs 2 *et seq.* above.

hitherto existing appliance levy has been completed with a cassette levy, and that in the case of private-sector photocopying an appliance levy, tied up with a so-called operator levy, has been newly introduced. Apart from this, however, it is highly significant that the allowability of computer program reproduction, even for private use, has been totally ruled out[207] (Article 53(2)).

(130) In the already-mentioned case of the public playing of musical works in university environments, the OLG Koblenz,[208] with reference to both the old and the new legislation (Article 53(5), first sentence, in the new version and Article 54(3) in the old version), finally established that copies legitimately produced for personal scientific purposes, including in the field of higher education, might not be used for communication to the public in connection with the courses.

(131) The new provisions were of direct significance with regard to the question, which the OLG Karlsruhe[209] had answered in the affirmative, whether State teacher-training colleges come under the heading of "non-commercial institutions of education and further education," which under Article 53(3), in the case of certain specific copies, enjoy the same privileges as schools. In the event, the copying of 18 pages from the work concerned and the distribution of the copies to participants in the teacher-training course were allowed. Such an approach had not been permissible under Article 53 in the old version, however, so that for the time remaining before the new provisions came into effect a small amount of compensation was awarded at a rate of 0.10 DM per page copied. The rate of remuneration of 0.02 DM provided for the so-called operator remuneration under the new version of Articles 53 and 54 was not held to be relevant, as the case in point involved compensation for unlawful reproduction, not reproduction permitted by law.

(132) Remuneration claims under Article 54 (and therefore also the legal remuneration for appliances, applicable to photocopying machines), like the expressly-granted right to demand information (under Article 54(5)), may only be made by collecting societies (Article 54(6)). In the course of an arbitration proceeding under Article 14 of the Copyright Administration,[210] on which we have yet to elaborate[211] and which was initiated by the Wort collecting society, the question was whether reader-printers were covered by the obligation to pay remuneration under Article 54 of the Copyright Law. The apparatus concerned afforded the possibility of reading various types of microfilm—e.g. microfiche and microfilm—on a screen, and producing enlarged copies in the DIN standard formats. This question was answered in the affirmative by the Arbitration Board, not least because the producer of the reader-printer had placed strong emphasis on the copying facility.

(WIPO translation)

(To be continued)

[207] The LG Düsseldorf (see footnote 68 above) had also refused the application of the old version of Articles 53 and 54 in a special case of the supply of a copying program to circumvent the protection of a word-processing program against copying.

[208] Cf. footnote 179 above.

[209] OLG Karlsruhe—6 U 31/86—of May 27, 1987, GRUR 1987, 818.

[210] Arbitration Board—Sch-Urh 5/87—of April 21, 1988, ZUM 1988, 353.

[211] Cf. paragraph 201 [second part, *Copyright*, March 1990].

Calendar of Meetings

WIPO Meetings

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

1990

March 12 to 16 (Geneva)

Working group on the application of the Madrid Protocol of 1989 (First Session)

This working group will consider the draft of new Regulations under the Stockholm Act of the Madrid Agreement Concerning the International Registration of Marks and the Protocol (adopted in Madrid in June 1989) relating to the said Agreement and will suggest other measures required by the co-existence of the Madrid (Stockholm) Agreement and the said Protocol.
Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, Greece, Ireland, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.

May 28 to June 1 (Geneva)

Committee of Experts on the International Protection of Indications of Source and Appellations of Origin

The Committee will advise the International Bureau of WIPO on the possible conclusion of a new treaty on the international protection of indications of source and appellations of origin or the possible revision of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration and on the possibilities of increasing the use of the registration facilities of that Agreement.
Invitations: States members of the Paris Union and, as observers, certain organizations.

June 5 to 8 (Geneva)

Consultative meeting of developing countries on the harmonization of patent laws

This consultative meeting will, on the basis of working documents prepared by the International Bureau of WIPO, study problems of particular relevance to developing countries in connection with the preparation of a treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: Developing countries members of the Paris Union or WIPO.

June 11 to 22 (Geneva)

Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Eighth 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.

June 11 to 22 (Geneva)

Preparatory meeting for the diplomatic conference on the adoption of a treaty on the harmonization of patent laws

The preparatory meeting will prepare the organization of the diplomatic conference which will negotiate and adopt a new treaty on the harmonization of patent laws. The preparatory meeting will, in particular, establish the draft rules of procedure of the diplomatic conference and decide which States and intergovernmental and non-governmental organizations should be invited to the diplomatic conference and in what tentative capacity.
Invitations: States members of the Paris Union.

June 25 to 29 (Geneva)

Committee of Experts on the Harmonization of Laws for the Protection of Marks (Second Session)

The Committee will continue to examine draft treaty provisions on the harmonization of laws for the protection of marks.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

July 2 to 6 (Geneva)

PCT Committee for Administrative and Legal Matters (Third Session)

The Committee will examine proposals for amending the Regulations under the Patent Cooperation Treaty (PCT), in particular in connection with the procedure under Chapter II of the PCT.
Invitations: States members of the PCT Union and, as observers, States members of the Paris Union not members of the PCT Union and certain organizations.

July 2 to 13 (Geneva)

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

September 24 to October 2 (Geneva)

Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-First Series of Meetings)

Some of the Governing Bodies will meet in ordinary session, others in extraordinary session.
Invitations: As members or observers (depending on the body), States members of WIPO or the Unions and, as observers, other States and certain organizations.

October 15 to 26 (Geneva)

Committee of Experts Set up under the Nice Agreement (Sixteenth Session)

The Committee will complete the fifth revision of the classification established under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.
Invitations: States members of the Nice Union and, as observers, States members of the Paris Union not members of the Nice Union and certain organizations.

October 29 to November 2 (Geneva)

Committee of Experts on a Protocol to the Berne Convention (First Session)

The Committee will 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.
Invitations: States members of the Berne Union and, as observers, States members of WIPO not members of the Berne Union and certain organizations.

October 29 to November 2 (Geneva)

Working group on a possible revision of the Hague Agreement (First Session)

This working group will consider possibilities for revising the Hague Agreement Concerning the International Deposit of Industrial Designs, or adding to it a protocol, in order to introduce in the Hague system further flexibility and other measures encouraging States not yet party to the Hague Agreement to adhere to it and making it easier to use by applicants.
Invitations: States members of the Hague Union and, as observers, States members of the Paris Union not members of the Hague Union and certain organizations.

*November 5 to 9 (Geneva)

Committee of Experts on Measures Against Counterfeiting and Piracy (Second Session)

The Committee will continue to consider draft model provisions for national laws on protection against counterfeiting and piracy.
Invitations: States members of the United Nations or specialized agencies and, as observers, certain organizations.

*November 19 to 23 (Geneva)

Committee of Experts on the Settlement of Intellectual Property Disputes Between States (Second Session)

The Committee will continue the work it will have started during its first session (February 19 to 23, 1990).
Invitations: States members of the Paris Union, the Berne Union or WIPO or party to the Nairobi Treaty and, as observers, certain organizations.

November 26 to 30 (Geneva)

Working group on the application of the Madrid Protocol of 1989 (Second Session)

The working group will continue the work it will have started during its first session (March 12 to 16, 1990).
Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, Greece, Ireland, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.

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* Dates particularly subject to possible change.

December 10 to 14 (Geneva)

PCT Committee for Administrative and Legal Matters (Fourth Session)

The Committee will continue the work it will have started during its third session (July 2 to 6, 1990).
Invitations: States members of the PCT Union and, as observers, States members of the Paris Union not members of the PCT Union and certain organizations.

1991

January 28 to 30 (Geneva)

Information meeting(s) on the revision of the Paris Convention

An information meeting of developing countries members of the Paris Union and China and, if it is so desired, information meetings of any other group of countries members of the Paris Union will take place for an exchange of views on the new proposals which will have been prepared by the Director General of WIPO for amending the articles of the Paris Convention for the Protection of Industrial Property which are under consideration for revision.
Invitations: See the preceding paragraph.

January 31 and February 1 (Geneva)

Assembly of the Paris Union (Fifteenth Session)

The Assembly will fix the further procedural steps concerning the revision of the Paris Convention and will take cognizance of the aforementioned proposals of the Director General of WIPO. It will also decide the composition of a preparatory meeting which will take place in the first half of 1991.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

***June 3 to 28**

Diplomatic Conference for the adoption of a treaty on the harmonization of patent laws

This diplomatic conference will negotiate and adopt a treaty on the harmonization of patent laws, which will supplement the Paris Convention as far as patents are concerned.
Invitations: To be decided by the preparatory meeting to be held from June 11 to 22, 1990 (see above).

September 23 to October 2 (Geneva)

Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-Second 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 1991, the Governing Bodies will, *inter alia*, review and evaluate activities undertaken since July 1990, and consider and adopt the draft program and budget for the 1992–93 biennium.
Invitations: States members of WIPO or the Unions and, as observers, other States members of the United Nations and certain organizations.

***November 18 to December 6**

Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (Fifth Session)

The Diplomatic Conference will negotiate and adopt a new Act of the Paris Convention.
Invitations: States members of the Paris Union and, without the right to vote, States members of WIPO or the United Nations not members of the Paris Union as well as, as observers, certain organizations.

UPOV Meetings

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

1990

April 23 to 27 (a.m.) (Geneva)

First Preparatory Meeting for the Revision of the UPOV Convention

Invitations: Member States of UPOV.

April 27 (p.m.) (Geneva)

Consultative Committee (Forty-First Session)

The Committee will mainly discuss the outcome of the First Preparatory Meeting for the Revision of the UPOV Convention.
Invitations: Member States of UPOV.

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* Dates particularly subject to possible change.

June 25 to 29 (Geneva)	**Second Preparatory Meeting for the Revision of the UPOV Convention** *Invitations:* Member States of UPOV.
October 15 and 16 (Geneva)	**Third Preparatory Meeting for the Revision of the UPOV Convention** *Invitations:* Member States of UPOV.
October 17 (Geneva)	**Consultative Committee (Forty-Second Session)** The Committee will prepare the twenty-fourth ordinary session of the Council. *Invitations:* Member States of UPOV.
October 18 and 19 (Geneva)	**Council (Twenty-Fourth Ordinary Session)** The Council will examine the reports on the activities of UPOV in 1989 and the first part of 1990 and approve documents for the Diplomatic Conference to Revise the UPOV Convention. *Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

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

Non-Governmental Organizations

1990

April 11 to 13 (Paris)	International Publishers Association (IPA): Copyright Symposium
May 8 to 11 (Washington)	Foundation for a Creative America: Bicentennial Celebration of the Enactment of the United States Patent and Copyright Laws
May 13 to 17 (Beetsterzwaag, Netherlands)	International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislative Committee
May 28 to 30 (Helsinki)	International Literary and Artistic Association (ALAI): Study Days
September 27 and 28 (Brussels)	International Federation of Reprographic Rights Organisations (IFRRO): Annual General Meeting
October 8 to 14 (Budapest)	International Confederation of Societies of Authors and Composers (CISAC): Congress