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# Copyright

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## COPYRIGHT AND NEIGHBORING RIGHTS LAWS AND TREATIES

(INSERT)

Editor's Note

### INDONESIA – UNITED STATES OF AMERICA

Agreement Between the Government of the United States of America and the Government of the Republic of Indonesia on Copyright Protection (of March 22, 1989) . . . . . Text 01

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## Notifications Concerning Treaties

### Rome Convention

#### Accessions

#### HONDURAS

The Secretary-General of the United Nations, in a letter dated January 24, 1990, informed the Director General of the World Intellectual Property Organization that the Government of Honduras deposited, on November 16, 1989, its instrument of accession to the International Convention for the

Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) done at Rome on October 26, 1961.

In accordance with Article 25, paragraph 2, the Convention entered into force, with respect to Honduras, on February 16, 1990.

#### LESOTHO

The Secretary-General of the United Nations, in a letter dated January 24, 1990, informed the Director General of the World Intellectual Property Organization that the Government of Lesotho deposited, on October 26, 1989, its instrument of accession to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) done at Rome on October 26, 1961.

The instrument of accession contains the following reservations:

*(Original: English)*

Pursuant to Article 12 of the said Convention, the Government of the Kingdom of Lesotho declares that the provisions of this Article will not apply in respect of broadcasts made for non-profit-making purposes or where communication to the public in public places is not the result of a purely commercial activity;

Pursuant to Article 13, the Government of the Kingdom of Lesotho declares that it does not consider itself bound by the provisions of item (d).

In accordance with Article 25, paragraph 2, the Convention entered into force, with respect to Lesotho, on January 26, 1990.

## Correspondence

### Letter from the Federal Republic of Germany

#### The Development of Copyright Between 1984 and the Beginning of 1989

Adolf DIETZ

(Second Part)\*

### II. Copyright Contract Law

#### 1. General Principles of Copyright Contract Law

(133) Apart from the special provisions on publishing contracts in the 1901 Publication Law, the Copyright Law itself contains a few basic provisions applicable to all copyright contracts in its Articles 31 *et seq.*; the so-called purpose of assignment principle (Article 31(5)) and also the prohibition on the grant of licenses for hitherto unknown forms of use (Article 31(4)) are particularly significant in this connection. A series of important decisions interpreting those provisions have been handed down during the period under review.

(a) *Invalidity of the grant of licenses for hitherto unknown forms of use (Article 31(4))*

(134) In two rulings, "GEMA Presumption I"<sup>212</sup> and "GEMA Presumption IV,"<sup>213</sup> the Federal Court emphatically stated, in its rejection of the lower courts' findings to the contrary, that Article 31(4) of the Copyright Law was also applicable to the relations between the author and the collecting society and to the representation contracts entered into in that connection. A distinction does in principle have to be made between whether the author licenses a third party or a collecting society, as the collecting society works in the author's interest. The author's interest generally consists in granting the collecting society whatever rights of use are relevant. The position is different, however, in the

opinion of the Federal Court, in the case of *secondary uses of feature films* by means of videocassettes. In that case, it said, the composer of music for a film could most certainly have an interest in managing his rights himself, for instance with a view to granting them wholesale to the film producer against payment of additional remuneration. In "GEMA Presumption I," the Federal Court ordered the lower court to investigate whether, at the time of the representation contracts concluded with GEMA in 1968, the secondary use of films by means of videocassettes was still an unknown form of use within the meaning of Article 31(4) and, if not, whether the assignment was not invalidated by the provisions on the purpose of assignment principle (Article 31(5)). In this connection the *form of use* should not be understood as merely the mechanical reproduction and distribution (in terms of the legal definition), but, in conformity with the protection purpose inherent in Article 31(4), as *any specific, technically and economically independent form of use of the work*.

(135) In "GEMA Presumption IV," on the other hand, the Federal Court found a way out for GEMA, in spite of its contention regarding Article 31(4) of the Copyright Law. While it did deny GEMA the privilege of the so-called GEMA presumption for the rights in *secondary uses on video* of (preexisting) feature films, it nevertheless, at least with regard to the use of works in the GEMA repertoire, accorded a corresponding presumption of representation for so-called *primary uses on video*, which in this respect was not invalidated even by Article 31(4). So it is ultimately a question of whether the offending videocassettes were involved in a secondary use of feature films or in original video productions. In that respect the case needed to be clarified further by the lower court.

(136) Referring directly to the definition of the form of use given by the Federal Court, the OLG

\* For the first part of this "Letter," see the February 1990 issue of this review, pp. 58 *et seq.*

<sup>212</sup> BGH—I ZR 53/83—of June 5, 1985, BGHZ 95, 274 = Schu BGHZ 334 (Lerche) = GRUR 1986, 62 = ZUM 1986, 48.

<sup>213</sup> BGH—I ZR 96/85—of October 15, 1987, GRUR 1988, 296 = ZUM 1988, 241; lower instance: OLG Hamburg—3 U 131/84—of April 4, 1984, ZUM 1986, 151.

Munich<sup>214</sup> then reached the conclusion that the secondary use on video of cinema films was still, at any rate in 1968, an unknown form of use within the meaning of Article 31(4) of the Copyright Law. The film producer concerned consequently failed to acquire exploitation rights in the film on the basis of the 1968 contract. This could in no way be altered by the presumption of assignment in favor of the film producer provided for in Article 89, as that was likewise subject to the condition of "every known manner." The OLG Munich had come to the same conclusion regarding the film made in 1936 on the Berlin Olympic Games.<sup>215</sup>

(137) The LG Munich I<sup>216</sup> made a controversial decision, on the other hand, when it ruled that "cable and satellite rights" did not constitute independent exploitation rights alongside the right of broadcasting. The case was settled in favor of the second German television channel (ZDF).

*(b) Significance of Interpretation According to the Purpose of the Contract*

(138) In a case decided by the OLG Koblenz<sup>217</sup> the ZDF once again succeeded in having its legal position vindicated. The case involved the interpretation of contracts written in English assigning the right to broadcast feature films on television. However, the contract expressly excluded not only cable and satellite rights, but also broadcasting by means of signal amplifiers and decoders or other similar devices. In view of the fact that the contractual clause concerned, originally written in English, was adjusted to the circumstances of the United States of America, the Court applied the purpose of the contract principle and came to the conclusion that, if the disputed clause had been applied literally, any terrestrial broadcasting of feature films on the ZDF would have been practically impossible. The party of the first part was presumed to have known that terrestrial broadcasting in the Federal Republic of Germany was only possible with the aid of relay equipment and amplifiers. The licensing of terrestrial broadcasting rights accompanied by a ban on the use of such aids would have made no sense whatever.

(139) In the "Metaxa" case, it was a question of what rights had been assigned under a contract to produce a photographic montage for an advertising

poster. In this case the Federal Court<sup>218</sup> held that when it was a question of exploitation in stages, first as discussion material for negotiation purposes and then for the actual marketing, it was not a foregone conclusion that the use of the montage should be regarded as consented to only for the first stage. Even where the subsequent stage of exploitation was still uncertain, the contracting parties could have agreed at the outset on the licensing of both forms of exploitation, for instance in accordance with business practice. The Federal Court referred the case back for further clarification. At the same time it made what amounted to an incidental pronouncement on Article 36(1) of the Copyright Law, which provides for an equitable share of income for the author in the case of a royalty grossly out of proportion to the actual use of the work. It held that there was not such disproportion where a royalty in the amount granted in the case in point (which totalled about 5,000 DM) was accepted as having taken due account of the exploitation of the montage for the mass market.

(140) In another case involving the design of printed promotional material (tourist brochures) for a district council, the Federal Court<sup>219</sup> ruled on the basis of the purpose of the license (Article 31(5)) that the district council was entitled to further reprints over and above the planned initial edition of 50,000, with a second edition of 100,000. The actual print runs had in this case not been specifically written into the contract. The OLG Karlsruhe<sup>220</sup> had to rule on a similar case which concerned the interpretation of a contract ordering the production of photographs of manor houses in Schleswig-Holstein. Here the impartial consideration of the interests of both parties in the subject matter to be exploited, required by Article 31(5), led to the publisher concerned being allowed to publish the photographs not in just one journal, but also in another periodical from his collection. The LG Hamburg,<sup>221</sup> on the other hand, ruled in the already-mentioned "Neon Precinct" case that the unrestricted reproduction of photographs of a work of art installed in the open air in the book concerned was not justified by the fact that the artist had previously cooperated with the publisher in announcing the showing of the work of art in the daily press, and had therefore agreed to the publication of the photograph taken for the purposes of that announcement.

<sup>214</sup> OLG Munich—29 U 1686/86—of June 25, 1987, GRUR 1987, 908 = ZUM 1988, 137.

<sup>215</sup> OLG Munich—29 U 1552/85—of June 27, 1985, ZUM 1985, 514.

<sup>216</sup> LG Munich I—21 O 17784/85—of March 14, 1986, ZUM 1986, 484.

<sup>217</sup> OLG Koblenz—6 U 1261/86—of November 13, 1986, AfP 1988, 39.

<sup>218</sup> BGH—I ZR 179/83—of March 20, 1986, GRUR 1986, 885 (Hertin) = ZUM 1987, 39.

<sup>219</sup> Cf. footnote 102.

<sup>220</sup> OLG Karlsruhe—6 U 142/83—of May 9, 1984, GRUR 1984, 522.

<sup>221</sup> Cf. footnotes 94 and 195.

(141) The question of the assignment of rights under Article 31(5) of the Copyright Law sometimes also plays a part in determining at the outset whether the person who asserts author's rights in an infringement action has in fact acquired the necessary rights himself. For instance, the OLG Düsseldorf<sup>222</sup> replied in the negative, in the already-mentioned "Catalog Photographs" case, to the question whether or not the plaintiff had acquired from the photographer the exclusive rights in photographs that he had used in his catalog. This finding was moreover unaffected by the fact that no other form of use of the original pictures had been anticipated at all. The OLG Munich,<sup>223</sup> in the likewise already-mentioned "Residential Development" case, came to the conclusion, on the basis of the purpose of the contract principle, that an architect to whom everything to do with the construction of a building, from the initial plans to the overseeing of the building work, had been entrusted did not accord his principal any right of reproduction, as he had already made use of that right of reproduction himself. It was therefore difficult to assume any tacit grant of a right of reproduction as long as the overall assignment entrusted to the architect was still uncompleted and the subject of continuing negotiations. The KG Berlin<sup>224</sup> eventually decided that the fact of sculptor Ernst Barlach having allowed a friend to have bronze castings of a clay work made for himself and for the artist did not constitute the grant of reproduction and distribution rights, which then could have been further transferred by succession and otherwise.

*(c) Further Transfer of Exploitation Rights Only with the Copyright Owner's Consent*

(142) In the "Video License Contract" case, the Federal Court<sup>225</sup> upheld the finding of the lower court<sup>226</sup> to the effect that the grant of exclusive distribution rights, including the rental of videocassettes, did not encompass the right to transfer those rights further or to sublicense them, as the case might be. When, as in this case, the original licensor is not the author himself but a film distributor, Article 34 of the Copyright Act (which allows the assignment of a license only with the author's consent) is admittedly not directly applicable. Yet with other transfers of licenses, and also in the case of

industrial property rights, the reservation regarding consent is customary with respect to sublicensing, and indeed the rule in the case of film exploitation and video license contracts. Licensing against a percentage share requires the licensor to have a very special degree of confidence in his licensee. He is after all dependent on the latter's ability and commitment and also, with regard to accounting, his reliability. In such cases only the reservation regarding consent affords the possibility of influencing the choice of prospective licensees.

*(d) Salaried Authors*

(143) Article 43 of the Copyright Law, under which the interpretation of contractual clauses in the case of authors in service or on commission is determined only quite generally by the object or nature of the service or commission, is highly unsatisfactory on account of its lack of specificity. The question of the extent to which the author's rights accrue to the employer or principal therefore has to be settled in specific cases by case law. In the "Electrode Factory" case, in which the author concerned made design documents for electrode factories accessible to his employer long before actually becoming the latter's employee, the Federal Court<sup>227</sup> came to the conclusion that there was no obligation on the author to surrender to his subsequent employer, free of charge, plans drawn up prior to the start of his employment relations, even if he has been paid a large fee for them. Similarly, the Munich Provincial Labor Court<sup>228</sup> ruled that the computer programmer of a university was not obliged, as an employee, to hand over to his employer at all, and still less free of charge, protected computer programs related to his area of concern that he had written prior to the start of his employment relations.

(144) A case decided by the OLG Karlsruhe<sup>229</sup> related only incidentally to the question of the extent to which the employer had acquired copyright in a documentation program written by his employee; on that point it declared succinctly—as indeed the Provincial Labor Court decision had done before it—that when the result of work done in the course of employment relations pertained to the area of activity of the employee, the employer in principle acquired exclusive exploitation rights in it. That applied also where programming activity and the writing of programs did not constitute the main activity of the author concerned in his capacity as head of data processing organization and applications, but where the development of a docu-

<sup>222</sup> Cf. footnote 50 and also, for a similar example which however eventually left the question open, LG Oldenburg, footnotes 106 and 112.

<sup>223</sup> Cf. footnotes 85 and 144.

<sup>224</sup> Cf. footnote 157.

<sup>225</sup> BGH—I ZR 102/84—of July 10, 1986, GRUR 1987, 37 (Hubmann) = ZUM 1987, 83.

<sup>226</sup> OLG Munich—6 U 1679/83—of April 5, 1984, GRUR 1984, 524 = FuR 1984, 589.

<sup>227</sup> Cf. already footnotes 52, 143 and 156.

<sup>228</sup> Cf. footnote 74.

<sup>229</sup> Cf. footnote 69.

mentation program nevertheless concerned his area of responsibility within the overall data processing framework.

(145) Special conditions exist in connection with *university teachers*; in Germany their relationship with the university is usually that of service personnel or civil servants. In a rather unusual case of a guest lecturer at the media center of a university who, in the course of a lecture, had organized a "happening," the Federal Court<sup>230</sup> came to the conclusion, in a decision that has already been mentioned, that it did not follow from the mere fact of the acceptance of the visiting lectureship either that the lecturer concerned had transferred his rights in the "happening" to the university, or that he would have been obliged to do so. In spite of the provisions in Article 43 of the Copyright Law, it is not ordinarily part of a lecturer's obligations at a university that he should assign rights in respect of whatever protectable works he has created and used in the attainment of the objective of the teaching (lecture texts, demonstration material, etc.) to the party commissioning his work (the university).

(146) The OLG Karlsruhe<sup>231</sup> had to settle the question of the copyright position of university lecturers in a still more fundamental way<sup>232</sup>: to whom should the vast scientific estate of an professor of prehistory and early history at the philosophy faculty of the university concerned pass on his death? The estate also contained a large amount of copyright material. In an exhaustive analysis, which was related to the basic right of scientific freedom under Article 5 of the German Basic Law, the OLG came to the conclusion that the copyright in that material in any case did not belong to the university. The professor was not conducting research for the purposes of the university but rather—and this was consistent with his duties as a lecturer—by virtue of his fundamental right under Article 5 of the Basic Law to pursue his scientific speciality appropriately in the form of research and teaching. Equally he was not in a position of relative dependency within a hierarchical organization, which might have made his copyright assignable to his principals.

*(e) Copyright and Physical Ownership of the Work*

(147) The principle of the separation of physical ownership of the work and copyright (Article 44

of the Copyright Law) was summarily upheld by the Federal Court<sup>233</sup> in the already-mentioned "Video Film Show" case, when it ruled that the acquisition of a videocassette in no way entitled the owner of a club bar to show the video film. Similarly the OLG Düsseldorf,<sup>234</sup> in the "Catalog Photographs" case, ruled that Article 44 was to be applied also in connection with the protection of mere photographs by virtue of the related right of protection under Article 72. Accordingly the handing over of original photographs or transparencies did not constitute the grant of exclusive license to use the photographs. Even where there is no provision at all for use of the original pictures in another form, this rule is a thoroughly sensible one, as the photographer can, by virtue of the exclusive right of use still belonging to him, prevent the acquirer of the photograph from making use of it for purposes other than those originally intended.<sup>235</sup>

*2. Publishing and Similar Contracts*

*(a) Questions of Author's Fees and Termination of the Publishing Contract*

(148) The treatment of authors' remuneration in Article 22 of the 1901 special law on publishing contracts is thoroughly inadequate. This has therefore become a frequent cause of conflict in relations between authors and publishers. In the "Fee Advance" case<sup>236</sup> ruled on by the OLG Karlsruhe, the writer concerned succeeded in having declared unlawful the publisher's claimed settlement of all fee entitlement with the total amount of advances paid for 19 books in all. What had been concluded between the parties was not a blanket publishing contract, but a series of independent publishing contracts for the individual titles. The advances were in the nature of guaranteed minimum fees, but each one was related to an individual work. Any form of global settlement was therefore ruled out.

(149) The LG Flensburg<sup>237</sup> ruled that a publisher who distributed copies of a given work (in this case a law review) in the form of a pre-publication issue at a reduced (subscription) price was entitled to calculate the author's fees according to that reduced subscription price in respect of the

<sup>230</sup> Cf. footnote 93.

<sup>231</sup> OLG Karlsruhe—6 U 101/86—of January 27, 1988, GRUR 1988, 536.

<sup>232</sup> On this subject generally, see also Krasser/Schricker, *Patent- und Urheberrecht an Hochschulen. Die Verwertung von Erfindungen und urheberrechtlich geschützten Werken an Hochschulen wissenschaftlich Tätiger*, Baden-Baden, 1988.

<sup>233</sup> Cf. footnotes 168 and 182.

<sup>234</sup> Cf. footnotes 50 and 222.

<sup>235</sup> On the liability of a magazine publisher for original slides sent to him to be examined for suitability for publication, see LG Cologne—30 O 593/83—of December 20, 1985, AfP 1987, 533 (Damm).

<sup>236</sup> OLG Karlsruhe—6 U 193/85—of January 15, 1986, GRUR 1987, 912 = ZUM 1986, 405.

<sup>237</sup> LG Flensburg—1 S 120/85—of November 14, 1985, NJW-RR 1986, 1058.

copies concerned. Under Article 21 of the 1901 Publication Law, the publisher alone determines the retail price and is therefore in principle entitled to reduce it, even where the agreed fee has been worked out according to the retail price. Finally, in the "Illustration Contract" case decided by the Federal Court,<sup>238</sup> the question—which is still not finally settled—of the extent to which a publisher who had had illustrations made by an illustrator for a number of children's books bad, on the basis of the contract between them, acquired exploitation rights only in respect of the first edition or without any restriction, had to be examined. The Federal Court came to the conclusion that in any case no change in the arrangements regarding further editions could be inferred from the conduct of the illustrator, who in spite of differences with the publisher had continued to supply illustrations. Due account had to be taken of the generally applicable principle of copyright to the effect that the transfer of exploitation rights could only be assumed when it was the unambiguously stated will of the parties that this be so. The lower court had however to reexamine the question whether an interpretation of the contract corresponding to the publisher's contention might not be deduced from an accepted practice in the trade or from the amount of the agreed fee. This question was eventually answered in the negative after the KG Berlin<sup>239</sup> had thoroughly investigated both aspects. One interesting feature is that the KG Berlin expressed strong reservations regarding the "Guidelines for the Conclusion and Interpretation of Contracts Between Creative Artists and Publishers," dating from 1926, which were also mentioned in the Federal Court ruling, and specifically questioned whether they could still even be regarded as forming part of business practice in the context of the 1970s.

(150) In a case decided by the OLG Hamm,<sup>240</sup> the conclusion of publishing contracts with several coauthors failed even before negotiations were completed, even though the publisher had ostensibly incurred costs in that connection. Although one of the coauthors was clearly the spokesman for the others in dealings with the publisher, the aim was to conclude an independent publishing contract with each coauthor individually, which for a number of reasons did not come about. The result was that the publisher was unable to win back from the authors, as damages, the expenses that he had incurred.

<sup>238</sup> BGH—I ZR 141/82—of December 13, 1984, Schu BGHZ 346 (Gerstenberg) = GRUR 1985, 378 = ZUM 1985, 317.

<sup>239</sup> KG Berlin—5 U 961/85—of January 31, 1986, Schu KGZ 87 (Gerstenberg).

<sup>240</sup> OLG Hamm—4 U 157/85—of March 4, 1986, AfP 1987, 515.

*(b) Termination of the Publishing Contract, Notably by Denunciation*

(151) As the publishing contract, according to its legal model and according to general practice, generally constitutes long-term mutual obligations contracted over a period of years or decades, there have to be very compelling reasons before the author can withdraw from it. Case law has shown that this succeeds only in a few cases. Nevertheless the LG Munich<sup>241</sup> ruled that a publishing contract may be summarily terminated by the author when the publisher, in spite of having been frequently called upon to do so, first has submitted no accounts at all for a given period of time, and then eventually, after a long delay, submits accounts that are incorrect. Moreover, on account of overindebtedness of the publisher, there was no guarantee of the author's fees being paid. By virtue of the national treatment principle (Universal Copyright Convention, Article II), this right of termination operated even though the author concerned was a US citizen. The OLG Cologne<sup>242</sup> has also allowed the termination of publishing contracts for valid reasons when the publisher has for a number of years failed to pay royalties punctually or merely to provide punctual accounts of sales. Even in cases where the author is not dependent on the fees alone for his livelihood, he should not be expected to send innumerable summonses before receiving them.

(152) The OLG Frankfurt,<sup>243</sup> in its turn found for the summary termination of a music publishing contract in one particular case, which involved far-reaching and irreconcilable differences between the author or the copyright holder on the one hand and various publishers on the other, which in the course of an employment dispute had also come out into the open. The music publishing contract was furthermore inseparably tied up with the working relations between the author and the music publisher; as a result of the publisher's conduct the mutual trust on which the working relations and consequently also the publishing contract were based had disappeared.

(153) In the likewise rather untypical "Zorba the Greek" case,<sup>244</sup> the Greek author Nikos Kazantzakis had licensed to a particular publisher the rights in the work concerned for all German-speak-

<sup>241</sup> LG Munich—7 O 18029/85—of December 3, 1985, GRUR 1987, 911.

<sup>242</sup> OLG Cologne—6 U 18/86—of March 27, 1986, GRUR 1986, 679.

<sup>243</sup> OLG Frankfurt—6 U 78/85—of November 19, 1987, ZUM 1989, 39.

<sup>244</sup> BGH—I ZR 89/83—of November 28, 1985, ZUM 1986, 278.

ing countries; later there was an amicable termination of the contract and reversion of the publishing rights. In the opinion of the Federal Court, however, this did not, in the particular circumstances of the case, warrant complete termination of the contract as originally envisaged. Indeed the termination agreement had left intact paperback licenses that had been granted during the intervening period, and the paperback license contract could not be effectively rescinded either. Another somewhat out-of-the-ordinary case, called "Archive Contract,"<sup>245</sup> concerned the literary estate of the well-known Austrian playwright Odön von Horvath. After the author's death, his literary works had been transferred by his brother to the Berlin Art Academy, and were now demanded back by his heirs. The Federal Court intimated that the contractual relations were those of a *sui generis* contract which, however, for want of any express provisions to that effect, could not be interpreted as a transfer of ownership without limitation in time such as would exclude any form of termination possibility. The Federal Court found an argument to back up its ruling also in the protection of the author's and his heirs' intellectual and personal relation to the work under Article 11 of the Copyright Law. It therefore allowed the archive contract to be ended by termination in the ordinary way after an appropriate period of exploitation. The lower court's ruling to the contrary<sup>246</sup> was annulled.

(154) In a series of other cases, however, the authors concerned failed to have their contractual relations terminated. With just one exception, these were all cases of *music publishing contracts*. The "Ligeia" case<sup>247</sup> concerned works of "serious" music; the matter at issue was whether or not the publisher had brought out a particular piece of music entitled *Ligeia the Siren* in accordance with his contract. The piece was however entirely incorporated in another piece brought out by the publisher, in such a way that *Ligeia* could be recognizably discerned in it. The fact that *Ligeia* was contained within the piece produced, and the phrase marking which in itself also made it possible to perform *Ligeia* alone was sufficient, together with the reported conduct of the composer, for the latter to be denied the right of termination for failure by the publisher to exercise the exclusive rights of exploitation under Article 41 of the Copyright

Law; the composer had indeed failed to alert the publisher to the partial similarity of content in the two pieces of music concerned. As moreover the publisher had not, for the one piece in particular, taken on the obligation to reproduce and distribute it, the specific right of withdrawal under Articles 32 and 30 of the Publication Law was not applicable.

(155) The "Sun Song" case<sup>248</sup> decided by the Federal Court, on the other hand, expressly stated that, in the presence of a genuine music publishing contract, under which the publisher has assumed the obligation to reproduce and distribute the work, the withdrawal right under Article 32 in conjunction with Article 30 of the Publication Law has to be examined. In this case, which also involved works of serious music, the Federal Court came to the conclusion, with reference to accepted practice in the trade, that direct reproduction of the handwritten scores of the composer concerned was in keeping with the contract. As for the other composition, however, it had to be assumed that the period of grace to be set by the author under Articles 30 and 32 of the Publication Law in the case of the exercise of the right of withdrawal was not long enough, so that the work that appeared later in fact appeared within a period to be considered appropriate. The delays were to a large extent of the composer's own making. The ruling of the lower court,<sup>249</sup> which contains significant comments on the circumstances of the modern music publishing business, was confirmed by the Federal Court.

(156) A case decided by the OLG Celle<sup>250</sup> concerned the publishing rights in most of the works of the deceased German writer Arno Schmidt. The author had with one exception assigned to the publisher the publishing rights for all editions and reprints, and also the so-called neighboring rights. The Court ruled at the outset that contracts committing the parties to the duration of the legal term of copyright were not outside the category of generally accepted publishing contracts. However, Arno Schmidt's widow was not accorded important grounds for termination, even though the publisher had failed to put in hand a new edition as soon as each work went out of print. Under Article 17 of the Publication Law, the author may, where the publisher fails to produce a reprint, impose an appropriate deadline on the latter, after the expiry of which he is entitled to withdraw from the con-

<sup>245</sup> BGH—I ZR 250/85—of May 7, 1987, GRUR 1988, 396 = ZUM 1987, 584.

<sup>246</sup> KG Berlin—5 U 6165/83—of July 16, 1985, ZUM 1985, 550 (Sieger, p. 527).

<sup>247</sup> BGH—I ZR 144/83—of March 6, 1986, Schu BGHZ 343 (Hubmann) = GRUR 1986, 613 = ZUM 1986, 534.

<sup>248</sup> BGH—I ZR 114/85—of October 15, 1987, GRUR 1988, 303 = ZUM 1988, 347.

<sup>249</sup> KG Berlin, cf. footnote 136.

<sup>250</sup> OLG Celle—13 U 165/85—of March 5, 1986, ZUM 1986, 213.

tract, although that did not in fact occur in the present case. The general interest in seeing Arno Schmidt's works on the market at all times, not only in paperback form but also in bound editions, was found not to warrant, in itself, assertion of the right under Article 17 of the Publication Law. For other disputed works, in respect of which withdrawal under Articles 32 and 30 of the Publication Law might have applied, there had also been a failure to set a deadline. The author's widow was finally obliged also to put up with the publisher having paperback versions produced by a subsidiary even after the expiry of the license agreements with it, as it was itself entitled to arrange for such editions. Also on the basis of an overall consideration of the conduct of the parties, the Court came to the conclusion, in spite of minor inconsistencies in the bookkeeping, that summary termination could only be the ultimate recourse, when there was no other way of rectifying contractual relations. The action thus ended with the defeat of the Arno Schmidt Foundation, which on the death of the widow had become the sole successor. The Foundation had better luck in another legal action between the same parties before the LG Frankfurt,<sup>251</sup> in which the publisher was prohibited from publishing the complete works of Arno Schmidt, or from having such a publication made under license.

(157) The OLG Munich<sup>252</sup> had to rule on the validity of a publishing subcontract in a case of dispute between several music publishers. The publishing subcontract was concluded by an original publisher in 1937 because he had had to leave Germany (in 1934 already). The original contract had admittedly been replaced and its territorial scope reduced in 1960. By virtue of their new agreement in 1960, the parties had expressly declared the original contract invalid, and renewed the license contract subject to amended terms. So any claim of the non-existence of a commercial basis, which in principle might have been possible earlier, now became impossible. Other grounds for termination were likewise not recognized by the Court, in spite of certain breaches of the contract. Another thing that is important is the construction and interpretation that the Court puts on the publishing subcontract as a copyright license contract to which, as to the publishing contract itself, the principles governing termination of long-term mutual obligations are applicable.

(c) *Other Questions Relating to Publishing Contracts*

(158) In the "Price Difference Clause" case decided by the Federal Court,<sup>253</sup> it was ruled that, in the case of a paperback license contract, the legal successors of the original licensor were similarly committed. This is the result of the application by analogy of Article 33 of the Copyright Law, under which a non-exclusive license that the author has granted prior to granting an exclusive license remains binding on the exclusive licensee in the absence of any agreement to the contrary. The idea underlying this provision is that the author may transfer only those rights that he himself has in his possession. The same thing should apply, however, when it is not the author but—as in this case—the holder of a comprehensive license who first grants a third party a restricted license and later transfers his own exclusive license to that same party. There too he can only transfer to that third party the rights that he still has; the rights previously granted without reservation thus remain unaffected.

(159) In the already-mentioned "Collection of Laws" case, the OLG Frankfurt<sup>254</sup> goes thoroughly into the question of the importance of a collective work as an economic undertaking, which as such has to be dissociated from the copyright concept of the collective work (Article 4). In view of the reputation enjoyed by a periodically-appearing collective work, and in view of its relations with contributors and subscribers, undertaking means a forward-looking entity which embodies all the business rights and interests associated with the activity of producing a collective work. A decisive criterion determining the legal position of the producer of the collective work in relation to the publisher is who the collective work, as an economic undertaking, belongs to, in other words who directs that undertaking, and therefore owns the written material in its entirety. It was eventually established that this directorship of the collection of laws concerned never belonged to the founding co-producer, not even in the form of a joint directorship. The ruling shows how thoroughly the courts often have to concern themselves with economic factors and assessments even in copyright disputes. Another example of this is the ruling of the Federal Finance Court,<sup>255</sup> the highest German tax court; by means of an anal-

<sup>253</sup> BGH—KZR 31/84—of June 25, 1985, Schu BGHZ 349 (Schricker) = GRUR 1986, 91 = ZUM 1985, 614 (Becker); for the lower instance ruling—OLG Stuttgart—cf. the previous "Letter," *loc. cit.* (footnote 1), footnote 216; confirmed by the Federal Court.

<sup>254</sup> Cf. footnote 118.

<sup>255</sup> Bundesfinanzhof—III R 25/77—of November 11, 1983, GRUR 1984, 589.

<sup>251</sup> LG Frankfurt—2/3 O 80/88—of May 5, 1988, NJW 1989, 403; see also the editorial note in the latter.

<sup>252</sup> OLG Munich—6 U 2164/83—of March 8, 1984, ZUM 1987, 297.

ysis of the tax aspects of the publishing activity, the Court came to the conclusion that the publishing rights granted to the publisher constituted ownership of assets, which was to be assessed accordingly in fiscal terms.

### 3. Other Copyright Contracts

(160) The judgment of the OLG Munich<sup>256</sup> in the "Salome" case shows what awkward results the all-too-obvious solution of calculating the term of copyright contracts according to the term of copyright protection can have. Contracts concluded between the famous German composer Richard Strauss (and in some cases his music publisher) and the Bavarian State Opera Company before the First World War (in 1906) had provided by way of royalties for participation in the gross revenue of the opera company. Although since the 1976-1977 season there has been a new system for collecting royalties for stage performances in Germany, that new system, which instead of the earlier percentage payment from the theater's ticket income provides for a charge per theatergoer, was clearly not being applied retroactively. Eventually the Court helped with a contract adjustment according to the concept of the disappearance of the commercial basis which had evolved in German civil law, and in the case in point this led to the termination of the contract.

(161) In the "Children's Opera" case decided by the KG Berlin,<sup>257</sup> what had to be decided was the scope of the authorization that a music publisher had given to a broadcasting organization to broadcast a recorded performance of the children's opera on television. What was actually provided was the right to make one broadcast on the first German television channel (ARD), and also a repeat on the so-called northern channel of the Third Program. The broadcast did not take place on the First Program, however, but only on the northern channel of the Third Program, to which West German Radio's Third Program was connected. The only payment that had been made was for the First Program broadcast, which eventually did not take place. In the view of the Court, the first broadcast of the children's opera on the two Third Programs, in relation to the first broadcasting on the First Program, was not a "minus," but an "aliud," not least because the circles of viewers reached, in terms of their number and composition, were not identical.

The Court dismissed the claim of copyright infringement.

### 4. Special Provisions in the Cinematographic Field

(162) The special provisions on cinematography contained in Part III of the German Copyright Law (Articles 88 *et seq.*) have to do with copyright contracts for the most part, and are intended to serve, by means of what are known as presumptions of assignment to the film producer, to facilitate the cinema exploitation of films, which generally represent a considerable financial investment. It is moreover significant that Article 94 provides special protection for the film producer, which under Article 95 operates even where not actual cinematographic works but simple sequences of images and sound are involved. The already-mentioned "Video Intimate" case<sup>258</sup> was regarded as such an instance of a protected sequence of images, as the pornographic films in question were not cinematographic works, being simply crude portrayals of sex acts. Admittedly the Court did intimate that, in the case of violation of rights in connection with pornographic films, damages claims could lapse when the offending articles could not be traded in legitimate commercial dealings; damages cannot be claimed for infringing acts that one could in any event not have engaged in legitimately. In this particular case, however, the Court did not consider that the material was unfit on account of its contents being offensive under criminal law, to be exploited commercially.

(163) In view of the extensive presumptions of assignment (in favor of the film producer) under Articles 88 *et seq.* of the Copyright Law, the relation between those special provisions and the general provisions on contracts, especially Article 31(4) (invalidity of licenses for hitherto unknown forms of use) and Article 31(5) (purpose of assignment principle) is often unclear. In the already-mentioned "Happening" case, the Federal Court<sup>259</sup> expressly established that Article 88(1) (presumption of assignment in the case of preexisting works) contained one manifestation of the purpose of assignment principle, which was generally applicable in copyright contract law, and that the presumption could be disputed. Under the very special circumstances of this case (the head of the art department had allowed the university to record his "happening" on video), it had rather to be assumed that it

<sup>256</sup> OLG Munich—29 U 5170/86—of July 14, 1988, ZUM 1988, 581 (Dielz, p. 566).

<sup>257</sup> KG Berlin—5 U 4735/84—of March 11, 1986, GRUR 1986, 536.

<sup>258</sup> Cf. footnote 81.

<sup>259</sup> Cf. footnotes 93 and 230.

was not the usual exploitation rights under Article 88(1) that had been assigned, but only the much more restricted rights of publication and distribution of the video recordings for the specific purposes of the course.

(164) The provision on the presumption of assignment in the case of preexisting works (Article 88) is admittedly often replaced, in practice, with specific contractual clauses, especially where the licensing of musical works in the GEMA repertoire is involved. This is illustrated by a case decided by the LG Munich.<sup>260</sup> The basis of this decision was the practice according to which so-called "film production rights" in musical works, in other words the right to make use of preexisting musical works from the GEMA repertoire for the production of films, are indeed managed by GEMA, but GEMA, on request, transfers the film production right in individual cases back to the composer or music publisher (this does not apply to television productions for broadcasting purposes). Admittedly, as long as no such reverse transfer had in fact occurred, GEMA was entitled in any case, *prima facie*, to assign the appropriate film production rights in the work concerned (Richard Strauss's *Alpine Symphony*) itself.

(165) The Munich courts have had to pronounce in a number of cases on the question of the relation between Article 89 of the Copyright Law (presumption of assignment of exploitation rights by film authors) and the already-mentioned Article 31(4) and (5). In the likewise already-mentioned "Secondary Use of Video" case, the OLG Munich<sup>261</sup> comes to the conclusion that Article 31(4) (invalidity of assignments relating to hitherto unknown uses) operates not only alongside Article 88 but also alongside Article 89, because the latter "presumption provision" is restricted to all *known* forms of use. In 1968 however, when the film concerned was made, the secondary use of feature films by means of videocassettes for private purposes was not yet a known form of use, and therefore also could not pass to the film producer by virtue of the presumption. The OLG Munich<sup>262</sup> had come to the same conclusion in a case involving the video rights in the film of the 1936 Olympics; there the Court expressly confirmed the authorship of film director Leni Riefenstahl. In 1936 the potential economic and technical uses of videocassettes were completely unknown, and therefore could not pass to the producer.

(166) The LG Munich<sup>263</sup> likewise assumed that the audiovisual rights had not passed in 1967 to the producer of the feature film *Negresco—a Deadly Affair*; in doing so it went thoroughly into the question when a form of use was to be considered "known." In another case, however, the same LG Munich<sup>264</sup> found for a film producer when it ruled that in 1951 television rights already formed part of the known forms of use of the film concerned, *All About Eve*; the German dialogue and dubbing had in this case been written by the author Erich Kästner. We should nevertheless still bear in mind the already-mentioned ruling of the KG Berlin<sup>265</sup> which makes it quite clear that the right of publication under Article 12 of the Copyright Law, being a fundamental moral right, is not affected by the special provisions in Articles 88 *et seq.*

(167) For the sake of completeness we should also refer to a case decided by the Hamburg courts,<sup>266</sup> in which the antitrust aspects of the legal relations between film rental agencies and cinema operators were analyzed. The case involved the quite understandable wish of many a cinema owner to have more rapid access, or just to have access, to popular feature films. The central concept in the OLG ruling was that the limited number of available copies of films led to only a limited number of cinemas being supplied according to their wishes.

### III. The Law of Collecting Societies

#### 1. The Relationship Between Collecting Societies and Their Members or Those Entitled to Their Services

(168) The importance of the law governing collecting societies as a subsystem of copyright protection is illustrated, as far as the Federal Republic of Germany is concerned, by the special provisions on it in the Copyright Administration Law of 1965. As already mentioned,<sup>267</sup> this Law has been substantially improved, especially in its Article 13b (presumption of relevant competence) and Articles 14 *et seq.* (arbitration procedure). Of course the great majority of actions brought by or against collecting societies concern their relations with users of works

<sup>263</sup> LG Munich I—21 O 5147/84—of June 8, 1984, FuR 1984, 664.

<sup>264</sup> LG Munich I—21 O 13408/83—of May 15, 1984, FuR 1984, 534.

<sup>265</sup> Cf. footnote 129.

<sup>266</sup> OLG Hamburg—3 U 179/85—of February 27, 1986, GRUR 1987, 566; lower instance: LG Hamburg—15 O 385/85—of September 4, 1985, GRUR 1987, 567.

<sup>267</sup> Cf. paragraphs 8 *et seq.*

<sup>260</sup> LG Munich I—7 O 6348/82—of September 20, 1983, FuR 1984, 266.

<sup>261</sup> Cf. footnote 214.

<sup>262</sup> Cf. footnote 215.

or groups of users of works. We shall be going into this later. In some cases, however, the courts had to concern themselves also with "internal relations" between the collecting societies and their members or between the owners of the exploitation rights managed by them.

(169) One particularly interesting but highly problematic ruling was handed down by the Federal Court<sup>268</sup> in the "GEMA Valuation Procedure" case. The main problematic feature is the Federal Court's statements regarding the competence of the Federal Cartel Office in the supervision of collecting societies, insofar as the latter are not exempted from the prohibition on cartels under Article 102a of the Law Against Restrictions on Competition. In the view of the Federal Court, the effect of the market-dominating position of a collecting society was felt not only in the representation of rights in relation to third parties but also in the acquisition of exploitation rights from copyright owners. In spite of the provisions in the Administration Law, the latitude available to a collecting society, when like GEMA it enjoys a monopolistic position, is not restricted by any competition in this area either. The Federal Court therefore expressly confirms the ethical control exercised by cartel law alongside the German Patent Office supervision that derives directly from the relevant provision of the Administration Law. In this connection the Federal Court also emphasizes that the holders of rights, in other words the composers, lyric writers and publishers, are operating, when they exploit their works, as independent participants in business transactions, and therefore as entrepreneurs. While this may be beyond doubt for publishers, it nevertheless has to be asked whether this characterization of authors as entrepreneurs can still be defended today against the background of the ruling of the Federal Constitutional Court mentioned earlier.<sup>269</sup>

(170) Irrespective of these very far-reaching theoretical observations, the Federal Court lifted the Federal Cartel Office order whose applicability to GEMA had been the underlying feature of the proceedings, and accorded GEMA a relatively large amount of leeway for the drafting of its *principles of distribution*. The proceedings were brought on account of certain disagreements between GEMA and composers of serious music, who considered themselves put at a disadvantage by certain of GEMA's distribution principles which had resulted from the so-called two-stage procedure used for sharing out royalties. We cannot go into details of this matter

here; suffice it to say that the Federal Cartel Office had seen the procedure as a misuse of a market-dominating position in relation to the composer concerned. However, as the Federal Cartel Office had not used an individual case as the basis for its prohibition order, but had eventually made an abstract examination of the distribution plan, it had unlawfully interfered in the area of supervisory competence of the German Patent Office (Administration Law Articles 7(1) and 19(1)). The latter has for instance to determine whether the provisions of the distribution plan contain rules strict enough to preclude arbitrary action.

(171) There was another case decided by the LG Berlin<sup>270</sup> in which a holder of rights (namely a music publisher, as a member of GEMA) felt himself unfairly treated under the provisions of the distribution plan and had asked for information regarding the distribution key that GEMA had used in that particular case. That information had been given in the course of the dispute. As the music publisher was thereupon unable to provide detailed evidence of his unfair treatment, the complaint was dismissed. At the same time the Court ruled that GEMA could ultimately only distribute money that it had collected, and that any performances that had remained unpaid constituted a loss to be borne by the holders of rights affected and not by all the holders of rights. That could not be looked upon as unfair treatment.

(172) The fact that GEMA administers, among other things, so-called "film production rights" in relation to the repertoire under its management was illustrated by the above-mentioned ruling of the LG Munich,<sup>271</sup> in which a clear distinction was made between the internal relations of GEMA with the holders of rights on the one hand and the external relations of GEMA and the users of works on the other. Conduct on the part of GEMA in its internal relations that was in breach of contract would not make any licensing of rights to third parties invalid.

(173) As we know, a growing number of collecting societies<sup>272</sup> are becoming active in the Federal Republic of Germany alongside GEMA, one of them being the VG Bild/Kunst for the *field of decorative art* and photography. The already-mentioned "Illustration Contract" case decided by the Federal Court<sup>273</sup> shows clearly that it is only since the cre-

<sup>270</sup> LG Berlin—16 O 124/84—of December 12, 1985, Schu LGZ 198 (Reichardt).

<sup>271</sup> Cf. footnote 260.

<sup>272</sup> Cf. paragraph 23 and in particular footnote 32.

<sup>273</sup> Cf. footnote 238; for the final ruling see KG Berlin, footnote 239.

<sup>268</sup> BGH—KVR 4/87—of May 3, 1988, GRUR 1988, 782 = ZUM 1989, 80.

<sup>269</sup> Cf. footnote 21 and in particular paragraph 19.

ation of the VG Bild/Kunst that the efficient administration of a number of rights in this area has become possible. The case involved fee claims in respect of illustrations for children's books, which were asserted by the VG Bild/Kunst under a management contract.

## 2. *Obligation on Collecting Societies to Enter into Contracts with Third Parties*

(174) Under German law (Article 11 of the Administration Law) collecting societies are under what is known as the obligation to conclude, in other words they are bound, on request, to license the rights administered by them to anyone on appropriate conditions. Where no agreement is reached on the amount of remuneration in such negotiations, the exploitation rights are considered granted when the remuneration demanded by the collecting society has been paid or deposited subject to reservations. The question of the conditions under which this obligation to conclude affects the collecting society has had to be examined by the German courts in a number of cases involving GEMA.

(175) One important condition in this respect, as the LG Munich<sup>274</sup> made quite clear, is that the party interested in exploitation has first to make the effort to secure the grant of exploitation rights in dealings with GEMA. It is therefore not enough to start by acting without the knowledge or consent of GEMA and then, on being discovered, quickly to pay the remuneration demanded. In such a case GEMA is quite entitled to seek injunctions—as it did in this case of unlawful exploitation of films in videocassette form. Payment after the event of the fees payable according to the tariff does not remove the unlawfulness of a copyright infringement already committed. The OLG Munich<sup>275</sup> also ruled that an injunction granted to GEMA for unlawful use of videocassettes was to remain in force and therefore be enforced with fines, for as long as it existed. Mere payment of the royalty according to the tariff (on account of the infringement of rights GEMA demanded double) was therefore not sufficient to overcome the prohibition order.

(176) The need for prior negotiation between the parties so that the fictitious assignment under Article 11(2) of the Administration Law may operate is also emphasized by the LG Berlin.<sup>276</sup> It is

moreover not sufficient simply to pay or deposit a particular sum of money; the user concerned must provide the collecting society with the customary information and any other details that may be required, so that the latter may examine the payment for correctness and, after the reservation has been lifted, make the sum over to the entitled party. Here too GEMA was granted a prohibition order, in the form of a restraining injunction, against a producer of videocassettes. The same Court<sup>277</sup> imposed a fine—in conformity with the ruling of the OLG Munich just mentioned—in spite of the fact that a specific sum had been paid, for violation of a restraining injunction granted earlier.

## 3. *Presumption of Entitlement to Administer (the So-Called GEMA Presumption) and its Limits*

(177) Whereas the "GEMA presumption" and its limits, as we shall forthwith discuss, is the outcome of case law over numerous years, the reform legislator introduced in 1985, as already mentioned,<sup>278</sup> by inserting an Article 13b in the Copyright Administration Law, a special *statutory* presumption in favor of collecting societies. This concerns claims to information and remuneration that can only be asserted by a collecting society.<sup>279</sup> In such cases, there is a statutory presumption that the collecting society concerned in fact administers the rights of all the copyright owners.

(178) This new provision has already been the subject of two court decisions. For instance, the OLG Oldenburg<sup>280</sup> decided in the case of a claim for remuneration asserted by GEMA against a video rental firm in respect of the rental and distribution of videocassettes and phonograms that the intent of the new provision in Article 13b of the Copyright Administration Law was to facilitate the work of the collecting societies in asserting their claims to information. It was therefore not sufficient to refute that presumption for the video dealer to claim that he rented only videocassettes containing films of foreign origin. Indeed, to refute that presumption it would have been necessary to demonstrate that GEMA was not in possession of the corresponding musical rights in each individual case. Since the amount of the claim to remuneration under the relevant GEMA tariff depends on

<sup>274</sup> LG Munich I—7 O 350/84—of April 10, 1984, Schu LGZ 195 (M. Schulze) = FuR 1985, 224.

<sup>275</sup> OLG Munich—6 W 2866/84—of December 21, 1984, FuR 1985, 223.

<sup>276</sup> LG Berlin—16 O 562/83—of September 20, 1983, FuR 1985, 222.

<sup>277</sup> LG Berlin—16 O 561/83—of May 8, 1984, Schu LGZ 196 (M. Schulze).

<sup>278</sup> Cf. paragraph 10.

<sup>279</sup> Cf. for claims to information Article 26(3) to (5) and Article 54(5) and (6) of the Copyright Law and for claims to remuneration Articles 27(1) and 54(1), (2) and (5).

<sup>280</sup> Cf. footnote 174.

the number of cassettes offered for rental, GEMA could not reasonably be required to obtain the data required to calculate the remuneration itself, through the work of a multiplicity of outside staff, since the video dealer would have no problem in providing such information. In a similar situation, in a case heard by the OLG Düsseldorf,<sup>281</sup> it was held—in concordance with the OLG Oldenburg—that the statutory presumption under Article 13b also applied to claims that arose prior to the entry into force of that provision since it was in fact no more than procedural law.

(179) However, where it is no longer a question of a claim to information or remuneration under Article 13b, the collecting society concerned, particularly GEMA, can no longer rely on that statutory presumption, but only, at most, on what is known as the *de facto* GEMA presumption that is afforded by the courts within certain limits. During the report period, the Federal Court has expressed itself on the requirements and limits for this *de facto* presumption in a whole number of important decisions, particularly in those actions referred to by the specialized press as the “GEMA Presumption” cases (I to IV).

(180) In the “GEMA Presumption I” case,<sup>282</sup> the subject was the application of GEMA tariffs to what is known as audiovisual exploitation (secondary exploitation of cinematographic films); foreign productions originating in the United States of America and Italy, and also Hong Kong, and German films of the 1940s and 1950s were more particularly concerned. GEMA considered that it could rely on the GEMA presumption for all types of entertainment music including the field of mechanical reproduction and dissemination of film music on video and audio mediums, including those cases where the film music was of foreign origin. However, that view was clearly rejected by the Federal Court. Although the GEMA presumption recognized in case law amounted for GEMA, in view of its comprehensive domestic and foreign repertoire, to a *de facto* presumption of its entitlement to administer the performance rights in domestic and foreign dance and entertainment music and also for what are known as the mechanical rights, the assumption was also that the works enjoyed copyright protection.

(181) The presumption does not in fact concern all the rights administered by GEMA. It is a condition that GEMA should possess a *de facto monopoly* in respect of the rights administered in each

case, that is to say that it constitutes the sole collecting society in Germany and that it can claim a complete or practically complete inventory of rights through a system of reciprocal agreements with foreign collecting societies. However, it is not possible to assume such a *de facto* monopoly or such a comprehensive repertoire in respect of the commercially exploited rights in the mechanical reproduction and dissemination of film music on videotapes for personal use that has only developed in the recent past. The complete acquisition of rights cannot be assumed in respect of the foreign inventory of film music. Nevertheless, since GEMA undisputedly possessed the respective rights for the various foreign productions involved in the case in point, the Federal Court finally afforded a claim to information under the general principles of law that included the extent of the existence of its rights, that is to say fundamental information on those data that are required to clearly identify the films and the film music involved. The already-mentioned question whether GEMA in fact possessed the rights in respect of *German* films of past years<sup>283</sup> also played a part in this decision.

(182) In a further decision,<sup>284</sup> closely related to the above case, the Federal Court afforded GEMA a claim to information under the general principles of law, despite having rejected the so-called GEMA presumption, where there was a strong likelihood that infringement of the exploitation rights administered by GEMA would continue in numerous cases and to a considerable extent in respect of the overall production of a manufacturer of videocassettes in view of the infringements that had already been materially ascertained. Where it is probable, on the other hand, that infringements are only likely in isolated cases, it can merely be a matter of *basic information*. In such a case, however, it is not sufficient to state the title of a videocassette nor to give complete lists of music of the cinematographic and television films involved, since in both cases there are frequent differences between those films and the videocassettes. Conversely, a videocassette manufacturer can also require written advice from GEMA under Article 10 of the Copyright Administration Law as to whether exploitation rights subsist in given pieces of music. Despite the fact that a *de facto* presumption of the administration entitlement was refused to GEMA by the Federal Court, a claim was afforded for information under general principles of law in the “Copy Work” case<sup>285</sup> in

<sup>283</sup> See in detail paragraph 134.

<sup>284</sup> BGH—I ZR 154/84—of December 18, 1986, ZUM 1987, 244; lower instance: OLG Munich—6 U 2460/83—of June 28, 1984, ZUM 1985, 269.

<sup>285</sup> BGH—I ZR 210/86—of April 21, 1988, GRUR 1988, 604 = ZUM 1988, 575.

<sup>281</sup> Cf. footnote 174.

<sup>282</sup> Cf. footnote 212.

which copies of video films were made for third parties.

(183) The issue of secondary exploitation of films by means of videos was subsequently involved in the Federal Court decision in the "GEMA Presumption IV" case.<sup>286</sup> The considerations set out in the "GEMA Presumption I" case were repeated practically word for word and GEMA was again refused reliance on the GEMA presumption. However, the Federal Court made an important restriction. In those cases where it did not concern video exploitation rights acquired through the film producer, but productions that were *directly intended for video exploitation* and in which it had to be assumed that the use of the music in making the video film had taken place without the consent of the copyright owner, the Federal Court held that GEMA once more enjoyed its presumption of entitlement. The reason given was the author's interest in consolidated defense against infringements through a collecting society. This case was again referred back for greater clarification.

(184) This differentiation between the *secondary exploitation* of cinematographic films and the *primary* exploitation of videos was already prefigured in the "GEMA Presumption II" decision<sup>287</sup> in respect of the use of music in the production of pornographic films. The Federal Court in this case confirmed application of the GEMA presumption and made explicit reference to the legislator's option in favor of effective collecting societies and to the fact that the sound track in the case in point was to be placed in the category of entertainment music. This assumption can only be invalidated if it is possible to show and to prove for each individual film which pieces of music have been used and who the composers, writers of the words, adaptors and publishers are and for which can additionally be shown that the authors concerned are not represented by GEMA, or that it is a simple musical sound track that is not copyrightable. These proceedings again required further clarification by the preceding instance despite the fact that the Federal Court already held the claim to what is known as the basic information to be founded.

(185) In the "GEMA Presumption III" decision,<sup>288</sup> these principles laid down by the Federal Court were again confirmed in respect of the musi-

cal background to pornographic films; in the case in point, however, the proceedings concerned the public reproduction of such pornographic films in nightclubs. In view of GEMA's tariff arrangements, the presumption can only be invalidated in such cases if it can be proved without exception that no GEMA music has been used. The decision contains detailed considerations on this issue of invalidation.

(186) GEMA was afforded a claim to information under the general principles of law, however, by the already-mentioned decision of the OLG Kohlenz<sup>289</sup> against a university, as a public law institution, in respect of the unauthorized public reproduction of works of music in public educational events. The Court further raised the question whether the GEMA presumption that primarily concerned entertainment and dance music could also apply to religious music, but finally provided no answer. The GEMA presumption was confirmed, on the other hand, for the area of mechanical rights in domestic and foreign dance and entertainment music by the Federal Court in the already-mentioned "Record Import III" decision<sup>290</sup> in three separate respects: the presumption of entitlement, the presumption of copyrightability and the presumption of infringement.

#### 4. Determination of the Person Required to Pay

(187) It is understandable that GEMA should attempt to identify without exception all users of musical works in the areas it administers. However, its endeavors are not always rewarded with success. In the "Symphonie d'Amour" case heard by the Federal Court,<sup>291</sup> an interpretation had to be given of what are known as "standard" contracts between GEMA and the phonographic industry, which are based in turn on the inclusive contract between GEMA and the German national group of the International Federation of the Phonographic Industry (IFPI). Since the actual distribution firm for the records and cassettes concerned had gone bankrupt, GEMA attempted to claim from the manufacturer. As a result of its interpretation of the relevant provisions in the standard contracts, which were held to continue to apply, the Federal Court pointed out that in cases where undertakings in the phonographic industry worked together and were included in the system of standard contracts, for reasons of practicability in respect of the various acts of copyright exploitation (recording, reproduc-

<sup>286</sup> Cf. footnote 213.

<sup>287</sup> BGH—I ZR 35/83— of June 13, 1985, BGHZ 95, 285 = Schu BGHZ 335 (Schulze) = GRUR 1986, 66 = ZUM 1986, 53; for the lower instance—OLG Hamm—see already preceding "Letter," *loc. cit.* (footnote 1), paragraph 155.

<sup>288</sup> BGH—I ZR 137/83—of December 5, 1985, Schu BGHZ 337 (Schulze) = ZUM 1986, 199.

<sup>289</sup> Cf. footnotes 179 and 208.

<sup>290</sup> Cf. footnote 155.

<sup>291</sup> BGH—I ZR 20/85—of March 25, 1987, GRUR 1987, 632 = ZUM 1987, 626.

tion and dissemination); remuneration was due only once and that was, materially, from the distribution firms. This meant that a claim could not be asserted against the manufacturer working to contract.

(188) This principle, that manufacture to contract is also covered where the necessary rights have been obtained by the contracting party, was once more confirmed by the Federal Court<sup>292</sup> in the already-mentioned "Copy Work" decision as regards the manufacture of videocassettes. In that case, however, the basic requirement was lacking, that is to say the grant of rights, with a result that the copying was also subject to the claim to information by GEMA in view of the probability of infringement. The existence of an inclusive contract between GEMA and the video group of the German national group of IFPI made no difference since the contract simply constitutes a framework that does not afford any exploitation rights to individual members.

(189) In the field of public communication of musical works as part of open-air concerts, the LG Mannheim<sup>293</sup> was required to decide who was the responsible organizer or joint organizer liable to make payment to GEMA. The organizer of a performance liable to pay remuneration was held, in the decision, to be the person who has caused the event to be organized and whose activities had put it in hand, particularly that person who is responsible for the performance both organizationally and financially. This was so in the case in point since the defendant had been responsible for the entire local organization for carrying out the event concerned.

##### 5. Application and Equitableness of GEMA Tariffs and Competence of GEMA

(190) The crux of the already-mentioned decision in the "Record Import III" case<sup>294</sup> was the question of the amount of remuneration GEMA could claim in the case of a "jumble sale" of unsold records imported at extremely low prices from abroad (United States). GEMA had applied what is known as "license analogy" to claim a minimum remuneration according to the tariff of 1 DM for each long-playing record. This minimum tariff was basically compatible with the requirement of equitableness since the objective of a schedule of fees also allowed a certain degree of rounding off.

The principle now expressed in the new version of Article 13(3) of the Copyright Administration Law that the author is to participate as equitably as possible in the economic advantages obtained from his work may not, however, be unreasonably applied to the disadvantage of the exploiter. Such was in fact the case where the minimum remuneration (1 DM) was considerably more than the wholesale price (0.66 DM and 0.57 DM for each record in fact). In such a case where unsold stocks are sold off by the container at extremely low prices, the corresponding GEMA tariff is not appropriate and therefore also not equitable for calculating the damages. The Federal Court recommended a percentage participation, but referred the case back for further clarification. However, what are known as returns (of unsold records) cannot remain unaccounted for when examining infringement of the right of distribution.

(191) Likewise, in the "Film Music" case heard by the Federal Court,<sup>295</sup> a decision had to be taken as to the equitableness of a GEMA tariff as the basis for calculating damages in a case of unauthorized distribution of videocassettes (in the case in point these were mostly sex and pornographic films). The published GEMA tariff laid down 10% of the recommended retail selling price. The Federal Court began by noting that, as regards the transitional provision in Article 26a of the Copyright Administration Law, it was not necessary in the present case to first approach the Arbitration Board, as laid down in Articles 14 and 16 in the case of individual users, since the proceedings had already been instituted prior to the entry into force of the 1985 reform law. Contrary to the lower court,<sup>296</sup> the Federal Court concluded that to use the retail selling price as a basis was indeed closest to the principle of equitable participation for the author in the advantage obtained from his work. This view is now expressed in the new version of Article 13(3) of the Copyright Administration Law. The Federal Court therefore only criticized the amount of the GEMA tariff, that is to say 10%, particularly when compared with the rates of remuneration in respect of records. In the case of videocassettes, it had to be taken into account that the medium was essentially determined by the performances of other owners of rights (film authors and actors) irrespective of the degree of significance of the film music. The Federal Court proposed alto-

<sup>295</sup> BGH—I ZR 194/83—of January 22, 1986, BGHZ 97, 37 = Schu BGHZ 351 (Schulze) = GRUR 1986, 376 = ZUM 1986, 280 = IIC 1988, 406.

<sup>296</sup> Cf. the preceding "Letter," *loc. cit.* (footnote 1), paragraph 150 and footnote 242; the OLG Hamburg—3 U 103/83—of April 19, 1984, ZUM 1985, 440, adopted the same view as the OLG Munich.

<sup>292</sup> Cf. footnote 285.

<sup>293</sup> LG Mannheim—7 O 176/83—of December 16, 1983, Schu LGZ 194 (Movsessian).

<sup>294</sup> Cf. footnotes 155 and 290.

gether detailed considerations (which it would be impossible to report here) and sent the lower court back to do its sums.

(192) In the already-mentioned decision taken by the LG Düsseldorf,<sup>297</sup> it was held, in view of the interpretation of the entitlement contract with GEMA that the special exploitation right to make use of the musical involved (*West Side Story*) for the purpose of advertising products of a different trade was not transferred to GEMA. In view of the risk of damaging the creator's reputation it had in fact to be assumed that the creator or the owner of the rights of utilization would wish to decide himself. This meant, therefore, that the music publisher involved was able to claim damages for the use of extracts from *West Side Story* in motor vehicle advertising on radio.

(193) The fact that GEMA, on the other hand, also now administers what are known as "cable rights" within the framework of the rights of broadcasting has already been made clear in connection with the "Cable Television II" decision of the Federal Court.<sup>298</sup> The cable rights are not in fact transferred further to the broadcasting organizations since such a transfer only covers a broadcasting organization's own acts of utilization. This means that GEMA also participates in the inclusive contract on cable royalty with the German Federal Post Office.

#### 6. Twice the Tariff Fee As Damages for Collecting Societies?

(194) In the "Film Music" case just described, the Federal Court<sup>299</sup> also discussed the matter of the areas in which GEMA could obtain a 100% infringement surcharge, that is to say a double tariff fee, as damages. This is only possible for unauthorized public communication of music, but not for cases of the unauthorized reproduction and distribution of musical works. The lump-sum surcharge for damages in the case of performances of music was approved on the grounds that GEMA must maintain an extensive and costly monitoring system in order to pursue copyright infringements in a multiplicity of possible localities and installations. These extensive monitoring costs are therefore charged to the infringer, not to the authors or—by increasing tariffs—to the lawful licensees. This jurisprudence is nevertheless exceptional and is not normally applicable to other infringements of law since they require no comparable monitoring out-

lay. However, in addition to surrendering the profit made by the infringer, the costs incurred in such cases for identifying an actual infringement of copyright could be claimed as damages.

(195) These basic considerations had already been suggested by the Federal Court in the "GEMA Presumption III" case<sup>300</sup> and once more explicitly confirmed in the "GEMA Presumption IV" decision.<sup>301</sup> The Federal Court did not accept GEMA's reference to the special additional costs that arose due to the fact that the video market was highly complex and subject to rapid change. Furthermore, the claim to damages under Article 97 could not assume the function of a penalty—even if only serving preventively.

#### 7. Arbitration

(196) As already mentioned at the beginning of this "Letter,"<sup>302</sup> the arbitration procedure has also been amended in the reform of the Copyright Administration Law. In particular, the competence of the Arbitration Board was extended to all disputes with collecting societies concerning the use of protected works or performances. This therefore now also applies to each individual user and not only, as was previously the case, to associations of users that had been unable to agree on the conclusion of an inclusive contract with the collecting society. Where such disputes on utilization concern the applicability or equitableness of the collecting society's tariff, it is indeed a condition for instituting proceedings before a court that a proceeding before the Arbitration Board under Article 16 should have first been carried out.<sup>303</sup> However, the OLG Oldenburg held as follows in an already-mentioned decision<sup>304</sup>: in the case of a claim for payment of copyright remuneration where the applicability and equitableness of a tariff is disputed, it is a condition of proceedings that an arbitration procedure be carried out and, where such is not the case, the action is inadmissible; however, this did not apply to the assertion of a claim to information since, contrary to a claim to payment, it is not related to a tariff. In such cases, therefore, it is not necessary for an Arbitration Board procedure to have been carried out. It is to be assumed that the collecting societies will make frequent use of this possibility of rapid assertion of a claim to information.

<sup>297</sup> Cf. footnote 288.

<sup>298</sup> Cf. footnotes 213 and 286.

<sup>299</sup> Cf. paragraphs 8 *et seq.*

<sup>300</sup> For the importance of the transitional provisions in Article 26a of the Copyright Administration Law, cf. paragraph 191.

<sup>301</sup> Cf. footnotes 174 and 280.

<sup>297</sup> Cf. footnote 138.

<sup>298</sup> Cf. footnote 185.

<sup>299</sup> Cf. footnote 295.

(197) The improvement in the arbitration procedure, that is altogether in the interests of the users of works, has indeed already led to a number of interesting *settlement proposals* under Article 14a(2), both as regards disputes with individual users and those disputes covered by Article 14 concerning the conclusion or amendment of inclusive contracts. The settlement proposals made by the Arbitration Board so far contain numerous detailed legal and economic considerations and arguments and constitute a true mine of information on the practice of the collecting societies as regards tariffs and inclusive contracts. Although again most of the cases concerned GEMA, there were nevertheless other proceedings that involved the VG Wort collecting society and the GVL, the collecting society for the exploitation of neighboring rights. Unfortunately, it will only be possible to give a brief survey of these interesting settlement proposals, for reasons of space.

*(a) Disputes Involving Individual Users*

(198) The first settlement proposal<sup>305</sup> began by laying down that the organization responsible for a sports center, that was also a member of an association of municipal and sports centers, was entitled to request the Arbitration Board to verify the equitableness of the tariffs under an inclusive contract that the association had concluded with GEMA. Since the inclusive contract is not binding on the members of the association, the opposite applies only if the member has explicitly or conclusively recognized the contract in respect of himself. Moreover, the equitableness of tariffs established by a collecting society is not to be taken for granted even where, for instance, the society is subject to State supervision. The outcome was that the Arbitration Board—as already the Federal Court<sup>306</sup> in the “Film Music” case—placed emphasis on the significance of the principle of participation now anchored in Article 13(3) of the Copyright Administration Law; according to that provision, the bases for calculating the tariffs are normally to be pecuniary advantages obtained for the exploitation. Pecuniary advantages are generally to be understood as the gross proceeds obtained due to the exploitation. The rate of 10% of the gross proceeds has also been generally accepted in other areas.

(199) In the second settlement proposal,<sup>307</sup> the admissibility of appealing to the Arbitration Board

was also confirmed for the same organization despite the fact that, in this case, an individual contract has indeed already been concluded with GEMA. However, that contract referred to only *one* of a number of tariffs on which invoicing was based. Moreover, the conclusion of the individual contract as such had no effect on the *admissibility* of the arbitration procedure. Again here it was emphasized, with explicit reference to the first settlement proposal made for the same parties, that the tariffs of collecting societies must be based on the pecuniary advantages (Article 13(3)) as a percentage participation in the gross turnover. In view of the very low gross takings at some of the events concerned and the theoretically resultant amounts of remuneration that were quite tiny, the Arbitration Board proposed a minimum rate on the basis of a 20% occupation of the hall concerned as a function of its average capacity. As for the disputed tariff, a 5% rate of remuneration was applied.

(200) A further settlement proposal by the Arbitration Board<sup>308</sup> concerned the equitableness of a tariff for the reproduction and distribution of film cassettes. Again in this case, the Arbitration Board laid down that arbitration was not inadmissible on the grounds, for instance, that an inclusive contract existed in the area concerned or that negotiations were ongoing. Since the inclusive contract had no legal effect for the members of parties to such a contract, that was even less the case for non-members (IFPI in this case). An individual proceeding was permissible, however, where the Arbitration Board had already laid down a tariff in an overall proceeding and subsequently had to decide on the same tariff within an individual case. However, the Arbitration Board in fact saw no reason to change its findings in the decision on the inclusive contract procedure between GEMA and IFPI. The result was that a rate of 2.43% was laid down for IFPI members and a rate of 3.0375% for non-members, with explicit reference to the fact that the Federal Court<sup>309</sup> had held remuneration of 10% to be excessive.

(201) In a further individual procedure,<sup>310</sup> the plaintiff was a collecting society, that is to say VG Wort. The proceedings concerned the already-mentioned special case of a reader-printer for which VG Wort had asserted a statutory remuneration claim for photocopying appliances. The case therefore involved not a tariff but a different kind of user dispute in which appeal to the Arbitration Board was likewise admissible. The finding was

<sup>305</sup> Arbitration Board—Sch—Urh 1/86—of October 13, 1986, ZUM 1987, 183.

<sup>306</sup> Cf. paragraph 191 and footnote 295.

<sup>307</sup> Arbitration Board—Sch—Urh 2/86—of January 30, 1987, ZUM 1987, 187; for a parallel action to assess a tariff of the GVL collecting society “attached” to the GEMA tariff, cf. Arbitration Board—Sch—Urhg 5/86—of February 25, 1987, ZUM 1989, 207.

<sup>308</sup> Arbitration Board—Sch—Urh 8/87—of May 3, 1988, ZUM 1988, 351.

<sup>309</sup> Cf. footnote 291.

<sup>310</sup> Cf. already footnote 210.

that such an appliance was also subject to the obligation to remuneration under Article 54 of the Copyright Law and the Annex thereto.<sup>311</sup> The claim to information on the number of appliances sold was therefore justifiable. Here again, the fact that an inclusive contract already existed did not oppose the obligation to give information and pay remuneration since such a contract, even where members were concerned, only set up framework conditions and was only binding on the collecting society and the association of users. Collecting societies were entitled to pursue claims against individual exploiters beyond the framework of the inclusive contract.

### (b) Disputes Concerning Inclusive Contracts

(202) An interesting proceeding concerning an inclusive contract was heard by the OLG Munich.<sup>312</sup> The case was decided on the basis of previous law which, however, in the case of inclusive contracts, already provided for arbitration proceedings with a subsequent possibility of appeal to a court (Article 14(5) of the old version of the Copyright Administration Law). The procedure was initiated by the GVL (society for the exploitation of neighboring rights) against public broadcasting organizations and the commercial radio companies of those organizations. The decision is of interest in that it defines the term "inclusive contract" within the meaning of Article 12. This type of inclusive contract as such governs neither the authorization to use in the case of actual individual uses nor the resultant obligation to remuneration. Such agreements in fact constitute individual utilization contracts that cannot be concluded with a group of users, but only with a single user in each case.

(203) Another decision was taken by the Arbitration Board<sup>313</sup> under the previous law in which it refused to give a *provisional order* during proceedings on the laying down of a new inclusive contract, in accordance with the statutory situation at that time (which is now different under Article 14c(2)). Reference was also made to the significance of a provisional arrangement under Article 11(2)) (payment subject to reservation or deposit). A deposit under Article 11(2) can therefore also be made in that simply the disputed part of the amount between lower remuneration under the preceding inclusive contract and higher remuneration required by the collecting society is deposited.

(204) In a further decision of the Arbitration Board,<sup>314</sup> the dispute concerned the extent of the obligation of a collecting society to conclude inclusive contracts under Article 12 where the association of users only had a small number of members. In the case in point, the membership of the association of users had fallen from 68 to 41 undertakings, of which in turn only 25 had settled their accounts with GEMA, and it was held that the conclusion or non-terminated continuation of an inclusive contract could not be required of GEMA. The decision went the other way, however, in a later proceeding<sup>315</sup> in which the overall membership of a recent association of cinema owners with some 190 members was held sufficient despite the fact that around 140 or 150 of those were already members in the existing main association of cinema owners. The difficulty of having to come to terms with two parties in the same field was a fact that had to be accepted by the collecting society for reasons of cartel law.

(205) The settlement proposal made by the Arbitration Board<sup>316</sup> in respect of an *inclusive contract* between GVL and the Federal Cable and Satellite Association together with the Federal Association of German Newspaper Publishers is doubtlessly of great interest in this area. It concerns the claims to remuneration of GVL (based on the neighboring rights of performers and phonogram manufacturers) in respect of the broadcasting of records, music cassettes and other published phonograms in *private* radio programs (terrestrial or cable distributed). A rate of 4.5% of the gross income from advertising was held equitable as compared with the GEMA remuneration rate (4.96%) and with remuneration in the area of public broadcasting (also approximately 4.5%).

(206) The settlement proposal is of interest not only in view of its detailed provisions that go far beyond the simple matter of tariffs, but also in view of the grounds that are given. The crux of the grounds is the finding of the Arbitration Board that the GVL enjoys a *de facto* presumption of comprehensive entitlement not only for domestic, but also for foreign holders of rights. This also applied in respect of phonogram manufacturers in the United States of America.<sup>317</sup> The Arbitration Board likewise made reference to the obligation of GVL to conclude administration contracts with EC nationals. All that meant a high degree of probability that

<sup>314</sup> Arbitration Board—Sch—Urh 1/85—of November 20, 1986, Scbu Scbst 3 (Movsessian).

<sup>315</sup> Arbitration Board—Sch—Urb 11/87—of September 22, 1988, *Blatt für Patent-, Muster- und Zeichenwesen*, 1989, 59.

<sup>316</sup> Arbitration Board—Sch—Urh 14/15/41/42/88—of July 14, 1988, ZUM 1988, 471.

<sup>317</sup> Cf. also paragraph 242 below.

<sup>311</sup> Cf. for detail paragraph 132.

<sup>312</sup> OLG Munich—6AR 13/84—of September 12, 1985, ZUM 1986, 157.

<sup>313</sup> Arbitration Board—Sch—Urh 2/84—of March 19, 1984, *Blatt für Patent-, Muster- und Zeichenwesen*, 1984, 253.

GVL administered a comprehensive domestic and foreign repertoire. Moreover, the demands to be placed on a *de facto* presumption of entitlement to assert statutory *claims to remuneration* are to be placed at a lower level than for the administration of (exclusive) rights of authorization and utilization. Emphasis was also laid on the importance of calculating the remuneration in accordance with Article 13(3), that is to say on the basis of the gross proceeds.

#### IV. Neighboring Rights

(207) On a number of occasions, particularly in connection with the protection of works of photography,<sup>318</sup> cinematographic works<sup>319</sup> and video games<sup>320</sup> mention has already been made of the complementary function of various neighboring rights, particularly those for what are known as simple photographs and for sequences of images. They frequently facilitate the efforts of the courts to determine infringements insofar as it is then not necessary to decide whether it is the one or the other form of protection that is to be applied. I will not go into these cases again here. This also applies to a number of decisions that concerned the neighboring rights of phonogram manufacturers.<sup>321</sup>

##### 1. Protection of Performers

(208) The most important decisions in this field are without doubt those of the Federal Court in the "Bob Dylan"<sup>322</sup> and "Magic Flute"<sup>323</sup> cases. However, the main aspect of those cases was to determine how far foreign performers could enjoy protection in Germany on the basis of the Rome Convention, where appropriate. More detail will be given below in this respect.<sup>324</sup>

(209) Furthermore, the issue regulated in detail in Article 80 of the Copyright Law played a part in

two cases, that is to say how the rights of all the participating performers are to be administered in the case of groups of artists (such as choirs, orchestras, ballets). For instance, the OLG Munich<sup>325</sup> held that the members of a ballet could not assert for themselves alone the claims deriving from infringement of neighboring rights; according to Article 80(2) of the Copyright Law only the management of the ballet company was entitled to take action. The sole entitlement of the managing board also comprised the assertion of claims from infringements under Articles 97 *et seq.* of the Copyright Law. Likewise, the criminal law remedy under Article 108(4) was not available to individual members of the company.

(210) Conversely, in the already-mentioned "Opera Opening" case heard by the OLG Frankfurt,<sup>326</sup> the question was whether the management of the orchestra was in fact entitled to take action against infringements in the case of an unauthorized transmission of orchestral pieces on radio since some at least of the members of the orchestra had transferred their rights to GVL (society for the exploitation of neighboring rights). The Court came to the conclusion, however, in line with GVL practice, that the right to *consent*, as a primary exploitation right, to the (*direct*) radio broadcast of the orchestra's performance was not administered by GVL. GVL was limited by the administration contract to asserting the secondary exploitation rights, that is to say claims to remuneration for authorized exploitation of performances that were *already recorded*. This differentiation corresponded to the provision in Article 78 of the Copyright Law that reserves to the performer, despite possible transfer, the right in any event to grant authorization himself for a (*direct*) radio broadcast; in order to institute an action for infringement of this right of consent under Article 80(2) of the Copyright Law the orchestra management is then entitled to act on their behalf. A transmission of this right on the basis of the tariff contract between the musicians and the city of Frankfurt was likewise excluded.

##### 2. Protection of Phonogram Producers

(211) For the sake of completeness, mention should also be made here of a decision of the Supreme German Fiscal Court, that is to say the *Bundesfinanzhof*,<sup>327</sup> which, though it deals with tax

<sup>318</sup> Cf. paragraphs 68 *et seq.*

<sup>319</sup> Cf. paragraph 50.

<sup>320</sup> Cf. paragraphs 46 *et seq.*

<sup>321</sup> For the administration of remuneration claims in respect of neighboring rights, cf. also paragraphs 205 *et seq.* For the rights of phonogram producers, cf. also already paragraph 202 and paragraph 219 ("Bootleg Copies" case).

<sup>322</sup> BGH—I ZR 68/83—of November 14, 1985, Schu BGHZ 350 (Nordemann) = GRUR 1986, 454 (Krüger) and 734 (Schack) = GRUR Inl. 1986, 414 (Krüger, p. 381) = ZUM 1986, 202 = IIC 1987, 418; for the lower court—OLG Munich—cf. already preceding "Leiter," *loc. cit.* (footnote 1), paragraph 166 and footnote 274.

<sup>323</sup> BGH—I ZR 188/84—of November 20, 1986, GRUR 1987, 814 (Schack) = GRUR Inl. 1988, 60 = ZUM 1987, 462; lower court: OLG Hamburg—3 U 68/84—of October 4, 1984, GRUR Inl. 1986, 416 (Krüger, p. 381) = ZUM 1985, 371 (Hesse, p. 365) = IIC 1987, 425.

<sup>324</sup> Cf. paragraphs 237 *et seq.* below.

<sup>325</sup> OLG Munich—29 U 2426/87—of January 21, 1988, GRUR 1989, 55 = ZUM 1988, 349.

<sup>326</sup> Cf. footnote 191.

<sup>327</sup> Bundesfinanzhof—III R 6/76—of December 9, 1983, GRUR 1984, 586.

law assessment of phonograms, nevertheless contains important considerations on the economic and legal differences between copyright in the narrow meaning and the rights that protect performances (neighboring rights). The neighboring right of a phonogram producer is a right under competition law that protects him against the misuse by third parties of his performance consisting in the economic and technical outlay and in the risk assumed when manufacturing and distributing phonograms. As far as taxation or assessment law is concerned, the phonogram producer's neighboring right does not constitute an "author's right." In legal theory, therefore, there exists a clear dividing line between the protection of the author's creative performances and protection of the performer's act of reproducing the created work as also the more technical and economic action of the phonogram producers and broadcasting organizations.

### 3. A Neighboring Right for Publishers?

(212) Apart from the special provision in Article 71 (neighboring rights for the publication of posthumous works) German copyright law contains no general ruling as to a neighboring right for publishers to which they could indeed be entitled as "producers" of embodiments of works in the same way as the phonogram producers and film producers. However, in some cases this gap can be closed by recourse to protection under the Law on Unfair Competition. Particular mention should be made in this connection of the Federal Court's decision<sup>328</sup> in the "Music Engravings" case concerning the photomechanical copying of editions of freely available works of music by a competing publisher. The case involved sheet music that had been printed in the first part of this century. The Federal Court, that did not however basically call into question protection under Article 1 of the Law on Unfair Competition, began by stating that exploitation of the performances of others contrary to competition law only existed in the presence of further unfair circumstances in addition to the photomechanical reproduction and that such was not the case. The musical engravings had been produced in the first part of this century, that is to say more than 50 years ago, and the initial publisher had had a reasonable period of time to exploit them. Indeed, he had distributed the music during that period and in the meantime at least his production costs had

been covered. Article 1 of the Law on Unfair Competition did not protect specific interests of cultural policy, for instance the mission of a traditional music publisher and, in any event, 50 years were held to be sufficient even when compared with other neighboring rights. Despite the special nature of music publishing, it was not held justifiable to extend the period for undisturbed exploitation of the printed music, since only the complementary competition law protection could be taken into consideration, to more than 50 years.

(213) Simply for the sake of completeness, I may mention here that in a further decision<sup>329</sup> the Federal Court assumed, in agreement with the lower court, an identical appropriation of a performance contrary to competition law in a case in which a competitor had systematically appropriated and distributed information—although with a different outside arrangement—in the field of the building industry. The result of the performance, which was the crux of the matter according to the Federal Court, was the collection and content of the extensive, detailed and specialized information not its superficial form of presentation. Astonishingly, the issue of copyright protection for collections of data was not examined.

## V. Damages and Other Penalties for the Infringement of Copyright or Neighboring Rights

### 1. Presumption of Authorship (Article 10 of the Copyright Law)

(214) In numerous actions for damages it was first necessary to verify the plaintiff's right to sue; in many cases the plaintiff could however rely on the provision on presumption of authorship under Article 10 of the Copyright Law, which again was basically the same as Article 15 of the Berne Convention. A condition is that either the author or the editor or publisher has marked the item or the original in the usual way. In the "Bora Bora" case, the Federal Court<sup>330</sup> began by stating the principle that in the case of claims for damages resulting from copyright infringement the injured party must prove his right to sue, that is to say his ownership of the copyright that is asserted. In this case the claim was successful under Article 15(1) of the Berne Convention since in the song concerned the name

<sup>328</sup> BGH—I ZR 98/84—of February 6, 1986, Schu BGHZ 352 (Movsessian) = GRUR 1986, 895 (G. Schulze) = ZUM 1987, 238 = IIC 1988, 392; lower court: OLG Frankfurt—6 U 164/82—of April 12, 1984, GRUR 1984, 543 = GRUR Int. 1984, 764 (extract) = IIC 1985, 764.

<sup>329</sup> BGH—I ZR 221/85—of December 10, 1987, ZUM 1988, 569.

<sup>330</sup> BGH—I ZR 128/84—of July 10, 1986, Schu BGHZ 354 (Seydel) = GRUR 1986, 887 = GRUR Int. 1987, 40 = ZUM 1987, 40 = IIC 1988, 411.

of the author was printed between the title and the music. Since, in fact, two names were written one below the other, it was presumed that both persons were joint authors of the song concerned, that is to say, materially, that they were the creators of the melody and of the words with equal rights. In the case of the one author, however, the presumption in regard of the musical component fell away since the person concerned had referred to himself as only the author of the *words*.

(215) In the "Goggolore" case, heard by the OLG Munich,<sup>331</sup> the Court dealt extensively with the presumption of authorship under Article 10. It was usual in the case of literary works that the author's name be stated together with the title, particularly on the title page. The fact of being designated as the author thus results from the place of designation. Certain formulations in the preface did not oppose the presumption despite the fact that it could be opposed in principle. The objection that the author concerned had not created the work himself but had simply written it down from commonly available material was unsuccessful. The OLG Schleswig<sup>332</sup> based itself in the already-mentioned "Clay Figurines" case where the initial letter of the surname of the plaintiff, that appeared on all the animal figurines, sufficed for the presumption of authorship under Article 10. The same applied to the signing of "alienated" photographs in the case heard by the OLG Koblenz<sup>333</sup> as also for the statement as to authorship on the summary or shooting script for a film as decided by the OLG Cologne.<sup>334</sup> The fact that the script had been written down by someone else, and had been conceived in part whilst so doing, was not sufficient to reverse the onus of proof.

(216) The issue of the presumption of authorship in the form of a designation of the editor (Article 10(2) of the Copyright Law) has now begun to play a part in the field of computer games as shown in two decisions taken by the LG Hanover.<sup>335</sup> In both cases, the designation of the editor on the original packaging of the computer games concerned sufficed to establish the right to sue. The fact that the games were also on offer from other software houses did not suffice to oppose that right since it would have been necessary to submit original packagings bearing a designation of editor from such other software houses.

## 2. Other Requirements for Claiming Damages

(217) Apart from the matters already dealt with in connection with collecting societies, particularly that of the GEMA presumption<sup>336</sup> and of the double tariff fee,<sup>337</sup> further issues concerning the law of damages had to be clarified in numerous other cases. For reasons of space, only a brief mention can be made of those cases. As regards the entitlement to assert claims to damages, first mention should be made of the "Video Right" case heard by the Federal Court<sup>338</sup> in which two parties were in dispute as to who was entitled to exploit a film as a video. The action for a "negative" *declaratory judgment* requested by one of the parties against the other party was not already held unfounded although the plaintiff had not succeeded in proving his own acquisition of the video rights. That question was not the subject matter of the declaratory dispute which, in fact, concerned the entitlement of the *defendant*. This means that the plaintiff—contrary to the situation in an action for payment—is *not* required to prove his own entitlement.

(218) In a case concerning the infringement of rights of use for the plans of two residential houses,<sup>339</sup> the OLG Munich refused an action for damages deriving from the plaintiff's own claim since the plaintiff could not rely on an exclusive, but only on a simple (non-exclusive) right of utilization; the suit would only have been permissible as action on behalf of another party on the basis of authorization from the copyright owner insofar as a protectable interest could be proved by the plaintiff. The OLG Frankfurt,<sup>340</sup> on the other hand, in the already-mentioned "Le Corbusier Chair" case, admitted the suit for damages of a foundation that was the universal legatee of the deceased architect despite the fact that the exclusive licensee (the manufacturer of the chairs concerned) had already asserted a claim to damages in a parallel action. Since the foundation had its *own* interest in asserting these rights, due to its participation in the license revenue, it was entitled to assert the copyright claims in addition to the exclusive licensee.

(219) Further decisions concerned the question of proving the infringement and also proving the existence of culpability (intentional or negligent) on the part of the infringer. In the "Bootleg Copies" case heard by the Federal Court,<sup>341</sup> and likely to

<sup>331</sup> OLG Munich—29 U 2068/87—of May 19, 1988, GRUR 1988, 819 = ZUM 1988, 578.

<sup>332</sup> Cf. footnote 97.

<sup>333</sup> Cf. footnote 114.

<sup>334</sup> OLG Cologne—6 U 208/87—of April 15, 1988, GRUR 1988, 762.

<sup>335</sup> Cf. footnotes 77 and 158.

<sup>336</sup> Cf. paragraphs 177 *et seq.*

<sup>337</sup> Cf. paragraphs 194 *et seq.*

<sup>338</sup> BGH—I ZR 75/85—of May 13, 1987, GRUR 1987, 938 = ZUM 1988, 296.

<sup>339</sup> Cf. footnote 86.

<sup>340</sup> Cf. footnote 101.

<sup>341</sup> BGH—I ZR 210/84—of February 5, 1987, BGHZ 100, 31 = GRUR 1987, 630 (von Gravenreuth) = ZUM 1987, 86.

achieve great significance in practice, the Court eased the production of evidence of infringements in cases of record piracy in that it admitted what is known as *presumptive evidence* that applies in the case of typical sequences of acts. In the case in point, it could be assumed from experience that unlawfully manufactured record sleeves would be used for their obvious purpose, that is to say for pirated records. Thus, the quantity of record sleeves could be used as a basis for calculating the damages. In a similar way, the LG Hanover<sup>342</sup> confirmed the existence of an infringement<sup>343</sup> in a suit for injunction against the producer of hootleg copies of computer games (protected as sequences of images under Article 95 of the Copyright Law) in view of the existence of a number of circumstances (sending of a stock list, a price offered at one tenth of the normal selling price, offered without cover or description or delivery also on diskettes, plus the technical possibility of making pirate copies) held that an act of infringement existed in the form of distribution (offer to the public).

(220) The difficulty, on the other hand, of proving infringement in the relationship between a biography and a radio program allegedly created on the basis of that book is shown in the judgment of the KG Berlin<sup>344</sup> in which the Court referred to the similarities between the book and the program which were a necessary result of the situation and, basically, rejected the infringement action. The LG Nuremberg-Fürth<sup>345</sup> was also cautious in that it granted a right to the plaintiff press agency to inspection of all volumes of an advertising newspaper that had appeared and were archived in view of the systematic unauthorized utilization of its photographs in that newspaper, but however refused a right to communication of the names and addresses of the persons or firms from which the advertising newspaper had received the photographs concerned for use. That was opposed by the legitimate interests of the infringer and of third parties in maintaining their secrecy.

(221) As to the question of *culpability*, the Federal Court<sup>346</sup> held in the frequently-mentioned "Record Import III" case that the manager of a limited company was also personally liable for an unauthorized act committed by him in that capac-

ity. The OLG Düsseldorf,<sup>347</sup> on the other hand, refused, in a somewhat special case, the personal liability of a head of a city archive who had produced on the orders of his superior a draft that infringed copyright, since he had not written it as a private person. In the "Video Licensing Agreement" decision, the Federal Court<sup>348</sup> held that there was also liability for damages as a result of copyright infringement where the infringer had not himself effected the unauthorized rental of the video cassettes, but had nevertheless caused it to take place in that he had granted a sublicense without the consent of his licensor. The right that was still maintained by the licensor to consent in the case of the granting of sublicenses was sufficient to assume *copyright infringement*, and not only contractual infringement, in respect of the licensor since he retained a residual portion of the right of rental.

(222) The LG Düsseldorf<sup>349</sup> went as far as to assume, in the case of the supply of what is known as a "copying program," that the avoidance of the protection against copying in the case of a protected program led to copyright infringement as an *accessory*. An act of infringement in the form of participation in the distribution of an illegal copy of a work of sculpture was also assumed by the KG Berlin.<sup>350</sup> The view of the Federal Court<sup>351</sup> in the already-mentioned "Illustration Contract" case in which it would seem to assume negligence, despite the fact that the infringer had based himself on the interpretation of the contract, and which the lower instance had likewise used as a basis in its original rejection of the suit, would appear more problematic. The judgment further contains interesting considerations on the issue of what is known as "forfeiture" which precludes the assertion of claims if a lengthy period of time has lapsed and holds a subsequent assertion as a breach of good faith.<sup>352</sup> The OLG Frankfurt<sup>353</sup> showed itself in a similarly strict vein in the "Le Corbusier Chair" case in which it held that the infringer had been negligent despite the previous decision of the OLG that had been favorable to the infringer. It held that the infringer had acted in full knowledge and had knowingly accepted the risk of committing an act that the courts would eventually hold to constitute an infringement of copyright.

<sup>347</sup> OLG Düsseldorf—20 U 133/86—of March 17, 1987, GRUR 1987, 909.

<sup>348</sup> Cf. footnote 225; for the lower court (OLG Munich), cf. footnote 226.

<sup>349</sup> Cf. footnotes 68 and 207.

<sup>350</sup> Cf. footnotes 157 and 224.

<sup>351</sup> Cf. footnotes 238 and 273.

<sup>352</sup> For the final decision on the infringement, cf. KG Berlin, footnotes 239 and 273.

<sup>353</sup> Cf. footnotes 101 and 340.

<sup>342</sup> Cf. footnotes 158 and 335.

<sup>343</sup> Likewise LG Hanover, footnotes 77, 158 and 335.

<sup>344</sup> Cf. footnotes 117 and 201.

<sup>345</sup> Cf. footnote 111.

<sup>346</sup> Cf. footnotes 155, 290 and 294. For the liability of a political party for its agent under Article 100 of the Copyright Law, cf. also OLG Bremen—2 U 115/84—of March 7, 1985, GRUR 1985, 536. Cf. also paragraph 226 below.

(223) Both forfeiture and the issue of the danger of repetition required by Article 97 of the Copyright Law if an injunction is to be claimed were dealt with by the LG Cologne<sup>354</sup> in a case concerning plagiarism of a film (*The White Shark vs The White Killer*). Professional distributors of films are expected to have knowledge of competing films. A videocassette manufacturer acts negligently if he simply relies on the assurance given by his suppliers that the music involved is "not subject to GEMA"<sup>355</sup>; the same applies to an importer of phonograms as regards the simple assurances of his preceding supplier.<sup>356</sup>

### 3. Calculation of Damages

(224) In most cases, the amount of damages is determined by the courts by analogy with licenses; the appropriate license fee for the purposes of damages is deemed to be the amount that a reasonable licensor would have demanded for the contractual granting of a corresponding right of utilization and a reasonable licensee would have agreed to. As a rule, the usual remuneration is taken as a yardstick as was specifically confirmed by the Federal Court<sup>357</sup> in the "Song Text Reproduction II" case. The Court held a rate of 0.002 DM for each printed copy as appropriate in the case of the unauthorized publication of a pop song in newspapers. A regressive right in view of the high quantity edition was not applied since it was held that the author should as a rule enjoy without limitation the increased economic utilization of a work resulting from the quantity edition.

(225) In the "Preliminary Design II" case, the Federal Court<sup>358</sup> first confirmed that a simple legal error did not necessarily exclude negligence; an equitable license fee was then awarded in this case of infringement of architectural plans and it was admitted that information on the constructional cost of the infringing building could be demanded in order to calculate the fee. Likewise, in the "Video Licensing Agreement" case, the Federal Court<sup>359</sup> took its decision on the principle of appropriate licensing analogy; in view of the special features of the case—it concerned only the residual

right of rental in the form of the right of consent to sublicensing—surrender of the whole profit obtained could not be demanded for the granting of the complete right of rental, but only the fraction that corresponded to the extent of the infringed right.

(226) A number of OLG decisions have likewise concerned the equitable license as damages, such as that of the OLG Hamburg<sup>360</sup> in a case of unauthorized use of a photograph on posters and that of the OLG Karlsruhe<sup>361</sup> in a case of a suit for unauthorized manufacture of photocopies for an advanced course at a State teachers' training college. However, application of the statutory provision on remuneration (0.02 DM per page)<sup>362</sup> now contained in the annex to Article 54 of the Copyright Law was explicitly refused by the Court since it did not concern reproduction permitted by law, but in fact unlawful reproduction. It applied a rate of 0.10 DM per page as damages. Moreover, the *Land* was held liable for the infringing act on the part of the lecturer concerned since it was the authority responsible for the institution.<sup>363</sup>

(227) In two decisions by the OLG Munich,<sup>364</sup> concerning damages for unauthorized use of architectural plans; on the other hand, the Court held to be permissible the plaintiff's method of calculating what is known as the material damage by including loss of profit; however, just like the Federal Court in the above-mentioned "Preliminary Design II" case, the Court based itself on the overall building cost. The LG Cologne,<sup>365</sup> however, awarded as damages for the infringement of a contract drawn up by lawyers the amount that the infringers had saved through their unauthorized use of a text, that is to say the (theoretical) lawyer's fee for drawing up the contract text. This not altogether unproblematic decision carries with it the danger that those parts of the content of the text drawn up by the lawyers that are not protected as legal advice will be included in the calculation of damages.

### 4. Further Civil Law Penalties for Infringement

(228) Under Article 98 of the Copyright Law, the destruction of unlawful copies can be required under certain conditions. A corresponding request

<sup>354</sup> LG Cologne—28 O 2/83—of July 11, 1984, ZUM 1985, 455 (Goltz, p. 423).

<sup>355</sup> Cf. BGH "GEMA Presumption III," footnotes 288 and 300.

<sup>356</sup> Cf. BGH "Record Import III," footnotes 155, 290, 294 and 346.

<sup>357</sup> Cf. footnote 194.

<sup>358</sup> Cf. footnotes 84 and 142.

<sup>359</sup> Cf. footnotes 225 and 348; for the lower court (OLG Munich), cf. footnotes 226 and 348.

<sup>360</sup> Cf. footnote 110.

<sup>361</sup> Cf. footnote 209.

<sup>362</sup> Cf. paragraph 4.

<sup>363</sup> Cf. also paragraph 221 and footnote 346.

<sup>364</sup> Cf. footnotes 85, 144 and 223 in the one case and footnotes 86 and 339 in the other.

<sup>365</sup> Cf. footnote 45.

for destruction was granted by the LG Cologne<sup>366</sup> in the already-mentioned case of plagiarism of the film *The White Shark*. The Federal Court,<sup>367</sup> on the other hand, refused a suit for destruction in its "Video Recorder Destruction" decision in respect of the manufacture of pirate copies of videocassettes for destruction of the allegedly used *video recorders* since Article 98(2) only stipulates that equipment destined exclusively for the unlawful production of copies may be rendered unusable or, if this is not practicable, destroyed. The requirement of *exclusive* purpose for unlawful manufacture meant that interchangeable devices and appliances that could be used for other purposes, such as typesetting machines, photocopiers and the like were excluded from destruction. The KG Berlin,<sup>368</sup> on the other hand, in the frequently mentioned case of the unauthorized recasting of a statue required the infringer to surrender the bronze cast against equitable remuneration (2,000 DM) by applying the possibility provided by Article 99 of the Copyright Law and not the request for destruction.

(229) Article 96 of the Copyright Law, which prohibits the distribution of unlawfully made copies and their use for public communication, as the recording and public communication of unlawfully made broadcasts, constitutes an additional safeguard for the owners of rights; this is particularly the case where the actual infringers (manufacturers) cannot be reached. In the "GEMA Presumption III" decision,<sup>369</sup> the Federal Court emphasized that this provision was of a subsidiary nature and could therefore not be applied where the defendant had already made himself liable to payment of damages on account of unauthorized public communication. The case had concerned the unauthorized *public communication* of unlawfully manufactured pornographic films in a nightclub. The fact that the nightclub owner could not be made liable for the manufacture of the film copies and the resultant unauthorized reproduction of musical works meant that a remedy could not be found by recourse to Article 96(1). Article 96 only operates where a preceding unauthorized act of utilization of another person (the unlawful manufacture of the copies) is exploited by a third party for performing an act which is *authorized in itself* (distribution and public communication) as a utilization (e.g. the playing of an unlawfully manufactured record on radio). In this case, however, the nightclub owner was not entitled to make public communica-

tion and a double claim against the infringer for one and the same act of communication is, however, excluded.

(230) It is worth mentioning the Federal Court's detailed grounds, in the already-mentioned "Cable Television II" case<sup>370</sup> that the cable dispute with the German Federal Post Office constituted a copyright dispute within the meaning of Article 104 of the Copyright Law for which the ordinary remedy lay with the *civil courts*. The Federal Post Office had also to respect copyright provisions when supplying households with radio broadcasts and in such cases the public authorities and the authors stood upon an equal footing. The public authorities were in no way different to a private user.

### 5. Criminal Law Penalties

(231) Increased significance has been assumed by criminal law penalties for copyright infringements in the manufacture of bootleg copies of computer games. For instance, the LG Wuppertal<sup>371</sup> sentenced the accused to a fine of a total of 1,200 DM for unauthorized distribution of computer games by offering them to the public (dispatch of lists to interested parties). In a similar case, which concerned not only offers made in the form of small advertisements, but also the sale of pirated computer programs, the AG Hamburg<sup>372</sup> gave a sentence of four months detention. In a case which evidently concerned systems software, the AG Munich<sup>373</sup> gave a sentence of seven months detention and in the case of a "fanatical computer freak" who had exchanged and sold bootleg copies of valuable PC programs on a large scale, the AG Wolfratshausen<sup>374</sup> gave a sentence of six months detention. The AG Kronach<sup>375</sup> sentenced a youth for copyright infringement on account of his handing a blank diskette to another person in order that that person may unlawfully transfer a computer program. Apart for the decision of the AG Hamburg, which dealt in detail with the matter of the eligibility of the programs concerned for protection,

<sup>370</sup> Cf. footnotes 185 and 298; likewise the lower court—OLG Munich—footnote 186.

<sup>371</sup> Cf. footnote 159.

<sup>372</sup> Cf. footnote 78.

<sup>373</sup> AG Munich—71 Ds 331 Js 13441/84—of September 2, 1985, CR 1986, 223.

<sup>374</sup> AG Wolfratshausen—2 Ds 4Js 16612/84—of October 16, 1986, CR 1986, 777 (reported by von Gravenreuth).

<sup>375</sup> AG Kronach—Ds 3 Js 2137/87—of June 25, 1987, CR 1988, 930; further cases are reported by von Gravenreuth in ZUM 1985, pp. 488 *et seq.*, ZUM 1987, pp. 439 *et seq.* and ZUM 1988, pp. 319 *et seq.* See also in general by the same author, *Das Plagiat aus strafrechtlicher Sicht*, Cologne, etc., 1986.

<sup>366</sup> Cf. footnote 354.

<sup>367</sup> BGH—1 ZR 25/86—of November 26, 1987, GRUR 1988, 301 = ZUM 1988, 532.

<sup>368</sup> Cf. footnotes 157, 224 and 350.

<sup>369</sup> Cf. footnotes 280, 300 and 355.

these decisions do not practically go into the question of the necessary conditions for criminal penalties. There is an impression that the high level of requirements applied by the Federal Court in the "Collection Program" case<sup>376</sup> are hardly taken into account by the criminal instances.

## VI. Protection of Foreign Authors and Owners of Rights and Application of Convention Law

### 1. National Treatment

(232) The growing internationalization of copyright exploitation means that copyright disputes are also frequently carried out with foreign participation. In view of the system of law under the international conventions and the principle of national treatment to be found therein, this does not usually imply, at least in the field of copyright within the narrow sense, to any significant complications. This is shown, for instance, in the already-mentioned case of the "Asterix Plagiaries"<sup>377</sup> which had concerned the French cartoonist of the well-known comic strips, as also in the "Bora Bora" case<sup>378</sup> heard by the Federal Court and which concerned persons with their usual place of residence in Tahiti, who were quite simply able to rely on the presumption of authorship under Article 15(1) of the Berne Convention (which corresponds to Article 10 of the Copyright Law).

(233) The OLG Karlsruhe,<sup>379</sup> on the other hand, strictly applied convention law in the already-mentioned "Atari Games Cassettes" case with the result that the registration of games programs in the U.S. Copyright Register was held to be without significance when assessing the issue of copyright protection in the Federal Republic of Germany; the generation and content of copyright are indeed to be judged on the law of the country of protection. The two decisions in respect of cable television<sup>380</sup> may also be accounted to those in which convention law is applied without problem and in which detailed grounds were given to explain why GEMA was authorized to administer the repertoire of foreign collecting societies as a result of the system of reciprocal agreements. An important part was played in both decisions by the analysis and application of Article 11<sup>bis</sup>(1)(ii) of the Berne Convention in respect of the rebroadcasting of foreign programs.

(234) As already mentioned,<sup>381</sup> GEMA was forced to accept, on the other hand, a limitation of the so-called GEMA presumption in respect of the foreign repertoire in the field of administration of musical rights in respect of the audiovisual exploitation of films. That, however, in no way limits the rights of foreign authors or owners of rights, but simply follows from the fact that the system of exploitation of rights in the film area in other countries, particularly in the United States of America, is organized in a different way and is frequently outside the sphere of the collecting societies. As far as the foreign inventory of film music (from the United States, Canada, Britain and Hong Kong) was concerned, therefore, GEMA had not acquired the entire rights. The Federal Court<sup>382</sup> further emphasized, however, that an order by a foreign author in respect of the right afforded to him for the Federal Republic of Germany must adopt the compulsory contractual provisions of German copyright law (such as Article 31(4) of the Copyright Law) irrespective of the law applicable to the contract of entitlement. The significance of this apparently subsidiary comment by the Court cannot be sufficiently emphasized. It shows that the interplay between the principles of convention law and of private international law is not always clear and has not always been established.

### 2. Calculation and Comparison of the Term of Protection

(235) Already in the previous "Letter,"<sup>383</sup> I referred to the fact that an Italian theater and music publisher had tried to obtain the full German term of copyright protection of 70 years *post mortem auctoris* (i.e. to the end of 1994 in the case in point) for the opera *Tosca* by the Italian composer Puccini who had died in 1924, despite the fact that in the country of origin, Italy, copyright protection had already lapsed at the end of 1980. The publisher based his action on the independent granting of copyright protection to foreign nationals under Article 121 of the Copyright Law in the case of works published in the Federal Republic of Germany; that provision gives, similarly to Article 3(4) of the Berne Convention, a period of grace of 30 days. The decision of the Federal Court<sup>384</sup> in the "Puccini" case put a definitive end to this attempt. The

<sup>376</sup> Cf. paragraphs 38 *et seq.* and footnote 60.

<sup>377</sup> Cf. footnote 346 (OLG Bremen).

<sup>378</sup> Cf. footnote 330.

<sup>379</sup> Cf. footnotes 75 and 172.

<sup>380</sup> Cf. footnotes 185, 298 and 370 (BGH) and 186 and 370 (OLG Munich as lower courts).

<sup>381</sup> Cf. paragraphs 180 *et seq.*

<sup>382</sup> Cf. footnotes 213 and 286.

<sup>383</sup> *Loc. cit.* (footnote 1), paragraph 161.

<sup>384</sup> BGH—I ZR 50/83—of July 11, 1985, BGHZ 95, 229 = GRUR 1986, 69 = GRUR Int. 1986, 802 = ZUM 1986, 57; for the lower court (OLG Munich) cf. the preceding "Letter," *loc. cit.*, footnotes 266 and 102.

essential aspect of the decision is that the provision on independent granting of protection, comprising the 30-day period of grace, under Article 121(1) is not applicable to works published in Germany before the entry into force of the 1965 Copyright Law. That is to say that the question whether the independently granted copyright protection with the full German term had been obtained depended therefore on the provisions valid at the time of publication. For that to be the case, it would have been necessary for publication to have taken place in Germany at the same time at the latest (without the period of grace) and that was not the case of this opera. Thus, Berne Convention law continued to apply, meaning that under Article 7(8) of the Paris Act, which contains the principle of comparison of the terms of protection, the opera could not obtain a longer term in Italy, its country of origin. The Federal Court also made an important point for convention law in determining that a finished act—that is to say the generation of protection in the country of origin—is to be assessed on the basis of the legal situation at the time involved. Rights that have already been generated, even where this is under the Convention, cannot be retroactively affected by a revision of the requirements for the generation of copyright protection in the country of origin.

(236) A dispute that was similar in some respects was also heard by the LG Berlin<sup>385</sup>; the issue at point was whether the relevant works of foreign composers (these were in fact Alexander Scriabin, Nikolai Sokolov, Ferruccio Busoni and Edward Elgar) could obtain the full 70-year *post mortem auctoris* term of protection under Article 64(1) of the Copyright Law. These works were published for the first time, prior to the collapse of the German Empire, on what is now the territory of the German Democratic Republic. Action was taken by the heirs and successors in title of all these deceased composers against GEMA since it had apparently refused to take the works into account when distributing revenue. GEMA based its procedure on the fact that the 50-year term of copyright protection in the German Democratic Republic was applicable to these compositions, since it was the country of origin under convention law, and that therefore the comparison of terms under Article 7(8) of the Berne Convention was operative. Contrary to the "Puccini" case, however, first publication of the compositions in the German Empire was to be assumed in the cases concerned already under the law of the time with

the result that independently granted copyright protection with the full term of German protection was already justified at that time and had been maintained on the basis of the transitional provisions of the 1965 Copyright Law (Article 129(1)). The successors in title of the composer Scriabin, who had died in 1915, were particularly lucky in this case since a special provision (Article 143(1)) of the 1965 Copyright Law applies the new provision on the term of protection already to works whose protection would have lapsed in 1965 despite the fact that the 1965 Law as a whole did not enter into force until January 1, 1966. The LG further confirmed in this context that the independently granted copyright protection existed alone in addition to convention protection with a result that the Court in the case in point saw no reason to examine the international law situation of the German Empire nor the problems of legal relations between the two German States.

### 3. *Protection of Foreign Performers in the Federal Republic of Germany*

(237) Two important decisions by the Federal Court show that it is not always easy for foreign performers to obtain protection in the Federal Republic in view of the restricted scope and effectiveness of convention protection in the field of neighboring rights. In the first case, that of "Bob Dylan,"<sup>386</sup> the concern was for three records by this well-known American pop singer that had been published in Italy; it was not clear whether these were hootleg recordings of live concerts he had given in Italy or whether they were studio recordings made with his consent. Be that as it may, the Federal Court refused protection against the distribution of the relevant record album in Germany. Application of the Rome Convention was refused on the grounds that the United States of America did not belong to that Convention, whereby the Court did not examine the special ruling under Article 4 of the Rome Convention (place of performance). (The Federal Court corrected its approach in this respect in the second "Magic Flute" decision.) Neither the Universal Copyright Convention nor the earlier bilateral copyright treaty of 1892 between the German Empire and the United States of America were of application.

(238) The independent granting of a (limited) term of protection under Article 125(6) of the

<sup>385</sup> LG Berlin—16 O 673/86—of November 11, 1986, ZUM 1988, 139 (Ritter, p. 121).

<sup>386</sup> Cf. footnote 322; for the lower court—OLG Munich—cf. already the preceding "Letter," *loc. cit.* (footnote 1) paragraph 166 and footnote 274.

Copyright Law,<sup>387</sup> offered by German copyright law for all performances of foreign nationals, was held by the Federal Court to be likewise inapplicable since those provisions only applied to performances that had been given within the country. Protection against *dissemination of records made abroad* cannot be afforded for that very reason. An important aspect was that protection is also not available through Article 96<sup>388</sup> despite the fact that this provision normally contains a prohibition on the distribution of unlawfully manufactured copies in favor of performers as well. Likewise, the ruling was not covered by the provision under Article 125(6) of the Copyright Law. This meant that a foreign performer was only protected under Article 125(6) against the secret recording of his performance—which had to have been given within the country—but not against any further exploitation. The question whether the production carried out abroad was unlawful was therefore of no further account.

(239) Almost a year later, the Federal Court<sup>389</sup> had a further opportunity, in the “Magic Flute” case, to again take a stance on this problem of protection for foreign performers; in so doing it took into account the criticism that the specialists had leveled against the “Bob Dylan” decision.<sup>390</sup> Again in this case it had concerned a record edition manufactured in Italy of a performance of Mozart’s opera *The Magic Flute* conducted by the well-known conductor Herbert von Karajan. The performance had taken place in 1962 in Vienna and had been broadcast live by Austrian radio; the record version was based on a recording of that broadcast. Karajan further claimed that the sound was of low quality and of a technical standard that lay well below the usual level. Contrary to the lower court,<sup>391</sup> the Federal Court refused domestic protection in this case also despite the fact that all three countries involved, that is to say the Federal Republic of Germany, Italy and Austria, are indeed member States of the Rome Convention.

(240) It was the view of the Federal Court that the Rome Convention was nevertheless not applicable since at the time of the performance (the performance of the opera) Austria had not been a member of the Rome Convention and that for this purpose it was not the time of manufacture of the records in 1982, but the time of the initial fixation

on the phonogram in 1962 that was of importance. The Rome Convention was not applicable to performances given or fixations made before the date of its entry into force in the Federal Republic (October 21, 1966). The Federal Court further refused protection under Article 125(6), including the possibility of Article 96(1), of the Copyright Law, advancing the same, but more detailed, grounds as in the “Bob Dylan” case. Article 125(6), in conjunction with the provision of Article 121(6) which applied to foreign *authors*, constituted minimum protection that was reduced to the personality right core of neighboring rights and which, in addition, had as a prerequisite an infringement committed within the country as a compulsory result of the principle of territoriality. A foreign performer was only protected against those acts of use explicitly designated in Article 125(6) of the Copyright Law or against further acts of exploitation deriving from the infringer himself, but not against further exploitation by other parties who, for instance, reproduce and distribute the secretly-recorded performance.

(241) Likewise, there was no distortion under Article 83 of the Copyright Law, since the simple fact that it concerned the recording of a live broadcast with technical weaknesses does not mean that the recording can be deemed a distortion or impairment of the performance under Article 83. It is interesting, however, that the Federal Court—contrary to the “Bob Dylan” case—was not willing to exclude at least competition law protection in view of the alleged inferior technical quality of the recording. It was a fact that a competitor did not have to accept competition from his own performance in a manner that was damaging to his own reputation in a case where he himself did not consider the performance of a sufficient quality to be placed on the market. The case was therefore referred back to the OLG for examination of that issue.

(242) For the sake of completeness, I may mention again the settlement proposal made by the Arbitration Board for an inclusive contract in the GVL area.<sup>392</sup> In relation with the considerations already described as to the entitlement to administer on the part of GVL in respect, also, to foreign phonogram manufacturers and performers, the Arbitration Board gave interesting considerations on the effect for German law of the altogether different ruling in the United States of America for the protection of phonograms. It is to be assumed in the present legal situation that phonograms manufactured in the United States enjoy protection under the Rome Convention (Articles 4 and 5(2)) already

<sup>387</sup> As regards the protection of performers under Articles 74, 75, first sentence, and 83 of the Copyright Law, i.e., in particular, protection against direct recordings or radio broadcasts of performances and against the distortion of performances.

<sup>388</sup> Cf. in this respect paragraph 229.

<sup>389</sup> Cf. footnote 323.

<sup>390</sup> Cf. particularly Krüger, GRUR Int. 1986, pp. 381 *et seq.*

<sup>391</sup> Cf. footnote 323.

<sup>392</sup> Cf. footnote 316.

in view of the international involvement of the phonogram industry, despite the fact that the United States has not acceded to the Rome Convention. This and other considerations led to the result that GVL administered, with a high degree of probability, a comprehensive domestic and foreign repertoire.

#### Conclusion

(243) It is to be hoped that the preceding analysis of the numerous and frequently significant decisions of German courts was able to demonstrate the dynamic development of copyright in the Federal

Republic of Germany. It was necessary to describe the four subsystems of today's copyright (substantive copyright law, copyright contract law, the law of collecting societies and the law of neighboring rights) and the way in which they dovetail with the provisions on penalties and with the law of the Berne Convention in order to illustrate the true dimensions of those problems and their economic relevance. Of the numerous groups concerned by copyright, may the group of authors as the creators of works and the large group of creative workers as a whole be given a greater chance than was hitherto the case.

*(WIPO translation)*

## Calendar of Meetings

### WIPO Meetings

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

**1990**

**May 28 to June 1 (Geneva)**

**Committee of Experts on the International Protection of Geographical Indications**

The Committee will examine a document prepared by the International Bureau of WIPO on the need for a new multilateral treaty on the international protection of geographical indications and its possible content.

*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 Certain Provisions in Laws for the Protection of Inventions**

This consultative meeting will, on the basis of a working document prepared by the International Bureau of WIPO, study problems of particular relevance to developing countries in connection with the preparation of a treaty supplementing the Paris Convention as far as patents are concerned (patent law treaty).

*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 supplementing the Paris Convention as far as patents are concerned (patent law treaty).

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

**June 19 to 22 (Geneva)**

**Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned**

The Meeting will prepare the organization of the diplomatic conference which will be convened to negotiate and adopt a treaty supplementing the Paris Convention as far as patents are concerned (patent law treaty).

*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 a draft trademark law treaty.

*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 22 to 26 (Geneva)** **Committee of Experts on the Settlement of Intellectual Property Disputes Between States (Second Session)**  
The Committee will examine principles for a possible multilateral treaty.  
*Invitations:* States members of the Paris Union, the Berne Union or WIPO or party to the Nairobi Treaty and, as observers, 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 26 to 30 (Geneva)** **Working Group on the Application of the Madrid Protocol of 1989 (Second Session)**  
The working group will continue to study Regulations for the implementation of the Madrid Protocol of 1989.  
*Invitations:* States members of the Madrid Union, States having signed or acceded to the Protocol, 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.
- December 10 to 14 (Geneva)** **PCT Committee for Administrative and Legal Matters (Fourth Session)**  
The Committee will continue the work 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**  
(dates and place to be confirmed) **Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned**  
This diplomatic conference will negotiate and adopt a treaty supplementing the Paris Convention as far as patents are concerned (patent law treaty).  
*Invitations:* To be decided by the preparatory meeting to be held from June 19 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**  
(dates and place to be confirmed) **Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (Fifth Session)**  
The Diplomatic Conference is to 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 26 (Geneva)** **First Preparatory Meeting for the Revision of the UPOV Convention**  
*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.
- April 27 (a.m.) (Geneva)** **Consultative Committee (Forty-First Session)**  
The Committee will examine a number of questions related to the functioning of the Union, in particular the preparations for the revision of the UPOV Convention.  
*Invitations:* Member States of UPOV.
- April 27 (p.m.) (Geneva)** **Council (Ninth Extraordinary Session)**  
The Council will advise Czechoslovakia in respect of the conformity of its laws with the provisions of the 1978 Act of the UPOV Convention.  
*Invitations:* Member States of UPOV.
- June 25 to 29 (Geneva)** **Second Preparatory Meeting for the Revision of the UPOV Convention**  
*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.
- October 15 and 16 (Geneva)** **Third Preparatory Meeting for the Revision of the UPOV Convention**  
*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.
- 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 for the Revision of the UPOV Convention.  
*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental and non-governmental organizations.

**1991**

March 4 to 19  
(dates and place to be confirmed)

**Diplomatic Conference for the Revision of the UPOV Convention**

*Invitations:* Member States of UPOV and, without the right to vote, States members of the United Nations not members of UPOV as well as, as observers, certain 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 7 to 13 (Budapest)

International Confederation of Societies of Authors and Composers (CISAC): Congress

**1991**

April 22 to 29 (Aegean Sea)

International Literary and Artistic Association (ALAI): Congress



