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

Copyright

27th year – Nos. 7-8
July-August 1991

Monthly Review of the
World Intellectual Property Organization (WIPO)

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ISSN 0010-8626

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ECUADOR

The Government of Ecuador deposited, on July 8, 1991, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, and amended on October 2, 1979.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, will enter into force, with respect to Ecuador, on October 9, 1991. On that date, Ecuador will become the 86th member of the International Union for the Protection of Literary and Artistic Works ("Berne Union").

Ecuador will belong to Class VII for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 134, of July 9, 1991.

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The Government of Gbana deposited, on July 11, 1991, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, and amended on October 2, 1979.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, will enter into force, with respect to Ghana, on October 11, 1991. On tbat date, Ghana will become the 87th member of the International Union for the Protection of Literary and Artistic Works ("Berne Union").

Ghana will belong to Class VII for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 135, of July 11, 1991.

MALAWI

The Government of Malawi deposited, on July 12, 1991, its instrument of accession to the Berne Convention for tbe Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971, and amended on October 2, 1979.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on October 2, 1979, will enter into force, with respect to Malawi, on October 12, 1991. On that date, Malawi will become the 88th member of the International Union for the Protection of Literary and Artistic Works ("Berne Union").

Malawi will belong to Class S for tbe purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 136, of July 12, 1991.

Withdrawal of Declaration Concerning Article 33(1) of the Paris Act (1971)

CZECHOSLOVAKIA

The Government of Czechoslovakia deposited, on June 11, 1991, a notification by which it withdraws the declaration which, in 1980,* it made concerning Article 33(1) of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

Berne Notification No. 133, of June 14, 1991.

* See Berne Notification No. 97, of January 11, 1980, in *Copyright*, 1980, p. 84.

Correspondence

Letter from Austria

Robert DITTRICH*

I. Legislation

Since my previous "Letter from Austria,"[1] the Austrian Copyright Law has been amended twice, namely by the 1988[2] and 1989[3] Amending Laws. Additionally, the Semiconductor Protection Law[4] contains a provision dealing with the relationship between the protection of semiconductors and copyright. I shall deal with these provisions not in their chronological sequence but in a systematic order that corresponds to the structure of the Copyright Law.

1. Article 25 of the Semiconductor Protection Law reads as follows:

The commercial exploitation of topographies shall not be affected by copyright in works of literature under Article 2(3) of the Copyright Law (BGBl. No. 111/1936) and neighboring rights for photographs under Article 73 of the Copyright Law.

The following comments on the Government Bill for this Law[5] (in which the corresponding provision was identical) are altogether apposite in my view[6]:

It has been suggested that under existing law microchips may in certain circumstances enjoy protection under various provisions of the Copyright Law (Auer, "Der Schutz von Micro-Chips nach inländischem Recht," *EDV und Recht*, 1987, No. 2, p. 20):

first as copies of a computer program incorporated in the circuitry of a microchip where the program enjoys copyright protection as a work of literature;

secondly as copies of the graphic representation on which the microchip is based where such representation is a work of literature under Article 2(3) of the Copyright Law (that is, a work of a scientific or educational nature which consists in a pictorial representation in two or three dimensions, unless it counts as a work of art);

thirdly as copies of a photograph within the meaning of Article 73 of the Copyright Law if a photographic or similar process within the meaning of that Article is used in the manufacture of the microchip.

In the latter two cases, protection derives directly from the outward form of the semiconductor product—as does the special protection considered appropriate in the Bill, that is, the topography within the meaning of Article 1(1). It would be unsatisfactory if protection under the Copyright Law could continue to be claimed alongside the special protection under the Bill, which makes the generation of the right subject to a grant and registration procedure and which sets particular material and time limits on the scope of protection; copyright arises without formality and affords considerably longer terms of protection than semiconductor protection.

Legal security for those concerned, which the Bill creates with the requirement of an application for the topography and its entry in a semiconductor register, would be lost if it had to be accepted that copyright protection arising without any formality could continue to be asserted.

Moreover, the circles concerned will have no further need to enjoy copyright protection once special protection, as provided for in the draft and which they themselves have demanded, has been introduced.

Although the legal situation is not clear, owing to a lack of court decisions on the question of microchip protection under the Copyright Law, the Bill considers it necessary, in the light of the above considerations, specifically to exclude, in Article 25, the possibility of such dual protection.

This exclusion concerns all topographies and is not limited to those that might qualify for semiconductor protection. It would be obviously unjust if topographies with original features were excluded from copyright, while for others that did not possess originality the protection of copyright, more extensive than semiconductor protection, could be claimed. In such cases protection under Article 2(3) of the Copyright Law would of course hardly apply; the lack of originality is in any event no obstacle to protection as a photograph, as such protection does not have an original form requirement.

On the other hand, the exclusion of protection under the Copyright Law refers solely to the commercial exploitation of the topography within the meaning of the Bill. What that means is that protection for other types of exploitation according to the Copyright Law—what one might call "classical" exploitation—is maintained, and applies for instance to the publication of a representation of a topography, which constitutes a work under Article 2(3) of the Copyright Law, in a manual, or to photographs of a layer of semiconductor material hung on the wall for demonstration purposes or for decoration.

The relationship between semiconductor protection and copyright protection for computer programs is quite different. The Bill aims, as its Article 1(2) clearly states, to protect only the external form and not the content, for instance a program incorporated in the semiconductor product. Copyright protection of a computer program, on the other hand, does not relate to the

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[1] *Copyright*, 1987, p. 169.

[2] *Bundesgesetzblatt* (BGBl) (Federal Law Gazette) 1988, No. 601.

[3] BGBl 1989, No. 612.

[4] BGBl 1988, No. 372.

[5] 586 in the annexes to the Verbatim Minutes of the National Council, 17th Legislature.

[6] *Ibid.*, pp. 12 and 13.

external form (in the topography sense) in which the program is incorporated in a semiconductor product. It is not therefore dual protection for the same subject matter, but multi-layer protection, which is quite common in copyright. The following illustration could be used: if a painter uses a poem, in other words a work of literature, to create a picture, giving the text a particular pictorial form by special arrangement of the characters and the color scheme, copyright in the poem as a work of literature and copyright in the picture as a work of art exist in parallel (as in the painting by Paul Klee, *Einst dem Grau der Nacht enttaucht*).

Anyone wishing to incorporate a copyrighted computer program in a semiconductor product therefore requires, under the Copyright Law, the consent of the person holding the rights in the program. On the other hand, copyright in the program does not alone give entitlement to exploit commercially a topography in which the program is incorporated where the topography enjoys semiconductor protection.

These explanations given in the comments appear to me to be of basic significance for other related legal systems; should not such general considerations also lead to copyright protection of semiconductor topographies? In my view, for those other legal systems, there arises the question of how to interpret the silence on the part of the semiconductor protection lawmakers in relation to copyright.

2. Article 16(3) of the Copyright Law, which governs exhaustion of the right of distribution, used to read, until it was changed by the 1988 Amending Law—which entered into force on January 1, 1990, as did the changes under the 1989 Amending Law (Article II of the 1988 Amending Law and Article III of the 1989 Amending Law)—as follows:

> The right of distribution shall not extend to copies of the work that have been put into circulation by transfer of ownership with the consent of the person entitled thereto; however, where such authorization has been given only for a specified area, the right to distribute outside that area copies that have been put into circulation inside it shall not be affected.

The 1988 Amending Law replaced the full stop with a semicolon and added the following qualification:

> [T]his exception shall not apply to audio media put into circulation in a member State of the European Economic Community or of the European Free Trade Association with the consent of the person having the rights therein.

This amendment was based on the following considerations[7]:

1. Restriction of the general rule on exhaustion of the right of distribution contained in Article 16(3) of the Copyright Law makes it possible to justify territorially limited distribution rights with exclusive effect in relation to third parties: where the author agrees, for example, to the distribution of a work in another State, he retains the right to prohibit distribution of that work in Austria. It is thus possible for him to prevent what are known as parallel imports (parallel, that is, the distribution channels authorized by himself or his successor in title). The same applies also to the right of distribution in the field of neighboring rights.

This legal situation also exists in relation to the member States of the EEC and EFTA. In the case involving parallel importation of sound recordings—July 10, 1979 (ÖBl 1980, p. 25 = EvBl 1979, No. 242 = SZ 52, No. 114)—the Supreme Court held that the generation and exercise of authors' rights, in their broadest sense, were not subject to the Agreement signed between Austria and the EEC, at least insofar as the restrictions agreed to therein did not go beyond the content of the protected right. The European Court of Justice was however of the opinion that, on EC territory, it was not permissible under the EEC Treaty to prevent parallel imports by the exercise of authors' rights; that did not apply, however, to parallel imports from non-member States.

This legal situation is one of the main reasons why audio media are considerably more expensive in Austria than on EEC territory, particularly in Germany.

Both in the interests of Austrian consumers[8] and with a view to the continued alignment with the EEC sought by Austria, it is desirable that the prevention of parallel imports by copyright means should also be banned in Austria.

For works of other kinds, for instance audiovisual media (such as videos), this type of measure is not necessary since with them the exclusion of parallel imports does not have the same implications as with audio media.

Furthermore, the ruling should also apply for EFTA in order to avoid contradictory assessments.

2. The Bill achieves this by correspondingly restricting the scope of the exception contained in the second clause of paragraph 16(3) of the Copyright Law. For audio media put into circulation with the consent of the owner of rights in a member State of the EEC or of EFTA, the rule contained in the first clause of the present version (in the first sentence of the Bill)[9] will apply without restriction, and therefore the right of distribution will not apply to copies put into circulation by transfer of ownership with the consent of the holder of that right. Under what circumstances the right of distribution in such audio media would lapse therefore raises no new legal questions.

To avoid any misunderstanding over the scope of the new provision, however, various individual matters will be discussed:

(a) The question whether the right of distribution under Article 16(3) of the Copyright Law has lapsed can of course only be settled according to Austrian Copyright Law. It is therefore not sufficient for a copy to have been distributed in a member State of the EEC or EFTA under its law without the consent of the holder of rights, whether because the term of protection in that country is shorter than in Austria or because given groups of holders of rights (performers for instance) do not qualify at all for a right of distribution. Likewise, the question of the person to whom the right of distribution belongs and whose authorization is therefore required has to be settled according to Austrian copyright law. So within the purview of the new provisions too it is necessary in all cases, for the right of distribution to be exhausted, that the works have been put into circulation in a member State of the EEC or EFTA by transfer of ownership, that is, with the consent of the person to whom Austrian copyright law accords the right of distribution *for that State*. The effect of the new provisions is simply that any restriction of that authorization on the territory of the State concerned remains without effect, and that the right of distribution therefore also lapses for Austria.

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[7] Comments on the Government Bill (633 in the annexes to the Verbatim Minutes of the National Council, 17th Legislature), pp. 45 and 46.

[8] Cf. Hodik, "Reizwort 'Parallelimport-Verbot,' Sind Österreichs Musikproduzenten Preistreiber?" *Medien und Recht* (MR), 1987, No. 4, p. 120.

[9] The 1980 Amending Law made the original first clause into a separate sentence ending with a full stop in Article 16(3) of the Copyright Law.

(b) Since the restriction mentioned speaks in general of EFTA member States and does not make an exception for Austria, it therefore also applies within that country. It would be a misinterpretation to rule out the territorial apportionment of the right of distribution among certain foreign States, and to allow it to continue within the country.

(c) By decreeing the *mutatis mutandis* application of Article 16(3) of the Copyright Law in Articles 67(2), 76(6) and 76a(5) of the same Law, the new provisions also cover the right of distribution of the performer, the show, the phonogram manufacturer and the broadcasting organization without any further amendment to the Copyright Law being necessary.

In this way a "one-way street to Austria" has been opened, in the sense that Austria has unilaterally made a preliminary gesture.[10]

3. The provisions that have existed since 1980 on what is known as private cross-recording have been supplemented so that anyone who places recording material on the market or offers it for sale in Austria, commercially and for a consideration, but who is not the first person to do so, is liable for the appropriate remuneration of the holder of rights as guarantor and payer; anyone with a quarterly turnover of audio material representing not more than 5,000 hours of playing time and video material representing not more than 10,000 hours of playing time is exempt from liability. This addition introduced by the 1989 Amending Law thus provides for the joint liability of wholesalers and retailers. The report of the Judicial Committee of the National Council contains the following interesting comments on the interpretation of the new provisions[11]:

A quarter relates to the calendar year, i.e. January 1 to March 30 of a given year and so on. Also the exception from liability applies only when both prerequisites are satisfied, that is, when the stipulated limit is not exceeded for either audio or video material; if a dealer goes beyond that limit for only one of the two types of material, he bears liability for both types.

At the same time Article 87a of the Copyright Law, which regulates the right to claim a rendering of account, was supplemented so that the person who is liable as guarantor and payer as described above now must also state, to the person having the right, from whom he has obtained the recording material in cases where he has not paid the remuneration for the material.

This also applies correspondingly to those persons who are exempt from joint liability.

4. The 1980 Amending Law inserted in the Copyright Law an Article 59a which—to explain it simply—introduced a statutory license for the simultaneous, complete and unchanged retransmission of foreign broadcasts by cable.[12] In the meantime, a decision—which is not yet final—of the Higher Provincial Court of Vienna[13] holds that

...satellite programs are not to be considered foreign broadcasts. The Court justifies this statement by stating that such broadcasts are "not intended only for reception abroad."

It is further stated in the decision that

...since a satellite services foreign and domestic territory equally—irrespective of whether the signal is sent to the satellite from inside or outside the country—a broadcast via satellite is neither a "domestic" nor a "foreign" broadcast. Regardless of whether the signals emitted by the satellite are receivable for the public, this means that in any event there is no foreign broadcast, and that therefore application of Article 59a of the Copyright Law is not appropriate.[14]

This situation led members of the National Council from both of the coalition parties to introduce a joint initiative in the National Council with the aim of clarifying for satellite broadcasts the conditions under which they are to be considered domestic or foreign broadcasts, in view of the fact that the 1980 legislation obviously intended broadcasts to be either of domestic or foreign origin. In the light of recent case law it therefore seems that legislation should also define for satellite programs the conditions under which they are to be considered domestic or foreign programs. This is to be achieved by the initiative in question. In the meantime, broadcasts are not in any event to be considered "domestic" broadcasts where their distribution does not originate in Austria, that is, where the signals retransmitted by satellites do not originate within the country. It is further to be assumed that such foreign satellite programs can be received not only in Austria but also in other States. Finally, satellite programs are to be considered foreign programs only in cases where the Federal Constitutional Law on the safeguarding of broadcasts is not applicable to them and it is therefore not a matter—regardless of the location of the technical distribution—of broadcasting within the meaning of the Austrian legal system. Such programs would be subject to the special constitutional and general provisions of Austrian broadcasting law.[15]

During the parliamentary debate on this initiative, the Supreme Court[16] took the following decision:

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[10] Cf. Dillrich, "Die Annäherung Österreichs an die EG im Bereich des Urheberrechts," *Rundfunkrecht* (RfR), 1989, p. 1.

[11] 1114 in the annexes to the Verbatim Minutes of the National Council, 17th Legislature, p. 4.

[12] See my "Letter from Austria" in *Copyright*, 1981, pp. 81 (82).

[13] MR 1988, No. 3, p. 94.

[14] Report of the Judicial Committee of the National Council, p. 1.

[15] Reproduced in the Report of the Judicial Committee, p. 1.

[16] December 13, 1988, *Österreichische Blätter für gewerblichen Rechtschutz und Urheberrecht* (ÖBl), 1989, p. 26 = *Zeitschrift für Rechtsvergleichung*, 1989, p. 57 = *Zeitschrift für Urheber- und Medienrecht* (ZUM), 1990, p. 29 = *Wirtschaftsrechtliche Blätter* (WBl), 1989, p. 65 (with comment by Scolik).

(1) A broadcast does not constitute a "foreign" broadcast simply because the transmitter emitting the signals is located abroad. In view of the purpose of the provisions, it would have to be a broadcast that was intended exclusively for foreign territory, with any retransmission in Austria simply representing "marginal use." What is important is the "intended" area of distribution. Likewise, it is immaterial that a (non-coded) satellite broadcast may be received direct simply with a small installation technically and financially within the means of any person.

(2) A broadcast emitted from a ground station abroad is "used for a simultaneous retransmission, complete and unchanged" within the meaning of Article 59a of the Copyright Law only if the domestic cable operator receives the signals so emitted and feeds them into his cable network.

The major part of the statement of grounds reads as follows if one omits the quotations from legal literature:

What is meant by "foreign" broadcast in Article 59a of tbe Copyright Law canoot be deduced from tbe Law. Likewise, the preamble to tbe 1980 Copyright Amending Law contains no definition of this term; however, the observations on the aims pursued by the legislation instituting a statutory license are of valuable assistance: by the introduction of Article 59a of the Copyright Law the intention was to legalize the marginal uses of foreign television programs in the area of what is known as "non-intentional (unavoidable) spillover"—that is, the tecbnically unavoidable crossing of national frootiers by electromagnetic waves outside tbe direct reception area; wbat was involved was primarily tbe programs of tbe (public) television organizations of Austria's Germao-speaking neighbors (Germany and Switzerland). The retransmission of these programs in Austria, and also tbe up-and-coming commercial sector represented by the cable operators, appeared to the lawmakers—particularly for reasons of media policy—so important at that time that tbey actually wisbed to *facilitate* substantially the necessary *acquisition of rights* by iotroducing a statutory license. This stemmed from the realization tbat for individual cable operators to acquire all tbe necessary rights for tbe complete retransmission of such television programs by contract would often be altogetber impossible, and io any event very difficult, particularly since it appeared doubtful at best tbat tbe foreign broadcasting organizations involved would be at all willing or in a position to grant the necessary exploitation rights for the operation of cable systems io Austria, or at least to support Austrian cable operators in tbe acquisition of sucb rights.

An objective, teleological analysis of Article 59a of the Copyright Law, witb a view to determining tbe purpose of the statutory provisioo, therefore leads to tbe finding that the condition for a broadcast to be "foreign" cannot be satisfied simply by the fact that tbe transmitter emitting the signals is located outside tbe national territory of the Republic of Austria. Accordiog to the clearly perceivable will of the lawmakers, the statutory license uoder Article 59a of tbe Copyright Law is meant to operate only in cases where the retransmission of such a program over an Austrian cable system constitutes a simple *marginal use* of a television broadcast *intended exclusively for foreign countries*, with the attendant *difficulties of obtaining* the necessary *rights*. However, none of this applies io the case in point: the subject matter of tbe dispute is a (wire) retransmission of the RTL-Plus program that does not constitute exploitatioo of the uoavoidable spillover of a program emitted abroad and iotended for foreign countries, and therefore not a simple "marginal use" of the program in Austria, but the direct use of a satellite program also intended for Austria. The defendants used the program transmitted to them via the ECS 1 satellite with the express consent of the Luxembourg-based maker of tbe program; they are therefore also in a position to obtain tbe necessary rights for emission io Austria by contractual arrangement, witbout any need for the statutory license under Article 59a of tbe Copyright Law. In order to draw the line between a "domestic" and a "foreign" broadcast within the meaning of this provision, however, after what has been said above, one cao only refer to tbe distribution area that the maker of tbe program intended to supply. Where the emission of a television program is effected via a communication satellite—of which the ECS 1 satellite is one—the aim of also (or exclusively) supplying Austrian cable operators with the program concemed means that one cannot speak of a "foreign" broadcast within the meaning of Article 59a of the Copyright Law; the broadcast would only be "foreign" if the program concerned were intended exclusively for the territory of one or more foreign States—that is, only for a foreign service area and not for Austria—and if reception in Austria could then in fact be held to be a "marginal use" not govemed by contracts. However, satellite broadcasts—whether they travel direct or by means of a cable system—are receivable signals whose reception is (also) "intended" within tbe country; they can therefore not be "adjacent" foreign broadcasts within the meaning of Article 59a of the Copyright Law. The situation would also be exactly the same if the—non-coded—emission of tbe RTL-Plus program via the ECS 1 satellite were indeed—whether immediately or at some later stage—receivable with equipment technically and financially within the means of any persoo; indeed that actually would be a case of program distribution intended (also) for the general public in Austria, and so even less a "foreign" broadcast withio the meaning of Article 59a of the Copyright Law.[17]

This initiative was adopted, in amended form, by the legislative bodies; a new subdivision 4 has been inserted in the Copyright Law under the heading "Retransmission of satellite programs," comprising a single Article 59b and reading as follows:

Where a program that is not emitted from the national territory is retransmitted by satellite simultaneously, completely and uncbanged, works may be broadcast in the manner referred to in Article 17(2) with the consent of the organizer of the program; however, tbe autbor sball be entitled to equitable remuneration therefor. Such claims may only be asserted by collecting societies. Article 59a(2) shall apply for calculating the remuoeratioo.

The new rule assumes that the economic situation underlying the cable retransmission of broadcasts emitted from the ground and that of satellite programs is different. In the case of broadcasts from the ground, these are essentially programs of the public broadcasting organizations of Germany and Switzerland. Their hroadcasts are intended for reception in their own countries; the fact that they can also be received in Austria is due to the technically unavoidable overspill of electromagnetic waves across national frontiers. The foreign hroadcasting organizations have acquired full broadcast-

[17] See io particular Dillenz, "Anmerkuog zum Urteil des OGH vom December 13, 1988," ZUM 1989, p. 128.

ing rights only in respect of their own service areas; they have no contractual relations with domestic cable operators.

The position regarding the satellite programs currently retransmitted in Austria is different, however: they have been produced with the aim of being retransmitted by cable systems also here. Their inclusion in Austrian cable systems occurs under a contract between the foreign originating organization, which produces the program and emits it via satellite, and the domestic cable operators. The economic interest of concluding such contracts is primarily that of the originating organization, since the advertising revenue grows with the audience ratings. It can be assumed that the originating organization generally acquires the broadcasting rights for Austria also, and therefore agrees in the contracts to hold domestic cable operators harmless. Exceptions to this are mainly the rights administered by AKM (Society of Authors, Composers and Music Publishers) and which may therefore only be acquired direct from that society.[18]

As far as the scope of the new provision is concerned, the following may be said[19]:

1. As in Article 59a of the Copyright Law, the newly-incorporated Article 59h allows the domestic cable operator to carry out the wire distribution of works contained in a foreign satellite program without the consent of the author. Contrary to Article 59a of the Copyright Law, this statutory license requires the consent of the program organizer to the domestic cable broadcast.

The program organizer is to be understood as the person who decides which programs are to be emitted via the satellite. This corresponds to the definition of originating organization in the Brussels Satellites Convention.

The basic assumption—as already stated in the general part of the comments—is that the program organizer will have already acquired the greater part of the rights needed for broadcasting in Austria when the program is also intended for distribution in Austria, and will have also paid for them. What this means, then, is that the introduction of a statutory license under Article 59b of the Copyright Law only represents a restriction of legal position for those holders of rights of whom that is not true.

On the other hand, a domestic collecting society can only assert a claim to remuneration under Article 59b of the Copyright Law if the holders of rights have transferred to that collecting society, by representation agreement, the right to assert the claim, or if they are entitled to assert such claims on the basis of reciprocal agreements with foreign collecting societies.

2. The proposed rule adopts the criteria used in Article 59a for assessing equitable remuneration. However, this does not mean that the competence of the Arbitration Board provided for in Article III.§1(2), in conjunction with Article II(1) of the 1980 Copyright Amending Law, has also been adopted for disputes over such remuneration. The Bill deliberately avoids supplementing the catalogue of claims contained in Article II(1) of the 1980 Copyright Amending Law on which the Arbitration Board has to decide, with the claim under Article 59h of the Copyright Law.

So, according to Article 14 of the Law on Collecting Societies, which applies *mutatis mutandis* to the assertion of the claim to remuneration in question under Article II(1) of the 1980 Copyright Amending Law, an Arbitration Board will therefore have to decide in accordance with that provision.

3. According to the reference technique adopted in the Copyright Law, a reference to the new Article 59h is included in Articles 67, 74 and 76 of the Copyright Law, in such a way that the provision applies also to the broadcasting rights of performers, show organizers, photographers and phonogram manufacturers, *mutatis mutandis*.

4. In view of the program organizer's consent which is needed for the application of a statutory license, the rule has not been extended to the broadcasting rights of broadcasting organizations under Article 76a of the Copyright Law. Where broadcasting rights under Article 76a of the Copyright Law subsist in a satellite program (and Article 59b is not applicable), the consent of the (originating) broadcaster or of his successor in title is therefore always needed for a cable broadcast.

In addition, this also avoids conflict between the legal position of the broadcasting organization that makes use of a direct broadcasting satellite on the one hand and that of the originating organization within the meaning of the Brussels Satellites Convention (that is, one that makes use of a point-to-point or distribution satellite on the other). Whereas the rights of the former are restricted by a statutory license, those of the latter are maintained without restriction. The latter, namely the originating organizations within the meaning of the Brussels Satellites Convention, do not in fact possess any neighboring rights under Article 76a of the Copyright Law, as they are not broadcasting organizations within the meaning of that provision; so extension of Article 59b of the same Law to the broadcasting rights of the broadcasting organization cannot affect the latter's legal position at all. They do on the other hand enjoy protection on the basis of the Brussels Satellites Convention, which is applied in Austria by virtue of telecommunication law.

5. Article 59b of the Copyright Law intentionally does not speak of the retransmissioo of a (radio) broadcast, but of the retransmission of a (satellite) program, since emission via point-to-point or distribution satellites, both covered by the new provision, does not constitute a broadcast within the meaning of the Copyright Law. The term "program" has not yet been expressly used in the Copyright Law. It was however used in the report and motion of the Judicial Committee on the 1980 Copyright Amending Law, where it was said that the term was sufficiently established in Article 3 of the 1974 Broadcasting Law (BGBl 397); it was to be accorded the meaning given it in that statutory instrument. This applies also to Article 59b of the Copyright Law.[20]

5. There was a desire to compensate for the limitation of the right of distribution resulting from the amendment of Article 16(3) of the Copyright Law by making it easier for persons basically entitled to distribution in Austria to assert their claims. Even if they had lost the distribution rights in the audio material concerned, they could still (under reciprocal agreements with domestic collecting so-

[18] Report of the Committee of the Judicial Committee of the National Council, p. 3.

[19] *Ibid.*, pp. 4 and 5.

[20] This equating of point-to-point or distribution satellites with direct broadcasting satellites is consistent with the intentions of the Commission of the European Communities (see "Broadcasting and Copyright in the Internal Market," discussion paper of the Commission of the European Communities on copyright questions concerning cable and satellite broadcasts (November 1990)).

cieties) have an indirect royalty claim on the collecting society of the country of origin. To assert that claim they required information that they would not be able to obtain, or not without great difficulty, unless they filed a new information claim. The internationally connected phonogram manufacturers, for their part, also required this information for their internal corporate accounting.[21]

The 1988 Amending Law has therefore inserted a new Article 87b in the Copyright Law under the heading "Claim to information," which reads as follows:

> Any person who distributes on the national territory audio material in which tbe right of distribution has lapsed as a result of marketing in a member State of the European Economic Community or of the European Free Trade Association (Article 16(3)), shall be required to provide to the entitled person on request correct and complete information on tbe manufacture, content, country of origin and quantity of the audio material distributed. The claim to information shall belong to the person to whom the right to distribute the audio material on the national territory had been granted at the time of lapse.

The comments on the Government Bill[22] have the following to say as regards content and scope:

> 1. The content [of the audio material] means information on the recorded works, on the performers wbo have participated in the recording and possibly on the organizer (Article 66(5) of the Copyright Law); it sbould be possible to determine the rights involved on the basis of that information. It will generally suffice, to satisfy this claim, to state the manufacturer's catalogue number, since all furtber particulars are readily accessible by means of that information.
>
> 2. Country of origin means the State in which marketing bas led to lapse of the right of distribution.
>
> 3. The claim to information does not extend, in view of the purpose stated above, to the disclosure of the commercial cbannels through whicb the audio material has reacbed Austria. This would involve the risk of the entitled persons, particularly in the phonogram industry, attempting to block those commercial cbannels.

By means of a change to Article 90 of the Copyright Law, a three-year limitation was imposed on this claim to information.

6. The legal position of the holders of rights was further improved with respect to their actual assertion of the claim to appropriate remuneration for what is known as private cross-recording[23] in that the 1989 Amending Law provides for participation of the customs authorities in identifying imported recording material. That which is imported for free circulation, for pre-notified circulation for unspecific sale or for pre-notified storage in an open warehouse within the meaning of the customs provisions, must be informed accordingly by the person making the customs declaration, on a separate notification which gives the quantity, nature, playing time and trademark of the recording material together with the name and address of the person making the notification and the recipient of the material. These notifications are to be communicated to the relevant collecting society (Ordinance of the Federal Minister of Justice of January 9, 1990 (BGBl. No. 40)) that is, in the present contractual situation, Austro-Mechana—Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mit beschränkter Haftung (AuMe). Consignments that remain duty-free under customs regulations or do not contain more than 100 articles are exempted from notification.

Detailed implementing rules are given in the Service Instructions for Customs Offices Relating to Import Notifications under the Copyright Law.[24]

7. Article III of the 1980 Copyright Amending Law set up a nine-member Arbitration Board at the Federal Ministry of Justice. It has been called upon to settle disputes on claims under the Copyright Law provisions, claims of equitable remuneration for private cross-recording and for the simultaneous, complete and unchanged retransmission of foreign broadcasts by cable, and has moreover been in a position to issue sets of rules on the settlement of such claims.[25] Experience has shown since then that the Arbitration Board is less suited than the ordinary courts, because of the nature of its composition, to the conduct of proceedings that primarily concern the clarification of litigious subject matter and the production of an enforcement order. As long as it is not a matter of determining equitable remuneration (in accordance with general considerations) there is indeed no reason to remove such disputes away from the ordinary courts; the balance of interests that is to be sought in the composition of the Arbitration Board is only relevant for those questions.

The competence of the Arbitration Board has therefore been limited by the 1989 Amending Law to the settlement of this matter (by the issue of a notice of assessment). Since such disputes, as referred to in the current version of the provision, are of a civil character, the ordinary courts are therefore given jurisdiction without the fact having to be

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[21] Explanatory comments on the Government Bill (633 in the annexes to the Verbatim Minutes of the National Council, 17th Legislature), p. 46.

[22] *Ibid.*, p. 46, layout changed by the autbor.

[23] See footnote 12.

[24] *Amtsblatt der Österreichischen Finanzverwaltung*, 1990, No. 81, reproduced in Dittrich, *Urheberrecht*, 2nd edition, 1990 supplement (additional pages), pp. 44 *et seq.*

[25] See my "Letter from Austria" in *Copyright*, 1981, pp. 81 (98).

expressly stated.[26] This does not apply to proceedings that were already pending before the Arbitration Board when the Federal Law entered into force (Article III(2) of the Amending Law). This transitional provision has since lost its practical significance.

II. International Agreements

Article 2 of the Bilateral Agreement between the Republic of Austria and the Union of Soviet Socialist Republics on the Reciprocal Protection of Copyright is to be amended by a Protocol dated September 28, 1989, to read as follows[27]:

> Each Contracting Party shall apply the Universal Copyright Convention of September 6, 1952, to works or rights in works of nationals of the other Contracting Party regardless of when they were created and regardless of whether and if so when they were published. A work of a national of one of the Contracting Parties that has fallen into the public domain on the territory of that State on expiry of the term of protection shall not, however, obtain protection under this Agreement on the territory of the other Contracting Party.

The Austrian ratification procedure has been completed, but the Soviet procedure has not yet.

As for the scope of this amendment, the comments on the Government Bill have the following to say[28]:

> Both Austria and the Union of Soviet Socialist Republics are party to the UCC of September 6, 1952 (BGBl 1957/108), in other words to the Geneva Act of this multilateral Convention. The conclusion in Vienna on December 16, 1981, of the Agreement between the Republic of Austria and the Union of Socialist Soviet Republics on the Reciprocal Protection of Copyright supplemented the relations between the two UCC States in that, *inter alia*, retroactive application was provided for to a limited extent. Under Article 2 of the Bilateral Agreement each of the Contracting Parties applies the UCC also to works or rights in works of nationals of the other Contracting Party if they were created prior to May 27, 1973 (the date of entry into force of the UCC for the Soviet Union), but which at that time were not published either on the territory of one of the two Contracting Parties or anywhere else, unless, up to the entry into force of the Agreement, they were published as free works on the territory or the relevant other Contracting Party.
>
> The ground for the provision agreed for Article 2 was the fact that Article VII of the UCC is liable to be interpreted differently by the Contracting States with regard to retroactive effect, owing to differences in the English and French versions. The Austrian view is that the Convention is not applicable to works that have been created prior to its entry into force for a given Contracting State. The Soviet Union holds the contrary view, whereupon the compromise now appearing in Article 2 of the Bilateral Agreement was found.
>
> Under the new version,
>
> The UCC is also to be applied to works or rights in works of nationals of the relevant other Contracting Party regardless of when they were created and regardless of whether and if so when they were published. The only exception is a work of a national of one of the Contracting Parties that has fallen into the public domain on the territory of that State owing to expiry of its term of protection.[29]

III. Case Law

The number of decisions published and of general interest in copyright circles since I completed the manuscript for the last "Letter from Austria" is unusually large this time. I am therefore obliged to limit myself to a select few.

1. General

The owner of a building cannot invoke his ownership rights to prohibit the manufacture and commercial exploitation by others of postcards of the building; nor does he enjoy any claim on utilization.[30] A pertinent argument used in the grounds was a comparison with the free use of works under Article 54(5) of the Copyright Law[31]: if it is permissible to reproduce and distribute reproductions of works of architecture once the construction has been completed, or other works of art permanently located in a place used as a public thoroughfare without infringing copyright, then it must also be permissible to manufacture and distribute such pictures without infringing rights of ownership.

2. The Concept of the Work

(a) A single word—in this case the designation "radial" for goods—can never constitute a work of literature; such a work requires the existence of a linguistic structure that turns the assemblage of words into a work of literature. That is lacking,

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[26] Report of the Judicial Committee of the National Council, pp. 5 and 6.

[27] The version that is still currently valid is reproduced in Dittrich, *Österreichisches und internationales Urheberrecht*, 2nd edition, p. 760.

[28] 1181 in the annexes to the Verhatim Minutes of the National Council, 17th Legislature, p. 4.

[29] See Dittrich, "Zur Revision des bilateralen Urheberrechtsabkommens mit der UdSSR," RfR 1990, p. 53; Dittrich, "Die urheberrechtlichen Schutzfristen im der UdSSR," and at the same time an update: "Zur Revision des bilateralen Urheberechtsabkommens mit der UdSSR," RfR 1991, p. 31.

[30] Supreme Court (OGH) October 25, 1988, MR 1989, p. 23 = *Richterzeitung*, 1989, p. 277.

[31] This provision, with the introductory phrase added, reads as follows: "it shall be permissible:...(5) to reproduce, to distribute, to exhibit publicly using optical devices and to broadcast reproductions of works of architecture or other works of art permanently located in a place used as a public thoroughfare; but this shall not include the copying of a work of architecture or the reproduction of a painting or work of graphic art for the purpose of publicly locating them in a place of the kind referred to, or the reproduction of a three-dimensional work in the form of another three-dimensional work."

however, where only single words or brief sentences are involved.[32] This decision is entirely correct, since language is a living tbing. Thus, even new coinages must remain public property. Likewise, the combination of two words must remain free of protection if language is not to lose its fluidity. In the same way, the "white-haired revolver" (André Breton) or "sensitive ships" (Paul Klee) must not remain protected elements of a work. In my view, protection is only possible from a combination of three words onwards (which does not of course mean that any—unusual—combination of three words will of itself fall into tbe purview of protection).[33]

(b) The draft for a purchase contract drawn up by a lawyer using the usual books of standard clauses does not constitute an individual intellectual creation, for lack of the involvement of imagination and of structural expression and is therefore not a copyrightable work; what is missing is "that which clearly transcends the commonplace."[34, 35]

(c) The line "Full of life and full of death is this earth" (from the poem *The Song of the Earth* by Jura Soyfer) enjoys copyright protection in itself as part of a work of literature.[36]

The same applies to the line "A day as beautiful as today."[37]

(d) A computer program may also constitute a copyrightable work[38] on condition that the general requirement—that is, tbe presence of individual intellectual creation—is satisfied.[39] A computer program generally does bave the character of a work, however, because as complex software, it comprises several thousand programming steps and tbus affords considerable scope for individual expression, apart from whicb it has been developed by numerous specialists with a considerable expenditure of time and cost, and without the possibility of recourse to existing program components to solve the new problem.[40]

3. Exploitation Rights

(a) Article 17(1) of the Copyright Law establishes the exclusive right to "broadcast the work by radio or any similar method." A broadcast is any activity by means of which the delivery or performance of a work of literature, a musical or cinematographic work or a work of three-dimensional art, is made perceivable by means of electromagnetic waves to anyone within the range of those waves who makes use of suitable reception equipment. Whether or not the broadcast is in fact perceived is immaterial; it is sufficient that the possibility of so doing has been given. The fact that the Sky-Channel program, which originates in Britain, is received in Austria via the ECS 1 satellite and the Post and Telegraph Directorate in Vienna, and tben distributed over an Austrian cable network, makes it a "broadcast" and not a "rebroadcast."[41] The words "similar method" concern laser or gamma rays, for instance.[42]

Although the wording of Article 17(1) of tbe Copyright Law does not explicitly mention "tbe public," broadcasting operations are inherently public.[43]

(b) Tbe exploitation of a work by broadcasting takes place if enjoyment of the work by consumers is a typical feature. Where a broadcast is directed abroad, therefore, tbe broadcasting rights must be obtained for each country of reception.[44] The es-

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[32] OGH February 17, 1989, OBl 1987, p. 109 = WBl 1987, p. 129 = *Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivilsachen* (SZ), Volume 60, No. 26.

[33] As already in Dittrich, "Der urheberrechtliche Werkbegriff und die moderne Kunst," *Österreichische Juristenzeitung* (ÖJZ), 1970, pp. 365 (374).

[34] Cf. my comments in my last "Letter from Austria," *op. cit.* in footnote 1, p. 172, under II.1*(e)*.

[35] OGH February 22, 1989, MR 1989, No. 4, p. 34 = WBl 1989, p. 163 = *Anwaltsblatt*, 1989, p. 695.

[36] MR 1990, p. 228 = WBl 1990, p. 382 = ecolex, 1990, p. 679.

[37] OGH October 23, 1989, MR, 1991, p. 22.

[38] Higher Provincial Court (OLG) of Vienna, April 22, 1986, MR 1986, No. 6, p. 17 = *EDV und Recht* (EDVuR) 1986, No. 4, p. 34 (on the same subject, Wittmann in EDVuR 1986, No. 4, p. 2; OLG Vienna, December 12, 1985, MR 1986, No. 1, p. 22 = *Der Gesellschafter* (GesRZ), 1986, p. 102 – not yet final since in its decision of May 19, 1987, MR 1987, p. 135 (with note by Walter) = EDVuR 1987, No. 3, p. 3 (see also Wolff, *ibid.*, p. 6) = WBl 1987, p. 245, the OGH held that the copying of another's computer program and its distribution in order to compete with the aggrieved party's product was a case of parasitic exploitation and therefore unethical within the meaning of the Law on Unfair Competition, and left the question of copyright protection unanswered; the first instance decision was published in MR 1985, No. 5, archives p. 11.

[39] See, in particular, Röttinger, *Der Urheberrechtsschutz von Computersoftware in Österreich*, ÖJZ 1990, p. 33.

[40] See footnote 38.

[41] OGH February 4, 1986, ÖBl 1986, p. 53 = MR 1986, No. 2, p. 16 = RfR 1986, p. 35 = *Evidenzblatt der Rechtsmittelentscheidungen* (EvBl) 1986, No. 101 = *Juristische Blätter* (JBl) 1986, p. 320 = *Recht der Wirtschaft* (RdW) 1986, p. 177 = *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil* (GRUR Int.), 1986, p. 484 = ZUM 1986, p. 285 (first-instance decision published in MR 1985, No. 1, archives 14 = ZUM 1985, p. 331, second-instance in MR 1985, No. 3, archives 14 (Korn) = ZUM 1985, p. 566 = GRUR Int. 1985, p. 690).

[42] OGH June 17, 1986, ÖBl 1986, p. 132 = MR 1986, No. 4, p. 20 = JBl 1986, p. 655 = GRUR Int. 1986, p. 728 (second-instance decision published in MR 1986, No. 1, p. 21, first-instance in MR 1985, No. 3, archives p. 12).

[43] See previous footnote.

[44] OLG Vienna, November 30, 1989, RfR 1990, p. 21 = JBl 1990, p. 386 = RdW 1990, p. 118 = ecolex 1990, p. 146 = MR 1990, p. 22 = ZUM 1990, p. 569 = GRUR Int. 1990, p. 537, not final.

sence of the grounds for this decision reads as follows[45]:

The Law provides no reasons for making the place of broadcasting dependent on the technical process of sending the broadcast signal downwards. It cannot be assumed that it was the will of the lawmaker, when regulating the copyright problems of satellite television, not to be guided by the actually, and above all economically relevant place, namely the target audience, but to make the applicable substantive law exclusively contingent on the location decided by the broadcasting organization, which would then have had the possibility of choosing a location possessing a particularly low level of protection or even, in an extreme case, a State that was not party to the international copyright conventions. Such a connection already seems unsound since neither the extent of the appropriation of authors' rights (and the consequent hampering of the authors' exploitation of their works elsewhere) nor the advantage gained by the broadcasting organization through the appropriation of the rights depends on the location of the organization, but exclusively on the size of the target audience. It would therefore seem more appropriate to assume that the exploitation of a work by broadcasting takes place where the enjoyment of the work by the consumer typically occurs.

The appeal court therefore aligned itself with more recent doctrine (the so-called "Bogsch theory") which is based on the law of those countries in which the broadcasts are intended to be received.

As far as one can see, the Supreme Court has not yet concerned itself with this matter. In another context, however, namely the interpretation of "foreign broadcast" in Article 59a of the Copyright Law, it related the term to the "intended distribution area" (OGH December 13, 1988, ÖBl 1989, 26 = MuR 1989, 19). This approach would also seem suitable for resolving the present question. So, for broadcasts directed towards foreign countries, broadcasting rights must be obtained from the entitled person in each country of reception.

The arguments advanced against the "Bogsch theory" by advocates of the opposing view are essentially of a legal policy nature.

The Supreme Court decision is still awaited in this matter.[46]

(c) In the case of distribution by cable, assimilated by Article 17(2) of the Copyright Law to broadcasting, the unlimited nature of communication, which exists by definition in the case of wireless broadcasting, is not present. Apart from this difference, however, cable broadcasting also aims at a "wider" audience in that its effective area goes beyond an individual building or a complex of related buildings. The earlier legislator envisaged a "network of reception installations" with which an effect of breadth comparable to broadcasting could be achieved. Installations for a single building—even a big one—are not concerned. So, for instance the relaying of video films from a hotel installation to the individual rooms of the same hotel does not involve the cable broadcasting rights belonging to the author.[47] In the same way, the playing of videocassettes on a monitor in a sex shop for viewing in booths intended for one customer at a time is not affected by that right.[48] When determining the public character of a cable broadcast the existence of a plurality of reception installations has also to be taken into account.[49]

The source of a program in no way affects the definition of cable broadcasting.[50]

The Supreme Court has thereby made a distinction between a cable broadcast and a "public rendition...outside the place...where it occurs."[51]

(d) The existence of a public performance does not depend on the persons to whom the work is communicated all being in the same place.[52] The point is whether a work is made accessible to the public, and not the accessibility of the public place in which it can be heard and seen.[53] It is also immaterial whether or not the communication of the work takes place simultaneously, since today's technical storage and reproduction systems can use a copy to reach such a group of persons one after the other.[54]

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[45] The literal quotation has been shortened by omission of the bibliographic references.

[46] I have frequently put forward my own contrary view: cf. Dittrich, "Urheberrechtliche Probleme des Satellitenfernsehens," ZUM 1988, p. 359.

[47] OGH June 17, 1986, ÖBl 1986, p. 132 = MR 1986, No. 4, p. 20 (Walter, critical) = RdW 1986, p. 340 (principles only) = JBl 1986, p. 655 (Scolik) = GRUR Int. 1986, p. 728, Hodik (second-instance decision published in MR 1986, No. 1, p. 21, first-instance in MR 1985, No. 3, archives p. 12).

[48] OGH January 27, 1987, MR 1987, p. 54.

[49] OGH June 17, 1986, ÖBl 1986, p. 132 = MR 1986, No. 4, p. 20 = JBl 1986, p. 655 = GRUR Int. 1986, p. 728 (second-instance decision published in MR 1986, No. 1, p. 21, first-instance in MR 1985, No. 3, archives p. 12).

[50] See previous footnote.

[51] Cf. Article 18(3) of the Copyright Law: "Public delivery, performance and exhibition shall include the use of a radio broadcast for the public reproduction of the broadcast work by means of loudspeakers or other technical devices, as well as the public reproduction, by such means, of a delivery, performance or exhibition of a work outside the place (theater, hall, public square, garden, etc.) in which it takes place."

[52] OGH June 17, 1986, ÖBl 1986, p. 132 = MR 1986, No. 4, p. 20 (Walter, critical) = RdW 1986, p. 340 (principles only, with notes by Holeschofsky) = JBl 1986, p. 655 (Scolik, critical) = GRUR Int. 1986, p. 728 (Hodik, critical) – second-instance decision published in MR 1986, No. 1, p. 21, first-instance in MR 1985, No. 3, archives p. 12; OGH February 27, 1987, MR 1987, p. 54 (Walter) = WBl 1987 p. 127.

[53] OGH June 17, 1986, ÖBl 1986, p. 132 = MR 1986, No. 4, p. 20 (Walter, critical) = RdW 1986, p. 340 (principles only, with notes by Holeschofsky) = JBl 1986, p. 655 (Scolik, critical) = GRUR Int. 1986, p. 728 (Hodik, critical) – second-instance decision published in MR 1986, No. 1, p. 21, first-instance in MR 1985, No. 3, archives p. 12.

[54] OGH February 27, 1987, MR 1987, p. 54 (Walter) = WBl 1987, p. 127.

Where the significant factor is communication of the work to an ill–defined group of persons who are not connected by mutual personal relations, the fact that enjoyment of the work occurs in a private setting (in this case a hotel guest in his room) in no way changes the public character of the reproduction.[55]

This startling decision hy the Supreme Court means that the notion of sameness of place and time has been abandoned in the definition of public reproduction. The repercussions of this jurisprudence are still awaited.

4. *Utilization Rights and Authorizations*

(a) Where an organizer puts on modern dance and entertainment music without tbe authorization of AKM the result is that, with the high degree of probability required in matters of *prima facie* evidence, he has infringed the rights of AKM, which in the form of *petits droits* administers practically the whole world repertoire.[56]

(b) The utilization rights in works created by an employee in the course of his employment duties basically helong to the employer. Proof that the activity forms part of the employment duties has to be furnished by the employer. Uses not required by the employer remain the property of the employee. The scope of the authorization to use accorded to the employer is assessed on the basis of the intention of the parties at the time of conclusion of the employment contract and in the light of tbe corporate purpose of the undertaking.[57, 58]

(c) The publisber's right is generally an (absolute) right to utilize a work which may be independently invoked against third parties. To that extent the author is also excluded from utilization of the work. The person entitled to use the work can even prohibit the autbor from making adaptations, but not independent new creations.[59]

(d) The author's obligation of restraint can go beyond the scope of the right to use a work that bas heen afforded (right of puhlication) and implicitly relate also to another work. This presumes a close link between tbe two works. If the author deals with the same suhject matter in the new work, tbe two works must be individual and it must not be possible to confuse them; moreover, tbe subsequent work must not adversely affect sales of the earlier one. In particular tbe author of a work is not entitled to make a new edition of the work, even if with substantial changes, as long as the previous edition is not sold out. This applies even in the absence of an express agreement on tbe prohibition of competition, and also where the publisher's right is limited to one edition.[60]

(e) Relations under publishing contracts are permanent contractual relations, and as sucb may be terminated prematurely for compelling reasons.

A puhlishing contract is a special bond of trust, so the important reasons will for instance include circumstances that shake confidence in the loyalty and honesty of the other contracting party. In that event special care must he taken to consider the balance of interests and the nature and degree of the problem.

Premature termination can only be contemplated where it is either impossible or impractical to rectify the situation in any other way. As a rule, the other party must be required (in court if necessary) to fulfill the contract.

One important reason is when the publisher fails to take court action following infringement of a protected title. Confidence is not undermined by the fact of the song which infringes the rights in a title being included in the suhcontract of an Austrian publisher in which the contractual partner has a minority shareholding and acts as manager with sole authorization to sign.[61]

5. *Film Copyright*

(a) Exploitation rights in commercially produced cinematographic works helong to the film producer. However, any change in tbe cinematographic work, its title or the designation of authors, which under Article 21 is permissible only with the author's consent, requires the authorization of the authors so designated (Article 39(4) of the Copyright Law). The aim was to establish a clear–cut and secure legal situation.

Any person who has participated in tbe creation of a commercially–produced cinematographic work in such a manner that the overall nature of the work may be deemed to constitute an individual intellectual creation, may demand of the producer that he he named as an author in the film itself (and in the advertising of the cinematographic work). The question of the person wbo is to be regardcd as hav-

[55] See footnote 53.

[56] OGH April 12, 1988, ÖBl 1988, p. 165 = JBl 1988, p. 727 = RdW 1988, p. 353 = RZ 1988, p. 256 = MR 1988, p. 90 = ZUM 1988, p. 568.

[57] OLG Vienna, October 27, 1988, MR 1988, p. 199.

[58] Cf. Dittrich, *Arbeitnehmer und Urheberrecht,* particularly pp. 63 *et seq.*, cited as a reference in 1he decision.

[59] OGH May 5, 1987, MR 1988, p. 92 (with note by Walter).

[60] OGH June 14, 1988, MR 1988, p. 123 (with note by Walter) = (in part) WR 1988, p. 220.

[61] OGH June 16, 1987, MR 1987, p. 173 (with note by Walter); *ibid.*, p. 208 = SZ 60, No. 107.

ing made the creative effort that determined the overall nature of the cinematographic work is to be decided between the film producer and those involved; the person will normally be the director.

While the Law does not in any way specify the contents of the designation of authors, a simple statement that "photography and editing" were done by a particular person is not to be regarded as the designation of an author. Changes therefore do not require the consent of that person.[62]

(b) Where a production contract for an advertising film provides for the "assignment" of "exploitation rights of whatever nature" to the commissioning party, that is to be regarded as assignment of all exploitation rights (within the meaning of Article 40(1), first sentence, of the Copyright Law).

Where in the same contract the commissioning party leaves the "commercial exploitation of the production" to the producer, that is to be understood—in relation to the other provisions of the contract too—as the grant of an exclusive right to use the work.

Authorization to include excerpts from an advertising film (four sequences totalling four minutes and 10 seconds) in a documentary also constitutes a "commercial exploitation" even if in the case in point no remuneration was required (by the unauthorized commissioning party).

It cannot be considered a final declaration of consent if the person entitled to use the work has learned of the intended use and indeed indicated his agreement in principle, whereupon the contact (and conclusion of a contract) requested has not taken place. Where the person entitled to use the work objects to the use only after the film has been completed and a copy for broadcasting has been supplied to the ORF (Austrian radio and television broadcasting organization), that is not to be seen as either final approval or tacit waiver or abusive exercise of rights.

The application by analogy of provisions on the right of quotation that concern other categories of works to quotations from cinematographic works (film quotations) is open to question. In any event, one can only talk of a quotation if the complete or partial reproduction of a copyrighted work in another work clearly—that is, by giving the name of the work reproduced and of its author—serves the purpose of making reference to the work so reproduced within the later work.[63]

[62] OGH May 8, 1990, MR 1990, p. 189 (with note by Walter).

[63] OGH September 29, 1987, MR 1988, p. 13 (with note by Walter) = WBl 1988, p. 27.

6. *Bankruptcy of a Publisher*

A declaration of withdrawal made by the receiver appointed to administer the assets of a publisher does not result in the (retroactive) cancellation of a publishing contract; all that happens is that the implementation of the contract ceases and the other party can demand damages as a creditor in bankruptcy.

The fact that the implementation of the publishing contract ceases means that the author's free right of exploitation is restored. At the same time, the publishing rights of the receiver who has replaced the publisher also lapse in respect of the books still present in the bankrupt's estate; he may no longer distribute these stocks, and in particular may not remainder them, that is, sell them as a residual edition at a price that is usually well below the retail price.

The publisher (receiver) is under no obligation to sell off the remaining stocks without delay as waste paper after termination of the publishing contract, neither does the author have a corresponding right to demand their surrender at the waste paper price. On the contrary, the publisher (receiver) retains the right to hold currently unsellable stocks in the hope of subsequently obtaining a higher price. He must simply ensure that there is no distribution whatever, of any type, until the copyright lapses (Article 60 of the Copyright Law).[64]

7. *Free Uses of Works*

(a) The free use of works in the reporting of current events (Article 42a of the Copyright Law[65]) cannot be invoked by a person who reproduces and distributes representations of individual works at the preview of a forthcoming auction at which those works are to be sold. This type of free use concerns only reports on actual occurrences, that is, events that take place either at the same time as the report or shortly before, but not announcements of future devclopments or events.[66]

"Current events" within the meaning of this statutory provision are events that derive their appeal from their topical interest. It is not therefore a case of free use under this provision when a poster displayed in the entrance of a residential building is

[64] June 16, 1987, ÖBl 1988, p. 108 = SZ 60, No. 108 = GRUR Int. 1988, p. 519.

[65] This provision reads as follows: "Works perceptible to the public in the course of occurrences that are the subject of reporting on current events may be reproduced, disseminated, broadcast or used for public lectures, performances and presentations to the extent justified by the informatory purpose."

[66] OGH October 10, 1989, ÖBl 1990, p. 37 = EvBl 1990, No. 54 = MR 1989, p. 212 (with note by Walter).

deliherately photograpbed and subsequently used as an illustration in a magazine article that does not deal with "current events" (in the case in point it was an election poster).[67]

(b) The conditions governing permissible reproduction of individual passages from a puhlished work of literature, known as "minor quotations" (Article 46(1) of the Copyright Law) are only fulfilled if it is made clear that the quoted passage is taken from the work of another person. A quotation exists only if it is recognizable as such; if the reproduced passage is incorporated in tbe overall work without heing recognizable as a quotation, then it does not constitute a quotation.

According to Article 57(2) of the Copyright Law, the source of the quotation must also be stated. An incomplete statement of the source constitutes an infringement of this provision, whicb protects the author's personal rights. Where the quotation is nevertheless recognizable as such there is no infringement of exploitation rights.

A quotation is only recognizable if the fact of it being one is mentioned in a direct context (in this case with the quotation used as a title); explanations given later (in the work of literature) are not enough.[68]

(c) Contrary to "other works of three-dimensional art," the free use of already constructed works of arcbitecture does not require them to he located in a place used as a public thoroughfare.

There is nothing in the Law that says that free use under Article 54(5) applies only to the external appearance of huildings; the internal parts of a building, sucb as the staircase, the courtyard, an entrance ball, individual rooms, even porches and doors, also constitute "works of architecture."

Even what is known as "interior design"—relating to the design of rooms and comprising not only the selection of materials, tbe relative positions of walls, ceilings and floors, the application of color and tbe provision of natural and artificial lighting, hut also tbe furnishing and the fitting of special installations—has to be considered "architecture" within the meaning of Article 54(5) of the Copyright Law.

Where the designer takes care of the overall design of a room (particularly in residential or commercial premises), with the individual items of furniture and other objects being artistically matched both to each other and to the particular character of tbe individual room, this too must be considered a uniform work of architecture within the meaning of Article 54(5) of the Copyright Law. Since only the individual, overall design of a given room is concerned, it makes no difference whether the architect in the case in point has also built the room himself or whether the room designed by him is located in a building constructed by another architect.

Individually-designed furnishings, taken by themselves, are not "works of architecture" but other works of three-dimensional art within the meaning of Article 3(1) of the Copyright Law. However, owing to their connection with a given room forming part of a uniform work of art, they become at the same time an integral part of an individual creation in the field of interior design and therefore a "work of architecture" within the meaning of Article 54(5) of the Copyright Law. Insofar as they are reproduced, distrihuted, publicly displayed or broadcast in this form they are covered hy the free use provision in Article 54(5) of the Copyright Law; if on the other hand such furnishings are reproduced alone without any recognizahle connection with other furnisbings or the room around them, free use cannot as a rule be invoked.[69, 70]

The hallway of a residential building does not constitute a "place used as a public thoroughfare."[71]

8. Neighboring Rights of Broadcasting Organizations

The neighboring rights of a broadcasting organization serve to protect the organizational and technical work that broadcasting requires. Every broadcast is protected regardless of its content and independently of the individual creative character of the broadcast and tbe performance's competitive quality and worthiness of protection. The rights are property rights with no personal content.

Tbese neighboring rights cover not only whole broadcasts, but also relatively small (not completely unessential) parts of broadcasts. Two sentences in a news program that contain a complete concept within themselves are protected. Article 1(2) of the Copyright Law is applicable by analogy to neighhoring rights as a general principle of law.

The neighhoring rights of the broadcasting organization also cover use in an altered form.

The protection notably covers the right of reproduction and distribution. As in copyright, the right of distribution is not limited to use for commercial

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[67] OGH May 31, 1988, ÖBl 1989, p. 118 = MR 1988, p. 161.

[68] OGH July 10, 1990, MR 1990, p. 227 (with note by Walter).

[69] See footnote 31.

[70] OGH September 12, 1989, ÖBl 1989, p. 187 = EvBl 1990, No. 16 = ZUM 1990, p. 514.

[71] OGH May 31, 1988, ÖBl 1989, p. 118 = MR 1988, p. 161.

purposes. The manufacture of 972 records and the free distribution of some 100 copies infringes the reproduction and distribution rights of the broadcasting organization; it is not a case of reproduction merely for personal use.

The provisions on the right of quotation cannot be applied *mutatis mutandis* to neighboring rights.

The neighboring rights of the broadcasting organization do not affect the basic right of freedom of expression.[72]

(WIPO translation)

[72] OGH November 6, 1990, MR 1990, p. 230.

Letter from Bulgaria

Georges SARAKINOV*

In the wake of the great political changes that began in Bulgaria at the end of 1989, as they did in many other countries of Eastern Europe, two main innovations have been made in the provisions governing copyright.

The first was the adoption on March 30, 1990, of a Law amending the Copyright Law.[1] The second arose out of the promulgation of the Council of Ministers Decree No. 19, of February 13, 1991, on the remuneration of authors and performers, which entered into force on March 1, 1991.[2]

An underlying feature of both documents is the desire to make the regulatory system more democratic and to bring it closer to the standards of western Europe. It should be pointed out at once that the decisive step has yet to be taken. The draft of a new law has been presented to Parliament, but, as the supreme legislative body is overburdened with work, no one can say when (or indeed whether) it will become law.

The above-mentioned amendment of the Law in force is very limited in scope. Its aim is to lend more strength to the fight against piracy in the intellectual property field by introducing more severe sanctions in certain specified cases, namely:

(1) sale and rental of videocassettes or other video material on which films or other audiovisual works are fixed;

(2) public performance by any means of films or audiovisual works;

(3) diffusion to the public by cable of films and other audiovisual works;

(4) sale and rental of cassettes, disks and other sound media on which musical, dramatico-musical or literary works are recorded;

(5) sale and rental of any copies of publishcd literary, artistic and scientific works.

In all the above cases, if the use is madc without the written consent of the owner of the copyright or of a natural person or legal entity duly authorized by him, the guilty party is punished with a fine. In the event of a second or subsequent offense within a year of the previous condemnation, the fine is increased substantially and the offending object, together with the equipment that served for the commission of the offense, are confiscated and made over to the State.

It was thus necessary to add to the Law so that effective action could be taken against thc many private companies that had come into being with the transformation of society and had begun to distribute video films and sound recordings as well as copies of books, often with total disregard for copyright. The results of this amendment of the Law were quite considerable. In the months following its entry into force, more than 300 privatc phonogram producers and more than 50 distributors of video programs, who until then had of course been working illegally in copyright terms, entered into contracts for mechanical reproduction rights and began to pay royalties to the owners of the copyright. The first fines were also imposed. Those punished were video film distribution companies.

The second instrument, the Council of Ministers Decree of February 1990 on the remuneration of

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[1] Published in *Copyright*, December 1990, insert *Laws and Treaties*, text 1-01. The main law of 1951, as most recently amended in 1972, was published in *Copyright*, 1972, pp. 223-226.

[2] The Bulgarian text was published in *Durzhaven vestnik* No. 16, of February 26, 1991.

authors and performers, is far more important. It abolishes a large number of the administrative requirements that had been in force for decades and provided the legal hasis for quite heavy State intervention in the control of the relations between authors and performers on the one hand and users on the other. Such intervention, which is characteristic of all countries described until recently as socialist, could legally take a number of forms. First, the remuneration provided for in the contracts between the authors or performers and the users had to conform to the tariffs approved by the Council of Ministers. In most cases those tariffs provided for a minimum and a maximum amount, within the limits of which the parties could agree between themselves. Conventions that provided for amounts below the minimum or above the maximum were prohibited. When the royalties payable to authors were set in the tariffs in the form of a percentage, any increase in admission charges or in food and drink purchases in restaurants, cafés and discotheques did not automatically bring about an increase in the calculation hase. Generally authors could only receive remuneration in the cases expressly provided for in the tariffs, regardless of the provisions of the law. In other words it was not the law, but the will of the administration that determined the rights of authors. That situation, which corresponded to the totalitarian character that the State then had, had for a certain time a favorable influence on the process of creation and distrihution of literary and artistic works. It assured authors of a degree of security in the form of a guaranteed minimum, and obliged users to respect authors' rights. In countries with insufficient traditions in that area, such a period of State intervention could for a certain time be necessary and indeed useful. However, such excessive intervention tends gradually to distort the true purpose of copyright and actually hamper the creative process.

The second feature of the copyright system in force in Bulgaria until recent months was that authors could not freely assign their rights for the publication or any other use of their works abroad. They could do so only through an organization accredited by the State, namely in this case the Bulgarian Copyright Agency, known as JUSAUTOR. It was likewise mandatory for contracts for the "import" of rights to be concluded through it. Payments made under all these contracts were required to pass through the Agency. Authors were entitled to half the convertible currency received in their name abroad; the other half was paid to them in Bulgarian leva. For countries without convertible currencies, the currency problem played a large part in the import and export of copyright. Users could rely only on those currencies that were made available to them by the State. Under the regime of the planned socialist economy, where currencies were strictly centralized, that was the only means of access to foreign culture, but it could also be readily made into a hidden means of censoring culture imports in line with political considerations.

The new Decree No. 19 of February 1991 provides for a radical change on all the above points. First, it specifies that authors and the owners of neighboring rights may freely assign their rights in their works and performances within the country and ahroad, without need for any authorization. It also abolishes all existing tariffs and introduces the principle of the free determination of authors' and performers' remuneration by contract between the owner and the user. For the purposes of the Decree, "user" means any organization or company that brings the work to the notice of the public. The author or performer may negotiate with foreign users either direct or through a person chosen by him. In all cases currency received abroad belongs to him. The Decree also liberalizes the system of the "import" of copyright. Bulgarian users can henceforth negotiate with foreign authors either direct or through a freely chosen agent. If they do not have the necessary currency, they can acquire it on favorahle terms. Users who engage foreign performers have to procure the necessary currency themselves.

The abolition of all existing tariffs also had the effect of removing the prohibition on the incorporation of price increases in the calculation of the royalties payable to authors. A new tariff applies in cases where, according to the provisions of the Copyright Law, use of the work does not require authorization hy the author. In such cases, as there are no relations between the author and the user, only the State can specify the remuneration. In the present Law the new tariff refers to instances of legal licensing that concern ahove all the various forms of public performance, including radio and television. Remuneration is set in the form of a percentage of the users' income. For the organizers of concerts, the basis is the gross ticket revenue. For restaurants, cafés and discotheques it is the amount of profit and for broadcasting organizations, the amount of the proceeds. Up to now broadcasting organizations have rewarded authors on the basis of the fees paid by subscribers, but this system has proved rather unsatisfactory as the number of subscribers remains practically unchanged, while the volume of programs grows steadily.

One of the novelties of the new tariff is that it provides for the payment of royalties hy hotels that play music in their rooms. Here it is the profits that serve as the calculation base. Another novelty, perhaps even more interesting, is the introduction of a charge on blank cassettes used in the family circle.

This charge is five per cent of the wholesale price of each cassette produced in or imported into Bulgaria. The following are exempted from the charge:

(a) cassettes produced within the country but not intended for export;

(b) cassettes produced or imported for marketing in the form of prerecorded cassettes;

(c) cassettes purchased by broadcasting organizations for the purposes of their own broadcasts.

Of the total income from these charges, 20% is earmarked for the Ministry of Culture to be used for general cultural purposes. The balance has to be distributed as follows: 40% for authors, 30% for performers and 30% for the producers of programs, phonograms and videograms.

Clearly the Decree is a great step forward in the alignment of the Bulgarian copyright regime on thc legal principles of Western Europe; it not only establishes contractual freedom with minimum State intervention, but also introduces a charge on blank cassettes, which moreover benefits both authors and the owners of certain so–called neighboring rights. Some elements of protection of these latter rights are indeed appearing before the Law has even been amended. The charges on blank cassettes are of course also going to benefit authors abroad, in accordance with the Berne Convention, whereas foreign performers and the producers of foreign recordings will bave to await Bulgaria's accession to the Rome Convention. That accession naturally cannot take place until neighboring rights have won the protection of the Law.

By way of conclusion I should like to dwell for a moment on the part tbat will be played in the new regime by what today is the only copyright entity in Bulgaria, namely the Bulgarian Copyright Agency, or JUSAUTOR as it is known abroad. The new Decree, about which we have spoken at length, expressly defines JUSAUTOR's functions as follows:

(a) government body with competence in the copyright and neighboring rights fields which oversees the implementation of copyright legislation; liaison with international governmental organizations in tbat area; registration, at the request of authors, of still unpublished manuscripts, to afford proof of authorship; management of authors' rights that accrue to the Agency under the law in the absence of beirs when the term of protection has not expired;

(b) organization for the collective management of copyright and neighboring rights, where that power has been given to it by the owners or arises from a legislative or regulatory text;

(c) representative of authors for the conclusion of contracts assigning copyright or neighboring rights, where the owners of those rights mandate it accordingly. More specifically, the collection of *petits droits*, or royalties for non–dramatic musical performances, and blank cassette charges has been expressly entrusted to JUSAUTOR; in other arcas of the management of rights, including mechanical reproduction rights, and the rights in stage and literary works, it will have tbe same activities as bitherto, but without any monopoly: it is possible that other organizations will start to operate alongside it in these areas.

The Bulgarian Copyright Agency has itself undergone structural changes. It now has new regulations, which have been approved by the Minister of Culture. Under those regulations, the Agency is a nonprofit organization financed by royalties and commissions which acts as intermediary or representative for the collective management of copyright and neighboring rights, and it performs other functions entrusted to it by the State in that connection. It will be directed by an Administrative Council; two–thirds of the members of the Council will be elected by the General Assembly. The latter is composed of all the natural persons who have received from the Agency during the past year sums in excess of three times the minimum salary for the country in that same year. The remaining third will be composed of the representatives of organizations designated by the Minister of Culture. It is tbought that those organizations will be the Ministry of Culture itself, music publishing houses and associations or unions of authors or performers. The term of office of the Administrative Council is two years. The Council appoints the Director General, subject to approval of the appointment by the Minister of Culture; it approves the rules of distribution and the annual financial report, pronounces on questions of structure, etc. All these alterations to the status of the Agency will no doubt bring about the lasting democratization of its activity. As we can see, tbat activity is gradually freeing itself from State intervention and coming closer to the contemporary pattern for authors' societies in other modern countries.

(WIPO translation)

Calendar of Meetings

WIPO Meetings

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

1991

September 2 to 6 (Geneva)

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

The Committee will continue the preparations 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.

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 session every two years in odd-numbered years. In the 1991 sessions, the Governing Bodies will, *inter alia*, review and evaluate activities uodertaken since July 1990, and consider and adopt the draft program and budget for the 1992–93 hiennium.
Invitations: As membors or ohservers (depending on the body), States members of WIPO or the Unions and, as observers, other States members of the United Natioos and certain orgaoizations.

October 17 and 18 (Wiesbaden, Germany)

Symposium on the International Protection of Geographical Indications (organized by WIPO in cooperation with the Government of the Federal Republic of Germany)

The Symposium will deal with the protection of geographical indications (appellations of origin and other indications of source), at the national and multilateral level.
Invitations: States members of WIPO and certain organizations. The Symposium will he opeo to the public (against payment of a registration fee).

November 4 to 8 (Geneva)

Committee of Experts on a Possihle 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 ohservers, States members of WIPO oot members of the Berne Union and certaio orgaoizations.

November 11 to 18 (Geneva)

Working Group on the Application of the Madrid Protocol of 1989 (Fourth Session)

The Working Group will continue to study Regulations for the implementation of the Madrid Protocol.
Invitations: States members of the Madrid Unioo, 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.

UPOV Meetings

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

1991

October 21 and 22 (Geneva)

Administrative and Legal Committee

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

October 23 (Geneva)	**Consultative Committee (Forty-Fourth Session)** The Committee will prepare the twenty-fifth ordinary session of the Council. *Invitations:* Member States of UPOV.
October 24 and 25 (Geneva)	**Council (Twenty-Fifth Ordinary Session)** The Council will examine the reports on the activities of UPOV in 1990 and the first part of 1991 and approve the program and budget for the 1992-93 biennium. *Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

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

Non-Governmental Organizations

1991

September 30 to October 4 (Prague)	International Copyright Society (INTERGU): Congress
October 1 to 4 (Berlin)	International Federation of Reproduction Rights Organisations (IFRRO): Annual General Meeting
October 5 and 6 (Madrid)	International Literary and Artistic Association (ALAI): Executive Committee
October 7 to 9 (Salamanca)	International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting

1992

January 27 to February 1 (New Delhi)	International Publishers Association (IPA): Congress
October 18 to 24 (Maastricht/Liège)	International Confederation of Societies of Authors and Composers (CISAC): Congress