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# Copyright

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### WIPO 1991

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## WIPO Meetings

### International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961)

Intergovernmental Committee

Thirteenth Ordinary Session

(Paris, June 19 to 21, 1991)

#### REPORT

adopted by the Committee

#### Introduction

1. The Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961) (hereinafter referred to as "the Committee"), convened in accordance with paragraph 6 of Article 32 of that Convention and Rule 10 of the Rules of Procedure of the Committee, held its thirteenth ordinary session at Unesco headquarters in Paris from June 19 to 21, 1991.

2. The 12 member States of the Committee (Brazil, Chile, Colombia, Denmark, Finland, France, Germany, Mexico, Niger, Philippines, United Kingdom and Uruguay) were represented. The governments of nine States party to the Rome Convention but not members of the Committee (Austria, Czechoslovakia, Dominican Republic, Ecuador, El Salvador, Italy, Japan, Norway and Panama) and 31 States not party to the Rome Convention (Argentina, Australia, Bolivia, Bulgaria, Comoros, Côte d'Ivoire, Egypt, Greece, Guinea, Holy See, Hungary, India, Israel, Jamaica, Lebanon, Libya, Madagascar, Namibia, Nigeria, Poland, Portugal, Rwanda, Senegal, Soviet Union, Spain, Sudan, Syria, Thailand, United Republic of Tanzania, United States of America and Venezuela) were represented by observers.

3. Two intergovernmental organizations, the Commission of the European Communities (CEC) and the Council of Europe (CE), and nine international non-governmental organizations: Interna-

tional Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Federation of Actors (FIA), International Federation of Film Producers Associations (FIAPF), International Federation of Musicians (FIM), International Federation of the Phonographic Industry (IFPI), International Literary and Artistic Association (ALAI), International Music Council (IMC), International Publishers Association (IPA), attended the session as observers.

4. The list of participants is annexed to this report.

#### Opening of the Session

5. In the absence of Mr. N. Steinitz (United Kingdom), outgoing Chairman, Mr. J.M. Morfin Patraca (Mexico), Vice-Chairman of the Committee, opened the session in accordance with the provisions of Rule 9(1) of the Rules of Procedure of the Committee.

6. Ms. Milagros del Corral welcomed the participants on behalf of the Director-General of Unesco. The representative of the Director-General of ILO and the representative of the Director General of WIPO also greeted the participants and thanked Unesco for hosting the session.

#### Election of Officers

7. Following a proposal made by the delegation of Mexico and seconded by the delegation of

France, Mr. H. Wager (Finland), Mr. H. Castro Moreno (Colombia) and Mr. I. Diawara (Niger) were unanimously elected Chairman and Vice-Chairmen respectively.

#### Adoption of the Agenda

8. The provisional agenda (OIT/UNESCO/OMPI/ICR.13/1 Prov.) was adopted unanimously by the Committee, with the addition of an item concerning a request for the admission of an inter-governmental organization as an observer.

#### Request for Observer Status

9. The Committee, after considering the request submitted by the CEC to be invited to be represented at the Committee's sessions as an observer, decided to grant observer status to that organization.

#### States Party to the Rome Convention: State of Accessions, Ratifications and Acceptances

10. The discussions were based on document OIT/UNESCO/OMPI/ICR.13/2.

11. The observer from Japan recalled that his country had just acceded to the Rome Convention and informed the Committee that two amendments had been made to his country's copyright legislation in order to bring it into line with the provisions of the Rome Convention, and to increase the term of protection from 30 to 50 years and grant national treatment to foreign owners in connection with phonogram rental rights. He also stated that questions relating to the protection of works created by means of computer, computer-assisted translations and private copying of phonograms and videograms were currently being studied. Lastly, he expressed his thanks to the Secretariats of the three organizations for the assistance his country had received from them in connection with its accession to the Convention.

12. The observer from Australia informed the Committee that in 1989 a law protecting the rights of performers had been adopted and that an implementing regulation concerning these right holders was being prepared. As soon as the regulation came into force, his country would proceed to accede to the Rome Convention in the near future.

13. The delegate of Mexico said that a reform of national copyright legislation was under way in his

country with a view to bringing it into line with the provisions of the Rome Convention and to extending the term of protection to 50 years for the three categories of right holders concerned. He added that it would be desirable for the Secretariat to address an appeal to States not yet party to the Convention to accede to it as soon as possible. The delegate added that the national society of music performers proposed to organize a three-day meeting of representatives of societies administering performers' rights in Mexico City at a date to be determined later.

14. The observer from Israel informed the Committee that the new law adopted by his country's parliament now made it possible for Israel to consider accession to the Rome Convention.

15. The delegate of Colombia informed the Committee, in reference to the revision of his country's Constitution, that the principles relating to copyright protection had been maintained. Moreover, national legislation, which was currently being amended, included provisions which would strengthen penal sanctions against piracy.

16. The delegate of Germany drew the Committee's attention to the fact that, since the reunification of Germany, the Rome Convention and the national legislation of the Federal Republic of Germany applied throughout the newly constituted territory.

17. The observer from Spain said that her government had deposited an instrument of accession to the Rome Convention with the Secretary-General of the United Nations.

#### List of States not Party to the Rome Convention but Party to the International Copyright Instruments Mentioned in Article 24 of that Convention

18. The discussions were based on document OIT/UNESCO/OMPI/ICR.13/3.

19. The representative of the Director General of WIPO informed the Committee that since the preparation of the document, Guinea-Bissau had deposited its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works on April 18, 1991. The Convention would enter into force for that State on July 22, 1991.

20. The observer from Italy pointed out that the number of States party to the Rome Convention

was not high in comparison with those party to the copyright conventions. He suggested that the international non-governmental organizations should make more sustained efforts to encourage the governments of States not party to the Rome Convention to consider accession.

21. The observer from the CEC, after thanking the Committee for having granted his organization observer status, described recent developments within it concerning a proposed decision submitted to the Council of the European Communities which would oblige member States of the European Communities which had not already done so to accede to the Rome Convention before December 31, 1992. He added that a draft directive had been drawn up concerning rental rights and public lending rights in the field of copyright and neighboring rights, as well as certain other aspects of neighboring rights. Lastly, he stated that a number of improvements might be made to the text of the Convention at a later stage, but stressed that priority should be given to achieving wider accession before examining such improvements.

**States Party to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) and Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention): State of Accessions, Ratifications and Acceptances**

22. Discussions were based on document OIT/UNESCO/OMPI/ICR.13/4.

23. The observer from Greece reported to the Committee that a law that had entered into force on April 22, 1991 made it possible for his country to ratify the Satellites Convention.

**Report on the Three Organizations' Activities to Provide Assistance and Training for Developing Countries with a View to Promoting the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**

24. Discussions were based on document OIT/UNESCO/OMPI/ICR.13/5.

25. The representatives of the Director-General of Unesco and of the Director General of WIPO introduced the annexes to the document which concerned the activities of their respective organizations. The representative of the Director-General of ILO informed the Committee that, in the ab-

sence of assistance and training activities for developing countries, her organization had just published a study on the remuneration received by performers and producers of phonograms for the dissemination and public communication of phonograms. Two studies dealing with the status of performers had been undertaken by her organization on the basis of a recommendation of Unesco on the subject. She added that a tripartite meeting on the conditions of employment of performers was scheduled to be held in May 1992 under the aegis of ILO.

26. All the speakers thanked the Secretariat for its efforts to organize assistance, training and information activities for developing countries in the field of neighboring rights.

27. The observer from the United Republic of Tanzania stressed the importance of regional seminars on neighboring rights, and requested Unesco's support for cultural industries in order to broaden the distribution of intellectual works. He also suggested that correspondence courses in copyright and neighboring rights be organized.

28. With regard to training activities, the delegate of the United Kingdom and the observer from FIA emphasized the importance of addressing questions of copyright and neighboring rights together. The observer from FIA added that special attention should be devoted to neighboring rights in order to establish a fair balance between them and copyright.

29. The observers from Australia and Japan informed the secretariat that their countries were prepared to cooperate in training activities for developing countries. The observer from Australia expressed satisfaction that Unesco was holding an information seminar on copyright and neighboring rights for journalists, and suggested that Unesco contact member States interested in participating in the creation of a data bank on legislation, and legal doctrines and precedents involving copyright and neighboring rights.

30. The observer from Guinea thanked Unesco, WIPO and CISAC for offering assistance in organizing training seminars in his country.

31. The observer from Jamaica expressed his gratitude to WIPO for its assistance in framing his country's copyright legislation, and added that an administrative infrastructure was now needed.

32. The delegates of Brazil, Chile, Colombia, Mexico and Uruguay submitted a recommendation

calling for an increase in the means made available to Unesco in order to expand its assistance and training activities for developing countries, and seeking to promote the protection of the three categories of beneficiaries covered by the Rome Convention.

33. Following discussion, the recommendation, as attached to this report in Annex I, was adopted unanimously by the Committee.

**Information About, and Comments on, the Implementation of the Rome Convention Received by the Secretariat from the States Party to the Rome, Berne and Universal Conventions as well as from the International Non-Governmental Organizations Concerned**

34. The discussions were based on document OIT/UNESCO/OMPI/ICR.13/6.

35. The observer from FIM pointed out that performers were accorded less protection than other categories of owners of neighboring rights, the number of countries which had granted protection to producers of phonograms being approximately twice as many as those whose legislation afforded protection to performers. He stressed the role of the State in bringing about an equitable balance between the three categories concerned. For that reason and in view of the development of new technologies, he proposed that the possibilities of improving the protection established by the Rome Convention in respect of neighboring rights in general and the rights of performers in particular should be explored. In the light of that situation, he suggested that a working group be set up to examine such aspects before the Committee's next session.

36. A representative of the Secretariat stated that having regard to the progress of work on the preparation of the programs and budgets of the organizations concerned, it was not possible to accept that suggestion for the next biennium.

37. The delegate of France and the observer from Australia expressed their countries' regret at not having been able to submit, at the appropriate time, the comments requested by the Secretariat in its survey on the implementation at the national level of the Rome Convention. They nonetheless stated their intention to provide the relevant information at a later date.

38. The delegate of Mexico was pleased to note the importance of the findings of the survey re-

flected in document OIT/UNESCO/OMPI/ICR.13/6, and proposed that greater efforts should be made by the Secretariat to obtain as many replies as possible. He stated that it would be desirable for the item to remain on the agenda of the next session and for the Secretariat, in the meantime, to communicate to member States all the information on the subject that had been brought to its notice.

39. The delegate of Colombia stated that it would seem sensible to define the notion of neighboring rights more precisely and considered that exclusive rights should also be recognized for performers. He wondered whether it was possible to envisage the preparation of different instruments for each category of owners of neighboring rights.

40. The observer from IFPI stressed the importance of the new technologies, in particular digital recording, satellite broadcasting and cable distribution which gave direct access to recordings of original quality without acquisition in the form of purchase, rental, etc., of phonograms. These developments added a new dimension to uses previously considered as secondary and this new situation needed to be taken into account in the updating of the protection of neighboring rights. He supported the proposals made by some delegations for an examination of ways of improving protection of the three categories of beneficiaries under the Rome Convention. He hoped that this item would also be included in the agenda of the Committee's next session.

41. The observer from FIAPF said that, given the insufficient number of States party to the Rome Convention, any changes to the current system of protection of neighboring rights would be likely to discourage new accessions. Where audiovisual works were concerned, technological developments since the adoption of the Convention did not warrant any modification.

42. The Chairman, summing up the discussion, noted the wish expressed by several delegations for information to continue to be collected on the implementation of the Convention, so as to enable States that had not yet replied to the survey and States that had introduced legislation in the meantime to transmit information to the Secretariat for the next session. He added that the Secretariat could analyze that information, indicating areas where there appeared to be some shortcomings, mentioning new protection standards and outlining possible future developments. He noted that there was a consensus in the Committee in that regard.

## Other Business

43. The observer from Czechoslovakia said that despite the increased protection of the rights of performing artists and phonogram producers afforded by a recent law, the phonographic industry in his country was suffering heavy losses because of the large number of pirated cassettes coming from Poland. He asked the observer from Poland to request her government to take steps to halt these illicit exports as soon as possible.

44. The observer from IFPI said that to contain the problem of piracy that existed in Poland, the draft law currently being discussed there would have to be adopted and implemented.

45. The observer from India said that although his country had not yet acceded to the Rome Convention—a matter currently being considered—the rights of phonogram producers and broadcasting organizations were protected by copyright law.

## Adoption of the Report

46. The Committee unanimously adopted this report.

## Closure of the Session

47. After the usual thanks, the Chairman declared the session closed.

## ANNEX I

### Recommendation

#### The Intergovernmental Committee.

1. *Bearing in mind* the report submitted by the Secretariat of the Committee on the activities of Unesco, WIPO and ILO to provide assistance and training for developing countries with a view to promoting the protection of performers, producers of phonograms and broadcasting organizations;
2. *Noting* the importance of the activities carried out by Unesco in this area, that are not only of benefit to the sectors concerned in the developing countries but also represent general progress in relation to the protection of performers, producers of phonograms and broadcasting organizations;
3. *Also bearing in mind* the need for this work to be taken still further in view of the innovations resulting from technological modernization in that field, and *recalling* the importance of continuing to pay particular attention to the needs of developing countries;
4. *Invites* the General Conference of Unesco:
  - (a) to take into account and give due recognition to the exemplary and important activities of assistance and

training carried out by Unesco in developing countries with a view to promoting the protection of performers, producers of phonograms and broadcasting organizations;

- (b) to consider increasing the budgetary provision for those areas in the Organization's Programme and Budget for 1992-1993;
5. *Requests* the Director-General of Unesco:
    - (a) to transmit this recommendation to all member States of Unesco;
    - (b) to study, within the limits of the budget established by Unesco's governing bodies, the possibility of allocating further funds to the Organization's assistance and training activities in developing countries, aimed at promoting the protection of performers, producers of phonograms and broadcasting organizations;
  6. *Requests* the member States of Unesco and the Contracting States of the Rome Convention, taking into account the importance of Unesco's activity in the above-mentioned fields, to consider making voluntary contributions for this purpose.

## ANNEX II

### LIST OF PARTICIPANTS

#### I. Member States of the Committee

Brazil: M.M. Meirelles Nasser; I. de Freitas; J.C. Müller Chaves. Chile: G. Figueroa Yañez; R. Sanhueza. Colombia: H.A. Castro Moreno; N. Parra. Denmark: P. Schonning. Finland: H. Wager. France: H. de Montluc; F. Genton; S. Mory. Germany: K. Kemper. Mexico: J.M. Morfin Patraca; J. Neri Rendón; V. Blanco Labra. Niger: I. Diawara; A. Mahaman. Philippines: R.G. Manalo; D. Ongpin-Macdonald. United Kingdom: P. Britton. Uruguay: D. Espino de Ortega; R. Varela.

#### II. Observers

##### (a) States Party to the Convention which are not Members of the Committee

Austria: R. Dittrich. Czechoslovakia: V. Popelková; J. Karhová; D. Illík. Dominican Republic: E.L. Fernández. Ecuador: R. Ríofrío; L. Orcés-Pareja. El Salvador: L. Bloch. Italy: G. Aversa. Japan: M. Watanabe; D. Yoshida; K. Maekawa. Norway: B.O. Hermansen. Panama: J. Patiño.

##### (b) Other States

Argentina: C.A. Aldereté; L. Guinsburg. Australia: C. Creswell. Bolivia: A. Prudencia Claire. Bulgaria: D. Takova. Comoros: A. Saadi. Côte d'Ivoire: E. Miczanezo. Egypt: M.S. Salem. Greece: N. Papageorgiou; Guinea: O. Kaba. Holy See: L. Frana; P. Brun; P. Lambert. Hungary: G. Boytha. India: S. Jain. Israel: M. Ophir. Jamaica: M. Brown. Lebanon: B. Risk. Libya: M. Allablab. Madagascar: J. Rakotobé. Namibia: T. Shinavene. Nigeria: M. Ekpo; D. Omenai; Y. Lijadu. Poland: M. Romanska. Portugal: P. Cordeiro. Rwanda: R. Mutombo. Senegal: M. Mody Sagna; C.S. Diallo. Soviet Union: G. Ter-Gazariants; B. Kokine; G. Boundoukin. Spain: T.J. Díaz; L. Escobar de la Serna. Sudan: K.A. Abdalla; A. El Sayed. Syria: A.E. Saoud; M. Zouri. Thailand: S. Povatong. United Republic of Tanzania: C.C. Liundi; I.K. Bavu. United States of America: R. Oman; L. Flacks. Venezuela: M. von Braun de Karttunen.

*(c) Intergovernmental Organizations*

Commission of the European Communities (CEC): J. Reinbothe.  
Council of Europe (CE): G. Brianzoni.

*(d) International Non-Governmental Organizations*

International Confederation of Societies of Authors and Composers (CISAC): N. Ndiaye; D. Abramowicz. International Copyright Society (INTERGU): R. Talon. International Federation of Actors (FIA): R. Rembe; B. Hoberg-Petersen. International Federation of Film Producers Associations (FIAPF): A. Chauveau. International Federation of Musicians (FIM): J. Morton; Y. Burckhardt; Y. Akerberg. International Federation of the Phonographic Industry (IFPI): I.D. Thomas; N. Garnett; P. Fishet; D. de Freitas. International Literary and Artistic Association (ALAI): W. Duchemin; D. Gaudel. International Music Council (IMC): G. Huot. International Publishers Association (IPA): S. Wagner.

**III. Secretariat****International Labour Office (ILO)**

H. Sarfati (*Chief, Salaried Employees and Professional Workers Branch, Sectoral Activities Department*); R.A. Beattie (*Senior Research Officer, Salaried Employees and Professional Workers Branch, Sectoral Activities Department*).

**United Nations Educational, Scientific and Cultural Organization (UNESCO)**

M. del Corral (*Director, Book and Copyright Division*); A. Amri (*Senior Legal Officer, Book and Copyright Division*); E. Gucrasimov (*Legal Officer, Book and Copyright Division*); A. Garzón (*Programme Specialist, Book and Copyright Division*).

**World Intellectual Property Organization (WIPO)**

M. Ficsor (*Director, Copyright Law Division*); P. Masouyé (*Senior Legal Officer, Copyright Law Division*).



## Studies

### Legal Protection of Computer Programs in Chile

Dina HERRERA\*

#### 1. Introduction

In Chile, for a number of years there has been great interest in the creation of computer programs and, as a logical consequence, there has naturally been parallel interest in their legal protection. Up to this year, in the absence of any specific legislation or provisions, the protection of computer programs had been subject to legal interpretations of the ordinary principles of copyright.

This understandable concern regarding the situation of computer programs once they have been marketed or disclosed to persons who are not the authors or owners of rights therein was expressed in forums, specialized reviews, magazines, newspapers and in the course of our day-to-day work at the Register of Intellectual Property. In Chile, computer programs started to be written on a large scale in the 1980s. Currently, they are mostly created in universities and private enterprises and they are starting to be exported to other American countries.

The teaching of computer sciences is widespread and takes place in universities, as well as in secondary schools and institutes. It is a popular subject both with students and adults.

The above considerations led those responsible for national legislation to deal with the matter and to decree a number of special protection measures which are described below.

#### 2. Protection of National Programs

The history of legal protection of computer programs can be divided into three distinct stages:

- (1) up to 1985;
- (2) from 1985 to 1990; and
- (3) from 1990 to date.

During the first stage up to 1985, computer programs were not mentioned in the Law on Intellectual Property (No. 17.336 of August 28, 1970).<sup>1</sup>

This was only natural because the Law in force dated from 1970, a time when Chile was not involved in the creation of computer programs and still less in their protection. Nevertheless, during the period in question, they were entered in the Register of Intellectual Property when requested, on the basis of the possibility given to the Registrar to interpret the Law for administrative purposes, particularly since the list of intellectual works protected under the Law was not exhaustive but merely illustrative.

The second stage commenced with the adoption of Law No. 18.443 of October 7, 1985,<sup>2</sup> which amended Law No. 17.336, and specifically included computer programs in the list of registration fees, thereby signifying that such works were subject to the ordinary system of protection for literary works. In other words, the Law followed the principle of "assimilation of computer works to literary works," which at the time was the operative system in international protection.

During the third stage, as from March 1991, those responsible for national legislation included special provisions on the protection of computer programs in intellectual property law as a result of the adoption of Law No. 18.957 of February 22, 1990,<sup>3</sup> which amended the relevant provisions of Law No. 17.336. Chile has followed international legislative trends by deciding to protect computer programs under copyright rather than patent law, as originally envisaged but decided against for a number of reasons such as the long period of examination of industrial patent applications, the legal requirement of "novelty," the cost of granting patents, the risk of piracy due to publication of patents granted, etc., in comparison with the advantages under copyright, namely automatic protection of the work at the national and international levels, since works protected under copyright must only fulfill the requirement of originality for national and international protection in order to be effective, and entry in the Register constitutes only legal proof in the majority of countries.

\* Director, Register of Intellectual Property, Santiago.

<sup>1</sup> See *Copyright*, 1971, pp. 210 *et seq.*

<sup>2</sup> *Ibid.*, insert *Laws and Treaties*, June 1987, text 1-01.

<sup>3</sup> *Ibid.*, June 1991, text 1-02.

This discussion therefore appears to be definitively resolved and settled, particularly since those national laws that have incorporated protection of computer programs have done so within their respective intellectual property laws, with the exception of Brazil, which has adopted a special law on the protection of software, although it is based on copyright principles.

At present, protection of computer programs under patent law only appears practicable in very special cases in which the computer program is inseparably linked to a work subject to protection under patent law.

Countries that have adopted laws in this field can generally be placed in one of two groups: those countries which apply ordinary copyright law to programs as a result of the inclusion of one or two relevant articles in intellectual property laws; and countries which have instituted a special regime of protection for computer programs within copyright by including special provisions in their respective laws and, where appropriate, derogating from ordinary copyright law, for example, France, Spain and Japan.

Chile is situated in the first group.

In order to study the situation of computer programs in Chile, first of all a distinction must be drawn between national and foreign programs.

A national program is a program created by a Chilean author or by a foreign author domiciled in Chile, in accordance with the provisions of Article 2 of Law No. 17.336. This provision also places within the same category programs created by stateless authors or authors of unspecified nationality who have their domicile in Chile (second paragraph).

Foreign programs, on the other hand, are those created by foreign authors not domiciled in Chile and whose rights are governed by the international copyright conventions in force in the country in question. This group also includes stateless authors or authors of unspecified nationality who have their domicile abroad.

National computer programs are subject to the relevant provisions contained in Law No. 18.957, the ordinary copyright provisions on literary works contained in Law No. 17.336 and Law No. 18.443, as well as to national ordinary law, whether civil law, procedural law or any other applicable law.

In order to give this study a logical framework, we shall deal with the main aspects regarding computer programs in the following order:

#### Definition

Law No. 18.957 defines a computer program as

...a set of instructions for direct or indirect use in a computer for the carrying out of a particular process or the achievement of a

particular result, which instructions are embodied in a cassette, diskette, magnetic tape or other material medium.

The definition contained in the Chilean Law is similar to that in the majority of laws which define computer programs.

The Law then goes on to define what is meant by a copy of a computer program, namely:

...a physical medium containing instructions taken directly or indirectly from a computer program, and incorporating all or a substantial amount of the instructions constituting the said program.

In both these definitions, Chilean law draws the traditional copyright distinction between the work itself, meaning an original work created, and the medium on which it is fixed, in other words, the copies made of it.

Copyright not only distinguishes between the work itself and its physical medium, but also specifies the form in which the work is reproduced, which, according to the *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights*,<sup>4</sup> is:

The expression of the contents of a work in a reproducible manner. The work becomes identifiable and eligible for copyright protection through its form, which is, however, not to be confused with the enduring material expression of the same.

#### Protection

As already stated, under Chilean law a computer program automatically enjoys legal protection from the time of its creation, in other words, it must only be created for copyright protection to attach (Article 1 of Law No. 17.336). However, as mentioned above, in order to be protected a program must fulfill the general copyright requirement of "originality" applicable to literary and artistic works. If copying or plagiarism is alleged, it will be up to the judge to decide whether or not the requirement of originality has been met.

There is no international consensus on what is meant by originality of a computer program, which constitutes a major area of uncertainty that must be resolved since it is fundamental to protection of programs.

#### Registration

Computer programs can be registered in the Register of Intellectual Property in the same way as literary and artistic works. A number of national and foreign programs have already been registered, the latter generally prior to bringing an action for infringement in Chile. As stated above, registration constitutes a means of legal proof, but it is not a prerequisite to copyright since this dates from the actual moment of creation of the work.

<sup>4</sup> WIPO publication, Geneva, 1980, p. 122.

### *Term of rights*

As far as this aspect is concerned, computer programs are subject to the general copyright regime, with one exception laid down in Law No. 18.957.

Rights in a computer program, therefore, last for the author's lifetime and 30 years after his death, and belong to his heirs, assignees and legatees. The surviving spouse and certain female children are also given rights for their lifetime.

Law No. 18.957 contains provisions on the following special case regarding the term of copyright: when a computer program is made by employees of a legal entity in the course of their employment, the term of protection is 30 years from the date of first publication.

You might ask what happens once these terms have expired?

When these terms have expired, the program becomes freely available to any person; taking into account the useful life of such works, however, this provision is of little practical importance. The long term of copyright has been widely questioned, because the useful life of a computer program is estimated at approximately seven years.

### *Ownership*

Copyright provides for two owners of rights: the author, who is the original owner and from whom the author's rights derive, and owners of rights who have legally acquired the copyright from the author or other owners. The author's heirs are the owners of copyright acquired by inheritance after the author's death, as well as assignees, including publishers, who have acquired the rights transferred to them by the author or other owners.

The author is necessarily a natural person because he has created the work, but the owner of rights may be either a natural person or a legal entity, since both may acquire rights assigned to them by the author.

While this rule is valid for computer programs, Law No. 18.957 provides for two special situations which are not contrary to the principles of national copyright but are in accordance with the general spirit of the copyright law in force.

These situations concern programs created by employees of natural persons or legal entities in the course of their employment, and programs created as a result of a commission.

In the first case, the owner is the natural person or the legal entity that is the employer, and in the second, the rights are deemed to have been assigned to the person commissioning the work. In other words, in the former case there is transfer of ownership by operation of law, and in the second case a legal assignment takes place.

In both cases, parties may agree otherwise.

### *Assignment of the right of use*

As the title indicates, this is a situation in which the owner of rights authorizes use of a program, without transferring the copyright he possesses. This is called an "exploitation license." It is the objective for which the program was created, just as a book is written to be read, a film to be shown, etc.

In this connection, the Law specifies that the copying of a program done by the possessor or authorized by the legitimate owner does not constitute infringement provided the copy is essential for its use in a particular computer or for archival or backup purposes. Copies that do not meet these requirements are prohibited.

It is very difficult to define the requirement "essential" and, in my view, its meaning should be agreed to by the possessor of the program and the owner of rights so as to avoid any subsequent problems and, if these do arise, the matter should be brought before the competent judge.

### *Moral rights*

Copyright recognizes two types of rights to the author: economic rights and moral rights. The former are related to economic aspects of the work, such as the right of reproduction, publication, translation, etc. Moral rights are prerogatives attached to the person of the author himself as such and to the integrity of his work; for example, they include the right to recognition of authorship of the work, which prevails even when the rights have been assigned, the right to prohibit alterations of the work without his consent, etc.

This last right has been the subject of much discussion at the international level, due to the counterproductive effects its exercise might have in respect of an employer enterprise and remunerated author, taking into account the special nature of computer programs. To give one example, it would be illogical to prevent an enterprise from modifying or adapting a program to its needs due to opposition.

The Law establishes that moral rights are inalienable and that any agreement to the contrary is invalid; therefore, the assignment or transfer of rights by an author only relates to his economic rights.

Nevertheless, Law No. 18.957 provides that the adaptation of a computer program done by the possessor or authorized by the legitimate owner does not constitute infringement provided such adaptation is essential for its use in a particular computer and the adapted program is not used in any other way. The Law adds that copies of such adapted programs may in no way be transferred unless the

owner of the corresponding copyright has given prior authorization.

### *Sanctions*

Infringement of rights in a computer program is covered by the relevant part of Law No. 17.336, amended in 1985. In general terms, infringement is punishable by fines in the form of monthly accounting units and the minimum level of minor imprisonment.

### *Scope of protection of copyright in a computer program*

Of particular interest to the author or owner of rights in computer programs is to know which of its elements are protected and which are not, since computer programs involve prior or complementary work whose legal protection is uncertain.

This is not an easy question to answer, and as a solution the general provisions of copyright law have been applied since some of this work in itself constitutes work protected under copyright. In any event, the degree of protection for such work must be decided in each particular case.

### **3. Protection of Foreign Programs**

The Chilean Law states that a computer program created by a foreign author not domiciled in Chile is governed by the international conventions in force. These are principally the Berne Convention and the Universal Copyright Convention.

The Berne Convention dates from 1886 and its last revision took place in 1971. Therefore, it obviously does not include computer programs specif-

ically. Nevertheless, its list of protected works is not exhaustive and Article 1 lays down that "[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Article 2 adds that "[t]he expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain...such as books, pamphlets and other writings" adding a long illustrative list of examples of protected works.

Similarly, the Universal Copyright Convention of 1952, as revised in 1971, does not contain an exhaustive list of works protected by copyright.

In my view, both Conventions contemplate the inclusion of new forms of protected works of a literary, artistic or scientific nature that might emerge as a result of cultural developments.

Moreover, copyright allows the protection of some types of works which are not purely artistic but which also have a utilitarian purpose, for example, works of architecture and applied art. In addition, a large number of countries already protect computer programs under copyright. Therefore, we consider that the relevant conventions can be interpreted to include computer programs. This has already been made clear in Chile where the courts have granted protection to foreign programs.

Nevertheless, we believe that it would be appropriate to revise the Conventions to specifically include computer programs as protected works under special provisions. Such provisions are already included in the draft model provisions for national laws, the objective of which is to harmonize the approach of national legislations and the Berne Convention.

*(WIPO translation)*

## Correspondence

### Letter from Lesotho

#### The Copyright Order No. 13 of 1989

Teboho KIKINE\*

#### 1. Introduction

When Lesotho attained independence from Britain in 1966 the copyright law in force at the time was the Copyright Proclamation of 1912 (chapter 93). As a law extended throughout territories under British rule it was known as the Imperial Copyright Act.

Though the Act provided for protection of the copyright rights during the life of the author and 50 years after his death, it was limited in scope as it did not provide for a wider protection of various categories of creators such as broadcasters, filmmakers, producers of phonograms and audiovisual material. Furthermore, this law did not take into account special circumstances prevailing in Lesotho nor was it responsive to the cultural needs and aspirations of the Basotho people.

There was, therefore, an urgent need to replace the Imperial Copyright Act by a modern law which could accommodate not only the technological developments but could respond to the cultural needs and aspirations of the Basotho people. Lesotho has not only a wealth of cultural heritage but possesses authors and artists of distinction who require protection not only within the confines of Lesotho but within the Southern African subregion where there is a free interchange of literary and artistic works.

The Imperial Copyright Act was repealed by the Copyright Order No. 13 of 1989, which came into force on August 1, 1989. It is worthy of note that Lesotho acceded to the Berne Convention for the Protection of Literary and Artistic Works on June 27, 1989, and subsequently became a member of the Berne Union on September 28, 1989. The new copyright law is, therefore, in consonance with the spirit and thrust of the Convention in most of its provisions.

Whilst the Ministry of Law with its department of the Registrar General worked on the draft of the new law in conjunction with WIPO, the implementing body is the Ministry of Tourism, Sports and Culture.

#### 2. Works that Qualify for Protection

Though Part I of the Copyright Order is a definition section, it itemizes under "literary, artistic and scientific" a wide range of works to be protected by copyright. These categories include the following:

- (a) books, pamphlets, theses, etc.;
- (b) lectures, addresses and sermons;
- (c) dramatic works;
- (d) musical, vocal and instrumental works;
- (e) choreography and pantomimes;
- (f) cinematographic works;
- (g) paintings, drawings;
- (h) photographic works;
- (i) works of applied art, handicrafts;
- (j) illustrations, maps, three-dimensional works relative to technology and science.

It must be noted that not all the works listed in Part I of the law have been mentioned here.

#### 3. Requirements for Protection

Although the law does not provide for formality of registration, one of the conditions for protection is that the literary, artistic and scientific works should be original (section 3(1)). However, there is no requirement that the work be fixed i.e. that it should be presented in a form of recording if it is a musical work, or be in printed form if it is a book. In terms of section 3(2) works are to be given protection irrespective of their form or the purpose for which they were created. Protection cannot, therefore, be denied simply because a work has been poorly presented. The purpose of this provision is

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\*\* See *Copyright*, May 1990, insert *Laws and Treaties*, text I-01.

basically to encourage originality and creativity. Furthermore, there is no requirement for novelty as it is the case under the Industrial Property Order of 1989, where it is a major requirement for registration and protection of patents, designs and utility models.

#### 4. *Derivative Works*

Whilst protection is given to original works immediately after their creation by the author, the law also extends protection to translations, adaptations, compilations, anthologies and other works which are known as "derivative works." Also included in this category are works inspired by expressions of folklore.

In terms of section 4(2) protection of these derivative works is without prejudice to the protection of preexisting works of folklore used in the making of such derivative works.

#### 5. *Works Inspired by Expressions of Folklore*

A special mention has to be made that though works inspired by expressions of folklore are categorized as derivative works, their protection is of special significance to Lesotho because there has been a variety of works which derive their inspiration from expressions of folklore, for instance literature and music based on folk tales and poetry.

#### 6. *Application*

In terms of the general provisions of the Order (section 38) this law applies to works of authors who are nationals of Lesotho, or whose habitual residence is Lesotho. It also applies to works first published in Lesotho irrespective of the nationality or residence of their authors.

With regard to expressions of folklore the requirement is that they should have been developed and maintained in Lesotho. Section 38(7)(b) introduces an element of reciprocity as regards protection of expressions of foreign folklore. It is provided that such works shall be protected if the country or community from which they emanate grants similar protection to expressions of folklore developed and maintained in Lesotho.

The reciprocal provisions on foreign folklore are intended to encourage a free exchange of ideas originating from traditional artistic heritage, between communities with different cultural values.

The principle of reciprocity is also extended to unpublished works and works first published in a foreign country (section 38(7)), provided that country where a foreign author resides grants simi-

lar protection to unpublished works produced by Lesotho nationals or first published in Lesotho.

#### 7. *Matters Excluded from Copyright Protection*

Categories of works which are excluded from protection comprise court decisions or rulings given by administrative bodies, news of the day either through radio broadcast or other media, and mere communications of facts and data, for instance weather reports and statistics. The rationale behind these provisions is to allow for objective reporting of news and a free flow of information.

#### 8. *Substance of Copyright*

Since an author or artist should enjoy both recognition for his work and be able to derive some material benefit from the work, sections 7 and 8 of the Copyright Order deal specifically with his economic and moral rights respectively.

#### 9. *Economic Rights*

Subject to the right of the government to control publication, presentation or circulation of a work to maintain public order, the owner of a copyright work has the exclusive right to authorize reproduction of his work, public performances, broadcasting, adaptation, translation or any transformation of the work (section 7). Since the rights are pecuniary in nature the author is able to earn a living if they are effectively protected.

Whilst this section is silent about assignment or transfer of economic rights, in section 15 of the Order it is specified that they could be assigned entirely or partly.

There appears to be no provision for what is known as "*droit de suite*" which literally means "the right to follow" a work. An example of this is the right of the author to demand proceeds of sales from dealers or at public auctions.

#### 10. *Moral Rights*

Unlike the economic rights under section 7, moral rights provided for in section 8 are inalienable and not transferrable (section 8(2)). After the death of the author they are exercisable by his heirs. This concept is derived from the continental European approach.

The author is entitled to claim authorship for his work but he cannot claim this acknowledgment if a

work is merely mentioned in reporting current affairs by means of photography or audiovisual recordings.

The author is also entitled to object to distortion, mutilation or any derogatory acts which may be prejudicial to his honor or reputation (section 8(1)(b)).

### 11. Concept of Free Use

Like all other legislations which seek to strike a balance between the rights of a copyright owner and the interests of the general public who are the users, the Copyright Order permits the concept of free use. It does recognize that in a number of instances consent of the author, as well as remuneration, could be dispensed with for *bona fide* purposes. A few of the examples of free use which is permitted in section 9 are mentioned hereunder:

- (i) reproduction, translation, etc. for personal and private use e.g. photocopies;
- (ii) quotations whose source is acknowledged by the user and which are compatible with fair practice and made to an extent which is justified by the purpose;
- (iii) illustrations in publications, broadcasts, distribution by cable and for teaching purposes in schools, universities, etc.

The limitations placed on the author's exercise of exclusive rights encourage the users to derive some benefits from the work particularly if it is used for purposes of learning.

### 12. Duration of Copyright

Rights in copyright are protected during the lifetime of the author and for 50 years after his death. For works produced by coauthors the period of protection is the lifetime of the survivor of the authors and 50 years after his death.

For works which are either anonymous or published under a pseudonym the term of protection is 50 years from the date of lawful publication. However, if for some reason the identity of the author or authors is revealed, the normal term of protection for an author or joint authors applies.

For both cinematographic or audiovisual works economic rights are protected until 50 years expire from the date of making such works. For photographic works and works of applied art, the term of protection is 25 years from the date of making.

### 13. Ownership of Copyright

In terms of section 14(1) ownership in both the moral and economic rights belongs in the first

instance to the author or authors who made the work jointly. If there is no proof of ownership the work is deemed to belong to the person who is acknowledged therein.

In a contract of service or employment the economic rights in a work belong to the employer in the absence of any contractual provisions to the contrary.

As regards cinematographic works there seems to be no provision in the law for ownership of copyright.

### 14. Inheritance Provision

In terms of section 14(5) the rights in copyright shall be inherited in terms of the Administration of Estates Proclamation 1935, the Law of Inheritance 1873 and the Interstate Succession Proclamation 1953. These provisions do not appear to take into account the dual structure of the legal system in Lesotho. The aforementioned acts are applicable where parties are married by civil rites whereas if parties are married by customary law the customary rules are applied. The effect of this provision would, therefore, be application of the civil law of inheritance where a person who is married by customary rites appears to own a copyrighted work.

### 15. Transfer of Rights

Since copyright is personal, movable property, economic rights may be assigned in whole or in part in terms of section 15(1). Any assignment of a right has to be done in writing and signed by both the assignor and the assignee.

There are, however, limitations to assignments or disposition by will. The owner could in terms of section 15(3) make the assignment to apply to certain acts over which he has exclusive right to control, or part of the term of protection, or to a specified country.

The effect of the assignment provisions is that the receiver becomes the owner of the copyright assigned to him either as a whole package or in relation to a specific right. He can, therefore, be sued or take legal action in connection with such a right.

### 16. Licensing

Whilst the owner of copyright retains ownership he may in terms of section 16(1) transfer his rights by means of a license enabling users or interested persons to acquire rights for a specific purpose. The conditions of such contracts are to be laid down by the Minister in the regulations (section 16(1)).

The rights conferred on the user shall be non-exclusive unless they have been granted explicitly as exclusive. The licensee has the right to take legal action for an infringement of an exclusive right conferred on him.

### *17. Works in the Public Domain*

In terms of section 18 the Registrar for copyright matters has power to authorize reproduction, broadcasting, translation or other acts mentioned in section 7 for works which are in the public domain. Such works include those whose term of protection has expired, works whose authors have no successors in title and works whose owners have renounced copyright (section 18(2)).

Since expressions of folklore are part of the national heritage their utilization has to be authorized by the Minister responsible for copyright in terms of section 19(1).

### *18. Establishment of a Society of Authors and Artists*

The law provides for the establishment and composition of a Society of Authors and Artists which shall be responsible for the promotion and protection of the interests of authors, artists and performers who are its members (sections 31 and 32).

The Society which shall be a non-profit-making body corporate shall maintain a register in which work productions and associations of authors, artists and performers shall be recorded. In Lesotho the establishment of this Society is long overdue. Now that the law has been passed an infrastructure for such an organization is urgently needed.

### *19. Registrar of Copyright*

Whilst the law does not provide for formalities of registration of copyright it appoints a Registrar within the public service whose functions would be to examine the register, records and books of the Society of Authors and Artists. He is also responsible for the collection and distribution of any royalties accruing from expressions of folklore.

Since the implementing Ministry is the Ministry of Tourism, Sports and Culture, the Registrar's office should be within the Ministry.

### *20. Civil Remedies and Sanctions*

In terms of section 36(1) any person whose rights have been infringed could approach the court

for civil damages. He could apply for an interdict restraining further use of the infringing copies by the aggressor. He could also seek an order for damages. Any objects made in the process of infringement shall be forfeited to the State.

The Copyright Order also makes it a criminal offense for any person to violate the copyright of others and one of the penalties is five years imprisonment or a fine of M12,000. Offenses range from utilization of expressions of folklore without the authorization of the Minister to obstruction of the Registrar in the exercise of his duties (section 37(7)).

In order that these provisions should be effective, an awareness exercise is required to inform judicial officers, law enforcement agencies and customs officials about the importance of copyright and the need to combat acts of piracy.

### *21. Protection of Performing Artists, Producers of Phonograms and Broadcasters*

Part IV of the Order has specific provisions for the protection of performers (sections 24 and 25), producers of phonograms (sections 26 to 28), and broadcasting organizations (section 29). The rights enjoyed by these categories are known as "neighboring rights"; whilst a separate act could have taken care of the protection of these rights, their inclusion in the copyright law has provided a convenience for the users of the law to have everything in one package.

The rights enjoyed by performers include the right to authorize broadcasting or distribution by cable of their performance (section 24(1)). Producers of phonograms also have the right to authorize distribution of their phonograms to the public (section 26(1)(c)). As regards broadcasting organizations anybody rebroadcasting or distributing by cable their entire broadcasts or parts of them has to be authorized (section 29(1)).

### *22. The Role of the Ministry of Information and Broadcasting*

Under section 30(2) the Ministry of Information and Broadcasting has the power to issue licenses for the reproduction of duplicates of phonograms where such phonograms are for educational or scientific research, provided they are distributed in Lesotho and there is a remuneration for the phonogram producer.



### *23. Duration of Protection for Neighboring Rights*

The period of protection for performing artists is 20 years from the end of the year in which performance took place (section 24(5)). Producers of phonograms are entitled to equitable remuneration for 20 years from the end of the year in which the phonogram was initially made.

### *24. Application*

It must be noted that in terms of section 38 protection of performers under this law is available where the performer is a national of Lesotho and the performance took place in Lesotho and is fixed in a phonogram qualifying for protection.

In the same manner the producer of a phonogram must be a national of Lesotho and the phonogram should have been first fixed into sound in Lesotho. With regard to broadcasters, the headquarters of the organization given protection has to be in Lesotho and the broadcast transmitted from a transmitter in Lesotho.

### *25. Conclusion*

Modernization of the copyright law has been greatly appreciated by government departments dealing with matters related to preservation of culture and national heritage. The task which lies ahead is dissemination of information to the public about the law and its importance. The law should emerge as an effective means of protection of the rights in copyright within Lesotho, whilst Lesotho's accession to the Berne Convention should ensure protection of works by Lesotho authors within the Southern African subregion and abroad.

It is also hoped that the establishment of a Society for Authors and Artists will not only ensure that the law is implemented effectively but will help preserve the integrity of the works that are protected by this law. Since licenses for translation and reproduction are placed under ministerial control, authors and artists who often enter into contracts with publishers in a weak bargaining position are also assured of effective protection, provided the copyright law is correctly applied.

## Calendar of Meetings

### WIPO Meetings

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

1991

- 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 undertaken since July 1990, and consider and adopt the draft program and budget for the 1992-93 biennium.  
*Invitations:* As members or observers (depending on the body), States members of WIPO or the Unions and, as observers, other States members of the United Nations and certain organizations.
- 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 be open to the public (against payment of a registration fee).
- November 4 to 8 (Geneva)**      **Committee of Experts on a Possible Protocol to the Berne Convention (First Session)**  
 The Committee will examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content.  
*Invitations:* States members of the Berne Union and, as observers, States members of WIPO not members of the Berne Union and certain organizations.
- 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 Union, States having signed or acceded to the Protocol, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.

### 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 inter-governmental 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

