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Contents

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Notifications Concerning Treaties Administered by WIPO in the Field of Copyright

WIPO Convention

Accession

LITHUANIA

The Government of Lithuania deposited, on January 30, 1992, its instrument of accession to the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, and amended on October 2, 1979.

Lithuania will belong to Class C for the purpose of establishing its contribution towards the budget of the WIPO Conference.

The said Convention, as amended on October 2, 1979, will enter into force, with respect to Lithuania, on April 30, 1992.

WIPO Notification No. 155, of January 31, 1992.

Normative Activities of WIPO in the Field of Copyright

Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works

Second Session

(Geneva, February 10 to 17, 1992)

QUESTIONS CONCERNING A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

PART II*

MEMORANDUM

prepared by the International Bureau

Table of Contents

* See Part I of the memorandum submitted to, and the report of, the first session of the Committee in the February 1992 issue of this review, pp. 30 to 53.

Taking into account that both Part II of the memorandum and the report of the second session of the Committee are voluminous, they have to be published in two consecutive issues. Part II of the memorandum is published in this issue, while the report will be published in the April 1992 issue.

INTRODUCTION

1. In accordance with the program of WIPO for the 1990–91 biennium (document AB/XX/2, Annex A, item PRG.02(2)), a Committee of Experts has been convened from November 4 to 8, 1991, for its first session to examine questions concerning a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Berne Convention" which, unless expressly stated otherwise, means the 1971 Paris Act of the Berne Convention). This memorandum has been prepared for that Committee of Experts (hereinafter referred to as "the Committee").

2. The program item referred to in the preceding paragraph reads as follows:

> "The International Bureau will prepare, convene and service a committee of governmental experts in one or more meetings in order to examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content, with a view to submitting for adoption the draft of such a protocol to a diplomatic conference after 1991. The protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies.
>
> "The need for such an exercise lies in the fact that there are certain questions in respect of which professional circles have no uniform views and, what is of particular concern in inter-

national relations, even governments which legislated or plan to legislate on such questions seem to interpret their obligations under the Berne Convention differently. Such discrepancies in views already surfaced, or are likely to surface in the lear future, in respect of certain subject matters of protection (e.g., computer programs, phonograms, computer-generated works), certain rights (e.g., right of rental, public lending right, right of distribution of copies of any kind of works, right of display), the applicability of the minima (no formalities, term of protection, etc.) and the obligation of granting national treatment (without reciprocity) to foreigners. In this connection, it will also be examined whether countries whose national law protects subject matters as works under their copyright law, or recognize the protection of certain rights in their copyright law, may refuse the application of the minima or the granting of national treatment to foreigners or make the protection of foreign works or the application of certain rights to foreigners dependent on reciprocity."

3. The expression "protocol" (to the Berne Convention) is used tentatively. Whether the new instrument, if any, will be called a protocol or by another name (for example, "Treaty Supplementing the Berne Convention for the Protection of Literary and Artistic Works") is not yet decided. In any case, the new instrument would be a multilateral treaty under Article 20 of the Berne Convention, which provides that "[t]he Governments of the countries of the [Berne] Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." In other words, the new instrument—that from here onwards is called a Protocol—could not contain provisions that would diminish the rights of authors existing under the Berne Convention.

4. This memorandum is issued in two documents.

5. The first document (document BCP/CE/I/2) has been distributed as the basis of the discussions in the first session of the Committee convened for November 4 to 8, 1991.

6. That document proposes, in its Chapter I, entitled "Applicability of the Berne Convention" that the possible Protocol should be open only to countries that are party to the Berne Convention and that the said Protocol apply also in respect of works whose country of origin is a country party to the Berne Convention but not party to the Protocol. Furthermore, in its Chapter II, entitled "Works Protected," the said document deals with computer programs, data bases, artificial intelligence systems and computer-produced works. Finally, in its Chapter III, entitled "Producers of Sound Recordings (Phonograms)," that document deals with the protection of sound recordings.

7. The present paper is the draft of the second document which, in its final form, will be prepared for the second session of the Committee. The present paper is not submitted to the first session of the Committee for discussion but merely for information in order to give the participants an indication of the topics that are planned to be put before the second session to be convened a few months after the first session. This paper will, in the light of the experience the International Bureau will gain during the first session, be revised, and it will be that revised document that will be the basis for discussions in the second session.**

8. The present paper is divided into three chapters: Chapter IV, "Rights Protected"; Chapter V, "Term of Protection"; and Chapter VI, "Collective Administration of Rights."

[9–70. These paragraph numbers are not used in the present draft document; in the following, the paragraphs are numbered as a continuation of paragraph numbering in the first document (document BCP/CE/I/2).]

CHAPTER IV

RIGHTS PROTECTED

71. The program item quoted in paragraph 2, above, mentions certain rights in respect of which "professional circles have no uniform views" and "even governments...interpret their obligations under the Berne Convention differently," and refers to the following rights as examples: right of rental, public lending right, right of distribution and right of display. This memorandum deals with the said rights. In addition, it also deals with the following questions related to rights protected concerning which discrepancies in views have surfaced or are likely to surface in the near future: in respect of the

** After the first session of the Committee, it was found that there was no need to revise the document which, as indicated, had been originally distributed as a draft, and it was decided that it would serve as a basis for discussions in the second session of the Committee without any changes.

right of reproduction, the question of storage of works in computer systems, the questions related to reprographic reproduction, "home taping" and other forms of private reproduction by devices for personal use; in a certain relationship with the right of distribution, the right of importation; and, in respect of the right of broadcasting, the questions related to satellite broadcasting. Furthermore, this memorandum also deals with the possibility of including in the possible Protocol provisions under which countries party to the Protocol would undertake the obligation not to apply non–voluntary licenses for sound recording of musical works and not to apply, or only to apply in certain limited cases, non–voluntary licenses for broadcasting of any kinds of works. In the latter aspects, the discrepancies that have emerged concern the question of in what cases, if any, it is appropriate and in harmony with the spirit of the Berne Convention to apply such non–voluntary licenses. Finally, the memorandum proposes the inclusion in the possible Protocol of definitions of "public display," "public performance" and "communication to the public."

Right of Reproduction: Storage of Works in Computer Systems

72. As a result of the development of computer technology and, particularly, the increasingly widespread use of digital and optical storage and retrieval techniques, more and more literary and artistic works are stored in computer systems. In their stored form, the works cannot be perceived by the human eye or ear but they can be retrieved by means of appropriate devices (screens, printers, facsimile reproduction units, loudspeakers, etc.) and made perceivable to the human eye or ear.

73. Under Article 9(1) of the Berne Convention, "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form*" (emphasis added). Reproduction "in any manner or form" includes reproduction (fixation) even if the reproduction, to be perceivable, requires the use of a machine or other device.

74. The results of discussions at various recent WIPO meetings–in which, *inter alia*, questions related to storage in and retrieval from computer systems of works protected by copyright were dealt with–reflect growing agreement in professional circles that the storage of works in computer memories should be considered reproduction within the sense of Article 9 of the Berne Convention. A provision in the possible Protocol to make this clear would be useful to eliminate discrepancies in views that may still exist in this respect.

75. *It is proposed that the possible Protocol should provide*
– either (simply) that storage of a work in a computer system is to be considered reproduction within the sense of Article 9 of the Berne Convention,
– or (in a more general way) that any storage of a work by any method now known or later developed, in an artificial memory from which memory (for example, of a computer system) the work cannot be directly perceived by seeing or hearing but, with the aid of a machine or other device, can be so perceived and, if so desired, further reproduced or communicated, is to be considered reproduction within the sense of Article 9 of the Berne Convention.

Right of Reproduction: Reprographic Reproduction by Libraries, Archives and Educational Establishments

76. The Berne Convention states the basic principle of the right of reproduction in its Article 9(1) which reads as follows: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

77. The general rule on the possible limitations of this exclusive right is contained in Article 9(2) which reads as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

78. For the interpretation of this provision, it should be noted that the Program for the 1967 Stockholm Diplomatic Conference for the revision of the Convention contained a proposal for more specific limitations. The proposal aimed basically at making it possible for national legislation to permit the reproduction of protected works in certain cases, namely "(a) for private use; (b) for legal or administrative purposes; and (c) in certain particular cases, provided that (i) the reproduction was not contrary to the legitimate interests of the author, and (ii) that it did not conflict with a normal exploitation of the work."

79. At the Diplomatic Conference, after a long discussion, agreement was reached on a more general wording which is now the wording of Article 9(2). That wording omits any reference to private use ((a), above) and to legal or administrative purposes ((b), above), and, in its essence, is the same as what is provided in (c), above. The report of the Diplomatic Conference contains the following interpretive statement in relation to Article 9(2):

> "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying may be permitted without payment, particularly for individual or scientific use." (Paragraph 85 of the report of Main Committee I.)

80. Developments in reproduction technology have brought about what are generally referred to as mass reproduction techniques. The common characteristic of such techniques is that, by means of them, reproduction takes place at a great number of different places; therefore, the exercise of the right of reproduction on an individual basis—that is, at each place where reproduction takes place, by each owner of rights—is, for all practical purposes, impossible so that collective administration seems to be the only practical way of exercising rights.

81. There are two main fields of mass reproduction which have also been discussed in detail at various WIPO meetings, namely what are commonly called "reprographic reproduction" and "home taping." In this chapter, the questions of reprographic reproduction (with the exception of private reproduction for personal use) are discussed, and—as the title of the chapter indicates—it is only such reproduction by libraries, archives and educational establishments in respect of which provisions are proposed. The questions of "home taping" and private reprographic reproduction for personal use are discussed in the following chapter. (In both chapters, the words "copy"/"copying" and "reproduction" are used interchangeably.)

82. "*Reprographic reproduction*" of a work is making a facsimile copy of the original or a copy of the work, except for storage of such a copy in electronic (digital–optical) form. It is to be noted that what is generally referred to as "*electrocopying*" (i) *is not covered* by the above notion of "reprographic reproduction" as far as electronic *storage* of a facsimile copy (typically, by means of optical–digital technique) is concerned but (ii) *is covered* in respect of cases where a facsimile copy is made by electronic means *without storage* of such a copy in electronic form and (iii) *is also covered* where a hard copy (typically, on paper) is made of a facsimile copy electronically stored. The reason for the exclusion of electronic *storage* of facsimile copies from the notion of reprographic reproduction—for the purposes of the proposed Protocol—is the growing agreement in professional circles that electronic storage (input) of works should always be subject to the author's authorization because, without the possibility for the author to exercise his exclusive right of authorization, it would be difficult for him to control the extremely broad and easy utilization of the work that such storage makes possible. Therefore, the limitation of the right of reproduction which may be justified in the case of reprographic reproduction as defined above is not justified in the case of electronic *storage* of copies. At the same time, in the case of *direct facsimile copying* by electronic means (without storage) and hard copy facsimile copying on the basis of an electronically stored copy, the same legal and economic considerations seem to prevail as in the case of "traditional" facsimile reproduction (typically, photocopying).

83. As far as the notion of a "*facsimile*" copy is concerned, it can be defined as a copy reproducing a visually perceptible, two–dimensional, tangible copy (including the original) of a work (other than an audiovisual work, and, typically, a literary or graphic work) without changes other than possible reducing or enlarging the size of the copy or change in the quality of the copy (including black–and–white reproduction of colored copies) that may follow from the copying technique.

84. There are significant discrepancies in the views of professional circles concerning the questions of in which cases reprographic reproduction should not require the author's authorization ("free use") and in which cases it could be allowed without the author's authorization subject to the obliga-

tion to pay equitable remuneration to the author ("non-voluntary license"). Those questions should be answered on the basis of Article 9(2) of the Berne Convention in the way indicated in paragraph 79, above.

85. Since 1967 (that is, the time of the Stockholm Diplomatic Conference for the revision of the Berne Convention), important developments have taken place in the field of reprographic reproduction: first, reprographic reproduction machines have made reproduction possible in an extremely rapid and perfect way and, at the same time, cheaper; second, as a result of this, reprographic reproduction has become a widespread practice; and, third, collective administration systems have been set up to exercise the economic rights of authors in respect of reprographic reproduction, and they have proved to be an efficient way of exercising such rights.

86. The relevant paragraph of the Records of the 1967 Stockholm Diplomatic Conference for the revision of the Berne Convention quoted in paragraph 79, above, refers to various cases of reprographic reproduction as examples indicating when the exclusive right of reproduction should not be limited, when it can be limited to a right to equitable remuneration, and when reproduction can be free. However, it seems fairly clear that, while the conditions determined in Article 9(2) of the Berne Convention have remained unchanged since then, the examples mentioned at that time are not necessarily relevant any more. When the criteria prescribed by Article 9(2) of the Berne Convention are applied, the present situation should be taken into account, which seems different from the one in 1967 (at that time, the implications of reprographic reproduction could not yet be seen clearly).

87. As indicated above, the case of private reproduction for personal use is dealt with separately in the following chapter. If that case is set aside, when determining under what conditions reprographic reproduction can be permitted, at least the following criteria should be taken into account: (a) *the nature of the work* copied (considering the fact that, in the case of certain works (such as computer programs, data bases, sheet music), the limitation of the exclusive right to authorize free reprographic reproduction would necessarily conflict with the normal exploitation of such works); (b) *the extent of copying* (e.g., whether an entire book or only an article from a periodical is copied); (c) *the number of copies* made; (d) *the nature of the entity which makes*, or allows the making of, *copies* (e.g., whether it is a non-profit-making library, archive or school or a company where copies are made in connection with commercial activities); and (e) *the purpose of copying* (e.g., whether the purpose is private study or commercial use).

88. Taking the above criteria into account, *it is proposed that the possible Protocol should provide that, in respect of reprographic reproduction other than private reprographic reproduction for personal use, Article 9(2) of the Berne Convention should be considered as permitting the limitation of the exclusive right of reproduction in the following ways:*

(a) [Libraries and Archives: Replacement Copies] National legislation may provide that reprographic reproduction does not require the authorization of the author where the reproduction is made by a library or archive whose activities do not serve obtaining, directly or indirectly, commercial gain, and the purpose of the reproduction is to replace a copy which has been lost, destroyed or has become unusable in the permanent collection of that or another library or archive, and where it is not possible to obtain, under reasonable conditions, a replacement copy of the work,

provided that the work is not a computer program, a data base, sheet music, a one-use publication (such as an exercise book) or any other work of such a nature that its reprographic reproduction would conflict with the normal exploitation thereof or would unreasonably prejudice the legitimate interests of the author, and provided further that the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.

(b) [Libraries and Archives: Copies for Third Persons] National legislation may provide that reprographic reproduction does not require the authorization of the author where the reproduction is made by a library or archive whose activities do not serve obtaining, directly or indirectly, commercial gain, and where
– what is reproduced is an article or other item published in a collection of works (other than a computer program or sheet music) or in an issue of a periodical, or a short extract from a work expressed in writing, with or without illustrations,

– the purpose of the reproduction is to satisfy the request of a physical person, and
– the library or archive is satisfied that the reproduction will be used solely for the purpose of study, scholarship or private research,

provided that the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions, and provided further that there is no collective license available (that is, offered by a collective administration organization for such purposes in a way that the library or archive knows about it or ought to be aware of it) under which such reproduction can be made.

(c) [Educational Establishments: Copies for Teaching] National legislation may provide that reprographic reproduction does not require the authorization of the author where the reproduction is made by an educational establishment whose activities do not serve direct or indirect commercial gain, and
– what is reproduced is an article or other item published in a collection of works (other than a computer program or sheet music) or in an issue of a periodical, or a short extract from a work expressed in writing, with or without illustrations, and
– the purpose of the reproduction is to use the copies exclusively in the course of face-to-face teaching activities,

provided that the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions, and provided further that there is no collective license available (that is, offered by a collective administration organization for such purposes in a way that the educational institution knows about it or ought to be aware of it) under which such reproduction can be made.

89. It should be noted that, in the case of points (b) and (c)—but not in the case of point (a)—free reproduction is only allowed if no collective license is available.

90. Collective administration organizations (so-called reproduction rights organizations ("RROs")) administering rights in respect of reprographic reproduction exist in more and more countries and have proven to be efficient means to exercise the exclusive right of reproduction in this field in a way that also satisfies users.

91. The cases mentioned in paragraph 88(b) and (c) (copies by libraries and archives for third parties; copies by educational establishments for teaching) represent uses that are so important from the viewpoint of legitimate public interests (related to certain basic functions of the said institutions) that it would not be justified to exclude the possibility of free reprographic reproduction, if—in the absence of an appropriate collective administration system—licenses are not available to authorize them. It should also be noted that, in certain countries, in the said cases, reprographic reproduction is free, irrespective of whether such licenses are available or not. The proposals in paragraph 88(b) and (c), above, are, however, based on the growing recognition (reflected, *inter alia*, in the relevant provisions of the 1988 Copyright, Designs and Patents Act of the United Kingdom) that the legitimate public interests mentioned above can he duly served also if the exclusive right of authors to authorize reprographic reproduction is maintained, provided that it is combined with an appropriate (collective) licensing scheme (including, of course, also the possibility of government intervention against any abuse of a monopoly position; in respect of which, see Chapter VI, below), and, if such a scheme is available, it would unreasonably prejudice the legitimate interests of authors if free use were allowed in such cases.

92. It is to be noted that the above-proposed provisions would not extend the possibility of free reprographic reproduction—even to the extent defined in the proposed provisions—to other entities (such as companies, institutions, educational establishments whose activities serve gainful purposes). Those entities, therefore, would need autborization (individual or collective) in any case of reprographic reproduction even if they make copies for "internal" purposes. One could consider as a possible alternative to allow reprographic reproduction also for these entities for their "internal" purposes in a certain narrow field (e.g., in respect of isolated articles or short excerpts from books) provided that no collective license is available for such reproduction.

93. The cases of reprographic reproduction in respect of which the above provisions are proposed are clearly covered by the right of reproduction under Article 9 of the Berne Convention. It is evident, therefore, that all the minima of the Berne Convention that are relevant with respect to the right of reproduction (particularly those on formality-free protection and on the term of protection)

and the principle of national treatment under the Convention are applicable to the proposed provisions.

Right of Reproduction: Private Reproduction for Personal Use by Devices

94. As indicated in paragraph 79, above, Article 9(2) of the Berne Convention does not refer explicitly to reproduction for private use as a possible exception to the exclusive right to authorize reproduction of a work. Therefore, national legislation has to apply the criteria under Article 9(2) also in respect of reproduction for private use (see paragraphs 76 to 81, above).

95. "*Private reproduction*" means reproduction in private places (that is, places not open to the public), typically in private homes, while "*personal use*," in this context, means the use by the person making the copy and, at most, by members of his family or his close social acquaintances.

96. As indicated in paragrapb 81, above, of the cases of private reproduction for personal use by devices (machines or other optical, mechanical, electric or electronic devices), the case of "home taping" has been discussed in detail in various international meetings. "*Home taping*" is an expression commonly used to mean private reproduction of audiovisual works and sound recordings for personal use. Before the advent of digital recording and reproduction technique in the form of digital audio tape (DAT) machines, there was a growing agreement that, although "home taping" may be considered as not conflicting with the normal exploitation of the works concerned, it does unreasonably prejudice the legitimate interests of authors and, therefore, it should not be allowed without eliminating such a prejudice or, at least, reducing it to a reasonable level. In the countries where this has been recognized, a payment due to the authors concerned has been introduced on recording equipment and/or on recording material (blank tapes and cassettes).

97. With the advent of *digital audio technique*, the situation has changed, since the quality of the reproduction is much higher if that technique is employed than if the older technique is employed: if analogue sound recordings are reproduced by analogue equipment, there is always a loss in quality when a copy is made, and thus, after three or four generations of copies, such recordings are not enjoyable; however, where digital recordings are reproduced by DAT machines, not only the first, but also the second, 10th or 100th generation of copies are of exactly the same quality as the original recording. Such *serial reproduction* (that is, the reproduction of more than one generation) of perfect copies, even for private purposes, if allowed without restriction, not only unreasonably prejudices the legitimate interests of authors but also conflicts with the normal exploitation of the works concerned. Therefore, it should not be allowed, unless the conflict is eliminated, and, if prejudice is still caused to the legitimate interests of authors, unless it is, at least, reduced to a reasonable level (by using the same technique—that is, introducing a payment on recording equipment and/or material—as in the case of analogue reproduction).

98. Until recently, "home taping" was the only widespread case of private reproduction for personal use in respect of which discrepancies emerged concerning the application of Article 9(2) of the Berne Convention. Recently, however, two new developments have taken form which indicate that the question of the application of Article 9(2) of the Berne Convention in respect of private reproduction for personal use by devices should be studied in a wider context.

99. The first such development is the appearance in the market, and the growing use of, relatively cheap, but still efficient, *reprographic reproduction machines for private reproduction.* In view of this, at least in one country (Germany), special provisions have been introduced concerning the exercise of the right of reproduction in respect of such private reproduction. The said machines can be used for the reproduction of works whose unauthorized reproduction, even in private homes and for personal purposes, would conflict with their normal exploitation (such as entire books, computer programs, sheet music and the like), and can be used in other cases in a way that even such reproduction unreasonably prejudices the lcgitimate interests of authors.

100. The second, and, if possible, even more important, new development is the growing use of *digital and optical reproduction technique* by means of which also works other than musical works embodied in sound recordings can be easily and perfectly reproduced (data bases in CD-ROMs, videodisks, "interactive" CDs in which various categories of works can be stored by means of digital and optical techniques). Many of such digitally–optically stored works have great economic value, and their free reproduction, even in private homes and for personal purposes, would clearly conflict with their normal exploitation. If that is the case, reproduction should not be allowed without the authorization of the authors concerned. Also in

cases where there is no such conflict, private reproduction for personal use by means of such techniques may unreasonably prejudice the legitimate interests of authors; and such prejudice should, at least, be reduced to a reasonable level.

101. The above-mentioned developments seem to make it desirable to include, in the possible Protocol, provisions concerning the application of Article 9(2) of the Berne Convention in respect of private reproduction by devices for personal use.

102. *It is proposed that the possible Protocol should provide as follows:*

(a) The private reproduction of books (in their entirety), computer programs, electronic data bases or sheet music by mechanical or electronic devices, and the private serial digital reproduction of any works or sound recordings, shall not be permitted without the authorization of the author of the work or the producer of the sound recording concerned, even if such reproduction is for personal purposes.

(b) The private reproduction, other than serial digital reproduction, for personal use of audiovisual works, works embodied in sound recordings and sound recordings themselves, and private reprographic reproduction for personal use, except where such reprographic reproduction is covered by point (a), shall be permitted without the permission of the author, provided that the prejudice caused by such reproduction to the legitimate interests of authors and producers of sound recordings concerned is eliminated, or at least reduced to a reasonable level, by means of a payment on reproduction equipment normally used for private reproduction for personal use or on blank material normally used for such reproduction, or on both.

(c) The payment mentioned in point (b) shall be paid by those who manufacture such equipment or material (except for those which are exported) or who import such equipment or material into the country (except where the importation is by a private person for his personal use).

103. The remark made in paragraph 93, above, concerning reprographic reproduction by libraries, archives and educational institutions applies *mutatis mutandis* concerning private reproduction for private purposes by certain devices discussed above.

Right of Reproduction: Possible Exclusion of the Application of Non-Voluntary Licenses for Sound Recording

104. Under Article 13(1) of the Berne Convention, "[e]ach country of the [Berne] Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority." This provision serves as a basis in certain countries for non-voluntary licenses.

105. The main reason for allowing—in 1908—such non-voluntary licenses was the fear that, without this possibility, the music publishing industry and the collective administration organizations representing composers and music publishers could abuse their exclusive rights vis-à-vis producers of sound recordings. This fear has proved to be unjustified as shown by the experience of countries where no such non-voluntary licenses have been introduced. It has also become evident that there are means other than non-voluntary licenses to prevent abuse (such as antitrust laws), should the fear continue to exist. Finally, it should also be taken into account that the situation is now fundamentally different from that existing at the time when the idea of such non-voluntary licenses emerged. At that time, the development of the record industry was still in its initial stages, and it may have been justified to apply less stringent requirements to that industry. In the meantime, however, the record industry has become one of the most vigorous entertainment industries and does not need protection against the rights of authors.

106. It also should be taken into account that, in the meantime, phonogram producers themselves have been granted an exclusive right of reproduction of their sound recordings—*without* the possibility of non-voluntary licenses—in the Rome Convention and the Phonograms Convention and, should the proposals made in Chapter III of the first part of the present memorandum (document BCP/CE/I/2) be followed, they (the phonogram

producers) will be granted the same also in the Protocol.

107. For the above-mentioned reasons, there is an increasingly broad opinion that the above-quoted provision of the Berne Convention allowing non-voluntary licenses has become obsolete.

> 108. *It is proposed that the possible Protocol provide*
>
> *(i) that countries party to the Protocol which do not provide for non-voluntary licenses under Article 13(1) of the Berne Convention will continue not to provide for such licenses, and*
>
> *(ii) that countries party to the Protocol which provide for non-voluntary licenses under Article 13(1) of the Berne Convention will eliminate them within a certain period (e.g., five years).*

Right of Public Display

109. The notion of "display" may be defined as follows: "static showing of the original or a copy of the work, either directly or indirectly, that is, by means of a device, such as film, slide or on a screen (television or other)." In the case of an audiovisual work, showing of individual images thereof without sound and nonsequentially should also be considered "display." "Showing" means making perceptible to the human eye.

110. It should be noted that the said definition covers two major types of display: showing the work directly (generally called "exhibition") and showing the work indirectly, that is, by a device (typically, on a screen). As discussed below, different considerations seem necessary concerning those two types of display, but, in respect of both, the recognition of a right is only justified—by analogy to the right of public performance—if the act of display is *public*. (Concerning the notion of "public display," see paragraph 156(a), below.)

111. Although the act of direct exhibition (or display) to the public of originals or copies has always been an important use of certain artistic works (such as paintings and sculptures), the Berne Convention does not require that countries party to it recognize that authors of literary or artistic works enjoy an exclusive right of authorizing the public exhibition (or display) of their works. Such a right is accorded by a number of national laws, however, and it is believed that the time has come to recognize such a right at the international level.

112. The other type of display—indirect showing—has become important because of the advent of indirect display techniques through electronic means. The absence of a public display right of this second type may seriously undermine the efficient protection of certain important categories of works, in particular writings and graphic works.

113. The Berne Convention does not contain provisions concerning the public display of a work by a device (e.g., on a screen). On the basis of a rather broad interpretation of Article 9 of the Convention, it could be considered that such a display is a kind of reproduction, since what appears on the screen is a copy, albeit ephemeral. It would, however, be dangerous for authors to try to rely merely on such a possible interpretation, which could be countered by the argument that there is no reproduction where the result is not a *permanent* and *tangible* copy.

114. But neither can public display be recognized as public performance. The display of a work, typically a writing or a graphic work, on a screen differs in nature from the performance of a dramatic, dramatico-musical or musical work, the recitation of a literary work and the broadcasting or other communication to the public of such a performance or recitation, as well as from the performance, broadcasting or other communication to the public of an audiovisual work. The essence of the difference is that, when works are displayed on a screen, their image is static (fixed) for a finite time (usually from a fraction of a second to a few minutes), while, when the above-mentioned other uses are involved, that is not the case.

115. For all these reasons, it seems necessary to explicitly recognize a public display right.

> 116. *It is proposed that the possible Protocol should provide that the author of a literary and artistic work shall enjoy the exclusive right of authorizing the public display of the original or a copy of his work.*

117. If this right is going to be guaranteed by the possible Protocol, that Protocol should also make it clear that, naturally, the provisions of the Berne Convention on national treatment (Article 5(1)) apply to it, that its duration is governed by Articles 7(1), (3), (5), (6) and (8) and 7^{bis} and that the limitations allowed under Articles 9(2), 10 and 10^{bis} as well as the provisions on enforcement (Article 15) apply to it too.

Right of Rental and Public Lending Right

118. The above-mentioned two rights, as well as the right of distribution, which are referred to separately in the program item quoted in paragraph 2, above, are dealt with together here because the right of rental and the public lending right can be—and in certain countries actually are—considered as restricted variants of the right of distribution.

119. The right of *distribution* is the right to authorize any acts where ownership or possession of copies of the work changes hands; in the case of sale, gift, etc., it is ownership, whereas, in the case of rental and lending, it is possession that goes from one person to another. Naturally, ownership and possession may change hands simultaneously. In certain countries, the right of distribution is recognized by case law deriving it from the right of reproduction, while in other countries statutory law recognizes it.

120. Under national laws that grant a right of distribution, this right, in general, *ceases to exist* (is "exhausted") *or is restricted* in respect of any copy of the work *after the first sale* (or other first transfer of ownership) of that copy (hereinafter, the expression "first sale" refers to any kind of first passing of ownership of the copy). Where exhaustion is provided for in a national law, the right of distribution *ceases to exist*, that is, the owner of copyright has no right in respect of any distribution subsequent to the first sale of a copy (resale, rental, lending). National laws that do not provide for full exhaustion of, but only *restrict*, the right of distribution after the first sale of a copy, usually do so by maintaining it (as an exclusive right or, at least, as a right to equitable remuneration) in the case of rental and lending of copies of certain categories of works, and by denying it in all other cases of subsequent distribution (characteristically, resale).

121. "*Rental*" may be defined as "transferring the possession of a copy of a work for a limited period of time, for profit-making purposes."

122. "*Lending*" may be defined as "transferring the possession of a copy of a work for a limited period of time for non-profit-making purposes." *Private lending* (e.g., between family members and social acquaintances) is usually considered not to require the authorization of the author; at the same time, authors may, and in certain countries in certain respects do, have rights concerning *public lending*, that is, lending by institutions whose services are available to the public (public libraries, archives, etc.). It should be noted that the notion of "*public lending right*" in many countries has a specific restricted meaning. It is not a general right to authorize public lending or such a right to equitable remuneration for public lending, but it only covers the right to a certain remuneration for authors in respect of lending of their *books by public libraries.*

123. It is only concerning cinematographic works (and works adapted for such works) that the Berne Convention provides for a right of distribution (Articles 14(1) and $14^{bis}(1)$). There is, however, some difference between the English and French texts of the Convention. In the English version, the word "distribution" is used, while in the French text, the expression "*mise en circulation*" is used. The English word "distribution" can be interpreted in two ways: either to mean the *first* distribution only, or to mean *all* acts of distribution. The expression "*mise en circulation*" ("put into circulation") seems to indicate that only the first distribution is meant.

124. It seems fairly clear that there would be insufficient support for the recognition of a right of distribution that would cover the right to authorize not only the first distribution ("putting into circulation"), but also any kind of subsequent distribution ("circulation"), of copies of works. A proposal for the recognition of such a general right was also rejected by an overwhelming majority of the delegations at the 1967 Stockholm Diplomatic Conference for the revision of the Berne Convention. (The proposal (Conference document S/72), submitted by the Delegations of Austria, Italy and Morocco, suggested recognition of such a right by a simple modification of the draft provision that has become Article 9(1) of the Berne Convention. Those delegations proposed that, after the word "reproduction," the words "and circulation" be added, as a result of which the exclusive right to authorize reproduction would have been transformed into an exclusive right to authorize reproduction *and* any subsequent distribution ("circulation") of copies. At the sixth meeting of Main Committee I, the proposal was rejected by 17 votes to seven, with eight abstentions (see Summary Minutes of Main Committee I, paragraph 709).)

125. As a possible alternative, it may be considered that a right of distribution could be recognized which would then be restricted, after the first authorized sale of a copy, to the right to authorize rental and public lending of copies of certain categories of works (or, at least, a right to remuneration in the said cases). However, if the question of importation—which may be considered a specific aspect of distribution and which is proposed to be the subject of a separate right (see paragraph 134,

helow)—is set aside, the authorization of the first distribution ("*mise en circulation*") of copies in the country where reproduction of the work is authorized seems to follow inevitably from the authorization of reproduction (in the sense that it would be completely meaningless to authorize making copies in a quantity suitable for distribution without an—either implicit or explicit—authorization of the distrihution of the said copies). It would not seem worthwhile trying to use the possihle Protocol to further clarify that age–old relationship between reproduction and (first) distribution of copies of works just for stating immediately (as it would have to he) that, after the first sale of a copy, the right of distribution is exhausted. It seems more appropriate to recognize those aspects of the right of distribution whose maintenance even after the first sale of copies—according to growing agreement at the international level—seems justified, namely the right of rental and public lending in respect of certain categories of works.

126. An agreement along the lines indicated in the preceding paragraph would he desirahle, in view of the fact that rental of copies has become the main—or, at least, an extremely important—form of exploiting certain categories of works, particularly audiovisual works and musical works performances of which are emhodied in sound recordings (and of course, sound recordings themselves; in this respect see paragraph 66(a)(ii) and (h) of the first part of this memorandum (document BCP/CE/I/2)). The types of works for which the right of rental will probably become more and more important include, in particular, computer programs and electronic data hases emhodied in CD–ROMs. It should be added that musical works in "sheet music" form have also long been typically exploited through rental.

127. As regards "puhlic lending right" in the meaning to which paragraph 122, above, refers—that is, a right to some remuneration in respect of lending hooks by puhlic lihraries—there is disagreement even ahout the question of whether such a right forms part of copyright at all. (In most cases, a negative answer is given to this question, and such a right is qualified as a specific "cultural right" or "social right" outside copyright.)

128. In respect of the categories of works mentioned in paragraph 126, above, unauthorized puhlic lending would, however, conflict with a normal exploitation of the works concerned in the same way as unauthorized rental. Therefore, the right to authorize public lending of copies of such works should he recognized, along with the right to authorize rental of copies.

129. *It is proposed that the possible Protocol should provide that it shall be the exclusive right of the author to authorize rental or public lending of copies of*

(i) audiovisual works,
(ii) works whose performances are embodied in sound recordings,
(iii) computer programs,
(iv) data bases and
(v) sheet music,

irrespective of who is the owner of the copies which are the subject of the rental or public lending.

130. If the right of rental and public lending is going to be guaranteed by the possible Protocol, it should also be indicated that, naturally, the provisions of the Berne Convention on national treatment (Article 5(1)) apply to it, that its duration is governed hy Articles 7(1), (3), (5), (6) and (8) and 7^{bis}, and that the provisions on enforcement (Article 15) apply to it too.

Right of Importation

131. The history and various provisions of the Berne Convention—particularly its provisions concerning national treatment—indicate that the rights granted under the Berne Convention have always heen construed as territorial rights, that is, rights existing separately and independently country by country. It is evident, therefore, that the mere fact that a certain act (e.g., reproduction) whose performance requires the author's authorization according to the law of one country has been authorized by the author in that country does not make the performance of that (or any other) act lawful in another country. This is further evidenced (i) hy Article I6 concerning seizure of infringing copies which are not necessarily infringing copies in the country from which they are imported, (ii) hy Article 13(3) on seizure of sound recordings imported without permission from another country where they have heen produced on the basis of a non–voluntary license, and by (iii) Article IV(4)*(a)* of the Appendix which forbids the exportation of copies made on the hasis of compulsory translation or reproduction licenses.

132. However, under the recent laws of at least two countries (Australia and Malaysia), importation of copies without the consent of copyright owners is permitted in respect of copies made with the authorization of such owners.

133. It seems that, for the sake of appropriate application of the principle of territoriality of copy-

right in respect of one of the basic rights, the right of reproduction, provisions are necessary to make it clear that, without the authorization of the copyright owner, it is an infringement to import copies of a work into a country for distribution.

> 134. *It is proposed that, in the possible Protocol, it should be provided that, except where the importation is by a private person for his personal use, it is the exclusive right of the author to authorize the importation of copies of his work, even where such copies were made with his authorization, into a country party to the Protocol or into the territory of a group of countries party to the Protocol that constitutes an economic community or a single market.*

135. If this right is going to be guaranteed by the possible Protocol, it should also be indicated that, naturally, the provisions of the Berne Convention on national treatment (Article 5(1)) apply to it, that its duration is governed by Articles 7(1), (3), (5), (6) and (8) and 7[bis], and that the provisions on enforcement (Article 15) and seizure (Article 16) apply to it too. (Concerning the right of importation of producers of sound recordings, see paragraph 66(a)(iii) of the first part of this memorandum (document BCP/CE/I/2).)

Right of Broadcasting: Direct Broadcasting by Satellite

136. In respect of the right of broadcasting, Article 11[bis](1) of the Berne Convention makes it clear that broadcasting is a form (actually, the main form) of communication to the public by wireless means.

137. There is no doubt that direct broadcasting by satellite is covered by Article 11[bis](1) of the Berne Convention. The question remains, however, which act may be considered an act of broadcasting in such a case; whether the act of broadcasting is merely the emission of the signals towards the satellite, or whether it includes both the upleg stage (signals going from the place of the emission to the satellite) and the downleg stage (signals going from the satellite to the "footprint" of the satellite, that is, where the work is made normally receivable) of the transmission. ("Normally receivable" means that the signals can be received by equipment generally available to the public.) There is growing support for the latter interpretation, which seems to be in harmony with Article 11[bis](1) of the Berne Convention under which broadcasting is not mere emission but communication (to the public).

138. The question of what constitutes an act of broadcasting in the case of direct broadcasting by satellite is important because programs are frequently emitted from one country (or from international waters or other places outside the jurisdiction of any country) and transmitted to the public in another country. The answer to the question of where the act of broadcasting takes place also determines the identity of the person who has the right to authorize such broadcasting, if that person is not the same in the country or place of emission as in the country or countries where the signals are normally receivable.

139. Because copyright is a territorial right under the Berne Convention which exists separately and independently country by country, it is the person who is the copyright owner in the country who can exercise the copyright in that country. Furthermore, under Article 5(2) of the Berne Convention, "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." This means that, in the case of direct broadcasting by satellite where a program is emitted from one country and communicated to the public of one or more other countries—taking into account the fact that broadcasting starts in one country and is only completed in another country—the requirements of two or more laws must be complied with, namely the law of the country of emission and the law or laws of the country or countries where the signals are normally receivable, and, if the owner of the broadcasting right is not the same in all the said countries, the rights of the copyright owners in each of those countries must be respected.

140. Discrepancies in views exist in respect of the applicable law and the exercise of rights of different copyright owners in the country of emission and in the country where the signals are normally receivable. It seems justified to make an attempt to eliminate those discrepancies in the possible Protocol.

141. The provisions proposed for the elimination of the said discrepancies should correspond to the following principles: (i) they should be easily and efficiently applicable; (ii) they should be in keeping with the principle of territoriality of copyright and with Article 5(2) of the Berne Convention concerning applicable law; and, last but not least, (iii) they should guarantee that the rights of copyright owners both in the country of emission and in the country or countries where the signals are normally receivable are duly respected.

> 142. Taking into account the said principles, *the following provisions are pro-*

posed to be included in the possible Protocol:

(a) Article 11bis(1) of the Berne Convention also applies where the broadcasting is direct broadcasting by satellite;

(b) where the signals transmitted through a direct broadcasting satellite are emitted from a country or other place and are (also) receivable in one or more (other) countries, the law of the country of emission should be applied, provided that the law or laws of the country or countries where the signals are normally receivable must (also) be applied in the following cases:

(i) where, at the place of the emission, the right of broadcasting is not protected as an exclusive right or is subject to non–voluntary licensing, and/or

(ii) where the right of broadcasting belongs to different persons in the country or countries where the signals are normally receivable rather than at the place of the emission.

143. It should be noted that, in the rare cases where the owner of rights is not the same person in the country of emission as in the country where the signals are normally receivable, agreement between the two owners of rights may also be established in the framework of a collective administration scheme, where the broadcasting right of the copyright owner in the country where the signals are normally receivable is administered by a collective administration organization of the country and that organization concludes a mutual representation agreement with a collective administration organization in the country of emission.

Right of Broadcasting: Possible Exclusion or Restriction of the Application of Non–Voluntary Broadcasting Licenses

144. Under Article 11bis(2) of the Berne Convention, "[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph [concerning broadcasting and retransmission of broadcast works] may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority." This provision serves, in certain countries party to the Convention, as a basis for applying non–voluntary broadcasting licenses.

145. When non–voluntary broadcasting licenses were allowed in 1928, the justification for such limitations on copyright was the need for the availability of works for broadcasting organizations, which argued that, otherwise, they might remain unprotected against possible abuse by authors' societies that may be in a monopoly position.

146. Developments in the meantime have proved that the possible dangers that works would not be readily available for broadcasting were overestimated. Where such problems may have existed, they have been eliminated by the establishment of appropriate collective administration systems. The arguments referring to possible abuse by authors' societies have proven to be unjustified. In the field of public performance rights, it is beyond doubt that there is no need for non–voluntary licenses to prevent abuse of any *de facto* monopoly position of collective administration organizations. The advent of important new alternative channels of communication of works to the public (such as cable–originated programs) has also put the question of non–voluntary broadcasting licenses into a new light. (Under Articles 11(1), 11ter(1), 14(1) and 14bis(1) of the Berne Convention it is an exclusive right of copyright owners to authorize the communication of their works to the public by cable in a cable–originated program (that is, a program which is not a mere simultaneous and unchanged retransmission of a broadcast program) and, therefore, compulsory licenses are not permitted. The function of cable–originated programs is exactly the same as that of broadcast programs which are otherwise frequently retransmitted by cable along with cable–originated programs. As a rule, the said different programs also compete with each other; there seems no appropriate reason to grant one of the competitors the advantage offered by the possibility of non–voluntary licenses.)

147. The above–mentioned developments may justify consideration, in the framework of the possible Protocol, of the elimination of non–voluntary broadcasting licenses.

148. *It is proposed that the possible Protocol provide*

(i) that countries party to the Protocol which do not provide for non–voluntary licenses under Article 11bis(2) of the Berne Convention will continue not to provide for such licenses, and

(ii) that countries party to the Protocol which provide for non-voluntary licenses under Article 11bis(2) of the Berne Convention will eliminate them within a certain period (e.g., five years).

149. If the proposal in the preceding paragraph is not accepted, it is proposed as an alternative that non-voluntary licenses should be excluded, at least, in respect of direct broadcasting by satellite and possibly also in other cases.

150. Programs broadcast by direct broadcasting satellites are, as a rule, also communicated to the public of other countries (and sometimes exclusively to the public of other countries). Taking into account the fact that direct broadcasting by satellite includes both the upleg and downleg stages of communication and, thus, is only completed at the end of the downleg stage—in the said cases, in countries other than the country of emission—it would be in conflict with the above-quoted provision of the Berne Convention to base such a broadcast on a non-voluntary license allowed in the country of emission. Although this follows from an appropriate interpretation of Article 11bis(2) of the Convention, it would be useful to expressly state in the possible Protocol that, for direct broadcasting by satellite, no compulsory licenses can be applied.

151. For consideration of excluding non-voluntary broadcasting licenses in other cases, various aspects should be taken into account, such as the impact of broadcasting on different categories of works (e.g., the application of such non-voluntary licenses could be explicitly excluded in respect of audiovisual and dramatic works), the purpose of broadcasting (e.g., the application of non-voluntary licenses could be restricted to certain non-commercial—such as educational—programs), or the actual availability of works (e.g., no non-voluntary licenses could be applied where collective administration schemes exist).

Definitions of "Public Display," "Public Performance" and "Communication to the Public"

152. The delimitation of public and private acts is important from the viewpoint of certain rights protected under the Berne Convention, namely, the right of public performance and the right of communication to the public (of which—the latter—the right of broadcasting is a specific variant in respect of which separate provisions apply), and it is also relevant for a proposed "new" right, namely the right of public display.

153. There are certain discrepancies in the views of professional circles as to the notion of "public" where used in copyright law; however, the principle is increasingly accepted that every use should be considered "public" (rather than "private") that goes beyond the circle of family members and close social acquaintances of a family or an individual person.

154. It would be desirable to include definitions in the possible Protocol which could eliminate the discrepancies of views in respect of the notion of "public" that have surfaced or might surface in the future.

155. Of the proposed definitions of the three "public" acts mentioned in paragraph 152, above, two—"public" display and "public" performance—have common elements. The common elements flow from the fact that the work or sound recording, respectively, can be directly perceived by those who are (or, at least, could be) present at the place where the relevant act (display of the work or performance of a work or sound recording) takes place. The third "public" act—communication to the "public"—differs from the above-mentioned two acts in the sense that, in the case of communication to the "public," the work or sound recording is made available (receivable) to a person or persons who is not or are not present at the place from where the work or sound recording is made available (e.g., where the work is displayed or where a work or a sound recording is performed), but is or are at such a distance that the images and/or sounds have to be transmitted to him or them through electronic, electric or similar devices, whether using wire or not.

156. *It is proposed that the following definitions should be included in the possible Protocol:*

"(a) 'Public display' is any display of a work

(i) at a place where the public is or can be present, or

(ii) at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its close social acquaintances is present,

and where the display can be perceived without the need for communication thereof to the public according to point (c), below."

"(b) 'Public performance' is any per-

formance (including any recitation) of a work or of a sound recording

(i) at a place where the public is or can be present, or

(ii) at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its close social acquaintances is present,

and where the performance can be perceived without the need for communication to the public according to point (c), below."

"(c) 'Communication to the public' is the transmission by electronic, electric or similar means (either by wire or without wire) of the image or sound or both of a work or the sound of a sound recording (including the display of a work and the performance or broadcast of a work or a sound recording) in a way that the said image or sound can be perceived by any person on the same conditions at a place or places whose distance from the place where the transmission is started is such that without the electronic, electric or similar means the images or sound would not be perceivable at the said place or places."

157. "[T]he same conditions" mentioned in point (c), above, means that, e.g., the work or sound recording is made receivable to anybody who is in the possession of a receiving equipment, and, who, in case of encrypted programs, also obtains the decoder necessary for reception or, e.g., the transmission is made receivable to a place open to anybody without any conditions, or to anybody who fulfills a certain condition (such as buying a ticket, joining a club, staying in a hotel room where the program can be received).

158. It is to be noted that the "communication to the public" remains a communication to the public even where, in fact, the communication—although receivable—is not received by anyone, or is received only by one person or very few persons, or is received by such persons in different places. For example, where each room of a hotel contains a television set into which certain programs are fed through wires controlled by the management of the hotel, the communication is "communication to the public," but where each room of a hotel contains a television set with its own antenna and the transmission is by each receiving set, captured from the air, the communication is broadcasting as a specific variant of communication to the public (because it is wireless).

CHAPTER V

TERM OF PROTECTION

159. At the 1967 Stockholm Diplomatic Conference for the revision of the Berne Convention, a resolution was adopted under which "negotiations should be continued between the countries concerned for the conclusion of a Special Agreement on the extension of the term of protection in countries party to that Agreement" (Records of the Diplomatic Conference, page 1189). The main reason for envisaging a possible extension of the term of protection was that the 50-year *post mortem auctoris* term of protection (which is the minimum provided for in the Berne Convention) had originally been adopted to make reasonably certain that at least the first generation of authors' heirs should normally be able to enjoy the rights protected, but, because of the continuous increase in life expectancy, such certainty no longer existed.

160. No such negotiations have taken place and no special agreement has been concluded so far. Nevertheless, a number of national laws, adopted after 1967, have provided for terms of protection longer than 50 years (Brazil and Spain for 60 years, Austria, Germany, Israel, Nigeria and—in respect of musical works—France for 70 years, Colombia, Guinea and Panama for 80 years, Côte d'Ivoire for 99 years) *post mortem auctoris*. Thus, in the framework of the preparation of the possible Protocol which, if adopted, will be a "special agreement," a follow-up discussion to the above-mentioned resolution may be justified. In this context, it should be taken into account that, of the longer terms determined in various national laws, 70 years seems to be not only an average term but also the most frequent one.

161. Therefore, *it may be justified to consider the inclusion of a provision in the possible Protocol under which all references to 50 years in the Berne Convention would be replaced by 70 years. It may also be considered to leave for the introduction of such a longer term a certain period (e.g., five years) for countries where a shorter term is now granted.*

162. Irrespective of whether the proposal in the preceding paragraph is adopted or not, the extension of the minimum term of protection for photographic works should be considered. Professional circles argue that photographic works deserve protection for the same period as other categories of works generally enjoy. Other specialists in copyright law advocate the extension of the present minimum (25 years from the "making" of the photo-

graph) provided for in Article 7(4) of the Berne Convention but not up to the minimum generally applicable to literary and artistic works. It would seem appropriate to settle this question in the possible Protocol and to provide for a term of protection which should be at least double the present minimum but which could also be the same term as it is or will be for works other than photographic works.

163. *It is proposed that—irrespective of whether the proposal in paragraph 159, above, is adopted—the possible Protocol should provide for the following minimum term of protection for photographic works:*

(a) either of 50 (or 70) years post mortem auctoris,

(b) or of 50 (or 70) years from the making of a photographic work.

CHAPTER VI

COLLECTIVE ADMINISTRATION OF RIGHTS

164. The growing importance of collective administration of rights protected by copyright has become obvious with certain new technological developments. Where the obtaining of individual authorizations (that is, for each protected work separately) is, for all practical purposes, impossible, some laws provide for non–voluntary licenses. Collective administration seems to be a solution better than non–voluntary licenses where the obtaining of individual authorizations is not practical.

165. The questions of collective administration were discussed in various WIPO meetings, and the International Bureau published, in 1990, a study entitled *Collective Administration of Copyright and Neighboring Rights* which offers advice to governments on the establishment and operation of collective administration systems.

166. Taking into account the desirable scope of the possible Protocol and the relevant aspects of collective administration, there seem to be four questions in respect of which some provisions may be useful in the possible Protocol to eliminate or prevent discrepancies in views that have surfaced or may surface in the future.

167. *First*, it should be provided that government intervention in the determination of fees and conditions of authorizations given by a collective administration organization is only allowed if, and to the extent that, such intervention is indispensable for prevention or elimination of *actual* abuse (particularly abuse of a *de facto* monopoly position) by a collective administration organization. *Second*, it should be prescribed that the fees collected by a collective administration organization be distributed to the interested copyright owners as proportionally to the actual use of their works as possible (after deducting the actual costs of administration). *Third*, it should be prohibited to use the fees collected by collective administration organizations on behalf of copyright owners without the authorization of the copyright owners concerned, or by persons or bodies representing them, for purposes other than distribution of fees to them and covering the actual costs of collective administration of the rights concerned. *Fourth*, foreign copyright owners should enjoy the same treatment as copyright owners who are members of the collective administration organization and nationals of the country where the organization operates. *Fifth*, it should be provided that national legislation may only prescribe (in an obligatory way) collective administration of those rights for which the Berne Convention allows determining the conditions of their exercise, that is, in the cases where non–voluntary licenses are allowed by the Convention (broadcasting, recording, certain reproductions, *droit de suite*), because the condition that a right can only be exercised through collective administration is clearly a condition of that right.

168. *Thus, the inclusion of provisions on collective administration of rights in the possible Protocol should be considered.*

(a) The provisions on collective administration should

(i) as far as the determination of license fees and other license conditions fixed by collective administration organizations is concerned, allow government intervention only in cases where, and to the extent that, it is necessary to prevent or eliminate any abuse, particularly an abuse of a de facto monopoly position of such an organization;

(ii) require the distribution of all the license fees collected by such an organization to copyright owners according to the actual use of their works;

(iii) forbid the use, without the authorization of the copyright owners concerned, or of the persons or bodies representing them, of any license fees collected by such an organization for purposes other than distributing the fees according to (ii), above, and covering ac-

tual costs of administration of the rights concerned; and

(iv) require strictly equal treatment for nationals and foreigners whose rights are administered by such an organization.

(b) Furthermore, the provisions on collective administration should provide that, while the establishment of collective administration is a right rather than an obligation of authors, national laws may make collective administration obligatory in respect of those rights for which the Berne Convention allows non–voluntary licenses (Articles 9(2), 11bis(2), 13(1) and 14ter of the Convention).

Registration Systems Administered by WIPO

The Film Register (International Registration of Audiovisual Works) Treaty in 1991. The Treaty, adopted at Geneva on April 18, 1989, entered into force on February 27, 1991, following its ratification or approval by the following States: Austria, Burkina Faso, Czechoslovakia, France, Mexico. The International Film Registry was officially opened on September 1, 1991. From September 1 to December 31, 1991, the Registry received 149 initial work–related applications, which all led to corresponding registrations.

On December 11, 1991, in Geneva, the Director General and the Minister for Foreign Affairs of Austria signed the WIPO–Austria headquarters agreement.

Activities of WIPO in the Field of Copyright Specially Designed for Developing Countries

Africa

Seminars

Regional Seminar on Copyright. From December 3 to 6, 1991, a Regional Seminar on Copyright was jointly organized in Kampala by WIPO and the Organization of African Unity (OAU), with the assistance of the United Nations Development Programme (UNDP). The seminar was held in English and French. In addition to some 150 participants from Uganda (from government offices, universities, law institutes and performing rights societies), the participants were from the following 14 countries: Benin, Burkina Faso, Cameroon, Congo, Egypt, Ghana, Guinea, Malawi, Mali, Mauritius, Namibia, Senegal, United Republic of Tanzania, Zimbabwe. Lectures were given by WIPO consultants from Algeria, Ghana, Switzerland, Uganda and the United States of America, by an official from the OAU and by a WIPO official. Two other WIPO officials also participated in the seminar.

Assistance with Legislation and Modernization of Administration

Guinea–Bissau. In December 1991, at the request of the national authorities, the International Bureau sent a draft law on copyright.

Senegal. A WIPO official visited Dakar in December 1991 and discussed with senior government officials the organization of a high–level meeting for Western African countries on piracy of musical works, to be held in Dakar in March 1992.

Uganda. On the occasion of the Regional Seminar on Copyright held in Kampala in December 1991, a WIPO official had discussions with government officials on the training of the staff of the Registrar General's Department and of the members of the Performing Rights Society, as well as on general aspects of the protection of copyright in Uganda.

United Republic of Tanzania. In December 1991, two WIPO officials visited Dar es–Salaam and held discussions with government officials on the country's possible accession to further treaties administered by WIPO and on the modernization of the industrial property office.

Zambia. A WIPO consultant from Switzerland visited Lusaka in December 1991 to discuss the implementation of the Berne Convention and measures to strengthen the copyright system in that country.

Study Visits Organized by WIPO

Madagascar. In December 1991, two officials from the Malagasy Copyright Office participated in a practical training course on the collective administration of copyright, organized by WIPO in cooperation with the Society of Authors, Composers and Music Publishers (SACEM), France, at SACEM's headquarters in Paris.

Asia and the Pacific

Viet Nam. In December 1991, at the request of the national authorities, the International Bureau sent comments on the draft copyright law drawn up on the basis of a model law prepared earlier by the International Bureau.

Development Cooperation (in General)

United Nations Development Programme (UNDP). Interagency Consultative Meeting (IACM) (New York). In December 1991, two WIPO officials attended the above meeting, which reviewed the resource situation of UNDP and the implementation of the decisions adopted by the UNDP Governing Council in June 1991 in relation to, in particular, national execution of UNDP-funded projects and support cost successor arrangements.

Activities of WIPO in the Field of Copyright Specially Designed for European Countries in Transition to Market Economy

Regional Activities

Baltic States. In December 1991, a WIPO official met the Director General of the Swedish Performing Rights Society (STIM) in Stockholm to discuss STIM's future activities in relation to the copyright situation in the three Baltic States.

National Activities

Russian Federation. As reported on page 28 of this review (February 1992 issue), the Director General received a note from the Ministry for Foreign Affairs of the Russian Federation stating that the membership of the Union of Soviet Socialist Republics (until December 25, 1991) in WIPO and all its bodies as well as participation in all the conventions, agreements and other international legal instruments signed in the framework of WIPO or under its auspices was continued by the Russian Federation (as from December 25, 1991).

A Deputy Director General visited Moscow in December 1991, where he met the Vice-President of the Russian Federation and government officials, with whom he discussed the Russian Federation's participation in the work of WIPO. The International Bureau was requested to make comments on the new draft laws on patents (also dealing with utility models), on trademarks, on the protection of integrated circuits and on the protection of computer programs.

Contacts of the International Bureau of WIPO with Governments and International Organizations in the Field of Copyright

Intergovernmental Organizations

General Agreement on Tariffs and Trade (GATT). Two WIPO officials attended, as observers, a number of meetings held in Geneva in December 1991 by the Contracting Parties of GATT and by the Negotiating Group on the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Non-Governmental Organizations

In December 1991, WIPO held an informal meeting at its headquarters with international non-governmental organizations in order to exchange views on the activities and program of WIPO. The following non-governmental organizations were represented: European Association of Industries of Branded Products (AIM), European Committee for Interoperable Systems (ECIS), International Advertising Association (IAA), International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), International Association for the Protection of Industrial Property (AIPPI), International Association of Conference Interpreters (AIIC), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Film Producers Associations (FIAPF), International Federation of Industrial Property Attorneys (FICPI), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organisations (IFRRO), International Federation of the Phonographic Industry (IFPI), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Patent Documentation Group (PDG), Union of European Practitioners in Industrial Property (UEPIP).

Regional Organizations

Nordic Countries. In December 1991, a WIPO official delivered a lecture on a possible protocol to the Berne Convention at a meeting jointly held in Stockholm by the copyright societies of the five Nordic countries, which was attended by some 100 participants from those countries.

Other Organizations

International Federation of the Phonographic Industry (IFPI). The Director General of IFPI visited WIPO in December 1991 to discuss questions relating to the Berne Convention and the Phonograms and Rome Conventions, and also questions of digital broadcasting, with a WIPO official.

International Literary and Artistic Association (ALAI). In December 1991, the President of ALAI visited WIPO, where he discussed with a WIPO official the organization of the ALAI meeting to be held at the headquarters of WIPO in February 1992.

National Contacts

Sweden. In December 1991, a WIPO official met a number of Swedish government officials in Stockholm, where they discussed Sweden's accession to the Madrid Protocol and the future development cooperation program in both the industrial property and the copyright sectors. The same official gave a lecture on WIPO's activities at the Stockholm School of Economics, which was attended by some 50 participants.

United Kingdom. In December 1991, an official of the Computer Industry Research Unit (CIRO) of the United Kingdom visited WIPO to discuss the possible technical protection of literary and artistic works in digital form (copy protection and copy management systems) with a WIPO official.

Calendar of Meetings

WIPO Meetings

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

1992

March 30 to April 3 (Geneva)

WIPO–IFIA Symposium on "Support to Inventors"

This symposium, which is the fifth symposium organized jointly by WIPO and the International Federation of Inventors' Associations (IFIA) since 1984 on questions of topical interest to inventors, will examine the assistance and services offered to inventors (both individual and corporate) by industrial property offices, innovation centers and universities.
Invitations: States members of WIPO, inventors' associations and certain organizations (R&D institutions, innovation centers). The symposium will be open to the public.

April 27 to 30 (Geneva)

Committee of Experts on the Development of the Hague Agreement (Second Session)

The Committee will continue to consider possibilities for revising the Hague Agreement Concerning the International Deposit of Industrial Designs, or adding to it a protocol, in order to introduce in the Hague system provisions intended to encourage States not yet party to the Hague Agreement to adhere to it and to make it easier for applicants to use the system.
Invitations: States members of the Hague Union and, as observers, States members of the Paris Union not members of the Hague Union and certain organizations.

May 25 to 27 (Geneva)

Meeting of Non-Governmental Organizations on Arbitration and Other Mechanisms for the Resolution of Intellectual Property Disputes Between Private Parties

The meeting will consider the desirability of establishing within WIPO a mechanism to provide services for the resolution of disputes between private parties concerning intellectual property rights, as well as the type of services that might be provided under such a mechanism.
Invitations: International non-governmental organizations having observer status with WIPO.

June 1 to 5 (Geneva)

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

The Committee will continue to examine a draft trademark law treaty, with particular emphasis on the harmonization of formalities with respect to trademark registration procedures.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

June 15 to 19 (Geneva)

Committee of Experts on a Model Law on the Protection of the Intellectual Property Rights of Producers of Sound Recordings

The Committee will consider a draft Model Law dealing with the protection of the rights of producers of sound recordings, which could be used by legislators at the national or regional level.
Invitations: States members of the Berne Union or WIPO, or party to the Rome Convention or the Phonograms Convention, and, as observers, certain organizations.

September 21 to 29 (Geneva)

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

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

October 12 to 16 (Geneva)

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

The Working Group will continue to review joint Regulations for the implementation of the Madrid Agreement Concerning the International Registration of Marks and of the Madrid Protocol, as well as draft forms to be established under those Regulations.

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.

November 2 to 6 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (Tenth Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights since the Committee's last session (April 1991) and make recommendations on the future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 9 to 13 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Industrial Property (Fifteenth Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Industrial Property since the Committee's last session (July 1991) and make recommendations on the future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 30 to December 4 (Geneva)

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

The Committee will continue to examine the question of the preparation of a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works.
Invitations: States members of the Berne Union, the Commission of the European Communities and, as observers, States members of WIPO not members of the Berne Union and certain organizations.

UPOV Meetings

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

1992

April 8 and 9 (Geneva)

Administrative and Legal Committee

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

October 26 and 27 (Geneva)

Administrative and Legal Committee

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

October 28 (Geneva)

Consultative Committee (Forty-Fifth Session)

Invitations: Member States of UPOV.

October 29 (Geneva)

Council (Twenty-Sixth Ordinary Session)

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

October 30 (Geneva)

Meeting with International Organizations

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

Other Meetings

1992

April 8 to 11 (St. Helena, California)	International Wine Lawyers Association (IWLA): 1992 Conference
May 11 to 15 (Marrakesh)	International Chamber of Commerce (ICC): Conference on "Development Dimensions in the '90s"
May 18 to 20 (Lisbon)	Commission of the European Communities (CEC): PATINNOVA '92. Second European Congress on Patents, Trade Marks and Innovation in Industry
October 7 to 10 (Amsterdam)	International League of Competition Law (LIDC): Congress
October 18 to 24 (Maastricht/Liège)	International Confederation of Societies of Authors and Composers (CISAC): Congress
November 15 to 21 (Buenos Aires)	International Federation of Industrial Property Attorneys (FICPI): Executive Committee

1993

June 7 to 11 (Vejde)	International Federation of Industrial Property Attorneys (FICPI): Executive Committee
June 26 to July 1 (Berlin)	Licensing Executives Society (International) (LES): Annual Meeting

1994

June 10 to 17 (Vienna)	International Federation of Industrial Property Attorneys (FICPI): Congress
June 12 to 18 (Copenhagen)	International Association for the Protection of Industrial Property (AIPPI): Executive Committee