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Berne Union

Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite

(Paris, March 18 to 22, 1985)

Report

I. Introduction

1. In pursuance of the decisions taken by the General Conference of Unesco at its twenty–second session and by the Governing Bodies of WIPO at their fourteenth series of meetings in October 1983, the Secretariat of Unesco and the International Bureau of WIPO (hereinafter referred to as "the Secretariats") jointly convened a "Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite" (hereinafter referred to as "the Group of Experts") which met at Unesco headquarters in Paris from March 18 to 22, 1985.

2. The mandate of the Group of Experts was to examine the legal problems in the field of copyright raised by direct broadcasting by satellite, and the results of the meeting were to be submitted to the Intergovernmental Committees of the copyright conventions at their next session in June 1985.

3. The experts attending the meeting, who were invited in a personal capacity, were nationals of the following five countries: Barbados, China, India, Senegal and the United Kingdom. The two consultants who had assisted the Secretariats in drafting the preparatory documents also attended the meeting.

4. The States party to the international treaties concerning intellectual property were invited to follow the discussions of the Group of Experts. Delegations from the following States attended the meeting: Algeria, Australia, Austria, Bangladesh, Belgium, Brazil, Cameroon, Canada, Congo, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic of), Ghana, Greece, Haiti, Holy See, Hungary, Indonesia, Iraq, Israel, Ivory Coast, Jordan, Kenya, Mongolia, Netherlands, Niger, Nigeria, Norway, Poland, Portugal, Rwanda, Saudi Arabia, Senegal, Soviet Union, Sweden, Togo, Tunisia, Turkey, United Kingdom, United States of America and Yugoslavia.

5. Observers from three intergovernmental organizations and 18 international non–governmental organizations also attended the meeting.

6. The list of participants is appended to this report.

II. Opening of the Meeting

7. On behalf of the Director–General of Unesco, Mr. H. Ben Amor, Acting Assistant Director–General for the Programme Support Sector, opened the meeting and welcomed the participants. The Director General of WIPO, Dr. Arpad Bogsch, echoed his words of welcome and thanked Unesco for hosting the meeting.

III. Election of Officers

8. Mr. Jennings (United Kingdom), Mr. Li Qi (China) and Mr. Sonko (Senegal) were unanimously elected Chairman and Vice–Chairmen, respectively, of the Group of Experts.

IV. Documents

9. The participants had before them two working documents, drafted by Mr. André Kerever and Mr. Gabriel Perle at the request of the Secretariats.

10. The participants were unanimous in praising the quality and comprehensiveness of these two documents, on which they warmly congratulated their authors.

V. Discussions

General questions

11. The meeting first heard the oral presentation that the authors of the two preparatory documents, Mr. A. Kerever and Mr. G. Perle, made.

12. During the discussion that followed on general questions, the Director General of WIPO advanced the following tentative views on certain of those questions:

(i) Broadcasting through direct broadcasting satellites is broadcasting in the sense of Article 11bis of the Berne Convention.

(ii) According to that Article, broadcasting is a means of communication to the public by wireless diffusion (namely by radio waves). The said Article uses the concepts "communication to the public" and "diffusion" and does not use the concept "emission," a concept that is narrower than "communication to the public" and "diffusion." Consequently, broadcasting takes place where the wireless diffusion takes place as a communication to the public. Where communication to the public by means of radio waves is effected through a direct broadcasting satellite, the communication takes places in all countries which are covered by the "footprint" of the satellite.

(iii) Under the Berne Convention, which provides for national treatment, the national law of each country covered by the "footprint" of the satellite is applicable. The national laws may grant an exclusive right (Article 11bis(1)), or may provide for what may be called a non–voluntary license (Article 11bis(2)). Any broadcasting through direct broadcasting satellites, when the "footprint" covers more than one country, must, therefore, comply with the copyright laws of each of the countries covered by such broadcasting. Otherwise, a communication to the public in one country would be governed by the national law of another country, a result contrary to the principle of national treatment.

(iv) Where the "footprint" covers only a part of a country, one might consider, according to the "de minimis" principle, that the national copyright law of that country need not be taken into account.

(v) Compliance with the applicable national copyright laws is the responsibility of the person or organization that gives the order for the broadcasting through direct broadcasting satellite. No other entity has any responsibility. In particular, no person who receives the broadcast in any country has any responsibility, in particular needs no authorization from, and needs not pay anything to, the owner of the copyright in the broadcast work, for such reception.

(vi) These views are based on the Berne Convention as it is today.

13. The representative of the Director–General of Unesco noted that the Universal Copyright Convention as revised in 1971 provided in its Article IV*bis*, *inter alia*, for the exclusive right to authorize the broadcasting of intellectual works. That provision could be applied to this new technique of diffusion inasmuch as broadcasting in the sense of the Convention encompassed direct broadcasting by satellite.

14. A number of participants emphasized the need for examining the questions arising in connection with direct broadcasting satellites in the field of copyright. Some of them stressed the urgency of the issue, with particular regard to the fact that broadcasting by satellite may compete with traditional broadcasting in the countries within the coverage area of the satellite.

15. The representative of the Commission of the European Communities informed the participants of the publication, in June 1984, of the Green Book on "Television without frontiers," dealing with the establishment of a common market of broadcasting, among others, by satellite. The Commission is waiting for direct broadcasting by satellite becoming operational and is inclined, for the time being, to think that the related copyright problems could be solved within the Community by means of contracts.

16. One participant referred to the discussion of copyright questions concerning direct broadcasting satellites in the Council of Europe.

17. Participants from Nordic countries informed the meeting of discussions that took place on the subject among the Nordic countries, where a Nordic satellite project was under consideration. According to present plans, only the national law of the country of emission would apply, even where the "footprint" covered several countries.

18. Several participants said that it was also necessary to deal with questions of so–called neighboring rights relating to direct satellite broadcasting. The representative of the International Labour Office noted with satisfaction that certain participants had

highlighted the importance of additional discussion of so–called neighboring rights in connection with satellite transmission. Doubtless no one would dream of disputing their importance. It was not the responsibility of the present meeting to deal with the matter, since its mandate was confined to copyright. Nevertheless, in technical terms it would already be providing useful food for thought concerning so–called neighboring rights. The speaker announced that, on the combined initiative of ILO, Unesco and WIPO, the Intergovernmental Committee of the Rome Convention would be called upon to consider, at its next session (June 1985), a proposal to undertake a study of the problems raised, insofar as these concerned the Rome Convention, by legal and practical developments in the sphere of cable and satellite transmission. The study would be submitted to the Committee at its next session. If the proposal were accepted, it would be possible to study problems affecting neighboring rights with due regard to the specific characteristics of the Rome Convention.

19. Several participants dealt with the narrowing of the technical difference between fixed satellite services and broadcasting satellite services. Powerful communication satellites allowed easier reception, in some cases even by individual members of the public, and distribution on earth of the signals received was increasingly effected by cable; on the other hand, the direct broadcasting satellite industry was developing only slowly and dishes for domestic reception of direct satellite broadcasts were expensive. Distribution by cable enabled the use of uncomparably more channels than possible through satellites, and cable technology was quickly developing. Local distribution by cable of programs transmitted by fixed satellite service was spreading in particular in the United States of America, but also in Europe (Sky Channel, Music Box, etc.). Nevertheless, the participants found that copyright questions of direct satellite broadcasting should be dealt with separately.

20. The participants were informed of the British Cable and Broadcasting Act of 1984 which assimilated direct broadcasting by satellite to broadcasting. In France, the Bill introduced to the Parliament on the revision of the Copyright Act 1957, contained a new term, "*télédiffusion*" which was defined as "the diffusion by any telecommunication process of sound, images, documents, data and messages of any kind." The purpose was to use a single term to cover all forms of telecommunications; it therefore applied to both radio broadcasting and cable distribution. Under Article 8 of the Bill, the diffusion of a work by the emission of signals towards a satellite for subsequent reception either directly by the public or, under certain conditions, through the mediation of some other body, was assimilated to the broadcasting of the work in question.

21. One participant said that satellite broadcasting was, by its very nature, broadcasting in the traditional meaning of the word, since the satellite replaced, for purposes of television broadcasting, the so–called Heaviside layer which naturally reflects to earth short waves used in sound broadcasting.

22. A great number of participants said that broadcasting via direct broadcasting satellites amounted to broadcasting also from the point of view of copyright. Many participants found that, as a consequence, direct satellite broadcasting needed no special consideration, and the use of direct broadcasting satellites merely increased the effect of the original emissions.

23. A number of other participants, however, emphasized that the quantum jump as regards the extent of the area covered by satellite broadcasting resulted in a new quality of broadcasting. Whereas in the case of traditional broadcasting the coverage of territories neighboring to the country of the emission could be generally considered as a mere "overspill," broadcasting via satellite frequently covered the territory of several countries, totally or to a considerable extent, even where the emission was effected from a country having a large territory. Moreover, broadcasting via satellite could not be compared with sound broadcasting by short waves over large distances, owing to technical differences, differences in attainable quality of reception, and relative economic considerations. These factual differences called for a corresponding legal treatment. Aspects which could be neglected in the case of traditional broadcasting have to be considered in the case of direct broadcasting satellites.

24. Some participants referred to the possibility of developing technical means of narrowing the actual coverage area of a direct broadcasting satellite and limiting it to the area allotted, under the International Telecommunication Convention, to the country under the law of which the satellite operates. Other participants held, however, that the feasibility of such technical solutions was yet to be proved and that the difference in the coverage areas of traditional and satellite broadcasting would in any case remain so significant that special copyright considerations seemed unavoidable.

25. Some participants asked the question whether direct broadcasting by satellite could not be re-

garded under the Berne Convention as a *sui generis* communication to the public governed by Articles 11 and 11ter, or, in the case of cinematographic productions, as distribution under Articles 14 and 14bis, and noted that those four Articles did not allow — as did Article 11bis(2) — for the determination, by national legislation, of the conditions of the exercise of copyright in the work communicated to the public. It was found, however, that communication to the public by means of radio waves came under the provisions of the special rules contained in Article 11bis concerning broadcasting.

The applicable law

26. The participants agreed that it was always the broadcaster originating the direct broadcasting by satellite (determining its program and giving the order for its distribution) who was responsible vis–à–vis the owners of the copyright concerned.

27. One participant expressed the view that among countries that were party to the Berne Convention or the Universal Copyright Convention (1971 text), the rule that only the laws of the country of emission were applicable did not raise any problems, except in the case of non–voluntary licenses; it would therefore suffice to settle that problem, and there was no need to take the laws of the countries of reception systematically into account. As for countries that were not party to the above–mentioned international treaties, it was hardly feasible to make them show greater respect for the authors' rights of nationals of other countries.

28. Several participants said that, since direct broadcasting by satellite was broadcasting, the law applicable to the responsibility of the broadcaster under international conventions should be determined in the traditional way, as has generally been determined in connection with traditional broadcasting. According to these participants, the law of the country of the broadcaster, and that law alone, should apply to the copyright responsibility of the broadcaster, even where the satellite broadcasting covered several countries. This country was, according to some of the said participants, the country where the broadcaster had its headquarters, whereas according to others it was the country where the emission to the satellite took place. One participant informed the meeting that, under the law of the United Kingdom, the broadcast was deemed to be made from the place from which it was transmitted to the satellite. In the view of some participants, there was nothing in the Berne Convention which would support the application of the laws of all countries covered by the satellite; this would amount to considering the reception as an act relevant to the copyright liability for broadcasting; the necessity of acquiring the right to broadcast the work in each country concerned would often cause unmanageable difficulties in practice, particularly since the refusal of the grant of the right for one of the countries covered by the satellite would make it impossible to go ahead with the broadcasting by satellite of that work at all. Two participants said that such an interpretation of the Berne Convention would open the way to obstructing direct broadcasting by satellite for political reasons, enabling the copyright owner or his representative to refuse the authorization for certain countries where he or it regarded the broadcast of the work politically undesirable.

29. Other participants said that the application only of the law of the country where the broadcast originates would imply a concept according to which broadcasting is merely emission, and it is just such a concept which is alien to the Berne Convention, in which broadcasting is considered as communication to the public and emission is not even mentioned. Whereas emission took place only in one country, communication to the public of the work was effected in each country where the work was made available to the public by means of diffusion of radio waves, under the law applicable according to Article 5(1) of the Berne Convention. Making available to the public was not the same concept as the concept of reception and did not imply any responsibility of anyone who received the broadcast. It was said that in the case of traditional broadcasting, the question did not arise since, characteristically, traditional broadcasting concerned only the country where the emission was made. Several participants said that the acquisition of rights with regard to several countries usually did not cause any practical difficulties, since the owner of the rights relating to various countries was, in most cases, one and same person, and those rights which were collectively administered could generally be obtained for all countries from one and the same organization, namely the organization of the country of the broadcaster since such organization represented also the organizations of the other countries concerned; furthermore, it was said that where rights for various countries were owned by different persons or organizations, the broadcaster would not be in a worse situation than, for example, publishers are with regard to books containing works of several authors and intended to be distributed in several countries. It was also stressed that political considerations should not deprive the author of the exercise of his exclusive right at his discretion and that it followed from the author's moral right that in certain cases he may refuse his authorization for reasons of political convictions.

30. One participant said that whereas a publisher may still proceed to the publication of a book if he was not allowed to distribute it in certain countries, the satellite broadcaster had to refrain necessarily from the entire broadcast if he was not allowed to diffuse the work in one of the countries of the satellite's coverage area. It was also said, however, that in countries where the right of broadcasting was an exclusive right, the possibility of refusal of the authorization could not be avoided.

31. One participant said that appropriate remuneration, corresponding to the extent of the actual use of the work by satellite broadcasting, could also be secured to the author through contractual stipulations, under the single law of the country of the origination of the broadcast. On the other hand, it was said that this argument could apply only where the country of the broadcaster recognized the right of broadcasting as an exclusive right (otherwise the legal basis for effective negotiation was missing) and that, in any case, the application of several laws under the international conventions did not merely serve the purpose of securing remuneration. Any diffusion of a work without the author's express authorization in a given country may interfere with other kinds of uses of the work, e.g. in the case of the broadcasting of an audiovisual work in a country where the owner of the copyright did not wish that television reception be possible before theatrical exhibition had taken place.

32. One participant said that copyright fees for the broadcast were usually calculated in consideration of the public intended to be served and it was difficult to estimate the public actually reached within the entire "footprint" of the satellite since, for instance, the language of the broadcast may not interest most of the people in different language areas; it should be also considered that in the last few years the viewing time was generally becoming shorter and shorter (owing, *inter alia*, to the increasing number of channels and the use of video cassettes), and that towards the peripheries of the "footprint" the broadcast signals were weakening so that they could be received satisfactorily only by means of sophisticated receiving sets and it was hardly possible to determine under which conditions of reception could the broadcast still be considered as communication to the public. Another participant said that the effect on the reception of different language areas and other factors influencing the probable number of receivers within the "footprint" of the satellite should be considered when negotiating the amount of the remuneration; as to the type of receivers supposed to be suitable for the reception of satellite broadcasts, that participant referred to the ITU Radio Regulations according to which individual receptions in the broadcasting satellite service should be possible by a simple domestic installation and in particular those possessing small antennae. Some participants said that broadcasting satellite services financed from advertising fees would face difficulties if they were required to respect authors' rights in each country covered by their broadcast since advertisers were not prepared to pay for diffusion in countries where they were not interested in advertising. On the other hand, it was said that any actual use of protected works was subject to copyright liability irrespective of whether it was profit–making or not.

33. Several participants referred to the difficulties in enforcing rights concerning the satellite broadcast of a work in a country party to a copyright convention protecting the work broadcast if the broadcast was originated in a country not bound by that convention. Others said, however, that the mere fact that one could not enforce a right in certain cases should not mean that the right should not be recognized and that there might be cases where, because of the foreign broadcasters having assets or other interests in the country of infringement, remedies could be available. It was also said that if something was illegal in a country, it would not become legal just because it came from abroad. One participant said that it was rather academic to consider such cases. It was recalled, however, that there were still important countries not party to the Berne Convention and that broadcasts could be originated also from international waters.

34. One participant was of the view that if the application of several laws did not follow from the Berne Convention, one could have recourse to a special agreement under Article 20 of that Convention.

35. Some participants suggested that if the Berne Convention were to be interpreted as meaning that the author of a work transmitted by direct broadcasting satellite had no rights in a country covered by such broadcast other than the country of the broadcaster, then such interpretation would logically imply that any cable distribution of such broadcast in those countries should also be free; this, however, would be an unacceptable result. On the other hand, other participants said that cable distribution was an act separate from broadcasting and was governed by its own rules.

36. The representative of cable distributors said that the broadcaster should acquire the rights required to make legitimate diffusion of its program in all countries covered by its broadcast, including the right of cable distribution of the broadcast in those countries.

37. One participant saw difficulties in drawing the borderline between irrelevant coverage by broadcast of the territory of a country and coverage involving copyright liability.

Non–voluntary licensing

38. Some participants recalled that at the time of the 1928 Rome Conference for the revision of the Berne Convention when it was made a matter for national legislation to determine the conditions of the exercise of the right of broadcasting, enabling the countries of the Union to introduce systems of non–voluntary licensing in favor of broadcasting organizations, the factual situation was characterized by the following: (i) broadcasting was made overwhelmingly by organizations under public law, (ii) television broadcasting was non–existing and (iii) both the emission of the radio waves and the communication to the public of the sounds took place essentially, if not exclusively, within the limits of the country of the broadcaster. Since that time, commercial broadcasting had become more and more important, television broadcast became a reality, and the diffusion of the signals increasingly covered also territories of countries other than the country of the broadcaster. Thus, the initial conditions that were underlying the said provisions in the Berne Convention had profoundly changed and there was no reason any more to allow the granting of non–voluntary licenses, at least not to commercial broadcasters, and because in most cases it also became impossible to limit the effects of a non–voluntary license to the territory of the country under the law of which such a license was granted.

39. One participant recalled that when considering the possibility of non–voluntary licensing in the Diplomatic Conference of 1948 for the revision of the Berne Convention, one delegation proposed to exclude the application of such licenses in the case of commercial broadcasts. That proposal was not adopted, so that Article 11bis(2) may be equally applied to broadcasts financed by public funds, subscribers' fees or fees paid by advertisers.

40. Some participants emphasized that the grant of so–called compulsory licenses to broadcast protected works by means of direct broadcasting satellites was inconsistent with the Berne Convention since by their very nature such broadcasts characteristically covered territories of countries other than that where the compulsory license was granted and since the Berne Convention expressly limited the effect of any compulsory license to the territory of the country that granted such license.

41. Other participants mentioned the consequences of the inapplicability of compulsory licenses to broadcasting satellite services in countries where such licenses prevail: under the law of such countries, the author had no exclusive right based on which he could negotiate a contract and, owing to the inapplicability of compulsory licensing, the situation was not regulated at all.

42. One participant informed the meeting of the idea of the Nordic countries to agree upon, in a convention, the use of non–voluntary licensing of direct satellite broadcasting in each of them.

43. Some participants said that according to the national treatment rule of the Berne Convention the national law of each country covered by the direct broadcasting satellite applied to the authors' rights relating to the diffusion of the work over the territory of that country: in any country where there is a compulsory licensing the broadcaster may benefit from it, in any country where the right is an exclusive right the broadcaster has to respect it.

44. Some participants emphasized that under Article 11bis(2) of the Berne Convention the countries may limit compulsory licensing, if any, to certain types of broadcasts, for example to broadcasts by governmental broadcast services.

45. One participant said that one should not, with reference to Article 11bis(2), speak generally of compulsory licenses. The "conditions" mentioned in that provision may equally consist of statutory or compulsory licenses, obligatory collective administration of broadcasting rights in certain kinds of works, compulsory representation by authors' organizations of non–members of those organizations, etc.

46. One participant suggested considering the establishment of an arbitration body for the determination of the amount of remuneration to copyright owners where it could not be agreed upon by the parties.

Pay television

47. One participant raised the question whether the so–called "pay television," that is, television broadcasting receivable only by those members of the public who hired or bought the decoder necessary to decrypt the encrypted signals diffused by the broadcaster, could be qualified as broadcasting at all, since the public to which the communication of signals is intended was restricted to those who availed themselves of the additional service of the broadcas-

ter consisting in providing his customers with decoders ("real audience").

48. One participant said that such decoders should be considered as any other accessories of receiving equipments, such as, for instance, converters or normal aerials, which did not add any new act of communication to the broadcast; thus "pay television" amounted to broadcasting.

49. Some participants said that the rental or sale of decoders was a kind of guarantee of receiving the subscription fee and was a trading activity of the broadcaster. It was also said that fees charged to the public by the user of a work for access to it did not alter the type of the act of using the work.

50. Several participants said, however, that although "pay television" was broadcasting, national legislation should not allow for its non–voluntary licensing. The meeting was informed of a bill introduced to the Parliament in Denmark providing that the use of protected works in encrypted broadcasts may not be subjected to compulsory licensing.

Ephemeral recording

51. One expert said that the unavoidable recording of the broadcast work in the direct broadcasting satellite, placed on a geostationary orbit, was kept only for a minuscule portion of a second and, therefore, it was irrelevant for all practical purposes; the geostationary position over the coverage area rendered recordings for deferred diffusion to the area allotted to the satellite unnecessary.

Conclusion

52. In conclusion, the participants agreed that direct broadcasting of works by means of a satellite (broadcasting satellite service) was broadcasting in the sense of both the Berne and Universal Copyright Conventions. The participants suggested that various aspects of the application of those Conventions when broadcasting is effected through direct broadcasting satellites should be further studied by the Secretariats, in particular as regards the following questions: (i) the law of which country or countries applicable in the case of direct broadcasting by satellites covering several countries; (ii) the applicability of non–voluntary licensing; (iii) the applicability of remedies under criminal law and civil law other than the law on copyright; (iv) differences between, and common characteristics of, fixed satellite and broadcasting satellite services; (v) links between satellite broadcasting and cable distribution. The participants also suggested to extend the study to the field of neighboring rights. The participants noted that the Secretariats would report on the meeting to their respective Copyright Committees.

VI. Adoption of the Report

53. This report was adopted unanimously by the participants on March 22, 1985.

VII. Closing of the Meeting

54. After the usual thanks, the Chairman declared the meeting closed.

List of Participants

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Rapporteur, Copyright Division, Turkish Radio and Television Organization

United Kingdom

Mr. H.P. Nicholas Steinitz
Principal Industrial Property and Copyright Department, Department of Trade and Industry

United States of America

Mr. William H. Skok
Office of Business Practices, Department of State

Ms Lucy Hummer
Senior Policy Adviser, Office of the Coordinator for International Communication and Information Policy, Department of State

Yugoslavia

M. Lado Hribar
Chef du Service du droit d'auteur, Radio–Télévision de la Slovénie

Mme Radmila Mihailović
Chef des relations internationales, Radio–Télévision yougoslave

IV. Observers

a) Intergovernmental Organizations

International Labour Organisation (ILO): R. Cuvillier. **European Economic Community (EEC):** D. Franzone. **Arab Educational, Cultural and Scientific Organization (ALECSO):** F. Ammar; Y. Al–Eryani.

b) International Non–Governmental Organizations

European Broadcasting Union (EBU): W. Rumphorst. **International Alliance for Distribution by Wire (AID):** G. Moreau. **International Association of Art (AIAP):** C. Bleynie. **International Association of Broadcasters (AIR):** N. Pizarro. **International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM):** J. Elissabide. **International Chamber of Commerce (ICC):** D. Ladd; C. Colombet; O. Carmet; D. Gaudel. **International Confederation of Societies of Authors and Composers (CISAC):** J.–A. Ziegler; C. Joubert; R. Abrahams. **International Copyright Society (INTERGU):** G. Halla. **International Federation of Actors (FIA):** R. Rembe. **International Federation of Associations of Film Distributors (FIAD):** G. Grégoire. **International Federation of Film Producers Associations (FIAPF):** A. Brisson; S. Madoff; H. Dobrensky. **International Federation of Journalists (IFJ):** S. Ove Gronsund. **International Federation of Musicians (FIM):** Y. Burckhardt. **International Federation of Phonogram and Videogram Producers (IFPI):** M. Burnett; E. Thompson. **International Federation of Translators (FIT):** M. Voituriez. **International Literary and Artistic Association (ALAI):** R. Castelain; D. Gaudel. **International Publishers Association (IPA):** D. Duclos. **International Secretariat of Arts, Communications Media and Entertainment Trade Unions (ISETU):** M. Lesage.

V. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

H. Ben Amor *(Acting Assistant Director–General for the Programme Support Sector)*; A. Amri *(Acting Director, Copyright Division)*.

World Intellectual Property Organization (WIPO)

A. Bogsch *(Director General)*; C. Masouyé *(Director, Public Information and Copyright Department)*; G. Boytha *(Director, Copyright Law Division)*.

Notifications

Nairobi Treaty on the Protection of the Olympic Symbol

MEXICO

Ratification

The Government of the United Mexican States deposited, on April 16, 1985, its instrument of ratification of the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty enters into force, with respect to the United Mexican States, on May 16, 1985.

Nairobi Notification No. 28, of April 16, 1985.

National Legislation

ICELAND

Act Amending the Copyright Act No. 73, of May 29, 1972*

(No. 78, of May 30, 1984)**

Article 1. Two new paragraphs shall be added to Article 11 of the Act and shall read as follows:

"The authors of works which have been broadcast or published on audio or video tape are entitled to special remuneration on account of the recording of their works on audio or video tapes for private use under provisions contained in the first paragraph of the present Article. A levy shall be paid in respect of equipment for the recording of works on audio or video tapes for private use as well as unrecorded audio and video tapes and other tapes which may be considered to be intended for such use. The levy shall be paid on equipment and tapes imported into Iceland or manufactured in this country and the duty to effect payment of this levy is imposed upon importers and manufacturers. The levy on equipment shall amount to four per cent (4%) of the import price or manufacturing price in case of domestic manufacture. The levy on unrecorded audio tapes shall amount to Kr. 10,00 but to Kr. 30,00 in case of unrecorded video tapes. The Minister of Culture and Education will lay down further rules relating to this levy, including the value guarantee thereof.

A joint collection center of a federation of copyright holders, including performing artists and producers, will collect copyright levies in accordance with the preceding paragraph and will dispose thereof. Statutes shall be laid down in respect of the collection center in cooperation with the Ministry of Culture and Education and these shall be subject to the Ministry's confirmation. The Statutes shall, among others, stipulate the distribution of income among the member associations, and therein may also be contained instructions with respect to contributions for the support of the publication of audio and video tapes."

Article 2. The words "first paragraph of Article 11" in the second paragraph of Article 45 shall be replaced by: "first and third and fourth paragraphs of Article 11".

Article 3. The words "A gramophone record or other sound recordings may not be copied" at the outset of the first paragraph of Article 46 shall be replaced by: "Video tapes and audio recordings, including gramophone records, may not be copied".

Article 4. The words "the first paragraph of Article 11" in the second paragraph of Article 46 shall be replaced by: "the first and third and fourth paragraphs of Article 11".

Article 5. The beginning of the second paragraph of Article 54 shall be worded as follows:

"The following violations shall be subject to fines or imprisonment of up to two years".

Article 6. A new clause shall be added to the second paragraph of Article 54 and this will be clause 6, reading as follows:

"(6) the importation and manufacture of equipment and audio or video tapes for the purpose of distribution thereof to the public and the distribution of such equipment or tapes to the public without copyright levy being paid thereon, in accordance with the third and fourth paragraphs of Article 11 or rules which are laid down in accordance therewith, cf. the third paragraph of Article 11".

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* See *Copyright*, 1973, pp. 242 *et seq.*

** The official Icelandic text of this Act was published in the *Law Gazette*, Series A, No. 78/1984, of May 30, 1984. Authorized English translation communicated to WIPO by courtesy of the Ministry of Culture and Education of Iceland.

Article 7. The second paragraph of Article 56 shall be worded as follows:

"A person who has criminally infringed the rights of an author or a performing artist shall be ordered by the Court to pay compensation to the injured party for mental suffering".

Article 8. The first and second paragraphs of Article 59 shall be worded as follows:

"Violations of the present Act shall be subject to official indictment, but the institution of legal action shall at all times be permissible for the injured party. Violations shall be subject to official indictment only upon the requirement of the injured party, unless important public interests require legal action.

After an author's death, official indictment may furthermore be required or legal action may be instituted by the party whom the author has authorized to exercise his copyright in accordance with the second paragraph of Article 31, or alternatively the husband or wife of the deceased author, his parents, children, brothers and sisters may do so on account of violations of the first and second paragraphs of Article 4, the second and third paragraphs of Article 26, the first paragraph of Article 28, and the directions of the author in accordance with the second paragraph of Article 31, or a performing artist may do so in accordance with the same provision, cf. the second paragraph of Article 45".

Article 9. Item B of Article 61 shall be worded as follows:

"B. The provisions of Article 46 apply to video and audio recordings wherever and by whomever these have been produced, but the right to remuneration in accordance with the third and fourth paragraphs of Article 11 applies only to recordings made in this country or in States granting similar rights to Icelandic recordings".

Article 10. The present Act enters into force forthwith. The Ministry of Culture and Education is, however, authorized to postpone laying down rules in accordance with Article 1 with respect to the collection of levies on video tapes and equipment for recording thereonto.

Article 11. When the present Act enters into force, the provisions thereof shall be included in the text of the Copyright Act No. 73, of May 29, 1972 and the Act shall be published thus amended.

UNITED KINGDOM

The Copyright (International Conventions) (Amendment No. 2) Order 1984

(No. 1987, of December 19, 1984)*

1. This Order may be cited as the Copyright (International Conventions) (Amendment No. 2) Order 1984 and shall come into operation on 21st January 1985.

2. The Copyright (International Conventions) Order 1979*(b)* shall be amended as follows:

(a) in Schedule 3 (which names countries in whose case copyright in sound recordings includes exclusive right to perform in public and to broadcast) there shall be included a reference to the Philippines;

(b) in Schedules 4 and 5 (which name countries whose broadcasting organisations have copyright protection in relation to sound broadcasts and television broadcasts respectively) there shall be included a reference to the Philippines with a related reference in each Schedule to 25th September 1984.

3. (1) This Order, except for paragraph *(b)* of Article 2, shall extend to all the countries mentioned in the Schedule hereto.

(2) Paragraph *(b)* of Article 2 shall extend to Bermuda and Gibraltar.

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* The Copyright (International Conventions) Order 1979 has been amended by Orders in 1980, 1983 and 1984. See *Copyright*, 1980, pp. 212 *et seq.*; 1981, p. 80; 1984, pp. 287 *et seq.*

SCHEDULE *Article 3(1)*

Countries to which this Order (except Article 2(b)) extends

Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands
Falkland Islands Dependencies
Gibraltar
Hong Kong
Isle of Man
Montserrat
St Helena
St Helena Dependencies (Ascension, Tristan da Cunha)

EXPLANATORY NOTE

(This Note is not part of the Order)

This Order further amends the Copyright (International Conventions) Order 1979 to take account of the accession of the Philippines to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

The Order extends to the dependent countries of the Commonwealth to which the 1979 Order now extends.

General Studies

The First Sale Doctrine — The Defense That Never Was?

Richard COLBY*

Activities of Other Organizations

International Literary and Artistic Association (ALAI)

Study Session, Executive Committee and General Assembly

(Oxford, April 10 to 13, 1985)

1. At the invitation of its British National Group (the British Literary and Artistic Copyright Association, shortly referred to as BLACA), the International Literary and Artistic Association (ALAI) held a Study Session in Oxford on April 11 and 12, 1985, on the subject "Copyright in Free and Competitive Markets." The Session, which took place in the Music Room of the Wadham College, was chaired by Professor Georges Koumantos (Greece), President of ALAI, and was attended by some 90 participants from the following countries: Austria, Belgium, Denmark, Finland, France, Germany (Federal Republic of), Greece, Italy, the Netherlands, Norway, Sweden, the United Kingdom and the United States of America. WIPO was represented by Mr. György Boytha, Director of the Copyright Law Division.

2. The discussions were based on three main papers, delivered by Professor René Joliet (Judge of

the European Communities Court of Justice, Luxembourg) on "The Impact of the Jurisprudence of the EC Court of Justice on Copyright," by Messrs. Michel Walter (Austria) and Jan Rosen (Sweden) on "Free Trade and Competition: EFTA and the EEC," and by Mr. David Ladd (former Register of Copyrights, United States of America) on "Antitrust Policy and Copyright: the US Experience."

3. "Initial discussants" were Messrs. Adolf Dietz (Federal Republic of Germany) and Claude Joubert (France), concerning the subject "Impact of the Policy of Free Movement of Goods and Free Provisions of Services"; Professor Valentine Korah (United Kingdom), concerning the subject "Impact of the Rules of Competition"; Messrs. Charles Clark (United Kingdom) and Nelson Landry (Canada), concerning the subject "Antitrust Policy and Copyright." The contributions of the "initial discussants"' were followed by a wide exchange of views among the participants.

4. On the occasion of the Study Session, the Executive Committee of ALAI met twice in the Seminar Room of the Wadham College, on April 10 and 13, 1985. Besides approving the Note prepared by Professor André Françon (Secretary General of ALAI) on the January 1985 meeting of the Executive Committee held in Paris, noting the reports of the Secretary General on past and planned activities of ALAI and of Mrs. Gaudel (Treasurer of ALAI) on the finances thereof, as well as discussing various questions related to those subjects, the Executive Committee adopted, as a result of the Study Session, the following statement:

The ALAI Executive Committee

Notes that certain recent trends in case law and certain recent initiatives by European Community bodies, although claiming to concern solely the exercise of copyright, are in fact liable to prejudice the very existence of that right;

Considers that the implementation of the principles of free movement of goods, of freedom to provide services and of free competition should not lead to restrictions on the rights afforded to authors by the international conventions and by national legislation;

Further notes, with satisfaction, that in certain countries that had not hitherto recognized the specific nature of copyright the concept was gaining acceptance in case law and in certain legislative drafts;

Stresses that it is necessary to safeguard copyright if it is wished to promote creativity, which enriches the cultural heritage of mankind and constitutes the source of the cultural industries.

5. On April 12, 1985, ALAI also held its General Assembly in the Music Room of the Wadham College. The Note prepared by the Secretary General on the General Assembly of April 7, 1984, held in Paris was adopted. The General Assembly noted further the report of the General Secretary on past and planned activities of the Association, as well as the report of the Treasurer on its finances.

Book Reviews

Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976, by *J.H. Reichman*. One volume of 121 pages. Article reprinted from the Duke Law Journal, No. 6, December 1983.

Can and should aesthetic qualities and utility be separated, for the purposes of granting protection to utilitarian articles incorporating an artistic element? This 18th–century debate is far from being resolved in our age: since the often–cited salt-cellar designed in the 16th century by Benvenuto Cellini, the ever–continuing consequences of the industrial revolution have made the problem increasingly complex, and extended the argument to "plastic salad bowls, drinking glasses, fireplace grates, a hair brush, the luggage rack of a motor scooter, and the hexagonal head of a lubricating pump."

The author, an Associate Professor of Law at the Ohio State University, considers, in this first reprinted article, the evolution of design protection in certain member countries of the Berne Union for the Protection of Literary and Artistic Works, in the light of the options they provided for the United States of America, and goes on to trace different influences in that country until the General Revision of the Copyright Law in 1976.

The three options outlined by the author are, predictably, total cumulation (concurrent protection offered under copyright law, as well as special *sui generis* design laws), non–cumulation (protection offered exclusively under such special design laws), and partial cumulation (protection in principle offered under special design laws, but without excluding the possibility of other protection in the case of objects considered to incorporate expressions of high artistic value). In explaining the theories "unity of art" versus "duality of art," the author quotes, in connection with the former, an interesting passage from Pouillet, who wrote in the late 19th century in France, an outstanding example of a country affording total cumulative protection:

"Whence comes the difficulty that is found in clearly defining the nature and character of the industrial design and model? It comes ... from the fact that we have got it in our heads that art and industry, two things made to be allied and united, should be separated, and because we have dreamed of establishing a line of demarcation between them."

How, indeed, can acts of demarcation by the courts between "art" and "industrial design" escape the charge of being esta-

blished, at least to a certain extent, on subjective criteria? On the other hand, how to avoid the pitfalls of the "unity of art" theory, where lack of rigor in granting relatively lengthy copyright protection makes possible excessive private appropriation of items embodying little creativity?

The author holds the view that in the United States of America a non–cumulative line, limiting access to copyright protection, was followed from 1954 to 1969 whilst the Copyright Office was pressing for a *sui generis* design law, and that from 1969 to 1976 that Office acted to reinforce the non–cumulative line in the face of delay by Congress in the enactment of both the revised copyright law and the special design law incorporated within it. He ends with the revised law of 1976, which further reinforced non–cumulation by retaining and incorporating the Italian doctrine of "scindibilità" or separability: a design could only be considered a work of art if it were possible to identify it as such in its being distinct (separate) from the utilitarian aspects of the article. In the author's opinion, the United States of America got the worst of both worlds because "the reformed copyright law lacked the special regime of design protection that gave coherence to the Italian system."

This article, as well as the second[1] in the series, appropriately read like academic dissertations of undoubted scholarship. However, their structure does not always assist the comprehension of readers less well–versed than himself in the subject. For instance, it would have been clearer to discuss the respective merits and demerits of copyright and industrial property protection more fully at the outset, as an integral part of the main line of argument, rather than to put them in somewhat incidentally here, and then at the very end of his second article.

A salient feature of the author's views is his strong impression of the success of the Italian system, although it is true that he also recognizes its weaknesses. It is worthwhile, perhaps, to quote one of the critics of that system: "the form of clothing, shoes, furniture, cars, typefaces, or typewriters (famous Italian designs there!) can never be protected by copyright... One could ask what then really is left for copyright protection of applied art... According to Fabiani, the criterion of 'separability' in reality boils down to the idea of 'artistic value,' which according to Benussi is an illusory distinction."[2]

In his interpretation of legislative developments in the United States of America, the author has some views worthy of serious study concerning the Bill S. 2075 of 1959 — which was not enacted — that he sees as a watershed, and as a promising combination of the originality criterion and greater ease and length of copyright protection and the stricter regime of eligibility of design patent law. In his own words, "the proposal attempted to relegate applied art to a mini–regime of copyright law, which would coexist with a stricter regime of design patent law, in return for a shortened period of protection." The failure of its passage is regretted by the author, and this refrain is increasingly echoed in the views of other experts in the field, who share his desire for a more composite approach bringing together different areas of intellectual property law.

A.S.

[1] See the review, below, of his second article, "Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models."

[2] See *Copyright*, 1983, pp. 317 to 323 ("Protection of Industrial Designs Between Copyright and Design Laws: A Comparative Study," by Herman Cohen Jehoram).

Design Protection After the Copyright Act of 1976: A Comparative View of the Emerging Interim Models, by *J.H. Reichman*. One volume of 119 pages. Article reprinted from the Journal of the Copyright Society of the USA, Volume 31, No. 3, February 1984.

This second article is less a sequel to than an illustration and amplification of the author's conclusions in his first article.*

A large part of it is devoted to the practical implications and actual application of legislation in the United States of America, as well as in the countries supplying the "interim models" in Europe. His analysis of case law in the United States of America is particularly informative. He outlines important legal decisions from the case of *Stein* v. *Mazer* in 1909, which first established the protectibility of applied art under copyright law (the objects in question were dancing figures used as lamp bases), to recent times. Of special interest is the case *Kuddle Toy Inc.* v. *Pussycat–Toy Co. Inc.* (1974), which highlights the greater legal and economic complexity engendered by conceptual separation: a collection of copyrighted teddy bears, many owned by the plaintiff, were followed by yet another teddy bear, examined for real originality as opposed to trivial variations in comparison with the others. To uphold trivial variations as eligible for copyright protection would have been "tantamount to private appropriation of the item in question from the public domain," in the author's words, and brought up the issue of the excessive generosity, in some cases, of copyright law, which could confer a commercial monopoly for a long period, on softer terms than industrial property law.

The author also examines and compares conceptual and practical difficulties of different systems in various countries (notably, total cumulation in France, partial cumulation in the Benelux countries and the Federal Republic of Germany, and non–cumulation in Italy). Where partial cumulation and non–cumulation exist, the courts, even in some examples against their will, in some way are turned into arbiters of artistic creation; where total cumulation is used to avoid this dilemma, in the author's opinion, the resulting over–protection, creating unjustifiable economic monopolies, itself produces efforts by the courts to limit copyright protection in practice. A noteworthy example given by the author is Belgium, before the enactment of the Uniform Benelux Designs Law in 1975: although a Royal Decree of 1935 declared acceptance of the "unity of art" thesis, within a matter of months the courts in actual practice found themselves asserting artistic criteria for purposes of granting protection. Equally striking are some examples of the pains taken by legislators to deny the use of truly artistic criteria: in the Netherlands, before 1975, such thinly–veiled terms as "the aesthetic 'effect' desired by the creator" were used.

The author returns to the conviction expressed in his first article — that the only realistic solution is a dual regime, a combination of *sui generis* and copyright protection. Both articles contain useful and stimulating material for specialists in this field.

A.S.

* See the review, above, of his first article, "Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976."

Calendar of Meetings

WIPO Meetings

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

1985

June 6 to 14 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Planning and on Special Questions

June 17 to 25 (Paris) — Berne Union: Executive Committee (Extraordinary Session) (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

June 26 to 28 (Paris) — Rome Convention: Intergovernmental Committee (Ordinary Session) (convened jointly with ILO and Unesco)

July 8 to 12 (Geneva) — Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions

September 11 to 13 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Patent Information for Developing Countries

September 16 to 20 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

September 23 to October 1 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

October 7 to 11 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information

October 21 to 25 (Geneva) — Nice Union: Committee of Experts

November 4 to 30 (Plovdiv) — WIPO/Bulgaria: World Exhibition of Young Inventors and International Seminar on Inventiveness for Development Purposes (November 12 to 15)

November 18 to 22 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning

November 25 to 29 (Paris) — Committee of Governmental Experts on Model Provisions for National Laws on Publishing Contracts for Literary Works (convened jointly with Unesco)

November 25 to December 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information

November 26 to 29 (Geneva) — Committee of Experts on a Treaty for the Protection of Integrated Circuits

December 3 to 6 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property

December 9 to 13 (Geneva) — Committee of Experts on the International Registration of Marks

UPOV Meetings

1985

June 4 to 7 (Hanover) — Technical Working Party for Agricultural Crops, and Subgronp

June 18 to 21 (Aarslev) — Technical Working Party for Fruit Crops, and Subgroup

June 24 to 27 (Aars and Aarslev) — Technical Working Party for Ornamental Plants and Forest Trees, and Subgroups

July 8 to 12 (Cambridge) — Technical Working Party for Vegetables, and Subgroup

October 14 (Geneva) — Consultative Committee

October 15 and 16 (Geneva) — Meeting with International Organizations

October 17 and 18 (Geneva) — Council

November 12 and 13 (Geneva) — Technical Committee

November 14 and 15 (Geneva) — Administrative and Legal Committee

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

Non-Governmental Organizations

1985

June 7 to 12 (Munich) — International Copyright Society (INTERGU) — Congress

June 19 and 20 (Geneva) — International Federation of Phonogram and Videogram Producers (IFPI) — Council and General Assembly

August 18 to 24 (Chicago) — International Federation Of Library Associations and Institutions (IFLA) — Congress

September 10 to 14 (Athens) — International Federation of Actors (FIA) — Congress

September 16 to 18 (Geneva) — International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) — Annual Meeting

September 19 (Geneva) — International Literary and Artistic Association (ALAI)— Executive Committee

1986

April 24 and 25 (Heidelberg) — International Publishers Association (IPA) — Copyright Symposium

September 8 to 12 (Berne) — International Literary and Artistic Association (ALAI) — Congress