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World Intellectual Property Organization

Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works

(Geneva, June 18 to 22, 1984)

Report

I. Introduction

1. Pursuant to decisions taken by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-second session and by the Governing Bodies of the World Intellectual Property Organization (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") convened a Working Group to examine model provisions for national laws on the rights and obligations of authors and publishers under publishing contracts for literary works, with special emphasis on the interests of developing countries. The Working Group met at the headquarters of WIPO in Geneva from June 18 to 22, 1984.

2. Six of the seven consultants invited in their personal capacity by the Directors General of Unesco and WIPO, who were nationals of Algeria, Brazil, China (People's Republic of), France, Germany (Federal Republic of) and Poland, took part in the work of the Working Group; the consultant from the Republic of Cameroon, who had also been invited, had presented his apologies, being unable to travel to Geneva.

3. Observers from three international non-governmental organizations also attended the meeting.

4. The list of participants appears in Annex II to this report.

II. Opening of the Meeting

5. The meeting of the Working Group was opened on behalf of the Director General of WIPO by Mr.

Claude Masouyé, Director, Public Information and Copyright Department, and on behalf of the Director-General of Unesco by Mr. Abderrahmane Amri, Senior Lawyer, Copyright Division, who welcomed the participants.

III. Election of the Chairman

6. On a proposal by Mr. Salah Abada (Algeria), Mr. André Kerever (France) was elected Chairman of the Working Group.

IV. Documentation

7. The Working Group had before it a document containing draft Annotated Model Provisions for National Laws on Publishing Contracts for Literary Works (document UNESCO/WIPO/GC/PC/2). It also had at its disposal a document containing an inventory of national legal provisions governing various aspects of authors' contracts (document UNESCO/WIPO/GC/PC/3).

V. General Discussion

8. After having had the documents presented by the Secretariats, the Chairman invited the participants to present considerations of a general nature.

9. All the members of the Working Group commented favorably on the quality of the documents presented by the Secretariats, which took due account both of established customs and of the specific position of developing countries. After having engaged in a wide-ranging exchange of views on the draft Model Provisions, they expressed their agreement on the general structure of the provisions and

then concentrated on certain specific points, either in the text itself or in the comments on it.

VI. Consideration of the Model Provisions

10. After an examination, provision by provision, of the draft submitted to it by the Secretariats, the Working Group recommended a revised text which appears in Annex I to this report. It was understood that the comments on the Model Provisions would subsequently be reworked by the Secretariats in order that the various observations made in the course of the discussions might be taken into consideration. To that end the Working Group suggested that the comments on certain model provisions might be completed as follows.

11. As regards *Model Provision No. 1*, the Working Group suggested

(i) to supplement the comments so as to make it clear that the specification of the essential elements of the contract, serving the purpose of reproducing and distributing copies of a book edition of a literary work, does not exclude the possibility of stipulating in the contract the grant of rights and undertaking of obligations concerning further forms of uses of the work provided that such stipulations are not contrary to any applicable provisions of the law. The legal definition in paragraph (1) comprises the aspects which must be covered by the contract in order that it be a valid contract for publishing a literary work in book form;

(ii) to make it clear that paragraph (2) serves the purpose to save the contract by statutory provisions if the parties did not stipulate anything as regards the form of edition of the work or the territory where it can be offered for sale to the public; and

(iii) to explain, by means of examples, various possible forms of establishing a written contract required under paragraph (3).

12. As regards *Model Provision No. 2*, the Working Group recommended giving a detailed explanation of how the nature and scope of the rights granted to the publisher can be determined in consideration of the stated purpose of the contract, taking into account also the usual field of activities or statutory objectives of the publisher.

13. As regards *Model Provision No. 3*, it was suggested to explain under what circumstances, and why, the author might be exempted from the liability to indemnify the publisher in case of actions brought against the latter owing to infringement of rights of third persons by publishing the work.

14. As regards *Model Provision No. 4*, the Working Group suggested

(i) to refer, in connection with the fixation of the time limit for the reproduction of copies of the work, to paragraph (2) of Model Provision No. 9, which regulates the termination of the contract owing to non-compliance with the date of publication and which provides for the grant of a just and reasonable grace period to the publisher;

(ii) to mention that the author is interested in specifying a reasonable time limit for the publication of his work also because he wants to see it distributed to the public as soon as possible; and

(iii) to explain that the statutory time limits for the publication of the work are proposed in square brackets since the relevant possibilities of publishing houses may vary from one country to another, and may be different also as regards various kinds of books.

15. As regards *Model Provision No. 5*

(i) more explanation should be given concerning various types of selling prices prevailing in different countries;

(ii) it should be explained that publishers may not arbitrarily fix the published price of a book although they have the right to determine it, and that the regulation under paragraph (1) implies the possibility of the author objecting to a price which does not correspond to the criteria set forth in the said paragraph; and

(iii) it should be mentioned that the three-year term in paragraph (3) is proposed in square brackets since related professional usage may vary from one country to another and also depend on the kind of books sold.

16. As regards *Model Provision No. 6*, it should be explained that

(i) the right to claim authorship of the work also implies the right to request anonymity or to have a pseudonym indicated on the book;

(ii) "due prominent form" usually means indication of the author's name in a visible manner on both the cover and the inner title page of the book, whenever appropriate; and

(iii) the right to claim respect of the integrity of the work as desired by the author also implies the right of the author to update his scientific or technical texts accepted by the publisher, without prejudice, however, to the latter's legitimate interests if the process of reproduction of the text has already begun;

(iv) usual corrections to be made in the course of editing the text do not amount to modification thereof.

17. As regards *Model Provision No. 7*, the comments should contain

(i) an interpretation of the term "reasonable advance," with special regard to different usages in various countries and concerning different kinds of books; and

(ii) a description of the practice prevailing in certain countries concerning the calculation of special royalty rates on net receipts for copies sold for distribution in foreign countries overseas.

18. As regards *Model Provision No. 8*

(i) it should be stressed that the provisions of paragraph (1) concerning the obligation of the publisher to render proper reports and accounts of the exploitation of the work, and those of paragraph (2) concerning the right of the author to verify the publisher's relevant statements are likewise mandatory. Since, however, paragraph (2) provides for a right, rather than an obligation deriving from the law, it became necessary to state in the Model Provision itself that the right in question may not be waived by the author. This explanation also refers to all other cases under the Model Provisions, where it has been considered necessary to protect the interests of the author by excluding the possibility of waiving his respective right; and

(ii) reference should be made to the practice prevailing in certain countries according to which publishers agree to render half-yearly accounts only subject to the sum exceeding a certain minimum, or where payments are not normally made if the sum due is below a certain minimum and so insignificant that the costs of the administration of its remittance would virtually absorb it.

19. As regards *Model Provision No. 9*

(i) information should be given concerning various possible forms of liquidation of the publisher, regulated differently under national laws applicable to bankruptcy;

(ii) it should be mentioned concerning both selling off the remainder of an edition and bankruptcy of the publisher that, in certain cases, the author may be interested in maintaining the contract (e.g. if there is no manifest possibility of providing for a new edition elsewhere, and there is still some hope that the publisher, or in case of its liquidation its possible successor, would resume the publication of the work); and

(iii) in relation to paragraph (4) it should be noted that after the lapse of the agreed duration of the contract the author may still be interested in having the copies in stock sold by the publisher, especially if he did not have the possibility to enter into a new publishing contract for the same work, with another publisher.

20. As regards *Model Provision No. 10*, it should be made clear that, in case of publishers whose enterprise is composed of several independent legal entities dealing with different kinds of publishing activities (such as, e.g. book publishing, music publishing, theatrical production), the separate or combined sale or liquidation of any parts other than the publishing body corporate on behalf of which the contract was signed would not come under the coverage of paragraph (2).

21. As regards *Model Provision No. 11*, it should be explained that paragraph (5) is proposed in square brackets since under certain national laws special rules prevail concerning ownership of commissioned works which may preclude, totally or partially, the application of the present set of model provisions relating to contracts for book publishing.

22. As regards *Model Provision No. 12*, the Working Group made no observations concerning the related comments.

VII. Conclusion

23. The Working Group noted that the Secretariats will prepare a completed version of comments relating to the Model Provisions in the light of the suggestions made by the Working Group, and will submit the Revised Draft Model Provisions for National Laws on Contracts for Publishing Literary Works in Book Form, along with the said completed comments, to a Group of Experts for further consideration, in 1985.

VIII. Adoption of the Report

24. In the absence of Mr. André Kerever, the consultants elected Mr. Salah Abada to preside over the last meeting during which this report was unanimously adopted.

IX. Closing of the Meeting

25. After the usual words of thanks the Chairman declared the meeting closed.

ANNEX I

**Revised Draft Model Provisions
for National Laws on Contracts for Publishing Literary Works in Book Form**

Model Provision No. 1*Essential Elements and Form of the Contract for Publishing a Book Edition of a Protected Work*

- “(1) In a contract for publishing in book form a literary work protected by copyright (hereinafter referred to as “the contract”), the author of such work shall grant to the publisher the rights necessary for the reproduction of the work in its original language or in a translation, respectively, in a specified form of edition and according to stipulations concerning the quantity of printed copies, for distribution over a specified territory, whereas the publisher shall undertake to publish the work by reproducing and selling it to the public accordingly, and to pay the author a remuneration. The rights and obligations of the parties under the contract are subject to the model provisions set forth hereunder.
- “(2) The absence of stipulations by the parties concerning the form of edition or the territory of its distribution shall not invalidate the contract and the work shall be published in the form of a standard book edition and the territory referred to above shall be understood as the country of the publisher, respectively.
- “(3) The contract shall be concluded in writing.”

Model Provision No. 2*Grant of Rights*

- “(1) Total assignment to the publisher of the copyright in a work, and any assignment of rights to, or licensing of, the publisher in relation to unknown future forms of use of the work, shall be null and void.
- “(2) Any assignment of copyright or any grant of publishing rights under a license shall extend only to such rights as are expressly specified in the contract. In case of doubt, the nature and scope of the rights granted to the publisher shall be determined by the stated contractual purpose to be served by the exercise of those rights.
- “(3) Unless expressly agreed otherwise, the publisher shall acquire exclusive rights, and shall have the power to institute legal proceedings on his own for the enforcement of those rights against third parties.
- “(4) The manuscript or other copy from which the work is being reproduced shall remain the property of the author.”

Model Provision No. 3*Warranty*

- “(1) The author shall warrant to the publisher that the work does not infringe the copyright or any other right of third parties protected by law, and that he is fully entitled to grant to the publisher the rights specified in the contract.
- “(2) In the event of any claim or action brought against the publisher for infringement, resulting from the use of the work according to the contract, of any third party rights, the author shall join the publisher in any corresponding legal proceedings. It depends on the circumstances, in particular on whether the publisher knew or should have known of the infringing facts involved, if, and to what extent, the author shall indemnify him for any expense or damage arising for him in connection with the said infringement.”

Model Provision No. 4*Publication of the Work*

- “(1) The time limit for the reproduction of copies of the work and the beginning of their distribution shall be fixed in the contract and shall not exceed [two] years, or, in case of publication of the work in a translation not yet available, [four] years, from the signing of the contract or the delivery to the publisher of the final text of the work, whichever occurs later.
- “(2) If no date of publication has been agreed upon in the contract, the work has to be published within a reasonable time, depending on its nature and the agreed form of its edition, which term shall not however exceed the maximum period provided for in paragraph (1).
- “(3) The provisions of paragraphs (1) and (2) shall not apply to the publication of books consisting of works of different authors.”

Model Provision No. 5*Determination of the Selling Price*

- “(1) On request by the author, the estimated selling price of the copies of the work to be published shall be mentioned in the contract. The publisher shall have the right to alter this price in good faith and to

determine the published price before the publication of the work as justified, in particular, by cost and marketing considerations at the time of publication, also taking into account the developments in the level of retail prices for similar kinds of works and editions.

- “(2) The publisher shall inform the author of the final published price per copy of the work prior to its sale to the public.
- “(3) In the event of the sales of copies of the published work remaining below a certain number of copies fixed in the contract in any [three] consecutive years, the publisher shall be entitled to sell off the remainder of the stock, subject in each case to prior notification of the author, who shall have the right to buy such stock or a part thereof within 30 days on the terms of the best offer the publisher can prove that he has received. If no minimum of sales has been fixed in the contract below which the publisher would become entitled to the remainder of the stock, such action shall be subject to prior approval by the author, and the latter may not unreasonably refuse such approval.”

Model Provision No. 6

Moral Rights

- “(1) The publisher shall in no respect modify the work without the explicit prior consent of the author.
- “(2) The publisher shall have the name of the author printed in due prominent form on each published copy of the work, unless explicitly requested by the author otherwise.”

Model Provision No. 7

Remuneration of the Author

- “(1) The author’s remuneration for the reproduction of his work and distribution of copies thereof shall be fixed either in the form of royalties to be calculated as a percentage of the published price of the copies and to be paid for all copies sold, or in the form of a lump sum for either a specified number of copies reproduced or a certain period of time during which the publisher may distribute copies of the work reproduced by him, irrespective of their actual number. The author’s share in the publisher’s returns from such licenses as he has been entitled to grant to third parties under the contract has to be fixed separately for each kind of use of the work under such licenses.
- “(2) If the contract provides for the payment of royalties, they shall be paid also for copies sold off according to Model Provision No. 5(3). In such cases the royalties shall be calculated on the basis of the actual revenues from such sales.

- “(3) On signature of the contract, a reasonable advance shall be paid to the author against the royalties or the lump sum, as the case may be. The lump sum shall become payable to the author at the latest on publication; royalties shall be paid to him within 30 days following the relevant accounts due under paragraph (1) of Model Provision No. 8. Advance payment against royalties cannot be claimed back on the ground that it was not subsequently covered.
- “(4) If the right to reproduce and to distribute the work were granted to the publisher against a lump sum and, in the course of the implementation of the contract, the publisher’s revenues from the actual use of the work prove to be considerably higher than initially estimated and become grossly disproportionate to the remuneration paid to the author, the publisher shall, at the request of the author, agree to an amendment of the contract by providing for a fair percentage of the total revenues from the distribution of the work to be paid to the author. The sum already paid to the author shall be deductible from the amount of his share in the revenues. The author’s claim to such an increase in his remuneration may not be waived in advance; it shall not be enforceable, however, after two years have elapsed following the publisher’s first statement of sales and revenues revealing the facts giving rise to the claim.”

Model Provision No. 8

Statements and Accounts of Sales

- “(1) At least once a year, the publisher shall send the author statements of sales and any other use of the work effected or licensed by him under the contract, irrespective of whether such sales or other uses of the work gave the author a claim to payment of fees. The publisher shall also give in his statements a detailed account of royalties and other revenues accruing to the author from the realization of the contract, where authors’ fees other than a lump sum have been agreed upon.
- “(2) The publisher shall put at the author’s disposal all documents necessary to justify his statements and accounts of sale and other commercialization of the work. The author shall have the right also to verify the publisher’s statements of sales and revenues by having the relevant accounts of the publisher audited by an expert to be appointed jointly by the author and the publisher or, in the absence of agreement between them, by a certified accountant appointed by the author; this right may not be waived. The auditor appointed shall be obliged to keep his findings confidential and to inform the author only of facts relating to the use of his work.”

Model Provision No. 9*Termination of the Contract*

- “(1) If the contract was concluded for the reproduction and distribution of a specified number of copies of the work or for a specified period of time, it shall terminate on the sale of the last copy of the work reproduced under the contract or on the lapse of the time agreed upon, respectively, without prejudice to the provisions of paragraph (4).
- “(2) If the publisher fails to publish the work within the period specified according to Model Provision No. 4, or if he allows the work to go out of print and fails to issue a new edition within six months, provided his rights were not limited to publishing a single edition and limitation as regards duration of the contract did not prevent him from doing so, the author shall set a just and reasonable new term for the publisher to comply with his obligation under the contract. If the publisher refuses to publish the work or fails to publish it within the new term set for him to comply with his obligation the author shall have the right to revoke all rights granted to the publisher; this right may not be waived.
- “(3) If the publisher sells off the copies published by him in accordance with Model Provision No. 5(3), and in the event of the publisher going into liquidation, the author shall have the right to terminate the contract with the effect that all rights granted to the publisher under that contract shall [cease to exist.] [revert to the author.]
- “(4) The termination of the contract according to any of paragraphs (1), (2) and (3) shall not affect existing licenses that the publisher was entitled under the contract to grant to third parties, and shall not be prejudicial either to any claims the author may have to shares in the returns from such licenses, or to any other claim to payment of fees or damages that the author or the publisher may have against the other party at the time of the termination of the contract. After the termination of the contract owing to lapse of its agreed duration, the publisher shall have no right to continue to sell copies of the work still in stock, unless the author expressly authorizes him to do so.
- “(5) All declarations concerning the termination of the contract shall be made through written notice.[”]
- [“(6) The contract and any license granted under it by the publisher shall terminate, in any case, after the lapse of [state number] years following their conclusion or grant, respectively; paragraph (4) shall apply *mutatis mutandis*.”]

Model Provision No. 10*Succession to Rights and Obligations*

- “(1) The rights granted to the publisher under the contract shall not be transferred by him to third parties without the prior written consent of the author.

“(2) Notwithstanding paragraph (1), on prior written notice to the author, the publisher’s rights and obligations under the contract may be transferred to a party who legally succeeds to all or substantially all his business and assets related to the legal entity under the responsibility of which the contract has been signed.

“(3) The provisions specified in the contract shall also empower and bind, as appropriate, the successors in title of the author. If the author dies before having accomplished the work under the contract the publisher shall not publish the available part of the work and shall not have that part completed by another author without the consent of the successors in title of the deceased author. The publisher shall not be obliged to publish an incomplete work.”

Model Provision No. 11*Special Rules on Commissioning the Work*

- “(1) Where the contract is concluded for the publication of a work yet to be created, the manuscript shall be prepared and assessed for acceptance according to stipulations, to be made in writing, concerning the subject and extent of the work as well as the purpose and form of its publication.
- “(2) The date for delivery of the manuscript shall be fixed with due regard to the nature of the commissioned work and to the purpose of its publication. In the case of delay in the delivery of the manuscript, the publisher shall, at the request of the author, grant a just and reasonable period of grace, provided that such a delay does not prejudice the purpose of the publication.
- “(3) The publisher shall make a declaration concerning the acceptance of the work within two months from the date on which he received the complete manuscript, unless another time limit is fixed in the contract. If the publisher fails to make such a declaration within that time limit, the work shall be deemed accepted.
- “(4) Within the time limit for acceptance of the work, the publisher shall be entitled to return the same to the author for necessary correction or amendment; he shall give reasons in writing in support of such requests. Such requests can be made repeatedly, subject to the fixing of reasonable dates for compliance with them. If the author refuses to comply with such a request or if the amended work still does not correspond to the stipulations referred to in paragraph (1) the publisher may terminate the contract and shall be obliged to pay to the author, at the latter’s request and for the work done by him in good faith, an appropriate fee.[”]
- [“(5) Provisions Nos. 1 to 10 and 12 apply also to contracts for the publication of commissioned works.”]

Model Provision No. 12*Option to Publish Further Works of the Author*

- “(1) An agreement by which the author grants to the publisher the right to decide whether he wishes to enter into a contract for the publication of one or more future works of the author shall be confined to works of which at least the nature is specified. Such an agreement must be made in writing and may be terminated by the author after a period of five years following its conclusion, subject to six months’ notice. That right of termination may not be waived.
- “(2) The publisher shall decide on the acceptance of each new manuscript of the author within two months of its presentation to him. If he wishes to publish it, he

shall submit his draft contract for its publication. The author shall have the right to negotiate in good faith the conditions of the contract in the light of the success of the publication of his previous work or works and the conditions generally applicable to similar cases.

- “(3) If the publisher does not submit to the author, within the period provided for in paragraph (2), his written draft of the contract for the publication of the new work presented to him, or if the parties fail to agree on conditions for its publication similar to conditions that the author can provide proof of being able to stipulate for publication of that work by another publisher, the author shall be free to contract for its publication with that other publisher.”

ANNEX II

List of Participants**I. Members of the Working Group**

- M. Salah Abada
Directeur général, Office national du droit d’auteur, Alger, Algérie
- M. André Kerever
Conseiller d’Etat, Paris, France
- M. Walter Moraes
Magistrat, Professeur, Université de Sao Paulo, Sao Paulo, Brésil
- M. Samuel Nelle
Directeur, Société camerounaise du droit d’auteur (SOCADRA), Douala, Cameroun
- Mr. Wilhelm Nordemann
Professor of Law, Free University, West Berlin, Federal Republic of Germany
- Mr. Jerzy Serda
Juge, Professor, Institute of Invention and Protection of Intellectual Property, Jagiellonian University, Krakow, Poland
- Mrs. Zhai Yiwo
Publication Expert, Member, Copyright Study Group, Publishers Association of China, Beijing, People’s Republic of China

II. International Non-Governmental Organizations

International Confederation of Societies of Authors and Composers (CISAC): N. Ndiaye. **International Literary and Artistic Association (ALAI):** N. Ndiaye. **International Publishers Association (IPA):** J.-A. Koutchoumow; J.-F. Cavanagh; C. Clark; W. Von Lucius.

III. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

A. Amri (*Senior Lawyer, Copyright Division*).

World Intellectual Property Organization (WIPO)

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

**Excerpts from the Preparatory Document
Introducing the Subject Matter and Containing the Draft Comments
on Each Proposed Model Provision**

**Need for Legislative Provisions on Authors' Contracts,
with Special Regard to Book Publishing**

1. Authors need to be protected against both (i) unauthorized uses of their works and (ii) excessive, inadequate or incomplete conditions of authorizing uses thereof.
2. These two aspects of the protection of authors' interests are reflected in Article 5 of the Berne Convention, which distinguishes between the *enjoyment* and the *exercise* of the rights granted to authors in respect of works for which they are protected under that Convention.
3. The substantive rules of the Berne Convention concentrate, however, on the assertion of the authors' exclusive rights to authorize various forms of use of the work, and do not extend to the specific regulation of the protection of authors' interests in the course of the voluntary exercise of such rights, except for a few general provisions, partly of a prohibitive nature — prohibition of any formality as a condition of the exercise of authors' rights (Article 5(2)) or the exclusion of the possibility of alienating specified moral rights (Article 6^{bis} (1)) — and partly admitting of limitations on the exercise of certain exclusive rights (Article 9(2), Article 11^{bis} (2) and (3), Article 13(1); Appendix containing special provisions regarding developing countries). It was only in the context of regulating the ownership of copyright in cinematographic works that, during the 1967 Stockholm Conference for the revision of the Berne Convention, certain rules were adopted concerning the interpretation and form of contracts for the use of contributions to the making of the work (Article 14^{bis} (2)). Not even the last-mentioned provisions, however, contain substantive rules determining the contents of such contracts.
4. The Universal Copyright Convention likewise focuses on the protection of the enjoyment of copyright; in Articles V, V^{bis}, V^{ter} and V^{quater} it provides for special limitations of the exercise of certain exclusive rights (as regards developing countries virtually in the same manner as contained in the Appendix to the Berne Convention), and does not contain any provisions concerning the contents of contracts for the voluntary exercise of the author's rights.
5. As to the legal nature of the exercise of copyright, both the Berne and Universal Copyright Conventions also admit of the assignment of authors' rights. Article 2 of the Berne Convention speaks of "the author and his successors in title"; Article 6^{bis} (1) of that Convention, however, excludes the possibility of alienating certain moral rights of the author. Article I of the Universal Copyright Convention provides for the protection of the rights of "authors and other copyright proprietors." And yet both Conventions reflect a marked preference for licensing: the essence of each author's right guaranteed under the Berne Convention is defined as "exclusive right of authorizing" (Articles 8, 9(1), 11(1), 11^{bis} (1), 11^{ter} (1), 12, 13(1), 14(1) and (2)); and under the Universal Copyright Convention "the basic rights ensuring the author's economic interests" are understood as including "the exclusive right to authorize reproduction by any means" etc. (Article IV^{bis}.1).
6. Whatever the legal nature of the exercise of copyright may be under a given copyright law, it remains a matter for national legislation to implement the protection of the authors' rights recognized under the national law and international Conventions against unjust exploitation of such rights by means of unwarranted or ambiguous contractual stipulations, or through the omission of just and reasonable clauses. Modern developments in the producing and marketing of goods incorporating authors' works further aggravates the problem of properly authorizing distinct forms of use of works, and the author, when entering into individual contracts for the publication, stage performance, broadcasting or cinematographic adaptation of his work, has an increasing need for legislative assistance in exercising his rights.
7. Proper regulation of the author's contracts with the primary users of his work, who make the work available to the public in a form suitable for marketing, has become even more important in the face of the proliferation of branches of the so-called cultural industry catering for secondary uses of works, based on an existing supply of them as produced by other users. Such is the case, for example, with reprographic reproduction services drawing on the output of publishers, with the cable distribution of programs that utilize broadcasts of works or with the manufacture of equipment and blank tapes for home taping, which prosper from the production of phonograms, films and videocassettes embodying works. In many cases, the author cannot even grasp the range and scale of possible further uses of the work that may follow the implementation of the contract he is signing with the primary user, and he cannot always be expected to recognize the extent to which his control over future uses of the work depends on proper specification of the conditions of any authorization given by him to prospective users.
8. Experience shows that the bargaining position of an individual author is in many cases weaker than that of the cultural enterprise he is going to authorize to use his work. This imbalance justifies special legislative assistance to the author in exercising his rights, in particular as regards the conclusion of individual contracts entered into by him for special kinds of use of a specified work of his. The main contracts of this kind are the contracts for publishing, stage performance, broadcasting (both sound and television) and cinematographic adaptation, since, in many cases, they are concluded by the author himself. Individual

authors also cannot be expected to have the same professional experience as organizations, which have at their disposal a huge repertoire of works needed by user enterprises.

9. Moreover, individual authors are sometimes confronted with printed contract forms prepared by the prospective user of their works, which provide for the transfer of various authors' rights that are not absolutely necessary for the envisaged kind of use of the work to be efficiently made, for an unlimited duration of the contract, etc. In such cases, authors are frequently bewildered and unable to argue.

10. An approach based on authors' rights does not mean, however, that relevant legislation should not also consider the just interests of the cultural industry, without whose vigorous development authors' creativity could not flourish. Proper legislative provisions on authors' contracts are an important civil law guarantee of undisturbed trading on the cultural market, helping to prevent rights from being blocked without corresponding use of the work concerned and thereby inhibiting the formation of unlimited monopolies in the cultural market, which are also harmful to potential users of the work. Legal provisions on authors' contracts should provide for an equitable balance of all the lawful interests involved, in order to secure the unhampered, the widest possible and the most rewarding distribution of the work with the author's consent, this being the ultimate objective of copyright protection.

11. Proper legislative provisions on authors' contracts are of special importance to developing countries, where the development of a modern national cultural industry is given high priority. They help to give more and more effect to national creativity and to stimulate its further growth, at the same time promoting national education and research; they may also contribute to a beneficial growth in the dissemination of cultural values both within the country and across its frontiers.

12. Legislative regulation of essential aspects of certain types of contract, such as contracts of sale or lease, exists throughout the world and is considered a natural corollary to the principle of freedom of negotiation. Moreover, it is more and more necessary in the field of copyright for the owner of the rights in a work and its prospective user to have legislative guidance when entering into a contract for the proposed uses of the work. Without such guidance, freedom of negotiation could easily become meaningless to the party with less experience or in a weaker bargaining position.

13. The purpose of furthering the mutual and substantial freedom of the contracting parties may be served by legislation in a twofold manner. On the one hand, the law should guarantee a proper balance of reciprocal duties and prerogatives in promoting the interests of the parties, by providing for the rights, obligations, limitations and sanctions that are necessary for such a balance to be found and maintained. Provisions to this end are generally mandatory rules (*ius cogens*) which the parties may not disregard or replace by different stipulations. On the other hand, the law should provide for just and reasonable solutions for

important situations that the parties may not have regulated in their contract. This requirement should be met with rules subordinate to different stipulations by the parties (*ius dispositivum*); such rules apply only where the parties have not agreed on any specific solution to the problem concerned. Naturally, non-mandatory rules also afford guidance to the parties in the negotiation of their contract, and necessarily have a harmonizing effect on contractual practice.

14. Several basic rules on authors' contracts are applicable to every kind of contract, be it a contract for publishing, performance, broadcasting or any other use of the work. Such *general rules* usually determine the possible nature of the grant of rights by the author to other persons (either assignment or licensing); they may, among other things, provide for limitations on the duration of contracts for the use of works, for the possibility of terminating the contract for failure to make the stipulated use of the work, or for revision of the specified conditions as a consequence of gross disproportion between the author's remuneration and the actual returns from the use of his work, etc. However, in an increasing number of cases, legislation also adopts *special rules* applicable to distinct types of authors' contract, in view of the special nature of the conclusion and performance of those kinds of contract. It is obvious that the problem of legislation on authors' contracts has become a major and complex issue which cannot be solved globally at the outset. It is therefore proposed, as a first step, that work should concentrate on contracts for book publishing and that Model Provisions for national legislation should be devised for this most important type of author's contract.

15. The proper place to look for provisions on authors' contracts in general, and contracts for book publishing in particular, is the law of copyright. Legislative provisions on contracts for different uses of authors' works primarily concern the exercise of the author's right, which is indeed a very special kind of right. Although all the relevant lawful interests of the users of works and of the public to which the works should be made available must likewise be considered, it is only natural that modern legislation has been dealing with the subject in the framework of copyright protection laws, rather than in the part of the Civil Code on contracts, or as a chapter of mercantile law, as used to be done in some countries with publishers' contracts.

16. A survey of existing legislation on authors' contracts, including in particular the special provisions on publishing contracts, is to be found in a separate document (UNESCO/WIPO/GC/PC/3).

Annotated Model Provisions for National Laws on Authors' Contracts for Publishing Literary Works in Book Form

Nature and Purpose of the Model Provisions

17. The Model Provisions are intended to serve as a guideline to national legislation for the regulation of the main aspects of authors' contracts for book publishing,

with special regard to developing countries preparing new legislation on copyright or the revision of their existing copyright laws. The Model Provisions are not intended to cover every detail of the relations between the author and the publisher of his work; they are confined to proposing the minimum guarantee of just and reasonable conditions for the publication of protected literary works, and also certain standards for the harmonization of the basic contents of publishing contracts both within the country adopting them and at the international level.

18. The Model Provisions may inspire legislators to develop them further; they may be incorporated in existing systems of rules on authors' contracts or alternatively considered when such systems are revised; they may also be adopted as a separate part of the copyright law. Some of the Model Provisions, albeit drafted for book publishing, could be generalized and incorporated in the body of legislative provisions concerning all kinds of authors' contract.

19. The Model Provisions are not designed to replace the contracts negotiated separately and in greater detail in each case, according to the actual circumstances of any proposed publication of a book. They should govern the drafting of such contracts rather than be considered a standard contract in themselves. Their content is intended to become law, mandatory as regards certain basic requirements and subordinate to the parties' stipulations in other respects.

20. Whether or not a rule is mandatory is determined by its wording or by the substance of the provision in its proper context. Rules on the interpretation of unclear or disputed clauses, on formal requirements, on limitations or on sanctions are mandatory by their very nature and cannot be excluded by the parties. On the other hand, rules providing for rights and corresponding obligations have to be expressly qualified in the law, either as mandatory provisions (e.g., by a statement that the right established by the law cannot be waived) or as provisions subordinate to any different agreement between the parties (e.g., by the statutory proviso "unless expressly agreed otherwise").

Comments on Model Provision No. 1

21. The Model Provisions are confined to the legislative regulation of a special kind of authors' contract, namely the contract for publishing (i) literary works, (ii) in book form. "Literary works" are understood in the broadest sense of the word, covering all kinds of writings, whether fiction, drama or poetry, works of science, technology or popular science, school books, hobby books or any other kinds of original text, illustrated or not. On the other hand, only book publication is considered, and the Model Provisions are not applicable to publication in newspapers or periodicals. "Book" is understood as an individual publication embodying one or more works in volume form, irrespective of the number of its pages.

22. Statutory definition of the author's contract for publishing his literary work in book form serves the purpose

of specifying the mandatory elements constituting such a special type of contract, subject to the particular legal consequences attached to it by law. Those elements should be:

(i) the grant of the rights (whether by assignment or by licensing) necessary for reproduction and distribution of the work by the publisher;

(ii) the determination of the scope of the use of the work as regards form and the number of copies to be reproduced (the latter aspect does not necessarily entail specification of a definite number of copies; it is possible to agree on a minimum or maximum number of copies, or to provide that, following an initial edition of a specified number of copies, further copies should be produced according to actual demand for the work);

(iii) the specification of territorial limits for the distribution of the copies reproduced;

(iv) the obligation on the publisher (and not merely the faculty) to reproduce and distribute the published work as agreed; and

(v) the specification of remuneration payable to the author, to be fixed according to the nature of the planned publication (type of edition proposed, for instance, hard cover, paperback, pocket book, book club, etc.), the extent of the specified use (number of copies reproduced or sold, as the case may be), and also possible differences in sales conditions in various markets within the agreed territory of distribution.

23. The consequences of disregard by the parties of the statutory requirements fixed by the legislator as basic elements of the publishing contract may depend on whether the parties simply omitted relevant clauses (for instance as regards the kind or size of the edition agreed upon — in which case the corresponding statutory provisions complete the contract) or whether instead they agreed on legal effects alien to the statutory concept of the publishing contract (in which case the contract would fall into a different legal category, and become for instance a contract of service, or an innominate contract subject to the general rules of the contract law). If there is no clause in the contract concerning the remuneration of the author, the publisher is obliged by law to pay remuneration, according to the terms of Model Provision No. 7, to be fixed in consideration of the practice in the country of the publisher. It is possible, however, that the author may renounce his right to remuneration; such renunciation might involve the application of special rules of the contract law, beyond those governing the publishing contract.

24. The requirement of the written form for contracts for book publishing is justified by the long-lasting and complex relations between the parties, which evolve in time and introduce the possibility of different recollection of applicable clauses, with the consequent risk of disputes. A natural effect of the requirement of the written form is that the parties cannot enforce their rights, either against each other or against third parties, without having them specified in writing. The written form of contracts is an important guarantee of protection for the parties' rights and is highly advisable in developing countries.

Comments on Model Provision No. 2

25. The purpose of this Provision is to prevent the author from being deprived of his rights beyond the extent necessary for the exercise of usual publishing activities and certain subsidiary uses of the work as manifestly intended by both parties.

26. This purpose should be served by three basic rules:

(i) prohibition of total assignment of copyright and of the grant of rights concerning hitherto unknown forms of exploiting the work, the consequences of which cannot be predicted by the author;

(ii) the requirement that each right granted to the publisher be specified separately, both as regards its nature (by reference to the kinds of use to which it relates, for example, the right to publish a standard trade edition, the right to grant (exclusive or non-exclusive) licenses for pocket book editions of the work or for the printing of extracts from it in newspapers or periodicals, etc.), and its extent (by possible limitation in time or space, or by imposing other conditions, for example, by making the exercise of one of the rights granted to the publisher subject to the prior exercise of another right);

(iii) the rule of narrow interpretation of the nature and scope of ambiguously specified rights. The extent of the rights granted by the author should be confined to what is necessary for the achievement of the purpose of the contract as specified by the parties (for example, the right to publish the work does not necessarily include the right to secondary uses, and especially, not the right to make any translation or adaptation, etc.).

27. It follows from these basic rules that all rights not specifically granted to the publisher remain reserved to the author.

28. Model Provision No. 2 would not however exclude the possibility of the publisher being granted subsidiary rights that went beyond the use of the work as published by him; it leaves room, for instance, for granting the right to license translations or adaptations of the work. Such subsidiary rights must however be unequivocally specified by the parties and, in the sense of Model Provision No. 1, the relevant uses of the work must be made subject to corresponding remuneration.

29. The conditions of book publishing make it necessary for the publisher to be granted exclusive rights. In case of doubt, therefore, the rights granted to the publisher should be considered exclusive.

30. With regard to some legislation which links the standing to sue with ownership of the copyright, and in order to avoid possible complications in case of litigation, the law must provide expressly that the publisher has the power to take any legal action for the enforcement of his exclusive rights on his own, irrespective of whether those rights have been granted to him by assignment or under a license, or whether or not he has become the owner of the rights concerned, even vis-à-vis the author. The law

should however allow the parties to agree expressly to the publisher waiving his right to institute proceedings against third parties on his own.

31. It is necessary to clarify that the grant to the publisher of various rights in the work or illustrations contained in it does not involve the transfer of the property right in the manuscript or other material from which the work or its illustrations are being reproduced. Such a distinction serves the purpose of enabling the author to reclaim from the publisher the material embodiment of his writing or other works, in order to secure his position to initiate or to control further uses thereof, and also to sell the manuscript or other material separately.

Comments on Model Provision No. 3

32. A warranty is the usual assurance by a contracting party of the lawful enjoyment of something conveyed to the other party under the contract, and its fitness for the specified use. In the present context, it is an undertaking on the part of the author to the effect that the specified use of the work and the exercise of the rights granted by him to the publisher will not encroach on any right that third parties may have in the work. This warranty implicitly asserts that the work is original and that it does not violate any rights in preexisting protected works (in other words, that it is not plagiarized and, in the case of lawful uses of other works in it, that the relevant legal requirements have been duly respected), that other kinds of right have not been infringed by it either (e.g., that it is not libellous) and that the author is entitled to grant to the publisher the rights specified in the contract, and has not granted to any other person rights that might conflict with them. The warranty is combined with an obligation to render active assistance to the publisher in responding to any action brought against the latter in connection with the exercise of the rights granted to him under the contract.

Comments on Model Provision No. 4

33. In the interests of both author and publisher, it is necessary to specify a reasonable time limit for effecting the publication contracted for. The author has to know as from what date he may expect the public distribution of the work, associated in most cases with payments to him. The publisher needs a reasonable date to be set for publication, in order to be insured against premature reminders from the author and to be in a legally secure position to schedule the publication properly. Just and reasonable time limits for publication depend on many factors, including on the proposed type of book to be produced, the prevailing situation on the book market, or whether the work has to be translated first.

34. In order to prevent unjustifiably long publication delays, it is necessary that the law

(i) set maximum periods that cannot be exceeded by contractual provision, and

(ii) provide for publication within a reasonable time not exceeding the statutory time limits where the parties

have not agreed on any date of publication. In the light of the practice of book publishing today, it seems appropriate to set, by law, a two-year limit for publication in the language in which the work was placed at the publisher's disposal, and a four-year limit where the work has to be translated for the purpose of its publication. It should be noted that the law should also provide for a proper grace period in case of delay on the part of the publisher; this is done in Model Provision No. 8(2).

35. The publication of collective works usually involves editorial work and is bound to mean the publication of more than one work at the same time, not necessarily handed over to the publisher on the same day. Thus, the statutory time limits set by the law for publication in general cannot apply to the publication of collective works.

Comments on Model Provision No. 5

36. The fixing of the catalogue price of the book, i.e., the price at which it is offered to the public, is an important factor influencing the distribution of the published work. In countries where the publisher may not fix the retail price of the book in a manner binding the book sellers, the "catalogue" or "list" price amounts to a recommended selling price. Prices higher than usual for similar types of edition of similar kinds of work may adversely affect the distribution of the work but may effect a quick return on the publishing costs through the sale of fewer copies, to those who can afford to pay the higher price, than would be necessary if the price were lower. Experience shows that libraries, education or research institutes or some specialized professionals buy certain kinds of book that fall within their sphere of interest almost irrespective of their prices. On the other hand, sales at reduced prices may be prejudicial to the reputation of the author (consumers often thinking that cheaper books are of lesser value), but may be useful to the publisher, providing him with revenue within a short period and clearing out his stocks. It is therefore important that several aspects of fixing the selling price of published works be properly regulated by law.

37. It is a generally accepted practice that the catalogue price of a book is not definitively fixed until the time of actual publication of the work. Nevertheless, the author should have some guidance as to the economic effect of the proposed publication of his work, and it should not be left to the publisher to determine the catalogue price arbitrarily. Paragraph (1) therefore requires that an indicative estimated price be stated by the parties in the contract, and makes the fixing of the actual catalogue price dependent on relevant conditions prevailing on the market for the book at the time of publication. However, even the final catalogue price should be fixed under the supervision of the author, and the law should give him the possibility of preventing the fixing of a catalogue price that obviously does not correspond to the price level of other comparable editions and would be gravely prejudicial to his lawful interests. In this context, consumers' interests relating to reasonable distribution of the book should also be considered.

38. It is possible that the book does not sell as expected at the selling price originally fixed. The consequences of falling-off in sales should also be regulated by law. The conditions of sale at reduced prices should be determined by a time factor and by a minimum of sales as a function thereof. The law should provide that the parties specify a minimum number of copies to be sold over a period of any three consecutive years, entitling the publisher to sell off the remainder only if that minimum has not been reached. A three-year period appears to be long enough to outweigh short-term setbacks due to temporary factors and to allow for the recognition of a lasting lack of interest in the book. The minimum of sales below which it would be unreasonable to maintain the original catalogue price depends to a great extent on the nature of the work and the edition concerned. Where the parties fail to determine such a minimum, the law should not allow the publishing stock to be cleared without the consent of the author. The author should not however be entitled to refuse unreasonably his agreement to justified sales at reduced prices.

Comments on Model Provision No. 6

39. This provision serves to implement the protection of the basic moral rights of the author in the field of book publishing. It is of particular importance in countries that have not express legislative provisions on the protection of authors' moral rights, and where otherwise there would be no statutory protection whatsoever against possible modifications (omissions, additions, distortions or other changes) to the work and the incorrect or missing indication of its authorship.

Comments on Model Provision No. 7

40. The remuneration of the author should comply with the following basic requirements:

(i) the specified remuneration should be proportional to the returns from the marketing of the work under the contract (paragraphs (1) and (2));

(ii) the author should have the possibility of renegotiating the contract with regard to gross disproportions between the author's fees originally agreed upon and the actual revenue that accrues to the publisher during the marketing of the work (paragraph (4));

(iii) the author should be guaranteed to receive a minimum of remuneration for having granted the publisher the right to reproduce the work, regardless of its marketing success, by means of an advance payment (paragraph (3)).

41. The fact that, according to paragraph (3), an advance payment made against royalties cannot be reclaimed by the publisher on the ground that it has not been subsequently covered does not mean that such advance payments cannot be claimed back under any circumstances whatsoever. In cases where the contract has to be terminated owing to culpability on the part of the author (e.g., breach of warranty), the advance payment already made by the publisher may be reclaimed by him in compensation for actual damages or gains prevented.

42. It is just and reasonable for the author's possibility of claiming an increase in his remuneration under paragraph (4) to be restricted by means of a special provision limiting to two years, following the publisher's first statement of sales and revenues revealing the facts giving rise to the claim, the period during which such a claim can be enforced. Whether that period has to be counted from the date of dispatch of the statement ("mailbox theory") or rather from the date of its receipt by the author will depend on whatever other provisions of domestic law are applicable.

Comments on Model Provision No. 8

43. The author should be in a position (a) to request from the publisher proper statements of sales or any other uses of the work under the contract, and also accounts of all relevant revenue accruing to the author (paragraph (1)), and (b) to verify such statements and accounts properly (paragraph (2)).

The relevant rules under Model Provision No. 8 are self-explanatory.

Comments on Model Provision No. 9

44. A contract for publishing a work in book form may come to an end either in accordance with its terms, i.e., on the sale of the last published copy, if the contract was limited to publication of a certain number of copies or on the lapse of its duration, if it was concluded for a definite period (paragraph (1)), or alternatively owing to obstacles preventing its performance (breach of contract (paragraph (2)), lack of demand for the work necessitating a clearance sale of copies, or the fact of the publisher going into liquidation (paragraph (3)). In order to avoid uncertainty concerning related legal consequences for both the contracting parties and possible third parties involved, the conditions and the effect of the termination of the contract should be covered by the law as regards all cases mentioned previously (paragraph (4)).

45. The consequences of a breach of contract by the author are regulated by Model Provision No. 3 on "Warranty." With regard to possible breaches of the contract by the publisher, entitling the author to terminate the contract, paragraph (2) provides for conditions under which the contract may be terminated in two cases:

(i) failure to publish the work within the period agreed upon, and

(ii) allowing the work to stay off the market for at least six months where the publisher was not prevented by contractual limitations from continuing the reproduction and distribution of copies.

46. According to Model Provision No. 1, the publisher is obliged to publish the work as stipulated in the contract; he cannot, however, be forced to fulfil this obligation by operation of the contract itself. If, after a grace period to be mandatorily granted him by the author for a just and reasonable time, the publisher still does not publish or republish the work, the author may unilaterally terminate the

contract (paragraph (2)) and enforce his claims for damages for non-publication of his work (paragraph (4)). Depending on the relevant provisions of the applicable civil law, damages may consist in lost remuneration, in the author's reputation being affected by not having a timely work of his published with due promptness, or in actual damages, for instance debts the author incurs in anticipation of the promised publication.

47. The consequences of the termination of the contract must be regulated with special regard also to the validity of any licenses the publisher may have been entitled to grant to third parties (they remain in force provided they were granted in accordance with the provisions of the contract before its termination) and to the possibility of the publisher continuing to sell any copies he may still have in stock at the time of the contract terminating (this should be lawful only on explicit authorization by the author)(paragraph (4)).

48. Paragraph (5) provides (in square brackets, since its adoption is regarded as depending very much on the legal philosophy underlying the copyright law of a given country) for mandatory termination of the contract, in any event, after a certain number of years have elapsed. Such a provision may serve the purpose of making it possible for the parties' contractual relations to be renegotiated or for a new contract with another party to be concluded by the author. Such a coercive limitation of the life of the contract should apply individually to the actual publishing contract concluded between the author and the publisher and to any licenses the publisher may have been entitled to grant to third parties under that contract. The provisions of paragraph (4) should also apply to licenses granted under the contract that has suffered mandatory termination.

Comments on Model Provision No. 10

49. Usually, it is not a matter of indifference to the author who publishes his work and to whom he grants the right to reproduce and to distribute copies of it. The law should therefore forbid the transfer of the rights acquired by the publisher under his contract with the author unless the latter expressly allows this in writing prior to the transfer (paragraph (1)). It should be noted that the exercise of "subsidiary rights," often granted to the publisher in addition to the right to reproduce and to distribute copies of the work, which entitle the publisher to license third parties to make various kinds of supplementary use of the work (e.g., translation in specified languages), does not amount to transfer of the relevant right of the publisher. What is subject to the written consent of the author in such cases is the transfer of the right to authorize others — by granting them licenses — to use the work in certain ways.

50. On the other hand, the law also has to provide for continuous performance of the contract, in cases where not only rights under it are being transferred but all, or substantially all, of the publisher's business (paragraph (2)). Prior written notice should be required in such cases, in order to keep the author informed, so that he may take

all necessary steps to enforce any claims he may have against the publisher, and get in touch with the publisher's successor in good time.

51. As to the rights and obligations of the author, they should devolve on his successors in title by law only if the final text of the work has already been accepted by the publisher. The heirs or possible other successors in title of the author can be neither compelled to complete the creation of the work nor entitled to request the publisher to reproduce and distribute their contribution. On the other hand, the publisher may publish existing parts of the work or have them completed by another author only with the consent of the competent successors in title of the deceased author. It goes without saying that any of the author's claims to remuneration under the contract that may already have fallen due before the succession to his copyright can also be enforced by his successors.

Comments on Model Provision No. 11

52. The main purpose of Model Provision No. 11 is to ensure that, and to regulate the manner in which, the parties provide guidelines in their contract for cooperation in the creation and acceptance of the work to be published, in order to prevent, as far as possible, any arbitrary views and actions of the parties in the achievement or abandonment of their common goal. This purpose can be served, in particular, by:

(i) requiring unequivocal and detailed description, according to aspects specified by the law, of the work to be created, with the consequence that that description should constitute the only arguable criterion for the evaluation and acceptance or refusal of the work once created;

(ii) fixing, or requiring the stipulation according to statutory criteria, of the time limits for the compliance of both parties with their obligations in relation to the creation and acceptance of the work;

(iii) regulating the termination of the contract in case of the commission becoming thwarted, obliging the publisher to pay remuneration, in any case, to the author commissioned by him, and making the fixation of the amount of such payment subject to statutory guidelines.

53. The paragraphs of the Model Provision in question are self-explanatory. They relate to stipulations concerning the first phase of a contract for the publication of a commissioned work, consisting in the creation and acceptance of the work not yet existing at the time of conclusion of the contract (paragraphs (1) to (4)). Other aspects of such a contract are covered by the other Model Provisions regulating the publication of a literary work in book form in general.

54. Delay in the delivery of the manuscript to the publisher may prejudice the purpose of its publication, e.g., where the book was intended for a special event (such as non-recurring social events, Olympic Games, anniversaries, etc.) after which it would have no further relevance.

Comments on Model Provision No. 12

55. In order to prevent the publication of future works of the author from being blocked by the unqualified grant to the publisher of the "right of first refusal" of the author's forthcoming works, the law must:

(i) limit such a right (also called the option to publish future works) as regards both its scope and its duration;

(ii) regulate the acceptance of future works submitted to the publisher, and also the negotiation of the contracts for the publication of each one of them, and

(iii) specify the conditions under which the author becomes free to contract with another publisher for the publication of the work submitted first to the publisher enjoying the option to publish it.

56. The relevant rules under Model Provision No. 12 are self-explanatory.

Notifications

Convention Establishing the World Intellectual Property Organization

CYPRUS

Accession

The Government of the Republic of Cyprus deposited, on July 26, 1984, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO).

The Convention Establishing the World Intellectual Property Organization will enter into force,

with respect to the Republic of Cyprus, three months after the date of deposit of its instrument of accession, that is, on October 26, 1984.

WIPO Notification No. 129, of July 27, 1984.

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

PHILIPPINES

Accession

The Secretary-General of the United Nations has informed the Director General of the World Intellectual Property Organization that the Government of the Philippines deposited, on June 25, 1984, its instrument of accession to the International Convention for the Protection of Performers, Producers

of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961.

Pursuant to Article 25(2), the Convention will enter into force, for the Philippines, three months after the date of deposit of the instrument of accession, that is, on September 25, 1984.

Nairobi Treaty on the Protection of the Olympic Symbol

ALGERIA

Accession

The Government of the People's Democratic Republic of Algeria deposited, on July 16, 1984, its instrument of accession to the Nairobi Treaty on the Protection of the Olympic Symbol, adopted at Nairobi on September 26, 1981.

The said Treaty entered into force, with respect to the People's Democratic Republic of Algeria, on August 16, 1984.

Nairobi Notification No. 25, of July 18, 1984.

BRAZIL

Ratification

The Government of the Federative Republic of Brazil deposited, on July 10, 1984, 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 entered into force, with respect to the Federative Republic of Brazil, on August 10, 1984.

Nairobi Notification No. 24, of July 11, 1984.

SENEGAL

Ratification

The Government of the Republic of Senegal deposited, on July 6, 1984, 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 entered into force, with respect to the Republic of Senegal, on August 6, 1984.

Nairobi Notification No. 23, of July 9, 1984.

National Legislation

SOUTH AFRICA

Copyright Act, 1978

An Act to regulate copyright and to provide for matters incidental thereto

(No. 98 of 1978)*

as amended by the respective Copyright Amendment Acts
No. 56 of 1980, No. 66 of 1983 and No. 52 of 1984*

ARRANGEMENT OF SECTIONS

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Definitions

1. (1) In this Act, unless the context otherwise indicates —

- (i) “adaptation”, in relation to —
 - (a) a literary work, includes —
 - (i) in the case of a non-dramatic work, a version of the work in which it is converted into a dramatic work;
 - (ii) in the case of a dramatic work, a version of the work in which it is converted into a non-dramatic work;

- (iii) a translation of the work; or
- (iv) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;

- (b) a musical work, includes any arrangement or transcription of the work, if such arrangement or transcription has an original creative character;
- (c) an artistic work, includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable; (i)

- (ii) “arbitration” means arbitration in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965);(iii)

- (iii) “artistic work” means, irrespective of the artistic quality thereof —

- (a) paintings, sculptures, drawings, engravings and photographs;
- (b) works of architecture, being either buildings or models of buildings; or
- (c) works of artistic craftsmanship, or works of craftsmanship of a technical nature, not falling within either paragraph (a) or (b); (iv)

* Published in the *Government Gazette*: No. 6092 of June 30, 1978; No. 7010 of May 23, 1980; No. 8735 of June 1, 1983; No. 9185 of April 18, 1984.

- (iv) “author”, in relation to —
- (a) a literary, musical or artistic work, means the person who first makes or creates the work;
 - (b) a photograph, means the person who is responsible for the composition of the photograph;
 - (c) a sound recording, means the person by whom the arrangements for the first fixing of the sounds of a performance or of other sounds were made;
 - (d) a cinematograph film, means the person by whom the arrangements for the making of the film were made;
 - (e) a broadcast, means the Corporation;
 - (f) a programme-carrying signal, means the Corporation;(xxv)
 - (g) a published edition, means the publisher of the edition;
- (v) “broadcast” means a broadcasting service as defined in section 1 of the Broadcasting Act, 1976 (Act No. 73 of 1976), and includes the emitting of programme-carrying signals to a satellite; and a reference to “broadcast” when used as a noun, shall be construed accordingly;(x1)
- (vi) “broadcaster” means a person who undertakes a broadcasting service as defined in section 1 of the Broadcasting Act, 1976 (Act No. 73 of 1976);(x1i)
- (vii) “building” includes any structure;(ix)
- (viii) “cinematograph film” means the first fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a sound-track associated with the film;(xxxii)
- (ix) “copy” means a reproduction in written form or in the form of a recording or a cinematograph film or in any other material form: Provided that an object shall not be taken to be a copy of a work of architecture unless the object is a building or a model of a building;(xv)
- (x) “copyright” means copyright under this Act;(xxvi)
- (xi) “Corporation” means the South African Broadcasting Corporation as defined in section 1 of the Broadcasting Act, 1976 (Act No. 73 of 1976);(xvi)
- (xii) “country” includes any colony, protectorate or territory subject to the authority or under the suzerainty of any other country, and any territory over which trusteeship is exercised;(xvii)
- (xiii) “derived signal” is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations;(ii)
- (xiv) “diffusion service”, means a telecommunication service of transmissions consisting of sounds, images, signs or signals, which takes place over wires or other paths provided by material substance and intended for reception by specific members of the public; and diffusion shall not be deemed to constitute a performance or a broadcast or as causing sounds, images, signs or signals to be seen or heard; and where sounds, images, signs or signals are displayed or emitted by any receiving apparatus to which they are conveyed by diffusion in such manner as to constitute a performance or a causing of sounds, images, signs or signals to be seen or heard in public, this shall be deemed to be effected by the operation of the receiving apparatus;(x1v)
- (xv) “distribution” in relation to —
- (a) a sound recording, means any act by which records embodying the sound recording are offered, directly or indirectly, to the general public or any section thereof;
 - (b) programme-carrying signals, means any operation by which a distributor transmits derived signals to the general public or any section thereof;(x1iv)
- (xvi) “distributor”, in relation to programme-carrying signals, means the person who decides that the transmission of the derived signal to the general public or any section thereof shall take place;(xliii)
- (xvii) “dramatic work” includes a choreographic work or entertainment in dumb show if reduced to the material form in which the work or entertainment is to be presented, but does not include a cine-

- matograph film as distinct from a scenario or script for a cinematograph film;(vii)
- (xviii) “drawing” includes any drawing of a technical nature or any diagram, map, chart or plan; (xxxvii)
- (xix) “emitted signal” means a programme-carrying signal which goes to or passes through a satellite;(xxxix)
- (xx) “engraving” includes any etching, lithograph, woodcut, print or similar work, but does not include a photograph;(xi)
- (xxi) “exclusive licence” means a licence authorizing a licensee, to the exclusion of all other persons including the grantor of the licence, to exercise a right which by virtue of this Act would, apart from the licence, be exercisable exclusively by the owner of the copyright; and “exclusive licensee” shall be construed accordingly;(xlii)
- (xxii) “infringing copy”, in relation to —
- (a) a literary, musical or artistic work or a published edition, means a reproduction thereof;
- (b) a sound recording or a substantial part thereof, means a record embodying that recording;
- (c) a cinematograph film, means a copy of the film; and
- (d) a broadcast, means a cinematograph film of it or a copy of a cinematograph film of it or a sound recording of it or a record embodying a sound recording of it or a still photograph or an individual image or a copy of a still photograph,
- being in any such case an article the making of which constituted an infringement of the copyright in the work, recording, cinematograph film or broadcast or, in the case of an imported article, would have constituted an infringement of that copyright if the article had been made in the Republic; (xxxv)
- (xxiii) “judicial proceedings” means proceedings before any court, tribunal or person having by law power to hear, receive and examine evidence on oath;(x)
- (xxiv) “licence” means a licence granted by or on behalf of the owner or prospective owner of the copyright in a literary, musical or artistic work or in a sound recording or a broadcast, being —
- (a) in the case of a literary or musical work, a licence to publish the work in a material form or to perform the work or an adaptation thereof in public or to broadcast it or to record it or to cause it to be transmitted in a diffusion service;
- (b) in the case of an artistic work, a licence to include it or an adaptation thereof in a cinematograph film or in a prerecorded or live television broadcast or to cause the work or an adaptation thereof to be transmitted in a diffusion service;
- (c) in the case of a sound recording, a licence to make a record embodying it; and
- (d) in the case of a broadcast, a licence to rebroadcast it, to record it or to cause it to be transmitted in a diffusion service;(xix)
- (xxv) “licence scheme”, in relation to licences of any description, means a scheme prepared by one or more licensing bodies, setting out the classes of cases in which they are willing or the person on whose behalf they act is willing to grant licences of that description, and the charges, if any, and terms and conditions subject to which licences may be granted in those classes of cases, and includes anything in the nature of such a scheme, whether described as a scheme or as a tariff or by any other name;(xxi)
- (xxvi) “licensing body”, in relation to —
- (a) such licences as are mentioned in paragraph (a) or (b) of the definition of “licence”, means a society or other organization which has as one of its objects the negotiation or granting of such licences, either as owner or prospective owner of copyright or as agent for the owners or prospective owners thereof;
- (b) such licence as is mentioned in paragraph (c) of the said definition, means any owner or prospective owner of copyright in sound recordings or any person or body of persons acting as agent for any owners or prospective owners of copyright in sound recordings in relation to the negotiation or granting of such licence; and
- (c) such licences as are mentioned in paragraph (d) of the said defini-

tion, means the Corporation or any organization appointed by it for negotiating or granting such licences;(xx)

- (xxvii) “literary work” includes, irrespective of literary quality and in whatever mode or form expressed —
- (a) novels, stories and poetical works;
 - (b) dramatic works, stage directions, cinematograph film scenarios and broadcasting scripts;
 - (c) textbooks, treatises, histories, biographies, essays and articles;
 - (d) encyclopaedias and dictionaries;
 - (e) letters, reports and memoranda;
 - (f) lectures, addresses and sermons; and
 - (g) written tables and compilations;(xviii)
- (xxviii) “Minister” means the Minister of Industries, Commerce and Tourism;(xxii)
- (xxix) “performance” includes any mode of visual or acoustic presentation of a work, including any such presentation by the operation of a loudspeaker, a radio, television or diffusion receiver or by the exhibition of a cinematograph film or by the use of a record or by any other means, and in relation to lectures, addresses, speeches and sermons, includes delivery thereof; and references to “perform” in relation to a work or an adaptation of a work shall be construed accordingly: Provided that “performance” shall not include broadcasting or rebroadcasting or transmitting a work in a diffusion service;(xxiv)
- (xxx) “photograph” means any product of photography or of any process analogous to photography, but does not include any part of a cinematograph film;(viii)
- (xxx1) “plate” includes any stereotype, stone, block, mould, matrix, transfer, negative or other similar appliance;(xxvii)
- (xxxii) “prescribed” means prescribed by or under this Act;(xlvi)
- (xxxiii) “programme”, in relation to programme-carrying signals, means a body of live or recorded material consisting of images or sounds or both, embodied in signals emitted for the purpose of ultimate distribution;(xxviii)
- (xxxiv) “prospective owner”, in relation to copyright, means a person who shall be entitled to the copyright, wholly or partially, in a work in which copyright does not yet subsist or whose entitlement to the copyright which does exist shall become effective upon a future event;(xxxviii)
- “published edition” means the first print by whatever process of a particular typographical arrangement of a literary or musical work;
- (xxxv) “qualified person” means a qualified person within the meaning of section 3(1);(vi)
- (xxxvi) “rebroadcasting” means the simultaneous or subsequent broadcasting by one broadcasting organization of the broadcast of another broadcasting organization;(xii)
- (xxxvii) “record” means any disc, tape, perforated roll or other device in or on which sounds are embodied so as to be capable of being automatically reproduced therefrom or performed;(xxiii)
- (xxxviii) “Registrar” means the Registrar of Copyright, who shall be the person appointed as Registrar of Patents under section 7 of the Patents Act, 1978;(xxix)
- (xxxix) “regulation” means a regulation made under this Act;(xxx)
- (xl) “reproduction”, in relation to —
- (a) a literary or musical work or a broadcast, includes a reproduction in the form of a record or a cinematograph film;
 - (b) an artistic work, includes a version produced by converting the work into a three-dimensional form or, if it is in three dimensions, by converting it into a two-dimensional form;
 - (c) any work, includes a reproduction made from a reproduction of that work;
- and references to “reproduce” and “reproducing” shall be construed accordingly;(xxx1)
- (xli) “satellite” means any device in extra-terrestrial space capable of transmitting signals;(xxxiii)

- (xlii) “signal” means an electronically generated carrier capable of transmitting programmes;(xxxiv)
- (xliii) “sculpture” includes any cast or model made for purposes of sculpture;(v)
- (xliv) “sound recording” means the direct exclusively aural fixation of sounds of a performance or of other sounds capable of being reproduced, but does not include a sound-track associated with a cinematograph film;(xiv)
- (xlv) “this Act” includes the regulations;(xiii)
- (xlvi) “work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors;(xlvii)
- (xlvii) “writing” includes any form of notation, whether by hand or by printing, type-writing or any similar process.(xxxvi)

(2) Any reference in this Act to a sound-track associated with a cinematograph film shall be construed as a reference to any record of sounds which is incorporated in any print, negative, tape or other article on which the film or part of it, in so far as it consists of visual images, is recorded or which is issued by the author of the film for use in conjunction with such an article.

(2A) Any reference in this Act to the doing of any act in relation to any work shall, unless the context otherwise indicates, be construed as a reference also to the doing of any such act in relation to any substantial part of such work.

(3) The provisions of this Act shall with reference to any act or omission outside the territorial limits of the Republic by or on any ship or aircraft registered under any law in the Republic apply in the same manner as it applies with reference to acts or omissions within the territorial limits of the Republic.

CHAPTER 1

Copyright in Original Works

Works eligible for copyright

2. (1) Subject to the provisions of this Act, the following works, if they are original shall be eligible for copyright —

- (a) literary works;
- (b) musical works;
- (c) artistic works;
- (d) cinematograph films, to which are assimilated works expressed by a process analogous to cinematography;
- (e) sound recordings;
- (f) broadcasts;
- (g) programme-carrying signals;
- (h) published editions.

(2) A literary, musical or artistic work shall not be eligible for copyright unless the work has been written down, recorded or otherwise reduced to material form.

(3) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

Copyright by virtue of nationality, domicile or residence, and duration of copyright

3. (1) Copyright shall be conferred by this section on every work, eligible for copyright, of which the author or, in the case of a work of joint authorship, any one of the authors is at the time the work or a substantial part thereof is made, a qualified person, that is —

- (a) in the case of an individual, a person who is a South African citizen or is domiciled or resident in the Republic; or
- (b) in the case of a juristic person, a body incorporated under the laws of the Republic:

Provided that a work of architecture erected in the Republic or any other artistic work in a building located in the Republic, shall be eligible for copyright, whether or not the author was a qualified person.

(2) The term of copyright conferred by this section shall be, in the case of —

- (a) literary or musical works or artistic works, other than photographs, the life of the author and fifty years from the end of the year in which the author dies: Provided that if before the death of the author none of the following acts had been done in respect of such works or an adaptation thereof, namely —
 - (i) the publication thereof;
 - (ii) the performance thereof in public;
 - (iii) the offer for sale to the public of records thereof;
 - (iv) the broadcasting thereof;

the term of copyright shall continue to subsist for a period of fifty years from the end of the year in which the first of the said acts is done;

- (b) cinematograph films and photographs, fifty years from the end of the year in which the work is lawfully made available to the public or, failing such an event within fifty years from the making of the work, fifty years from the end of the year in which the work is made;
 - (c) sound recordings, fifty years from the end of the year in which the recording is first published;
 - (d) broadcasts, fifty years from the end of the year in which the broadcast first takes place;
 - (e) programme-carrying signals, fifty years from the end of the year in which the signals are emitted to a satellite;
 - (f) published editions, fifty years from the end of the year in which the edition is first published.
- (3)(a) In the case of anonymous or pseudonymous literary, musical or artistic works, the copyright therein shall subsist for fifty years from the end of the year in which the work is lawfully made available to the public or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter.
- (b) In the event of the identity of the author becoming known before the expiration of the period referred to in paragraph (a), the term of protection of the copyright shall be calculated in accordance with the provisions of subsection (2).

(4) In the case of a work of joint authorship the reference in the preceding subsections to the death of the author shall be taken to refer to the author who dies last, whether or not he is a qualified person.

Copyright by reference to country of origin

4. (1) Copyright shall be conferred by this section on every work which is eligible for copyright and which —

- (a) being a literary, musical or artistic work or a sound recording, is first published in the Republic;
- (b) being a broadcast, is made in the Republic;
- (c) being a programme-carrying signal, is emitted to a satellite from a place in the Republic;

- (d) being a cinematograph film, is first published or made in the Republic;
- (e) being a published edition, is first published in the Republic;

and in respect of which copyright is not conferred by section 3.

(2) Copyright conferred on a work by this section shall be subject to the same term of copyright provided for in section 3 for a similar work.

Copyright in relation to the state and certain international organizations

5. (1) This Act shall bind the state.

(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organizations as may be prescribed.

(3) Copyright conferred by this section on a literary or musical work or an artistic work, other than a photograph, shall subsist for fifty years from the end of the year in which the work is first published.

(4) Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal or published edition shall be subject to the same term of copyright provided for in section 3 for a similar work.

(5) Sections 3 and 4 shall not confer copyright on works with reference to which this section applies.

(6) Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the *Gazette*.

Nature of copyright in literary or musical works

6. Copyright in a literary or musical work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the work in any manner or form;
- (b) publishing the work;
- (c) performing the work in public;
- (d) broadcasting the work;
- (e) causing the work to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;
- (f) making an adaptation of the work;
- (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) inclusive.

Nature of copyright in artistic works

7. Copyright in an artistic work vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the work in any manner or form;
- (b) publishing the work;
- (c) including the work in a cinematograph film or a television broadcast;
- (d) causing a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;
- (e) making an adaptation of the work;
- (f) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (d) inclusive.

Nature of copyright in cinematograph films

8. (1) Copyright in a cinematograph film vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing the film in any manner or form;
- (b) causing the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
- (c) broadcasting the film;
- (d) causing the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;
- (e) making an adaptation of the film;
- (f) doing, in relation to an adaptation of the film, any of the acts specified in relation to the film in paragraphs (a) to (d) inclusive;
- (g) importing (other than importing for the private and domestic use of the importer), selling, letting, offering or exposing for sale or hire by way of trade, or distributing, directly or indirectly, a reproduction or an adaptation of the film.

(2) The authorization to use a work, other than a musical work, for the making of a cinematograph film, or the contribution of a work to such making shall, in the absence of agreement to the contrary, include the right to broadcast such film.

Nature of copyright in sound recordings

9. Copyright in a sound recording vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Making, directly or indirectly, a record embodying the sound recording;
- (b) importing (other than importing for the private and domestic use of the importer), selling, letting, offering or exposing for sale or hire by way of trade, or distributing, directly or indirectly, a reproduction of the sound recording.

Nature of copyright in broadcasts

10. Copyright in a broadcast vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) Reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph of an individual image;
- (b) rebroadcasting the broadcast;
- (c) causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.

Nature of copyright in programme-carrying signals

11. Copyright in programme-carrying signals vests the exclusive right to undertake, or to authorize, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.

Nature of copyright in published editions

11A. Copyright in a published edition vests the exclusive right to make or to authorize the making of a reproduction of the edition in any manner.

General exceptions from protection of literary and musical works

12. (1) Copyright shall not be infringed if a literary or musical work is used solely, and then only to the extent reasonably necessary —

- (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
- (b) for the purposes of criticism or review of that work or of another work; or

- (c) for the purpose of reporting current events —
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film:

Provided that, subject to the provisions of section 13, the expression “used” shall not be construed as authorizing the making of a copy of the whole or a substantial part of the work in question: Provided further, in the case of paragraphs (b) and (c)(i), that the source shall be mentioned, as well as the name of the author if it appears on the work.

(2) The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(4) The copyright in a literary or musical work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(5)(a) The copyright in a literary or musical work shall not be infringed by the reproduction of such work by the Corporation by means of its own facilities where such reproduction or any copy thereof is intended exclusively for lawful broadcasts of the Corporation and is destroyed before the expiration of a period of six months immediately following the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work.

(b) Any reproduction of a work made under paragraph (a) may, if it is of an exceptional documentary nature, be preserved in the archive of the Corporation, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.

(6)(a) The copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose.

(b) The author of a lecture, address or other work referred to in paragraph (a) shall have the exclusive right of making a collection thereof.

(7) The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.

(8)(a) No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.

(b) The author of the speeches referred to in paragraph (a) shall have the exclusive right of making a collection thereof.

(9) The provisions of subsections (1) to (7) inclusive shall apply also with reference to an adaptation of a work.

(10) The provisions of subsections (1) to (4) inclusive and (6) and (7) shall apply also with reference to a work or an adaptation thereof which is transmitted in a diffusion service.

(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.

(12) The copyright in a literary or musical work or an adaptation thereof shall not be infringed by a *bona fide* demonstration thereof to a specific client by a licensed dealer in radio or television receivers or any type of recording equipment.

General exceptions in respect of reproduction of works

13. In addition to reproduction permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not

unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Special exception in respect of records of musical works

14. (1) The copyright in a musical work shall not be infringed by a person (in this section referred to as the "manufacturer") who makes a sound recording or a copy of the work or of an adaptation thereof in the Republic, whether from an imported disc, tape, matrix or otherwise, if —

- (a) copies of the work or of a similar adaptation of the work were previously made in or imported into the Republic for the purposes of retail sale and were so made or imported by, or with the licence of, the owner of the copyright in the work;
- (b) before making the sound recording or copy the manufacturer gave the prescribed notice to the owner of the copyright of his intention to make it;
- (c) the manufacturer intends to sell the copy by retail or to supply it for the purpose of resale by retail by another person or to use it for making other records to be so sold or so supplied; and
- (d) in the case of a copy which is sold by retail or supplied for the purpose of resale by retail, the manufacturer pays to the owner of the copyright, in the prescribed manner and at the prescribed time, the prescribed royalties.

(2) Where a sound recording or copy comprises, with or without other material, a performance of a musical work or of an adaptation of a musical work in which words are sung or are spoken that are incidental to, or in association with, the music and no copyright subsists in that work or, if copyright does subsist therein, the conditions specified in subsection (1) are fulfilled in relation to such copyright and —

- (a) the words consist or form part of a literary work in which copyright subsists; and
- (b) the copies referred to in subsection (1)(a) were made or imported by or with the licence of the owner of the copyright in that literary work; and
- (c) the conditions specified in subsection (1)(b) and (d) are fulfilled in relation to the owner of that copyright,

the making of the sound recording or copy shall not constitute an infringement of the copyright in the literary work.

(3) For the purposes of this section an adaptation of a work shall be deemed to be similar to an adaptation thereof contained in a previous sound recording or copy if the two adaptations do not substantially differ in their treatment of the work, either in respect of style or, apart from any difference in number, in respect of the performers required to perform them.

(4) A manufacturer may for the purposes of paragraph (a) of subsection (1) make the prescribed enquiries in order to ascertain whether the previous copies referred to in that paragraph were previously made in or imported into the Republic, and if the owner of the copyright fails to reply to such enquiries within the prescribed period, the said previous copies shall be taken to have been made or imported, as the case may be, with the licence of the owner of the copyright.

(5) The preceding provisions of the section shall apply also with reference to sound recordings or copies of a substantial part of a work or an adaptation thereof: Provided that the provisions of subsection (1) shall not apply with reference to —

- (a) a copy of the whole of a work or an adaptation thereof unless the previous copies referred to in paragraph (a) of that subsection were copies of the whole of the work or of a similar adaptation; or
- (b) a sound recording or copy of a part of a work or an adaptation thereof unless the sound recordings or copies previously made in or imported into the Republic as contemplated in paragraph (a) of that subsection were of, or included, that part of the work or of a similar adaptation.

General exceptions from protection of artistic works

15. (1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.

(2) The copyright in a work of architecture or in the relevant drawings shall not be infringed by the reconstruction of that work on the same site in the same style as the original.

(3) The copyright in a artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.

(3A)(a) The copyright in an artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright owner (hereinafter referred to as authorized reproductions), shall not be infringed if any person without the consent of the owner makes or makes available to the public three-dimensional reproductions or adaptations of the authorized reproductions, provided —

- (i) a period of at least ten years has elapsed since the end of the calendar year in which authorized reproductions of such work were first made available to the public; and
 - (ii) the authorized reproductions primarily have a utilitarian purpose and are made by an industrial process.
- (b) For the purposes of paragraph (a)(i) authorized reproductions of any artistic work in question made available to the public before the commencement of section 2 of the Copyright Amendment Act, 1983,¹ shall be deemed to have been first so made available on the date of such commencement.

(4) The provisions of section 12 (1), (2), (4), (5) and (12) shall *mutatis mutandis* apply with reference to artistic works.

*General exceptions from protection
of cinematograph films*

16. The provisions of section 12 (1) to (4) inclusive and (12) shall *mutatis mutandis* apply with reference to cinematograph films.

*General exceptions from protection
of sound recordings*

17. The provisions of section 12 (1) to (5) inclusive and (12) shall *mutatis mutandis* apply with reference to sound recordings.

General exceptions from protection of broadcasts

18. The provisions of section 12 (1) to (4) inclusive and (12) shall *mutatis mutandis* apply with reference to broadcasts.

*General exceptions from protection
of programme-carrying signals*

19. (1) The copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried —

- (a) that consist of reports of current events; or
- (b) as are compatible with fair practice, to the extent justified by the informatory purpose of such excerpts.

(2) The provisions of this section shall not apply with reference to a programme carried by programme-carrying signals representing a sporting event.

*General exceptions from protection
of published editions*

19A. The provisions of sections 12(1), (2), (4), (5), (8) and (12) shall *mutatis mutandis* apply with reference to published editions.

Residuary rights

20. (1) Notwithstanding the transfer of the copyright in a literary, musical or artistic work or in a cinematograph film, the author shall have the right to claim authorship in the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author: Provided that an author who authorizes the use of his work in a cinematograph film or a television broadcast may not oppose modifications that are absolutely necessary on technical grounds or for the purpose of commercial exploitation of the work.

(2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2.

Ownership of copyright

21. (1)(a) Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

(b) Where a literary or artistic work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the

¹ The Copyright Amendment Act, 1983 entered into force on June 1, 1983 (date of its publication in the *Gazette*).

copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.

- (c) Where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a cinematograph film or the making of a sound recording and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, such person shall, subject to the provisions of paragraph (b), be the owner of any copyright subsisting therein by virtue of section 3 or 4.
- (d) Where in a case not falling within either paragraph (b) or (c) a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4.
- (e) Paragraphs (b), (c) and (d) shall in any particular case have effect subject to any agreement excluding the operation thereof and subject to the provisions of section 20.

(2) Ownership of any copyright conferred by section 5 shall initially vest in the state or the international organization concerned, and not in the author.

Assignments and licences in respect of copyright

22. (1) Subject to the provisions of this section, copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law.

(2) An assignment or testamentary disposition of copyright may be limited so as to apply to some only of the acts which the owner of the copyright has the exclusive right to control, or to a part only of the term of the copyright, or to a specified country or other geographical area.

(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicenser, as the case may be.

(4) A non-exclusive licence to do an act which is subject to copyright may be written or oral, or may be inferred from conduct, and may be revoked at any time: Provided that such a licence granted by

contract shall not be revoked, either by the person who granted the licence or his successor in title, except as the contract may provide, or by a further contract.

(5) An assignment, licence or testamentary disposition may be granted or made in respect of the copyright in a future work, or the copyright in an existing work in which copyright does not subsist but will come into being in the future, and the future copyright in any such work shall be transmissible as movable property.

(6) A testamentary disposition of the material on which a work is first written or otherwise recorded shall, in the absence of a stipulation to the contrary, be taken to include the disposition of any copyright or future copyright in the work which is vested in the deceased at the time of his death.

(7) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright, shall be binding upon every successor in title to his interest in the copyright, except a purchaser in good faith and without notice, actual or constructive, of the licence or a person deriving title from such a purchaser, and any reference in this Act to the doing in relation to any copyright of anything with or without the licence of the owner of the copyright shall be construed accordingly.

(8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purposes of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.

CHAPTER 2

Infringements of Copyright and Remedies

Infringement

23. (1) Copyright shall be infringed by any person, not being the owner of the copyright, who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner of the copyright may authorize.

(2) Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work —

- (a) imports an article into the Republic for a purpose other than for his private and domestic use;

- (b) sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article; or
- (c) distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected,

if to his knowledge the making of that article constituted an infringement of that copyright or would have constituted such an infringement if the article had been made in the Republic.

(3) The copyright in a literary or musical work shall be infringed by any person who permits a place of public entertainment to be used for a performance in public of the work, where the performance constitutes an infringement of the copyright in the work: Provided that this subsection shall not apply in a case where the person permitting the place of public entertainment to be so used was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of the copyright.

(4) Where sounds embodied in a sound-track associated with a cinematograph film are also embodied in a record other than such a sound-track or in a record derived directly or indirectly from such a sound-track, the copyright in the film shall not be infringed by the use of that record.

Action by owner of copyright for infringement

24. (1) Subject to the provisions of this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright, and in any action for such an infringement all such relief by way of damages, interdict, accounts, delivery of infringing copies or plates used or intended to be used for infringing copies or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringements of other proprietary rights.

(2) Where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement but shall be entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

(3) Where in an action under this section an infringement of copyright is proved or admitted,

and the court having regard, in addition to all other material considerations, to—

- (a) the flagrancy of the infringement; and
- (b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court shall in assessing damages for the infringement have power to award such additional damages as the court may deem fit.

(4) In an action for infringement of copyright in respect of the construction of a building, no interdict or other order shall be made —

- (a) after the construction of the building has been begun so as to prevent it from being completed; or
- (b) so as to require the building, in so far as it has been constructed, to be demolished.

Rights of action and remedies of exclusive licensee

25. The exclusive licensee shall have the same rights of action and be entitled to the same remedies as if the licence had been an assignment.

Onus of proof in actions

26. (1) Where in the case of a literary, musical or artistic work a name purporting to be that of the author appeared on copies of the work as published or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appeared shall, if it was his true name or a name by which he was commonly known, in any action brought by virtue of this Chapter be presumed, unless the contrary is proved, to be the author of the work.

(2) In the case of a work alleged to be a work of joint authorship, subsection (1) shall apply in relation to each person alleged to be one of the authors of the work as if references in that subsection to the author were references to one of the authors.

(3) Where in an action brought by virtue of this Chapter with respect to a literary, musical or artistic work which is anonymous or pseudonymous it is established —

- (a) that the work was first published in the Republic and was so published within the period of fifty years ending with the beginning of the calendar year in which the action was brought; and
- (b) that a name purporting to be that of the publisher appeared on copies of the work as first published,

then, unless the contrary is shown, copyright shall be presumed to subsist in the work and the person whose name so appeared shall be presumed to have been the owner of that copyright at the time of the publication: Provided that this subsection shall not apply if the actual name of the author of a pseudonymous work is commonly known.

(4) Where in an action brought by virtue of this Chapter with respect to a literary, musical or artistic work it is proved or admitted that the author of the work is dead, the work shall be presumed to be an original work unless the contrary is proved.

(5) Subsection (4) shall also apply where a work has been published and —

- (a) the publication was anonymous or under a name alleged by the plaintiff to have been a pseudonym; and
- (b) it is not shown that the work has ever been published under the true name of the author or under a name by which he was commonly known or that it is possible for a person without previous knowledge of the facts to ascertain the identity of the author by reasonable inquiry.

(6) Where in an action brought by virtue of this Chapter with respect to copyright in a cinematograph film it is proved that the name purporting to be the name of the author of that film appears thereon in the prescribed manner, the person whose name so appears shall be presumed to be the author of that film, unless the contrary is proved.

(7) Where in an action brought by virtue of this Chapter with respect to copyright in a sound recording it is proved that records embodying that recording or part thereof have been issued to the public and that at the time when those records were so issued they bore a label or other mark comprising any one or more of the following statements, that is to say —

- (a) that a person named on the label or mark was the author of the sound recording;
- (b) that the recording was first published in a year specified on the label or mark; or
- (c) that the recording was first published in a country specified on the label or mark,

that label or mark shall be sufficient evidence of the facts so stated except in so far as the contrary is proved.

(8) Where in an action brought by virtue of this Chapter with respect to the alleged infringement by a person of the copyright in any artistic work of which three-dimensional reproductions were made available, whether inside or outside the Republic, to the public by or with the consent of the copyright

owner, it is proved that such reproductions at the time when they were so made available bore a label or other mark specifying the following claims, namely —

- (a) that copyright exists in the artistic work of which the reproductions were made;
- (b) that a person specified on the label or mark was the owner or exclusive licensee of the copyright; and
- (c) that the reproductions were first made available to the public in a year specified on the label or mark,

(which claims may be indicated by means of the symbol “©” in conjunction with the name of the relevant person and the relevant year) it shall be presumed, until the contrary is proved —

- (i) that the reproductions were first made available to the public in the year so specified; and
- (ii) that the first-mentioned person had at all relevant times been aware of the claims referred to in paragraphs (a), (b) and (c).

(9) In any civil or criminal proceeding by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film registered in terms of the Registration of Copyright in Cinematograph Films Act, 1977 (Act No. 62 of 1977), it shall be presumed —

- (a) that every party to those proceedings had knowledge of the particulars entered in the register of copyright mentioned in section 15 of the said Act from the date of the lodging of the application in question to record those particulars;
- (b) that the person who is alleged to have done an act which infringes the relevant copyright did that act without the required authority, unless the contrary is proved.

(10) In any civil or criminal proceedings by virtue of this Chapter with regard to the alleged infringement of the copyright in a cinematograph film, it shall be presumed, until the contrary is proved, that any person trading in the selling, letting or distribution of copies of cinematograph films and who was found in possession of a reproduction or adaptation of such a cinematograph film, sold or let for hire or by way of trade offered or exposed for sale or hire such reproduction or adaptation.

*Penalties and proceedings
in respect of dealings which infringe copyright*

27. (1) Any person who at a time when copyright subsists in a work, without the authority of the owner of the copyright —

- (a) makes for sale or hire;
- (b) sells or lets for hire or by way of trade offers or exposes for sale or hire;
- (c) by way of trade exhibits in public;
- (d) imports into the Republic otherwise than for his private or domestic use;
- (e) distributes for purposes of trade; or
- (f) distributes for any other purposes to such an extent that the owner of the copyright is prejudicially affected,

articles which he knows to be infringing copies of the work, or, in the case where such work consists of a cinematograph film registered in terms of the Registration of Copyright in Cinematograph Films Act, 1977 (Act No. 62 of 1977), articles which are reproductions or adaptations of the cinematograph film, shall be guilty of an offence.

(2) Any person who at a time when copyright subsists in a work makes or has in his possession a plate knowing that it is to be used for making infringing copies of the work, shall be guilty of an offence.

(3) Any person who causes a literary or musical work to be performed in public knowing that copyright subsists in the work and that performance constitutes an infringement of the copyright, shall be guilty of an offence.

(4) Any person who causes a broadcast to be rebroadcast or transmitted in a diffusion service knowing that copyright subsists in the broadcast and that such rebroadcast or transmission constitutes an infringement of the copyright, shall be guilty of an offence.

(5) Any person who causes programme-carrying signals to be distributed by a distributor for whom they were not intended knowing that copyright subsists in the signals and that such distribution constitutes an infringement of the copyright, shall be guilty of an offence.

(6) A person convicted of an offence under subsection (1) shall be liable —

- (a) in the case of a first conviction, to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, for each article to which the offence relates;
- (b) in any other case, to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, for each article to which the offence relates:

Provided that the total fine or the total period of imprisonment imposed by virtue of this subsection

shall not exceed fifty thousand rand or ten years, as the case may be, in respect of articles comprised in the same transaction.

(7) A person convicted of an offence under subsection (2), (3), (4) or (5), shall be liable —

- (a) in the case of a first conviction, to a fine not exceeding one thousand rand;
- (b) in any other case, to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year.

(8)(a) In the case of a conviction of a person of an offence in terms of subsection (1) in respect of the copyright in a cinematograph film the court may in its discretion, in addition to any other penalty which it may impose under subsection (6), prohibit that person from a date and for a period determined by the court, from carrying on, or having any direct or indirect financial interest in, or deriving any direct or indirect financial benefit from, any business which sells, lets, offers, exposes or distributes reproductions or adaptations of cinematograph films.

(b) Any person who commits an act contrary to a prohibition contemplated in paragraph (a) shall be guilty of an offence and liable on conviction to a fine not exceeding ten thousand rand or to imprisonment for a period not exceeding five years.

Provision for restricting importation of copies

28. (1) The owner of the copyright in any published literary or musical work or any published cinematograph film, any sound recording or any published edition may give notice in writing to the Commissioner for Customs and Excise (in this section referred to as "the Commissioner") —

- (a) that he is the owner of the copyright in the work; and
- (b) that he requests the Commissioner to treat as prohibited goods, during a period specified in the notice, copies of the work to which this section applies:

Provided that the period specified in a notice under this subsection shall not extend beyond the end of the period for which the copyright is to subsist: Provided further that the Commissioner shall not be bound to act in terms of any such notice unless the owner of the copyright furnishes him with security in such form and for such amount as he may require to secure the fulfilment of any liability and the payment of any expense which he may incur by reason of the detention by him of any copy of the work to

which the notice relates or as a result of anything done by him in relation to a copy so detained.

(2) This section shall apply to any copy of the work in question made outside the Republic which if it had been made in the Republic would be an infringing copy of the work.

(3) Where a notice has been given under this section in respect of a work and has not been withdrawn, the importation into the Republic at a time before the end of the period specified in the notice of any copy of the work to which this section applies shall be prohibited.

(4) Notwithstanding anything contained in the Customs and Excise Act, 1964 (Act No. 91 of 1964), a person shall not be liable to any penalty under that Act (other than forfeiture of the goods) by reason of the fact that any goods are treated as prohibited goods by virtue of this section.

(5) This section shall *mutatis mutandis* apply with reference to an exclusive licensee who has the right to import into the Republic any literary or musical work or any cinematograph film, sound recording or published edition published elsewhere.

CHAPTER 3

Copyright Tribunal

Establishment of Copyright Tribunal

29. (1) The judge or acting judge who is from time to time designated as Commissioner of Patents in terms of section 8 of the Patents Act, 1978, shall also be the Copyright Tribunal (in this Chapter referred to as the tribunal) for the purposes of this Act.

(2) The tribunal may order that the costs or expenses of any proceedings before it incurred by any party shall be paid by any other party, and may tax or settle the amount of any costs or expenses to be paid under any such order or direct in what manner they are to be taxed.

(3)(a) Regulations may be prescribed as to the procedure in connection with the making of references and applications to the tribunal and for regulating proceedings before the tribunal and as to the fees chargeable in respect of those proceedings.

(b) Any such regulations may in relation to proceedings before the tribunal apply any of the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), or alternatively,

any of the provisions applicable in the court of the Commissioner of Patents in terms of the Patents Act, 1978.

- (c) Any such regulations may include provision for —
- (i) requiring notice of any intended application to the court under section 36 to be given to the tribunal and to the other parties to the proceedings;
 - (ii) suspending or authorizing or requiring the tribunal to suspend the operation of orders of the tribunal in cases where after giving its decision an application under section 36 to any provincial division of the Supreme Court is noted;
 - (iii) modifying in relation to orders of the tribunal, of which the operation is suspended, the operation of any provisions of this Chapter as to the effect of orders made thereunder;
 - (iv) the publication of notices or the taking of any other steps for ensuring that persons affected by the suspension of an order of the tribunal will be informed of its suspension;
 - (v) for regulating or prescribing any other matters incidental to or consequential upon any request, application, order or decision under section 36.

(4) Without prejudice to any method available by law for the proof of orders of the tribunal, a document purporting to be a copy of any such order and to be certified by the Registrar to be a true copy thereof shall in any legal proceedings be sufficient evidence of the order unless the contrary is proved.

(5) The Registrar shall act as the registrar of the tribunal.

General provisions as to jurisdiction of tribunal

30. Subject to the provisions of this Chapter, the function of the tribunal shall be to determine disputes arising between licensing bodies and persons requiring licences or organizations claiming to be representative of such persons, either—

- (a) on the reference of a licence scheme to the tribunal; or
- (b) on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme.

Reference of licence schemes to tribunal

31. (1) Where at any time while a licence scheme is in operation a dispute arises with respect to the

scheme between the licensing body operating the scheme and —

- (a) an organization claiming to be representative of persons requiring licences in cases of a class to which the scheme applies; or
- (b) any person claiming that he requires a licence in a case of a class to which the scheme applies,

the organization or person in question may refer the scheme to the tribunal in so far as it relates to cases of that class.

(2) The parties to a reference under this section shall be—

- (a) the organization or person at whose instance the reference is made;
- (b) the licensing body operating the scheme to which the reference relates; and
- (c) such other organizations or persons (if any) as apply to the tribunal to be made parties to the reference and are in accordance with subsection (3) made parties thereto.

(3) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to a reference, and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may, if it thinks fit, make that organization or person a party to the reference.

(4) The tribunal shall not entertain a reference under this section by an organization unless the tribunal is satisfied that the organization is reasonably representative of the class of persons which it claims to represent.

(5) Subject to the provisions of subsection (4), the tribunal shall on any reference under this section consider the matter in dispute and after giving the parties to the reference an opportunity of presenting their respective cases, make such order, either confirming or varying the scheme in so far as it relates to cases of the class to which the reference relates, as the tribunal may determine to be reasonable in the circumstances.

(6) An order of the tribunal under this section may, notwithstanding anything contained in the licence scheme to which it relates, be made so as to be in force either indefinitely or for such period as the tribunal may determine.

(7) Where the tribunal has made an order in respect of a licence scheme which has been referred to it, such scheme shall, notwithstanding anything contained therein, in so far as it relates to the class of cases in respect of which the order was made, there-

after remain in operation subject to the terms of the order: Provided that this subsection shall not apply in relation to a reference as respects any period after the reference has been withdrawn or has been discharged by virtue of subsection (4).

Further reference of scheme to tribunal

32. (1) Where the tribunal has made an order under section 31 with respect to a licence scheme —

- (a) the licensing body operating the scheme;
- (b) any organization claiming to be representative of persons requiring licences in cases of the class to which the order applies; or
- (c) any person claiming that he requires a licence in a case of that class,

may, subject to the provisions of subsection (2), at any time while the order is in force, again refer the scheme to the tribunal in so far as it relates to cases of the class in respect of which the order applies.

(2) A licence scheme shall not, except with the special leave of the tribunal, again be referred to the tribunal under subsection (1) —

- (a) where the relevant order was made so as to be in force indefinitely or for a period exceeding fifteen months, before the expiration of a period of twelve months from the date on which the order was made; or
- (b) where such order was made so as to be in force for a period not exceeding fifteen months, at any time more than three months before the date of expiry of the order.

(3) The provisions of section 31 shall *mutatis mutandis* apply in respect of any reference under this section or any order made thereon, and the tribunal shall have power to make such order on any such reference as it deems just.

Applications to tribunal

33. (1) For the purposes of this Chapter a case shall be taken to be covered by a licence scheme if, in accordance with a licence scheme for the time being in operation, licences would be granted in cases of the class to which that case belongs: Provided that where in accordance with the provisions of a licence scheme —

- (a) the licences which would be so granted would be subject to terms and conditions whereby particular matters would be excepted from the licences; and

(b) the case in question relates to one or more matters falling within such an exception, that case shall be taken not to be covered by the scheme.

(2) Any person who claims that in a case covered by a licence scheme the licensing body operating the scheme has refused or failed to grant him a licence in accordance with the provisions of the scheme or to procure the grant to him of such a licence, may apply to the tribunal for an order under this section.

(3) An application for such an order may also be made by any person who claims that he requires a licence in a case not covered by a licence scheme, and either —

- (a) that a licensing body or person has refused or failed to grant the licence or to procure the grant thereof, and that in the circumstances it is unreasonable that the licence should not be granted; or
- (b) that any charges, terms or conditions subject to which a licensing body proposes that the licence should be granted are unreasonable.

(4) Where an organization (whether claiming to be representative of persons requiring licences or not) or a person (whether requiring a licence or not) applies to the tribunal to be made a party to an application under subsection (2) or (3), and the tribunal is satisfied that the organization or person has a substantial interest in the matter in dispute, the tribunal may if it thinks fit make that organization or person a party to the application.

(5) On any application under subsection (2) or (3) the tribunal shall give the applicant and the licensing body in question and every other party to the application an opportunity of presenting his case, and if the tribunal is satisfied that the claim of the applicant is well-founded, it shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms and conditions and subject to the payment of such charges (if any) as the tribunal may —

- (a) in the case of an application under subsection (2), determine to be applicable in accordance with the licence scheme; or
- (b) in the case of an application under subsection (3), determine to be reasonable in the circumstances.

(6) Any reference in this section to failure to grant or procure the grant of a licence shall be con-

strued as including a reference to a failure to grant it or to procure the grant thereof within a reasonable time after being requested to do so.

Diffusion service

34. In a dispute concerning the transmission of broadcasts in a diffusion service in the Republic, the tribunal shall disallow any claim under this Act —

- (a) in the case of broadcasts of the Corporation, to the extent to which the Corporation's licences under this Act provide for or include such transmission in a diffusion service;
- (b) in the case of broadcasts of an organization other than the Corporation, to the extent to which the licences of such other organization provide for or include such transmission in a diffusion service.

Effect of orders of tribunal, and supplementary provisions relating thereto

35. (1) Any person who complies with the conditions of an order made by the tribunal under this Chapter or who has given a satisfactory undertaking to the owner or prospective owner of the copyright to comply with such conditions, shall be deemed to be the holder of a licence under this Act.

(2) In the exercise of its jurisdiction in respect of licences relating to television broadcasts, the tribunal shall have regard *inter alia* to any conditions imposed by the promoters of any entertainment or other event which is to be comprised in the broadcasts, and in particular the tribunal shall not hold a refusal or failure to grant a licence to be unreasonable if it could not have been granted consistently with those conditions.

Review of proceedings

36. (1) Any decision, ruling or order by the tribunal shall be final, but subject to the right of any party, within ninety days after any such decision, ruling or order was given or made or within such further time as the tribunal may allow, to bring the same under review by a full bench of the provincial division of the Supreme Court having jurisdiction.

(2) Any reference in this Chapter to the giving of an opportunity to any person of presenting his case shall be construed as a reference to the giving to that person of an opportunity of submitting representation in writing and of being heard.

CHAPTER 4

Extension or Restriction of Operation of Act*Application of Act to countries to which it does not extend*

37. (1) The Minister may by notice in the *Gazette* provide that any provision of this Act specified in the notice shall in the case of any country so specified apply —

- (a) in relation to literary, musical or artistic works, cinematograph films, sound recordings and published editions first published in that country, as it applies in relation to literary, musical or artistic works, cinematograph films, sound recordings and published editions first published in the Republic;
- (b) in relation to persons who at a material time are citizens or subjects of that country as it applies in relation to persons who at such a time are South African citizens;
- (c) in relation to persons who at a material time are domiciled or resident in that country as it applies in relation to persons who at such a time are domiciled or resident in the Republic;
- (d) in relation to bodies incorporated under the laws of that country as it applies in relation to bodies incorporated under the laws of the Republic;
- (e) in relation to broadcasts and programme-carrying signals made or emitted to a satellite from places in that country or by one or more organizations constituted by or under the laws of that country as it applies in relation to broadcasts and programme-carrying signals made or emitted to a satellite by the Corporation.

(2) A notice under this section may provide —

- (a) that any provisions referred to therein shall apply subject to such exceptions or modifications as may be specified in the notice;
- (b) that such provisions shall so apply either generally or in relation to such classes of works or classes of cases as may be so specified.

(3) No notice shall be issued under this section in respect of any country which is not a party to a convention relating to copyright to which the Republic is also a party, unless the Minister is satisfied that, in respect of the class of works to which the notice relates, provision has been or will be made under the laws of that country whereby adequate protec-

tion will be given to owners of copyright under this Act.

Extended application of provisions relating to broadcasts and programme-carrying signals

38. The Minister may make regulations providing that, subject to such exceptions and modifications (if any) as may be specified therein, the provisions of this Act relating to broadcasts made, or programme-carrying signals emitted to a satellite by the Corporation, shall apply in relation to any other person carrying out in the Republic operations similar to those of the Corporation.

CHAPTER 5

Miscellaneous Provisions*Regulations*

39. The Minister may make regulations —

- (a) as to any matter required or permitted by this Act to be prescribed by regulation;
- (b) in consultation with the Minister of Finance, prescribing the tariff of fees payable in respect of proceedings before the Copyright Tribunal referred to in section 29(1);
- (c) in consultation with the Minister of Finance, prescribing the remuneration and allowances of members of the advisory committee referred to in section 40, and of its subcommittees, and the conditions upon which such members shall be appointed; and
- (d) generally, as to any matter which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.

Advisory committee

40. (1)(a) The Minister shall appoint an advisory committee on copyright law, consisting of a judge or a senior advocate of the Supreme Court of South Africa as chairman and such *ex officio* and other members as the Minister may from time to time determine.

(b) A member of the advisory committee shall hold office for such period as the Minister may direct and shall be eligible for reappointment upon the expiration of his period of office.

(2) The advisory committee shall as to witnesses and their evidence have the powers of a commission under the Commissions Act, 1947 (Act No. 8 of 1947).

(3) The advisory committee may from time to time make recommendations to the Minister in regard to any amendments to this Act and shall advise the Minister on any matter referred to it by the Minister.

(4)(a) The advisory committee shall constitute and maintain at all times subcommittees on sound recordings, cinematograph films, broadcasting and such other practices as the Minister may from time to time determine.

(b) The advisory committee shall appoint as members of the subcommittees such of its members and such other persons and for such periods of office as the advisory committee may from time to time determine.

(5) The advisory committee may call to its assistance any person it may deem necessary to assist it with, or to investigate matters relating to, copyright law.

(6) The Registrar shall be responsible for the administration of the advisory committee and the subcommittees.

Savings

41. (1) Nothing in this Act shall affect any right or privilege of the state subsisting otherwise than by virtue of any law, or any right or privilege of the state or of any other person under any law not expressly repealed, amended or modified by this Act.

(2) Nothing in this Act shall affect the right of the state or of any person deriving title from the state to sell, use or otherwise deal with articles forfeited under the laws relating to customs and excise, including any article forfeited by virtue of this Act or of any enactment repealed by this Act.

(3) Nothing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence.

(4) Subject to the preceding provisions of this section, no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.

Publication

42. For the purposes of this Act, the following provisions shall apply with respect to publication:

(a) A work shall be taken to have been published if copies have been issued with the consent of the owner of the copyright in sufficient quantities to satisfy the reasonable requirements of the public, having regard to the nature of the work, and, in par-

ticular, publication in relation to a cinematograph film shall mean the sale, letting on hire or offer for sale or hire of copies of the film.

(b) Where in the first instance a part only of a work is published, that part shall be treated as a separate work.

(c) A publication in the Republic or in any other country shall not be treated as being other than the first publication by reason only of an earlier publication elsewhere, if the two publications took place within a period of not more than thirty days from one another.

(d) The performance of a dramatic, dramatic-musical or musical work or a cinematograph film, the public delivery of a literary work, the transmission in a diffusion service or the broadcasting of a work, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

Application to work made before commencement of Act

43. This Act shall apply in relation to works made before the commencement of this Act as it applies in relation to works made thereafter: Provided that —

(a) subject to the provisions of paragraphs (c) and (d), nothing in this Act contained shall —

(i) affect the ownership, duration or validity of any copyright which subsists under the Copyright Act, 1965 (Act. No. 63 of 1965); or

(ii) be construed as creating any copyright which did not subsist prior to 11 September 1965;

[[b)]²

(c) the copyright in cinematograph films made before the commencement of this Act shall be governed by the relevant provisions of this Act, subject to the qualification in the case of cinematograph films treated as original dramatic works under section 35 of the Third Schedule to the Designs Act, 1916 (Act No. 9 of 1916) —

(i) that the author shall, if so required, remunerate the person who is the owner of a copyright in that film for the purposes of that Act, which remuneration shall be determined by arbitration if agreement thereon cannot be reached; and

² Paragraph (b) has been deleted pursuant to section 14(b) of the Copyright Amendment Act No. 52, 1984.

- (ii) the author shall indemnify the user against any further claims relating to the copyright in the film;
- (d) in the determination of the term of copyright contemplated in the proviso to section 3(2)(a) in the case of a work in respect of which the copyright has expired at the commencement of the Copyright Amendment Act, 1984,³ on the ground that the period mentioned in the said paragraph has lapsed, it shall be deemed that, subject to any rights acquired by any person after the lapse of that period and before the said commencement, copyright did not expire on that ground.

Time when a work is made

44. For the purposes of this Act a work shall be deemed to have been made at the time when it was first reduced to writing or to some other material form.

Regulation and control of distribution, performance or exhibition of works

45. (1) Notwithstanding anything to the contrary in this Act contained, the Minister may make such regulations as he may consider necessary in regard to the distribution, performance or exhibition of any work.

(2) Such regulations may empower any person specified therein to prohibit the distribution, performance or exhibition of any such work or to authorize the distribution, performance or exhibition thereof on such conditions as may be specified in those regulations.

(3) The distribution, performance or exhibition of any work in pursuance of authority granted in terms of such regulations shall not constitute an infringement of copyright in such work, but the copyright owner shall not thereby be deprived of any right which he may have had to obtain a reasonable remuneration, which shall in default of agreement be determined by arbitration.

Regulation and control of the reproduction or adaptation of artistic works

45A. (1) Notwithstanding anything to the contrary in this Act contained, the Minister may make such regulations as he may consider necessary in regard to the reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work.

(2) Such regulations may empower any person specified therein to authorize the reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work on such conditions as may be specified in those regulations.

(3) The reproduction or adaptation, or the making available to the public of reproductions or adaptations, of any artistic work in pursuance of authority granted in terms of such regulations shall not constitute an infringement of copyright in such work, but the copyright owner shall not thereby be deprived of any right which he may have had to obtain a reasonable remuneration, which shall in default of agreement be determined by arbitration.

Repeal of laws

46. The laws specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule: Provided that any proclamation, regulation or rule having effect under any provision so repealed and in force immediately prior to the commencement of this Act, shall continue in force after such commencement and may be repealed, amended or altered as if it had been made under this Act.

Short title and commencement

47. This Act shall be called the Copyright Act, 1978, and shall come into operation on 1 January 1979, except sections 1, 39 and 40, which shall come into operation upon promulgation of this Act in the *Gazette*, and except section 45, which shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

³ The Copyright Amendment Act, 1984 entered into force on April 18, 1984 (date of its publication in the *Gazette*).

Schedule

No. and year of Act	Title	Extent of Repeal
Act No. 63 of 1965	Copyright Act, 1965	The whole, except section 46
Act No. 56 of 1967	Copyright Amendment Act, 1967	The whole
Act No. 75 of 1972	Copyright Amendment Act, 1972	The whole
Act No. 64 of 1975	Copyright Amendment Act, 1975	The whole

General Studies

The Taxation of the Author in International Tax Law and the Madrid Convention for the Avoidance of Double Taxation of Copyright Royalties

Reinhold KREILE*

Book Reviews

International Publishing Today — Problems and Prospects.

Edited by *O.P. Ghai* and *Narendra Kumar*. One volume of XII-237 pages. Printed at the Jupiter Offset Press, Shahdara, Delhi (India), 1984.

Two distinguished figures on the Indian publishing scene, O.P. Ghai and Narendra Kumar (the President and former President, respectively, of the Federation of Indian Publishers), have put together this "festschrift" in honor of Manuel Salvat, himself an eminent member of a family of Spanish publishers, who was elected President of the International Publishers Association for the term 1980-84, for his "pionnering contribution to the cause of international publishing."

The 23 contributors to this volume, nationals of both developed and developing countries with widely differing socio-political systems, are connected in their respective professions with the various problems concerning publishing. They are the following: Jenny Curtis and Michael G. Zifcak (Australia), Propicio Machado Alves (Brazil), Sayed Ali El Gabri (Egypt), Peter Weidhaas (Federal Republic of Germany), Samuel Israel, Prem Kirpal, Girja Kumar, D.N. Malhotra, Vishwa Nath and Amrik Singh (India), Toshiyuki Hattori and Shigeo Minowa (Japan), José Luis Ramirez (Mexico), Ndéné Ndiaye (Senegal), Ivan Korovkin (Soviet Union), Francisco Perez Gonzalez (Spain), Martyn Goff and Gordon Graham (United Kingdom), Leo N. Albert and Robert E. Baensch (United States of America), J.-Alexis Koutchoumow (International Publishers Association) and Shahid Ali Khan (WIPO).

The contributions in this volume of articles deal with a number of important aspects relating to publishing including the role of books in human development, the role of the publisher in modern society, the freedom to publish, the effects of the global economic situation, developments of new technologies, training for manpower provision, as also problems connected with copyright and book piracy; they also deal with problems of publishing in developing countries and emphasize the need for closer cooperation between publishers in the developed and developing world.

The book, released on the occasion of the International Publishers Association Congress in Mexico, thus contains wide-ranging information on the present international situation in publishing and bookselling, its problems and the difficulties which the publishing industry confronts as also its future.

The volume brings out different approaches to the role of a publisher; he is "the gatekeeper of quality" for the dissemina-

tion of worthwhile knowledge and creativity, and also has to survive by business acumen, taking financial risks, being subject to national and global economic pressures which do not always allow only respect for quality. Indeed the need to sell in large numbers virtually induces the production of some "eye-catching" material, to use the language of one of the contributors.

Another question raised is the future of the book itself. Its place and form of survival must be considered in situations where newer media such as computers, television and various other audiovisual entities may diminish its role. This problem is of greater concern to technologically more advanced countries.

The volume amply illustrates how on the international scene, the book world naturally follows the trends of the international economic situation. The credit crisis, rising production and distribution costs, currency problems and new technologies create their own problems of financial management. Here again, the rising cost of the average book is a worldwide phenomenon, but it is worth repeating that its ill effects have far more serious consequences in the developing than in the developed countries.

However, as pointed out in the preface, "in spite of these numerous problems, publishers have continued to be innovative and have adapted successfully to changing situations." It is heartening to note this as well as to learn that in respect of the western world, for example Spain, Manuel Salvat's own country, is the fourth largest book-exporting country in absolute terms and first in the GNP/book export proportion. It is also interesting to know, as one contributor mentions, that the "paperback revolution" has made certain books cheaper than they were a century ago in relation to current purchasing power, and we have only to look back into the history of any country to be aware that the ability to read, let alone the possibility of possessing or borrowing books, was once confined to a small élite in society. Besides, the extent of book piracy today does indeed confirm the value and continuing use of the book; an illegal activity carried out on such a scale must necessarily relate to a thriving business. The importance of book fairs to international commerce is also rightly emphasized. Most encouraging of all is the trend to consider books as among the necessities of life.

This volume, by the diversity of its contributors, brings out various sides of the state of the reading habit and of book publishing. It is extremely thought-provoking and informative, not only on certain practicalities of the book world, but also, thanks to the wide culture of some of its contributors, on philosophical considerations that lie behind it.

Calendar of Meetings

WIPO Meetings

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

1984

- October 8 to 10 (Doha) — Regional Group of Experts on Means of Implementation in Arab States of Model Provisions on Intellectual Property Aspects of Protection of Expressions of Folklore (convened jointly with Unesco)
- October 15 to 19 (Geneva) — Nice Union: Preparatory Working Group
- November 5 to 9 (Geneva) — Committee of Experts on Biotechnological Inventions
- November 19 to 23 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning
- November 26 to 30 (Paris) — Group of Experts on Copyright Problems Related to the Rental of Phonograms and Videograms (convened jointly with Unesco)
- November 26 to December 7 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- December 10 to 14 (Paris) — Group of Experts on the Intellectual Property Aspects of the Protection of Folklore at the International Level (convened jointly with Unesco)
- December 17 (Geneva) — Informal Meeting with International Non-Governmental Organizations Essentially Concerned with Industrial Property or Copyright and Neighboring Rights

1985

- January 21 to 25 (Geneva) — International Patent Classification (IPC) Union: Committee of Experts
- February 4 to 8 (Geneva) — Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights
- February 25 to March 1 (Geneva) — Group of Experts on Copyright Protection of Computer Software (convened jointly with Unesco)
- March 11 to 15 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information
- March 18 to 22 (Paris) — Group of Experts on Copyright Problems in the Field of Direct Broadcasting Satellites (convened jointly with Unesco)
- April 22 to 26 (Paris) — Joint Unesco-WIPO Consultative Committee on the Access by Developing Countries to Works Protected by Copyright (convened jointly with Unesco)
- May 6 to 17 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information
- 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)
- 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)
- September 23 to October 1 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hagne, 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

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

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

UPOV Meetings

1984

October 8 to 11 (Valencia) — Technical Working Party for Fruit Crops, and Subgroups

October 16 (Geneva) — Consultative Committee

October 17 to 19 (Geneva) — Council and Symposium

November 6 and 7 (Geneva) — Technical Committee

November 8 and 9 (Geneva) — Administrative and Legal Committee

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

Non-Governmental Organizations

1984

European Broadcasting Union (EBU)

Legal Committee — October 3 to 6 (Cyprus)

International Confederation of Societies of Authors and Composers (CISAC)

Congress — November 12 to 17 (Tokyo)

1985

European Broadcasting Union (EBU)

Legal Committee — April 24 to 26 (Geneva)

International Copyright Society (INTERGU)

Congress — June 7 to 12 (Munich)

International Union of Architects (IUA)

Congress — January 20 to 26 (Cairo)