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Contents

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WIPO Meetings

The Printed Word

Preparatory Document for and Report of the WIPO/Unesco Committee of Governmental Experts

(Geneva, December 7 to 11, 1987)

Editor's Note. What is published in the following on this Committee of Experts consists of the text of the preparatory document (hereinafter referred to as "the memorandum of the Secretariats") that the International Bureau of WIPO and the Secretariat of Unesco have prepared for the Committee of Experts *and* the report on the discussions and conclusions of the Committee of Experts (hereinafter referred to as "the report of the Committee of Experts").

The memorandum of the Secretariats is printed in Roman characters (the "principles" in bold type), whereas the report of the Committee of Experts is printed in italics.

The memorandum of the Secretariats was published on September 14, 1987, under the title "Questions Concerning the Protection of Copyright in Respect of the Printed Word"; it has the document number UNESCO/WIPO/CGE/PW/3–I and II.

The report of the Committee of Experts was adopted by the Committee of Experts on December 11, 1987; it has the document number UNESCO/WIPO/CGE/PW/4.

The paragraphs in both documents have numbers. Each paragraph number of the report of the Committee of Experts is, in the following, preceded by the word "Report," so as to make the distinction between the two sets of paragraphs easier.

Contents

PART I

I. Introduction

1. The Committee of Governmental Experts for which the present document has been prepared is being convened by virtue of decisions made by the Governing Bodies of Unesco and WIPO responsible for establishing the programs of the two Organizations (see in particular, as far as Unesco is concerned, Approved Programme and Budget for 1986–1987 (23 C/5 Approved), paragraph 15115, and as far as WIPO is concerned, document AB/XVI/2, Annex A, items PRG.04(1) and document AB/XVI/23, paragraph 105.)

2. Those decisions provide for a new approach regarding copyright questions of topical interest in the 1986–1987 biennium. Whereas the discussions in the 1984–1985 biennium concentrated on *new uses* (mainly, cable television, private copying, rental and lending, direct broadcast satellites) affecting the owners or other beneficiaries of copyright and the so–called neighboring rights, the specific questions to be discussed in the 1986–1987 biennium are grouped according to the main *categories of works*. In connection with each category, all the various new uses of works of that category, and the interests of all the various owners and beneficiaries of copyright and so–called neighboring rights in such works are considered. Virtually, all main categories of works will be covered, so that, by the end of the biennium, a global review will have been carried out of the current situation in all the fields of copyright and the so–called neighboring rights.

3. According to the decisions mentioned above, the Secretariats of Unesco and WIPO have to prepare, convene and service meetings of committees of governmental experts on the following eight categories of works: the printed word, audiovisual works, phonograms, works of visual art, works of architecture, works of applied art, dramatic and choreographic works, musical works.

4. The Committee of Governmental Experts, for which the present document has been prepared, is invited to deal with the category of works which was called "the printed word" in the program.

5. The purpose of this document is to summarize and discuss various copyright issues in relation to "the printed word" for the purpose of arriving at certain "principles" which, together with the comments, could serve as a guidance for governments when they have to deal with those issues. It should be stressed that the principles—neither as proposed nor as they might emerge as the result of the deliberations of the Committee of Governmental Experts—have or will have any binding force on anyone. They are merely intended to indicate directions which seem to be reasonable in the search of solutions which, by safeguarding the rights of the authors and other holders of rights, give them a fair treatment and promote creative activity eminently necessary for safeguarding the cultural identity of every nation. At the same time, the proposed solutions should be of a nature that facilitates, from both the creators' and the users' viewpoint, the use of protected works.

6. The meeting of the Committee of Governmental Experts on the Printed Word is the last one in the series of meetings mentioned in paragraph 2. The other seven categories have been discussed in two ways. In the case of audiovisual works and phonograms, only the most topical questions—mainly the ones raised by the new technologies—were discussed; this was the case for two reasons: first, because those categories had been in the focus of attention for a long time and many significant questions of copyright protection had been dealt with; second, because the topical questions—piracy, home taping, rental and public lending, satellite broadcasting, cable distribution—in themselves offered a rich and extensive material to be discussed. The other five categories of works have been discussed on the basis of a more complete approach: many interesting questions of the protection of those works have not been on the agenda recently because they were not closely connected to the most important technological developments. Therefore, the meetings of the committees of governmental experts on those categories of works have dealt with practically all aspects of copyright protection.

7. The programs of Unesco and WIPO mentioned in paragraph 1, and the present document prepared in keeping with those programs, suggest the same approach in respect of the category of the printed word as the one applied in the case of audiovisual works and phonograms; namely, concentrating on the most topical questions, including those which have been raised by new technologies, for reasons similar to the ones referred to in relation to audiovisual works and phonograms. The programs mention the following such questions: piracy, reprography, private copying, storage in and retrieval from computer memories, electronic libraries, lending, translation. The present document only discusses those questions and some further questions which are closely connected to them, namely the problems of data bases and the question of the protection of the typographical arrangements of published editions.

8. It follows from the programs adopted by the Governing Bodies of Unesco and WIPO that the terms of reference of this Committee do not extend to such questions as the conditions of publishing contracts or the status of the works created under employment contract. Both those questions have been the subject of meetings of committees of governmental experts in the 1985–1986 program period.

9. The expression "the printed word" is not a precise legal term. According to the programs, it means any written works, that is, any writings included or to be included in books, newspapers, magazines or—as the programs also indicate—in computer memories, electronic libraries, etc., irrespective of whether their content is *belles-lettres*, scientific, educational or other. In the present document the expressions "the printed word" and "writings" will be used in the sense described above. Consequently, the expression "writings"— in the present document—does not cover computer programs even though, in several countries, they qualify as writings or literary works. Under the programs quoted above, the terms of reference of the Committee of Governmental Experts for which the present document has been prepared do not extend to computer programs.

10. At the same time, concerning certain questions such as reprography, electronic libraries and public lending right, the same or similar considerations prevail in respect of graphic works as in respect of writings. Therefore, in the case of the principles concerned, this document refers not only to writings but also to graphic works. The expression "graphic work" is used in the meaning defined in the WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights: "Graphic work: Generally understood as meaning an artistic work created by delineation and/or coloring on a flat surface, such as drawings or paintings and sometimes also engravings."

Report 1. In pursuance of the decisions adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-third session and by the Governing Bodies of the World Intellectual Property Organization (WIPO) at their fifteenth series of meetings in October 1985, the Directors General of Unesco and WIPO jointly convened a Committee of Governmental Experts on the Printed Word at the headquarters of WIPO in Geneva from December 7 to 11, 1987.

Report 2. The purpose of the meeting was to discuss the various copyright issues arising in relation to the printed word with a view to devising certain "principles" which, together with comments, could afford guidance to governments when they had to deal with those issues.

Report 3. The principles have no binding force and their purpose is merely to indicate directions that seem reasonable in the search for solutions which, by safeguarding the rights of authors and other owners of rights in the printed word, give them fair treatment and promote creative activity.

Report 4. Experts from the following 32 States attended the meeting: Algeria, Brazil, Canada, Denmark, Finland, France, German Democratic Republic, Germany (Federal Republic of), Hungary, India, Israel, Italy, Japan, Jordan, Kuwait, Lebanon, Mexico, Netherlands, Norway, Panama, Peru, Poland, Portugal, Republic of Korea, Soviet Union, Spain, Sweden, Switzerland, Turkey, United States of America, Uruguay, Yugoslavia.

Report 5. Observers from two intergovernmental organizations, namely the Commission of the European Communities (CEC) and the Organization of African Unity (OAU), and from 14 international non-governmental organizations, namely the European Broadcasting Union (EBU), the International Bureau of Societies Administering the Rights of Me-

chanical Recording and Reproduction (BIEM), the International Chamber of Commerce (ICC), the International Confederation of Societies of Authors and Composers (CISAC), the International Copyright Society (INTERGU), the International Federation of Journalists (IFJ), the International Federation of Newspaper Publishers (FIEJ), the International Federation of Phonogram and Videogram Producers (IFPI), the International Federation of Translators (FIT), the International Group of Scientific, Technical and Medical Publishers (STM), the International Literary and Artistic Association (ALAI), the International Publishers Association (IPA), the International Union of Architects (IUA), and the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law participated in the meeting.

Report 6. The list of participants follows this report.

Report 7. Mr. Henry Olsson, Director, Copyright and Public Information Department of WIPO, opened the meeting and welcomed the participants on behalf of WIPO and Unesco.

Report 8. Mr. Jukka Liedes (Finland) was unanimously elected Chairman of the meeting.

Report 9. The Committee adopted the Rules of Procedure contained in document UNESCO/WIPO/CGE/PW/2. It was decided that the Committee should elect two Vice–Chairmen and that the tasks of the Rapporteur should be fulfilled by the Secretariats. It was also agreed that, in accordance with the usual practice in meetings such as the present one, the report would be available only in English and French.

Report 10. Mr. Ajai Malhotra (India) and Mrs. Reguina Gorelik (Soviet Union) were unanimously elected Vice–Chairmen of the meeting.

Report 11. The provisional agenda of the meeting of the Committee, as appearing in document UNESCO/WIPO/CGE/PW/1 Prov., was adopted.

Report 12. Discussions were based on the Memorandum on Questions Concerning the Protection of Copyright in Respect of the Printed Word prepared by the Secretariats (document UNESCO/WIPO/CGE/PW/3–I and II).

Report 13. All the delegates who took the floor particularly stressed the high quality of the memorandum which was considered to provide an excellent basis for the discussions concerning various copyright problems in relation to the printed word. Several delegations underlined the fundamental importance of granting an efficient protection for this category of works and said that copyright protection must not remain a dead letter and, furthermore, expressed the hope that the consensus which might emerge from the discussions would prove useful in combating piracy in this field.

Report 14. Some delegations gave information about their national copyright laws which had been promulgated recently or were under consideration. A particularly great number of delegations referred to new measures against piracy.

Report 15. Some delegations underlined the important role of publishers and said that in various contexts of the memorandum, reference should also be made to publishers' interests and to the rights to be enjoyed by them.

Report 16. One delegation referred to those parts of the memorandum which dealt with reprography and public lending right and stressed the importance of the principle of national treatment which aimed at ensuring that foreign owners of rights were treated on an equal basis with the national ones.

Report 17. One delegation drew attention to the specific approach followed in the memorandum, namely that it concentrated on the secondary uses of the so–called printed word. That approach might have followed from the relevant items in the programs of Unesco and WIPO; it should, however, be taken into account that the rights of authors and publishers were determined by the legal regulation and contractual conditions of the first original use of the work, that is, particularly by the contracts between authors and publishers. During the discussions, consideration should be given to that aspect.

Report 18. An observer representing a non–governmental organization said that publishers' rights should be mentioned expressis verbis *in the principles, for example, in those concerning reprography.*

Report 19. An observer representing another non–governmental organization stressed the important role which newspaper publishers play in the production and distribution of newspapers in the sense that they decide on what material should be published and in what form, and take the commercial risk. They should, therefore, have the full right to use the material in all types of media.

Report 20. An observer representing still another non–governmental organization opposed the statement made by the previous speaker and said that, on

the contrary, natural justice as well as the principles discussed and the results obtained in other forums pointed in another direction, namely at preserving the authors' control of use of their material in new media. This statement was supported by an observer representing another non-governmental organization.

II. Piracy

Geoeral Remarks

11. The notion of "piracy" is sometimes used in a fairly wide sense, practically as a synonym of infringement. In this document, the notion of piracy is used in a narrower sense, namely in the sense according to which piracy is the unlawful commercial manufacture and tbe subsequent sale or other distribution of copies of works protected by copyright.

12. The piracy of the printed word was not totally unknown in the past but it was a fairly isolated phenomenon and did not have the disastrous consequences that today's piracy has.

13. The situation as regards piracy of printed matter has dramatically changed with the appearance and rapid spreading of ever more perfect reprographic methods and new printing techniques. The facilities for making copies are almost limitless and rapidly developing. Copies can be produced ever more quickly and cheaply and in such a way that they are practically indistinguishable from the original.

14. Piracy costs publishers and—consequently—authors over one billion dollars a year according to the data provided by the International Publishers Association (IPA).

15. Piracy does not concern all types of printed matter to the same extent. School textbooks and bestsellers are the main target. The market of school books is very attractive to pirates. Such books fall into the category of basic needs and their market is constant: the time and place when and where they are needed, the number of prospective buyers (the students enrolled) and tbe subjects in which they are interested, are all well known and predictable. Bestsellers are even more frequent victims of piracy. Their generally short-term profitability and sure market makes them obvious targets of pirates. In many cases, the pirate edition is already printed and on the market when the lawful copies imported or locally produced appear in the bookshops.

16. It is a false and hypocritical argument to say that pirates should be allowed to distribute their "products" because they are usually much cheaper than legally produced books and, consequently, are advantageous for consumers. Pirates are thieves, and this is why they can sell what they have stolen at a low price. This is possible mainly because they have to make only a very small investment, they pay no royalties or fees to authors and they evade taxes. At the same time, they do not take aoy commercial risk. They simply reproduce works which have become successful as a result of tbe creative and financial efforts of others. They can sell copies more cheaply thao the authorized publishers can; the latter have to recoup their investments. Pirates are, however, far from being philanthropists. Their sole aim is as much immediate profit as possible; even if they can sell a book at half the price of the publishers' edition, tbeir profit will be at least double that of the lawful publishers. However, pirate copies—including pirate textbooks—are often sold at the same price or only slightly more cbeaply thao tbe lawful copies are; not only because pirates' intentions are always purely commercial, but also because rather tban drawing attention to themselves through a marked difference io prices, they sometimes prefer to "camouflage" their products (especially when tbe quality of tbe print is good and infringers are liable to be prosecuted).

17. Piracy is particularly detrimental to the cultural life of developing couotries. It suffocates national publishing industries at birtb, and without national productioo tbere is no outlet for the development of national creativity. Piracy leads to cultural dependence, to tbe denationalization of popular demand and—as a most undesirable result—to the fading away of national cultural identity.

18. It sbould also be noted tbat when pirates destroy the basis for the development of national publishing industry, they do not eveo offer an appropriate alternative oo the market. They are not ioterested in the mainteoance of a sound local book trade. They frequently spring up overnight, sell tbeir pirate products and bastily disappear again. Providing a "stocking" service, servicing the whole market—not only some portions of it that are easy to reach, offering the possibility of repeat orders, taking care of updating school books and scientific publications or adapting them to the circumstances, conditions and needs of tbe couotry—in short: serving the interests of the oation—are tasks in relation to which pirates do not undertake any responsibility.

19. In addition to its disastrous effects on national book publisbiog aod creativity, piracy is also detrimental in regard of cooperation with foreign publisbers. Experience shows that the publishers of industrialized countries are, generally, ready to guarantee the supply of books necessary for developing couotries in various forms—joint book publishing programs, licensing arrangements, export of copies, etc.—in as simple a way as possible aod at prices which are reasonable for tbe countries concerned if the minimum legal and administrative conditions are guaranteed. In countries where piracy of books and otber protected works is widespread and no appropriate measures are taken against it, one cannot speak about the existence of such conditions.

International Conventions and Piracy

20. At tbe ioternational level, tbe copyright conventions do not leave any doubt that piracy is an illegal activity.

21. The most important foundation in the international copyright conventions for any action against piracy is the exclusive right of reproduction granted to the authors of works.

22. Under Article 9(1) of the Berne Convention, the authors of literary and artistic works protected by the Convention enjoy the exclusive right to authorize the reproduction of those works in any manner or form. Article 9(2) allows national legislators to provide for exceptions to the exclusive right of reproduction in certain special cases. However, acts of piracy obviously could never be considered as such cases. The Convention makes the exceptions subject to two conditions: the reproduction must not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author. Piracy does exactly the opposite.

23. The Universal Copyright Convention, in its Article IV*bis*, paragraph 1, provides for the exclusive right of authors to authorize reproduction by any means. Paragraph 2 of the same Article allows national legislation to make exceptions that do not conflict with the spirit and the provisions of the Convention, but it adds that a reasonable degree of effective protection should be accorded nevertheless. This provision also obviously makes piracy an illegal activity.

24. In the field of industrial property, the Paris Convention for the Protection of Industrial Property can be invoked, as it is designed, among other purposes, to protect trademarks and repress unfair competition. Trademark protection may be claimed wherever publications are sold under a trademark that has been affixed on the pirate copies without the authorization of the owner of the trademark. Furthermore, piracy is obviously an act of unfair competition, an "act of competition contrary to honest practices in industrial or commercial matters" (Paris Convention, Article $10^{bis}(2)$). The Paris Convention gives examples of acts of unfair competition among which the following is particularly pertinent: "all acts of such a nature as to create confusion ... with the establishment, the goods ... of the competitor" (Article $10^{bis}(3)$).

25. It is clear from the above references to international conventions that the legal weaponry exists at the international level. This weaponry is, however, not always applied in an adequate way in practice.

26. First, there is a number of States which are not party to the above-mentioned international conventions and in which a great number of copies of protected works are produced for commercial purposes and without giving authors any chance to enjoy any copyright and to receive any remuneration for the use of their creations. Therefore, different steps are being taken by Unesco and WIPO to promote wider acceptance of the international conventions.

27. Secondly, in some countries, national laws do not afford in practice sufficient protection of the interests at stake. Even though the international conventions generally provide that States party to them have to take the necessary steps to ensure their application, there are some countries whose national laws are not always in complete harmony with all the obligations assumed under the conventions.

28. Thirdly, existing provisions are not always applied effectively because the sanctions applicable against pirates are not strict enough, or there is a lack of capacity—if there is no reluctance—on the side of the law-enforcing authorities to fight piracy.

Measures Against Piracy at the International Level

29. In pursuance of the program approved by the General Conference at its twenty-second session (Approved Program and Budget for 1984-1985, paragraph 15132), the Unesco Secretariat carried out a comprehensive study of the phenomenon of piracy with a view to better identifying its causes, extent and socio-economic and cultural implications. The Unesco Secretariat has prepared a document entitled "Analysis of the Replies to the Unesco Questionnaire on the Phenomenon of the Piracy of Printed Material, Phonograms, Audiovisual Material, Films, and Radio and Television Programs," which summarizes and analyzes the replies to the questionnaire given by member States. That document might contribute to the further study of the problem of the protection of intellectual property rights against piracy.

30. WIPO has convened two Worldwide Forums on piracy. Both were held in Geneva; the first dealt with the piracy of sound and audiovisual recordings in March 1981, and the second with the piracy of broadcasts and of the printed word in March 1983. On the basis of the discussions in those forums, the most important means of fighting piracy were outlined.

31. The participants in the Worldwide Forum on the Piracy of Broadcasts and of the Printed Word adopted a Resolution which contains, *inter alia*, the following statements:

> "Representatives of governments, representatives of international and national organizations of authors and users of authors' works, broadcasters and publishers, and specialists, coming from developing and industrialized countries of different social and economic systems, participants in the WIPO Worldwide Forum on the Piracy of Broadcasts and of the Printed Word
>
> .....
>
> "*Express their concern* over the spreading of the piracy, on a commercial level, of broadcasts and the printed word, facilitated by new technological developments whose impact on copyright is frequently not clearly defined in laws and practice;
>
> "*Consider* that the search for measures for combating piracy more efficiently should continue;
>
> "*Consider* that these measures should comprise the provision of more effective sanctions, particularly penal sanctions, in the legislations, adherence to appropriate international conventions, a more effective cooperation between those whose rights are endangered and the law enforcement authorities, as well as a continuing search for simplifying the methods of ob-

taining the necessary authorizations from the holders of the rights at a reasonable price, particularly as far as the use of foreign books and broadcasts in developing countries is concerned;

"*Ask* WIPO to continue its work of making governments and the general public aware of the harmful effects of piracy on creativity and cultural progress;

"*Recommend* that the Director General of WIPO bring this resolution to the attention of the Conference of WIPO and the Assembly of the Berne Union for the Protection of Literary and Artistic Works, with a view to the possible adoption of recommendations at the official level."

32. In keeping with the recommendation of the above-quoted Resolution, the Conference of WIPO, at its seventh session, held in Geneva in September-October 1985, discussed the problems of piracy of literary and artistic works and adopted a Recommendation. The Conference—"desiring to encourage further progress towards the elimination of piracy and to review such progress on the basis of full and up-to-date information"—recommended "that the government of each member State provide information through the International Bureau to the next ordinary session (1987) of the Conference concerning *(a)* the extent within its jurisdiction of commercial piracy of works protected ..., *(b)* measures adopted to combat piracy and *(c)* the effect of the said measures." The forthcoming session of the WIPO Conference which will be informed about the information received from governments will be held in September 1987, after the finalization of this document.

33. Within the framework of the series of meetings of Committees of Governmental Experts mentioned in paragraph 3 above, one committee, namely the Committee of Governmental Experts on Audiovisual Works and Phonograms, whose meeting was held in Paris in June 1986, has already discussed the problems of piracy. The piracy of audiovisual works and phonograms raises questions similar to those raised by the piracy of the printed word, and the application of similar methods and means seem to be necessary in both fields. Therefore, it seems worthwhile to reproduce here the Resolution of that Committee:

"The Unesco/WIPO Committee of Govemmental Experts on Audiovisual Works and Phonograms, meeting in Paris from June 2 to 6, 1986, proposes that the appropriate bodies of the Berne and Universal Copyright Conventions endorse the resolution along the following lines:

"*Recognizing* that the enormous growth of the worldwide commercial piracy of audiovisual works and phonograms is posing a danger to national creativity, to cultural development, to local industry, and to intellectual property rights,

"*Urges* that States should, in their national laws, introduce the rights guaranteed under the international conventions in this field, and *invites* the States which are not parties to these conventions to adhere to them and bring their legislation up to date so as to take fully into account the new technological uses of intellectual property,

"*Expresses* the strong conviction that the adequate and effective protection of all rights holders under the conventions requires the provision of criminal sanctions in national law of sufficient severity to punish and deter piracy, and effective enforcement of such criminal sanctions,

"*Acknowledges* that such sanctions should include fines and/or imprisonment terms appropriate to other serious thefts of property in the country concerned; provisions for the seizure and destruction of infringing copies and the equipment used in their production; measures to prevent importation into Convention States; and, procedures to facilitate the detection and proof of piracy."

Results and Further Action To Be Taken

34. The discussions at the above-mentioned meetings and the resolutions and principles adopted had at least one immediate positive result. Piracy was unanimously condemned at the international level as a dangerous criminal activity which menaces both the bases of copyright protection and the sound development of culture, education and science throughout the world. It was made clear during those meetings that all arguments for justification for piracy were fundamentally false and cynical and that the fight against this dangerous phenomenon is a duty of all governments.

35. Unesco and WIPO have taken various measures for the promotion of an ever more efficient fight against piracy in their copyright programs, including within the framework of their development cooperation activities (training courses, seminars, etc.). Governments and interested non-governmental organizations (such as the International Publishers Association (IPA), International Group of Scientific, Technical and Medical Publishers (STM), International Confederation of Societies of Authors and Composers (CISAC), etc.) have also intensified their contributions to the general antipiracy program.

36. Positive results have started to occur. In recent years, several countries have legislated against piracy, penalties to be applied in such cases have been increased, new offenses have been defined, the procedural and administrative provisions concerning measures against pirates have been made more easily applicable and more efficient, stricter control has been introduced over importation and national markets, etc.

37. In spite of some recent positive developments, it cannot be said that piracy has been generally eliminated. Further measures need to be taken, also at the international level. The following principle is proposed for consideration and application:

Principle PW1. (1) Piracy is the unlawful commercial manufacture, sale or other distribution of copies (books, etc.) of literary and artistic works.

(2) Piracy is an illegal and criminal activity—a form of theft—and as such, thoroughly antisocial and contrary to the public interest and

not merely a matter affecting the private rights of individuals.

(3) States should take efficient measures to eliminate piracy which appropriately match its illegal, criminal and antisocial nature. Such measures should include at least the following:

(a) strong and unconditional public condemnation of piracy;

(b) granting copyright protection that corresponds, at least, to the minimum provisions of the Berne Convention and the Universal Copyright Convention, and that also takes fully into account the new uses of literary and artistic works;

(c) by States which are not yet party to the above-mentioned conventions, adherence to them;

(d) provision for criminal sanctions of sufficient severity to punish and deter piracy (including fines and/or—preferably—imprisonment terms equivalent to other serious thefts of property in the States concerned);

(e) provision for seizure and destruction of infringing copies and of the equipment used in their production;

(f) provision for an appropriate compensation for damages;

(g) effective enforcement of the sanctions mentioned in points (d), (e) and (f);

(h) procedures to facilitate the detection and proof of piracy;

(i) measures to prevent distribution, exportation and importation of pirate copies.

38. At the WIPO Worldwide Forum on the Piracy of Broadcasts and of the Printed Word, held in Geneva in March 1983, it was emphasized that the fight against piracy is meaningful and efficient only if it is carried out in close connection with the identification of other activities infringing the rights and prejudicing the justified interests of authors and with resolute and consistent actions also against such activities. Some participants warned that if attention is too unilaterally and nearly exclusively concentrated on piracy as the most flagrant example of copyright infringements, it may contribute to the strengthening of an ever more widespread and ever more dangerous misunderstanding or misinterpretation of the purposes and basic principles of copyright, misunderstanding or misinterpretation according to which, in cases where no commercial motive is involved on the part of users, a lower level of protection—for instance, introduction of compulsory licenses— is sufficient or there is even no need to grant authors any economic rights.

39. Copyright protection is not subject to the element of commercial intentions on the part of users because certain activities may dangerously infringe the rights and prejudice the interests of authors and publishers even when the use of works serves explicitly positive purposes (such as education, research, etc.) or when it is of private nature. Reprographic reproduction of books, periodicals and other printed matter—which is the subject of the following part of the present document—is a good example of this.

Report 21. A great number of participants stated that they were in agreement with the main lines of this part of the document and emphasized the usefulness of Principle PW1 for the adoption and application, at the national level, of efficient measures against piracy.

Report 22. One delegation suggested that, in addition to the interests mentioned in the document as those which are concerned by piracy, the interests of the consumers should also be taken into account because consumers are interested to know whether what they buy are lawful copies or pirated ones.

Report 23. Some delegations proposed the deletion of the word "commercial" from Principle PW1, paragraph (1). Several other delegates opposed such a deletion as it would imply that mere infringements of copyright would be included, while the definition of piracy should correspond to the strongly condemnable nature of the activities involved.

Report 24. One delegation suggested that in Principle PW1, paragraph (1), between the words "manufacture" and "sale," the words "and/or" should be inserted, so as to cover all possible versions of piratical activities.

Report 25. Some delegations were of the opinion that in Principle PW1, paragraph (2), the words "a form of theft" should be deleted and, perhaps, the entire paragraph could be left out or merged with paragraph (3)(a) which stated the need for a strong and unconditional public condemnation of piracy. One delegation suggested that the word "antisocial" could be deleted. Other participants opposed those changes stressing that paragraph (2) was necessary to underline the exceptionally dangerous and condemnable nature of piracy.

Report 26. One delegation proposed that the second sentence of Principle PW1, paragraph (3)—including points (a) to (i)—should be deleted. A great number of other participants stressed the importance of that sentence and the points included in it as offering concrete and efficient measures for combating piracy.

Report 27. An observer representing an international non-governmental organization proposed the deletion of the word "minimum" from Principle PW1, paragraph (3)(b).

Report 28. Some delegations were of the opinion that Principle PW1, paragraph (3)(c) did not fit well into the list of antipiracy measures. It would be better to include such an invitation to countries, which were not party to the international copyright conventions, in a separate paragraph.

Report 29. One delegation suggested that Principle PW1, paragraph (3)(e) should be made more flexible; the phrase "provision for seizure and destruction" should be replaced by the phrase "provision for the seizure and the destination—including the possible destruction—."

Report 30. An observer from an international non-governmental organization proposed that Principle PW1, paragraph (3)(f) should provide for "full compensation" rather than for "appropriate compensation."

Report 31. An observer from another international non-governmental organization suggested that both point (g) and point (i) of Principle PW1(3) should begin with the words "prompt and effective," and reference should also be made to the need for international cooperation between police and customs authorities. He also suggested that Principle PW1, paragraph (3)(h) be amended to add ", including pre-trial seizure of copies, equipment and documents, freezing of assets, funding and provision of enforcement agencies, and presumptions in favor of plaintiffs over burden of proof of copyright ownership."

Report 32. One delegation underlined the basic truth in the statement included in paragraph 17 of the memorandum according to which piracy is particularly detrimental to the cultural life of developing countries.

Report 33. Another delegation expressed the view that it was not enough to apply criminal sanctions against pirates; certain other measures, such as a reduction of book prices, should also be taken to eliminate the situations which might lead to piracy. It stressed the need which users in developing countries have for a quick and easy access to inexpensive versions of the printed word, both in original and translated form, to meet the educational and cultural needs in those countries. The delegation asked for information about the activities of Unesco and WIPO in this respect.

Report 34. Another delegation referred to the promotion of national book publishing, including joint publishing programs with industrialized countries, as a possibility of the application of measures other than sanctions.

Report 35. The representative of WIPO—also referring to the parallel activities of Unesco—gave detailed information about the extensive and active development cooperation program of his Organization and mentioned, in particular, the Joint Unesco/WIPO Service for Access by Developing Countries to Works Protected by Copyright.

Report 36. Some participants proposed that reference should be made—at least in the comments—to the related rights type protection of publishers as outlined in Principle PW26, as one of the measures which might serve the fight against piracy.

Report 37. One delegation stressed the importance of the statement included in paragraph 38 of the memorandum according to which the fight against piracy was only meaningful and efficient if it was carried out in close connection with the fight against all other copyright infringements.

Report 38. The representative of Unesco informed the participants that an international symposium on piracy will be held in 1989 in accordance with Unesco's Programme and Budget for 1988–1989. All interested international non-governmental organizations concerned will be invited to participate in the work of the symposium and all Unesco Member States will be invited to send observers. He called upon the representatives of the international non-governmental organizations to prepare corresponding documents on the extent of piracy to persuade States of the urgent need to combat piracy.

Report 39. The representative of WIPO gave information about several WIPO programs serving the purpose of combating piracy and referred to the forthcoming meeting of a Committee of Governmental Experts on Measures Against Counterfeiting and Piracy which would take place in Geneva in April 1988.

III. Reprography

General Remarks

40. There is a peculiar process which repeats itself with an almost eery repetitiveness in the field of the new technological possibilities for using literary and artistic works: at the beginning, the new way of using works is regarded as a "non-typical" and, therefore, negligible phenomenon. There are no detailed legal provisions or court cases which would identify the new use with an already existing and regulated one. Users try everything possible to interpret the alleged "silence" of the law to mean that the author's exclusive right does not extend to this "new" field and, therefore, their hands are completely free. By the time the discussion is brought before legislative bod-

ies or courts, users can claim that their free use of works is to be regarded as lawful, that they have acquired the right to freely use the works, since their practice has not been sufficiently questioned or challenged. They oppose what they call an "extension" of authors' rights although what is involved is the need for terminating a practice infringing authors' rights, a practice which is in conflict with the principles and provisions of the Berne Convention and the Universal Copyright Convention as well as with national laws. Unfortunately, it does happen fairly often that a "compromise" solution is chosen whereby the enforcement of copyright is made possible, but with some unjustified restrictions.

41. In this respect, it is important to bear in mind that it would be absolutely wrong to try and identify copyright as an institution protecting works only in the case of some traditional uses and to claim that the enforcement of authors' rights in relation to the uses of works emerging with the new technologies would go beyond the legitimate boundaries of those rights. Indeed, the very opposite of all that is true. Copyright can conform to its important social functions and remain the same—as far as its essence is concerned—only if its provisions are interpreted and applied in a flexible but consistent manner in respect of new technological and social developments. Reprography is a typical example of such new technological developments.

42. Now that the copyright implications of reprography are discussed, it may be interesting to note that this new copying technique was invented by a practitioner of intellectual property. Chester Carlson (1906–1968), a patent attorney (and physicist) in the United States of America, tried to get rid of the burden of retyping voluminous patent specifications. Photography, as a possible means of copying, had existed before but only wet processes were applied which were expensive, slow and far from being perfect. Carlson succeeded in devising a new process—which later became known as "xerography"—and obtained a patent for it in 1940. The technical application of the invention was, however, delayed and it was only seven years later, after having signed a contract with Haloid Corporation (which later became Xerox Corporation) that a commercial machine was developed. The first Xerox machines were marketed at the beginning of the 1950s. From there, the success story of reprography is known to everybody.

43. Reprographic machines have become ever more sophisticated during the last decade in all important aspects: they are of smaller size and at the same time produce better quality, more quickly and more cheaply. The recent appearance of color copiers on the market has opened new avenues for the reprographic reproduction of protected works, not to mention the combination of reprography with the retrieval of works stored in computers (which is discussed later in the present document).

44. Copying by means of reprography so far mainly has been done either in connection with the activities of schools, universities and other educational institutions, libraries, archives, research centers (both public and private ones) or by special "copy-shops" or coin-operated machines in stores and similar places. Government organizations and corporate bodies also use reprographic machines, but personal (home) use of photocopying equipment has not yet become widespread.

45. The situation in the field of reprography is in some respects different from the one which prevails in respect of copying of audiovisual works and phonograms. This difference follows from the fact that while the so-called "home taping" (that is, the reproduction of audiovisual works and phonograms at home, for private purposes) is a global phenomenon, the number of personal copying machines—as mentioned above—is still relatively small. Therefore, the control of the use of works for reprography can be organized much more easily and there are much better chances of avoiding the restrictions of the right of reproduction as an exclusive right of authors.

46. It should, however, also be taken into account that the functions of reprographic reproduction differ from those of home taping. While home taping concerns mainly works of entertainment, reprography is, typically, used for the copying of material necessary for education, research and library services in respect of which special public considerations prevail. Those considerations may serve—and do serve both in the international copyright conventions and in national laws—as a basis for certain restrictions of authors' exclusive rights.

47. Even though reprography can be more easily controlled than home taping, it is still of covert nature in the sense that—if no electronic or other special methods of identification are applied and, in general, they are not—it is difficult to verify how many copies have been made and of which works. Therefore, no absolutely reliable data are available as to the extent and consequences of photocopying. Nevertheless, the size and general impact of such copying are fairly clear. Certain estimates by interested international non-governmental organizations, made on the basis of extrapolating the results of several surveys, are available. It is believed that around 250 billion pages of protected works are copied yearly around the world.

48. Photocopying of literary and artistic works poses truly international problems. Certain analyses by experts and reprographic reproduction organizations give reason to believe that, in general, between 20% and 40% of the works copied are of foreign origin. These figures are even higher in some developing countries and in some smaller countries, depending also on which languages are official or at least widely spoken. It should, however, also be taken into account that in developing countries, photocopying machines are less widespread. In socialist countries, there are also fewer machines than in industrialized market-economy countries and "copy-shops" (that is, commercial use of such machines outside certain public institutions and corporate bodies), are only very few.

49. The landscape of photocopying is rapidly changing. In addition to color copiers, private (home) copiers have also appeared on the market. It is not sure how widespread the private operation of such machines will become. According to certain predictions, they will not be widely utilized as stand-alone units. With the develop-

ment and practical application of electronic delivery systems (electronic publishing, electronic libraries, electronic data bases), the role of home reprography may change and become much more important. Such a development will also change the legal situation considerably because the present solutions at the national level only—or mainly—take into account public or semi–private (internal) uses and not those which are entirely private.

Unesco/WIPO Meetings on the Copyright Questions of Reprography

50. Such an extremely important new development in the field of the use of literary and artistic works as reprography is, has, of course, been discussed also at the intergovernmental level in the course of meetings convened by Unesco and WIPO. What may be rather surprising is that so far only two meetings have dealt with the copyright questions of reprography in a more or less detailed manner and only one of the two has concentrated solely on reprography. This may seem to reflect an unproportionately low priority given to the problems of this new way of reproduction. In fact, however, this is not so. The lack of meetings and specific studies for a fairly long period followed from the results of the meeting of Subcommittees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention on Reprographic Reproduction, held in Washington, D.C. in June 1975, and from the decisions taken by the parent Committees at their next joint sessions, in Geneva, in December the same year.

51. At the 1975 meeting of the Subcommittees in Washington, D.C., various questions on the protection of copyright in relation to reprographic reproduction were discussed but the Resolution adopted avoided suggesting comprehensive and detailed enough solutions to States that were faced with those questions. The Resolution reads as follows:

"[The Subcommitees]

"Considering that reprographic reproduction of works protected by copyright is covered by those provisions of the Universal Copyright Convention and of the Berne Convention for the Protection of Literary and Artistic Works that concern the right of reproduction, as well as the exceptions permitted to that right,

"Anxious not to hamper the dissemination of knowledge to which the use of reprographic reproduction makes a great contribution,

"Conscious that the freedom to make reprographic reproductions, where this process is in widespread use, threatens the exercise of the exclusive right of the author in the matter of reproduction and is likely to impair his legitimate interests,

"Finding, however, that the problem does not arise in the same way for all countries and that, after a thorough study of these various aspects, it appears that a uniform solution on the international level cannot, for the time being, be found,

"Therefore, recommend that the States parties to one or the other of the said Conventions, with a view to reconciling, where necessary, the needs of the users of reprographic reproduction with the rights and interests of the authors, seek a solution based on the following principles:

"1. It rests with each State to resolve this problem by adopting any appropriate measures which, respecting the provisions of the Conventions mentioned above, establish whatever is best adapted to their educational, cultural, social and economic development; ....

"2. In those States where the use of processes of reprographic reproduction is widespread, such States could consider, among other measures, encouraging the establishment of collective systems to exercise and administer the right to remuneration."

52. As can be seen, the Resolution encouraged the establishment of collective systems, but otherwise, it did not answer the basic question: what the "appropriate measures ... respecting the provisions of the Conventions" could and should be, that is, what the minimum obligations and possible options of States party to the copyright conventions were. That cautiousness may be explained by the fact that reprography was not so widespread at that time as it is now and its impact on the exploitation of protected works and the prejudice caused by it to authors and publishers were not as clearly perceptible as they are now.

53. The findings of the Subcommittees were discussed at the subsequent sessions of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention in Geneva in December 1975. The Committees decided to consider the issue exhausted for the time being. It was furthermore considered preferable for the matter not to be reconsidered by the Governing Bodies of WIPO and Unesco, which statement was interpreted by some delegations as meaning "not in the near future."

54. It followed from the above–mentioned wish of the Committees that the problems of reprography were not reconsidered at the international level for a relatively long time. It was only the Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, in Geneva, in June 1984, that dealt again with the questions of reprography.

55. As the name of that Group of Experts shows, it only concentrated on the *private* copying of protected works while the copyright questions of reprography cover a much larger spectrum of problems. At the same time, the "printed matter" was only one of the subjects covered; the private copying of audiovisual and sound recordings and broadcasts was also discussed. Nevertheless, the Group of Experts outlined several principles and solutions which represented a considerable progress in clarifying the copyright implications of reprography.

56. The Group of Experts noted that according to the Berne Convention and the Universal Copyright Convention, the author has an exclusive right of authorizing the reproduction of his work, and it was particularly empha-

sized that "the right of reproduction is not limited to reproduction for public or profit–making use of the work and also covers protection as regards various forms of reproduction for private purposes."

57. It was also recalled that according to the 1971 Paris Act of the Berne Convention, national legislation may provide for limitations of the right of reproduction only "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (Article 9(2)). Under the Universal Copyright Convention, the Contracting States have to provide for the adequate and effective protection of the rights of authors (Article 1) and the States may make only such exceptions to those rights that do not conflict with the spirit and provisions of that Convention. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to the right to which exception has been made (Article IV*bis*.2 of the Convention, as revised in Paris, in 1971). It was stated that the cumulative effect of reprographic reproduction for private use of printed works is prejudicial to the author's legitimate interests (in particular, to his claim to derive material benefit from the use of his work by others) and such kinds of reproduction may also conflict with a normal exploitation of the work reproduced; it also conflicts with the requirement of guaranteeing a reasonable degree of effective protection of the right of reproduction. Consequently, national legislations should not exempt such reproductions for private purposes from copyright liability. This also follows from the requirement of "adequate and effective protection of authors' rights."

58. A number of participants underlined that "the exercise of the exclusive right of reproduction for private purposes should be effected by means of collective agreements between representative organizations of right owners and users. Legislation should provide that relevant claims of the owners of rights concerned may only be asserted by their respective organizations and such organizations should be in a position to guarantee the users against claims from right owners outside the authorizing organization." It was added that "where the system of collective agreements cannot be introduced"—and only there—"the States may introduce proper non–voluntary license schemes for certain kinds of reproduction for private purposes, subject to the payment of proper remuneration." Several participants also stressed that such remuneration "should be distributed to the owners of copyright in works presumed to be copied for private purposes in proportions corresponding to relevant data."

59. In the course of the discussions, special attention was drawn to related interests prevailing in developing countries. The participants noted that "the solution to the problem of reproduction for private purposes may be viewed differently in various developing countries." It was stressed, however, that "the protection of copyright and neighboring rights, as regards reproduction of works by means of modern technology for private purposes also means supporting the development of national cultural industry which, again, is an important factor of furthering national creativity."

60. The approach applied by the above–mentioned Group of Experts as well as the conclusions reached as a result of the discussions at its meeting, seem to be relevant and useful not only as far as private reproduction is concerned but also in respect of some other questions of reprography.

The International Copyright Conventions and Reprography

61. The first and most important fact is that the right of reproduction is an exclusive right under both copyright conventions which cannot be restricted— either allowing free use or in the form of non–voluntary licenses—but in cases which are strictly defined by the same conventions. It has never been questioned—and on the basis of the text of the relevant provisions of the conventions it could not be questioned seriously—that reprographic reproduction (photocopying, etc.) is a form of reproduction which is covered by the said exclusive right. Therefore, the question is not what rights owners of copyright should have at the international level in respect of reprographic reproduction of their works, as if there were no clear and fairly detailed provisions about this in the conventions; what should be discussed is only how these provisions can be applied.

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

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

64. For the interpretation of this provision, it is important to note that the Program for the Stockholm Diplomatic Conference in 1967 contained a proposal for a more specific limitation. The proposal aimed basically to make it possible for the national legislator to permit the reproduction of protected works in certain cases, namely "*(a)* for private use; *(b)* for legal or administrative purposes; and *(c)* in certain particular cases, provided that (i) the reproduction was not contrary to the legitimate interests of the author, and (ii) that it did not conflict with a normal exploitation of the work."

65. At the Diplomatic Conference, proposals were made in favor of both extending and restricting the scope of possible limitations. In the end, however, an agreement was reached on a more general wording which corresponded to the present contents of Article 9(2). Certain drafting changes were also made, mainly by means of placing the second condition before the first in order to

facilitate the interpretation of the provision. The Report of the Stockholm Conference contains the following well-known interpretative statement in relation to Article 9(2) which expressly refers also to photocopying:

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

66. From the viewpoint of reprography, it is important to note that the direct reference in the Program of the Diplomatic Conference to reproduction for private use does not appear in the final text of Article 9(2). During the Conference, the delegation of the United Kingdom submitted a proposal with the aim of eliminating items (a) and (b) from the Program proposal and instituting a different wording for condition (i) mentioned in the Program (mainly replacing the expression "is not contrary to the legitimate interests of the author" by "does not unreasonably prejudice the legitimate interests of the author"). Consequently, it could be concluded that there was a tendency at the Diplomatic Conference not to give national legislators specific instructions about the cases in which limitations were *always* possible. Instead, more general criteria were introduced in the proposed provisions. The result is that the national legislator now has to apply these criteria also in respect of reproduction for private purposes and of other special cases discussed during the Conference. If such reproduction conflicts with a normal exploitation of the work and/or unreasonably prejudices the legitimate interests of the author, it cannot be permitted.

67. The condition that limitations of the right of reproduction are only allowed in "certain special cases" is significant mainly in the sense that it excludes the application of generalized compulsory licensing (and, of course, also generalized free uses). The report of the Stockholm Diplomatic Conference reflects that the delegations of some countries proposed a clause to add to the text of Article 9(2) of the Berne Convention, a clause "permitting a compulsory general license for reproduction, with the right for the author to obtain remuneration." The Conference rejected this proposal.

68. The expression "certain special cases" is not defined. In order to try and identify its meaning, three aspects should be taken into account. First, it follows from the refusal of the idea of a generalized compulsory licensing system that the special cases should not be so numerous and important as to have the cumulative effect of a *de facto* generalized compulsory licensing (or free use). Second, as the report of the Stockholm Diplomatic Conference reflects, certain cases were mentioned where, according to some delegations, limitations could be allowed: in addition to "private use," such cases as "individual or family use," "strictly judicial or administrative purposes," "photocopying ... for ... scientific use." None of these cases were declared as unacceptable by the Conference, therefore this list may provide an indication as to the cases in which limitations may be considered. However, it was also made absolutely clear—and this is the third and the most substantive aspect—that no limitations, either in the separately discussed cases or in other special cases, could be imposed unless two further conditions were met which are discussed below in greater detail.

69. The report of the Stockholm Diplomatic Conference stresses that the two conditions indicated in Article 9(2) should be considered separately, step by step, and it first declares that "if it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all." "Not ... at all" is a fairly clear indication: if there is such a conflict no free use and no compulsory license is allowed (even if it were to be moderated by means of a compensatory arrangement). The strict nature of this condition necessarily influences its interpretation. If this were not necessary to be taken into account, it could be said, for example, that a mere loss of the possiblity to sell certain copies or any limitation resulting in any decrease of profit would conflict with the normal exploitation of the work. In a certain context and in a certain sense, such a statement might be true but not in the context of Article 9(2) of the Berne Convention and not in the sense in which the expression "conflict with a normal exploitation" was considered by the Stockholm Diplomatic Conference. A much narrower meaning is indicated by means of the example offered by the report of the Conference. According to the report, in the case of photocopying, even if a rather large number of copies is made for use in industrial undertakings, it may not conflict with the normal exploitation of the work but "only" unreasonably prejudices the legitimate interests of the author (which prejudice can, however, be eliminated by an equitable remuneration). Therefore, the expression "conflict with a normal exploitation" necessarily means a more serious conflict than just a certain conflict with the fullest possible exploitation of the work or a conflict with the interest in the highest possible profit. It must mean a conflict with the very possibility, with the very basis of the exploitation. That is, such a conflict only exists if *a normal form of exploitation itself as a whole* could be undermined, endangered or even eliminated (for example, lawful users could be obliged to cease to use works in such a form because uses made on the basis of limitations would lead to a deterioration of the market, and, therefore, the possibility for authors to exploit their works in that way might disappear or at least become significantly limited).

70. The question whether a possible limitation of the right of reproduction might unreasonably prejudice the legitimate interests of authors can only be considered if the answer to the first question—namely, whether it might conflict with a normal exploitation of the work—is negative.

71. It follows from the wording of the clause "does not unreasonably prejudice the legitimate interests of the author" that certain limitations may be permitted even if they prejudice the legitimate interests of authors. What is decisive is that such a prejudice should not be unreasonable. Neither the text of the Berne Convention nor the report of the Stockholm Diplomatic Conference defines which prejudice is reasonable and which one is unreasonable, but an example offered by the report may give some orientation in this respect. According to the report, in the case of photocopying, a small number of copies may be permitted without payment, particularly for individual or scientific use. This indicates that when deciding whether a prejudice is reasonable or not, in addition to the author's legitimate interests, certain legitimate interests of users and of society in general should also be taken into account.

72. The legitimacy of various interests involved and their importance should, however, be considered always keeping in mind the purpose of copyright protection. Free uses or non-voluntary licenses should not endanger creativity and should not discourage publishers and other users from investing in the dissemination of works. Any such limitation would necessarily be "unreasonable." Furthermore, it goes without saying that any limitation unnecessarily prejudicing the legitimate interests of authors is unreasonable. This consideration is particularly relevant when limitations are proposed to make the access to protected works easier for some important and lawful uses. If the access may be guaranteed on the basis of the exclusive right of authors—if necessary, through collective administration arrangements—the introduction of non-voluntary licenses cannot qualify as "reasonable."

73. In addition to Article 9, there is one more provision of the Berne Convention (apart from the Appendix to it containing preferential provisions for developing countries which is discussed below together with the relevant provisions of the Universal Copyright Convention) which might seem to be applicable to reprography, namely Article 10(2), which reads as follows: "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

74. It should be noted that this provision only refers to teaching (which of course is an important use in respect of reprography) and not to other possible uses. Furthermore, there are two reasons why this Article does not seem to be applicable in respect of reprography. The first reason is that in the context of Article 10(2), "publications" seems to refer to publications made available to the public by the book trade and not to reprographic reproduction. The second reason is that while the report of the Stockholm Revision Conference mentions new technical developments concerning sound and visual recordings, it is silent about reprography (which—as can be seen above—was taken into account in the case of Article 9). This confirms the fact that the word "publications" was used in the traditional meaning in Article 10(2). Nevertheless, this provision is not insignificant from the viewpoint of reprography for the following reasons: permitting the use of works by way of illustration in publications seems to be a more extensive limitation of the right of reproduction than doing the same in respect of reprography. Therefore, a similar limitation may be justified in respect of reprography on the basis of Article 9(2) as a special case not being in conflict with a normal exploitation of works and not prejudicing unreasonably authors' legitimate interests.

75. The Universal Copyright Convention, as mentioned earlier, provides for the basic right of reproduction in Articles I and IV*bis*. Provisions on exceptions to this right are contained in Article IV*bis*.2, applicable to the right of reproduction as well as to other rights. It reads as follows: "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made."

76. The Paris Diplomatic Conference adopted a number of interpretative statements concerning Article IV*bis*.2. The interpretative statements are to be found in paragraph 46 of the Report of the General Rapporteur of the Conference. Two of the statements seem to be particularly relevant from the viewpoint of the protection of works in relation to reprography.

77. One of the statements contains the so-called "*a contrario* principle." It refers to the report of a previous session of the Intergovernmental Copyright Committee which ... "stated the view of the Committee that 'the inclusion in the Convention of special provisions allowing developing countries to publish certain works and translations under compulsory licenses, means *a contrario* that, except as provided in Article V, there could be no question of developed countries instituting a general system of compulsory licences for the publication of literary, scientific or artistic works.'" The report states the following: "The Conference adopted this principle, it being understood that a 'general system' referred either to a system applying to a specific type of work with respect to all forms of uses, or to a system applying to all types of works with respect to a particular form of use."

78. This statement makes it clear that—similarly to Article 9(2) of the Berne Convention—Article IV*bis*.2 of the Universal Copyright Convention cannot serve as a basis for a generalized non-voluntary licensing system. Apart from the preferential rules for the developing countries contained in Article V*ter* and V*quater*, no such

license can be introduced "either for a particular category of works with respect to all forms of exploitation" or—what is more relevant from the viewpoint of reprography—"for all works with respect to a particular form of exploitation."

79. The other statement stresses that "the State must accord 'a reasonable degree of effective protection' to each of the rights named," (that is, named in paragraph 1 of Article IV*bis* of the Universal Copyright Convention). The report adds: "It was understood that, under the second sentence of paragraph 2 of Article IV*bis*, no State would be entitled to withhold entirely all rights with respect to reproduction, public performance, or broadcasting, that where exceptions are made they must have a logical basis and must not be applied arbitrarily, and that the protection offered must be effectively enforced by the laws of the Contracting State."

80. Article III of the Appendix to the Berne Convention and Article V*quater* of the Universal Copyright Convention contain practically identical provisions on the possibility of the application of non-exclusive compulsory licenses in developing countries under certain precisely defined conditions for the reproduction of works to be used in connection with systematic instructional activities.

81. In interpreting the expression "systematic instructional activities" in the English version, the parallel expression used in the French version is helpful. The French version speaks of "*l'enseignement scolaire et universitaire.*" These same French words are used to describe the purpose for which translation licenses may be granted under Article II of the Appendix to the Berne Convention and Article V*ter* of the Universal Copyright Convention but there the English words used are "teaching and scholarship." It was agreed in Paris at the 1971 Diplomatic Conference that this must be understood in a wide sense as including not only activities connected with the formal and informal curriculum of an educational institution, but also systematic out-of-school education. It was also understood in Paris that the competent authority in the developing country to whom a request for a license has been made would be under a duty to determine that the license would fulfill the need of specified systematic instructional activities. A license would necessarily be refused if such activities were in fact incidental to the actual purpose of the reproduction.

82. The texts of the above-mentioned provisions of the copyright conventions provide for the possibility of a license to reproduce and publish an edition which indicates that the Paris Conference was thinking of reproduction by means of published editions, rather than of other forms of reproduction, such as reprography. The probable lack of direct applicability of the special preferential provisions for reprographic reproduction, however, does not exclude the possibility for certain limitations of the right of reproduction in developing countries in favor of systematic instructional activities in respect of reprography on the basis of the general provisions of the Conventions (Article 9(2) of the Berne Convention and Article IV*bis*.2 of the Universal Copyright Convention).

83. As a result of the analysis of the relevant provisions of the copyright conventions, certain elements of the applicability and possible restrictions of the right of reproduction in respect of reprography seem to be fairly clear. It can be stated that no limitations—neither free uses nor compulsory licenses—should be applied covering reprography as a whole. The exclusive right of reproduction is the basic principle and this right should not be limited except in the cases and to the extent allowed by the international copyright conventions. Limitations should be restricted to certain special cases but, even in such cases (private use, teaching, library services), it should also be taken into account that no limitations should conflict with a normal exploitation of works, unreasonably prejudice the legitimate interests of the authors or undermine a reasonable degree of effective protection of the right of reproduction.

84. A further question in cases where no free use is allowed is whether compulsory licensing is justified or not. As discussed above, the international copyright conventions oblige the States party to them to avoid any unnecessary, unreasonable restrictions of authors' rights and particularly avoid non-voluntary licenses wheoever possible. Therefore, the exercise of exclusive right should be guaranteed whenever practicable; if necessary, appropriate collective administration systems should be established based on the exclusive right of authors, and non-voluntary licensing should be restricted to cases where such systems cannot be set up or cannot work in practice.

85. In the case of collective administration of rights, every effort should be made to preserve the exclusive oature of the rights involved. This means that the remuneration to be paid for reprographic reproduction should be fixed, as a rule, on the basis of negotiations; obligatory arbitration should be avoided whenever possible; remuneration should preferably be distributed among individual owners of rights; nonmembers—includiog foreigners—should enjoy the same rights as members of the collective administrative organization, etc.

86. These are the outlines of the most important priociples in respect of reprography whose application seems to be desirable on the basis of general copyright principles and of the relevant provisions of the international copyright conventions. However, before trying to express them in the form of a set of principles as guidance for national legislation, it seems to be appropriate to study how these considerations are applied in practice at the national level in countries where special legal solutions exist in respect of reprography.

Private Use, Personal Use, "Internal" Use

87. National laws contain special provisions concerning reprography with regard to certain typical uses such as private use, personal (or individual) use, "internal" use, research, library services, teaching (classroom copying, etc.). The notion of these expressions, in general, need not be defined for the purposes of the present document. Some comments should, however, be made about the

expessions "private use," "personal (or individual) use" and "internal use" which are more or less interrelated as well as about the conditions of limitations in relation to them.

88. It should be recalled that the expressions "private use," "personal use," "individual use" or "internal use" do not appear in the text of the international copyright conventions (unlike the text of the Rome Convention which, in its Article 15.1*(a)*, provides for the possibility of exceptions in respect of private use). As mentioned above, the private (or personal, etc.) nature of use is not decisive in itself in determining whether certain limitations are permitted in national laws or not. To be compatible with the international copyright conventions, a limitation should not conflict with a normal exploitation of the work, should not unreasonably prejudice the legitimate interests of the author, and should not undermine a reasonable degree of effective protection to the right of reproduction. The implications of those conditions can only be analyzed at the national level. It follows from these circumstances that even in the case of such uses, there is no need and at the same time there is no basis to offer a generally applicable definition in the present document.

89. Although there is no mention made about private or personal use in the text of the copyright conventions, and, consequently, those conventions do not offer direct provisions about the concrete conditions of possible limitations in regard of such uses, photocopying in "a small number of copies" and "particularly for individual or scientific use" is referred to in the report of the Stockholm Diplomatic Conference of the Berne Convention as a case where reproduction may be permissible without payment. When it comes to the relations between present-day reproduction for private purposes and the provisions of Article 9(2) of the Berne Convention, however, the following observation has to be made: the Stockholm Conferenee, in connection with Article 9(2), quite naturally used as its point of departure the technology available in the late 1960s. That situation was certainly not the same as the one prevailing today, where it is possible to make high-quality copies of recordings of works rapidly and inexpensively. Even farther removed from the situation at the time of the Stockholm Conference is the situation where inexpensive photocopiers are extremely widespread and also find their way into some individual homes. Therefore, the examples offered in the report of the Stockholm Conference should be considered as ones referring to the situation prevailing at that time. If national legislators have to decide now about the circle and conditions of limitations, their decisions should be based on the analysis of the actual situation which, by the way, may differ from country to country.

90. Several countries have availed themselves of the possibilities of limiting protection so as to allow the making of copies for private (or personal) purposes. Such limitations, broadly speaking, are of two kinds. In most cases, the national law contains express provisions which make it legal, usually under certain conditions, to produce copies of protected works for such purposes without authorization from the owner of rights and without payment. In other countries, especially in countries following Anglo-American legal traditions, reproduction for those purposes may be governed by provisions on "fair use" or "fair dealing."

91. As regards the contents of national laws, two issues are particularly relevant. One concerns the scope of the provisions on private (or personal) use, that is, the definition of what reproduction for private purposes is as opposed to reproduction for other purposes. The other important issue concerns the further conditions of copying for such purposes (whether the use is free or subject to payment, how many copies are allowed, etc.).

92. The first question is dealt with differently in various laws. The interpretation of the concepts "private" and "personal" ("individual") may vary, but they are used approximately in the following meaning: "private" use, in general, means the utilization of a reproduction either by a single person for his own purposes, or by a specific circle of several persons (belonging, for example, to the circle of a family) for their common purposes, without making the reproduction accessible to the public, while the term "personal (or individual) use" covers a slightly narrower scope; it only means the utilization of the reproduction by one single person, in a non-lucrative manner and without making it accessible to the public.

93. As far as the further conditions of copying for such purposes are concerned, national provisions specify—more or less precisely—the number of copies that may be made (speaking for example about "single copies," "a few copies," etc.). National provisions also deal with such matters as who is allowed to make the copy, that is, whether the copy has to be made by the person who intends to use it himself or whether that person is allowed to entrust the production of the copy or copies to other persons. Moreover, special provisions may apply to particular kinds of work. Some categories of works may be excluded from the application of the provisions on reproduction for private purposes. Some forms of material expression of certain categories of works, such as sheet music, may be considered so sensitive from a copyright point of view that private copying is forbidden. Reproduction for private purposes may be restricted to only parts of works and not allowed in respect of whole books, for instance. In addition, national provisions may contain rules on the use of the copies made for private purposes, stating more or less explicitly, for instance, that such copies may not be used for other purposes.

94. In the report of the Stockholm Diplomatic Conference to which reference was made above in relation to "individual" use, an example of so-called "internal" use is also mentioned as follows: "If [photocopying] implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the interests of the author, provided that, according to national legislation, an equitable remuneration is paid." In relation to this example offered by the report, two comments are needed.

95. The first comment refers to the possible application of compulsory licenses in the case mentioned in the report. In this respect, the same considerations prevail as the ones mentioned in paragraph 89 above, about the example offered in the same paragraph of the report of the Stockholm Diplomatic Conference concerning the possibility of allowing free individual use: the possibility of a compulsory license refers to the situation prevailing at the end of the 1960s, therefore, the example offered in the report cannot be used automatically for national legislations; it should be studied in the country concerned on the basis of the actual situation whether such a limitation, if imposed now, would be compatible with the international copyright conventions or not.

96. The second comment is that such "internal" uses (uses in the framework of an undertaking or of a school or university) are in the border area between public use and private use. Sometimes they are called semi-public or semi-private uses. Concerning the possible limitations of the right of reproduction, the precise qualification of the use—whether it is public or private—is not absolutely necessary as it is not decisive itself. During the series of meetings on various categories of works mentioned in paragraph 3 above, it was found, however, that the delimitation of the notions of "public" and "private" needs to be more thoroughly studied from the viewpoint of such uses as public performance and communication to the public. There were several indications during the discussions at those meetings to the effect that it would be appropriate to restrict the notion of "private" practically to that of a family circle (including friends and closer acquaintances) and not to include in it professional, school, etc., communities. Therefore, the above-mentioned "internal" uses should qualify as public uses rather than private ones.

National Laws on the Copyright Questions of Reprography

97. Proceeding now to the analysis of national solutions, first the example of the *Federal Republic of Germany* is mentioned because it was as early as in the 1965 Copyright Act that the legislation of this country contained fairly detailed provisions about the right of reproduction and on its limitations. Those provisions, although they did not refer directly to reprography or photocopying, were also meant to be applied—in respect of certain details, nearly exclusively—to such reproduction processes.

98. The legislators had taken into account a decision of 1955 of the Federal Court of Justice on photocopying which concerned the reproduction of articles from scientific journals by an industrial firm for the use by its experts. The Federal Court of Justice found that this activity served the objectives of the firm and, therefore, it was not a free use according to the notion of private use, but an infringement of copyright. This decision led to the conclusion of a contract between the Federation of German Industry (*Bundesverband der deutschen Industrie*) and the Association of the German Book Trade (*Börsenverein des deutschen Buchhandels*) on the photocopying from periodicals for the internal use of firms. The firms undertook to pay remuneration in the case of periodicals published not earlier than three years before being copied.

99. The 1965 Copyright Act permitted single copies of a work to be made for personal use, without the obligation to pay any remuneration. It was also permissible to make or cause to be made single copies of a work for one's own scientific use, for its inclusion in internal files and also for other internal uses with respect to small parts from published works or single articles published in newspapers or periodicals and to works which were out of print and the copyright owner could not be traced (if the copyright owner could be traced and the work was out of print for more than three years, he was allowed to refuse his consent to such reproduction only for a valid reason). The Copyright Act also provided that if the reproduction was for commercial purposes, an equitable remuneration was due to the author.

100. On the basis of the above-quoted provisions, the copyright collecting societies of the Federal Republic of Germany were able to conclude a series of licensing agreements. For example, in 1982, the general literary right society WORT (*Verwertungsgesellschaft* WORT) concluded an agreement with the ministers of culture of the Provinces (*Länder*) concerning the reprographic reproduction of protected works in schools for an annual lump sum. In order to distribute those sums, surveys were started in selected schools. WORT has also collected substantial amounts under agreements covering copying for commercial purposes. The other collecting society WISSENSCHAFT (representing authors of scientific works) also concluded licensing contracts. The remuneration so collected is divided equally between publishers and authors. The author's portion is transferred to authors' associations and used for general welfare purposes.

101. The Copyright Amendment Act of June 24, 1985, has made several changes in this system. The changes did not concern to a large extent the above-mentioned cases where reproduction had been possible without the author's consent although two new provisions are worth mentioning. The first is that it is permissible to make or to cause to be made copies of small parts of a printed work or of individual contributions published in newspapers for personal use, and for teaching in non-commercial institutions of education, in a quantity required for one school class or for State examinations in schools, universities and non-commercial institutions of education. The other new element is that, in three cases, absolute prohibition has been imposed on reprographic reproduction without the author's consent, namely in respect of whole books or whole periodicals, graphic recordings of musical works (sheet music) and computer programs.

102. The really significant change is that a statutory license has been introduced for all cases where the author's consent is not needed for reproduction. The legislation found that, since 1965, technological development had led to private copying on a scale that already unreasonably prejudiced the legitimate interests of authors and that this prejudice should be mitigated by means of provi-

sions on an equitable remuneration for such use. Therefore, the statutory license system also covers private copying.

103. The new legislation, however, differentiates between domestic and extra-domestic reproduction. It has been taken into account that, for the time being, only few copying machines are in private households and that they are less frequently used for copying of protected works than the machines functioning in libraries, educational institutes and other places where protected works to be copied are available to a qualitatively larger extent. Therefore, a hybrid levy system has been introduced. One of the elements of the system is an *equipment levy* to be paid by the manufacturer or importer (defined by the law between 75 DM and 600 DM depending on the capacity of the machines). This levy has to be paid on every machine irrespective of whether it is used in domestic or extra-domestic contexts as a lump sum payment corresponding to the amount of copyright material normally copied with the help of such machines. The fact that in extra-domestic situations (in schools, universities, public libraries, copy-shops, etc.) protected works are reproduced to a greater extent is taken into account by an *operator levy* to be paid in addition to the equipment levy (0.05 DM is charged for each A4 page from a school book and 0.02 DM for an A4 page from other works).

104. The collection of equipment levy is fairly simple. The amount of the operator levy is determined on the basis of a sampling method: it is established how large the percentage of the photocopies of protected works is in relation to all photocopies made in selected institutions that are representative of their area, and these data are used when charging remuneration for photocopying in a comparable institution. The law provides that the right to photocopying levy can only be exercised through a collecting society.

105. The example of the *Netherlands*, which was among the first countries to legislate on reprography, shows that well-functioning collective administration systems are inevitable for an appropriate solution in this field.

106. The first provisions on reprography were introduced in the years 1972–1974 but did not touch the limitation of the right of reproduction according to which, as a general rule, the reproduction of a few copies for private use was free. The Copyright Act is even more generous towards the government, libraries, educational institutions and other institutions representing public interests. These institutions are allowed to make more than a few copies for their own internal use. Finally, commercial organizations and institutions may also make more than a few copies, in other words "as many copies as are reasonably necessary." All these mass copiers, however, are obliged to pay an equitable remuneration. The remuneration to be paid by the government, libraries, educational institutions and other public interest institutions has been fixed at 0.025 guilder per copy of a page from a scientific publication and 0.10 guilder per copy of a page from a non-scientific publication. Libraries, however, may make single copies of articles for users and for interlibrary loans without a liability to pay such a remuneration.

107. Foundation Reprorecht, the Dutch collecting society representing authors and publishers—which had been set up to collect photocopying remuneration— was unable to fulfill this task for a fairly long time because it did not have any special status under the law and its membership was not wide enough. Therefore, copiers refused to deal with Reprorecht; only the government paid some nominal sums to it to keep alive the system it had set up itself.

108. Finally, a new Royal Decree was needed to get out of this deadlock. Under the Decree of August 23, 1985, reprography remuneration has to be paid to the collecting society appointed by the Minister of Justice with the exclusion of any other society and even of the owners of rights themselves. On February 19, 1986, Foundation Reprorecht was appointed as the exclusive collecting society.

109. In the copyright laws of the *Nordic countries*, the strong, institutionalized nature of collecting societies is the most typical feature of the regulation dealing with reprographic reproduction.

110. The basic copyright laws of *Denmark*, *Finland*, *Norway* and *Sweden* are from the years of 1960–1961 and are the results of close cooperation. The structure and the provisions of those laws are almost uniform. The questions of photocopying were dealt with later in the 1970s, and the close cooperation as well as the marked similarity of the basic solutions prevailed also in that field.

111. The Nordic copyright laws all recognize the exclusive right of authors to control their works in respect of producing copies thereof and making them available to the public. The classical limitation for "private use" can be found equally in all these laws. Works which have been disseminated to the public may be reproduced in "single copies" ("a few copies") for such use. "Private use" is interpreted in a narrow sense to cover personal, individual use. Institutions and legal persons may not on their own behalf copy for private use (that is, "internal" use), but copies for private use may also be made on demand by a third party, such as a library.

112. Special provisions exist in all the four above-mentioned Nordic countries in favor of libraries and archives to make copies for their own purposes (such as conservation of their collections, copying for loaning books or documents because of their fragility or rarity, etc.). It is also permitted for such institutions to make a single copy of an article appearing in a composite work or in a periodical or newspaper or of parts extracted from other published works for borrowers engaged in studies or scientific research (instead of lending the original volumes).

113. The most typical feature of the Nordic copyright laws concerning reprography is the so-called "extended collective agreement" system which applies the agreements concluded between collecting societies and the competent state and municipal authorities governing photocopying in schools and at universities. Under that system, the teachers and professors of the schools and universities which have received authorization from an asso-

ciation representing a large number of national authors of a certain category also have the right to copy published works of the same category, the authors of which (including foreign authors) are not represented by the association. Nonmember authors whose works are thus reproduced are, as regards, for example, remuneration, treated in the same way as the members of the contracting organization. Furthermore, they have always—even if the contracting organization decides to use the remuneration for collective purposes—a right to claim individual remuneration for the reproduction of their works. For nonmembers, there is a kind of compulsory licensing element in this system. This is, however, only a conditional element because there are also other guarantees to safeguard the rights of authors outside the organization. For example, no reproduction can be made under the agreement if the author has filed a prohibition against such reproduction with any of the contracting parties. There are also provisions in the laws for possible cases where users and the collecting organization are unable to reach agreement. In such cases an arbitration system—in Sweden, a special mediation system—is applied.

114. The agreements impose several limitations on photocopying which, in addition to the upper limits of the number of copies and of the extent of the portions to be copied from various types of works, etc., prohibit the reproduction of certain publications which are especially vulnerable from the point of view of photocopying (it being in conflict with the normal exploitation of such works), such as sheet music, exercise books, answer books and other one-time use publications.

115. In respect of the methods of the establishment of the remuneration as well as its collection and distribution, there are some differences between the various Nordic systems. In general, sampling methods are applied, but in Denmark a separate solution has been adopted: the users have to indicate in their reports the title of the work, the names of the author and the publisher as well as the year of the publication; furthermore, they have to produce one surplus copy on which the number of copies made is to be marked on the first page.

116. The differences in the distribution systems are particularly significant. Only COPYDAN, the Danish collecting organization, distributes the remuneration among individual authors and publishers on the basis of the above-mentioned detailed information. In the other countries, the remuneration is transferred to the associations representing authors and publishers more or less according to the proportion of the actual reproduction of the categories of works concerned and such moneys are used for certain collective purposes (grants, subsidies, etc.).

117. If the Nordic solutions offer good examples of how efficient collective administration systems may work with legislative support and with some semi-compulsory elements insofar as owners of rights outside the collecting organizations are concerned, in the case of the *United States of America* it can be ascertained that entirely private systems based on exclusive rights may also be workable.

118. The 1976 Copyright Act of the United States of America contains various provisions that may be relevant from the viewpoint of reprography. Section 107 of the Act provides for the fair use of works, including use "by reproduction [of] copies ... for purposes such as ... teaching (including multiple copies for classroom use), scholarship or research." In determining whether the use made of a work in any particular case is a fair use or not, at least four factors have to be considered: the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; the nature of the work; the amount and substantiality of the portion used in relation to the protected work as a whole; and the effect of the use upon the potential market for or value of the work. In respect of the practical application of fair use in the field of education, special guidelines were elaborated, entitled "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions" which had been negotiated by educational, authors' and publishers' organizations and accepted by the congressional committees. (Under that agreement, it is possible for the teacher, for example, to obtain a copy for the purposes of research or preparation of classes, in respect of a chapter of a book or an article from a periodical or newspaper, a short story or a short poem. In addition, multiple copies may be made by a teacher for the needs of a class. In such cases, the copy must meet certain conditions, the most important condition being that it should be short.)

119. Section 108 permits copying of most types of protected works without authorization by libraries or archives for their own purposes or for their users in specified—but very generously determined—circumstances, provided that reproduction or distribution is done without any purpose of direct or indirect commercial advantage and that the collection is open to the general public or to specialized researchers. Free photocopying for the purposes of libraries or archives does not involve any particularly extensive limitations of copyright (it covers such purposes as preservation, research use, replacing of damaged, lost or stolen copies if, after a reasonable effort, an unused replacement copy cannot be obtained at a fair price).

120. More extensive privileges are given to libraries and archives to make copies for users both from their own collections and to secure copies from other sources. The main privilege in this respect is conferred by section 108(d), which permits the making of not more than one copy of an article from a periodical, or other contribution to a protected collection, or a small part of any other protected work, for purposes of private study, scholarship, or research, provided that the library displays prominently at the place where orders are accepted, and includes in its order forms, the warning of copyright prescribed by regulation of the Register of Copyrights.

121. Libraries and archives also have the right under section 108(e) to make a copy for a user of an *entire* copyrighted work or a substantial part of it, or to secure a copy from another source, if (1) determination has been made that a copy cannot be obtained at a fair price; (2) the purpose of the requester is private study, scholarship or

research; and (3) the prescribed warning by the Register of Copyrights is displayed and included on the order form.

122. All the privileges to make copies that are enumerated in section 108 are limited by the prohibition in section 108(g) against "the related or concerted reproduction ... of multiple copies ... of the same material" and the "systematic reproduction or distribution" of periodical articles or other small portions of protected works. This prohibition against systematic reproduction and distribution, however, is in turn limited by the proviso in section 108(g)(2), which states that "nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

123. Although the 1976 Copyright Act limits the right of reproduction to a great extent, there are various important fields of photocopying where the exclusive right to authorize reproduction still prevails (such as copying by private schools and universities, by private corporations, etc.). In those fields, however, individual exercise of rights is impossible and only collective administration may be workable and efficient. In the United States of America, it is the Copyright Clearance Center (CCC) which takes care of the administration of such reprographic rights.

124. The CCC was set up as a result of a recommendation by the Congress that a practical clearance and licensing mechanism be developed, with the support of various bodies representing authors and publishers. The goal of CCC was to ensure that the publishers of scientific, technical and medical journals receive compensation for each copy reproduced by colleges, universities, libraries, private corporations, etc.

125. The original system for collection and distribution was the following: publishers established photocopy fees which were printed in journals, and it was also stated that copies could be made—for personal or internal use—if the indicated fees were paid to CCC. Each user had to keep a record of photocopies or send in a copy of the first page of each article indicating the number of copies made. CCC billed users on the basis of these records and copies sent in. After the deduction of handling charges the fees were forwarded to the individual publishers.

126. Although this system still functions in regard of several users, for other users it was found to be too burdensome. Therefore, CCC has introduced an alternative system. In the framework of that system, users keep track of photocopying only for a 90-day period and, on the basis of that sample, they pay a lump sum for a full year's photocopying. A further stage of development of a simpler, cheaper and still reliable system of administration is that if enough consolidated survey data are compiled from several licensees in the same industry, those data can be offered as bases to other licensees to avoid the 90-day survey.

127. The Copyright Amendment Act 1980 of *Australia* contains a long and complex regulation which has also taken into account the experience of other countries having legislated before in this field.

128. It is a fair dealing for a person to make—for the purpose of research or study—a copy of an article from a periodical or a reasonable portion of a work other than such an article ("reasonable" being defined to mean 10% or one chapter of the published edition). The Act also provides for free uses for copying of acts of Parliament, statutory instruments and judgments as well as for copying for the purposes of giving professional advice.

129. A separate section deals with copying by nonprofit-making libraries and archives. Copying under those provisions does not give rise to remuneration. A library or archives may make copies for a user to the same extent that the user would be able to do himself under the above-mentioned fair dealing provisions if the library or archives do not charge more than the cost of making and supplying the copy. However, a library or archives may go even beyond that limit and copy, for a user, a whole work (not only an article) or more than a reasonable portion of a work where the work forms part of its collection and a copy (not being a secondhand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price. The library or archives may also request other libraries or archives to copy a work for a user (where the same restrictions prevail) and also for inclusion in its own collection (not more than one copy). Finally, libraries or archives may copy works for their own purposes, such as preservation, replacing a damaged or deteriorated copy (provided that a new copy cannot be obtained within a reasonable time at an ordinary commercial price), research use, etc.

130. The 1980 Copyright Amendment Act has introduced a differentiated system for multiple copying in nonprofit-making educational institutions (both schools and universities). Multiple copying of small portions of works is free if it is done on the premises of the institution for the purposes of a course. (This free use is limited to two pages of a work or one percent of the total number of pages, provided that only a portion and not the whole work is copied.) If more than small portions are copied, a statutory license is applied where copyright owners can claim equitable remuneration. The Act contains some limitations to copying under this system (copying is not permitted where the required material is available for separate purchase; only one article may be copied from a periodical unless there is more than one article in the same issue related to the same subject; only a reasonable portion—10% or a chapter—may be copied of the same published edition other than a periodical, etc.). The educational institution has to keep a record with the details of the works copied which may be inspected by copyright owners. If there is no agreement about the "equitable remuneration," the Copyright Tribunal decides.

131. Photocopying fees are collected and distributed by the Copyright Agency Limited (CAL). Because there was no agreement about the tariffs in relation to educational copying, CAL applied to the Copyright Tribunal in 1984.

The Tribunal decided on a remuneration of two cents per copy and page and CAL has begun to claim this remuneration in 1986. Copyright owners will receive their payments based on the actual copying records kept by each institution.

132. In countries where there are no special provisions yet about reprography, sometimes case law gives some orientation as to how general provisions on the right of reproduction and about its limitations (in respect of private use, education, research, etc.) may be applied. This is the situation also in *France* where the Law of July 3, 1985, contains provisions on several copyright questions raised by the new technologies but does not touch upon the problem of reprography. On the other hand, the Finance Law of 1976 introduced a tax on reprographic machines produced in, or imported into, France. However, the revenues from this tax flow into the general funds of the State and the tax system does not benefit the copyright holders. The revenues are mainly earmarked for subsidies to book printing, and it was also indicated that the revenues would be used to increase the purchasing budget of libraries.

133. In certain countries bills and projects reflect the intention to deal with the problem of reprography in future legislation.

134. In *Canada*, according to the Report of the Subcommittee of the House of Commons on the Revision of Copyright published in October 1985, the Subcommittee opposed any limitations to be introduced on the right of reproduction in respect of photocopying and endorsed the formation of collective organizations to license such reproduction. The Subcommittee considered the possibility of applying statutory licenses or other limitations in favor of libraries, but rejected this idea as well. The government in its answer in February 1986 agreed with those views.

135. The draft Law on Intellectual Property in *Spain*, whose discussion by legislative bodies is in the final stage, contains a provision according to which the authors of published works have the right—along with the publishers concerned—to participate in a compensatory remuneration for the reproduction of such works for personal use by means of technical equipment other than typographic machines. The remuneration is paid by those who manufacture or import equipment or material for such reproduction. The government will regulate details. This right can only be exercised through collective administration organizations.

136. In the *United Kingdom*, the so-called White Paper (entitled "Intellectual Property and Innovation") presented to Parliament by the government in April 1986, which also contains the program for the revision of copyright, devotes a separate chapter to photocopying. The White Paper rejects both the statutory approach to blanket licensing and the idea of the abolition of the "fair dealing" and library exceptions in relation to photocopying. It refers to the satisfactory contractual arrangements the Copyright Licensing Agency (CLA) representing authors and publishers has established for photocopying in schools and other educational institutions. (The agreement allows teachers to make, against payment, copies of articles as well as portions of up to five percent of books in sufficient number to supply each member of a class and its teacher. Certain types of publications, such as sheet music, maps and work books are not allowed to be copied.) The White Paper expresses the intention to offer certain guarantees and conditions in respect of non-voluntary licensing. The jurisdiction of the Copyright Tribunal will be extended to the settlement of disagreements between collecting societies and users. There will be a statutory obligation on any collecting society licensing photocopying of a particular category of works to incorporate in its scheme a provision indemnifying licensees against infringement actions in relation to their photocopying of works within that category but whose copyright owners are not members of the scheme. To ensure that educational establishments are able to make multiple photocopies of very small proportions of any protected work for group instructions, such establishments will be freely licensed to copy up to 1% of the work if no license is available. Copyright owners may claim remuneration for such copying by offering an appropriate license scheme; when this is done, the entitlement to copy free of charge will cease. Finally, the Secretary of State will be empowered to take the following measures to guarantee meeting educationalists' needs: *(a)* if, after considering any representations, he is satisfied that the refusal by an individual copyright owner to join an existing scheme is unreasonable, he may make an Order that the owner should be treated as if he were a member of that scheme; such Orders would be subject to appeal; *(b)* following a recommendation to that effect by an inquiry ordered by him, the Secretary of State may make an Order providing for a compulsory licensing in respect of a particular class of work; the Order would allow a period for the copyright owners concerned to establish an appropriate licensing scheme, and if no scheme had been established by the end of that period, educational copying within that class would be freely licensed; the entitlement to free copying would cease when the Secretary of State certified that a scheme had been established.

Conclusions

137. The fairly detailed presentation above of national solutions including legislation and collective administration systems shows that decisive developments have taken place since the Subcommittees' meeting in Washington in 1975. The rich experience obtained in various countries shows that appropriate and practical ways and means can be applied to meet the obligations under the international copyright conventions without creating unreasonable obstacles to photocopying by various users, and particularly that collective administration of rights is a workable and efficient solution in this field.

138. There is one point, however, where further steps are needed. It is essential that national treatment should be fully applied in this field, and foreign copyright owners should enjoy the same rights as national ones. From this viewpoint, it is extremely important that collecting societies conclude reciprocal representation agreements and

that they grant equal treatment to the owners of rights represented by foreign societies. So far, the system of such agreements has been established only in a relatively narrow circle. CCC in the United States of America and WORT in the Federal Republic of Germany have been particularly active in this respect, and the Nordic societies have also concluded agreements between themselves, but a real international network does not exist yet. It is hoped, however, that such a system will be set up in the near future. One of the reasons for this hope is that the International Forum for Reproduction Rights Organizations (IFRRO)—which assembles collecting organizations in this field—has become much more active recently in promoting contracts and agreements among such organizations.

139. Before trying to outline certain principles as guidance for national legislation, two more questions have to be discussed. The first question is touched upon only in a very general way in some national laws, but absolutely clear and detailed regulations are nowhere to be found. The second question is not dealt with direct in any international convention or national law, but with the galloping technological developments, it may become significant.

140. The first question is the participation of publishers in the remuneration received for photocopying. Various answers to this question can be found in national laws, bills and projects as well as in collective administration agreements, and several legal and practical methods are applied. However, the end result is practically the same: authors and publishers share the photocopying remuneration between themselves. In general, it is the author who is indicated as the owner of right, which is normal because photocopying is covered by the right of reproduction. Authors then can—and fairly frequently do—transfer the right to receive payments for photocopying as one of the subsidiary rights, with the stipulation that they have the right to receive a certain percentage from such payments collected by the publishers. Some contracts, however, are silent about the entitlement to such remuneration. In such cases, it is useful if national legislation contains some guidance about the distribution of the amounts between authors and publishers. Furthermore, what is copied is not the work in general, but a concrete published edition of the work. If users do not use published editions but replace them by photocopies, this conflicts not only with the authors' rights and interests, but also with the acquired rights and the interests of the publishers. The interests of the authors and publishers are, however, not always the same. For example, the authors of scientific works may be interested in as wide and as free a use as possible of their works, an attitude, which from the viewpoint of publishers may be disastrous and may lead—and, according to the information received from interested international non-governmental organizations, frequently does lead—to the failure and disappearance of certain scientific journals. (This latter outcome then is detrimental also to the scholars because they lose a forum for publication of their works.) Those considerations—and for example the aim of better protection of publishers against piracy—have led certain legislators to recognize a separate neighboring right of publishers in their published editions. The question of such a right is discussed in a separate chapter of the present document. In the framework of the principles about reprography, only a reference is made to the possibility of recognizing a separate right of publishers to participate in remunerations paid for photocopying.

141. The second question is the possibility of applying certain electronic equipment to register the most essential data of the works concerned and the number of copies made, and to use such data for the collection and distribution of payments. Several proposals have been made for the introduction of such systems, but they have been rejected as being too expensive and too complicated. With recent developments of computer and photocopying technology, however, it has become ever more doubtful that the counterarguments against such systems are still well-founded. It is probable that, on the basis of appropriate cooperation between machine producers and publishers and with some legislative support, such a system could be established without unreasonably complicating photocopying activities. After all, if copyright owners are asked to accept certain prejudices of their interests in order to make photocopying as freely available as possible, they also seem to be entitled to demand from machine producers and copiers that the latter accept certain "complications" which are not unreasonable.

142. On the basis of the above considerations and of an analysis of the pertinent provisions of the international copyright conventions and of national laws, the following principles—formulated in accordance with the more detailed provisions of the Berne Convention—are offered for consideration:

Principle PW2. (1) Reprographic reproduction means the facsimile reproduction of writings or graphic works, for example by photocopying.

(2) Reprographic reproduction is covered by the authors' exclusive right to authorize the reproduction of their works. Consequently, authors' exclusive right to authorize reprographic reproduction should not be limited but in the cases and to the extent that international copyright conventions permit the limitation of the right of reproduction.

Principle PW3. In providing for limitations (free uses or non-voluntary licenses) to the right of reproduction, the following conditions should be taken into account:

(a) Limitations should be restricted to precisely defined special cases. The cumulative effects of such limitations should not be allowed to result in a generalized or unreasonably wide scope of free reproductions and/or non-voluntary licenses and should not endanger a reasonable degree of effective protection of the right of reproduction in respect of reprographic reproduction.

(b) No limitations should be allowed that would conflict with a normal exploitation of works to be reproduced. Reprographic reproduction does conflict with a normal exploitation of works, at least in cases where:

(i) copies are made for commercial distribution;

(ii) the number uf copies made is very large;

(iii) it concerns works whose market is particularly vulnerable to such reproduction (such as sheet music, artistic works of restricted edition, exercise books, other one–use publications, etc.).

(c) No limitations should be allowed that, even if not conflicting with a normal exploitation of the work, would unreasonably prejudice the legitimate interests of authors. When considering whether a limitation might unreasonably prejudice the legitimate interests of authors, at least the following aspects shuuld be taken into account:

(i) the purpose of the reprographic reproduction, including whether it serves—directly or indirectly—commercial purposes or is of a nonprofit character or not;

(ii) the nature of the work copied;

(iii) the number of copies;

(iv) the substantiality of the portion copied in relation to the work as a whole;

(v) the effect of the reproduction upon the potential market for the work and the remuneration of the author.

Principle PW4. (1) The reprographic reproduction of writings and graphic works—except works mentioned in Principle PW3(b)(iii)—may only be permitted without the authorization of the author and without payment of any remuneration in the following cases, or cases similar to them:

(a) reproduction of articles or short portions of other works or of very short complete works for nonprofit personal use, including teaching, learning or scientific study;

(b) reproduction by nonprofit libraries and archives for users for the purposes and to the extent mentioned under (a); reproduction by such libraries and archives of works without limitation as to the portion copied for the purposes of preservation or for the replacement of damaged, deteriorated, lost or stolen copies (if an unused replacement copy cannot be obtained after a reasonable effort and at a fair price), including reproduction in the framework of interlibrary arrangements, provided that such reproduction should not amount to a systematic reproduction or distribution of copies of works and that interlibrary arrangements should not have, as their purpose or effect, the substitution for subscription to or for the purchase of the works concerned.

(2) Whether free reprographic reproduction is justified or would unreasonably prejudice the legitimate interests of authors, should be considered case by case at the national level on the basis of all concrete circumstances. It should also be taken into account that relevant circumstances may change after a certain time, for example as a result of technological developments (home photocopying machines, for instance, may become widespread and the cumulative effect of uncontrolled home photocopying may unreasonably prejudice the legitimate interests of authors). Such changes may justify the abolition of free uses or, at least, the introduction of certain measures (such as a compensatory payment) to eliminate or mitigate such prejudices.

Principle PW5. (1) If the exclusive right of reproduction cannot be exercised on an individual basis—which is generally the case in respect of reprographic reproduction—collective administration schemes relating to the said right should be promoted. Non–voluntary licenses sbould only be introduced if, and during the time when, no appropriate collective administration organizations can be set up or can function in practice.

(2) Governments should promote the establishment and the operation of appropriate collective administration organizations and should provide for measures for the benefit both of users and of authors and publishers in case certain owners of rights in works belonging to the categories of works administered by such organizations are not members of such organizations. Tbe following measures may be considered in this respect:

(a) Collective administration organizations should be exempted from antitrust restrictions under competition law.

(b) Legislative provisions should facilitate the control of the extent of reprographic reproduction as well as the collection and distribution of remunerations for reprographic reproduction. For this purpose the imposition of the obligatory use in reprographic reproduction machines of appropriate electronic devices should be considered wherever it is possible.

(c) In the case of collective administration organizations operating licensing schemes for the reprographic reproduction of a particular category of works, an obligation sbould be considered to incorporate in such schemes a provision indemnifying licensees against infringement actions in

relation to reproduction (within the general scope of the license) of works which are within that category but whose copyright owners are not members of the scheme.

(d) When a collective administration organization representing a large number of authors of a certain category of works authorizes reprographic reproduction of works in its repertory, the validity of this authorization may, by legal provisions, be extended to works of the same category, the authors of which are not represented by the organization. In such cases, appropriate guarantees should be introduced to protect the rights and interests of authors not represented by the organization (for example a right of the author to claim payment even if otherwise the income is not distributed among individual authors, the right to probibit the reprographic reproduction of their works, etc.).

(e) It may be provided in certain cases that the right of reproduction in respect of reprographic reproduction may only be exercised through collective administration organizations.

(3) The remuneration to be paid and other conditions of authorizing reprographic reproduction should be determined, as a rule, by means of negotiations between users and collective administration organizations. If the partners cannot agree, the remuneration and the other conditions should be fixed by an impartial body—preferably by a court—designated by law.

Principle PW6. There should bc a guarantee that the collective administration of the right of reproduction, in respect of reprograpbic reproduction is in conformity with the exclusive nature of that right. From the exclusive nature of the right of reproduction, at least the following obligations follow:

(a) All decisions concerning any important aspects of collective administration should be taken by the owners of copyright whose rights are involved or by bodies representing them.

(b) Owners of copyright should receive regular, full and detailed information about all the activities of the organization that may concern the exercise of their rights.

(c) The amounts of remuneration collected for the autborization of reprographic reproduction—after the deduction of the actual costs of collective administration and other potential deductions that the owners of copyright whose rights are represented by the collective administration organization explicitely authorize—should be distributed, whenever possible, among the owners of copyright in proportion to the actual extent of the reproduction of their works.

(d) Copyright owners who are not members of the collective administration organizations—including particularly foreigners—should enjoy the same rights and receive the same remuneration as members. Furthermore, any decision by members concerning the use of the income for purposes other than their remuneration should be invalid in respect of nonmembers unless they or bodies representing them have agreed to it.

Principle PW7. (1) If the application of non-voluntary licenses is inevitable, it should, in extent and in time, be restricted as much as possible. As soon as the reasons for the application of non-voluntary licenses cease to exist, such licenses should be immediately abolished.

(2) In the case of non-voluntary licensing, Principle PW3 about the conditions of limitations of the right of reproduction should be applied, and Principle PW5(3) about the determination of the remuneration as well as Principle PW6(c) and (d) about tbe distribution of the remuneration and the rigbts of nonmembers, including particularly foreigners, should also be applied mutatis mutandis.

(3) When the law provides for the payment of an equitable remuneration in the framework of non-voluntary licensing, appropriate provisions should be considered so as to guarantee equitable participation in the remuneration by both authors and publishers.

Principle PW8. (1) If reprographic reproduction of works by equipment operated in private homes becomes widespread, it may unreasonably prejudice the legitimate interests of authors. In such a case, the introduction of a charge on equipment and/or material used for reprographic reproduction should be considered within the framework of a special indirect, non-voluntary licensing system.

(2) The charge mentioned in paragraph (1) should be paid by the manufacturer or importer, and equipment and photocopying material exported into another country should be exempt from the charge.

(3) It should be provided that the right to participate in revenue from the charge can only be exercised through a collective administration organization.

(4) Principle PW7 should be applied mutatis mutandis to the indirect non-voluntary licensing system described in paragraphs (1) to (3).

143. In this chapter of the document, the questions of reprography have been analyzed mainly taking into account the present and already widely used technical possibilities. There is no doubt that with the invention of new techniques and the wider use of electronic storage and delivery systems new problems will emerge. In such systems, reprography is only one element—and frequently only an optional element—in an extremely complex structure. Such systems, particularly if further developed open unforeseeable possibilities for using protected works and at the same time raise a series of new questions. Those questions are discussed in the following chapter.

Report 40. A great number of participants expressed their agreement with the main lines of this part of the memorandum and particularly with its Principles PW2 to PW8, although some of them indicated that they would find certain modifications desirable. Several delegations emphasized that the principles proposed in the memorandum seemed very useful for the adoption of legislative measures in their countries.

Report 41. Some delegations referred to existing national laws or to bills under consideration as well as to contractual solutions concerning reprography. In respect of the description of various national systems under the subchapter "National Laws on the Copyright Questions of Reprography," certain minor corrections were made and information was given about newer developments.

Report 42. One delegation said that the definition of reprography in Principle PW2, paragraph (1) should be considered to cover not only the reprographic reproduction of complete works but also the partial reprographic reproduction thereof.

Report 43. An observer from an international non-governmental organization said that although photocopying was reprographic reproduction for the time being, other methods—such as offset reproduction or reproduction by means of printing out from computerized data bases—should also be considered as being covered by the notion of reprography.

Report 44. Some participants suggested that in the first sentence of Principle PW2, paragraph (2), in addition to authors, other lawful owners of rights should also be mentioned. It was made clear, in this connection, that the memorandum used the word "author" in the traditional way—as this word is used in the international copyright conventions—that is, to cover not only individual creators of literary and artistic works, but also all lawful owners of rights in such works.

Report 45. One delegation said that, in its country, a special situation prevailed; in general, only a small number of copies were made in cases where works otherwise were not available, such copying was done without any lucrative purpose, and such a practice did not conflict with the normal exploitation of works and no prejudice to the legitimate interests of authors existed. In cases where such conflict or prejudice could occur, the reproduction was always done on the basis of the authorization of copyright owners.

Report 46. Another delegation suggested that in Principle PW3 and in all the other relevant parts of the memorandum, the word "limitations" should be replaced by the word "exceptions."

Report 47. An observer from an international non-governmental organization proposed that in Principle PW3, point (a), the phrase "should not endanger a reasonable degree of effective protection of the right of reproduction" should be replaced by the phrase "should not endanger at all the right of reproduction." In response to that proposal, the representative of Unesco drew attention to the fact that the phrase concerned corresponded to the relevant phrase in Article IVbis.2 of the Universal Copyright Convention and said that Principle PW3, point (a) should only be considered as a principle stating the minimum conditions of copyright protection.

Report 48. Several participants stressed that the notion of "normal exploitation" mentioned in Principle PW3, point (b) should be interpreted on the basis of the present circumstances rather than on the basis of the situation which existed in 1967 when, in the framework of the Stockholm revision of the Berne Convention, that notion first appeared in the text of Article 9(2) of the Convention. That notion included sales or lending of the copies of the work, sales of subsidiary rights in the work, etc., and, under the present circumstances, the licensing of reprography should also be added to the list of acts of normal exploitation of printed works in respect of all cases where individual or collective licensing was available to users on reasonable terms.

Report 49. An observer from an international non-governmental organization suggested that the present text of Principle PW3, point (b)(ii) should be replaced by the following text: "multiple copies or related and/or systematic single copies are made" because any level of multiple copying necessarily conflicted with the normal exploitation of the work and the same was true in respect of any form of systematic copying.

Report 50. Some delegations were of the opinion that it would be desirable to make Principle PW3, point (b)(iii) more flexible because, in their view,

the conflict with the normal exploitation of the work did not necessarily exist in the case of the reprographic reproduction of the works mentioned in that point. Several other delegations and observers from international non-governmental organizations were in favor of keeping that point and they even proposed that it should be extended to other works. Maps and scientific works were mentioned as cases to which that point should be extended.

Report 51. An observer from an international non-governmental organization proposed that a new subpoint (iv) should be added to Principle PW3, point (b), which should read as follows: "copies are made of entire works, or of self-contained parts of works."

Report 52. In answer to a question from an observer from an international non-governmental organization, the representative of WIPO said that in Principle PW3, point (c), the prejudice to the legitimate interests of authors necessarily included any possible prejudice to the legitimate interests of publishers in all cases where publishers were owners (or assignees or licensees) of the rights in the works concerned.

Report 53. Some participants expressed the view that in Principle PW3, point (c)(i), no reference should be made to commercial purposes or to the nonprofit character of the use, because limitations might be unjustified irrespective of such purposes and of such a character of the use.

Report 54. An observer from an international non-governmental organization suggested that in Principle PW3, point (c)(v), the words "and the remuneration of the author" should be deleted because, in respect of certain publications, such as scientific ones, the existence or the lack of any remuneration was not a decisive factor in determining whether limitations were justified or not.

Report 55. In respect of Principle PW4, paragraph (1), some delegations were of the opinion that it defined the cases in which free use might be allowed too rigidly. It was mentioned that in certain countries, for example, personal use or private use was free without the conditions mentioned in point (a) of that paragraph.

Report 56. Other participants stated that Principle PW4, paragraph (1) outlined the sphere of possible free uses too widely and that in certain cases mentioned in that paragraph, such a use was not justified. An observer from an international non-governmental organization suggested that the whole paragraph could be deleted because the other, more general principles seemed sufficient. Several observers from international non-governmental organizations said that it should be made clear that personal use and private use do not include use by employees of public or private institutions related to the purpose of their employment.

Report 57. An observer from another international non-governmental organization proposed that Principle PW4, point (b) should be restricted to those nonprofit libraries and archives which were accessible to the public and copying by such institutions should not amount to a concerted or systematic reproduction.

Report 58. Several participants suggested that the possible conflict with a normal exploitation of the work should also be mentioned in Principle PW4, paragraph (2) as a condition that should be considered in determining whether free reprographic reproduction was justified. An observer from an international non-governmental organization said that it should be made clear that copies which were lawful in some countries might be unlawful in other countries and therefore pertinent import and export restrictions should be observed.

Report 59. It was stressed that whenever a free use was justified, a compulsory license was also justified, because the latter necessarily involved a less serious limitation than free use did.

Report 60. Some observers from various international non-governmental organizations said that the responsibility of governments to comply with restrictions against unauthorized reprographic reproduction should also be recognized and that they should be expressed in a separate principle.

Report 61. In connection with Principle PW5, several participants stressed that while collective administration was preferable to compulsory licenses, collective administration should not be considered as the only such alternative; in certain cases individual arrangements might also be a workable means of exercising rights in respect of reprography. It was suggested that the phrase "—which is generally the case in respect of reprographic reproduction—" should be deleted from the first sentence of Principle PW5, paragraph (1), that the word "promoted" should be replaced by the word "encouraged" at the end of the same sentence and that in the second sentence of Principle PW5, paragraph (1), reference should also be made to the lack of appropriate individual arrangements in addition to the lack of appropriate collective administration schemes.

Report 62. Some delegations proposed that in Principle PW5, paragraph (2), it should be ex-

pressed that the task of the government was first of all to guarantee that there was no impediment to the voluntary establishment of collective administration organizations. One delegation expressed the view in that regard that if governments were to eliminate obstacles to the creation of collective administration societies, such an elimination of obstacles should not constitute an encouragement for the creation of multiple societies.

Report 63. An observer from an international non-governmental organization suggested that in Principle PW5, paragraph (2) it should be mentioned that users should also be encouraged to participate in the collective administration schemes.

Report 64. Some delegations were of the opinion that the memorandum overemphasized the need to avoid compulsory licenses because, in certain cases, such licenses might very well serve the interests of both the owners of rights and the users. One delegation suggested that the second sentence of Principle PW5, paragraph (1) should start with the words "Non-voluntary licenses can be considered as such encouragement particularly in the case where, and during the time when, ..." rather than with the words "Non-voluntary licenses should only be introduced if, and during the time when, ..." Furthermore, in Principle PW6, the reference to the exclusive nature of the right of reproduction in connection with collective administration should be left out and the second sentence of the principle should read as follows: "At least the following obligations should be reflected: ...." Finally, in Principle PW7, paragraph (1) the word "inevitable" should be replaced by the word "necessary." Another delegation supported those proposals while several other participants opposed them and insisted that all the references to the need for avoiding compulsory licenses should be kept. One delegation emphasized the importance of collective administration as an alternative to compulsory licensing.

Report 65. One delegation found Principle PW5, paragraph (2)(a) too rigid and proposed that its text should be replaced by the following text: "To the extent that the activities of the collective administration organizations are effectively regulated, such activities should be exempted from antitrust restrictions under competition law, either explicitly or implicitly, according to the laws of the country."

Report 66. Another delegation expressed the opinion that the legislative measures proposed in Principle PW5, paragraph (2)(d) should not prevent the possibility of public inquiries.

Report 67. Some delegations opposed the idea of the obligatory use, in reprographic reproduction machines, of electronic devices to control reproduction, as proposed in Principle PW5, paragraph (2)(b), while an observer from an international non-governmental organization regarded that proposal as premature. One delegation wondered what the sanction could be in case of non-compliance with such an obligation. Several other delegations and representatives of international non-governmental organizations insisted that such a measure should be seriously considered in the framework of national legislation.

Report 68. One delegation suggested that points (c), (d) and (e) of Principle PW5, paragraph (2) should be offered as alternative solutions to solve the problems raised by the fact that not all authors were represented by the collective administration organizations. An observer from an international non-governmental organization was in favor of the deletion of those points which he found too detailed.

Report 69. An observer from an international non-governmental organization proposed that the following point (f) should be added to Principle PW5, paragraph (2): "Legislative provisions should facilitate representative groups of authors and publishers to become participating members of collective administration organizations when the number of authors or publishers in a specific group makes individual membership unpracticable."

Report 70. An observer from another international non-governmental organization said that Principle PW5, paragraph (2) should also refer to the need for the promotion of international cooperation between collective administration organizations.

Report 71. Several participants stressed that the second sentence of Principle PW5, paragraph (3) should not be interpreted as an obligatory participation of an impartial body in the disputes about remuneration because that would bring an element of compulsory licensing in the system, and therefore the word "should" should be replaced by the word "could" in that sentence.

Report 72. One delegation observed that Principle PW5, paragraph (3) did not say anything about how the fees collected should be distributed to the owners of rights. That question had obviously been left to contractual arrangements or to the discretion of national legislation. In respect of non-voluntary licensing, Principle PW7, paragraph (3) required that appropriate provisions should be considered so as to guarantee an equitable participation in the remuneration by both authors and publishers. The latter principle should also be applied in respect of collective administration. Reprographic reproduction was

a secondary use of the published work and the principles should make it clear that both the author and the publisher had equal legitimate interests in being remunerated for such a use. If the right of the publisher was only based on the same right that the author enjoyed, the question of relationship between their rights should be necessarily dealt with. If parallel rights existed (both authors' rights and a neighboring rights type right of publishers), the legal situation was clearer, but the question of participation in the fees was still to be determined. Therefore, a separate principle on the question of remuneration for reprographic reproduction providing respect for the parallel interests of authors and publishers would be helpful.

Report 73. Several participants expressed the view that, in Principle PW6, points (a) to (d) went too far in trying to offer guarantees for the appropriate operation of collective administration organizations and that it would be more appropriate to leave those questions to the members of the organizations and to offer guarantees only in favor of nonmembers such as foreigners. Such a guarantee, however, should not go as far as the one suggested in the second sentence of point (d). Some delegations were, however, of the opinion that the principles contained in points (a) to (d) were helpful and necessary to avoid compulsory licensing elements in collective administration schemes. One of those delegations, nevertheless, added that the principles mentioned above reflected an ideal system that could not be immediately implemented in every country; therefore, it proposed that the second sentence of Principle PW6 should be replaced by the following sentence: "Based on the exclusive nature of the right of reproduction, where the right is being administered collectively, the following solutions should be aimed at to the extent that it is possible with regard to the particular circumstances of the case."

Report 74. An observer from an international non-governmental organization suggested that after the word "considered" the following phrase should be inserted into Principle PW7, paragraph (3) "—taking into account the nature and custom of the relevant publishing sector—" because in certain cases, such as that of certain scientific journals, special arrangements were justified which might involve that the whole remuneration should go to the publisher.

Report 75. An observer from another international non-governmental organization proposed that the first sentence of Principle PW8, paragraph (1), in addition to the prejudice to the legitimate interests of authors, should also refer to the possible conflict with the normal exploitation of works.

PART II

IV. Storage in and Retrieval from Computer Systems of Protected Works. Electronic Publishing, Electronic Libraries. Data Bases

General Remarks

144. The title of this chapter may seem to cover various subject matters. In reality, however, the expressions "storage in and retrieval from computer systems of protected works," "electronic publishing," "electronic libraries," "data bases" refer, by and large, to the same complex phenomenon, the combination of computer (electronic and, recently, optical) technologies with advanced communications systems which are transforming publishing activities and may lead to a completely new structure of creation and utilization of protected works.

145. The expression "storage in and retrieval from computer systems" was used in Unesco/WIPO documents as early as at the beginning of the 1970s. For example, Professor Eugen Ulmer (then Director, Max Planck Institute), in a study commissioned by Unesco and WIPO in 1971, defined computer storage and retrieval systems as follows: "Machine-readable data is fed into a computer on special material information carriers by means of special input units, is stored in internal and/or external storage units and is, after an appropriate interrogation, again made available to the user over special output units either wholly or in part." Even if in the meantime substantial technological developments have taken place, the quoted definition still expresses the essence of electronic information systems.

146. At that time, electronic storage and retrieval systems concerned protected works, almost exclusively, by means of "data bases."

147. Like "information," the expressions "data" and "data bases" are used here as terms of information technology where "information" and "data" mean the subject matters and/or the results of "data processing" by computers. From the viewpoint of those technical terms, protected works also qualify as "information" and "data." This meaning obviously differs from the meaning in which the words "information" and "data" are used in respect of copyright. In the context of copyright, there is a general agreement that mere information and data are not protected; what is only protected is the expression of thoughts or offering information (data) in an original, identifiable, concrete form (the original structure of presentation being also considered as such original form). This document uses the expressions "information," "data," "data base," etc., as they are used in the field of information technology, but it always makes a clear distinction (see particularly the subchapter below on data bases) between the cases where data are really mere data and where data amount to protected works. The expression "data base" in the field of information technology means any organized—and, in general, subject-oriented—machine-readable collection of "data."

"Data bank" is sometimes utilized as a synonym for "data base," but the present document uses only the word "data base," and it does so for two reasons: first, data "base" is the more generally accepted term, and second, if there is some slight difference between the two expressions, then it is that "data bank" is more frequently used in the case of mere numerical data than "data base" is, and therefore it covers a field where protected works are less typically concerned.

148. "Electronic publishing" is a more recent expression reflecting the results of fast technological developments which have taken place in the last decade. The expression is used frequently without a precise definition, and where definitions are offered they differ to a greater or lesser extent. It seems, however, that "electronic publishing" has a fairly wide meaning, wider than the word "publishing" has in the context of copyright. It means everything from sophisticated word processing ("corporate publishing" or "desktop publishing") through on-line data bases to publishing in the classical sense of, for instance, journals, newspapers, etc., by electronic (and/or optical) means. In that sense, "electronic publishing" means the storage, shaping, updating and making available by electronic means of information in written or graphic form to a certain circle of people or to the general public.

149. The expression "electronic libraries" is less frequently used. If it is used, it refers to the application of the same technical (electronic and optical) devices for the storage and retrieval of information, but here— following from the functions of libraries—it is the storage of information (very frequently, protected works) on which emphasis is placed.

150. At the beginning of the 1970s, it was predicted that full-text storage and retrieval of protected works would be rare for a fairly long period because of the time-consuming nature of transforming works into machine-readable form and because of the limits of storage capacities. In the meantime, spectacular developments have taken place in this field. Full-text storage has become possible more easily and cheaply, and this possibility is ever more frequently utilized.

151. "Electronic publishing" exists in two principal forms: on-line and off-line.

152. On-line electronic publishing (including on-line data base services) means that the information is made available direct from the computer through a communication network (through cables, telephone lines or even by broadcasting). The terminals receiving the information may be passive ("dumb") ones, but through appropriate intelligent terminals—for example by means of the ever more efficient personal computers—interactive contacts may also be established with the central unit, and thus the search for certain data or material can be speeded up, questions can be asked or even further information may be added to the one stored in the computer. Furthermore, printout or facsimile copies may be produced or certain data can be transferred ("downloaded") into the memory of the receiving computer (if its capacity is big enough even the whole data base can be "downloaded" which—if it is done without authorization—is the highest possible danger to data base services).

153. Off-line (or on-disc) delivery systems have just recently been developed on the basis of the ever more efficient external storage devices. (In respect of the means of storage of information, a basic distinction is made between internal storage, that is, storage in the central processing unit of the computer, and external storage; the latter is separated from—but may be connected to—the processing unit.) For a fairly long time, external storage devices were magnetic discs, drums and tapes and also microforms (microfilms and microrolls). Recently, however, a new technique has become widely utilized: the digital-optical technique which has led to a spectacular increase of storage capacities. In the case of digital-optical discs, the information is burnt in digital patterns by means of a laser beam and it is also optically read. In such discs, information (texts, graphics or even sounds) may be stored in a very high density and the access time to the information—through appropriate "drives"—is relatively short. Because such discs can be used for any compatible computers, including personal computers, they can be reproduced and transferred for use as tangible copies. This is what is called off-line electronic publishing. At present, CD-ROM discs are the most widespread of such external storage devices, CD-ROM being the acronym for Compact Disc-Read Only Memory. As the name of this information carrier indicates, it can only be read—that is, in a way, "played" as a video compact disc—and it cannot be complemented or erased. More sophisticated discs are, however, being developed or already applied, such as WORM (Write Once-Read Many), a digital-optical disc in the case of which the user may add further information (once it is added, it can be read, but cannot be erased).

154. Experience shows that several ways may lead to "electronic publishing." For example, "electronic publishing" may be the by-product of the ever more widespread use of word processors and electronic typesetting. Using electronic means for publishing does not necessarily mean "electronic publishing"; it may be restricted to facilitating traditional paper (folio) publishing. However, if the material stored electronically for such purposes is not erased, it can be utilized not only for on-demand publishing (which enables publishers to quickly adapt themselves to the demands of the market without running the risk of producing too many copies), but also for real electronic publishing either on-line—including the possibility of electronic delivery of copies in printout or facsimile form by means of appropriate terminals or off-line. The publisher can choose among the various media; the same storage source may be used as a "plate" for printing, as a master for the reproduction of floppy discs or optical discs (CD-ROM) and also as a data base for on-line service. Those distribution methods may be, and sometimes are, used side by side.

155. The other way which may lead to electronic publishing is "corporate publishing" which is now the fastest growing segment of what is called electronic publishing industry. It is not necessarily "publishing" in the tradi-

tional sense, but it may grow into that. It is the developed version of word processing systems; more efficient, quicker and capable of producing copies which are similar or equivalent in quality to traditionally printed material. It is mainly used for the production of office-related documents, but the fact that the information is stored electronically and that the possible end products are of extremely high quality, the choice for the operators of such systems is nearly as rich as that of publishers using electronic means for printing.

156. Similar possibilities are offered by so-called "desktop publishing" which sometimes appears as a subversion of "corporate publishing," but it should be considered separately because it can also be operated by private persons for personal or professional purposes. It is a smaller, microcomputer-based system which includes, as a rule, a personal computer and a laser printer with an appropriate publishing program. By means of such systems, usually shorter printed matters are produced but they are of high quality.

157. By means of personal word processors and personal desktop publishing equipment, even the process of creation and the preparation of manuscripts may change. Manuscripts may be directly produced in machine-readable form which in certain cases may mean print-ready form that is a quasi-plate for printing. Authors who want to prepare their manuscript in machine-readable form have access to a wide variety of hardware and computer programs. This gave rise to the use of various non-standard codes and obliged printers to apply expensive conversion processing (which often lead to the loss of cost and time benefits arising from the use of such "manuscripts"). Recently, however, a standard system has been developed at the international level—the so-called "Standard Generalized Mark-up Language (SGML)"—to be applied by authors and publishers for electronic manuscript preparation and mark-up. Such "manuscript" then can be transferred either on-line (if there is appropriate connection) or off-line (sending discs) to the publisher or directly to the printer (and, of course, it can also be used through desktop publishing equipment for direct publishing by the author himself).

158. One more possible way to electronic publishing is through the computerization of the storage of the material of libraries and archives. Thedirect purpose of transferring the material on electronic devices may be the preservation or the avoidance of storage capacity problems or the preparation of a comprehensive index system. However, as soon as the material is electronically stored, it may be available as a data base, it may be transferred through computer and communications systems, it may be used as a source of reproduction, etc. It will certainly be used in that way by which libraries may become even more what they are already called referring to their widespread reprographic reproduction activities: a kind of "on-demand publishers."

159. It is unnecessary to explain to what revolutionary changes electronic publishing may lead in respect of the process of dissemination of writings and graphic works. This does not mean, however, that paper (folio) publishing will be pushed into the background in the near future. It is probable that, in the short term, rather a growth of paper publishing will take place (on the basis of the more efficient and more profitable production process). In the longer term—at least for a fairly long period—paper and electronic publishing will peacefully coexist side by side.

160. According to the information received from the International Publishers Association (IPA), the number of data bases available to the public has increased in recent years as follows: 1980: 400; 1981: 600; 1982: 965; 1983: 1,350; 1984: 1,878; 1985: 2,453; 1986: 2,901. According to the same source, the worldwide turnover of electronic publishing in 1985 amounted to five billion US dollars and was shared as follows: United States of America: US$ 4,150 million (more than four-fifths of the turnover); Japan: US$ 375 million; United Kingdom: US$ 200 million; Germany (Federal Republic of): US$ 105 million; France: US$ 45 million; the rest of the world: US$ 170 million. However, electronic publishing still only represents a modest part of the market, considering that the worldwide turnover of traditional publishing amounts to 100 billion US dollars a year.

161. The more widely utilized systems with the biggest turnover are mainly on-line data bases containing nearly minute-by-minute updated financial and economic data complemented by news items both in the form of headlines and— as a second step of search—in that of full texts (Reuters, Dow Jones News/Retrieval, Data Resources Inc. (a McGraw Hill subsidiary), etc.). Many successful on-line systems exist in the field of legal and medical information and publication (for example the LEXIS and the MEDIS systems, respectively, both established by Mead Data Central (MDC) in the United States of America). Certain producers and marketers use their capacity for operating parallel special user-oriented systems (in addition to the just mentioned MDC, for example, Thyssen-Bornemisza network or the TRANSDOC in France; the latter, for example, has three major data bases: PASCAL (multidiscipline data base), INPI (patent documentation), EDF (technical reports). There are certain so-called host organizations, like DIALOG developed by Lockheed Corporation, which collect and make available several data bases transferred into the system by various data base producers.

162. The above-mentioned electronic data base systems are, usually, restricted to certain specific fields and intended for a relatively narrow professional public. Data bases and electronic publishing for the general public are rare and sometimes doubts are raised whether such systems can be really viable without government subsidies. The most widespread of such systems are the two versions of the so-called videotext systems: teletext and viewdata.

163. "Teletext" (not "teletex" which is something else: a fast telex system with electronic editing capability) means the transmission of "videopages" by television broadcasting. Such teletext transmission is the by-product of standard television signals in what is called the

vertical interval reference, that is the portion of the signals separating individual frames which—in sequence—create moving pictures. Only a decoder is needed, and several teletext channels can be received by means of a standard television set. Teletext is a one-way, not interactive system.

164. The other version of videotext, "viewdata," is an interactive service. The text is also delivered in this case in page format on a standard television screen. The level of interactivity depends on how intelligent terminals are used. The user may be connected to the data base by a simple telephone line, he can determine which page or pages are transmitted and he can make searches according to the "menu" offered by the system.

165. A special case of videotext is the French MINITEL system. The French Government offered subsidies to get out of the vicious circle which is often an obstacle to establishing a general data base network for the general public, namely that while there is not a wide enough public supplied with appropriate receiving equipment, such services are not offered; and because such services are not available, people do not buy receiving equipment. The French PTT (national public postal, telegraph, telephone and telecommunication service) has provided more than 1.5 million telephone subscribers with a small terminal through which—by dialing number codes—they can be connected to some 800 data bases and different services through telephone lines. By 1990 the number of such subscribers will be around three million. Customers pay for the services when they actually use them, as a part of the telephone bill.

166. Perhaps the most important example for the creation of library-based comprehensive data bases is the Optical Disc Pilot Program of the Library of Congress in the United States of America. Its final purpose is to include in an optical disc storage and retrieval system all the material contained in the huge collection of books, periodicals, etc., of the Library of Congress. Text-related print material will be stored on digital optical discs, while non-print or image-related material (including motion pictures, drawings, etc.) will be stored on videodiscs. A special "jukebox" system will store all those discs for selection, displaying and/or reproduction.

167. There are some typical examples of electronic publishing where certain newsletters or journals are made available on-line as special data bases by electronic channels. In general, paper versions of such publications also exist even if not necessarily with the same content. Such electronic publications are, for example, the *Chemical Abstracts*, certain publications of the Bureau of National Affairs (BNA) (such as LABOR LAW or PATLAW) in the United States of America, or *The Electronic Magazine* which is aimed at the so-called information community (much material is published both in the paper and the on-line electronic versions of *The Electronic Magazine*, but certain items only in one of the two versions; published material is kept in a kind of data base as an on-line service; search is practically free, but if the full text is requested for viewing or for reproduction, a special price is charged.)

168. Off-line electronic publishing—in general in the form of CD-ROM—is concentrated on materials which are large and complex (because of which electronic search and retrieval much facilitate their use) and at the same time does not need frequent updating (such as textbooks, certain encyclopedias, guidebooks, directories, catalogs). They may need updating time and again, but the updating of such electronic versions is much cheaper than that of paper versions.

169. The presentation of technical details is not the purpose of the present document. The short survey above is only meant to give a general overview of the main features and trends of "electronic publishing." In spite of the great variety of technical solutions, the expression used by Professor Ulmer in 1971 seems to cover all these new developments. What is involved here as a new form of using protected works is the storage in and retrieval from computer systems of such works. This is, however, a complex phenomenon which raises a number of serious copyright questions.

Unesco/WIPO Committees of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works

170. The Secretariats of Unesco and WIPO convened two Committees of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works. The Committees, even if they also dealt with the question of the use of computer systems for the creation of works, concentrated their attention mainly on the problems of the storage in and retrieval from computer systems of protected works.

171. The First Committee of Governmental Experts held its meeting in Paris in December 1980. On the basis of the discussions at that meeting, and of the observations received from governments and from intergovernmental and international non-governmental organizations, the Secretariats prepared a draft document entitled "Recommendations for Settlement of Copyright Problems Arising from the Use of Computer Systems for Access to or the Creation of Works" (hereinafter referred to as "Recommendations"). The Second Committee of Governmental Experts (hereinafter referred to as "Second Committee"), whose meeting took place in Paris in June 1982, discussed, in certain respects modified and completed, and finally adopted the text of the Recommendations.

172. The Recommendations are composed of three parts: "Preamble," "Use of Computer Systems for Access to Protected Works" and "Use of Computer Systems for the Creation of Works."

173. The preamble contains, *inter alia*, the following statements:

"*Recognizing that* creation of systems for the organization and coordination of information and documentation has become a main element for the performance of the various functions of the society, in particular in scientific, economic, technical, political, cultural, educational and social fields;

"*Noting also that* the rapid development of information technology and the importance of information

products and services in international trade have led to the creation of computerized information systems, networks, and data bases, on both national and international levels, to enable information-seeking users to have direct access to such systems;

"*Taking into account that*, at present, more and more works protected by copyright are used for storage in and retrieval from computer systems and this practice is likely to grow;...

"*Considering that* the development towards international computerized information systems and the increasing transborder flow of data make it highly desirable to harmonize international views on the settlement of these copyright problems and to achieve cooperation among States on common and practical solutions in this connection;

"The Committee is of the opinion that:

"*(a)* the use of computer systems for access to or the creation of protected works should be governed by the general principles of copyright protection as laid down in particular in the international copyright conventions and such use does not at present require amendments to these principles;

"*(b)* the copyright problems raised by such use are complex and while settling them national legislation should take into account the legitimate interests of both the copyright owners and the users of the protected works in order to stimulate creativity of authors and not hamper the dissemination of works by means of computer technology;

"*(c)* States, while seeking legal solutions on the basis of the existing principles or enacting specific legal provisions governing the problems arising from the use of computer systems for access to or the creation of works, should be guided by the following Recommendations ...."

174. The Recommendations which follow deal with all the major questions of the use of computer systems for access (that is, the storage in and retrieval from computer systems) of protected works. The relevant sections of the recommendations contain the following subtitles: "Subject Matter," "Rights Concerned," "Acts Concerned: Input, Output," "Moral Rights," "Limitations on Copyright," "Administration and Exercise of Rights and Legislative Measures" and offer detailed recommendations concerning the above-mentioned questions in 12 points. The recommendations cover nearly all the major questions which may emerge in respect of electronic publishing and, in general, seem to be applicable also under the conditions brought about by recent developments. Therefore, the following part of the document, in analyzing the questions of the storage in and retrieval from computer systems of protected works, tries to follow, in general, the structure of the Recommendations, but in certain respects modifications or completions are suggested. Recent developments show that certain further questions have to be discussed, such as the new problems in relation to the right of communication to the public and the right of broadcasting, respectively, the special copyright implications of off-line (on-disc) electronic publishing and also the problem of the protection of data bases.

Subject Matters Involved

175. The above-mentioned Recommendations contain the following statements under the subtitle "Subject Matter to which the Recommendations Apply":

"1. These recommendations apply to material which either constitutes intellectual creation and therefore is to be considered as enjoying protection under copyright legislation or otherwise enjoys protection under such legislation (hereinafter referred to as "protected works"). Bibliographic data as such of a particular protected work (name of the author, title, publisher, year of publication, etc.) are not included in this definition.

"2. Subject to the provisions of paragraph 1 above, protected works may embrace in particular the following categories:

"*(a)* full texts, or substantial parts thereof and other complete representations of protected works;

"*(b)* abbreviated representations of protected works either in the form of adaptations or derivative works or in the form of independent works;

"*(c)* collections and compilations of information, whether or not resulting from data processing, independently of the kind of information contained in them and of their material support (including collections and compilations of bibliographic data of several works);

"*(d)* thesauri and similar works intended for the exploitation of computerized data bases."

176. It is a kind of tradition that documents or legal writings dealing with the questions concerning the use of works in electronic storage and retrieval systems analyze the situation in respect of three types of subject matters which may be used in such systems, namely bibliographic data, abstracts or summaries and full texts. It is fairly clear, however, that these questions are not specific in respect of electronic storage and retrieval systems. The same copyright provisions and the same case law must necessarily prevail irrespective of whether bibliographical data, abstracts/summaries and full texts are reproduced on paper or in electronic or optical stores. The same is true in respect of collections and compilations of information as well as of thesauri and similar works.

Rights Concerned

177. The Recommandations contain the following point in respect of the rights that may be concerned in case of using works in computer systems:

"3. Storage in and retrieval from computer systems (input and output) of protected works may, as the case may be, involve at least the following rights of authors provided for in either international conventions or national legislation on copyright or both:

"*(a)* the right to make or authorize making of translations, adaptations or other derivative works;

"*(b)* the right to reproduce any work involved;

"*(c)* the right to make the work available to the public by direct communication;

"*(d)* the moral rights."

Acts Concerned

178. The Recommendations deal, under this title, with what would seem to be the most important copyright questions in relation to the use of works in computer systems. All the economic rights which, according to the Recommendations, may be relevant are discussed here under subtitles "Input" and "Output." As the report of the Second Committee makes clear, "input" and "output" are shorter and more technical synonyms for the expressions storage in and retrieval from computer systems of works.

179. There is agreement among experts—and this was emphasized also at the meetings of the two committees of governmental experts mentioned above—that copyright owners should be in the position to control the input of their works in computer systems. This control, under certain circumstances, is the only guarantee for the possibility of exercising their economic and moral rights. As soon as a work is included in a computer and communication system, it is very hard for the copyright owner to find out when the work is used either in the form of display or by means of printout, facsimile or other reproduction. In addition—as will be discussed later—certain doubts may emerge concerning the so-called "display right" both at the international and at the national levels.

180. The question whether copyright control should start at the stage of input, however, is not a mere *de lege ferenda* question. As is discussed below, there is a clear *de lege lata* situation in this respect.

181. Following the structure of the Recommendations, first the copyright questions in relation to input and then the problems in relation to output are discussed. In connection with output, however, the present document also analyzes the copyright implications of the communication and distribution processes which were only briefly touched upon by the two committees of governmental experts in 1980 and 1982.

Input

182. Under Article 9(1) of the Berne Convention "[a]uthors of literary and artistic works ... shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form*" (emphasis added). It is clear on the basis of this text that, under the Berne Convention, the notion of "reproduction" covers not only the production of copies from which the works are directly perceptible, but also any material fixation from which the work can be rendered perceptible to the human senses with the help of appropriate equipment.

183. Article 9(3) of the Convention makes this even clearer, stating expressly that "[a]ny sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

184. In the case of storing works by external storage devices (such as magnetic or digital-optical discs), it is obvious that what is involved is reproduction and what is produced are copies. There is, however, no difference between external and internal storage (that is, the storage in the central memory of the computer) as regards the nature of the fixation of works and the manner of perception and retrieval. Therefore, there is no doubt that internal storage is a reproduction of the work in the same way as external storage is.

185. "The exclusive right to authorize reproduction *by any means*" (emphasis added) is also recognized in Article IV*bis*.1 of the Universal Copyright Convention. The words "reproduction by any means" seem to suggest that this expression is to be understood in the same sense as in the Berne Convention. Therefore both under Article 9 of the Berne Convention and Article IV*bis* of the Universal Copyright Convention any sound and visual recording is also to be regarded as a reproduction and, therefore, it does not matter for the purpose of reproduction whether the fixation in material form is directly or indirectly perceptible to the human senses.

186. Certain doubts, in this respect, may emerge from Article VI of the Universal Copyright Convention, which states: "'Publication,' ..., means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." It cannot be argued, however, on the basis of this provision and particularly on that of its restriction to "copies from which the work can be read or otherwise visually perceived," that the term "reproduction" in Article IV*bis* must be interpreted in a similar narrow way. This term was formulated during the preparatory works of the Convention independently of the term "publication" as used in Article VI. The purpose of the 1971 revision of the Universal Copyright Convention, which was to safeguard for the authors the basic right of exploitation of their works, makes it likely that the term "reproduction" in this Convention includes also the fixation of works in material form on sound recording, magnetic tape, etc., where the use of equipment is necessary to make the work perceptible.

187. The Second Committee accepted this interpretation in the Recommendations whose relevant point reads as follows:

> "4. The act of input of protected works into a computer system includes reproducing the works on a machine-readable material support and fixation of the works in the memory of a computer system. These acts (such as reproduction) should be considered as acts governed by the international conventions (Article 9(1) of the Berne Convention and Article IV*bis*.1 of the Universal Copyright Convention, as revised in 1971) and national legislation on copyright and therefore subjected to the author's exclusive rights and the requirement of prior authorization by the copyright owner.
>
> "For the purposes of this paragraph, a work should be considered as reproduced when it is fixed in a form sufficiently stable to permit its communication to an individual."

188. In certain countries, however,—mainly in countries with Anglo-American legal traditions—the legal sit-

uation was not clear in this respect because the notion of "copies" was defined in a traditional way (restricted to material objects from which the works were directly perceptible to the human senses).

189. In the United States of America, section 101 of the 1976 Copyright Act dissolved any such doubts in defining the term "copies" in the following manner: "'Copies' are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The same section 101 imposes a slight restriction on the term "fixed" used in the definition of copies when it states as follows: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." According to this, transitory fixation in the computer does not fall within the term "copy." In practice, however, this may only cover the stage of data processing in its narrower sense. The storage of works in computer systems presupposes longer and more stable fixations.

190. In the United Kingdom, the Copyright (Computer Software) Amendment Act 1985 made it clear that storing a work in a computer is a form of reproduction, requiring the copyright owner's consent. The White Paper (which was mentioned in the chapter on reprography and which contains the proposals of the government, *inter alia*, relating to the revision of the copyright statute submitted to Parliament in April 1986) stresses, however, that: "Although the 1985 Act did much to clarify the law, there are still uncertainties over whether the act of copying a copyright work on to media, such as tape or disc, not connected to a computer, requires the consent of the copyright owner." It adds: "In order to give effective protection against modern forms of piracy and other kinds of infringement, it will be made clear that the rights given to copyright owners over reproduction extend to copying by fixing a work on any medium from which the work can in principle be reproduced."

191. Such legislative steps are in keeping with the Recommendations which, after having stressed that storage in computer systems is covered by the right of reproduction, add: "However, in order to harmonize the approach of States in settling the problems relating to input and output and to provide the authors with the real possibility of exercising control when their works are put into computer systems, States should consider the desirability of express recognition under their national laws of the exclusive right of the author to make his work available to the public by means of computer systems from which a perceivable version of the work may be obtained."

Output

192. The Recommendations contain the following statements in respect of output, that is, of the retrieval of works from computer systems:

"5. States should consider granting protection under copyright legislation in respect of output of protected subject matter from computer systems whether this constitutes:

"*(a)* a reproduction or a corresponding act (e.g. production of a hard-copy printout or fixation of texts, of drawings, of machine-readable forms, of sounds, of audiovisual works, etc., on analogous physical medium, or a transmission of the contents of a data base into the memory of another computer system with or without an intermediary fixation); or

"*(b)* an act whereby such subject matter is made available to the public (e.g. as visual images or other perceivable form of a presentation of a work).

"Provisions of national legislation concerning reproduction and direct communication to the public must normally apply to such acts."

193. There was no doubt at the meeting of the Second Committee that if, in the output stage, any copy was made, such as a hard-copy printout or facsimile reproduction or reproduction by electronic or optical means (in the internal memory of the receiving computer or in external storage facilities), that was a separate act of reproduction which was covered by the exclusive right of reproduction of the copyright owners.

194. This means that the authorization of the copyright owner is needed for any such acts, and this right cannot be limited but in the cases which are determined in the international copyright conventions. In this respect, the considerations discussed in the chapter on reprography apply *mutatis mutandis*. As far as the administration and exercise of these rights—as well as of other rights involved—are concerned, they are discussed, as follows from the structure of the Recommendations, under a separate subtitle.

195. When the works are not retrieved from an electronic storage device in the form of separate tangible copies (paper or other), but are only displayed on a screen, the copyright situation is less clear. The above-quoted Recommendations suggested that in respect of "an act whereby [a protected] subject matter is made available to the public (e.g. as visual images or other perceivable form of a presentation of a work)" appropriate protection should be granted under copyright legislation.

196. The above-quoted Recommendations were, presumably, based on the view that the display of writings and graphic works on a screen did not amount to "reproduction." However, it has never really been discussed in detail whether that view was right. The present document first analyzes what the legal situation would be if the above-mentioned "traditional" view were accepted and the display of writings and graphic works on a screen were not deemed to be reproduction. But after that analysis, the present document reverts to the basic problem, that is, to whether the display of writings and graphic works could not be regarded as reproduction.

197. According to the Recommendations, the provisions concerning "direct communication to the public" may apply when output does not involve reproduction.

198. Before trying to answer the question whether legislation concerning "direct communication to the public" can be applied or not in the stage of retrieval of works from computer systems, it seems to be necessary to analyze the distribution and transmission channels through which works stored in such systems can reach users.

199. In the present stage of development, three channels may be recognized: distribution of copies in the form of external storage devices (off–line distribution; usually by means of CD–ROM discs); the transmission of electronically stored "data" (which may include protected works) by means of television broadcasting; and transmission of "data" by wire (cable or telephone lines).

200. In the case of off–line distribution, real, tangible copies are involved like in the case of reproduction and distribution of books, videograms or phonograms. There is no doubt that the production of off–line storage devices (CD–ROM discs, etc.) is covered by the right of reproduction. It follows from this right that the owner of copyright can determine the scope and manner of distribution of such copies by means of the contract concluded between him and the publisher or data base producer.

201. It is, however, relatively rare that, on the basis of the right of reproduction, a fairly full right to control the distribution of the copies reproduced is recognized (for example, in France). In several countries, the so–called "exhaustion theory" or "first sale doctrine" prevails according to which the right in respect of certain uses (for example, rental) is practically transferred to the owners (buyers) of copies. The working document prepared for the Committee of Governmental Experts on Audiovisual Works and Phonograms (Paris, June 1986) suggests that in respect of videograms, the right of rental, as a particular form of the right of distribution, should be recognized irrespective of whether the "exhaustion theory" or the "first sale doctrine" is applied otherwise in the country concerned or not. There is not much experience available yet about the market and the use of CD–ROM discs and other copies storing works electronically or optically. It is possible, however, that rental may become a significant commercial utilization of such copies. In such a case, the recognition of an exclusive right in respect of rental may become justified also in this field.

202. As far as the second channel of dissemination of information stored in electronic systems, that is, broadcasting, is concerned, it is not typical. As discussed above, in the case of the teletext version of videotext services, "data" are transmitted by broadcasting. Neither Article 11bis of the Berne Convention, nor Article IV*bis*.1 of the Universal Copyright Convention and, in general, nor the relevant provisions of most national copyright laws, exclude particular categories of works (notably writings and graphic works) from the scope of the right of broadcasting. Therefore, if the "data" transmitted by broadcasting include protected works, the right of broadcasting seems to be applicable. The principles and the comments contained in the working document for the Committee of Governmental Experts on Audiovisual Works and Phonograms, mentioned above, in respect of satellite broadcasting and cable transmission of broadcast programs are consequently also applicable here *mutatis mutandis*.

203. So far, however, transmission by cable or by telephone line are the most typical channels for the on–line transmission of works and other data stored in computer systems.

204. Transmission of programs by wire is clearly communication to the public, if the transmission is not of a private or strictly internal nature. It is well known that several provisions of the Berne Convention provide for an exclusive right in respect of communication to the public. Therefore, one may think that there cannot be any doubt: literary or graphic works stored in computer systems must also be covered by this right. However, this is open to question if one considers display as communication to the public since the Berne Convention speaks of a right of communication to the public or of performance only in connection with a situation in which performers perform the work (Article 11 concerns the performance and the communication to the public of dramatic, dramatico–musical and musical works; Article 11ter concerns the recitation and the communication to the public of literary works, and Articles 14 and 14bis concern the performance and the communication to the public of cinematographic works and the preexisting works which are adapted or reproduced in cinematographic works).

205. Article IV*bis*.1 of the Universal Copyright Convention mentions the right of public performance as one of the rights whose protection is a minimum obligation under the Universal Copyright Convention. No clear definition of this term was produced at the diplomatic conference in 1971. However, neither the provisions of the Convention nor the documents relative to its revision in 1971 contain a single word which would indicate that the rights mentioned in Article IV*bis*.1 do not apply to specific types of works. On the contrary, it may be deduced that "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting" mentioned in Article IV*bis*.1 apply to all types of works. It seems, however, that the possibility for any Contracting State to make exceptions to these rights provided for in paragraph 2 of the same Article may also be applied with regard to certain types of works.

206. National copyright laws contain general provisions about the right of communication to the public which, therefore, also cover writings and graphic works and seem to be applicable also to the transmission of such works stored in computer systems.

207. When the off–line copy of the electronically stored work is retrieved on a screen, or when the work is transmitted on–line—by means of broadcasting or by wire—and received on a screen, it may, if it is made available to a public, represent a use which is relevant from a copyright point of view. Such public display seems to be

fairly rare for the time being. If, however, such a use is not of a private or a strictly internal nature but of a public one, it should be covered by copyright liability (the exercise of such a right could be settled in the same contract in which the owner of the right authorizes the storage of the work in computer systems).

208. The provisions of national copyright laws also contain fairly general provisions on the right of public performance which, at least in certain cases (for example, in the case of the legal situation under the French Copyright Law), may also be applicable to the screen display of writings and graphic works. However, if the display of writings and graphic works is not recognized as reproduction, the "right of display" as well as the right of communication of such works—through display—to the public should be explicitly recognized in national laws.

209. The 1976 Copyright Act of the United States of America seems to offer a rather useful example of how these rights may be regulated at the national level. Under section 106 of the Act, "the owner of copyright ... has the exclusive rights to do and to authorize ... in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works ... to display the copyrighted work publicly." Section 101 defines the expressions involved in the following manner: "To ... display a work 'publicly' means – (1) to ... display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a ... display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the ... display receive it in the same place or in separate places and at the same time or at different times. To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."

210. So far, the document has followed the line which was accepted by the Second Committee; consequently, it has analyzed the legal situation on the basis of the assumption that the display of writings and graphic works on a screen is not reproduction. It is questionable, however, whether this assumption is correct.

211. The display of writings or graphic works on a screen differs in nature from the performance of a dramatic, dramatico–musical or musical work, the recitation of a literary work and the communication to the public or broadcasting of such a performance or recitation as well as from the performance, communication to the public or broadcast of a cinematographic work. The essence of the difference is that when writings and graphic works are displayed on a screen they are *fixed* for a shorter or longer time, while in respect of the above–mentioned other uses that is not the case. The fixation takes place at least for the time which is necessary for reading the text and studying or enjoying the graphic work concerned. What appears on the screen is actually a copy of the work (or a part of it), usually in page format.

212. If it is true—and it seems to be true—that the display of a writing or a graphic work on a screen is reproduction and the presentation of the work is a copy, such a display is necessarily covered by the right of reproduction. The relationship between the storage of the work in the computer system (as a copy) and the screen display of the same work (as another copy) is similar to the relationship between a printing plate and the printed copies. The preparation of the printing plate does already qualify as the reproduction of the work and, of course, both that reproduction and the making of printed copies are covered by the right of reproduction. It is another matter that the preparation of the plate and the making of the copies can be—and actually are—considered as two stages of the same use, and usually both stages are covered—explicitly or implicitly—by the same authorization. When a writing or a graphic work is stored in a computer system for the purpose of making it available to the public through display on screens, the two acts of reproduction can be—and actually are—considered as two stages of the same complex use and usually the same authorization covers both (the authorization may also extend to another possible reproduction, namely to the hard–copy reprographic reproduction of the same work).

213. It follows from this "reproduction theory" that, in the case of storage in and retrieval from computer systems—through display on screens—of writings and graphic works, the transmission of electronic or optical signals from computer systems to end–users (screen–owners) should not be deemed as separate use (broadcasting or communication to the public) but rather as part of the same complex reproduction process. This does not mean, however, that such transmissions of signals escape copyright protection. The model of traditional (printing) reproduction of writings and graphic works is that the distribution of copies takes place *after* reproduction. In the case of computer storage and transmission to the public—for screen retrieval—of writings and graphic works, the process is different: the distribution takes place *during* the reproduction of the copies. While in the case of traditional reproduction techniques (such as printing), it can be questioned whether the right of distribution follows from the right of reproduction (in certain countries the answer is affirmative, and it seems to be correct), in the case of electronic distribution—or, as it is frequently called, "electronic delivery"—where distribution is part of the reproduction process, the recognition of a kind of implicit right of distribution (including distribution both by broadcasting and by wire) based on the right of reproduction seems to be inevitable.

214. The reproduction theory presented above offers a *de lege lata* solution (based on the provisions of the international copyright conventions about the right of reproduction) for the protection of authors' rights in respect of all elements of the use of works in the framework of storage in computer systems, transmission to the public and retrieval in the form of screen display of writings and graphic works. If the other—"traditional"—line is followed, in certain respects *de lege ferenda* solutions can only be offered, for example, through the recognition of a special "right of display." (This does not mean, however, that no basis exists in the international conventions for

the copyright control of display. Such control can be exercised through contracts authorizing input on the basis of the right of reproduction.)

215. It should be added that if the right of reproduction is recognized in respect of the display of writings and graphic works, all the provisions and considerations about this right should be necessarily applied. For example, as far as the limitations of this right are concerned, it seems to be fairly evident that it cannot be a sufficient basis for limitation that the work is displayed individually by end-users in private homes if it is done in the framework of a publicly available "electronic delivery" service. On the other hand, if, for exmaple, the owner of an off-line (on-disc) storage device displays a work for himself, such a reproduction should be exempt from the right of reproduction under both Article 9(2) of the Berne Convention and Article IV*bis*.2 of the Universal Copyright Convention.

Moral Rights

216. The Recommendations state as follows:

> "7. General provisions in national and international law on moral rights are also applicable to the use of computers for access to protected works. States should consequently ensure that the obligations in this respect following from the relevant instruments are duly taken into account."

217. This statement makes it clear that the author does not lose his moral rights by the fact that his work is stored in a computer system. The right to claim authorship includes the right to be named on the copies of the work or in connection with it. Computer systems should offer appropriate possibilities to meet such an obligation towards the author. However, this right should be exercised in a realistic manner taking into account the specific nature of this kind of use. Concerning the "right of respect," the special features of the storage in computer systems also should be taken into consideration. The limits of storage capacities, for example, may demand certain inevitable abbreviations or other changes which may concern the protected texts involved. The changes, however, should not be prejudicial to the honor or reputation of the author.

Limitations on Copyright

218. The Recommendations contain the following two complementary statements in this respect:

> "8. States should give special consideration to the application of the limitations of copyright protection permitted under international conventions (Articles 9(2), 10 and 10[bis] of the Berne Convention and Article IV*bis*.2 of the Universal Copyright Convention) and provided for in national laws with regard to the use of protected materials in computerized systems, taking into account the developments in the field of computerized systems and the impact which these sophisticated techniques may have on the application of such limitations.
>
> "9. States may consider the possibility of allowing in their domestic law, as an exception to the exclusive rights, certain uses of protected materials in computer systems but such use must be within the limits established by the international conventions on copyright and in no way reduce the level of protection provided for under the conventions."

219. Analyzing the Articles of the Berne Convention mentioned in point 8 of the Recommendations, it can be seen that Article 10(1) contains provisions on the possible free use in the form of quotations. In this respect, obviously, the generally prevailing interpretation and practice should be applied. It cannot be said, for example, that the quotations are "justified by the purpose" and "compatible with fair practice" if a data base is composed of nothing else but "quotations," or if quotations from a given work are so numerous that they may replace the reading of the whole work.

220. Article 10(2) provides for the use of works by way of illustration for teaching. The provision only mentions publications, broadcasts or sound or visual recordings in which works may freely be used for such purposes. As far as publications are concerned, the considerations in respect of reprography, as explained in paragraph 74 above, also apply here *mutatis mutandis*. Of the other uses, broadcasts may still be covered in the fairly rare cases (see paragraph 163 above) where the transmission of the electronically stored works qualifies as broadcasting.

221. Article 10[bis](1) provides as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved." This provision seems to be applicable in the field of electronic news publishing. Certain doubts may, however, be raised whether it is really in keeping with the spirit of this provision if, for example, a data base is composed of nothing else but such reproductions. What was considered at the adoption of this provision was the situation where the press uses such reproductions but their making available is not the sole purpose of a press medium.

222. Under Article 10[bis](2), "[i]t shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public." The application of this provision may be justified in certain situations also in respect of the use of works in computer systems. Such situations, however, are hardly typical for the time being.

223. Finally, as far as Article 9(2) of the Berne Convention and Article IV*bis*.2 of the Universal Copyright

Convention are concerned, they are analyzed in detail in respect of reprography, and the considerations discussed there are applicable *mutatis mutandis* also in respect of the use of works in computer systems (and, particularly, in the case of the reprographic reproduction of works at the stage of output).

224. There seems to be only one typical situation which should be discussed here separately. This is the problem of certain so-called "one use input" where storage assists in solving certain problems, for example, for the purpose of linguistic, syntactic or semantic analyses, as well as the case of indexing, where the selection of the descriptors is made by the computer itself and the full text must first, therefore, be stored. In these cases, it can be assumed—at least if the material stored is removed after the solution of the problem—that the input "does not unreasonably prejudice the legitimate interests of the author" in the sense of Article 9(2) of the Berne Convention and that an exception with regard to such input would neither "conflict with the spirit and provisions" of the Universal Copyright Convention nor diminish "a reasonable degree of effective protection" in the sense of Article IV*bis*.2 of that Convention. Sufficient latitude is, therefore, left for national laws to provide for an appropriate solution to this legal problem.

225. The Recommendations contain a separate point in respect of developing countries which reads as follows:

> "10. To the extent to which the right of translation and reproduction is concerned, in relation to storage in and retrieval from computer systems of protected works, the developing countries may avail themselves under national legislation of the relevant special provisions contained in the Paris Act of the Berne Convention and the Universal Copyright Convention as revised in 1971."

226. This statement is based on a liberal interpretation of the provisions of the Appendix to the Berne Convention and of Articles V*bis*, V*ter* and V*quater* of the Universal Copyright Convention. Appropriate exceptions might, however, also be introduced on the basis of, at least as far as reproduction is concerned, Article 9(2) of the Berne Convention and Article IV*bis*.2 of the Universal Copyright Convention. In this respect, see also paragraphs 80 to 82, above, about the question of the applicability of the Appendix to the Berne Convention and of Articles V*bis*, V*ter* and V*quater* of the Universal Copyright Convention in regard of reprographic reproduction.

Administration and Exercise of Rights and Legislative Measures

227. The Recommendations offer the following principles in this respect:

> "11. Storage in together with retrieval from computer systems of protected works should be based upon contractual agreements or other freely negotiated licenses arranged either individually or collectively. Taking into account that both authors and society at large are mutually interested in rapid and easy dissemination of works, States should consider undertaking appropriate measures to facilitate effective systems for the proper exercise and administration of rights in respect of works used in computer systems and practical possibilities for the exercise of moral rights.
>
> "12. The introduction of non-voluntary licenses in respect of use of protected works in computer systems is permissible only when freely negotiated licenses as mentioned in the preceding paragraph are not practicable and only to the extent to which such licenses are compatible with the relevant provisions of the international conventions on copyright. Although such use of protected works in computer systems can have a transborder character, the effect of non-voluntary licenses would be applicable only in the State where such licenses have been prescribed."

228. These seem to be well considered statements. It may be added that the practical examples discussed in respect of the administration of copyright concerning reprographic reproduction show clearly that appropriate collective administration schemes can be applied, and that, therefore, recourse to non-voluntary licenses can be avoided. Such collective administration schemes can be implemented also in the field of storage in and retrieval from computer systems of protected works.

Conclusions

229. On the basis of the above analysis of the copyright questions of the storage in and retrieval from computer systems of protected works, the following principles are offered for consideration which, practically, contain two alternatives: Principles PW9 to PW14—with the omission of the words in square brackets—correspond to the "traditional" approach according to which the display of writings and graphic works is not reproduction, while Principles PW9 to PW11 and PW14, with the inclusion of the words in square brackets, are based on the "reproduction theory" described in paragraphs 211 to 215.

Principle PW9. (1) The storage in computer systems (either in the internal memory of a computer or in external storage devices, such as magnetic or optical discs) of writings and graphic works is covered by the author's exclusive right to authorize the reproduction of his work.

(2) The retrieval of writings or graphic works from computer systems by means of reproduction in any manner or form (hard-copy printout, facsimile reproduction, transfer into other devices for internal or external storage, [display on screen,] etc.) is a separate act of reproduction and is subject to the author's exclusive right to authorize the reproduction of his work.

(3) The author's exclusive right to authorize the reproduction of his work mentioned in paragraphs (1) and (2) should not be limited but in the cases and to the extent that the international copyright conventions permit the limitation of the right of reproduction.

(4) In providing for limitations (free uses or nun–voluntary licenses) to the right of reproduction, Principles PW3 and PW4 apply mutatis mutandis.

Principle PW10. In respect of the applicability of non–voluntary licenses as well as of the need for promoting collective administrative schemes and the measures guaranteeing the appropriate operation of such schemes, Principles PW5 to PW8 apply mutatis mutandis.

Principle PW11. The author should have an exclusive right to authorize the rental of copies of his work stored in external storage devices (magnetic or optical discs, etc.) to be used for computer systems.

Principle PW12. Acts by which a work stored in a computer system are transmitted by broadcasting or by any other means of wireless diffusion to the public should be considered as broadcasting and should be covered by the author's exclusive right to authorize such acts. In respect of the availability of non–voluntary licenses as well as of the copyright implications of satellite broadcasting and cable retransmission of broadcast programs, the general principles and provisions of the international copyright conventions and national copyright laws should be applied.

Principle PW13. The author should have the exclusive right to authorize the display of his work, stored in a computer system, on a screen or in any similar manner at a place open to the public or at any place where a substantial number of persons outside a normal circle of family and its social acquaintances is gathered.

Principle PW14. The author should have the exclusive right to authorize the communication of his work, stored in a computer system, [by broadcasting,] by wire (cable, telephone line, etc.) or by any other similar means, to the public to be displayed [(reproduced)] on a screen or in other similar manner, irrespective of whether the members of the public capable of receiving the communication of the work to be displayed [(reproduced)] receive it in the same place or in separate places and at the same time or at different times.

Principle PW15. The author of a work which is stored in and retrieved from a computer system, independently of his economic rights and even after the transfer of the said rights, should have the right to:

(a) claim authorship and, as far as it is practicable, have his name mentioned in connection with his work;

(b) object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work which would be prejudicial to their honor or reputation.

230. The above principles refer only to writings and graphic works and not to other works (musical works, audiovisual works, etc.) which may also be stored in computer systems. There are two reasons for this. The first is that the task of this document is to deal with the "printed word" (writings, etc.) and the principles and comments discussed in it are extended only to graphic works whose nature is similar to that of writings, etc., in respect of the copyright questions involved here. The second reason is that for the time being, mainly writings and graphic works are stored in computer systems. It should be noted, however, that new phenomena have just started appearing in the field of "electronic publishing." For example, the off–line (on–disc) publication of "electronic encyclopedias" which, in addition to texts and graphic works, also contain excerpts from audiovisual works, musical works and recitations of literary works. It seems that such new publications and their use raise a lot of complex copyright and so–called neighboring rights problems which can be discussed in due course.

Special Considerations About Data Bases

231. As indicated in the General Remarks above, the most widespread version of the use of protected works in computer systems, for the time being, is the inclusion of such works in electronic "data bases" (which, in the field of information technology, means any organized machine–readable collection of "data").

232. The principles and comments above in relation to the storage in and retrieval from computer systems of protected works apply also to cases where such storage and retrieval are made in the framework of electronic data bases. This is what one may call the protection against unauthorized use of protected works in data bases.

233. Data bases as such represent the results of significant intellectual, organizational and financial efforts, fulfill an important role in the field of dissemination of information and knowledge and, at the same time, are vulnerable to unauthorized utilization and reproduction.

234. It follows from the development of computer and communications technologies and from the spectacular increase in the speed of data transmission as well as in storage capacities, that it is fairly easy to reproduce data bases or important parts of them. If data base producers are not granted appropriate protection against such acts when unauthorized, they may lose their interest in maintaining and operating these valuable information sources. Therefore, it seems to be necessary that data base producers should be granted appropriate protection.

235. It seems that data bases may enjoy protection under the general provisions of international copyright conventions and national copyright laws on the basis of two possible concepts.

236. The first possible basis is the indirect protection that data base producers may enjoy through the fact that the works included in data bases are works protected by copyright. There are, however, many data bases that contain material which is not protected by copyright or, at least, there is doubt whether the material is eligible for copyright protection or not.

237. The other possible legal concept for the protection of data bases is more comprehensive and does not depend on whether the individual "data" are protected themselves by copyright; that is the protection of data bases as original compilations.

238. Under Article 2(5) of the Berne Convention: "Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections." This provision only refers to the collection of literary and artistic works. However, because the emphasis is on the original nature of the selection and arrangement of the contents of the collection, a number of national laws do not restrict copyright protection to collections composed of works but extend it to any collections of information, data, etc., if such collections are of original nature by reason of selection, arrangement, etc.

239. In the framework of recent revisions of copyright laws—at least in certain industrialized countries—special attention is paid to the problem of data bases. For example, the definition of "compilation" in section 101 of the 1976 Copyright Act of the United States of America explicitly mentions collections of data: "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."

240. In Japan, the Law for Partial Amendments to the Copyright Law of May 23, 1986, has gone even further. The new Law, in addition to the general provisions about the protection of compilations, contains an explicit provision (Article 12*bis*), entitled "data base works" which reads as follows:

> "(1) Data bases which, by reason of the selection or systematic construction of information contained therein, constitute intellectual creations shall be protected as independent works.
>
> "(2) The provision of the preceding paragraph shall not prejudice the rights of authors of works which form part of data bases defined in that paragraph."

Another new provision (Article 2(1)(*xter*)) defines data bases as follows:

> " 'data bases' means an aggregate of information such as articles, numerals or diagrams, which is systematically constructed so that such information can be searched for with the aid of a computer."

241. It seems, therefore, that the copyright protection of data bases at the national level may, in many cases, be guaranteed irrespective of whether they contain protected works or not. However, it follows from the text of some of the above-mentioned national provisions—or even if not directly from their text but from the practice of courts in respect of the extent of originality necessary for copyright protection—that there may be certain kinds of data bases which are not protected by copyright. This may happen fairly frequently in countries where the concept "originality" means not only that the work is the result of an independent effort using skill and labor, but—and this is much more—that originality is the kind of expression of the personality of the author. The application of such a condition may lead to subjective value judgments and, consequently, to legal uncertainty; in several cases, the creator cannot be sure whether his production enjoys copyright protection until the court finds that its level of creativity is enough for copyright protection.

242. In countries where data base producers and operators face such uncertainties, this legal situation may cause that information services develop more slowly than what would be normal.

243. It would be hardly realistic to suggest that in the countries concerned the conditions of originality and copyright eligibility should be reconsidered. Other ways should be found. The application of contractual solutions and of the provisions on unfair competition may be considered and utilized in practice. Those legal means, however, do not offer the kind of exclusive right which would be needed for the safe development of data base production and of distribution of material from such bases. Therefore, the recognition of a specific right of exclusive nature would seem to be a more satisfactory solution.

244. In fact, there is an example at the national level which may be considered in this respect, namely the so-called "catalog" protection existing in Denmark, Finland, Norway and Sweden. For example, section 49 of the Danish Copyright Act provides as follows: "Catalogs, tables and similar productions in which a great number of items of information have been compiled, as well as programs, may not be reproduced without the consent of the producer until 10 years have elapsed from the year in which the production was published." There are similar provisions in the copyright laws of the other three Nordic countries mentioned above. These provisions only apply to productions originating in the country concerned and have no international application, not even between the Nordic countries themselves.

245. Works or other "data" which individually do not enjoy protection (works, because they are in public domain and other "data" because they do not qualify as works) do not, of course, become protected by the mere fact that they are included in electronic data bases which, because of their original nature, are eligible for copyright protection. Therefore, the reproduction of such individual data should remain free. What should be made dependent on the authorization of the producer of a data base only is the reproduction of the whole or of a substantial

part of the data base (in which the original character of the selection, coordination and arrangement of the data is manifested).

246. On the basis of the above considerations, the following principles are proposed for consideration:

Principle PW16. (1) "Electronic data base" means an aggregate of information—which may include protected works but may also be composed only of non-protected works or other data—and which is systematically arranged and stored in computer systems.

(2) In respect of the storage in and retrieval from computer systems of writings and graphic works as parts of electronic data bases, Principles PW9 to PW15 should apply.

(3) Electronic data bases which, by reason of the selection, coordination and arrangement of their contents, constitute intellectual creations, should be protected as such without prejudice to the copyright in each of the works which may form part of such electronic data bases. In respect of the protection of such electronic data bases, Principles PW9 to PW15 should apply mutatis mutandis.

Principle PW17. (1) In respect of electronic data bases which are not eligible for copyright protection because of their lack of originality, the granting of a specific protection to data base producers should be considered.

(2) The specific protection mentioned in paragraph (1) should include the exclusive right of data base producers to authorize the reproduction, in any manner or form, of the data bases produced by them or substantial parts thereof.

Principle PW18. The term of protection of the right mentioned in Principle PW17(2) should not be shorter than 10 years calculated from the end of the year in which the data base is first made available to the public or, after having been made available to the public, is substantially updated.

Principle PW19. The limitations applicable in respect of literary and artistic works included in electronic data bases should also be applicable in respect of the right mentioned in Principle PW17(2) or of any other rights which may be granted to data base producers.

Principle PW20. The specific protection granted to data base producers according to Principles PW17 to PW19 should leave intact and should in no way affect the protection of copyright in literary and artistic works included in electronic data bases.

Expert Systems

247. Expert systems represent one of the branches of what is called artificial intelligence technology. An expert system is an information retrieval system which combines the storage of specialized knowledge with the ability to imitate and apply certain thought processes for processing and manipulating that knowledge and thus to produce answers to certain questions and problems. Such systems are applied in fields where the knowledge of experts can be expressed in a series of simple, step-by-step—"if ... then" type—rules.

248. Expert systems are considered either as a special type of computer programs or as a combination of data bases with such programs. Such systems may raise specific copyright questions. However, since the present document— as it is mentioned in the Introduction—does not deal with computer programs, and since expert systems involve a specific version of such programs, they are not discussed in this document.

Report 76. The delegations which spoke on this subject matter underlined the usefulness of the memorandum, particularly in view of the detailed description of the technology and the suggestions for legislative solutions contained in it which elements were of special importance for future legislative measures at the national level.

Report 77. All delegations which spoke, furthermore, said that they were in general agreement with the principles proposed. Several delegations expressly stated that they accepted that storage of protected works in a computer system as well as retrieval of such works in the form of hard-copy printouts were a form of reproduction and that they were also in agreement with the proposed principles as regards the protection of data bases.

Report 78. As regards display on screen several delegations said that they considered such a display not as a reproduction of the work, because the copy of the work was not obtained in tangible form, but as a communication to the public or a public performance which was covered by the author's exclusive right. One delegation referred to case law in its country under which the showing of a work on a screen was not considered as producing a copy of the work, but noted that an express right of public display of literary and graphic material was now provided in its copyright statute.

Report 79. Several other delegations and observers from international non-governmental organizations were in favor of further study concerning the possibility of qualifying display as reproduction. Some of these participants underlined the fact that it was enough that a work was reproduced and that it was not a further condition that the reproduction be a

tangible and lasting fixation; uses of programs run in computers could be a good example of such short-term fixations which were recognized as reproductions of the work concerned.

Report 80. One delegation proposed that the following sentence should be added to the end of Principle PW9, paragraph (1): "In any case, the storage of a work which has not been published or otherwise made available to the public should not be allowed without the written authorization of the author."

Report 81. An observer from an international non-governmental organization suggested that in Principle PW9, paragraph (2), the words "and new" should be inserted after the word "separate" to create the phrase "is a separate and new act of reproduction." The observer was of the opinion that it was not enough simply to state that the retrieval of writings or graphic works from computer systems was a separate act, as that could be deemed to be a separate act carried out by or applicable to the same persons. What must be considered was that when a work was first stored in and then retrieved from a computer system (in whole or in part)—retrieved by an outside person or organization—that act was not only a separate use, but a new use. It was a new use because the ownership of the copyright could—and should—change when the work ceased to be a printed word and became stored and retrievable information. Provision should be made to facilitate the proper reversion of ownership to the original author where national legislation so permitted or made possible.

Report 82. Some delegations expressed reservations concerning the rental right proposed in Principle PW11 as regards external storage devices. These delegations said, inter alia, *that such a right was not envisaged in their national laws and that if there were reasons why works stored in such devices should be treated differently from other types of copies of works, those reasons were to be clearly clarified and further analyzed before any decision could be made on this principle. Some other participants were of the view that the recognition of a right of rental was justified in respect of external storage devices.*

Report 83. One delegation expressed concern about the scope of the limitations provided for in Principles PW13 and PW14 as applied to electronic publishing and particularly to data bases. In its opinion, these limitations should be as restricted as possible.

Report 84. One observer from an international non-governmental organization proposed that in respect of works created by employed authors, particularly as far as newspaper publishing was concerned, Principle PW15 on moral rights should be modified so as to be in keeping with Alternative B of the Model Provisions adopted by the Unesco/WIPO Committee of Governmental Experts on Model Provisions for National Laws on Employed Authors in Geneva in January 1986. The provisions in Alternative B of the Model Provisions on moral rights were, in his opinion, in conformity with the well-established practice in the field of newspaper publishing. The observer also proposed, as an alternative, the deletion of Principle PW15. He also said that if neither of his proposals was adopted, in point (a) of Principle PW15, the words "and practice" should be added after the word "practicable," and point (b) of the same Principle should be made more flexible taking into account both the Anglo-American and the so-called continental copyright traditions.

Report 85. One delegation proposed that the first sentence of Principle PW16, paragraph (3) should mention further possible acts which would result in recognizing data bases as intellectual creations. The sentence should refer to data bases which, by reason of the "selection, collection, coordination, assembling or arrangement of their contents, etc." constitute intellectual creations.

Report 86. The same delegation furthermore expressed serious reservations concerning Principle PW17 on a possible sui generis *protection of data bases, and also concerning Principles PW18 to PW20 related to that Principle. It expressed the opinion that States should extend copyright protection to electronically compiled collections of data on the basis of a reasonable standard of originality and certainly should never insist on a higher standard than for traditional compilations. Data bases should not be discriminated just because the collection of the data was made electronically. Not to recognize copyright protection in such cases would merely be interpreted as failure to adapt copyright law to changing technological circumstances. The danger inherent in a* sui generis *protection was that it would fall outside the system of the international copyright conventions and their principle of national treatment, that the coexistence of a copyright and a* sui generis *protection could result in a dilution of the copyright protection and, finally, that a* sui generis *protection could in itself be too broad and cover also fairly meager collections which were not worthy of protection.*

Report 87. Some participants shared the opinion of the above-mentioned delegation while some other participants were of the view that the need for a sui generis *protection of certain data bases could not be*

excluded. One delegation referred to the sui generis *protection of catalogs and similar collections of data which existed in the Nordic countries and said that just because it was not justified to differentiate protection according to whether a collection was made on paper manually or in a computer electronically, that certain computerized data bases should necessarily share the status of collections protected under* sui generis *protection. It was also emphasized that there were countries where mere skill and labor were not enough for collections to qualify as works protected by copyright on the basis of the notion of originality prevailing in such countries but where the significant investments made by data base producers did, on the other hand, need and deserve some kind of protection.*

Report 88. One delegation said that while certain data bases could be protected by copyright as compilations of original character, other data bases which were not original did not enjoy copyright protection. In the view of that delegation non–protected works were not covered by the terms of reference of the Committee and should not be dealt with.

Report 89. An observer from an international non–governmental organization stressed that there was an urgent need to offer a global and legally safe protection to data base producers, otherwise they might become reluctant to invest in such an expensive and at the same time ever more vulnerable service.

Report 90. One delegation drew attention to the distinction made in a decree of its country between "data bases" and "data banks," the latter concept being used essentially for bases which were consulted by users.

Report 91. One delegation proposed that in Principle PW16 a new paragraph should be inserted to read: "When a summary of a work is stored in a computer system, such a summary should be made either by the author of the work himself or on the basis of his authorization." An observer from an international non–governmental organization expressed concern whether it was meant by that proposal that authorization to prepare a summary would be required if it would not otherwise amount to an infringement of rights.

Report 92. One delegation drew attention to the fact that in certain countries the application of the notion of publication to data bases might raise difficult and complex legal problems.

Report 93. Some participants were of the view that the term of protection suggested in Principle PW18 was too short and that it should rather be at least 20 years which was the minimum term of protection under the Rome Convention in respect of other productions covered by the so–called neighboring rights.

Report 94. One delegation stressed the importance of collective administration in respect of the exercise of rights in connection with the storage in and retrieval from computer systems of protected works.

Report 95. An observer from an international non–governmental organization asked that it be made clear in Principles PW13 and PW14 that "public" included limited segments of the public such as groups, clubs, subscribers, networks, etc.

V. Public Lending Right

General Remarks

249. One of the most fundamental purposes of copyright is that it guarantees for autbors an appropriate remuneration—normally in proportion to the success of their works—for their creative activity and, through such guarantee, acts as an incentive for the creation of further literary and artistic works.

250. Such remuneration is guaranteed by means of economic rights on the basis of which the author is in a position to authorize all the major forms of utilization of his work dependent on his authorization or, on the basis of which, he is at least entitled to equitable remuneration.

251. In respect of the "printed word," the most fundamental right is the right of reproduction. This right enables the author to determine—by the contract concluded with the publisher—certain conditions of the distribution of his work (number of copies, territories, languages in which it is distributed, etc.) and to provide for appropriate remuneration.

252. Libraries play a double role in the distribution chain of the "printed word" (books, etc.). On the one hand, they are buyers and, in paying for the copies, they contribute to the income of the publisher and indirectly to the remuneration of the author. On the other hand, however, the overwhelming majority of libraries make available their collections to the public. The members of the public, instead of buying copies of the book, come to the library and borrow books. The work thus reaches the public—perhaps a very wide public—but the success of the book is not expressed in an appropriate income for the creator.

253. Sometimes, widespread loaning by libraries leads to a significant decrease in the number of copies bought by the public. In certain cases, contracts guarantee to authors an appropriate remuneration irrespective of the

proportion of copies actually sold. (This is, for example, the situation in the Eastern European socialist countries where authors usually receive the whole remuneration for all copies upon the publication of the work.) If, however, the remuneration (or at least a significant part of it) is paid on the basis of the number of copies sold—which is a fairly general practice in market-economy countries—the author may suffer big losses, and even the very economic basis of his creative activity may be jeopardized. In such a situation, appropriate legislative steps should be taken for preserving the economic value of authors' rights (and if the publishers' activities are also endangered, such steps should also extend to countermeasures in their interest).

254. Authors' rights traditionally do not extend to the authorization of the resale, rental or lending of copies already sold. The right of distribution which would cover such acts either does not exist or, even if it exists, after the sale of the copies, it is considered as exhausted. This legal situation did not cause any serious impact in the past when the kind of activities just mentioned were of secondary and complementary nature and did not have a serious impact on the market. Recently, however, in certain cases, for example in the case of videograms, rental has become the main channel of distribution, and now one of the ways to preserve the fundamental value of copyright in this respect is granting the owners of copyright an exclusive right to authorize rentals.

255. Public lending of books by libraries is of a different character than commercial rental of videograms. Those who borrow books do not pay fees or, although they pay some fees, those fees are nominal or of a symbolic nature. Governments, municipalities and other institutions running libraries do not intend to change this situation because, for educational, cultural and social reasons, they wish to make available the sources of knowledge and entertainment offered by libraries totally, or practically, free of charge.

256. Such libraries, of course, can lend books and other material free of charge only because they are heavily subsidized. Here, one is faced with the typical situation in respect of subsidized cultural activities: both the institutions (and their staff) and the public are subsidized; there is only one category which is left out from the benefits of this generous financial support, namely the authors whose remuneration is calculated on the commercial results of the distribution of copies of their works.

257. Such a situation may hardly be considered normal. It seems that if there is no other solution, then the subsidy itself should be shared in such a way that authors, too, will benefit from it. To take such steps would not be a matter of charity or generosity; it should be an obligation. Authors are entitled at least to the minimum right to receive equitable remuneration for the use of their creations.

258. The right of authors to receive remuneration—generally from public sources—for the lending of copies of their works by libraries is what is called "public lending right."

Provisions in National Laws About Public Lending Right

259. A public lending right was first introduced in Denmark in 1946. Denmark was followed by the other Nordic countries Finland, Iceland, Norway and Sweden. In addition to those countries, such a right exists now also in Australia, the Federal Republic of Germany, the Netherlands, New Zealand and the United Kingdom.

260. There is only one country, the Federal Republic of Germany, which provides for public lending right in the framework of the Copyright Law. In the other countries, public lending right is regulated outside copyright law and is officially qualified as a kind of cultural or social assistance institution. Nevertheless, for example in the Danish Copyright Act, there is at least a reference to public lending right. Section 23 provides as follows: "When a literary or musical work has been published, copies included in the publication may be further distributed or exhibited publicly. ...The rule in the foregoing paragraph does not restrict in any way the author's right to remuneration for books loaned to the public through the libraries."

261. The reasons for introduction of such a right, as reflected in legislative history, as well as the legal basis and the operation of public lending right systems indicate that their real nature is other than that of a mere general cultural or social institution. Public lending right is intended everywhere to compensate authors for the use of their works by the general public and thus to guarantee them appropriate economic conditions for the creation of further works, and, in the majority of cases, the remuneration is paid to the authors—more or less—in proportion to the actual use of the copies of their works.

262. Copyright protection, of course, serves important cultural and social purposes, but this does not make it a general cultural or social institution. Copyright is a bundle of all the rights authors are entitled to enjoy for the use of their creations; and public lending right is such a right.

263. This nature of public lending right is recognized, in general, when governments and legislators discuss its introduction. The recognized reason why it is still placed outside the framework of copyright law is, usually, to avoid the application of this right—on the basis of the principle of national treatment—in favor of foreigners.

264. It follows from the above-mentioned considerations that, in general, only authors who are citizens or residents of the countries concerned are entitled to public lending rights. The only exception is the Federal Republic of Germany, where the right of foreigners is also recognized.

265. The entitlement to public lending right is usually—more or less— restricted to certain categories of writers or other authors (illustrators, translators), and certain categories of publications (for example, scientific books or encyclopedias) are excluded.

266. The basis for the collection of public lending right payments is either the number of books stocked in libraries, or the number of loans effected or both, which numbers are established through sampling systems. In Finland, a specific solution prevails: there is no sampling, and the amount of payment is calculated as a percentage of the annual subsidy for libraries for the purchase of books.

267. Public lending right payments are covered by public funds (in general, by government or municipal budgets) and collected by special institutions—usually of a semi-public nature—such as national authors' funds. In the Federal Republic of Germany, however, public lending right payments are collected and administered by private collecting societies (the latter being a condition under the law itself).

268. The amount collected in certain countries (like in Denmark, the Federal Republic of Germany, Sweden) is paid out to individual authors even if a certain percentage is used for general cultural and social purposes. In other countries (like in Finland, Norway) there is no individual distribution: the whole amount is used for the writers' collective purposes.

269. In some countries (such as Australia, the Federal Republic of Germany) publishers also receive a certain percentage from the public lending right payments (it is thus recognized that public lending does also concern their justified interests). In the United Kingdom, the law provides that public lending right is assignable: thus in this country publishers may enjoy it as assignees. In the majority of countries, however, where public lending right exists, it is not assignable (that is also the case in Australia in respect of the portion to which authors are entitled).

270. In general, only authors and their close relatives (spouse, children) enjoy public lending right during their lifetime (for children, until their age of majority). In Australia, however, the term for the enjoyment of this right is the lifetime of the owner or 50 years from the date of first publication, whichever is later.

The Principle of National Treatment and Public Lending Right

271. Neither the Berne Convention nor the Universal Copyright Convention contains any provisions about public lending right, and granting such right is not an obligation of any country party to those conventions.

272. Article 5(1) of the Berne Convention, however, provides as follows:

> "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."

273. Article II of the Universal Copyright Convention provides as follows:

> "1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.
>
> "2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.
>
> "3. For the purpose of this Convention, any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State."

274. On the basis of the above-quoted provisions, it is clear that countries party to those conventions are obliged to grant the same rights to the authors of other countries party to the same conventions as those which their own authors enjoy in respect of works protected under the conventions.

275. Writings and graphic works included in books and similar publications are protected under the copyright conventions. Public lending right is a right that authors enjoy in respect of such works. Therefore, it follows from the Berne Convention and the Universal Copyright Convention that if a country party to these conventions grants a public lending right to authors, it should grant the same right to authors of other countries party to the same conventions. As a general rule, countries party to these conventions are not exempt from the obligation to grant foreigners national treatment just because they provide for rights of authors in a law other than the copyright law or just because they call these rights something other than copyright. The fact that the rights of authors in respect of the use of their works serve certain social purposes (such as guaranteeing appropriate conditions for creative activity) does not change the legal nature of this right either. Copyright does serve such purposes; it is one of its fundamental functions.

Conclusions

276. On the basis of the above analysis, the following principles are offered for consideration:

> **Principle PW21. (1) In countries where widespread lending by libraries of books and similar publications to the public unreasonably prejudices the justified interests of authors of writings and graphic works protected by copyright and included in such books and similar publications, the introduction of a right of the authors concerned to receive equitable remuneration for such lending ("public lending right") should be considered.**
>
> **(2) If public lending right is recognized in a country party to the Berne Convention or the Uni-**

versal Copyright Convention, foreign authors should be granted the same right in accordance with Article 5(1) of the Berne Convention and Article II of the Universal Copyright Convention, respectively.

Principle PW22. (1) Public lending right should be exercised through collective administration organizations.

(2) The amounts of remuneration collected for public lending—after the deduction of the actual costs of collective administration and other potential deductions that the owners of copyright whose rights are represented by the collective administration organization explicitly authorize—should be distributed, whenever possible, among the owners of copyright in proportion to the actual extent of the use of their works for lending purposes.

277. This chapter of the document deals only with the public lending of books and similar publications containing writings and graphic works. In respect of rental and lending of copies of other categories of works, other considerations prevail. There are certain vulnerable publications, such as sheet music, where any limitations of an exclusive right of rental and public lending could lead to detrimental consequences and to serious conflict with the normal exploitation of the works concerned. In such a case, the introduction of a public lending right—which is only a right to remuneration and not an exclusive right—is not an appropriate solution. In respect of the rental and public lending of videograms and phonograms, the working document prepared for the Committee of Governmental Experts on Audiovisual Works and Phonograms (Paris, June 1986) contains principles and comments.

Report 96. Several delegations stated that they were not opposed to the proposed principles, but stressed that the public lending right schemes in operation in their countries were to be seen as a form of support for national cultural activities and did not confer any transferable and inheritable rights to authors and, therefore, could not be considered as being covered by obligations under copyright law.

Report 97. A number of participants considered the recognition of public lending right premature and expressed reservations with regard to the proposed principles.

Report 98. One delegation declared that it fully supported the text in the memorandum, including Principles PW21 and PW22, and said that in its country the public lending right was part of the copyright law and that payments were also made to foreign authors on the basis of the principle of national treatment.

Report 99. One delegation questioned whether one should not construe the public lending right as an exclusive right subject to a compulsory license rather than as a mere right to remuneration.

Report 100. A number of delegations gave factual information about the public lending rights schemes in their countries and about the contents of existing or envisaged legislation in this field.

Report 101. One delegation suggested that Principle PW21, paragraph (1) be amended so as to refer to a right to equitable remuneration not only for authors concerned but also for their successors in title. It also suggested that the principle should apply only to lending by public libraries and furthermore said that one could consider referring, in Principle PW21, paragraph (2) concerning the application of national treatment, only to public lending right for profit-making purposes.

Report 102. One delegation expressed its support for the approach in Principle PW21 suggesting the introduction of a public lending right in countries where widespread lending by libraries unreasonably prejudices the interests of authors, but said that the proposed principles were premature for the time being. The right to remuneration should, in the opinion of that delegation, not necessarily be linked to the use of the work, but should be introduced when there was a need for action in supporting national creativity. Doubts had been expressed in its country as to whether a public lending rights scheme had to be established inside copyright law; if it was established outside such law, the extension of it to foreign works would be determined on the basis of a policy choice rather than on the basis of conventional obligations. Furthermore, the suggestions in Principle PW22 were, in its opinion, too detailed; the questions mentioned there would be best solved by the organizations themselves.

Report 103. Another delegation mentioned that the question of introducing a public lending right had been considered in its country but that a special system outside copyright law had been proposed. It joined the statements of the previous speaker to the effect that the proposals in the document were premature for the time being.

Report 104. One delegation expressed its disagreement with the statement in paragraph 275 of the memorandum where it is said that the public lending right is a right to be enjoyed by the authors and that countries were not exempt from their obligations in respect of national treatment just because rights of authors were provided for in a law other than copyright law; in the opinion of that delegation

the form in which the right was put was also important.

Report 105. One delegation said that its country had recently introduced a new copyright law in which there were no provisions on a public lending right. The delegation could, however, agree with a great deal of what was said in the memorandum as regards the justification for such a right. It suggested that in Principle PW21, paragraph (1) the word "justified" in relation to the interests of authors should be deleted and that one should speak of "fair" remuneration instead of an "equitable" one. In relation to Principle PW22, paragraph (2) the delegation considered that it went too far.

Report 106. One delegation said that it could accept Principles PW21 and PW22. It questioned, however, whether in Principle PW21, paragraph (1) the introduction of a public lending right should be linked to an unreasonable prejudice caused to authors by the lending or whether one should not rather just refer to situations where library lending was extensive.

Report 107. An observer representing an international non-governmental organization stressed the damage which public lending caused to the sale and other exploitation of books. It suggested that in the text of Principle PW21, paragraph (1) reference should be made not only to the authors but also to their successors in title and that the right should last for as long as the work was protected. The observer pointed out that in certain countries sheet music was also lent by libraries and suggested that such a practice conflicted with the normal exploitation of works and prejudiced the legitimate interests of authors and other copyright owners, therefore public lending right should also be recognized in respect of sheet music.

Report 108. Some observers representing international non-governmental organizations expressed their full support for Principles PW21 and PW22. One of those observers also stated its opposition to any limitation of the benefits of a public lending right to national authors. It also opposed a suggestion by a previous speaker that the right be limited to lending by public libraries. In its opinion lending in other libraries was also of considerable importance in this context.

Report 109. An observer representing an international non-governmental organization supported Principles PW21 and PW22 and stated that, in its view, Article 5(1) of the Berne Convention on national treatment was applicable to public lending right schemes.

Report 110. An observer representing still another international non-governmental organization said that the obligations under the international copyright conventions had to be interpreted in the light of international public law and with due regard to the practice of the States concerned and that, therefore, the obligations of States under the said conventions in respect of the public lending right were not as clear as indicated in the memorandum.

VI. The Right to Authorize Translations. The Rights of Translators

General Remarks

278. In relations between countries where different languages are spoken, translations provide the principal medium for facilitating the dissemination of the works of the mind. Indeed, it is through the intermediary of translations that the public of one country comes to know the works of an author of another.

279. The right of translation is a fundamental right of the author of an original work. There are some rare cases where the author himself prepares a translation of his work. However, in general, he authorizes others to do so. Translations, along with adaptations and other similar alterations of works, are often called derivative works, a term which means that they are based on preexisting works. Such alterations, of course, deserve the qualification of "work" only if they really contain additional creative elements. If they do, they are protected by copyright.

280. There is a close link between the right of the original author to authorize the translation of his work and the rights of translators. The present document deals with those rights separately, but with due attention to their close relationship.

The Right to Authorize Translations (the "Right of Translation")

281. The right of translation is one of the exclusive rights of the author which has been provided for in the Berne Convention since its commencement (Article 8). It allows the author to translate the work himself or to authorize someone to transform the work, in another language, in such a form that the thought, style and message of the original work are faithfully communicated.

282. The provision of the original 1886 text of the Berne Convention on the right of translation was the result of a compromise. Under Article 5 of that Act, the term of protection of the right of translation was 10 years following the publication of the original work.

283. The Additional Act adopted at Paris in 1896 amended the Convention so as to afford the same term of protection to the right of translation as to other rights in

protected works. At the Berlin revision conference in 1908, the Convention gave signatory countries the possibility of making reservations. This possibility was limited to the right of translation at the Rome revision conference in 1928. At the next revision conference at Brussels in 1948, the term of protection of the translation right was retained and confirmed as extending throughout the author's lifetime and for 50 years after his death. However, signatory countries were left the possibility of retaining the benefit of reservations they had previously made, in pursuance of Article 5 of the original text of the Convention, as supplemented by the Additional Act of Paris in 1896, and this possibility was extended to countries newly acceding to the Berne Convention.

284. Article 30(2)*(b)* of the 1971 Paris text of the Berne Convention is the result of this development. It reads as follows:

> "Any country outside the Union may declare, in acceding to this Convention and subject to Article V(2) of the Appendix, that it intends to substitute, temporarily at least, for Article 8 of this Act concerning the right of translation, the provisions of Article 5 of the Union Convention of 1886, as completed at Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. Subject to Article I(6)*b* of the Appendix, any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country."

285. This provision is known as the "10–year regime." Its application is not restricted to developing countries, but it is only applicable in respect of countries that are not yet members of the Berne Union. There are only two such industrialized countries (the Soviet Union and the United States of America). The importance of this provision is small for two reasons. First, for the time being, there are only four countries (Cyprus, Iceland, Turkey and Yugoslavia) where this regime is applicable. Second, if there is any country which may consider in the future the possibility of limiting the right of translation when adhering to the Convention, it will probably be a developing country, and in respect of such countries the Appendix to the Berne Convention offers a more up–to–date and comprehensive solution.

86. The Universal Copyright Convention also recognizes the right of translation. Article V provides that the right of authors mentioned in Article I of the Convention "shall include the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under this Convention."

287. Under paragraph 2 of the same Article "[h]owever, any Contracting State may, by its domestic legislation, restrict the right of translation of writings ..." subject to certain detailed provisions contained in points (a) to (f) of that paragraph.

288. The above–mentioned conditions outline a special compulsory license system. Point (a) of the paragraph reads as follows: "If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in a language in general use in the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non–exclusive licence from the competent authority thereof to translate the work into that language and publish the work so translated." Points (b) to (f) provide for certain conditions and procedural details which are intended to enable the owner of the right of translation to exercise this right in due time, furthermore, to guarantee to him a just compensation, a correct translation of the work, and his right to be named on the copies of the published translation.

289. At the 1967 Stockholm revision conference of the Berne Convention, another point was discussed regarding the limitations to the right of translation. No amendment to the text of Article 8 was submitted but proposals affecting the right of translation were made in connection with other Articles. For instance, there was a proposal to insert a phrase adding to the limitation of the right of reproduction a corresponding limitation of the right of translation. During the discussion of those proposals, it was considered that a general rule regarding exceptions to the right of translation was necessary and should be inserted in Article 8. It was left to the Drafting Committee to try to find a satisfactory formula and to suggest whether such a formula should be included in the text of Article 8 or merely in the part of the Report concerning that Article. The Drafting Committee opted for the latter solution.

290. It was generally agreed that the exceptions to the right of reproduction included the right to use the work in its translated form as well as in its original one.

291. However, differing views were expressed as regards the compulsory licenses to broadcast and make records (Articles 11*bis* and 13). Some delegations considered that those Articles applied to translated works (and certain countries have legislation to that effect even now), while others were of the opinion that the wording of those Articles did not permit the interpretation that the possibility of using a work without the consent of the author also included, in those cases, the possibility of translating it.

292. Article 2(3) of the Berne Convention accords copyright protection to translations but without prejudice to the copyright in the original work. On the basis of that provision and of Article 8 (on the right of translation), Articles 11(2) and 11ter(2) do not seem to be absolutely necessary. Those Articles provide that authors of dramatic or dramatico–musical and literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translation thereof.

293. The Appendix to the Berne Convention (Articles I to VI) and Articles V*bis*, V*ter* and V*quater* of the Universal Copyright Convention contain preferential provisions

for developing countries. Those provisions were added to the Conventions by the Paris Conference in 1971. They widen the existing exceptions to the authors' exclusive rights. Under the system laid down in those provisions, a developing country which wishes to do so may provide for a regime of non-exclusive, non-assignable compulsory licenses—carrying an obligation to make fair payment to the copyright owner—to translate and/or reproduce works protected by the Convention, exclusively for systematic instructional activities (or, in some cases, for teaching, scholarship or research). The Appendix to the Berne Convention and Articles V*bis*, V*ter* and V*quater* of the Universal Copyright Convention provide for specified conditions and procedural details which are intended to offer appropriate possibilities to the owner of the right of translation to exercise this right in due time, furthermore, to guarantee him a just compensation and an appropriate protection of his moral rights.

294. National laws, in general, expressly recognize the right of translation. For the time being, there are only two developing countries (India, Mexico) where the copyright laws provide for the possibility of the application of compulsory licenses mentioned in the preceding paragraph.

The Rights of Translators

295. The translator works on someone else's text but brings his own mind to bear on expressing the other's thought in a different language. Consequently, translation is a creative work in itself since it involves both a good knowledge of the subject treated and intellectual efforts of using appropriate phraseology, grammatical construction, style, expression, etc.

296. The original Act of the Berne Convention contained provisions on the protection of translations; however, such provisions were more restrictive from the viewpoint of translators than the provisions of the later texts of the Berne Convention, commencing in particular with the revision of the Convention in Berlin in 1908. Article 6 of the 1886 Act provided that only "lawful" (that is, authorized) translations were protected as original works. It added: "It is understood that in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers." The protection of translation was limited in several respects. The Berne Act did not protect unauthorized translations against use by third persons; it furthermore protected translations against unauthorized reproduction, but not against other uses.

297. It was, however, as early as at the Berlin revision conference in 1908, that the Berne Convention fully recognized translators' rights. Article 2 of the Berlin Act provided that "translations ... shall be protected as original works without prejudice to the rights of the author of the original work." This differs only very slightly from Article 2(3) of the 1971 Paris Act of the Convention which reads as follows: "Translations ... shall be protected as original works without prejudice to the copyright in the original work."

298. To be protected, translations should be really original and contain creative elements. The Berne Convention defines the expression "literary and artistic works" in Article 2(1) by giving a non-limitative list of such works, but it does not undertake a real substantial definition, that is, it does not define what is meant by the word "work" itself. On the basis of other provisions of the Convention, it is obvious, however, that "works" should be "intellectual creations" (see Article 2(5)) and it is just Article 2(3)— providing for the protection of derivative works—which uses the expression "original works."

299. Article IV*bis*.1 of the Universal Copyright Convention extends protection of the author's basic rights, "including the exclusive right to authorize reproduction by any means, public performance and broadcasting," both to works in their original form and "in any form recognizably derived from the original." There is no doubt that translation derives from the original work. Therefore, the said Article extends the protection also to translations of works protected under the Convention. Exceptions to this protection, in accordance with paragraph 2 of the same Article, must "not conflict with the spirit and the provisions" of the Convention and national laws must ensure "a reasonable degree of effective protection" of translations at least as far as reproduction, public performance and broadcasting are concerned.

300. The discussions at the various sessions of the Intergovernmental Copyright Committee established under the Universal Copyright Convention reflected the unanimous view of the countries party to that Convention that although Article 1 of the Convention did not mention translations explicitly in the non-exhaustive list of works protected, original translations did enjoy protection under the said Convention.

301. In December 1973, the Intergovernmental Copyright Committee adopted Resolution 66(XII) which contains, *inter alia*, the following statement: "in order to promote the dissemination of works, States party to the Universal Copyright Convention should accord translators, on the national level, the full rights granted to authors of literary, scientific and artistic works, without prejudice to the copyright in the original works."

302. In the light of Resolution 66(XII), the Unesco Secretariat prepared a report on the desirability of adopting an international instrument on the protection of translators. In pursuance of the resolution of the General Conference at its eighteenth session (Paris, 1974), the preliminary report was submitted to the member States of Unesco together with the first draft of a recommendation for comments and observations. The replies to that inquiry, an analysis by the Secretariat of the comments and suggestions received, and the revised preliminary draft recommendation in the form of a consolidated final report, were submitted to a Special Intergovernmental Committee of Technical and Legal Experts to Prepare a Draft International Recommendation for the Protection of Translators. That Special Committee, which met at Unesco headquarters in Paris in June-July 1976, at the conclusion of its work, unanimously adopted the Draft Recommendation. The Draft Recommendation was sub-

mitted to the nineteenth session of the General Conference of Unesco (Nairobi, 1976), which adopted it as the "Recommendation on the Legal Protection of Translators and Translations and the Practical Means to Improve the Status of Translators."

303. The Recommendation enjoins the member States of Unesco to "accord to translators, in respect of their translations, the protection accorded to authors under the provisions of the international copyright conventions to which they are party and/or under their national laws, but without prejudice to the rights of the authors of the original works translated" and proceeds to enumerate a number of specific measures to ensure the application in practice of protection afforded translators under those laws. These recommended measures, among others, concern the following: *(a)* the desirability of a written agreement, between the translator and the user, incorporating relevant details such as remuneration, supplementary payment, limitations of the rights granted to the translators, publicity of the name of the translator, resolution of any conflict by means of arbitration, mention of languages from and into which the translators will translate; *(b)* the encouragement of the adoption of model contracts between the parties involved; *(c)* the creation and development of professional organizations of translators and other organizations or associations representing them; *(d)* benefit from social insurance schemes relating to retirement, illness, family allowances, etc., and from any taxation arrangements generally applicable to the authors; *(e)* the training of translators, establishment of writing programs for translators, organization of terminology centers, exchanges of translators between different countries for improvement of their proficiency in the languages concerned.

The Conditions and the Scope of the Protection of Translations

304. Both international copyright conventions only protect creations which are original. Originality—or, as certain national laws put it, the existence of elements of new intellectual creation—is also a condition of the protection of translations at the level of national laws (in certain countries it follows from the texts of the laws themselves, in other countries this condition is established by case law).

305. Legal theory and case law in certain countries state that so-called "rough" translations—that is, those which give only a "mechanical" equivalent of the original works in another language—are not protected. The question of what translations are to be accepted as original (and what are not) depends of course on the different levels of originality and creativity that determine copyright eligibility in various national copyright systems.

306. It seems to be obvious under both the international copyright conventions and national laws that from the viewpoint of the copyright eligibility of translations what is decisive is their originality—that is, their independent creative nature—and not such irrelevant factors as the official qualification or the job description of the translator.

307. The translations of orally expressed works by interpreters—for example, conference interpreters—may also qualify as translations eligible for copyright protection. For the protection of such translations, of course, all the conditions of copyright protection should be met, and the legal consequences following from employment situations and from individual contracts should also be taken into account. Furthermore, such factors have to be considered as whether works have, under the law, to be fixed in a material form in order to enjoy protection.

308. The protection of original translations is not restricted to the translations of certain categories of works: it is not restricted, notably, to the translations of "*belles-lettres*" literary works ("fictions"). This is particularly stressed in points 1(a) and (b) of the Unesco Recommendation mentioned above, which reads as follows:

> "For purposes of this Recommendation:
> "*(a)* the term 'translation' denotes the transposition of a literary or scientific work, including technical work, from one language into another language, whether or not the initial work, or the translation, is intended for publication in book, magazine, periodical, or other form, or for performance in the theatre, in a film, on radio or television, or in any other media;
> "*(b)* the term 'translators' denotes translators of literary or scientific works, including technical works ...."

309. The protection of translations does not depend on whether the original work is protected. Original translations are protected even after the work which has been translated has fallen into the public domain or even if it was already in the public domain when the translation was prepared.

310. At the Stockholm revision conference in 1967, an amendment was introduced which made the legal status of translators of official texts more favorable. Under Article 2(2) of the 1948 Brussels Act, it was a matter for national legislation to determine the protection to be granted to translations of official texts of a legislative, administrative and legal nature. At the 1967 Stockholm Diplomatic Conference, it was felt that, on the one hand, this faculty should apply not only to translations of texts but to the texts themselves and, on the other hand, gn the case of translations it should be restricted to *official* ones. The situation of translators of such texts has been improved: the possibility left to national legislation of determining (and thus restricting) the protection of translations of offieial texts has been limited to official translations. It implies that the rights in non-official translations cannot be restricted in the same way.

311. As indicated above, the authorization of the translation of his work is an exclusive right of the author of the original work. Therefore, it is a further question whether unlawful original translations—that is, those which have not been authorized by the authors of the original works—may enjoy copyright protection or not.

312. The original 1886 text of the Berne Convention excluded unauthorized translations from copyright protection. It followed from the first sentence of Article 6(1) which reads as follows: "*Lawful* translations shall be protected as original works" (emphasis added).

313. The 1908 Berlin Diplomatic Conference modified this provision. Article 2(2) provided for the protection of translations, in general, and not only for the protection of lawful translations. The mere change in the text indicated that it was an intention of the Conference to extend protection to translations which were not "lawful," that is, which were not authorized by the authors of the original works. The report of the Diplomatic Conference, however, made this even clearer. The relevant part of the report reads as follows:

> "A person's individual work may have someone else's work as its starting point; it should nonetheless be protected in itself. The most obvious example is that of a translation. The translator has accomplished intellectual and often difficult work; he is entitled to protection. Of course, he may have to consider the author of the original work, and may have to obtain authorization without which the publication of his translation would be unlawful. This does not mean, however, that he is not entitled to prevent someone else from appropriating his work, and to take infringement action against anyone who reproduced it. Article 6 of the present Convention appears to be in disagreement; indeed, it states that '*lawful* translations shall be protected as original works,' which would imply that *unlawful* translations are not protected and may be reproduced with impunity. It was to remove this consequence that the German authorities proposed amending Article 6 by stating: 'Subject to the rights of the author of the original work, translations shall be protected as original works ....'"

314. The author of an unauthorized translation is in a specific situation. He is not in the position to lawfully authorize the use of his translations, because such an authorization without the agreement of the author of the original work is not valid. This does not mean, however, that a third person could freely use such translations without the authorization of the translators. Translators should be in a position to prevent the use of their translations even if they have not been authorized by the authors of the original works.

315. The provision of Article 2(3) of the Berne Convention according to which translations are protected as original works means that translators enjoy the same rights as the authors of other original works; that is, both moral rights and economic rights (right of reproduction, right of public performance, right of broadcasting and so on). The only condition of the protection of those rights is that—as the same Article of the Convention provides—it should be "without prejudice to the copyright in the original work."

316. It follows from the full protection of original translations that the authors of such translations also have the right of translation and the right of adaptation. Translating a translation into a third language is not a rare phenomenon. For example, a French translator who does not know Polish but knows English can undertake translating a Polish work into French on the basis of its English translation. In such cases, the secondary translator has to secure authorization both of the original author and the first translator. This, however, only refers to the situation where it is actually the translation in language A which is translated into language B and its use is not restricted to a source of control when translation is made from the original language into language B. It also goes without saying that for the translation from language A into language B, the authorization of the author of the original work is also needed.

317. Usually, national laws on copyright do not expressly refer to "indirect" translations. This may raise difficulties in the recognition of copyright protection for "intermediate" translations. For example, the copyright of the republics constituting the Soviet Union do not directly refer to the protection of such translations. This "silence of law" was used as a basis by courts in those republics to reject translators' claims of infringement of their rights where their translations were used for translation into other languages. The Supreme Court of the Soviet Union in a decision adopted in its Plenary Session on April 18, 1986, not only specified that all the author's statutory rights apply also to translators, but it explicitly pointed out that, without their authorization, their translation may not be used as an "intermediary" one for the purposes of translating the work into another language.

318. The translator is protected against any unauthorized utilization of his work like other authors are. The question can be raised, however, whether he is also protected against another person's independent translation of the same original work. The answer is that it depends on the stipulations of his contract with the author of the original work. If the latter grants him the exclusive right of translation in a certain language, no other translation may be published by another translator. If no exclusive right has been granted, the publication of another translation cannot be excluded. In the case of works in the public domain, translators, of course, cannot receive any such contractual guarantees.

Conclusions

319. The following principles are proposed for consideration on the basis of the above analysis of the right to authorize translations and the rights of translators:

> **Principle PW23. Authors of writings should enjoy the exclusive right to authorize the translation of their works. This right should not be limited but in the cases and to the extent that the international copyright conventions permit its limitation.**

> **Principle PW24. (1) A translation of original character should be protected as a literary work without prejudice to the copyright in the original work which has been translated.**

(2) The translation mentioned in paragraph (1) should be protected irrespective of whether the original work is already in the public domain or otherwise is not protected because, for example, it is an official text of a legislative, administrative or legal nature. (Official translations of such official texts, however, may be excluded from copyright protection.)

Principle PW25. The author of the translation mentioned in Principle PW24(1) should enjoy the same rights (including the right to authorize the translation of his translation into another language) for the same term of protection and under the same conditions as authors of original works do, without prejudice to the rights of the authors of the original works concerned.

Report 111. All the participants who took the floor in the discussion expressed their general agreement with the principles and comments contained in this part of the memorandum although some of them indicated that they had some remarks concerning certain details.

Report 112. In order to make Principle PW23 more obligatory, one delegation proposed that the said principle should read as follows: "Under the international copyright conventions the authors of writings enjoy the exclusive right to authorize the translation of their works." An observer from an international non–governmental organization supported this proposal.

Report 113. Some delegations informed the participants about the provisions of their national laws which provided for the protection of the right of translation and of the rights of translators.

Report 114. Some other delegations suggested that in Principle PW24, paragraph (1), or in the comments thereon, it should be made clear that in respect of the originality of translations the same criteria should be taken into account as in respect of any other categories of literary and artistic works. One delegation said that the best way to reach such a result would be to delete the words "of original character" from Principle PW24, paragraph (1).

Report 115. One delegation proposed that the second sentence of Principle PW24, paragraph (2), should be deleted because in its view the translations mentioned in that sentence should not be considered as works and therefore there was no need to deal with them in that context.

Report 116. The same delegation suggested that, in Principle PW25, the phrase in brackets which referred to the right to authorize the translation of a translation into a third language should be deleted. The delegation stressed that the coexistence of two exclusive rights in such cases would lead to conflicts. If the translator were in the position to authorize the translation of his translation into another language, that could be an obstacle to the exercise of the right of the owner of the original work.

Report 117. The delegation mentioned in the preceding paragraphs also proposed that a new Principle PW25bis should be added to the present principles to read as follows: "States should provide, in their national laws, for efficient measures to guarantee to translators an effective exercise of their rights on the basis of copyright."

Report 118. Some participants expressed their support for the proposals mentioned in the previous three paragraphs, while several other participants insisted that Principles PW23 to PW25 should not be changed. The latter participants expressed their agreement with the arguments contained in the memorandum in respect of those principles.

Report 119. One delegation, while supporting also Principles PW23 to PW25, said that with regard to the interdependence of the translator's and the original author's rights, it seemed advisable to further elaborate the principles concerning the scope and exercise of translators' rights. Translations were supposed to be faithful expressions of the contents, structure and style of the original works, consequently, translations were new language carriers of the original works and could not be separated from them. Translations were not independent works, nor self–contained adaptations of the translated works. So, for example, by the very nature of the translation, its utilization as a basis for a new translation of the original work, was of no relevance under copyright, since it did not result in retaining any element of the first translation. Thus, the translator might, by definition, have no right to authorize the translation of his own translation. Since it had no self–contained structure of ideas, the translation could not be adapted either; it could only be revised or improved. And the translator may not exercise any of his rights to reproduce or communicate his translation independently from or contrary to the exercise of the author's rights in his original work.

Report 120. One other delegation said that it found the ideas mentioned in the preceding paragraph interesting and that they deserved further study.

Report 121. An observer from an international non–governmental organization spoke about the im-

portance of the contribution of translators to cultural exchange and a better understanding between nations, and emphasized the creative nature of the work of translators and stressed the need for a full and efficient copyright protection of their rights in all kinds of original translations. The observer expressed his strong support for Principles PW23 to PW25.

VII. The Protection of Typographical Arrangements of Published Editions

320. Recently, several representatives of the publishing industry have expressed the view that copyright or a kind of related right protection should be granted to publishers so as to enable them to defend their justified interests.

321. Copyright originated in England at the beginning of the 17th century as a direct successor of the printers' and publishers' exclusive right. The transformation of that exclusive right into authors' copyright did not deprive publishers in all cases of an appropriate protection. In most of the cases, this protection only became indirect; they enjoyed protection as licensees or assignees of authors' rights.

322. This protection system functioned with success and to the satisfaction of the publishers for a long time. In recent decades, however, the situation has changed.

323. The most important reason for the change in the situation is the spectacular development of reprographic reproduction technology. As discussed above in respect of authors' rights, this development led to widespread piracy and to the use of reprographic techniques in a way which conflicts with the normal exploitation of printed works.

324. Publishers which publish works which are still protected and conclude appropriate contracts can continue to rely on the indirect enjoyment of authors' rights, but such a method is not sufficient in all cases.

325. In any case, publishers cannot, in all situations, count on the rights acquired from authors. If they are non-exclusive licensees—rather than assignees or exclusive licensees—of authors' rights and if national laws do not authorize them to sue third persons who use the works without authorization, and if the author does not cooperate, they cannot receive protection. Such lack of cooperation happens fairly frequently in the case of scientific publications, where authors may feel that it is in their interest that their works be disseminated in as wide a circle as possible at any price, even at the price of prejudicing the interests of publishers. (It is another matter that such authors' calculations may be wrong: such an attitude may lead to the impossibility of finding a publisher for the publication of their future works.) Authors may be indifferent also in other cases, for example if they only give a license to the publisher, and piracy or reprography only seem to result in the inability to sell the copies for which they have already received remuneration (for example, as an advance payment).

326. It is undeniable that in such situations the publishers' demand for some kind of protection—independent of authors' rights—may be justified.

327. There are certain countries with British legal traditions where such protection does exist in the form of the protection of typographical arrangements of published editions against unauthorized facsimile reproduction (by reprographic or similar methods).

328. Such protection exists in Australia, Bangladesh, India, Ireland, New Zealand, Pakistan, Singapore and the United Kingdom. The right is protected for 25 years from the end of the year in which the edition was first published.

329. Such a legal solution could also be applied in other countries for the protection of the legitimate interests of publishers.

330. In the above-mentioned countries, the said protection—along with the protection of phonograms and broadcasts—is called "copyright" protection. Such a protection, however, is not copyright protection in the meaning of "copyright" as used in the international copyright conventions, that is, in the meaning of the rights in literary and artistic works of authors.

331. Publishers—like phonogram producers and broadcasters—are not authors but, because of their valuable organizing activities and significant financial investments, they do deserve a protection which is similar, in certain respects, to the protection of authors. Their rights are so-called neighboring rights. In countries with Anglo-American legal traditions, the law does not always differentiate between the rights in literary and artistic works of authors ("copyright" proper in the meaning of the word as used in the international copyright conventions) and "neighboring rights" (rights neighboring with the rights in literary and artistic works) but rather call them all "copyright" which thus is used in a much wider meaning than the one accepted in the framework of the international copyright conventions. Some of the confusion is caused by the fact that, in English, the word "copyright" does not refer to the author. In French (*"droit d'auteur"*) and in most other languages other than English the terminology does not lend itself to confusion since the name of the right refers to the author.

332. What is important is that because the rights in published editions—like the rights of phonogram producers and broadcasters—are not rights in literary and artistic works of authors but so-called neighboring rights as far as their real nature is concerned, they are not protected by the international copyright conventions. It should be noted that no country which provides for copyright protection of such productions—in the wider meaning of the word "copyright"— actually grant producers, etc., rights which would satisfy the minimum level of copyright protection of literary and artistic works of authors prescribed by the copyright conventions.

333. The rights of producers of phonograms and broadcasting organizations— together with the rights of per-

formers—are protected at the international level by the Rome Convention, the Phonograms Convention and the Satellites Convention, respectively. The protection of typographical arrangements of published editions, however, is not covered by any such so–called neighboring rights conventions.

334. It will mainly depend on further developments at the national level, whether any international treaty could be envisaged in respect of the protection of published editions. If such protection is introduced, in a manner in which it exists in the above–mentioned countries, it may offer an appropriate neighboring–rights–type protection for publishers against piracy and may become a means for compensating the prejudice they suffer by widespread reprography.

335. It goes without saying that—similarly to other so–called neighboring rights—such a right of publishers should affect the protection of copyright in literary and artistic works. Also, the limitations applicable in respect of literary and artistic works are necessarily justified also in respect of this neighboring right.

336. On the basis of the above–mentioned considerations, the following principles are proposed for consideration:

Principle PW26. (1) States should consider granting appropriate protection to publishers in respect of the typographical arrangements of their published editions irrespective of whether such editions contain works protected by copyright.

(2) The protection mentioned in paragraph (1) should include the right of the publisher to authorize the reproduction of the typographical arrangements of published editions by reprographic or similar processes providing facsimile copies. This right should be protected for at least 25 years from the end of the year in which the edition concerned was first published.

(3) The limitations applicable in respect of the rights in literary and artistic works included in published editions should also be applicable in respect of the protection of typographical arrangements of published editions.

(4) Principles PW2 to PW8 on the protection of the right of reproduction of authors in respect of reprography apply, mutatis mutandis, to the protection of typographical arrangements of published editions.

(5) The protection of the typographical arrangements of published editions should leave intact and should in no way affect the protection of copyright in literary and artistic works published in such editions.

337. The principles set out above do not refer to the question of the storage in and retrieval from computer systems of works in the form of the typographical arrangements of published editions. It cannot yet be foreseen how widespread such use of published editions will be. If, however, such use is widespread enough in the future and thus conflicts with the normal exploitation of the editions concerned or unreasonably prejudices the legitimate interests of publishers, it will be justified to extend the protection of published editions to include also the storage in and retrieval from computer systems of such editions.

338. It may also be justified, under certain circumstances, to extend the said protection of publishers also to a right to receive public lending right payment (leaving, of course, the right of authors to such payments intact).

339. It should be noted that the protection of typographical arrangements of published editions—where the arrangements of whole pages are protected—is different from the protection of type faces. According to the Vienna Agreement for the Protection of Type Faces and their International Deposit, " 'type faces' means sets of designs of: *(a)* letters and alphabets as such with their accessories such as accents and punctuation marks, *(b)* numerals and other figurative signs such as conventional signs, symbols and scientific signs, *(c)* ornaments such as borders, fleurons and vignettes, which are intended to provide means for composing texts by any graphic technique" (that is, "type faces" means the elements from which typographical arrangements may be composed, but not the arrangements themselves). (The said Agreement, adopted in 1973, has not yet entered into force because of the lack of a sufficient number of ratifications.)

Report 122. A number of delegations expressed their support for the proposed principles while other delegations said that, although they understood the rationale behind the principles, it would be premature to agree on them for the time being and that further study and reflection was needed. Some of these delegations drew attention to the protection which might be available under the law on unfair competition.

Report 123. One of the delegations referred to in the preceding paragraph said that the protection of publishers should be based on their position as exclusive right holders and, in certain cases, as authors and that the adoption of the proposed principles on a specific right for publishers might lead to an erosion of publishers' rights. One particular concern for this delegation was that the system proposed in the principles would fall outside the international copyright conventions. The delegation furthermore questioned how the concept "typographical arrangements" would relate to electronic publishing and how the proposed protection would relate to the protection of computer programs and to the protection under trademark law.

Report 124. The same delegation also expressed its reservations concerning the statements on the

protection of phonogram producers contained in paragraph 331 of the memorandum and said that under a number of national laws phonograms were protected under copyright law and should not be given protection at a second-tier level. In this respect, also an observer from an international non-governmental organization expressed reservations mentioning that the Berne Convention and the Universal Copyright Convention did not grant protection to phonograms, but that a number of national laws granted protection to phonograms under copyright law. It would, according to that observer, be wrong to confine the notion of "copyright" only to apply to authors' rights in literary and artistic works. Conferring protection of phonograms under the notion of neighboring rights could lead to a weakening of the protection of phonograms.

Report 125. In reply to the last part of the statement of the preceding speaker, the representative of WIPO said that his Organization had always stressed the need for an efficient and high-level protection of phonograms and would continue to do so. The expression "neighboring rights" was nothing else but a traditional reference to productions other than literary and artistic works, and it was the level of the protection of such productions which was important rather than the mere fact that that protection was granted in the framework of a copyright act or under separate legislation or whether such a protection was called copyright protection in the wider meaning of the word mentioned in paragraph 331 or it was called neighboring right protection.

Report 126. Some delegations stressed that the concept "typographical arrangements" should be defined and it should be studied whether it were not the editions themselves that should be the objects of the sui generis *protection of publishers, and that, furthermore, the difference between such arrangements and the protection of type faces under the Vienna Agreement for the Protection of Type Faces and Their International Deposit should be made clear; this could be made in the beginning of this part of the memorandum.*

Report 127. The question of the scope of protection granted under the principles was raised by some delegations which asked how the protection would relate to the copying of optical discs and the use of optical readers.

Report 128. Another delegation, while stating that the suggested protection of publishers was very helpful particularly as regards the fight against piracy, said that the final decision about the suggested principles was premature.

Report 129. One delegation proposed the deletion, for the moment, of Principle PW26 or its replacement by the following text: "States should envisage the possibility to grant publishers an appropriate protection as regards the presentation of their editions for the purpose of preventing all acts of unfair competition and piracy, particularly in case of editions of works which belong to the same cultural field."

Report 130. Another delegation said that, in its country, the question of introducing a right for publishers in their editions was now under consideration and that Principle PW26 would be useful in these considerations. Still another delegation said that a discussion had started in its country on the introduction of such a protection and that presently the Supreme Court of the country considered whether the law on unfair competition would apply to a case where a publisher had published a law collection which was not protected under copyright law.

Report 131. An observer representing an international non-governmental organization expressed its support for the protection of publishers proposed in the memorandum. It referred to several national laws where such a protection existed. In those countries that protection was also called the protection of typographical arrangements of published editions, but it would be appropriate to find a better expression than "typographical arrangement." What was really involved was the protection of the "look on the page." Independent protection for publishers was useful in three ways, namely in the fight against piracy, in contractual relations with other publishers, and in participation in reprographic rights arrangements.

Report 132. Other observers representing two other international non-governmental organizations supported the proposals contained in the memorandum as regards the protection of publishers' rights. One of these observers stressed that the proposed special protection should in no way affect or restrict the copyright protection available to publishers. It also suggested that at the end of Principle PW26, paragraph (5), should be added: "and the ownership of such copyright (e.g., by a publisher under transfer)."

Report 133. At the end of the discussions, one delegation stated that it would be unrealistic to apply the principles under discussion in a uniform way on a worldwide scale since they might constitute obstacles to the circulation of knowledge. It stressed that the dissemination of knowledge was of particular importance to developing countries. Therefore, its country could accept neither the publisher's ambi-

tions for more profits nor any unjustified restrictions on the access to information. It also said that the restrictions which in its view might emerge from the document would contradict the high cultural objectives provided for under the United Nations' and Unesco's Charters.

Report 134. The representative of Unesco pointed out that, on the one hand, the search for solutions to the problems in the field of copyright raised by the new technologies was foreseen in Unesco's Programme and Budget for 1986–1987, adopted by the Unesco member States by the twenty–third session of the General Conference; on the other hand, that search must be based on the requirements of the Universal Copyright Convention adopted, in accordance with the provisions of the Unesco's Charter, by the Intergovernmental Conference in 1952 and revised in 1971. He expressed his firm conviction that no provision of the memorandum under discussion would be in contradiction with the said Convention. Therefore, in his opinion, it was out of the question that any part of the memorandum was in contradiction with Unesco's Charter.

VIII. Miscellaneous

Conclusion

Report 135. The Committee noted that the results of the meeting would be taken into account in the preparation of the working document for the meeting of a Committee of Experts planned for the 1988–1989 biennium on a synthesis of the principles concerning the copyright protection of various categories of works.

Adoption of the Report and Closing of the Meeting

Report 136. The Committee unanimously adopted this report and, after the usual thanks, the Chairman declared the meeting closed.

List of Participants

I. States

Algeria: A. Mechiet. **Brazil**: P. Almeida. **Canada**: J. Daniel; J. Gero. **Denmark**: L. Hersom. **Finland**: J. Liedes; S. Lahtinen; P.E. Lounela; P. Liedes; U. Kuosmanen. **France**: R. Lecat; S. Sayanoff–Lévy; S. Delfante; M.–C. Rault. **German Democratic Republic**: K. Stoecker. **Germany (Federal Republic of)**: B. Schmidt. **Hungary**: G. Boytha. **India**: A. Malhotra. **Israel**: M. Gabay; R. Walden. **Italy**: G. Aversa. **Japan**: S. Kamogawa. **Jordan**: M. Keilani; J. Shamayleh. **Kuwait**: M.M. Mansour. **Lebanon**: H. Hamdan. **Mexico**: A. Fuchs Ojeda. **Netherlands**: J. Meijer–Van der Aa; L.M.A. Verschuur–de Sonnaville. **Norway**: H. Soenneland. **Panama**: M. Saavedra Polo. **Peru**: G.A. León y León Durán. **Poland**: T. Drozdowska. **Portugal**: A. Gomes; N.M. da Silva Gonçalves. **Republic of Korea**: T.–C. Choi; M.–S. Ahn. **Soviet Union**: R. Gorelik. **Spain**: E. de la Puente García; L. Martinez Garnica; M. del Corral; J. Mollá. **Sweden**: A. Mörner; B. Rosén. **Switzerland**: C. Govoni. **Turkey**: A. Algan. **United States of America**: R. Oman; L. Flacks; R.C. Owens; A.J. Hartnick. **Uruguay**: R. González–Arenas. **Yugoslavia**: R. Tesić.

II. Intergovernmental Organizations

Commission of the European Communities (CEC): B. Posner; B. Czarnota. **Organization of African Unity (OAU)**: M.H. Tunis.

III. International Non–Governmental Organizations

European Broadcasting Union (EBU): M. Burnett. **International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM)**: N. Ndiaye. **International Chamber of Commerce (ICC)**: J.M.W. Buraas; S. Vidal–Naquet. **International Confederation of Societies of Authors and Composers (CISAC)**: N. Ndiaye. **International Copyright Society (INTERGU)**: V. Movsessian. **International Federation of Journalists (IFJ)**: S.O. Gronsund; L. Franke; R.J. Norris; J.–W. Rudolph. **International Federation of Newspaper Publishers (FIEJ)**: F. Leth–Larsen; T. Balding; B.E. Lindskog; N. Walker. **International Federation of Phonogram and Videogram Producers (IFPI)**: E. Thompson. **International Federation of Translators (FIT)**: J. Pienkos. **International Group of Scientific, Technical and Medical Publishers (STM)**: J.–A. Koutchoumow; J. Baumgarten. **International Literary and Artistic Association (ALAI)**: N. Ndiaye. **International Publishers Association (IPA)**: J.–A. Koutchoumow; C. Clark; E.T. Fennessy; S. Wagner. **International Union of Architects (IUA)**: J. Duret. **Max Planck Institute for Foreign and International Patent, Copyright and Competition Law**: S. Von Lewinski.

IV. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

E. Guerassimov *(Legal Officer, Copyright Division).*

World Intellectual Property Organization (WIPO)

H. Olsson *(Director, Copyright and Public Information Department)*; M. Ficsor *(Director, Copyright Law Division)*; P. Masouyé *(Legal Officer, Copyright Law Division).*

Calendar of Meetings

WIPO Meetings

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

1988

March 7 to 11 (Geneva) — Committee of Experts on the Establishment of an International Register of Audiovisual Works

March 14 to 18 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Working Group on General Information

March 21 to 28 (Geneva) — International Patent Classification (IPC) Union: Committee of Experts (Sixteenth Session)

April 18 to 22 (Paris) — Committee of Governmental Experts on Photographic Works (convened jointly with Unesco)

April 18 to 22 (Geneva) — Madrid Union: Assembly (Extraordinary Session)

April 25 to 28 (Geneva) — Committee of Experts on Measures Against Counterfeiting and Piracy (Third Session)

May 2 to 6 (?) — Permanent Committee on Industrial Property Information (PCIPI): Ad hoc Working Group on the Revision of the Guide to the IPC

May 16 to 20 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property (Twelfth Session)

May 24 to 27 (Geneva) — Consultative Meeting of Experts from Developing Countries on Legal Matters Relating to Intellectual Property in Respect of Integrated Circuits

May 25 to June 1 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Executive Coordination Committee (Second Session); Patent Cooperation Treaty (PCT) Committee for Technical Cooperation (PCT/CTC) (Eleventh Session); PCIPI Ad hoc Working Group on Management Information

May 30 to June 1 (Geneva) — Review Meeting on Intellectual Property in Respect of Integrated Circuits

June 2 and 3 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Ad hoc Working Group on IPC Revision Policy

June 6 to 17 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Working Group on Search Information

June 13 to 17 (Geneva) — Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Fifth Session)

June 20 to 24 (Geneva) — Nice Union: Preparatory Working Group (Ninth Session)

June 27 to July 1 (Geneva) — Committee of Governmental Experts for the Synthesis of Principles Concerning the Copyright Protection of Various Categories of Works (convened jointly with Unesco)

September 12 to 16 (Geneva) — International Patent Classification (IPC) Union: Committee of Experts (Seventeenth Session)

September 14 to 16 (Geneva) — WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property

September 22 and 23 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI) (Second Session)

September 26 to October 3 (Geneva) — Governing Bodies (WIPO Coordination Committee; Executive Committees of the Paris and Berne Unions) (Nineteenth Series of Meetings)

October 10 to 14 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Working Group on General Information (Second Session)

October 24 to 28 (Geneva) — Committee of Experts on Biotechnological Inventions and Industrial Property (Fourth Session)

November 21 to December 2 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Working Group on the Search Information (Second Session)

November 28 to December 2 (Geneva) — Committee of Experts on Model Provisions for Legislations in the Field of Copyright

December 5 to 9 (Geneva) — Madrid Union: Preparatory Committee for Diplomatic Conference for the Adoption of Protocols to the Madrid Agreement

December 12 to 16 (Geneva) — Permanent Committee on Industrial Property Information (PCIPI): Executive Coordination Committee (Third Session); Ad hoc Working Group on Management Information (Second Session)

December 19 (Geneva) — Information Meeting for Non-Governmental Organizations on Intellectual Property

UPOV Meetings

1988

April 18 to 21 (Geneva) — Administrative and Legal Committee

April 22 (Geneva) — Consultative Committee

June 7 to 9 (Edinburgh) — Technical Working Party on Automation and Computer Programs

June 13 to 15 (Wageningen) — Technical Working Party for Vegetables

June 16 aod 17 (Wageningen) — Workshop on Variety Examination (for Lettuce)

Juoe 20 to 24 (Melle) — Technical Working Party for Ornamental Plants and Forest Trees

June 28 to July 1 (Hanover) — Technical Working Party for Fruit Crops, and Subgroups

July 5 to 8 (Surgères) — Technical Working Party for Agricultural Crops

September 27 and 28 (Cambridge) — Workshop on Variety Examination (on Examination Techniques)

October 11 to 14 (Geneva) — Administrative and Legal Committee

October 17 (Geneva) — Consultative Committee

October 18 and 19 (Geneva) — Council

October 20 and 21 (Geneva) — Technical Committee

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

Non–Governmental Organizations

1988

March 21 to 25 (Locarno) — International Copyright Society (INTERGU): Congress

May 9 to 11 (Tel Aviv) — International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislative Committee

June 12 to 17 (London) — International Publishers Association (IPA): Congress

July 24 to 27 (Washington) — International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting

October 6 and 7 (Munich) — International Literary and Artistic Association (ALAI): Study Days

November 14 to 20 (Buenos Aires) — International Confederation of Societies of Authors and Composers (CISAC): Congress

1989

September 26 to 30 (Quebec) — International Literary and Artistic Association (ALAI): Congress