Published monthly
Annual subscription:
145 Swiss francs
Each monthly issue:
15 Swiss francs

24th year – No. 6
June 1988

Copyright

Monthly Review of the
World Intellectual Property Organization (WIPO)

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ISSN 0010-8626

Notifications Concerning Treaties

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Accessions

SWAZILAND

The Government of Swaziland deposited, on May 18, 1988, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO), signed at Stockholm on July 14, 1967.

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

The said Convention, as amended on October 2, 1979, will enter into force, with respect to Swaziland, on August 18, 1988.

WIPO Notification No. 142, of May 18, 1988.

TRINIDAD AND TOBAGO

The Government of Trinidad and Tobago deposited, on May 16, 1988, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO), signed at Stockholm on July 14, 1967.

The said Convention, as amended on October 2, 1979, will enter into force, with respect to Trinidad and Tobago, on August 16, 1988.

WIPO Notification No. 143, of May 16, 1988.

Madrid Convention

Accession

PERU

The Government of Peru deposited with the Secretary–General of the United Nations, on April 15, 1988, its instrument of accession to the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties (Madrid Convention), adopted at Madrid on December 13, 1979.

The Convention will enter into force three months after the deposit of the tenth instrument of ratification, acceptance or accession. Such instruments have so far been deposited by four other States (Czechoslovakia, Egypt, India and Iraq).*

* See *Copyright*, 1981, p. 316; 1982, p. 102; 1983, p. 136; 1981, p. 268.

WIPO Meetings

Photographic Works

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

(Paris, April 18 to 22, 1988)

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 December 14, 1987, under the title "Questions Concerning the Protection of Photographic Works"; it has the document number UNESCO/WIPO/CGE/PHW/3.

The report of the Committee of Experts was adopted by the Committee of Experts on April 22, 1988; it has the document number UNESCO/WIPO/CGE/PHW/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

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 1988–1989 (24C/5 Approved), paragraph 15115, and as far as WIPO is concerned, document AB/XVIII/2, Annex A, items PRG.03(4) and document AB/XVIII/14, paragraph 173).

2. Whereas the discussions in the 1984–85 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 discussed in the 1986–87 biennium were grouped according to eight *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 were considered.

3. The following categories were discussed within the framework of a series of meetings of committees of governmental experts in 1986 and 1987: the printed word, audiovisual works, phonograms, works of visual art, works of architecture, works of applied art, dramatic and choreographic works, musical works. One category of works, namely photographic works, was not covered by those meetings. The Committee of Governmental Experts, for which the present document has been prepared, is invited to deal with that latter category.

4. The purpose of this memorandum is to summarize and discuss various copyright issues in relation to photographic works 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. 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.

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–fourth session and by the Governing Bodies of the World Intellectual Property Organization (WIPO) at their sixteenth series of meetings in September–October 1987, the Directors General of Unesco and WIPO jointly convened a Committee of Governmental Experts on Photographic Works at Unesco headquarters from April 18 to 22, 1988.

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

Report 3. It was stressed that the principles have no binding force and their purpose was merely to indicate directions that seemed reasonable in the search for solutions which, by safeguarding the rights of authors and other owners of rights in photographic works, gave them fair treatment and promoted creative activity.

Report 4. Experts from the following 45 States attended the meeting: Algeria, Argentina, Barbados, Burundi, Byelorussian SSR, Cameroon, Chad, Chile, China, Congo, Côte d'Ivoire, Cuba, Denmark, Ecuador, Egypt, Finland, France, Gabon, Germany (Federal Republic of), Greece, Guinea, Holy See, Hungary, India, Italy, Japan, Jordan, Kuwait, Lebanon, Malta, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Panama, Soviet Union, Spain, Sweden, Thailand, Tunisia, United Republic of Tanzania, United States of America, Uruguay, Yemen.

Report 5. Five States attended the meeting as observers: Brazil, Costa Rica, German Democratic Republic, Philippines, Turkey.

Report 6. The Palestine Liberation Organization (PLO) also attended the meeting as an observer.

Report 7. Observers from four intergovernmental organizations: Agency for Cultural and Technical Co-operation (ACCT), Arab League Educational, Cultural and Scientific Organization (ALECSO), Commission of the European Communities (CEC), Council of Europe (CE) and from 14 international non-governmental organizations: International Association of Art (IAA), International Commission of Jurists (ICJ), International Confederation of Free Trade Unions (ICFTU), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Council on Archives (ICA), International Federation of Journalists (IFJ), International Federation of Newspaper Publishers (FIEJ), International Federation of Photographic Art (FIAP), International Literary and Artistic Association (ALAI), International Organization of Journalists (IOJ), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, participated in the meeting.

Report 8. The list of participants follows this report.

Report 9. Ms Marie-Claude Dock, Principal Director, Sector of Culture and Communication of Unesco, opened the meeting and welcomed the participants on behalf of Unesco. Mr. Mihály Ficsor, Director, Copyright Law Division of WIPO, greeted the participants on behalf of WIPO.

Report 10. Ms Margret Möller (Federal Republic of Germany) was unanimously elected Chairman of the meeting.

Report 11. The Committee adopted the Rules of Procedure contained in document UNESCO/WIPO/CGE/PIIW/2 Prov. 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 12. Mr. Salah Abada (Algeria) and Mr. György Pálos (Hungary) were unanimously elected Vice-Chairmen of the meeting.

Report 13. The provisional agenda of the meeting of the Committee, as appearing in document UNESCO/WIPO/CGE/PHW/1 Prov., was adopted.

Report 14. Discussions were based on the memorandum on Questions Concerning the Protection of Photographic Works prepared by the Secretariats (document UNESCO/WIPO/CGE/PHW/3).

Report 15. All the delegates who took the floor appreciated the quality of the memorandum which, they felt, provided an excellent basis for the discussions concerning various copyright problems in relation to photographic works. Several delegations underlined the importance of granting an efficient protection for this category of works and welcomed the initiative of Unesco and WIPO to deal with the copyright questions related to this category of works practically, for the first time.

Report 16. Several delegations gave information about their national laws in respect of photographic works. Some other delegations referred to legislation under preparation and discussion in their countries and said that that was a further reason why they followed with great interest the discussions by the Committee.

Report 17. A number of participants stated that the question of originality, as a condition of the copyright protection of photographic works, was particularly important.

Report 18. Some participants found that the definition of photographic works offered by the document was too wide. They opposed the solution that a quasi presumption was suggested concerning the originality of all photographs in relation to which human beings could have any influence whatsoever.

Report 19. Some other participants were of the opinion that the approach followed by the memorandum was correct and it was necessary to avoid subjective value judgments as a basis for deciding about copyright eligibility of such works.

Report 20. Several participants made comments concerning the question of ownership of copyright in photographic works.

Report 21. One delegation said that the best solution would be to have a general principle along the lines of Principle PHW5 stating that it was always the author (that is, the creator of the photographic work) who should be recognized as the original owner of copyright. Some participants supported that statement.

Report 22. Certain other participants were of the view that the special situations existing in the case of works created by employed authors and of commissioned works should be also taken into account, which might justify differing principles.

Report 23. Some delegations suggested that the Committee should not try to suggest separate principles on the question of ownership of copyright in photographic works created under employment contracts or in commissioned photographic works, because the questions involved did not only concern that category of works but also other categories of works. It was suggested that the question of the protection of commissioned works should be studied separately in the framework of future programs of Unesco and WIPO covering all categories of works.

Report 24. Some participants referred to new techniques used for creation and adaptation of photographic works, such as the electronic manipulation of photographs, and suggested that such techniques should also be considered when dealing with the copyright question of photographic works.

The Development of the Provisions of the International Copyright Conventions Concerning the Protection of Photographic Works

5. National copyright laws do differ in many important aspects regarding the level and the conditions of the protection of photographic works. The development of the provisions of the Berne Convention and, later, of the Universal Copyright Convention, about the protection of such works, may offer some explanations to the present great variety of national solutions.

Berne Convention

6. It was as early as at the 1884 and 1885 diplomatic conferences which led to the adoption of the Berne Convention that the idea emerged that photographs should be included in the non-exhaustive list of literary and artistic works to be protected by the international copyright convention whose draft was then under discussion. No agreement was reached, however, about that proposal. At the 1886 Berne Diplomatic Conference, a compromise was adopted and the following statements were included in the Final Protocol of the original text of the Berne Convention:

> "1.[1] As regards Article 4, it is agreed that those countries of the Union where the character of artistic works is not refused to photographs engage to admit them to the benefits of the Convention concluded today, from the date of its coming into force. They shall, however, not be bound to protect the authors of such works further than is permitted by their own legislation except in the case of international arrangements already existing, or which may hereafter be entered into by them.
>
> [2] It is understood that an authorized photograph of a protected work of art shall enjoy legal protection in all the countries of the Union, as provided for by the said Convention, for the same period as the principal right of reproduction of the work itself subsists, and within the limits of private agreements between owners of rights."

7. Paragraph [2] of point 1 of the Final Protocol quoted above seems to have been needless. The Report of the 1908 Berlin Diplomatic Conference, which later deleted this paragraph, correctly pointed out: "It should be noted at the outset that this last paragraph is totally unnecessary. A copyright work of art, such as a painting or a statue, cannot be reproduced by means of photography, any more so than by any other means, without the author's permission. If a sculptor has given a photographer the exclusive right to reproduce his statue, the photographer may take legal action against unauthorized photographs; he exercises a *derived right*, irrespective of the right he may have in his own name. This provision—maintained in 1896—was rightly considered to be superfluous."

8. The 1896 Paris Diplomatic Conference widened the basis of protection to photographic works and, at the same time, made it more uniform. National treatment was granted to photographs (except for the term of protection where reciprocity was applicable) irrespective of whether they were placed on the same footing as artistic works in the country concerned, or were rather protected by a special law. In addition, works produced by a process analogous to photography were separately mentioned as productions protected by copyright. The new text of paragraph [3] of point 1 of the Final Protocol reads as follows:

> "Photographic works and works produced by an analogous process shall be admitted to the benefits of these provisions insofar as the laws of each State permit, and to the extent of the protection accorded by such laws to similar national works."

9. The Report of the Conference stressed that while granting national treatment, no country had to sacrifice its principles, and added that the most important thing was that some form of protection be granted; the exact nature of the protection was unimportant. Under the provision quoted above, those countries party to the Berne Convention whose legislation did not grant any protection to photographs, were not obliged to protect the photographs of other Union countries, but at the same time benefited from the protection which might have been granted in those other countries. It was, however, expected that all countries of the Berne Union would gradually protect photographic works. A *voeu* was adopted by the Conference stating that it was desirable that, in all countries of the Union, the law should protect photographic works and works produced by an analogous process and that the term of protection should be at least 15 years.

10. Furthermore, it was understood that the general principle of Article 2 applied to photographic works, namely that no compliance with the formalities necessary in the country where protection was sought was required; it was sufficient that the formalities in the countries of origin had been complied with. (An explicit provision to this effect was included in the Declaration of Interpretation, an authentic interpretation of the Convention adopted by the Conference.)

11. At the 1908 Berlin Diplomatic Conference, it was agreed that all countries of the Union should protect photographs, and the basic provision about the protection of such works (which until that time had only been part of the Final Protocol) was included in the text of the Convention. Article 3 reads as follows:

> "This Convention shall apply to photographic works and to works produced by process analogous to photography. The contracting countries shall be bound to make provision for their protection."

12. It followed from the fact that photographs were covered by a separate provision of the Convention, and were not included in the non-exhaustive list of Article 2, that they were not deemed "literary and artistic works" proper under the Convention. Consequently, the provisions of the Convention referring to "literary and artistic works" did not apply to photographs. In those matters, the law of each country was relevant. The nature and duration of such protection could be determined freely by national laws.

13. Several delegations desired to provide in the Convention that photographic works should be protected for at least 15 years from the date of publication. No agreement was, however, obtained on that matter in view of existing wide divergencies. Article 7(3) provided that the term for such works should be governed by the law of the country where protection was claimed, but did not have to exceed the term fixed in the country of origin.

14. The 1928 Rome Diplomatic Conference did not change the text of the Berne Convention in respect of photographic works. It is interesting to note, however, that during the discussions at the Conference, attention was drawn to the fact that "merit and purposes" tended to become elements to which legislators and courts attached importance, thereby introducing criteria which were originally banned from use in determining eligibility of productions for protection under the Berne Convention. One delegation proposed to permit the criminal prosecution of any infringement only where the name of the author and the date of publication had been indicated on the photograph; however, the majority of delegations opposed such a measure, even in optional form. The question of the term of protection was discussed again, but no decision was taken.

15. At the 1948 Brussels Diplomatic Conference—as Marcel Plaisant, Rapporteur-General, put it in the General Report—photographs "reached the supreme rank of general protection." By this statement, he referred to the fact that "photographic works and works produced by a process analogous to photography" were inserted in the non-exhaustive list of "literary and artistic works" in Article 2(1) of the Berne Convention, and Article 3 was deleted. The discussions in the Sub-committee on Photography and Cinematography, however, reflected that there was no general agreement on what kinds of photographs were covered by that "supreme rank of general protection." The Sub-committee discussed whether it should be specified in the text that only photographic works having the character of personal creations were protected. There was doubt as to the appropriateness of such a step. It was not the idea thus expressed which was opposed by the majority of delegations, but it seemed to them that a criterion, which applied to all productions protected by the Convention, should not be mentioned separately in connection with a particular category of works such as photographic works. The question arose, at that point of the discussions, whether it was thus not advisable to define the notion of literary or artistic works in more explicit terms, by means of a general provision. Such a more detailed definition, however, would have jeopardized the balance between the two major copyright systems, namely the "continental" and the "common law" systems which differed, *inter alia*, just in respect of the question of originality and "character of personal creation" as conditions of copyright eligibility. For example, the Delegation of the United Kingdom which expressed its opposition to the proposed detailed definition and observed that such a provision could lead to discrimination between works according to merit, which would be contrary to the spirit of the Convention.

16. The 1967 Stockholm Diplomatic Conference changed the wording of the relevant part of Article 2(1) of the Berne Convention. It replaced the expression "photographic works and works produced by a process analogous to photography" by the expression "photographic works to which are assimilated works expressed by a process analogous to photography." The modification of the wording widened the definition of such works. It is perhaps even more important that, by this modification, it was emphasized that the manner in which the work was expressed was the decisive factor in the definition rather than the nature of the technical process.

17. After so many discussions at various diplomatic conferences, at Stockholm an agreement was reached at last about the term of protection of photographic works. Article 7(4) provided as follows: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works ...; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."

18. The 1971 Paris Diplomatic Conference did not introduce further changes in the provisions of the Berne Convention on photographic works.

Universal Copyright Convention

19. Article I of the Universal Copyright Convention does not mention photographs in the non-exclusive list of

literary, scientific and artistic works in respect of which the Contracting States undertake "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors." Reference to photographic works is contained in Article IV of the Convention. It should be mentioned first of all that paragraph 2 of that Article provides that the term of protection cannot be less than 25 years after the death of the author; as an exception to this general rule, the term of protection may be limited, in certain cases, to 25 years from the date of the first publication or registration of the work. However, with regard to photographic works, paragraph 3 of Article IV stipulates as follows: "The provisions of paragraph 2 shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works." In other words, the State becoming a party to the Convention is not obliged to protect such works of its own nationals. If the protection is granted, then the same protection should be granted to photographic works of foreign authors.

20. As for the term of protection "in those Contracting States which protect photographic works" (these words make it particularly clear that no State is obliged to protect such works), the above-quoted paragraph prescribes that it "shall not be less than ten years." This provision does not establish the date from which the minimum term must be computed. The reason for this was mentioned in the Report of the Rapporteur-General: "The date of commencement of this term was not specified in the paragraph, having regard to the fact that some countries protect photographic works from the date of creation and not from the date of publication." Therefore, Contracting States are free to choose the commencement date. It may be the date of publication of photographic works, the making of a photograph, the death of the author, or some other date.

Report 25. No comments were made concerning this part of the memorandum.

The Definition of Photographic Works and General Considerations About Their Protection

Introductory Remarks

21. The international copyright conventions do not contain any explicit definitions of the concept of photographic works. This does not mean, however, that no elements are offered by the conventions for the definition of such works in national copyright laws.

22. The expression used in Article 2(1) of the Berne Convention ("photographic works to which are assimilated works expressed by a process analogous to photography") and the history of the development of the relevant provisions of the Convention, as discussed above, do offer certain indications for a definition of such works (for example, in regard of the technological aspects and the type of expression involved). Furthermore, it seems to be obvious that as far as photographs are protected as a category of literary and artistic works, all the general considerations about the protection of such works necessarily apply.

23. In the following part of this memorandum, three major aspects of the definition of photographic works are discussed. First, the notions of photography and of processes analogous to photography, second, the problems of the general conditions of copyright eligibility in respect of photographic works and, third, the question of fixation and—in connection with that question—the delimitation between photographic works on the one hand and audiovisual works on the other.

The Concepts of Photography and of Processes Analogous to Photography

24. The word "photography" is composed of two elements of Greek origin: "photo" means "light" and "graphy" can be translated as "drawing," "engraving" or "writing." "Photographs" mean records of images produced on surfaces sensitive to light. Usually, but not necessarily, the image which is recorded is produced by means of lenses in a camera. When the sensitive material is exposed to the light forming the image, it undergoes changes in structure. In this way, a latent image is formed which becomes visible by development and permanent by fixation. Originally, all this involved chemical processes and, even now, that is still the typical way of producing latent pictures and of developing and fixing them. Recently, however, other processes have also appeared such as producing "electronic photographs."

25. With new developments, the quality of photographs is becoming ever more perfect and the means of expression of photographers ever richer, but all this does not concern, in itself, the notion and definition of photographic works. Such new methods as the use of electronic techniques may, however, raise some questions. One may ask, for example, whether the production of electronic images still qualifies as photography and whether it can be deemed a process analogous to photography or, yet again, whether it is even covered at all by the notion of photographic works.

26. Electronically produced pictures are made, for instance, by the so-called charge-coupled device (CCD) technique. Light is transformed by light-sensitive silicon chips into electronic charges which are amplified and transferred into a magnetic memory built into the camera or connected to it. The content of the memory is transformed into direct signals through a digital converter and the signals are fed into a computer system by means of which pictures can be produced. Such pictures are images recorded by means of action of light. Therefore, they are clearly covered by the notion of photographic works as used in the Berne Convention. The only question which may emerge is whether such pictures are photographic

works proper or rather works assimilated to photographic works (and expressed in a process analogous to photography). The answer depends on whether only those processes could be deemed photography which were known as such at the time of the inclusion of the expression concerned into the text of Article 2(1) of the Berne Convention (Stockholm, 1967) in which case every other method invented after that time could only be considered, at most, as a process *analogous* to photography even if it involved the recording of images of objects of reality produced through surfaces sensitive to light, or, such new picture-producing processes could still be deemed to be covered by the concept of photography (in which case the expression "process analogous to photography" would refer to something else). Both answers may be accepted as reasonable, but the latter answer seems to be more justified.

27. Where do processes analogous to photography start then? Probably, such fields as infrared "photography" and ultraviolet "photography" where invisible light is used, are in the border area between photography proper and processes analogous to photography, whereas radiography and other radiation recording techniques (such as X-ray radiography, gamma radiography, autoradiography)—which, in general, involve the recording of subsurface features of objects—are processes analogous to photography. Here, the source of the recording of images is not light but radiation, the techniques, however, are analogous to the techniques of photography. At the other end of the spectrum, there are then such picture-generating processes about which there could be serious doubts whether they are still analogous to photography or whether they are already beyond that category. The so-called nuclear magnetic resonance technique by means of which pictures are taken through scanning molecules, for example, in a human body that has been placed in a very powerful magnetic field (under the effect of that field, molecules emit radio signals which are recorded as a picture) or the techniques used for electronic microscopes are in that outer border area, although on the basis of an extensive interpretation of the term, they can still be deemed to be processes analogous to photography. In the case of sound-generated pictures ("sonar" pictures), it is even more difficult to speak about works produced by processes analogous to photography, but such an extreme interpretation of the notion of analogy cannot be excluded either; if this interpretation were to be accepted, its basis could be a possible principle that all processes which involve the recording of any pictures by means of capturing any waves by which light, radiation, magnetism, sound, etc., are spread can be deemed processes analogous to photography.

28. In the preceding paragraphs, this memorandum has dealt with the mainly technological aspect of the definition of photographic works. The description of the various new developments and borderline questions seemed necessary to outline an appropriate definition. Modern picture-producing techniques, however, do not raise significant legal problems. In respect of the concept of photographic works, it is rather the question of originality which involves the most serious and most numerous problems, both of theoretical and of practical nature.

The Problems of Copyright Eligibility of Photographic Works

29. Neither the Berne Convention nor the Universal Copyright Convention define the word "work." It is clear, however, from the general etymological meaning of the word and from the context in which it is used that "works" must be the result of intellectual creativity. Article 2(5) of the Berne Convention seems to confirm this interpretation in providing that "[c]ollections ... which ... constitute *intellectual creations*, shall be protected as such ..." [*emphasis added*]. It is another matter that, although the word "creations" offers some more substantive indications for the definition of "works," it also has to be interpreted and further defined. There is a fairly general agreement as to what "creations" (and, consequently, "works") do *not* include. First of all, "creations" do not include mere ideas or mere information as such. Copyright protection only exists if an idea has been fixed in a certain form, if a piece of information has been expressed in words, notes, pictures, etc. Furthermore, "creations" do not have to be novel, but they must be original.

30. Works must be original productions or, at least, must contain original elements; about this, there is still agreement. The point from where agreement ceases to exist, in legal theory and in national copyright laws, is the notion of originality. Under certain copyright laws—in general, under the copyright laws of countries with common law legal traditions—all productions in the literary and artistic domains that are the results of, at least, skill and labor, and are not mere copies of preexisting productions, qualify as works. In other countries, only those productions are recognized as original creations—and, consequently, as works—which clearly reflect the personality of their creators and which are the results of independent—and sometimes above-average—intellectual efforts. The international copyright conventions have always recognized the coexistence of such differing approaches, and the problems emerging from the differences in the interpretation of the notion of "works" have been left to national legislation.

31. The problems of differing concepts of originality have always been very strongly felt in respect of photographic works. As described in the preceding chapter of this memorandum, the question of originality of photographic works arose at several diplomatic conferences on the revision of the Berne Convention. The definitions of such works in national laws also differ to a large extent.

32. When the original artistic character of photographs was questioned, it was said that it was a machine and not a human being that produced the picture and that there was not sufficient room for creativity. In the early stages of development of photography and of international copyright protection (both of which took place in nearly the same period), a further source of doubt was that, for a while, it was traditional art (painting, drawing, etc.) whose artistic principles and values were taken into account when considering the eligibility of photographs for copyright protection and it was only later that the independent artistic laws and characteristics of photography were identified.

33. The national laws and/or courts of certain countries did recognize the originality and thus the copyright eligibility of, at least, certain photographs fairly early. The case of *Burrow-Gile's Lithographic Co.* v. *Sarony* is frequently referred to as one of the earliest examples of such recognition. In that case, the Supreme Court of the United States of America held photographs to constitute "writings" within the meaning of the "copyright clause" of the Constitution of that country as early as in 1884. The Court held that the portrait which was at issue in the case exhibited sufficient originality "by posing ... Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in the said photograph, arranging the subject so as to present graceful outlines, arranging the light and shade, suggesting and evoking the desired expression ...."

34. The Supreme Court declined to rule in the case mentioned above on the question of whether, in general, "ordinary photographs" exhibited sufficient originality or not, but the case law development that followed led to a legal situation which is now fairly typical in countries with common law traditions. That was expressed in the most eloquent way in another court decision which is also often quoted. Judge Learned Hand concluded in 1921 that "no photograph, however simple, can be unaffected by the personal influence of the author ..." and, by this, he stated that all independently produced photographs contained more or less originality sufficient to claim copyright protection (*Juveler's Circular Publishing Co.* v. *Keystone Publishing Co.*, 274 Fed. 932, 934 (S.D.N.Y.), affirmed 281 Fed. 83 (2d Cir. 1922)). Several copyright laws following the common law system contain provisions which make it clear that practically all independently created photographs enjoy copyright protection. For example, under the Copyright Statute of the United Kingdom, photographs are protected "irrespective of artistic quality" and such a provision, or one similar to it, can be found in many other copyright laws based on the common law legal approach. The language of those provisions also expresses the principle that no value judgment should be made as a condition of copyright eligibility.

35. In a number of countries with "continental" or "Roman" legal traditions, not all photographs are protected as works, but only those which pass a certain creative-step test. For example, the Brazilian Copyright Law provides that only those photographs enjoy copyright protection which, by reason of choice of subject and the conditions under which they are made, may be considered artistic creations. Other national laws do not indicate, in such a detailed manner, what criteria of copyright eligibility should be considered, but provide, in general, that only artistic photographs, or photographs of creative nature, enjoy copyright protection. In still other countries, copyright laws themselves do not contain any such special conditions in respect of photographic works, but certain photographs—about which the courts find that they do not exhibit sufficient creativity—are excluded from copyright protection within the framework of case law.

36. It is interesting how French legislation has developed in this field. The 1957 Copyright Law of France provided that only those photographs were protected by copyright which were of artistic or documentary character. The application of that provision led to a complex case law which sometimes involved certain subjective value judgments. That situation was criticized as a source of legal uncertainty and as being in conflict with the general principle expressed in Article 2 of the 1957 Law according to which all intellectual works were protected, irrespective of their genre, form of expression, merit or purpose. The Law of July 3, 1985, modified the provision of the 1957 Law concerning photographic works and extended copyright protection to all such works irrespective of their artistic or documentary character. It was stressed that photographs should be original to be protected, but their originality should be judged on the basis of the same criteria as the ones applied in respect of other categories of works.

37. There are certain African countries (Benin, Burkina Faso, Côte d'Ivoire, Guinea, Senegal) which have adopted the solution of the 1957 French Copyright Law; under the copyright laws of those countries, photographic works are only protected if they are of an artistic or documentary character.

38. In some countries, photographs not qualifying as works fall into the public domain, while in several other countries (such as Austria, Federal Republic of Germany, Hungary, Italy), there is a safety net for such works; although they do not enjoy copyright protection, they are protected under special related rights systems (which, in general, involve less favorable conditions, shorter terms of protection and sometimes even some formalities). These related rights systems are briefly discussed in the last chapter of this memorandum.

39. There is a third—middle-of-the-road—solution which prevails in the Nordic countries. In Denmark, Finland, Norway and Sweden, photographic works are not protected under the provisions on authors' rights as other kinds of pictorial and graphic works are. The copyright legislations of those countries expressly exclude photographs from the application of the copyright laws; there are separate laws about the protection of photographs on the basis of which all photographs are protected, irrespective of their artistic character or purpose. The protection of photographs under the separate laws is, however, in keeping with the minimum standards established by the Berne Convention in respect of photographic works. In the last but one chapter of the present memorandum, the relationship between such special systems, on the one hand, and the copyright protection described in the memorandum, on the other, is discussed briefly.

40. There seems to be no reason to use other criteria in respect of the protection of photographic works than the ones applied, in general, when copyright eligibility of literary and artistic works is considered. As a result of a fairly long legal development, it is now clear (at least under the Berne Convention) that all photographs should be considered as works and protected by copyright. As in respect of all other productions in the literary and artistic domains, in respect of photographs also, there could be only one condition of copyright eligibility, namely, that

they should contain creative elements, that is, they should be original. The artistic value, the merit, the purpose, etc., of photographs should not be taken into account as criteria of eligibility for protection.

41. During the more than 100-year-long discussions on whether the copyright protection of photographs is justified or not, it has been proved in a convincing manner that there are a great number of elements of the picture-producing process in which originality—even if it is interpreted as an expression of the personality of the author—can be manifested in the field of photography. The choice of the subject of which, of the time when and of the angle from which the picture is taken as well as the composition of the photograph (several books have been written about the rich choice and the possible artistic effects of different ways of picture composition) are practically always present when a photograph is taken by a human being even if a "simple," "automatic" camera is used. In addition to this, there can be original elements in choosing certain technical means (lenses, filters, the types of sensitive material) as well as in the phase of the development of pictures and the final cutting of the picture, not to mention the fact that in many circumstances where that is possible photographers, before taking pictures, arrange the subject to be photographed in a special way, use special light effects, and make other artificial preparations serving the purposes of making the picture.

42. The rich personal choice at the stage of taking and composing photographs indicates that Judge Learned Hand (see paragraph 34 above) was basically right when he stated that "no photograph, however simple, can be unaffected by the personal influence of the author." This means that practically all photographs taken by human beings necessarily contain some elements of originality. If originality is present, there is no basis for saying that less originality still is not sufficient but a certain higher level of originality is needed for copyright eligibility. Only those photographs should be excluded from copyright protection in the case of which there is no room for personal choice and no possibility of influencing the composition of the picture to be taken (such as pictures taken by fully automatic traffic control cameras and, at least under certain laws, simple photocopies, photographs taken by coin-operated machines, etc.). Furthermore, it goes without saying that no photographs that are copies of preexisting photographs can be protected as original works.

The Question of Fixation. Delimitation Between Photographic Works and Cinematographic Works

43. At the 1967 Stockholm Diplomatic Conference, in Main Committee I, the Delegation of the United Kingdom proposed that in the non-exhaustive list of works in Article 2 of the Berne Convention, the reference to photographic works should contain a condition concerning fixation. The Committee did not adopt the proposal; not because it thought that fixation was not a condition, but rather because it considered that—as the report of the Committee put it—"a photographic work must by definition be fixed." The position of Main Committee I seems to be correct. The very notion of photo*graphy* involves that an image is produced on a surface sensitive to light or radiation and the result is necessarily a still picture as in the case of *graphic* works proper.

44. The fact that a photographic work necessarily involves fixation is in harmony with Article 2(2) of the Berne Convention which allows that "any specified categories of works shall not be protected unless they have been fixed in some material form." What the position of Main Committee I clearly implies is that if a picture produced on the basis of light or radiation effects is not fixed, then it is not a photograph; it may be some other work protected by copyright, but not a photograph because photographic works are, by definition, fixed.

45. Cinematographic works are composed of a series of photographs (and, if they are "audiovisual," also of a sound track). Before cinematography was recognized as an independent genre, attempts had been made to protect cinematographic films element by element and, *inter alia*, as a sequence of photographic works. It became clear fairly soon, however, that the essence of cinematographic films was just that when such series of related images were shown in succession, they imparted an impression of motion. From that is derived the expression "motion pictures" as a synonym of cinematographic works. It is evident that while cinematographic works are composed of still images which—when individually taken—qualify as photographs, they are, as to their artistic essence, not a simple sum of individual photographs but do represent a new quality. Therefore, a cinematographic work is protected as such and not, for instance, as a collection of photographic works.

46. It is another matter that if a portion of the sequence of pictures is used as a still picture, it has the quality of a photograph. Should such a still picture extracted from a cinematographic film be protected as a photographic work according to the provisions on such works or should it be considered as a part of the cinematographic work? The majority of national laws are silent about that question which is also only rarely considered in case law. National laws which do provide for the copyright status of photographs "extracted" from cinematographic films contain diametrically opposing provisions. The national laws of several countries with common law legal traditions (Australia, Bangladesh, India, Pakistan, United Kingdom, etc.) exclude photographs that are parts of cinematographic films from the definition of photographic works, while the copyright laws of some other countries (such as those of Italy and Portugal) expressly provide that photographs from cinematographic films must be deemed to be photographs.

47. Important arguments can be cited in favor of both solutions mentioned in the preceding paragraph. It can be said that when a still picture from a film is used (for example, when it is published in a magazine), it possesses all the qualities of a photographic work and, at the same time, in itself, it cannot have the effect (motion) which is the essence of cinematographic works. On the other hand, it cannot be denied that if such a photograph is used sep-

arately, one cannot ignore the fact that it is (or was) part of the cinematographic film. It is used not so much as an independent work, but rather as an element of the sequence of pictures composing the film. Under that theory, the owner of the copyright in the picture is the owner of the copyright in the cinematographic work, the duration of the protection of the picture is the duration of the protection of the cinematographic work and not of the photographic work and, generally, the law concerning cinematographic works is applicable.

Conclusions

48. On the basis of the above considerations, the following principles are proposed:

Principle PHW1. (1) Photographs are still pictures produced on surfaces sensitive to light [or other radiation] irrespective of the technical nature of the picture-taking process (chemical, electronic or other).

(2) All photographs that contain original elements should be protected by copyright as photographic works. All photographs should be considered as containing original elements and thus as being photographic works, except those in the case of which the person taking the phntngraph has no influence on the composition or other significant elements of the picture.

Principle PHW2. Alternative A: To photographs extracted from cinematographic works, the law concerning photographic works should apply.

Alternative B: To photographs extracted from cinematographic works, the law concerning cinematographic works should apply.

49. It should be noted that Principle PHW1 does not use the expressions "works assimilated to photographic works" or "works expressed by a process analogous to photography." The assimilation of such works is carried out in the definition itself. Consequently, the expression "photographic works" used in the present memorandum—as defined in Principle PHW1—also includes works expressed by a process analogous to photography. In the case of Principle PHW2, two alternatives are offered on the basis of the considerations discussed in paragraphs 46 and 47 above.

Report 26. Some delegations informed the Committee on the definition of photographs and photographic works, respectively, in their national laws.

Report 27. There was agreement that paragraph (1) of Principle PHW1 was acceptable as a technical definition; that is, not as a definition of photographic works but photographs in general. Some participants stressed that the definition had the advantage of being general and was not attached to concrete techniques.

Report 28. The first sentence of paragraph (2) of Principle PHW1 was supported by all the participants who took the floor in the discussion. It was pointed out, however, that the concept of originality differed to a great extent at the national level.

Report 29. One delegation proposed that in paragraph (1) of Principle PHW1 the word "produced" should be replaced by the word "fixed," because, in certain cases, it was the phase of development where originality was manifested.

Report 30. A great number of comments were made in respect of the second sentence of paragraph (2) of Principle PHW1.

Report 31. Several participants supported the principle included in that sentence, stressing that it offered an objective basis for the delimitation between photographic works and photographs not eligible for copyright protection. Some delegations referred to the legislation and the case law of their countries which were in keeping with that principle.

Report 32. Several other participants opposed the sentence as it was worded in the memorandum because they considered it as a quasi presumption of originality of photographs. Some delegations referred to their national legislation and case law where the concept of originality was different from the one which was reflected in the second sentence of paragraph (2) of Principle PHW1, and emphasized that the same concept should prevail in respect of all categories of works.

Report 33. One delegation proposed that the second sentence of paragraph (2) of Principle PHW1 should be reworded: the principle should reflect that those photographs should be protected as photographic works in the case of which the person who took the picture had influence on the composition of the picture or on any other elements constituting intellectual creation. The delegation considered that, by means of such a wording, the quasi presumption of originality contained in that sentence could be avoided. Some other delegations supported that proposal.

Report 34. Another delegation proposed that the second sentence of paragraph (2) of Principle PHW1 should not refer to the influence of the person taking the photograph but to human influence, in general, because such a wording would cover better all cases where the copyright eligibility of photographs should be recognized. Several participants supported this proposal.

Report 35. Several participants proposed that the second sentence of paragraph (2) of Principle PHW1 should be deleted from the text of the principle and the question of the interpretation of originality should be left to the commentary where the differing approaches at the national level were correctly analyzed.

Report 36. One delegation proposed that the second sentence of paragraph (2) of Principle PHW1 be put in brackets to express that it was not applicable in all countries.

Report 37. A separate discussion took place concerning the copyright status of photographs taken by satellites. Some participants were of the view that such photographs should also be protected as photographic works because human influence on significant elements of producing such photographs—through pre–programming of the picture–taking process and also in the phase of development—was present. Some delegations said that the concept of originality prevailing in their countries did not seem to cover such photographs; no human influence could be recognized in such cases and thus copyright protection was not justified. They added, however, that such photographs might deserve protection of a related rights nature.

Report 38. An observer from an international non–governmental organization raised the question of whether photographs taken of two–dimensional works of fine art with the purpose of as perfect a reproduction as possible of such works could be considered as separate works or not. The representative of the Secretariats considered that it was a question which could only be answered at the national level depending on the concept of originality prevailing in the country concerned.

Report 39. Some participants referred to national laws where photographs not qualifying as photographic works were protected by related rights. In that context reference was made also to computer–generated works.

Report 40. In respect of Principle PHW2, several participants were in favor of Alternative A, while several other participants were in favor of Alternative B. Finally, it was agreed that both alternatives should be retained reflecting the differing solutions at the national level.

Formalities as Conditions of Protection or as Sources of Prima Facie Evidence

50. There are several national copyright laws under which it is a condition of the protection of photographs that the name of the author—and, under certain laws, also the year of the production or publication of the photograph—be indicated on the original and/or on the copies of the photograph.

51. Under Article 5(2) of the Berne Convention, the enjoyment and exercise of authors' rights shall not be subject to any formality. The indication of the name of the author and the place and year of the creation or publication of a work as a condition of copyright protection is a formality. In countries party to the Berne Convention, the protection of photographic works cannot be subject to such formalities. Such formalities do not seem to be justified in other countries either. Therefore, the following principle is proposed for consideration:

> **Principle PHW3. The copyright protection of photographic works should not be subject to any formalities (such as the indication of the name of the author and/or the year of the production or publication of the photograph on its copies as a condition of copyright protection).**

52. It is another matter that the indication of certain data, such as those mentioned in the preceding paragraphs, may be useful for the identification of the author or of the year of the production or publication of the photograph (which latter data may be important for the calculation of the term of protection). In respect of photographs—in case of dispute—it may be fairly difficult to find out and prove such data; therefore, it seems to be justified to encourage authors to indicate those data on the copies of the photographic works. The indication of such data is promoted, and the establishment of the data concerned in possible legal proceedings is facilitated if the indication of such data is recognized as *prima facie* evidence, as proposed in the following principle:

> **Principle PHW4. In the absence of proof to the contrary, the person whose name and the year of the production or publication which are indicated on the original and/or on the copies of the photographic works should be presumed to be the author of the work and the year of the production or publication of the work, respectively. This principle should also be applicable if the name indicated is a pseudonym, where, under the circumstances, there is no doubt as to the identity of the author who uses that pseudonym.**

53. Principle PHW4 is in keeping with Article 15(1) of the Berne Convention which provides as follows: "In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity."

Report 41. The participants who took the floor in the discussion expressed their agreement with Principle PHW3.

Report 42. Several participants were of the view that Principle PHW4 contained useful advice. Some delegations, however, were of the opinion that the principle should be restricted to the indication of the name of the author which was only covered by Article 15(1) of the Berne Convention and should not be extended to the indication of the year of the production or publication of the work; the latter question could be covered by the commentary.

Report 43. One delegation proposed that the whole Principle PHW4 should be deleted and the question of the prima facie evidentiary value of the indication of certain data should be dealt with in the commentary.

The Ownership of Copyright in Photographic Works

General Considerations

54. It follows from the general principles and provisions of the international copyright conventions that, as a rule, the author, that is, the person who creates the work, is the original owner of copyright.

55. National laws, in general, follow this principle in respect of photographic works as well. There are only three cases in which persons other than the creators of photographs are, in certain national laws, considered or designated as original owners of copyright, namely, first, the case of works created under employment contract; second, the case of commissioned works; and third, a special case in the legislation of certain common law countries which is described below.

56. The present memorandum does not discuss the ownership in works created under employment contract because the copyright problems raised in connection with such works are of a general nature and do not only concern photographic works but all categories of works created by employees. That is the reason why several participants in the meeting of the Committee of Governmental Experts on Works of Applied Art, in Geneva in October 1987, expressed the view that it was not appropriate to discuss the question of the protection of such works within the framework of meetings dealing with different categories of works.

57. The problems of commissioned photographs are discussed in a separate subchapter below.

58. The special provisions on the original ownership of copyright in photographic works which can be found in the copyright laws of certain countries following common law traditions (Ireland, New Zealand, Sierra Leone, United Kingdom) are of more general nature. They concern all photographic works (other than photographs made by employed authors and commissioned photographs). Under the provisions mentioned above (which, otherwise, cannot be found in the copyright laws of the majority of common law countries either), "author" in relation to a photograph means the person who, at the time the photograph is taken, is the owner of the material on which it is taken. These provisions have been criticized both outside and inside the countries concerned as conflicting with certain basic principles of copyright and as attributing authorship on a basis which may be wholly irrelevant. For example, the so-called White Paper on "Intellectual Property and Innovation" presented to the Parliament in the United Kingdom in April 1986 stated as follows: "It is somewhat arbitrary and frequently inappropriate that the owner of the film should also own the copyright in a photograph on the film." The new Copyright Bill which is under discussion in the Parliament of the United Kingdom at the time of the preparation of this memorandum, accordingly, does not contain any separate provision on the ownership of copyright in photographic works and, thus, the general provision of the Bill under which the "author" is the person who has created the work, is applicable.

59. It is another matter that the ownership of the original of the photograph (for example, the negative) on the basis of which copies can be produced may be of special importance in respect of the exercise of economic rights which is discussed below in the chapter about such rights.

60. The following principle states something that is fairly evident in respect of the majority of categories of works. It seems to be necessary to simply underline that the solutions described in paragraph 58 above—according to which the owner of the photographic film is designated as the owner of the copyright—do not seem to be appropriate to mention in this context:

Principle PHW5. The author (that is, the creator) of a photographic work should be recognized as the original owner of copyright in such a work.

61. It goes without saying that exceptions may be provided for, particularly in two cases. The first is the original ownership of the person who has commissioned the photograph (this case is discussed below), and the second is the possible original ownership of the employer (first of all in countries with common law legal traditions). The latter case is not, for the reasons mentioned in paragraph 56, discussed in this memorandum.

Ownership of Copyright in Commissioned Photographic Works

62. Contrary to the problems of photographic works created by employees, it seems to be justified to discuss the questions of the copyright status of commissioned

photographs in the present memorandum. Of all categories of works, perhaps photographs are the ones which are most frequently created on commission. Therefore, it is not by chance that several national copyright laws contain special provisions concerning the ownership of copyright in commissioned photographs.

63. The provisions of national copyright laws on this subject differ to a large extent, and one can find examples of practically all imaginable solutions.

64. In a number of countries (for example, in France, Italy and several European socialist countries), the original ownership of copyright in commissioned works belongs to the author. That is the case in those countries where it is declared that the author is the original owner and there is no exception to this principle in respect of commissioned works.

65. There are some countries (for example, Congo, Mali, Portugal, Senegal) whose laws provide that copyright belongs originally to the author, but they make possible contractual stipulations to the contrary. This means that, by operation of a contract, copyright can be originally vested in the person who commissions the work.

66. In other countries (such as Cyprus, Kenya, Malawi, Malaysia, Malta, Nigeria, Sri Lanka, Zambia) the general rule is that copyright is vested in the author, but in the case of commissioned works, it is deeemed to be transferred to the person who commissioned the work, subject to any agreement between the parties excluding or limiting such a transfer. This means that while in the countries mentioned in the preceding paragraph the lack of contractual stipulations to the contrary means that the author is the original owner of copyright; in the countries mentioned in this paragraph, if the contract is silent about this question, the copyright in the commissioned work is vested in the person who commissioned it.

67. There are national laws (such as the Copyright Law of Ecuador) where in principle the author remains the original owner, but this ownership is restricted to a large extent by a *cessio legis* type provision under which the person who commissioned the work has the exclusive right to use the work within the limits of the means of dissemination for which it was commissioned.

68. The Copyright Law of the Philippines contains a unique, middle–of–the–road solution. It provides that the author and the person who commissioned the work are the joint owners of copyright in the work.

69. The copyright laws of several countries (such as Canada, Denmark, Finland, India, Ireland, Israel, Norway, Pakistan, Singapore, Sweden, Trinidad and Tobago, United Kingdom, United States of America, Uruguay) provide that the person who commissioned the photographic work is the original owner of copyright (sometimes with a condition that this applies unless otherwise expressly provided for in a contract). In respect of the United States of America, it should be noted that this rule applies only in respect of commissioned photographs which are covered by the definition of "works made for hire" (last paragraph of section 101 of the 1976 Copyright Act).

70. It is understandable that the copyright laws of several countries contain specific provisions on the copyright status of commissioned photographs and that such specific provisions provide for the original ownership of the persons who commissioned such photographs. In general, the purpose of commissioning photographs is obviously more than just to have copies of such photographs, it is rather to be in the exclusive position to use the photographs for all possible purposes. Furthermore, the persons who commission such works often determine the objects of which photographs are to be taken as well as certain details of the photographs and thus they also have an influence on the nature and artistic features of such works. It is realistic for national laws to recognize the special status of commissioned photographs when they provide for the ownership and exercise of copyright. For the recognition of this special status, the following two alternatives are proposed:

> **Principle PHW6. Alternative A: In respect of photographic works created on commission, the person who commissioned the work should have an exclusive license to use the work for all purposes which could reasonably be said to have been within the contemplation of the parties at the moment of commissioning.**
>
> **Alternative B: In respect of photographic works created on commission, unless otherwise provided in contract, the person who commissioned the work should be recognized as original owner of economic rights (see Principle PHW8) in such a work.**

71. The two alternatives above seem to correspond to the two basic trends which can be deduced from the various national solutions described above (which two trends otherwise also exist in respect of works created by employed authors). The meaning of Alternative A can only be fully appreciated if it is read together with Principle PHW5 which latter states that the author is the original owner of copyright, while Alternative B is just one of the possible exceptions to Principle PHW5, as mentioned in paragraph 61 above. Both alternatives leave open the question of the exercise of moral rights. In the case of Alternative B, which is based on what could be called the common law approach, a further provision may be found necessary in national laws under which, in the case of commissioned photographs, it should be deemed, unless otherwise provided in contract, that the author has agreed not to his moral rights (at least his right to be named on the copies of the photograph or in connection with such copies).

Report 44. Several participants expressed their full support for Principle PHW5.

Report 45. Other participants drew attention to what was described in paragraph 55 of the memo-

randum in respect of possible exceptions to this principle and suggested that, for the sake of avoiding misunderstandings, the text of Principle PHW5 should also refer to the possibility of exceptions. It was proposed, as a solution, to insert the words "as a rule" into the text of the principle. As another solution, it was suggested that the principle should simply state that exceptions were possible.

Report 46. In respect of Principle PHW6, some participants expressed their preference for Alternative A, while other participants were in favor of Alternative B.

Report 47. Some participants drew attention to the last phrase of Alternative A and said that a more objective basis should be found than the contemplation of the parties at the moment of commissioning the work.

Report 48. One delegation proposed that, instead of the phrase mentioned in the previous paragraph above, Alternative A should simply refer to the purposes for which the photographic work had been commissioned. The delegation noted that it was important to define what was meant by "commissioned works" because, depending on the actual influence of the commissioner of the commissioned work both Alternative A and Alternative B could be acceptable.

Report 49. An observer from an international non-governmental organization stressed that it was not sufficient to take into account the contemplation of the parties at the moment of commissioning the work. The right of the commissioner to use the work should be interpreted in a more flexible way, taking into account any new conditions and circumstances (including new technologies) concerning the possible utilization of the work.

Report 50. One delegation drew attention to the fact that in the French version of Alternative B, the word "convention" *is used instead of the word* "contrat" *(contract) which appeared in the English version. While the word "convention" corresponded, in a certain sense, to the meaning of the word "contract," it might be misunderstood. Therefore, the delegation suggested that, in the French version, the word* "contrat" *should be used. This proposal was supported by some other participants.*

Report 51. Several participants said that they did not agree either with Alternative A or with Alternative B of Principle PHW6.

Report 52. One delegation suggested that an Alternative C should be added to the two alternatives contained in the memorandum, which should read as follows: "In respect of photographic works created on commission, the author (that is, the creator) of the photographic work, unless otherwise provided in the contract, should be recognized as the original owner of economic rights." Some participants supported this proposal.

Report 53. Several participants stressed that Principle PHW6 only concerned economic rights and it should be considered as leaving moral rights or authors intact. In that context, one delegation opposed the statement included in the last sentence of paragraph 71 of the memorandum.

Report 54. Several participants stressed that there was a close relationship between Principles PHW5 and PHW6 which should be further emphasized.

Report 55. One delegation proposed that it should be made clear that, while Principle PHW5 covered a question which should be settled in all national laws, Principle PHW6 dealt with a question in respect of which it was not necessary to offer a regulation at the national level; it was only intended to States which wished to do so.

Report 56. Some delegations informed the Committee on the legal situation in their countries. One delegation stated that the last sentence of paragraph 69 of the memorandum did not reflect precisely the legal situation in its country. The concept of "works made for hire" did not cover commissioned photographic works, in general, but only those which had been commissioned for certain purposes, such as for collective works (encyclopedias, etc.), for works used for instructional activities and for newspapers and magazines.

Report 57. One delegation said that, in its view, it was pointless to offer separate principles in respect of commissioned photographic works, because the same or similar questions emerged with regard to other categories of commissioned works (such as works of fine art and works of architecture). The delegation was of the view that if the questions of the protection of commissioned works were dealt with, then they should include all kinds of protected works. Some other participants supported that comment.

Report 58. The same delegation stressed that not only the recognition of the basic rights of authors was important, but also the conditions of the exercise of those rights, and first of all, the conditions to be applicable in contracts. The delegation said that it would be useful to deal with the questions of authors' contracts also at the international level.

Report 59. One delegation pointed out that, while a possible future meeting about the copyright questions of works created by employees and of commissioned works could not lead to the adoption of principles which were acceptable for all the States, it would be necessary and useful to deal with, at least, the international private law problems arising from the fact that, in certain countries, it was the author who was recognized as original owner of copyright, while, in certain other countries, it was the employer or the commissioner who enjoyed such a status. Several other participants supported that comment.

Report 60. Some participants expressed the view that Principle PHW6 should be deleted and the questions of the protection of commissioned photographic works should only be dealt with in the comments.

Report 61. An observer from an international non-governmental organization expressed the view that in certain situations, the commissioner could also be recognized as a coauthor of the work.

Moral Rights in Photographic Works

72. Moral rights are the expression of the close and intimate link which exists between the author and his creation, which may be more or less the expression of his personality.

73. Article 6bis(1) of the Berne Convention provides that "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." This provision also covers photographic works.

74. In the light of the foregoing, the principle governing moral rights in photographic works might be the following:

Principle PHW7. Independently of the author's economic rights, and even after the transfer of the said rights and/or after the alienation of the copy of the photographic works, the author should have the right to

(i) claim authorship and have his name indicated in connection with any public use of his work;

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

Report 62. Several participants pointed out that Principle PHW7 was along the lines of Article 6bis of the Berne Convention and, as such, represented a minimum standard for the protection of moral rights.

Report 63. Some delegations added that, in their national laws, some other moral rights were also granted (such as the right to make the work public, the right of withdrawal) and said that the minimum standard nature of the principle should be further emphasized.

Report 64. An observer from an international non-governmental organization stressed that, in the case of new technologies which permitted the manipulation and combination of pictures, particular attention should be paid to the fullest respect of moral rights.

Report 65. One delegation pointed out that, in the French version of the opening part of Principle PHW7, it should be made clear that not only copies produced on the basis of the original support of the work but also the original support itself was meant. This comment was supported by an observer from an international non-governmental organization.

Report 66. One delegation proposed that point (i) of Principle PHW7 should be worded in a more flexible manner to make it clear that the obligation to indicate the author's name did not cover cases where it would be unreasonable to meet such an obligation. Some other participants supported this proposal.

Economic Rights in Photographic Works

75. The international copyright conventions do not provide for specific limitations on the economic rights in respect of photographic works. Therefore, all economic rights granted to the authors of literary and artistic works should also be enjoyed by the authors of photographic works.

76. The following principle—formulated in accordance with the more detailed provisions of the Berne Convention—is offered for consideration:

Principle PHW8. (1) The owner of copyright in a photographic work should have the exclusive right to authorize at least the following acts:

(i) the reproduction of the work in any manner or form (including storage of the work in a computer);

(ii) the display of the work to the public on a screen (insofar as such display is not recognized as a reproduction of the work);

(iii) the public exhibition of the work;

(iv) the making of adaptations of the work;

(v) any communication to the public of the work (including its communication by wire in a cable-originated program);

(vi) the broadcasting of the work; any communication to the public by wire (by cable), or by rebroadcasting, of the broadcast of the work, when this communication or rebroadcasting is made by an organization other than the original one;

(vii) the inclusion of the (preexisting) work into an audiovisual work.

(2) The exclusive right of the author of the photographic work to authorize the acts mentioned in paragraph (1) should not be restricted but in the cases and to the extent allowed under the international copyright conventions.

77. The legal basis of the economic rights and the possible limitations to them as well as the questions raised by new technologies in relation to those rights and limitations were discussed in detail at the meetings of the committees of governmental experts dealing with the eight categories of works mentioned in paragraph 3 above. For example, the questions of cable distribution and the application of broadcasting right in the case of satellite broadcasting were discussed at the meeting of the Committee of Governmental Experts on Audiovisual Works and Phonograms in Paris in June 1986, the recognition of the right of exhibition was considered at the meeting of the Committee of Governmental Experts on Works of Visual Art in Paris in December 1986, while the problems of reprography (in respect of the possible restrictions of the right of reproduction), of the storage in and the retrieval from computer systems of works and of the display of works on a screen will have been dealt with—by the time of the meeting of the Committee for which the present memorandum has been prepared—by the Committee of Governmental Experts on the Printed Word (to take place after the writing of the present memorandum, in Geneva in December 1987).

78. The present memorandum does not contain separate principles about two economic rights (neither of which is of the nature of an exclusive right), namely, public lending right and the *droit de suite*.

79. As far as public lending right is concerned, its application might generally emerge only in respect of books containing pictures. Photographs, as such (i.e., in isolation), however, in general, are not covered by such a right under national legislation (the legislation of the Federal Republic of Germany seeming to be the only exception). If this right—which would, otherwise, be justified in respect of valuable albums and, perhaps, also in respect of at least certain cases of illustrations—is granted also in respect of photographs, the considerations reflected in the chapter on public lending right in the working document prepared for the Committee of Governmental Experts on the Printed Word are applicable *mutatis mutandis*.

80. The lack of any principle about the *droit de suite* is not simply because its application seems to be atypical in respect of photographic works, but rather because its recognition cannot be recommended at all in the field of such works. Article 14[ter](1) of the Berne Convention only provides for the *droit de suite* in respect of original works of art and original manuscripts of writers and composers. According to the generally accepted interpretation, "works of art" in this context means works of art proper, that is, drawings, paintings, statues, engravings and the like, and do not include photographic works in the case of which the original copy (the negative) plays a role which is different from that of the original works of art mentioned above. No national laws grant the *droit de suite* to the authors of photographs.

Report 67. Some delegations stated explicitly that they agreed with Principle PHW8.

Report 68. One delegation, while supporting Principle PHW8, referred to the right of display mentioned in point (ii) of paragraph (1) of Principle PHW8 for which the international copyright conventions did not provide explicitly. Therefore, there were no provisions in the conventions concerning the possible exceptions to that right and, thus, paragraph (2) of the principle did not refer to any exception either. The delegation informed the Committee that, in the national law of its country, there was a particular exception to the right of display of the author of a photograph. The lawful owner of a copy of a photograph had the right to display or otherwise exhibit that copy publicly without the authorization of the author.

Report 69. The representative of the Secretariats informed the Committee that the new version of principles included in the memorandum prepared for the Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works to be held in Geneva in June–July 1988 which was under distribution, did contain an exception, in respect of works of fine art, to which the delegation referred in respect of photographic works.

Report 70. One delegation proposed that the opening part of paragraph (1) of Principle PHW8 be worded as follows: "The owner of copyright in a photographic work should have the exclusive right to authorize any form of exploitation of his work presently known or to be invented in future. In accordance with the provisions of the Berne Convention, he should have the exclusive right to authorize at least the following acts ... etc."

Report 71. One delegation informed the Committee that, in its country, public lending right also covered photographic works.

Report 72. Some participants pointed out that, in addition to authors' rights, the personality rights of those persons whose photographs were taken should also be considered. Certain delegations referred to the legal situation in their countries.

The Role of the Ownership of the Original Copy of a Photographic Work

81. In the case of works of visual art (paintings, sculptures, etc.), particularly if only one single original copy of such a work exists, the ownership of the original copy is of legal and practical importance.

82. The ownership of such a single original copy means that the owner, whether he is the artist himself or another person, from a practical point of view is in an exclusive position to make the copy of the work of visual art available for any utilization. When the author transfers the ownership of such a single copy, he does so in realizing that in practice this other person will find himself in such an exclusive position. The manner of enjoyment and exercise of copyright in the work, in the case of the transfer of the only existing copy, is a question of contract. If, however, the contract does not include any particular stipulations in this respect, one has to rely on an interpretation of this silence.

83. The working document prepared for the meeting of the Committee of Governmental Experts on Works of Visual Art (Paris, December 1986) offered two alternatives to solve the problem of the silence of the contract concerning the enjoyment and exercise of copyright in case of the transfer of ownership in the single original copy. The first alternative—which corresponded to the traditional legal approach to this question—was that, in such a case, the economic rights should remain with the author; consequently, the owner of the copy, as well as any third person, should obtain an authorization from the author (or from his heir) for any further utilization of the work. The second alternative—which followed the trend of general practice in certain countries—was based on another possible interpretation of the silence of the contract, namely that, in transferring the only original copy the author accepts implicitly that it is the new owner of the copy who is authorized to exercise, at least, certain rights.

84. In the case of photographic works, at least as far as the present widespread "traditional" picture-producing processes are concerned, there are also original "copies" (negatives, etc.) which play a decisive role in the production of further copies (positives, etc.). Although the development of reprography makes the direct (positive from positive) reproduction of photographs possible in ever more perfect quality, the production of copies of photographs is still done normally on the basis of original copies (negatives). While, in respect of works of visual art, it is only a trend, in certain countries, that the transfer of the single original copy implicitly includes the transfer of the exercise of certain economic rights to the new owner of the copy, in the field of photographic works such an interpretation of the legal consequences of the transfer of the original copy seems to be much more than a mere trend. The simultaneous transfer of, at least, certain economic rights is generally accepted in such cases as a reality in the face of which any declaration that, at least, certain of the author's economic rights are not transferred by the transfer of the ownership in the "material support" would be pointless and unrealistic. Therefore, the following principle is suggested (in two alternatives which differ in respect of whether all economic rights are considered to be transferred or only those which are indispensable for the transferee's usual activity):

Principle PHW9. Alternative A: The transfer of the ownership in the original copy (for example, the negative) of a photographic work should, unless otherwise provided in contract, be considered to involve the simultaneous transfer of the economic rights (see Principle PHW8) in the work.

Alternative B: The transfer of the ownership in the original copy (for example, the negative) of a photographic work should, unless otherwise provided in contract, be considered to involve the simultaneous transfer of those economic rights in the work which are indispensable for the transferee's usual activity.

Report 73. Several participants stated that they opposed Alternative A of Principle PHW9 as not being in accordance with their national legislation.

Report 74. Some participants said that they did not agree with Alternative B of Principle PHW9 for the same reasons.

Report 75. Some other participants declared that Alternative B was acceptable to them. One delegation, however, proposed that Alternative B should only provide for the transfer of non-exclusive economic rights.

Report 76. One delegation proposed that a new Alternative C should be added to Principle PHW9 "according to which the author retained his economic rights in his work when the original copy (for example, the negative) was transferred to another person, unless otherwise provided in contract." Some participants supported this proposal, while certain other participants opposed it.

Report 77. Some participants expressed the view that they did not consider Principle PHW9 necessary because they were of the view that it was more appropriate to settle this question in contracts.

The Term of Protection of Photographic Works

85. As discussed in the chapter on the development of the provisions of the international copyright conventions, the term of protection is one of the rare questions about which both the Berne Convention and the Universal Copyright Convention contain specific provisions in respect of photographic works.

86. Article 7(4) of the Berne Convention provides as follows: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works ...; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."

87. Article IV.3 of the Universal Copyright Convention provides, as has been noted in paragraph 20 above, that the term of protection of photographic works must not be less than 10 years. However, this provision, for the reasons mentioned in the said paragraph, does not stipulate the date from which the term of protection must be computed.

88. The provisions of national laws on the term of protection of photographic works vary from country to country. In some countries, the term is calculated from the making of the photograph, in other countries from its publication, in still other countries from the death of the author, and the term of protection itself differs to a large extent. Furthermore, there are countries where the copyright law does not provide for a specific term of protection in respect of photographic works; therefore, the general terms of protection are applicable to such works as well.

89. The widely differing lengths of the term of protection of photographs at the national level may raise practical problems in relation to the administration of rights in such works. A further complicating factor is that, under the international copyright conventions, and in cases where the national law provides for more than the minimum term, the principle of comparison of terms may be applied. Under that principle, one has to know when the protection expires in *two* countries: in the country of origin of the work and in the country in which protection is claimed. The latter principle, in itself, seems to justify that attempts should be made to try to harmonize the terms of protection.

90. In trying to harmonize the terms of protection of photographic works, two elements should be considered: the starting point of the term and the duration.

91. It is often not easy to determine with precision the date on which a photograph was made, particularly if it has to be found out several years later. The system of calculation based on publication does not allow the term of protection to be known in advance as it may not occur until long after the photograph was taken and may even never take place.

92. There is only one solid basis for the calculation of the term of protection of photographic works, namely, the year of the death of the author as in respect of other categories of works.

93. When it comes to the duration of protection, it should be taken into account that there are extremely valuable photographic works of outstanding photographers in respect of which probably no one feels that a shorter duration is justified (the more so because with the improvement of technology, photographs preserve their quality and can be used for a much longer period than before). It is, however, true that there are also photographs of a lower quality and of a less marked originality. However, lower quality productions may be found in all and any categories of works. The difference in quality is not a real problem. More valuable works are generally used for a longer period, and there a longer term of protection can hardly be opposed. On the other hand, if a work is used for a long period and if users want to use just that work, why could that fact not be interpreted as proof that, after all, that work has some particular value?

94. The assimilation of the term of protection of photographic works to the general term of protection would seem to be the most justified solution on the basis of the considerations mentioned above. It should, however, be taken into account that, in respect of such works, the Berne Convention defines the minimum term in 25 years to be calculated from the date of making of the photograph and that under the Universal Copyright Convention, 25 years after the author's death is the general minimum term of protection. Therefore, that minimum duration is suggested in the following principle:

> **Principle PHW10. The term of protection of photographic works should, as a rule, be at least the life of the author and 25 years after his death.**

Report 78. Several participants expressed their support for Principle PHW10 as a compromise among the various provisions of the international copyright conventions and national laws. Some participants, however, insisted that they considered that photographic works should be protected under the same conditions and for the same term of protection as other categories of works.

Report 79. Some delegations informed the Committee about provisions in their legislation concerning the term of protection of photographic works. Some of them said that their national laws provided for a term of protection shorter than 25 years after the author's death. Other delegations stated that, under their national laws, the term of protection was longer than 25 years after the author's death.

Report 80. One delegation drew attention to the French version of Principle PHW10 which was

worded in a negative way—unlike the English version—which could be interpreted as a kind of criticism towards States where the term of protection was shorter. The delegation proposed that the French version of the principle should read as follows: "La durée de protection des oeuvres photographiques devrait, en règle générale, comprendre la vie de l'auteur et, au moins, 25 années après sa mort." *It was stated that the English version could remain unchanged. Some other delegations supported the above-mentioned proposal.*

Report 81. One delegation suggested that Principle PHW10 should only provide for the term of protection of economic rights since, in its opinion, moral rights should be granted perpetual protection which was the case in many countries. Another delegation opposed this proposal and referred to the national laws of certain other countries, including its own, where moral rights were protected for the same term of protection as economic rights were.

The Protection of Photographs—Including Photographic Works—Outside the Scope of the Copyright Law

95. As described in paragraph 39 above, there are national legislations which do not protect photographs within the framework of copyright law proper, but protect such works outside the scope of the copyright laws providing for the protection of literary and artistic works. (This way of regulation is similar to the one which was applied in the earlier Acts of the Berne Convention where photographs were not included in the notion and definition of literary and artistic works.) Such solution exists for the time being in four Nordic countries: Denmark, Finland, Norway and Sweden under which *all* photographs, regardless of originality, are protected.

96. The 1971 Paris Act of the Berne Convention to which all the four Nordic countries are party contains the obligation that photographic works should be protected as a category of literary and artistic works. The question then arises if the solution mentioned in the preceding paragraphs is compatible with the Berne Convention. It is obvious that at least a part of the photographs protected under such specific systems are to be considered as photographic works because they are of original character on the basis of any strict criteria of originality. Those works, however, are not identified as a distinct group; they are included in the general category of photographs, together with other photographs, which may not qualify as works because they might not pass a strict creative-step test. This means that such countries should meet the obligations under the international copyright conventions and, particularly under the Berne Convention in respect of *all* photographs covered by such a special protection system and should grant national treatment to all such photographs originating in other countries of the Berne Union so as to avoid conflict with the Convention. The legislations of the above-mentioned countries meet those conditions and, consequently, are compatible with the Berne Convention.

Related Right Type Protection of Photographs Not Qualifying as Photographic Works

97. It is suggested in paragraphs 40 to 42 and Principle PHW1(2) above, that practically all photographs should be protected as photographic works except those where the persons who produce them do not have any influence whatsoever on the composition and the artistic and other substantial features of such photographs. Nevertheless, as mentioned in paragraph 38 above, there are some countries where a fairly strict originality test is applied on the basis of which certain photographs (although not falling into the category described above because the influence of the maker of the photograph on the composition, etc., is not excluded) do not qualify as works, but they are protected within the framework of a related right type protection system (which includes, in general, a lower level of protection with fewer rights, with shorter terms of protection, with formalities, etc.).

98. The differences between various national laws, in respect of the notion of originality, have been known and accepted by the members of the Berne Union from the very foundation of the Union. Therefore, it cannot be said that the national legislations mentioned in the preceding paragraph would be in conflict with the Berne Convention, provided that, for photographic works with sufficient originality, they grant at least the minimum protection provided for in that Convention. All the countries in question do so provide.

Report 82. Some delegations confirmed that the analysis given in paragraphs 95 to 98 of the memorandum was correct.

Report 83. One delegation, while not questioning the correct nature of the above-mentioned analysis, expressed its regret that certain photographs, which, in its view, would deserve copyright protection, enjoyed only related right type protection in some countries.

Conclusion

Report 84. 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 the WIPO/Unesco Committee of Governmental Experts in the Evaluation and Synthesis of Principles on Various Categories of Works, which will be held in Geneva from June 27 to July 1, 1988.

Adoption of the Report and Closing of the Meeting

Report 85. The Chairman having had to leave the meeting, the closing session was chaired by Mr. György Pálos, Vice-Chairman of the Committee.

Report 86. The present report was unanimously adopted and, after the usual expressions of thanks, the acting Chairman declared the meeting closed.

LIST OF PARTICIPANTS

I. States

Algeria: S. Abada; N. Gaouaou. **Argentina**: G.H. Peiretti; S.M. Peláez Ayerra. **Barbados**: D. Newton. **Burundi**: D. Misago. **Byelorussian SSR**: V. Kolbassine; O. Laptenok; A. Néverko. **Cameroon**: E. Ndjiki-Nya. **Chad**: B. Touade. **Chile**: F. Urrutia. **China**: Linghan Gao; Shugao Ren. **Congo**: D. Ganga Bidie; A. Biaouila. **Côte d'Ivoire**: E.M. Ezo. **Cuba**: N.J. Valdés Duarte. **Denmark**: L. Hersom. **Ecuador**: M. Carbo Benites. **Egypt**: M.S. Salem. **Finland**: J. Liedes; H. Wager; K. Nordberg; R. Oesch. **France**: R. Lecat; L. Fournier; A. de Gouvion Saint-Cyr; A. Grimot; M.M. Ippolito; P. Hamon; C. Helft; I. Jammes. **Gabon**: P.M. Dong; P.E. Ango-Bie; R. Duboze. **Germany (Federal Republic of)**: M. Möller. **Greece**: A. Miltiadou; H. Zaphiriou. **Guinea**: A. Camara; H. Soumah. **Holy See**: R.-V. Blaustein; P. Brun. **Hungary**: G. Pálos; J. Batta. **India**: A. Ghose; P. Singh. **Italy**: G. Catalini. **Japan**: Y. Oyama; M. Inoue. **Jordan**: Z. Obiedat. **Kuwait**: S.H. Al-Nesef; M.M. Mansour. **Lebanon**: J. Sayegh. **Malta**: Y. de Barro. **Mexico**: G. Ugarte de Bernard. **Morocco**: A. Lahmili. **Netherlands**: L.M.A. Verschuur-de Sonnaville. **Nigeria**: R.A.E. Nkanga. **Pakistan**: N.A. Naik; M.H. Shaukat. **Panama**: J. Patiño. **Soviet Union**: A.V. Tourkine. **Spain**: E. de la Puente García. **Sweden**: K. Hökborg; G. Lundin; B. Rosén. **Thailand**: S. Povatong. **Tunisia**: A. Ben Jeddou; S. Zaouche. **United Republic of Tanzania**: J.A.T. Muwowo. **United States of America**: R. Oman; H.J. Winter; H. Oler; L. Flacks. **Uruguay**: G.C. Santos-Granada. **Yemen**: A.S. Sayyad.

II. Observers

(a) States

Brazil: J.C. de Souza-Gomes; J. de Souza Rodrigues. **Costa Rica**: J.A. Rodriguez Bolaños; I. Leiva de Billault. **German Democratic Republic**: A. Greim. **Philippines**: D. Macalintal; D. Ongpin-Macdonald. **Turkey**: A. Ulusan.

(b) Palestine Liberation Organization (PLO)

K. Hakim.

(c) Intergovernmental Organizations

Agency for Cultural and Technical Co-operation (ACCT): A. Touré. **Arab League Educational, Cultural and Scientific Organization (ALECSO)**: A. Derradji. **Commission of the European Communities (CEC)**: P. Kern. **Council of Europe (CE)**: G. Brianzoni.

(d) International Non-Governmental Organizations

International Association of Art (IAA): A. Parinaud; P. Legros. **International Commission of Jurists (ICJ)**: D. Bécourt. **International Confederation of Free Trade Unions (ICFTU)**: P. Raterron. **International Confederation of Societies of Authors and Composers (CISAC)**: N. Ndiaye; G. Pfennig. **International Copyright Society (INTERGU)**: R. Talon. **International Council on Archives (ICA)**: M. Quétin. **International Federation of Journalists (IFJ)**: S.O. Gronsund; J.-K. Sogaard. **International Federation of Newspaper Publishers (FIEJ)**: F. Leth-Larsen; B.E. Lindskog; D. Seligsohn. **International Federation of Photographic Art (FIAP)**: J.-G. Seckler. **International Literary and Artistic Association (ALAI)**: A. Françon; D. Gaudel; W. Duchemin. **International Organization of Journalists (IOJ)**: S. Gautier. **International Publishers Association (IPA)**: J.-A. Koutchoumow; C. Clark; S. Wagner. **International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU)**: P. Raterron. **Max Planck Institute for Foreign and International Patent, Copyright and Competition Law**: S. von Lewinski.

VI. Secretariat

United Nations Educational, Scientific and Cultural Organization (UNESCO)

M.-C. Dock (*Principal Director, Sector of Culture and Communication*); E. Guerassimov (*Legal Officer, Copyright Division, Sector of Culture and Communication*).

World Intellectual Property Organization (WIPO)

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

Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers)

(Lima, April 21 to 23, 1988)

The Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers) was held in Lima, from April 21 to 23, 1988. It was organized by WIPO, the Government of Peru through the National Library of Peru, and the *Pontificia Universidad Católica del Perú*. About 560 persons from a number of Latin American countries participated in the Congress, among them a number of magistrates from Peru. WIPO was represented by Mr. Henry Olsson, Director, Copyright and Public Information Department, and Mr. Carlos Fernández-Ballesteros, Senior Counsellor, Development Cooperation and External Relations Bureau for Latin America and the Caribbean.

The Congress was opened by the First Vice-President of the Republic, Dr. Luis Alberto Sánchez. The President of the Republic was represented by the Minister of Justice, Dr. Camilo Carrillo. The inaugural speech, under the title "WIPO and the International Conventions on Copyright and Neighboring Rights," was delivered by a WIPO official. The discussions at the Congress were based on 12 lectures presented by outstanding specialists mostly from Latin America. In addition, a roundtable discussion took place on "The Future of Copyright in Latin America." The inaugural speech as well as most of the lectures and interventions in the roundtable discussions are published in a book which is reviewed on page 301.

The presentation of the various papers was followed by an interesting and lively debate. The Congress proved to be a useful opportunity for an exchange of information and for discussions about the development of copyright and neighboring rights in general and about the current situation and future prospects in Latin America in particular.

Studies

The Copyright Aspects of Parodies and Similar Works

André FRANÇON*

Correspondence

Letter from Norway

Birger Stuevold LASSEN*

Activities of Other Organizations

International Copyright Society (INTERGU)

XIth Congress

(Locarno, March 21 to 25, 1988)

The International Copyright Society (INTERGU) held its XIth Congress in Locarno from March 21 to 25, 1988.

The Congress was attended by nearly 100 participants from 35 countries. WIPO was represented by Mr. Mihály Ficsor, Director, Copyright Law Division.

The discussions were presided over by Professor Erich Schulze, President of INTERGU, and their general topic was "Copyright Without Frontiers" in the framework of which invited speakers reported about recent copyright developments in the various regions of the world. Invited speakers were—in the order of the presentation of their reports—Professor Otto-Friedrich Freiherr von Gamm (Federal Republic of Germany), Professor Zheng Cheng-si (China), Mr. Shimpei Matsuoka (Japan), Professor James Lahore (Australia), Professor Nébila Mezghani (Tunisia), Dr. György Boytha (Hungary), Mr. Jack Black (United Kingdom), Professor Dr. Gerhard Reischl (Federal Republic of Germany), Mrs. Dorothy Schrader (United States of America), Dr. Hilda Retondo (Argentina).

At the end of their deliberations, the participants adopted five resolutions. Resolutions II to IV cover copyright questions of particular countries, while resolutions I and V are of a more general nature.

Resolution I states that INTERGU

Recognizes the importance of concerted action of all organizations, institutions and individuals concerned with the protection of the rights of authors of works of intellectual property at a time of mounting pressures resulting from new forms of use of musical, literary and artistic works and technological innovations in the broadest sense of the word,

Urges governments of all countries signatories to the international copyright conventions to take steps to bring national legislations in harmony with technological developments and international copyright conventions in order to secure the need for adequate protection of works of intellectual property and guarantee fair compensation,

Reaffirms, on the one hand, its deep commitment to the principle of national treatment of all rights of authors of works of intellectual property as the only valid principle governing the proper protection and remuneration for the use of such works and, on the other hand, understands the recourse to reciprocity in cases where economical hardship may result from a strict application of the principle of national treatment,

Recommends that WIPO and all organizations and institutions entrusted with the administration of authors' rights join in the effort to achieve the same levels of protection accorded to works of intellectual property by national legislation and international treaties and agreements, thus ensuring that these keep pace with all new forms of use of such works by means hitherto known or yet to be discovered and developed.

Resolution V deals with the copyright situation in developing countries. According to it, INTERGU

Welcomes all activities whatsoever aimed at promoting cultural life in developing countries, arousing or strengthening appreciation for the rights and interests of authors of works of intellectual property and improving national copyright laws,

Invites all organizations, institutions and individuals concerned with the protection of authors' rights, in particular WIPO and Unesco, to make the cultural and copyright cause of the developing countries their own and to vigorously support the same in a suitable manner, for instance by offering training facilities and courses, by providing professorships at universities, by means of cultural agreements and cultural exchange programs, by assistance in arranging for use of works, etc.

Books and Articles

Book Review

III Congreso Internacional sobre la Protección de los Derechos Intelectuales (del Autor, el Artista y el Productor). One volume of 249 pages. WIPO, Biblioteca Nacional del Perú and Pontificia Universidad Católica del Perú, Lima, 1988.

This volume contains the Spanish texts of the lectures and statements presented at the Third International Congress on the Protection of Intellectual Property (of Authors, Artists and Producers) which was held in Lima (Peru) in April 1988.

The lectures were: "WIPO and the International Conventions on Copyright and Neighboring Rights" by an official of WIPO; "Copyright and the Right to Culture" by Dr. Ricardo Antequera Parilli (Venezuela); "The Intellectual Work as a Product of the Mind, and Copyright" by Dr. Edmundo Pizarro Dávila (Peru); "Protection of Computer Programs and of Data Bases" by Dr. Carlos Alberto Villalba (Argentina); "Collection and Distribution of Remunerations" (two lectures, namely "Authors' Societies" by Sr. Martín Marizcurrena Oroñoz (Uruguay) and "International Relations" by Dr. Ulrich Uchtenhagen (Switzerland)); "Piracy of Writings and Reprography" by Dra. Delia Lipszyc (Argentina); "Piracy of Phonograms" by Dr. Henry Jessen (Brazil); "Piracy of Videograms" by Dr. James Bartolomé (United States of America); "Emission, Reception and Distribution of Programme-Carrying Signals Through Satellites, and Cable Distribution" by Lic. Carlos Corrales (Costa Rica); and "Procedural Protection of Intellectual Property" (two lectures by Peruvian specialists, namely "Penal Aspects" by Dr. Guillermo Bracamonte Ortiz, and "Administrative Aspects" by Sr. Carlos Puntriano Figari).

In the book are also included five statements prepared for a roundtable discussion held during the Congress on "The Future of Copyright in Latin America," by Dr. Jean-Alexis Ziegler (France), Dr. Robert Abrahams (United Kingdom), Dr. Fernando Zapata López (Colombia), Lic. Gabriel Larrea Richerand (Mexico) and Dr. Juan Luis Avendaño (Peru).

The lectures and the statements provide a comprehensive overview of such copyright and neighboring rights questions which are of specific importance in Latin America. The lectures included in the book deal, however, also with topics which are of general interest and the book is, therefore, useful not only to readers in Latin America, but also to interested persons outside that region.

H.O.

Calendar of Meetings

WIPO Meetings

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

1988

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)

The Committee will re-examine the principles of protection worked out for eight categories of works during the 1986–87 biennium (printed word, audiovisual works, phonograms, works of fine art, works of architecture, works of applied art, dramatic and choreographic works, musical works) and for photographic works in 1988.
Invitations: States members of WIPO, Unesco or the United Nations and, as observers, certain organizations.

September 12 to 19 (Geneva)

IPC (International Patent Classification) Committee of Experts (Seventeenth Session)

The Committee will adopt the final amendments, as well as the revised Guide, to the fourth edition of the International Patent Classification (IPC) and decide on the policy for the revision work during the next (sixth) revision period (1989–93).
Invitations: States members of the IPC Union and, as observers, certain organizations.

September 14 to 16 (Geneva)

WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property

The Forum will consider the impact of new technology on intellectual property law, with special emphasis on biotechnology, computer technology, the new technology for the recording of sounds and images, new broadcasting technology (for instance by direct broadcasting satellite) and new technology for transmission of programs by cable.
Invitations: States members of WIPO, the Paris Union or the Berne Union, certain organizations and the general public.

September 19 to 23 (Geneva)

Consultative Meeting on the Revision of the Paris Convention (Fifth Session)

The meeting will deal with Articles 5A (Patents and Utility Models: Importation of Articles; Failure to Work or Insufficient Working; Compulsory Licenses), 5*quater* (Patents: Importation of Products Manufactured by a Process Patented in the Importing Country) and 10*quater* (Geographical Indications and Trademarks, etc.), and possibly other Articles on the program of the Diplomatic Conference.
Invitations: Selected governments. No observers.

September 22 and 23 (Geneva)

Permanent Committee on Industrial Property Information (PCIPI) (Second Session)

The Committee will review the work done on the tasks of the program during the first nine months of 1988. It will start to work on the elaboration of a medium-term program for the PCIPI and of a global policy for, and the orientation of, the work of the PCIPI during the 1990–91 biennium.
Invitations: States and organizations members of the Committee and, as observers, certain other States and organizations.

September 26 to October 3 (Geneva)

Governing Bodies of WIPO and of Some of the Unions Administered by WIPO (Nineteenth Series of Meetings)

The WIPO General Assembly will consider the establishment of an International Register of Audiovisual Works. The WIPO Coordination Committee and the Executive Committees of the Paris and Berne Unions will, *inter alia*, review and evaluate activities undertaken since July 1987 and prepare the draft agendas of the 1989 ordinary sessions of the WIPO General Assembly and the Assemblies of the Paris and Berne Unions.
Invitations: As members or observers (depending on the body), States members of WIPO, the Paris Union or the Berne Union and, as observers, certain organizations.

October 24 to 28 (Geneva)

Committee of Experts on Biotechnological Inventions and Industrial Property (Fourth Session)

The Committee will examine possible solutions concerning industrial property protection of biotechnological inventions.
Invitations: States members of WIPO or the United Nations and, as observers, certain organizations.

November 7 tn 22 (Geneva)

Committee of Experts on Intellectual Property in Respect of Integrated Circuits (Fourth Session)

The Committee will examine a revised version of the draft Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits and studies on the specific points identified by developing countries.
Invitations: States members of WIPO or the Paris Union and, as observers, other States members of the Berne Union, as well as intergovernmental and non-governmental organizations.

November 7 to 22 (Geneva)

Preparatory Meeting for the Diplomatic Conference on the Adoption of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits

The Preparatory Meeting will decide what substantive documents should be submitted to the Diplomatic Conference—scheduled to be held in Washington in May 1989—and which States and organizations should be invited to the Diplomatic Conference. The Preparatory Meeting will establish draft Rules of Procedure of the Diplomatic Conference.
Invitations: States members of WIPO or the Paris Union and, as observers, intergovernmental organizations.

November 28 to December 2 (Geneva)

Committee of Experts on Model Provisions for Legislations in the Field of Copyright

The Committee will work out standards in the field of literary and artistic works for the purposes of national legislation on the basis of the Berne Convention for the Protection of Literary and Artistic Works.
Invitations: States members of the Berne Union or WIPO and, as observers, certain organizations.

December 5 to 9 (Geneva)

Madrid Union: Preparatory Committee for the Diplomatic Conference for the Adoption of Protocols to the Madrid Agreement

This Committee will make preparations for the diplomatic conference scheduled for 1989 (establishment of the list of States and organizations to be invited, the draft agenda, the draft rules of procedure, etc.).
Invitations: States members of the Madrid Union and Denmark, Greece, Ireland and the United Kingdom.

December 12 to 16 (Geneva)

Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Fifth Session; Second Part)

The Committee will continue to examine a draft treaty on the harmonization of certain provisions in laws for the protection of inventions.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

December 12 to 16 (Geneva)

Executive Coordination Committee of the PCIPI (Permanent Committee on Industrial Property Information) (Third Session)

The Committee will review the progress made in carrying out tasks of the Permanent Program on Industrial Property Information for the 1988–89 biennium. It will consider the recommendations of the PCIPI Working Groups and review their mandates.
Invitations: States and organizations members of the Executive Coordination Committee and, as observers, certain organizations.

December 19 (Geneva)

Information Meeting for Non-Governmental Organizations on Intellectual Property

Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright and their comments on the same will be invited and heard.
Invitations: International non-governmental organizations having observer status with WIPO.

1989

May 8 to 26 (Washington)

Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits

The Diplomatic Conference will negotiate and adopt a Treaty on the protection of layout-designs of integrated circuits. The negotiations will be based on a draft Treaty prepared by the International Bureau. The Treaty is intended to provide for national treatment and to establish certain standards in respect of the protection of layout-designs of integrated circuits.
Invitations: States members of WIPO or the Paris Union and certain organizations.

UPOV Meetings

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

1988

October 17 (Geneva)

Consultative Committee (Thirty–eighth Session)

The Committee will prepare the twenty–second ordinary session of the Council.
Invitations: Member States of UPOV.

October 18 and 19 (Geneva)

Council (Twenty–second Ordinary Session)

The Council will examine the accounts of the 1986–87 biennium, the reports on the activities of UPOV in 1987 and the first part of 1988 and specify certain details of the work for 1988 and 1989.
Invitations: Member States of UPOV and, as observers, certain non–member States and intergovernmental organizations.

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

Non–Governmental Organizations

1988

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.