

Copyright bulletin

Volume XXXV
No. 4,
October–December 2001

UNESCO
PUBLISHING

Settling conflicts in the digital environment

Digital
version



Copyright Bulletin

Vol. XXXV, No. 4, 2001

International conventions: recent news

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms

- 4 *Accession by Azerbaijan*

Doctrine

- 5 International experience in regard to procedures for settling conflicts relating to copyright in the digital environment, by Karim Benyekhlef and Fabien Gélinas
- 22 A critical analysis of Professor M. Walter's comparative study of various international instruments in the field of related rights

UNESCO activities

- 44 Promotion of teaching of copyright and neighbouring rights at the university: inauguration of a UNESCO Chair on Copyright in China

News and Information

- 45 Recent developments in French copyright law in the light of digital technology, by André Kéréver
- 51 Slovak Copyright Law, by Ján Švidron

Copyright Bulletin is issued online four times a year in English, French and Spanish by the United Nations Educational, Scientific and Cultural Organization, 7 place de Fontenoy, 75352 Paris 07 SP.

In co-operation with the Commission of the Russian Federation for UNESCO and with the State Committee for the Press, a Russian edition is published by Progress Publishers, Zubovski Bulvar 17, Moscow GSP-3, 119847, Russian Federation.

A Chinese edition is published in co-operation with the National Copyright Administration of China, 85 Dongsì Nan Daijie, Beijing 100703, People's Republic of China.

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Printed online by UNESCO, Paris (France)
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INTERNATIONAL CONVENTIONS RECENT NEWS

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms

Accession by Azerbaijan

On 1 June 2001, the instrument of accession by the Government of Azerbaijan to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, adopted at Geneva on 29 October 1971, was deposited with the Secretary-General of United Nations.

In accordance with Article 11(2), the Convention will enter into force with respect to Azerbaijan on 1 September 2001, that is, three months after the date on which the Director-General of the World Intellectual Property Organization informed the States, in accordance with Article 13(4), of the deposit of its instrument.

Accession by Azerbaijan brings to sixty-seven the total number of States that have deposited an instrument of ratification or acceptance of, or accession to, the above-mentioned Convention.

DOCTRINE

International experience in regard to procedures for settling conflicts relating to copyright in the digital environment*

Karim Benyekhlef and Fabien Gélinas

Contents

Introduction	6
Theoretical basis of sovereignty and competing jurisdictions	7
Sovereignty: a fluctuating concept	7
Competing sovereignties	9
Recent history and the near future of dispute resolution and the legal framework of the new models of justice on the Internet	11
The first experiments	11
Research projects and pilot projects	11
Current initiatives	12
Standard-setting methods and models of justice	14
Consumer justice	15
Commercial justice	17
Conclusion	21

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Introduction

Now that the novelty of the spectre of the new information technologies is gradually ceasing to cloud the issue, the time has come to analyse fully the regulations, standards, directives, codes, associations, etc., that regulate and define the legal relationships between parties to electronic commercial transactions. The regulation of electronic environments must be thought out from a pluralistic legal standpoint and, in order to do this, we must draw on both old and newer sources.

Alternative ways of settling disputes are an excellent example of the standard-setting which, in the context of the Internet, takes the form of the interpreter drawing on the past while reinterpreting it in the light of technological advances. A whole network of legal relationships is being put in place through e-commerce. The legal framework of the relationships presents important problems exacerbated by distance and the uncertainty surrounding the law applicable or the court that has jurisdiction.

As current practice shows, turning to alternative conflict-resolution methods is a particularly promising avenue. Long confined to the physical world, mediation and arbitration should display the flexibility, malleability, speed, simplicity and economy that have always justified their existence and often their success. It is therefore important to adapt these much-vaunted institutions to electronic environments so as to preserve all the qualities that still make them the favoured means of settling disputes in international trade.

We propose, first, to examine the theoretical bases of using alternative dispute-resolution mechanisms in cyberspace. In order to do this, we shall examine a historical precedent: trade in the Middle Ages. The *lex mercatoria*, or merchant law, which developed in that period is an excellent illustration of the putting in place of private dispute resolution and trade-regulation mechanisms into a historical context characterized by fragmentation, in this case, medieval Europe. An analysis of the principle of national sovereignty will help us reach a better understanding of such private standard-setting.

We shall then examine the first attempts to set up alternative conflict-resolution mechanisms in cyberspace and go on to present the most recent experiments in online conflict resolution that have arisen from electronic transactions. This overview will help us to understand the relationship between past and present mechanisms. We shall also have occasion to examine the strictly legal applications of the new institutions and their appropriateness to the practical reality of e-commerce. Similarly, it is important to examine the relationship between online settlement and intellectual property disputes. The observer will see that the first global experiment in online conflict resolution indeed concerns intellectual property-related issues, namely, the settlement of disputes about domain names. Furthermore, we shall also have to look at the delicate question of the possibility of settling intellectual property disputes by arbitration. It will be

seen that the differences between arbitration concerning intellectual property and other matters are dwindling.

Theoretical bases of sovereignty and competing jurisdictions

Electronic environments often seem to challenge the principle of national sovereignty. The State's power to control its borders, ensure that its laws are respected within its territory and sanction breaches and offences have been diminished by the advent of the new electronic channels of communication. We must examine how information technology affects the principle of national sovereignty. This brief examination will give us a better understanding of the *lex mercatoria*.

Sovereignty: a fluctuating concept

In order to understand why and how merchants in the Middle Ages used the *lex mercatoria*, we must say a few words about the principle of sovereignty. These few words will show that national sovereignty is a fluctuating concept and that, conceptually, the context of the information highways is not very different from that of the Middle Ages.

Sovereignty was originally a French concept which, according to Carré de Malberg, emerged in the Middle Ages. Sovereignty was also intended to bring together a fragmented medieval Europe. Today, sovereignty is an autonomous legal concept, a pure disembodied form imposed upon individuals. Sovereignty is not, however, an unchanging, transcendent given, but rather a simple concept mediating power and strength.

Since sovereignty requires a minimum of binding rules, it postulates the existence of law. Thus the equality, in law, of States in the international arena is a rule that seeks to temper the will-to-power that underlies sovereignty. We must therefore leave the domain of pure ideation and superlative symbolism and turn to legal rules. In a manner of speaking, then, law provides the framework for the concept of sovereignty. In fact, it does not seem possible at first glance to reduce the term to any conceptual construction detached from the contingent realities of power or value judgements that justify it. Hinsley has shown that sovereignty has been modulated according to the conditions of the exercise of power and the power relationships forged at a given point in history. The example of territoriality, the physical basis of sovereignty, illustrates the modulation which the concept of sovereignty may undergo.

Territoriality and physical space are the pivot around which the concept of

national sovereignty is structured. When territoriality comes up against the virtual spaces of cyberspace, the rigour of the concept is weakened. Sovereignty thus seems to be geared to its particular time.

We have said that medieval Europe was fragmented into duchies, baronies and other fiefs. Feudalism divided power among several orders. Despite everything, feudalism did not lead to the straightforward eclipse of sovereignty, which remained as a background. The king undeniably exercised sovereignty over all his subjects, though it was not full and complete sovereignty. Princes were loyal to the king, but not his vassals. In their duchies, domains and principalities, the princes formed autonomous enclaves that the royal authority did not impair, and within these princely dominions local lords exercised their power and felt as independent with respect to the prince as did the prince with respect to the king. Political organization was therefore based on fragmented sovereignty from which emerged the impassive image of the king's divine sovereignty.

We are far from the nation-state exercising a monopoly of force and, therefore, law. How could the legal security of transactions be ensured in such a context? Yet merchants trading over long distances had to enjoy some security in order to conduct their business. In those days of extreme territorial and political fragmentation, merchants also faced physical insecurity, as well as all sorts of taxes, customs and tolls 'levied by numerous lords, cities and communities when they crossed bridges or forded a stream or simply crossed their land'.

Yet the princes needed trade to fill their coffers and fuel the economic life of their fiefs. Some towns held great trade fairs where all the merchants of medieval Europe came to buy and sell. The fairs were thus markets in which a network of regulations began to emerge. Merchants also started to join forces to form guilds and associations from whose activities private commercial 'legislation' began to emerge. The merchants set regulations for themselves, the *lex mercatoria*, and the means of ensuring that those regulations were observed by resorting to embargoes or the exclusion of member merchants who contravened them.

The analogy with electronic environments is clear. Such fragmentation is also found in the virtual spaces in which territoriality has lost part of its meaning. No State authority can alone aspire to regulate a universe whose actors are outside its borders. But, as Hadfield writes, the need for a legal structure to support relationships in cyberspace is as fundamental as it was in medieval times. The development of a *lex electronica* is almost a natural extension of the *lex mercatoria*. Internet users do not at this stage in the development of the medium expect the illusory setting up of a coherent, comprehensive standard-setting structure, so a legal framework for electronic transactions must be provided, in particular, by recourse to private standard-setting.

It seems, therefore, that the Internet is giving an edge to a certain competition between sovereignties. In other words, standard-setting is no longer the exclusive preserve of the State. The phenomenon whereby cyber-traders set themselves

regulations and enforce them, in particular by using cyber-courts, must be put in a broader context.

Competing sovereignties

Electronic communications networks care little about national borders. In practical terms, the fluidity, intangibility and extra-territoriality of information, encryption techniques, techniques to guarantee anonymity and, above all, the ever-increasing number of users of the information highways militate against any attempt at legal regulation of the Internet.

The idea of the sovereign importance of movement advanced by Ruggie is therefore of interest, since it better describes the new economic realities. Economic integration, whether regional or international, cannot fail to reduce the areas in which States can intervene. Similarly, transnational financial markets operate with quasi-autonomy and are creating what are known as offshore markets, that is, places that escape State jurisdiction. A sort of extraterritorial realm is coming into being whose only sovereign is commerce and trade. Sovereignty is becoming one of movement and no longer one of physical place. Such offshore markets are the new medieval fairs in which merchants developed customs and practices independent of the law of the place in which they were conducted. In those days, the sovereign did not dream of imposing his law on merchants from all over Europe, for example, because he knew that, if he did, the commercial activity would be moved elsewhere, thus depriving him of the commercial advantages of the fairs. On the contrary, he sought to ensure the security of participants and transactions, knowing that he could not impose all his regulations on the merchants.

Today, the State has to put up with such extraterritorial enclaves, so some of the powers it exercises are reduced. It must, however, be recognized that, even before the advent of technologies enabling capital to be moved instantaneously, the State could not aspire to exercise its sovereignty over all or even some of the international economic players. The reduction in State power therefore seems rather limited, even though it must be admitted that technological advances have eaten away some national prerogatives.

Territoriality is losing its meaning as a result of the electronic networks that criss-cross the planet and allow financial flows to take place in real time. By definition, movement escapes the fixed point, the territory and, therefore, the authority of the sovereign. This quality is all the more marked when the movement is electronic and therefore virtual.

We have already emphasized princes' use of the concept of sovereignty to free themselves from the authority of the Church. We then moved on from a mystical, even divine, sovereignty, that of the Church, to a lay sovereignty, that of

the State, to arrive today at a pluralistic or composite sovereignty. After contracting, the concept of sovereignty is again destined to become fragmented and diffuse, thus keeping to a certain historical cycle. We can then say that international society is entering a period of neo-feudalism.

Today, because of the factors eroding modern sovereignty and, more specifically, the increasing effects of technology, we are witnessing a new implosion of space–time in the capitalist countries. The fixed point is giving way to a fragmentation of time and space. This hyperspace is making territoriality inadequate as a factor in theorizing about sovereignty.

Classical or symbolic sovereignty is under severe pressure. It has to confront other, competing, sovereignties that seek to substitute themselves for its authority in certain fields. However, neo-feudalism is not a straightforward return to the Middle Ages. In simple terms, the State is now confronted with competing sovereignties in an environment that is, of course, less anarchic and unstable. As we have said, feudal societies needed a king, a sovereign. Postmodern societies still need a sovereign, which is the State. But who are the feudal lords? We have talked about global civil society, international financial markets, those who determine the customs and practices of international trade and players in cyberspace.

The Internet is the reflection of these exogenous trends that political scientists have not failed to note. The creation of a virtual world in which electronic transactions can be concluded in a transnational context is a special phenomenon in which the participants have already started to develop their own rules beyond the boundaries of national legislation.

It is in this context that the various initiatives seeking to set up electronic conflict-resolution mechanisms are taking place. In order to make up for the legal and technical incapacity of legislators, private players are providing themselves with regulations and the means of implementing and enforcing them. The theoretical presentation we have just given the reader is therefore the background to the various standard-setting exercises to be seen in the context of electronic environments. The development of this *lex electronica* borrows, of course, from the legal corpus composed of international conventions, the general principles of international commercial law, national legislation, where applicable, the conventions of international trade, and precedent. In addition to law in the strict sense, political and economic considerations obviously take over from law at the rhetorical level.

Recent history and the near future of dispute resolution and the legal framework of the new models of justice on the Internet

Describing dispute resolution on the Internet enables us not only to provide an excellent example of the pluralistic standard-setting mentioned in Part I, but also to outline some of the legal questions that have arisen as a result of the development of transnational electronic environments.

We shall therefore first present the earliest experiments in online conflict-resolution mechanisms. This account of recent history should give us a clearer understanding of the issues raised by the emergence of new mechanisms and the promise they hold out for the future of justice, or the justice of the future.

The first experiments

We must first take a look at the very earliest experiments in the field which, in the form of research projects, identified – nearly five years before the beginning of the third millennium – several of the issues and challenges from which current initiatives, to be described later, are derived and still draw inspiration.

Research projects and pilot projects

VirtualMagistrate

The result of collaboration between the Cyberspace Law Institute (CLI) and the National Center for Automated Information Research (NCAIR), the VirtualMagistrate project, an online arbitration service, was launched in March 1996. The project's primary objective was to study the settlement of disputes between users and network operators, and among users themselves. The scope of the project was confined to conflicts generated by messages and files with an illegal content.

The 'arbitration' process was voluntary and essentially took place by e-mail. It should be made clear that it was a mechanism which, although having some 'compulsory' effects, was not enforceable within the meaning of the legislation and treaties on the recognition and enforcement of arbitration decisions. The VirtualMagistrate project is continuing under the auspices of the Chicago-Kent College of Law.

Online Ombuds Office

The Online Ombuds Office project is an initiative of the Center for Information Technology and Dispute Resolution at the University of Massachusetts. Since 1996, it has offered mediation services for certain disputes arising on the Internet, in particular those between members of chat groups, competitors, service providers and their subscribers, and issues concerning intellectual property.

Research on the use of texts and graphics has been undertaken in order to assist parties in their chosen settlement procedure. Proposed settlements are sent to the parties who, with the aid of interactive graphics and other technological tools, seek to measure the degree of their discontent and identify more precisely what they wish to obtain from each other. The project continues.

CyberTribunal

CyberTribunal was an experimental project developed by the University of Montreal Centre de Recherche en Droit Public (CRDP) in September 1996. The project aimed to assess the feasibility of using alternative mechanisms for settling disputes arising in electronic environments.

The scope of CyberTribunal was far broader than that of VirtualMagistrate and Online Ombuds Office. Despite its name, it is important to make it clear that it did not set itself up as a judge. It sought rather to facilitate dialogue between the parties to a dispute (mediation) and, if necessary, provide administrative and technological assistance in a decision-making process based on the will of the parties (arbitration). The project ended in December 1999. The principal architect of the system set up a new project, eResolution, which will be discussed *below*.

Current initiatives

First of all, it is essential to note that almost all the initiatives concerning online dispute resolution either have no technological infrastructure at all for dealing with disputes online, or are completely lacking in any experience in the treatment of real disputes. It is, furthermore, quite difficult to assess the number of such initiatives, since it fluctuates, sometimes wildly.

In the light of the foregoing, we shall concentrate on the initiatives that, on the basis of substantial technological infrastructure, have brought about the settlement of very real disputes and are therefore likely to prove instructive. There are two of them: the service for dealing with disputes between consumers used by SquareTrade, and the online service to settle disputes concerning domain names used by eResolution.

Online settlement of disputes between consumers: SquareTrade

SquareTrade was founded in the autumn of 1999 and operates almost exclusively in the area of e-commerce between consumers (C2C). The American company provides two levels of dispute resolution services: direct negotiation and mediation. Its partnership with eBay, one of the largest auction sites on the Web, very soon gave it a large volume of cases.

The procedure is very user-friendly and encourages friendly settlement at every stage. First, the purchaser or vendor lodges a complaint with SquareTrade, compiling all the relevant information on an electronic form. The opposing party is then notified by e-mail. If a reply is submitted, SquareTrade enables the parties to access the forms on a secure server through the use of passwords and user names. At this stage, the parties may try to reach a friendly settlement. If they are unable to reach agreement, they can ask SquareTrade to assign a mediator in return for a modest fee. If the parties reach agreement, with or without the help of a mediator, the dispute is settled and a document setting out the settlement is sent to the parties.

Online settlement of disputes about domain names: eResolution

eResolution was founded in the autumn of 1999 and launched its first online dispute settlement service when it received accreditation from ICANN to administer the settlement of disputes concerning domain names, in accordance with ICANN's policy of 1 January 2000. Several hundred cases from all over the world have since been settled through eResolution's technological platform.

The ICANN procedure eliminates all difficulties concerning the implementation or enforcement of decisions made. The owner of the domain name is linked by the registration contract with the registrar who, in order to obtain accreditation as such, undertakes to adopt ICANN's policy for the settlement of disputes about domain names. Under this policy, the registrar enforces decisions, unless there is an appeal to the courts within a set period, by immediately implementing the cancellations or transfers ordered in accordance with the policy.

From the start, eResolution set about transforming the document-based ICANN procedure into an online procedure. The technology eResolution has put in place enables the parties, decision-makers and administrators of cases to do everything online. All the exchanges take place within a secure environment accessible by password and user name.

Our purpose here is not to assess the procedure ICANN has put in place, but to analyse how it has been placed on a technological platform. This is connected above all with the nature of the online procedure. It is a sort of 'contractual arbitration': in other words, a procedure that has all the characteristics of legal arbitration, except the ability entirely to replace judicial proceedings in some contexts.

Since ICANN's policy was adopted, more than 2,500 decisions about domain names have been made. A corpus of regulations is gradually emerging from this mass of decisions. It is interesting to note that most of the decisions are based on the standards laid down by ICANN. It is clear to us that these regulations, resulting from a private decision-making process, are contributing to the development of a *lex electronica*. Here is an area of intellectual property, the law of trade marks, in which private players are involved in setting standards for electronic environments and thus helping to provide a framework for electronic transactions. The intervention of State authorities is minimal. It goes without saying that courts of law are not bound by the decisions made in the framework of the ICANN procedure, but it is, however, very clear that a court of law called upon to decide a dispute about a domain name could not ignore the principles emerging from ICANN case law. The customs, practices and principles the players observe are undoubtedly factors that a court of law would have to take into account. If it did not, there would be a great risk that the court's decision would not be in line with the activities it sought to regulate. This practical example of the *lex electronica* in a particular sector cannot fail to influence other branches of intellectual property law and illustrate the pluralism of standards on the Internet; and, as we said earlier, pluralism of standards seems to be the only way of facilitating the legal regulation of the medium.

Online dispute resolution mechanisms are contributing to the identification and crystallization of the basic regulations, customs and practices of the *lex electronica*. Particular attention should therefore be paid to this type of mechanism. On the basis of a series of ground rules – ICANN's policy and regulations – private players have been able to settle many difficulties that had previously seemed to some extent resistant to legal regulation. This is, without doubt, a precedent lawyers will not be able to ignore.

Moreover, eResolution's experience of implementing ICANN's policy is an important stage in the maturing process of online conflict-resolution mechanisms. The next stage, which has already begun, should start to define the respective roles of the various participants in the administration of justice on the Internet.

Standard-setting methods and models of justice

Contrary to other sectors where the existence of intense competition between jurisdiction and flourishing self-regulation presents no particular problem, the administration of justice tends to give rise to quite lively controversy when the State has to withdraw or leave a degree of initiative to the private sector. The problems and issues differ according to the particular field: consumer justice (B2C), on the one hand, commercial justice (B2B), on the other.

Consumer justice

The main problems encountered in the setting up of new mechanisms through which consumers may seek redress derives essentially from the ubiquity of public order considerations, all of which the State regards as components of the hard core of values whose protection will always justify its intervention. In the transnational context of intangible environments, the issues that interest us here come down to the right to choose jurisdiction and domiciliation, and the right to arbitration.

With respect to consumption that has now become international, debates about the limits to choice of jurisdiction are now polarized between consumer associations and associations representing the business world, and also between Europe and the United States.

The European position, which has a major impact on the form that regulations and customs of consumption take at world level, does not as yet provide for any significant alteration to consumer rights as they have been broadly harmonized within the European Union and, at the same time, encourages the development and establishment of extrajudicial methods for settling disputes in order to stimulate the development of e-commerce.

Jurisdiction clauses

First, with respect to choice of jurisdiction, before the advent of the Internet, the Rome Convention in substance provided that ‘a choice of law made by the parties shall not have the result of depriving the consumer of the protection guaranteed to him by the mandatory rules of the law of the country in which he has his habitual residence’. The application of this system to distance contracts concluded with consumers by telecommunication means such as the Internet is confirmed by the 1997 Directive on distance contracts and consumer protection. The system seems to mean that consumers enjoy the protection of their own law with respect to Internet transactions, regardless of where the vendor is situated and regardless of the representations made to the vendor.

Domiciliation clauses

With respect to domiciliation, the Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters follows the logic of the provisions of the Brussels Convention that affect ‘consumption’ by allowing consumers to bring a case before the court of the place in which they are domiciled or the court of the member State in which the trader is domiciled, and forbidding the trader to bring a case before a court other than that of the member State in whose territory the consumer is domiciled. Furthermore, jurisdiction clauses are forbidden which, prior to a dispute, vary from this system other than by allowing consumers to bring a case before other courts.

The European authorities are aware that this system might act as a brake upon the development of e-commerce. Therefore a declaration made by the Council orders the Commission to prepare a report in which particular attention should be paid to the application of provisions of the regulations with respect to consumers and small and medium-sized enterprises, in particular within the framework of e-commerce, and invites the Commission to propose, if necessary, amendments to the regulations within the usual time limit.

Arbitration clauses

At the formal level, the provisions limiting the right to choose domiciliation in consumer contracts are not applicable with respect to arbitration clauses. When analysing the right to arbitration in disputes about consumption, we naturally turn to the Council Directive on unfair terms in consumer contracts. We find there mention of clauses whose purpose or effect is ‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions’.

The exact scope of this nebulous provision remains extremely uncertain, and this forces prudent economic actors, among others, to interpret it by analogy in accordance with the spirit of the clearer, very restrictive provisions that govern the right to choose domiciliation in judicial matters. From a purely logical point of view, it is difficult to see why the situation with respect to the arbitration authority should be different, except, perhaps, by assessing the practical advantages of the arbitration mechanism for all the parties concerned. In the *Océano* case, the European Court of Justice analysed the circumstances surrounding the conclusion of a domiciliation clause and the consequences that clause would have in the parties’ balance of duties under the Directive. What is remarkable in this decision, in which the domiciliation clause was held to be invalid, is that the analytical framework, moulded to the circumstances of the case, would have led to the validation of a sufficiently balanced arbitration clause. But, given the economic risks at stake, such a hypothesis cannot be sufficient to reassure economic operators to the point of making them opt for arbitration in consumer disputes.

United States law has been more flexible in altering the legal conditions likely to foster the development of e-commerce between professionals and consumers. The right to choose is broader there and arbitration clauses that are not unfair are valid and frequent. But a detailed analysis of United States law would be of little help to us, since, where a global network and mandatory provisions are involved, it is to a great extent the rule of the lowest or highest common denominator that comes into play, in the sense that traders and professionals who want to offer their goods and services throughout the network are forced to submit to the mandatory

provisions of the territory in which they offer the greatest protection to the consumer.

Since the right to choose jurisdiction and domiciliation and the right to arbitration before a dispute arises are important conditions for the development of private initiatives with respect to justice, it can be seen that competing jurisdictions have very little room for manoeuvre.

The European authorities are well aware of this problem and determined to foster the deployment of extrajudicial mechanisms for the settlement of consumer disputes. It is unfortunately difficult to see how a European network would advance the situation internationally. Furthermore, the question of the role of the State, and that of the validity of binding mechanisms, remain entirely unresolved. On the one hand, the idea of a system of accreditation by governments of centres or mechanisms for settling consumer disputes is still on the agenda, despite private sector objections; on the other, the question of the possibility of setting up mechanisms that would *a priori* be binding has yet to find a satisfactory solution.

In these circumstances, the only quick way still open for the development at international level of new mechanisms is one which from the start excludes any contractual system binding the consumer *a priori*. In view of the widely recognized fact that the cost of legal proceedings is out of all proportion to the sums at stake in consumer disputes, extrajudicial settlement of disputes still has some value, even if it is conducted online.

Despite the slowness of legislative change and the legal confusion that may well last for some time in this field, the role of the State appears to us to be clear. The efforts to adopt guidelines for settling consumer disputes following attempts at international consultation are evidence of its emergence.

Commercial justice

From a formal point of view, international arbitration owes its effectiveness to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the accelerated modernization of national arbitration legislations. The New York Convention requires the 125 contracting States to recognize written arbitral agreements and declare themselves not competent when a case subject to an arbitration agreement is brought before them.

The New York Convention above all commits the States concerned to recognize and enforce foreign arbitral awards according to a system that confines their right of supervision to protecting public order. And it is precisely this model that we believe will eventually prevail for the administration of justice in fields that cannot be confined to commercial activity.

Form and online arbitration

First, the legal infrastructure on which international arbitration is based may quite easily withstand the transition to electronic means of communication. The first question of interest concerns the validity of an arbitration agreement concluded electronically. The problem here concerns the form sometimes required by law, both national and international, concerning the validity of the proof of arbitration or an arbitration clause. At national level, several national legal systems require an agreement in writing in order to recognize the legal effects of an arbitration agreement. At international level, a strict reading of the New York Convention would also seem to require a written agreement. What is the validity in such a context of an arbitration agreement concluded online?

With respect to national laws, it is clear that the formal regulations will not everywhere be brought into line with the new requirements of commerce easily or quickly, but it will be done. With respect to the New York Convention, flexible interpretation is recommended in order to assimilate intangible texts to the concept of writing.

The second question concerns the service of documents. This, too, is a quite minor problem if it is seen as an obstacle to arbitration taking place in a digital environment. With the agreement of the parties, there can be no objection to documents being served electronically. As for proof of sending and receipt by e-mail, the secure internal tools already available in reliable online dispute settlement centres circumvent the problem entirely satisfactorily. The same is true of problems of confidentiality of exchanges.

The third question concerns examination of the case. Here, a distinction may be drawn between the hearings, including the bringing of oral and documentary evidence, on the one hand, and the question of the place of arbitration, on the other. With respect to the hearings, we know that video conferences are already used in many international arbitration cases. Thanks to the Internet, this technique is now becoming more general and cuts down expense considerably. It should in any case be recalled that a large proportion of arbitration proceedings are taken up with the exchange of letters and documents between the parties and the arbitrators, and this can take place electronically.

Skating over the means of bringing written evidence, let us stress in passing that, in most legal environments, it is freely available to the parties. Let us also recall that the problem of digitization arises only in the event of a dispute as to the authenticity of the documents, something that is extremely rare. Also skating over the question of the place in which the procedure takes place, let us simply mention the present trend to accept the establishment of a fictitious place for arbitration, that is, a place to which neither the parties nor the arbitrators are required to go in order to conduct the proceedings.

The fourth and last question concerns the establishment of the award. At a sufficiently high level of analysis, the problem presented by the establishment of

the award may to a great extent be assimilated to the one we mentioned when discussing the arbitration clause. A further difficulty must also be mentioned: the award has to be signed. As for the arbitration agreement, it is to be hoped that the harmonization of technical standards and the flexible interpretation of existing law will be sufficient to reassure operators very rapidly as to the enforceability of an intangible award. Furthermore, online arbitration will not wait.

Arbitration and e-commerce

We mentioned above the idea of a *lex electronica* and traced its genealogy. We shall end simply by mentioning what impact e-commerce might have on nationless law and the administration of justice.

E-commerce likes to think it is international in the theoretical sense, and is rapidly becoming so in the empirical sense. On the one hand, national laws and courts are increasingly perceived as alien to the realities of international trade. The ever-increasing recourse to international arbitration and the principles of nationless law are incontestable proof of this. On the other hand, 'immanent' systems are considered insufficient because they are always incomplete and sometimes too generic. In their search for equitable law and justice appropriate to their activities, economic operators now have no choice but to turn to mechanisms that exploit to the limits the freedom to contract.

With respect to tangible law, we can expect a considerable growth in the number of codes of conduct, more or less imposed standard contracts, and formalized regulations and customs that make the law for the parties in some industries. This type of self-regulating instrument makes it possible both to adapt regulations to the particular, changing customs of a given industry and to avoid a highly inefficient ad hoc contractual environment that, in the absence of standardization, forces every party to negotiate the terms of each contract individually. This type of instrument will become more common and probably acquire phenomenal importance if the role of self-regulating associations is one day linked or merged with that of the major electronic markets.

Our analysis is similar with respect to justice and the administration of justice. Arbitration is the only viable solution for settling disputes arising from e-commerce, which is necessarily international, and online arbitration is the only mechanism that can guarantee that the costs are proportionate to what is at stake in international contracts that are no longer the preserve of large groups. Like the tangible regulations applicable to contracts, consensual regulations covering conflict resolution are rapidly moving away from using the rules of procedure of a particular legal system. To a lesser extent, the provisions covering conflict resolution are also tending to be dictated by the customs of the particular industry in question. Here again, if one day the role of traders' associations merges with

that of the major electronic markets, arbitration is likely to become the ordinary jurisdiction.

Can intellectual property disputes be settled by arbitration?

We have already described briefly the process for settling disputes about domain names in accordance with the policy and regulations adopted by ICANN. The regulations and policy are to a great extent based on the law of trade marks. Because of its monopoly over the Internet address system, ICANN can impose those regulations on the players – the registrars and owners of domain names. This monopoly creates a de facto legal enclave to a certain extent resistant to the general principles of arbitration. Consequently, the question as to whether intellectual property disputes can be settled by arbitration does not arise with respect to disputes about domain names. Although empowered by a sovereign authority, in this case the United States Congress, with respect to Internet addresses, ICANN acts as a private player. Having said that, we have stressed that the conflict-resolution system put in place by ICANN constitutes a precedent, and that there is a possibility of extending this model to other intellectual property sectors. We believe that online dispute resolution mechanisms could be of great legal use in the framework of intellectual property disputes that may arise as a result of electronic transactions on the Internet. The question then arises as to whether intellectual property disputes in other sectors can be settled by arbitration.

This question has long presented a problem because of the authorities' role in the attribution and recognition of intellectual property rights. It does seem, however, that national legislators have become more flexible by giving greater weight to the free will of the parties. Thus, it can be seen that the question whether or not these cases can be settled by arbitration is no longer a serious problem, though it should be pointed out that the degree to which different countries have moved in this direction varies. An examination of different national legislation shows that most of the developed countries now recognize that most intellectual property disputes can be settled by arbitration. That said, the recourse to arbitration presupposes the existence of a contractual link between the parties and the inclusion of an arbitration clause in the contract. It goes without saying that, in the absence of such a link or clause, the parties can still freely accept settlement of their dispute by arbitration, even if this method is more hazardous. Thus, intellectual property licensing contracts, contracts transferring intellectual property and contracts in relation to which intellectual property is developed (research or work contracts) may be the subject of disputes that can be settled by arbitration. In the context of electronic environments where the contract is a particularly promising standard-setting instrument, it is clear that contract-based intellectual property disputes can certainly be dealt with by online conflict-resolution mechanisms. It is therefore very likely that an arbitral case law will develop whose

principles will be a further application of the *lex electronica*. The *lex electronica* should make it possible to provide a legal framework for electronic transactions in the intellectual property field. Furthermore, it is also clear that some types of dispute, such as those involving forgery, which are not based on a contractual relationship, will not lend themselves to online conflict-resolution mechanisms. These cases should be brought before the courts in the traditional way.

Conclusion

While online conflict resolution is developing rapidly, this is not taking place at the instigation of the national and international authorities that control positive legal structures, but very much despite their unfitness to manage the changing legal environment known as 'globalization'.

The private administration of justice and the nationless legal environment to which it leads, is not new. As we saw in Part I, it draws on the organization of trade by the medieval guilds and responds to a self-regulating rationale that we may now suspect was only briefly interrupted by the advent of the territorial, monopolistic sovereignty of the nation-state, a paradigm that is now losing ground. The observer should not therefore be surprised to find these phenomena reappearing in cyberspace which, through its malleability and transnational character, is the perfect context for such legal (re)experimentation.

But the theoretical and historical factors that explain and justify this phenomenon are obviously not always the main preoccupation of the players: effectiveness, lowest cost, speed, simplicity, bringing dispute resolution into line with technological advances, are all practical factors demanded by the players. Noting these realities, national and international authorities should facilitate the putting in place of those electronic conflict-resolution mechanisms that seek, in short, to ensure an easier, less expensive exercise of parties' rights, whether consumers or traders, in electronic environments that otherwise do not facilitate the affirmation of those rights. This ideal of access to justice should not be evaded for the sake of ideological rigidity. Information and communication technologies are simply facilitating access to justice, thus enabling citizens to make themselves heard. Is it surprising that justice is also benefiting from technological breakthroughs? The online settlement of disputes arising in electronic environments is, in our opinion, only a stage. Such electronic methods should also be used in the world of traditional justice. Their introduction cannot fail to help achieve the democratic ideal of access to justice.

A critical analysis of Professor M. Walter's comparative study of various international instruments in the field of related rights*

Contents

Part I – First subsection (paragraphs 2–36)	24
1. Field of application of the protection: Persons and performances protected	24
2. Producers of phonograms	25
3. Scope of protection	26
4. National treatment and the most-favoured-nation clause	26
5. Protection under conventions. Right of rental	28
6. Direct applicability of the conventions	30
Part II – Second subsection (paragraphs 37–85)	31
7. Exploitation rights	31
8. Relations between performers and broadcasting organizations	32
9. Rights of performers with regard to fixation and reproduction	33
10. Right of importation	33
11. Rights of producers of phonograms to broadcasting	34
12. Satellite transmission	34
13. Online transmission	34
14. Exception to rights	35

* This analysis has been prepared by the Secretariat of UNESCO. It in no way constitutes an official interpretation of the provisions of the international instruments analysed.

Part III – Future of the Rome Convention and evolution of neighbouring rights
(paragraphs 86–100) **35**

- 15. Points for consideration **35**
- 16. Evaluation of existing instruments **36**
- 17. Coexistence of international instruments **37**
- 18. Loopholes of international protection **37**
- 19. Evolution of international protection **38**
- 20. Main issues **38**
- 21. Future evolution of the RC **38**
- 22. National treatment **39**
- 23. Enumeration of rights **40**
- 24. Contract law and collecting societies **40**

Conclusion **41**

The Study is arranged in two parts:

- The first part (numbered II): comparison between the various international treaties studied;
- The second part (numbered III): future of the RC and evolution of neighbouring rights.

These two parts are framed by an Introduction (Part I) and a Conclusion.

Part II comprises two chapters with a number of subdivisions. It covers 28 pages (in the English text), with the chapter entitled 'Exploitation Rights' alone occupying 15 pages. This part can, for the purposes of analysis, be divided into two subsections.

The first of these subsections concerns the *field of application* (beneficiaries and performances) of the international treaties. It studies the relationship between the treaties – essentially the RC, the TRIPS Agreement and WPPT. Mention is also made of the 'Phonograms Convention' (Geneva 1971); but this latter treaty is only of marginal importance and the Study's observations on this text do not call for comment. This first subsection corresponds to paragraphs 2 to 36 of the Study.

The second subsection is devoted to the analysis of neighbouring rights, distinguishing between 'exploitation rights' (themselves subdivided into rights relating to 'exploitation in tangible form' and 'exploitation in immaterial form'), 'claims to an equitable remuneration', 'moral rights' and 'term of protection'. This second subsection is contained in paragraphs 37 to 85 of the Study.

Part I – First subsection (paragraphs 2–36)

1. *Field of application of the protection: Persons and performances protected*

1.1 Performers. Definition for the purposes of protection

The Rome Convention (RC) protects three categories of beneficiaries: performers, producers of phonograms and broadcasting organizations. Article 3 of the RC defines the protected performers restrictively. Protection is limited to performers who ‘act or perform literary or artistic works’, that is to say, works protected by copyright. Performers such as ‘circus artists’ and sportsmen are therefore excluded from protection. Paragraph 3 of the Study notes that Article 9 of the RC explicitly permits national legislators to extend protection to performers excluded under Article 3 of the RC.

- 1.2 The Study draws from this Article 9 the conclusion (last sub-paragraph of paragraph 3) that the protection organized under the RC is not limited to those *performing literary or artistic works* and that consequently *sportsmen*, in particular, *can be considered as beneficiaries of the RC. This point of view is debatable.*
- 1.3 A distinction has to be made between the protection that each contracting State must accord on account of having subscribed to an international instrument and the protection that any State, whether a party to the treaty or not, can accord by virtue of its sovereign power. Article 9 of the RC makes the obvious point that a sovereign State clearly has the right to protect, if it so wishes, circus performers and sportsmen. *But the domestic legislation that avails itself of this possibility will have no international effect because it is outside the obligations prescribed by the treaty.* In particular, the *obligation* for contracting States to grant ‘*national treatment*’ (assimilation to nationals of the State where protection is claimed) to foreign performers covered by the treaty (entitled by their points of attachment to claim protection under the RC) extends only to those foreign performers who fall within the definition of Article 3 of the RC (perform literary or artistic works) and is not extended to those performers who are not covered by this Article 3. Under Article 2 of the RC, a contracting State is obliged to accord national treatment only to those performers who fall within the definition set out in Article 3 of the RC. In other words, any State is free to protect under its own legislation performers who come outside the scope of the definition in Article 3 of the RC. But this extension does not create any treaty obligation for the other contracting States.
- 1.4 It should be added that the question of whether performers not performing literary or artistic works are or are not protected by the RC is independent of

the content of the protection itself. While it is perfectly true, as stated in the last subparagraph of paragraph 3 of the Study, that the rights set forth in the RC are minimal rights that can be extended by the domestic legislation of the contracting States, this possibility does not in itself confer protection under the Convention to persons who are not covered by the restrictive definition in Article 3 of the RC. The question of *who* is protected must be separated from that of *how* protection is afforded.

- 1.5 The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has nothing to say on how performers are to be defined. This silence should be interpreted as an implicit reference to the RC. The Study rightly states that the WIPO Performances and Phonograms Treaty (WPPT) (Article 2 (a)) restricts protection exclusively to performers of literary or artistic works, to which was subsequently added the performance of 'expressions of folklore' (Study, paragraph 3). It may be noted that on this point the WPPT is a little more precise than the RC, since the last sentence of paragraph 2 of Article 3 says that: 'In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty'. But this clarification does no more than formulate explicitly an implicit rule already contained in Article 3 of the RC.

2. Producers of phonograms

- 2.1 The Study (paragraph 4) rightly notes that the RC does not protect the producer of a film soundtrack, the protected phonogram being defined as 'an exclusively aural fixation of sounds of a performance or of other sounds'. The same paragraph draws attention to the extension of the definition of the protected producer resulting from subparagraphs (b) and (d) of Article 2 of the WPPT. This article encompasses in the definition of the producer the person at the origin of the first fixation of sounds deriving from 'a representation of sounds', an expression that excludes any fixation incorporated in a cinematographic or audiovisual work. But the expression 'a representation of sounds' is intended to cover the production of sounds by computers or synthesizers, thereby adapting the definition of the phonogram to the digital age.
- 2.2 It needs to be added to the analysis contained in the Study that the Agreed Statements interpreting Article 2(b) of the WPPT limit the effects of the exclusion of soundtracks from the field of protection. For the Agreed Statements specify that 'the definition of phonogram in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work'. The statement in paragraph 4 of the Study to the effect that the wording of the

WPPT concerning the definition of the phonogram and its producer is only 'slightly modified' as compared with the RC therefore invites qualification. The extension of the notion of phonogram to include the 'representation of sounds' by electronic instruments and the interpretation of the Agreed Statements with respect to film soundtracks are legally and economically important.

3. *Scope of protection*

- 3.1 Paragraph 8 of the Study notes that Article 7.1 (b) and (c) of the RC and Article 6 of the WPPT invests performers, with regard to the first fixation of their performance, with exclusive or quasi-exclusive rights (right of prevention). The Study returns to the question of these rights in paragraph 41.
- 3.2 Paragraph 8 makes it clear that performers' rights in the first fixation, whether sound or audiovisual, are not affected either by Article 19 of the RC (cessation of the rights of performers once the latter have authorized the inclusion of a performance in an audiovisual fixation) or by Articles 7 *et seq.* of the WPPT restricting performers' rights to the incorporation of their performances in phonograms.
- 3.3 In fact, these rights to authorize the first fixation are restricted to cases where the performance requires the physical presence of the performer by the mere fact of he or she responding to a convocation by the organizer of an event or by a producer. This presence obviously constitutes consent with respect to the persons who use their performance in a contractual framework. In reality, these first fixation rights only protect performers against clandestine recordings made without their knowledge. The economic substance of such rights is thus minimal, although their usefulness may be increased by the need to combat increasingly aggressive piracy.

4. *National treatment and the most-favoured-nation clause*

- 4.1 Paragraph 10 of the Study accurately describes the content of the 'national treatment' defined in the RC: a contracting State must grant to the national of another contracting country the same treatment as it accords to its own nationals, subject only to the exceptions and limits allowed under the Convention. The content of 'national treatment' is referred to in paragraph 10 as 'national treatment *in the strict sense of the word*'. This statement means that 'national treatment' under the RC is of the same nature as that accorded by the Berne Copyright Convention: the foreign author enjoying protection under the Convention cannot be less well treated than a national author in

respect of all the rights conferred by the law of the State where protection is claimed, without the State concerned being entitled to demand reciprocity of protection in the State of which the foreign author is a national or to attempt to restrict assimilation to national treatment in respect solely of the rights mentioned in the Convention (cf. Article 5 of the Berne Convention: 'Authors shall enjoy (. . .) in countries of the Union other than the country of origin, the rights that their respective laws (. . .) grant to their nationals, as well as the rights specially granted by this Convention').

- 4.2 It is therefore a question here of *national treatment with full effect*, as distinct from *restricted national treatment* to which reference will be made. The expression 'with full effect' is more meaningful than 'in the strict sense of the word', which evokes on the contrary – and wrongly – a restrictive conception of national treatment. This national treatment 'with full effect' is that effectively provided for in the RC, despite a wording that is more ambiguous than in the Berne Convention.
- 4.3 In this connection, Article 2.2 of the RC stipulates that: 'National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention'. While the reference to 'limitations' is self-explanatory, the expression 'subject to the protection specifically guaranteed' (by the Convention) is ambiguous and could be interpreted as limiting national treatment to those rights expressly guaranteed by the Convention, which could entail, for example, a refusal to extend national treatment to national rights relating to the use of audiovisual works. But this latter restrictive interpretation is not tenable, and the Study is right to dismiss it. Article 2.2 of the RC alludes to the 'protection specifically guaranteed' by the Convention, even though the rights in question are not recognized by the legislation of the country in which protection is claimed. A similar view (national treatment with full effect) is taken by Masouye – Guide to the RC, p. 25 – who concludes, admittedly with some reservations, that it is a case of 'unrestricted assimilation of the foreigner to the national'.
- 4.4 This point of view is supported by a reading *a contrario* of the TRIPS Agreement and the WPPT, which expressly stipulate that assimilation to national treatment is compulsory only in respect of the rights explicitly mentioned in the instrument concerned. In the TRIPS Agreement, this restrictive conception of 'national treatment' is reinforced by the footnote (No. 3) to Articles 3 (national treatment) and 4 (most-favoured-nation treatment). This note states that 'protection shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of (. . .) rights as well as (. . .) the use of [the] *rights specifically addressed in this Agreement*'. The phrase 'rights specifically addressed in this Agreement' is very restrictive, more so than terms such as 'provided' or 'referred to' in the Agreement. A reading of the TRIPS Agreement shows that rights in respect

of the rental of carriers are 'expressly addressed' in the instrument. It seems that the precise purpose of the footnote is at least to exclude from 'national treatment' as defined in the TRIPS Agreement the rights of authors, performers and producers to remuneration for a private copy, as provided for in certain national legislations.

- 4.5 Paragraph 11 of the Study on the TRIPS Agreement notes the restrictions on 'national treatment' contained in Article 3, but does not mention the footnote analysed above. In these circumstances, it is difficult to understand the statement in this paragraph that 'the restricted understanding of the principle of national treatment (in the TRIPS Agreement) is not (. . .) obvious'. It is even less comprehensible since this paragraph of the Study itself makes reference to the restrictions.
- 4.6 On the other hand, paragraph 18 of the Study dealing with the most-favoured-nation clause accurately describes the reduced – not to say non-existent scope of that clause in the fields of copyright and neighbouring rights. Reference to this reduced scope is made again in paragraph 91 of the Study. For the record, we note – as does the Study – that the WPPT limits national treatment to 'the exclusive rights specifically granted in this Treaty' and to the right to equitable remuneration for broadcasting and communication to the public of phonograms of a commercial nature. This limitation thus excludes from the national treatment provided for in the WPPT the benefit of national legislation according rights to performers for the exploitation of audiovisual fixations and those relating to remuneration for private copying.

5. *Protection under conventions. Right of rental*

- 5.1 Paragraph 17 of the Study outlines the protection provided by the international instruments with regard to neighbouring rights: 'convention-protected' foreigners enjoy two advantages. The first is that of 'national treatment' or assimilation to nationals, referred to above. The second advantage involves guaranteeing protected persons a 'minimum standard' of protection consisting of rights that are specifically provided for by the instrument itself and may be enjoyed even if the corresponding right is not provided for in the domestic law of the State in which protection is claimed. Paragraph 17 specifically comments on this 'minimum standard' of rights expressly recognized by the TRIPS Agreement and the WPPT, and in so doing refers to the right of rental. Naturally, the right of rental is also referred to in the second subsection of the Study devoted to the analysis of neighbouring rights. The right of rental is also dealt with in paragraph 56. This structure inevitably gives rise to some repetition.
- 5.2 In paragraph 17, the Study states in particular that the TRIPS Agreement and

the WPPT grant performers, under the specific protection accorded by those conventions, a right of rental of phonograms. This claim needs to be strongly qualified: Article 14.4 of the TRIPS Agreement grants such right of rental 'to producers of phonograms and *any other right holders in phonograms as determined in a Member's law*'. A treaty right to rental of phonograms is thus recognized only for producers. Performers and authors are only endowed with the right of rental of phonograms if domestic law grants them such a right. It is therefore incorrect to claim that the TRIPS Agreement gives rise to a convention-protected right of rental of phonograms for performers since the granting of such a right is left to the discretion of domestic law.

- 5.3 Article 9 of the WPPT also leaves a certain leeway to domestic law to recognize or reject the right of rental of phonograms for performers. Paragraph 1 of Article 9 provides that 'performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms *as determined in the national law of Contracting Parties*'. The national law may thus freely 'define' – and hence restrict – those performances by performers fixed in phonograms that give rise to a right of rental.
- 5.4 Article 9 of the WPPT is taken directly from Article 7 of the WPIO Copyright Treaty (WCT) of 20 December 1996 (WCT), which appears to grant a right of rental to authors. With a wording that is different from that of the TRIPS Agreement, Article 6 of the WCT and Article 9 of the WPPT leave national legislators considerable latitude to grant or to reject the right of rental for authors and performers. The scope of this relegation to domestic law is confirmed and amplified by the 'Agreed Statement' interpreting Article 7 of the WCT as not requiring a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. In addition, according to the Agreed Statement, it is understood that this obligation (relating to the right of rental) is consistent with Article 14.4 of the TRIPS Agreement. This Agreed Statement applies legally only to the WCT, and is not taken up in the WPPT. It may nevertheless be assumed that this Agreed Statement relating to the rights of authors also applies to the rights of performers, because it is unlikely that domestic laws should grant performers rights that are greater than those recognized for authors.
- 5.5 This latitude given to domestic laws by the TRIPS Agreement, the WCT and the WPPT to recognize or to reject the right of rental for authors and performers is particularly significant in that those three instruments formally recognize a right of rental for producers of phonograms that is without restriction, convention-governed in nature, and binding on the Contracting Parties, with no leeway for domestic laws. But the Study analysed here makes no mention of this latitude given to domestic laws in determining rights of

rental, as provided for in the TRIPS Agreement and the WPPT and, on the contrary, leaves the reader with the false impression that these instruments formally recognize a treaty right of rental not only for producers but also for performers.

- 5.6 This comment leaves wide open the question of the interpretation of the provisions of the TRIPS Agreement and the WPPT – including the interpretative statements – that authorize this discretion left to domestic legislation. It is clear that these provisions are ambiguous and may be the subject of divergent interpretations. It may be claimed either that such relegation to domestic laws is only limited in scope, or, on the contrary, that the TRIPS Agreement and the WPPT formally and effectively preserve the freedom of Contracting Parties to allow or to reject the right of rental for performers, a freedom that is explicitly recognized by the Agreed Statement interpreting Article 7 of the WCT for authors.
- 5.7 It is therefore possible that the point of view expressed in paragraph 17 of the Study may be regarded as reflecting the first of the two possible interpretations that have just been mentioned. Seen in this way, this interpretation may be justified by its social and cultural intention, which is favourable to performers. All the same, it must be clearly stated that this is no more than an interpretation, which may be contested, and that, in any case, the wording of Article 14.4 of the TRIPS Agreement and Article 9 of the WPPT do not formally recognize a right of rental of phonograms for performers.

6. *Direct applicability of the conventions*

- 6.1 This question is dealt with in paragraphs 19 and 20 of the Study. The arguments therein are not legally incorrect, but they do appear to confuse two issues that should be kept separate: that of the mechanism for incorporating an international instrument into the domestic law of a contracting Party, and that of the direct applicability of the treaty provisions that are to be incorporated into domestic law.
- 6.2 Regarding the first point, contracting Parties fall into one or other of two constitutional systems. For some contracting Parties, such as France, the mere ratification of an international convention is sufficient to incorporate that convention into domestic law. For others (the United Kingdom and the United States in particular), mere ratification is insufficient. The incorporation of the provisions of a convention into their domestic law requires, in addition to ratification, the adoption of a specific national law acting as a screen between the convention and domestic law.
- 6.3 The second question appears to arise only for countries in the first group,

which do not have the 'screen law' system. For these States, the international convention, once ratified, is directly applicable to the extent that the provisions of the convention are unconditional and sufficiently precise.

- 6.4 Conventions that establish rights for private individuals such as authors, performers and producers seldom meet these latter requirements and generally leave a certain degree of discretion and implementation to domestic laws and regulations. In the field under consideration, it should be borne in mind that rights enshrined in a convention may, under the convention itself, be subject to limitations or exceptions arising from domestic laws.

Part II – Second subsection (paragraphs 37 to 85)

7. *Exploitation rights*

- 7.1 This second subsection analyses the various related exploitation rights, distinguishing exploitation in tangible form (mediums) and exploitation in immaterial form (terrestrial and satellite broadcasting, and communication to the public, including online digital transmissions); exceptions to rights; rights to equitable remuneration, moral rights and, finally, the term of protection. On the whole, this analysis is to be commended and gives rise to only a few reservations concerning minor details.
- 7.2 In paragraphs 58 and 59, the Study again comments on the rights of rental of phonograms – already referred to in paragraph 17 – and qualifies the claim in that paragraph that both performers and producers of phonograms enjoy a formal, convention-protected right of rental.
- 7.3 Paragraph 58 recognizes that, in the TRIPS Agreement, the right of rental for performers may depend on the goodwill of domestic laws. That same paragraph appears to say that the TRIPS Agreement, on which Article 9 of the WPPT (cf. paragraph 59) is aligned, would oblige the United States in its domestic law to grant an explicit right of rental to authors and performers (last sentence of paragraph 58). This interpretation is far from self-evident. On the contrary, the Agreed Statement relating to Article 7 of the WCT specifically states that that article does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms, adding that Article 7 of the WCT is consistent with Article 14.4 of the TRIPS Agreement. However, with regard to the right of rental instituted by the TRIPS Agreement, performers are in the same situation as authors.

8. *Relations between performers and broadcasting organizations*

- 8.1 Paragraph 41 of the Study comments specifically on Article 7.2 of the RC. Article 7.2 deals with possible rights of performers with regard to rebroadcasting and fixation/reproduction for broadcasting purposes in cases where performers have consented to broadcasting. This article, according to the forceful phraseology of Claude Masouye in his Guide to the RC, basically enshrines the 'abdication of the Convention with regard to these rights, which are entirely relegated to domestic law', with the proviso that such relegation shall not deprive performers of the possibility of regulating their relations with broadcasting organizations on a contractual basis. Paragraph 41 in fact highlights an internal contradiction in the RC. While Article 7.2(2) leaves the matter of the rights of performers in respect of ephemeral recordings made by broadcasting organizations to domestic law, Article 15.1 (c) of the same Convention classifies ephemeral fixations among the exceptions to the rights of performers.
- 8.2 On the other hand, while paragraph 41 provides an exact description of the contents of Article 7.2 of the RC on the rights of performers with respect to broadcasting organizations, it contains certain passages that, at least at first sight, are difficult to understand. For instance, it is paradoxical to write, at the beginning of paragraph 41, that the RC provides for 'another restriction' on the performer's rights arising from Article 7.2(3) on contractual agreements: according to Article 7.2(3) of the RC, leaving the protection of performers to domestic law 'shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organizations'. This reference to the ability to enter into contractual relations may hardly be regarded as a restriction. Only in paragraph 95 does the Study comment on the passage by drawing attention to contractual freedom. The Study notes that, in a contractual relationship, performers are the weaker party, and that contractual freedom is consequently stacked against performers and in favour of broadcasting organizations. Nevertheless, the very wording of Article 7.2(3) of the RC shows that the reference to contractual freedom is intended to be a protection for performers, inasmuch as the contract may compensate for the shortcomings of the legal protection provided by domestic law.
- 8.3 One might even ask whether the reference to contractual freedom contained in Article 7.2(3) of the RC does not entail prohibiting domestic laws governing the rights of performers from laying down rules of interpretation for contracts that are unfavourable to performers (such as the assumption that rights shall be assigned to producers). However, this may be a somewhat rash conclusion, given that the relegation to domestic law certainly allows States to provide for compulsory licensing regimes and to impose the collective management of rights – measures that are more restrictive for performers than rules of interpretation for contracts. In fact, what really characterizes Article 7.2 of the RC as a

whole is that it does not provide for any protection under the Convention but leaves the matter to domestic law alone, in tandem with contractual practice.

9. *Rights of performers with regard to fixation and reproduction*

9.1 Paragraph 44 of the Study deals with these rights as defined by Articles 6 and 7 of the WPPT. This paragraph prompts two remarks:

- a) The text points out that the Treaty comes with an Agreed Statement, which makes it clear that the right of reproduction fully applies in the digital environment, which is already the case with respect to the RC, but only implicitly. This observation is correct, but it must be borne in mind that this application of the right of reproduction in the digital environment must be taken together with Article 16 of the WPPT on exceptions to such rights. The scope of these exceptions will be dealt with in the comments on paragraph 76 of the Study.
- b) The second subparagraph of paragraph 44 furthermore expresses the view that the WPPT provisions are not substantially different from those of the RC.

9.2 But there is a difference between the two instruments: whereas Article 7 of the RC restricts protection of performers to the possibility of 'preventing' certain types of exploitation of the performances of performers, Articles 6, 7, 8 and 9 of the WPPT grant performers *exclusive rights* to authorize such acts (with the reservations already expressed regarding the right of rental). Considering that the term 'preventing' makes it possible to exclude the granting of exclusive rights and to retain only penal provisions, this difference between the two instruments is hardly minor from either the legal or the economic point of view. In this respect, the WPPT is more protective of performers than the RC.

10. *Right of importation*

10.1 This point deals with paragraph 55. The existence of a right known as the right of 'importation' is but the consequence of national exhaustion of the exercise of the right of distribution. If the exercise of the right of distribution is not affected by worldwide exhaustion but only by national exhaustion, the exercise of this right in one State (A) does not mean that its owner cannot claim it afresh in another State (B). Strictly speaking, the owner does not in fact possess a right of importation but he may justifiably require that his consent be given before copies are distributed in the country of importation. The choice between national exhaustion (recognition of a right to importation) and worldwide exhaustion (non-recognition of the right of importation) is not dealt with

clearly in any of the three instruments analysed. Article 6 of the TRIPS Agreement specifies that 'nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights'. Both the WPPT and the WCT also have reservations on this question.

11. Rights of producers of phonograms to broadcasting

- 11.1 Paragraph 63 of the Study recalls that, as far as the producers of phonograms are concerned, neither the RC nor the TRIPS Agreement provides for an exclusive right of broadcasting. It could also have been mentioned in that paragraph that the same applies to the WPPT.

12. Satellite transmission

- 12.1 The Study seems to uphold the distinction between direct broadcasting satellites and telecommunication satellites (paragraphs 66 and 67), drawing the conclusion that only transmission by direct broadcasting satellites could be regarded as an act of broadcasting for the application of legislation on copyright and related rights. This distinction is made by the body of international telecommunication law developed by the ITU. It is, however, no longer taken into account in the field of intellectual property, now that technological advances permit direct public reception of signals transmitted by telecommunication satellites. One is therefore justified in not sharing the doubts expressed in paragraph 67 that the signals transmitted by telecommunication satellites may be understood as 'broadcasting' provided that they are transmitted for the purpose of public reception.

13. Online transmission

- 13.1 Paragraph 71 rightly indicates that, in the context of neighbouring rights, online transmission cannot be equated with broadcasting. The author of the Study expresses the opinion that online transmission should, in respect of copyright and neighbouring rights, be regarded as an act – or acts – of reproduction or distribution.
- 13.2 As regards copyright, it may be noted that the WCT (Article 8) associates the right of online transmission with the 'right of communication to the public' as part of the process of 'making [protected works] available to the public (. . .) in such a way that members of the public may access these works from a place and at a time individually chosen by them'. In the field of neighbouring rights,

Articles 10 and 14 of the WPPT present this process of 'making available' as an autonomous right, distinct from that of broadcasting. These qualifications do not prevent such availability from being subject to the right of reproduction in the form of acts of reproduction in computer memories implicit in online transmission. There is no legal objection to an accumulation of rights in relation to a single act and there is no need to choose between the right of reproduction and the right of communication to the public.

- 13.3 When international legislation on neighbouring rights (WPPT) draws a distinction between the right of making available to the public – a qualification applicable to online transmission – and the right of broadcasting, it does so in order to give the former of these rights the status of an exclusive right, while maintaining the latter in the category of rights of remuneration (Article 15 of the WPPT). The international community is in fact not willing to make acts of broadcasting of phonograms subject to the authorization of producers and performers.

14. Exceptions to rights

- 14.1 It would have been useful if paragraph 76 of the Study had included a reference to the Agreed Statement interpreting WPPT Article 16 as permitting national legislations to provide for specific exceptions to the digital environment. This possibility especially concerns acts of temporary reproduction in computer memory that are essential for the circulation of signals on the 'Web'.

Part III – Future of the Rome Convention and evolution of neighbouring rights (paragraphs 86 to 100)

15. Points for consideration

This part of the Study is sub-divided into five sections:

- i) Evaluation of existing instruments (paragraphs 86–89).
- ii) Coexistence of several instruments (paragraphs 90–92).
- iii) Loopholes of international protection of related rights (paragraphs 93–95).
- iv) Evolution of international protection of related rights (paragraphs 96–98).
- v) Main issues of the possible revision of the Rome Convention (paragraphs 99–100).

16. Evaluation of existing instruments

- 16.1 The Study provides a consolidated analysis of the specific features of the RC, the TRIPS Agreement and the WPPT.
- 16.2 The RC ensures triple protection of performers, producers of phonograms and broadcasting organizations. This instrument grants the protected persons the benefit of full 'national treatment' (term used *stricto sensu* in the Study). The Study draws attention to the limits of the protection provided under the RC, in particular for performers. The latter are only protected – and even then without granting an exclusive right – with respect to their first fixations or 'live' broadcasts, which excludes any right of reproduction or communication to the public of the authorized fixations. Article 19 explicitly denies any protection concerning audiovisual exploitations. The RC does indeed provide a right to 'equitable remuneration' with respect to the broadcasting of commercial phonograms. However, the establishment of such a right is not binding on the Contracting States. The Study, which makes reference to these points (paragraph 87), calls for no comment.
- 16.3 With respect to the TRIPS Agreement, paragraph 88 recalls that this instrument contains some provisions for improved protection: the Contracting States must take steps to ensure that existing rights are observed; the term of protection, restricted to twenty years by the RC, is extended to fifty years. Lastly, the right of rental is specifically granted – albeit with considerable ambiguity where performers are concerned – as has been pointed out here. By contrast, 'national treatment' is understood restrictively, as it is confined solely to the rights explicitly set out in the Agreement.
- 16.4 A precise analysis of the WPPT is given in paragraph 89. The WPPT is restricted to the field of sound, to the exclusion of the audiovisual media. It considerably strengthens protection of performers with respect to their performances fixed by phonogram (exclusive rights over the reproduction of fixations; rights of distribution and rental; recognition of moral rights). The Study does not, perhaps, place sufficient emphasis on the importance of the explicit extension of the WPPT to digital exploitations (inclusion of digital copies within the scope of the right of reproduction; establishment of an exclusive right of 'making available' to the public by the process of online transmission; and lastly, the obligation for States to take measures to prevent the neutralization of electronic technical processes designed to identify the works/performances and their successors, and to prohibit multiple digital copies (Article 8: Obligations concerning technological measures; Article 9: Obligations concerning Rights Management Information).
- 16.5 Lastly, the Study rightly recalls that both the TRIPS Agreement and the WPPT establish, as a kind of general principle of intellectual property rights, the rule whereby the exceptions to exclusive rights must comply with the

triple limit outlined in Article 9(2) of the Berne Convention (limitation to 'special cases'; obligation not to harm the 'legitimate interests of the author' nor the 'normal exploitation of the work' – the so-called 'triple criterion' rule).

17. Paragraphs 90 to 92 of the Study, which concern the *coexistence of international instruments*, call for no comment.

18. Under the section on *Loopholes of international protection of related rights* (paragraphs 93–95), paragraph 94 rightly draws attention to the reticence of international legislators concerning the granting of exclusive neighbouring rights with regard to broadcasting where broadcasting is made by means of fixations or reproductions of fixations. In addition to the apprehension that such an exclusive right granted to the producers of phonograms might adversely affect the freedom of programming, mentioned at the end of paragraph 94, there is the hostility of the authors, who fear that their own exclusive rights over the broadcasting of their works would be weakened in cases where these rights have to be exercised in competition with similar rights granted to the producers of phonograms.

Similarly, the Study rightly expresses the hope, in paragraph 95, that any reform of international instruments concerning neighbouring rights would include provisions on 'obligations'. By this term – a trifle obscure on first reading – the Study means the contracts between performers, on the one hand, and producers or broadcasters, on the other.

The meaning of these provisions should, however, be made clear. The view taken in the Study is that such international regulation of contracts is needed in order to strengthen the position of performers, who are the weaker party in these contractual relations. It should, however, be borne in mind that the Berne Convention (Paris Act) regulates contractual relations between authors and audiovisual producers in an effort both to protect the pecuniary rights of authors and at the same time to improve the legal protection of producers who, in the interests of all the parties, must retain control of the strategy of exploitation of the film or audiovisual work. This means that the international regulation of contracts relating to neighbouring rights should pursue two objectives:

- (a) the performers should be associated financially with the products of all exploitations (in tangible or immaterial, analogical or digital form) of their performances; and
- (b) the producers should retain control of the exploitation of those performances, in particular in the audiovisual media.

Certain reservations should, however, be made about paragraph 93 of the Study insofar as it recommends the granting of neighbouring rights to audiovisual producers, a recommendation that is elaborated on in paragraphs 96 to 98, doubtless on the basis of a false analogy between audiovisual

producers and producers of phonograms. This suggestion seems to come from an incomplete reading of the Berne Convention, according to which only cinematographic producers and not the other producers of non-cinematographic audiovisual works would benefit from legal protection – a shortcoming that, according to the Study, should be remedied by granting neighbouring rights to producers throughout the audiovisual sphere. Yet the Berne Convention formally assimilates non-cinematographic audiovisual works to cinematographic works (Article 2: ‘. . . Cinematographic works to which are assimilated works expressed by a process analogous to cinematography;’).

There is therefore no legal vacuum which, under international legislation, would justify the inclusion of audiovisual producers among the beneficiaries of neighbouring rights.

19. In the section entitled *Evolution of international protection of related rights* (paragraphs 96–98) the Study favours a reinforcement of neighbouring rights. It follows from this general idea that there should be a revised version of the RC, which would continue to exist alongside the TRIPS Agreement and the WPPT. The revision of the RC recommended in paragraphs 97 and 98 should include the Brussels Satellite Convention ‘to ensure adequate protection’ of audiovisual performances (hence the abrogation of Article 19) and align the protection of performers and producers of phonograms on the protection granted under the WPPT. These considerations do not raise any objections except concerning the granting of neighbouring rights to audiovisual producers for the reasons already set out above.
20. In the section on *Main issues of a possible revision of the Rome Convention* (paragraphs 99 and 100), paragraph 99 sets out seventeen proposals for ‘updating the Rome Convention on the model of TRIPS and the WPPT’. This list is consistent with the assigned objective and therefore raises no objection.

21. Future evolution of the RC

Paragraph 100 of the Study refers to the future evolution of the RC. It proposes a complete recasting of the Convention which would go beyond a mere realignment on the TRIPS Agreement and the WPPT and would be complemented by an extension of protection to audiovisual exploitations. This full revision of the Convention would cover five areas: list of beneficiaries, national treatment, list of rights, contract law (contract regulations) and collecting societies.

- 21.1 International protection would extend to:
 - audiovisual producers;

- 'simple' photographs which, not being original works, are not covered by copyright;
- organizers of performances;
- publishers of scientific works;
- performers other than those performing protected works (circus artists and sportsmen).

21.2 We have already expressed our reservations concerning the granting of neighbouring rights to audiovisual producers. For the other categories there is clearly inadequate justification and in any case the problems raised by such extensions of international protection have not yet reached a sufficient level of maturity.

22. *National treatment*

- The Study proposes eliminating the reservations currently permitted by the RC, concerning the points of attachment (Article 5.3 for producers of phonograms, Article 16(a) for equitable remuneration and Article 16(b) for broadcasting organizations). This proposal is not backed up by specific justifications. It would raise delicate problems, whose implications have not been studied. Furthermore, the reservations allowed in Article 5.3 of the Rome Convention have been taken up in Article 3.3 of the WPPT.
- With regard to the status of collecting societies, referred to in subparagraph (b), it is true that there is a contradiction between the legal nature of the royalties collected by these societies, which are private funds, and the practice in several States that obliges these societies to set aside a portion of those funds for general cultural purposes. In this context, the suggestion made in the second part of paragraph 100 may prove useful for legalizing and structuring such State practices.
- However, the wording of the recommendation is too general. It cannot be applied to all rights, but only to certain rights in respect of which precise identification of beneficiaries is uncertain, that uncertainty justifying the use of part of the royalties collected (in particular, royalties on private copying) for social purposes.
- Lastly, it must be borne in mind that the problems arising from relations between collecting societies and public authorities concern not only neighbouring rights, but copyright as well, which means that measures cannot be proposed in respect of these societies from the point of view of neighbouring rights only.

23. Enumeration of rights

23.1 This paragraph recommends eight measures, four of which call for comments or reservations.

- *Right of importation*: this 'right' is but the reverse side of the restriction of the exhaustion of the right of distribution to the national territory – or a multinational economic entity.
- *Granting an exclusive right of broadcasting with regard to performances fixed on phonograms*: the objections and difficulties that would be raised by the institution of such a right in an international convention have been mentioned already. The solution found for the WPPT (denial of a right of broadcasting but granting of a right over online digital transmission) has struck a reasonable balance.
- *Exclusive right of rebroadcasting*: same reservations as above.
- *Elimination of restrictions* to the rights granted to broadcasting organizations by the RC (Article 13(c)): right of reproduction; and Article 16(b): communication of broadcasts in public places against payment).

23.2 The wording used in the Study regarding these eliminations is too general. It is certain that, with the adoption of the WPPT on the rights of performers and producers of phonograms, the rights of broadcasters as defined in the RC must be reviewed. But it is premature to decide right now to eliminate all the reservations set out in the Rome Convention.

24. Contract law and collecting societies

- The first two recommendations call for international regulations on neighbouring rights contracts to be drawn up in a manner favourable to performers: in particular, any clause whereby a performer renounces equitable remuneration or remuneration accruing from the transfer of exclusive rights would be null and void. Such a protective mechanism is in fact provided for in European law (Directive 92/100 of 19 December 1992). But the inalienability of the right to receive remuneration is conceivable only if it is associated with the presumption that exclusive rights are transferred from performers to producers, which the above-mentioned European Council Directive effectively provides. Subject to some reservation – and in fact it is an important one – no objection can be made to the recommendation.
- The third recommendation in subparagraph (e) (paragraph 100) of the Study, namely 'leaving to member States to confer the exercise of exclusive rights on collecting societies', is difficult to understand. The

normal activity of a collecting society consists, in particular, in administering the exclusive rights of its members by virtue of an assignment of rights or a mandate. The point of resorting to an international instrument to permit those societies to perform acts consistent with their corporate objective is not clear.

It is possible that the real objective of the recommendation is to ensure that holders of neighbouring rights are free to form collecting societies, or to strengthen those societies' position *vis-à-vis* national anti-trust laws. But this is mere supposition. We recall that, since all regulations on collecting societies relate to copyright, no decision in this field can be taken in respect of neighbouring rights only.

- The fourth recommendation in subparagraph (e) consists in imposing, on an international basis, the mandatory collective management of specific exclusive rights. European legislation provides that cable distribution rights must be subject to mandatory collective management (Article 9 of Directive 93/83 of 27 September 1993). But the wording used in the Study does not identify precisely enough those rights that would require mandatory collective management.

Mandatory collective management, which is an important restriction on contractual freedom, is legitimate only if it is confined to certain rights whose individual management would raise serious problems such as, for example, in the case of a large number of holders of rights over the same act of exploitation and the difficulty of identifying them.

Above all, resorting to mandatory management of certain exclusive rights must be left to the discretion of the various States and no serious argument has been put forward to justify laying down this obligation in a body of international law derived from a multilateral diplomatic treaty.

Conclusion

This analysis concludes with a consolidated synopsis of the main critical remarks on the Study by Professor M. Walter.

1. Contrary to the assertions in the Study it is not possible to conclude from Article 9 of the RC – recalling that any Contracting State may extend protection to artists who do not correspond to the conventional definition of those who perform literary or artistic works, such as circus performers or sportsmen – that performers not included in this definition nevertheless benefit from the provisions of the Rome Convention. In particular, they cannot benefit from national treatment. Furthermore, the WPPT maintains this restrictive definition of performers (point 1 of our analysis).

2. The Study underestimates the importance of Article 2 of the WPPT extending the rights of producers to phonograms obtained by a 'representation of sounds', i.e. music produced by synthesizers or computers (Point 2 of our analysis).
3. The assertion in paragraph 2 of the Study that the principle of national treatment in the TRIPS Agreement is not necessarily to be understood in a restrictive manner is difficult to understand when one reads Article 3 of the TRIPS Agreement along with its footnote (Points 4.4 and 4.5 of our analysis).
4. Our analysis notes several times that the wording of Article 14.4 of the TRIPS Agreement, in combination with Article 9 of the WPPT, with their provisions leaving the matter to national legislation, does not enable us to conclude, as the Study does, that these two instruments grant performers a convention-protected right of rental of phonograms, whereas such a right is granted unambiguously to producers (Points 5.2 and 5.3 of our analysis).
5. Similarly, it seems somewhat bold to consider, as the Study does, that Article 14.4 of the TRIPS Agreement would oblige the United States to modify its national law in order to grant an explicit right of rental to authors and performers (Points 7.2 and 7.3 of our analysis).
6. Paragraph 41 of the Study on the analysis of Article 7.2 of the Rome Convention is somewhat obscure, since that Article states that performers have the ability to enter into contractual relations with the users of their performances (Point 8 of our analysis).
7. The Study fails to note that the right of 'preventing' granted to performers by the Rome Convention has been transformed into the exclusive right to authorize or prohibit by the WPPT, which is a considerable improvement in protection (Point 9.1(b) of our analysis).
8. The distinction between direct broadcasting satellites and telecommunication satellites and particularly the consequences that that distinction might entail for intellectual property rights (paragraphs 66 and 67 of the Study) now seems to be superseded (Point 12 of our analysis).
9. Our analysis does not share the Study's interpretation concerning the classification of rights of online transmission (right of reproduction) set out in paragraph 71. From the point of view of positive law, the WCT and the WPPT see this right as a 'right of making available to the public' (Point 13 of our analysis).
10. Exceptions to the right of reproduction in the digital field. Paragraph 76 of the Study fails to mention the Agreed Statement interpreting Article 16 of the WPPT (Point 14 of our analysis).
11. Paragraph 95 of the Study expresses the hope that the reform of international instruments concerning neighbouring rights may include regulations covering the contracts entered into by performers; we feel compelled to state our view

on the implications of such regulation of contracts (referred to as 'obligations') (Point 18 of our analysis).

12. Reservations on paragraph 93 of the Study in that it recommends the granting of neighbouring rights to audiovisual producers (Point 18 of our analysis).
13. Recommendations contained in paragraph 100 of the Study. See Points 21, 22 and 24 of our analysis that contain many reservations on the recommended measures. It may be added that, in connection with a possible extension of the categories of beneficiaries of neighbouring rights, the Study could have referred to the producers of databases. Lastly, concerning the measures recommended in paragraph 100 on collecting societies and collective management, it should be emphasized that this subject is relevant not solely to neighbouring rights but also to copyright.

A reading of our analysis shows that any criticism it contains with regard to M. Walter's Study only concerns points of detail, except for the recommendations in paragraph 100 upon which opinions may vary. The limited nature of our comments demonstrates, *a contrario*, that we regard M. Walter's Study on the whole as a tool for reflection and legal analysis whose scope and seriousness cannot fail to impress the jurist.

UNESCO ACTIVITIES

Promotion of teaching of copyright and neighbouring rights at the university: inauguration of a UNESCO Chair in China

In the framework of the UNESCO activities designed to introduce and develop teaching of copyright and neighbouring rights at the university level to train, on regular basis, qualified personnel to work in all infrastructures concerned with this matter, the Director-General of UNESCO and the President of the Renmin University of China signed an agreement on the creation of a UNESCO Chair on Copyright and Neighbouring Rights at the Department of Law of this University. The Chair was solemnly inaugurated on 24 August 2001 by the Director-General of UNESCO Koishiro Matsuura and the President of the University Professor Ji Baocheng in presence of Mr Zhang Xinsheng, Vice-minister of Education, Mr Jiang Zhipei, President of the Supreme Tribunal of the Peoples Court and representatives of a number of governmental and non-governmental bodies, institutions and organizations as well of teachers of law and students of the university. At the end of the ceremony, Mr Matsuura was awarded the title of Professor honoris causa of the Renmin University.

NEWS AND INFORMATION

Recent developments in French copyright law in the light of digital technology

André Kéréver

Contents

Software originality: a prerequisite for copyright protection	45
Similarities and interoperability	46
Electronic games	46
Similarities between the external features of programming languages (look and feel)	46
Online digital communication	47
Journalists' copyright over digital editions of printed newspapers	47
The responsibilities that providers of sites have towards authors	48

Software originality: a prerequisite for copyright protection

In actions for infringement of copyright, the defendant often enters a defence contending that the plaintiff's software, by reason of its lack of originality, was not subject to copyright protection.

In traditional French case law, once software is taken to be a 'work of literature', the judge must inquire whether or not there are any similarities, in the two softwares under comparison, between those of their constituent parts that give them their originality. It will come as no surprise that the task of assessing similarities between softwares presents particular difficulties.

Similarities and interoperability

In its judgement of 28 November 2000, the Court of Cassation (criminal division) endorsed the Appeal Court for not having taken into account similarities between two softwares once it was established that those similarities related to their interoperability. The Appeal Court had in fact dismissed the action for infringement of copyright on the grounds that the plaintiff had not provided evidence to show that the defendant's software which was intended, under the tradename 'X Office Edition PME', for use by small and medium-sized businesses, reproduced in whole or in part the former's software, 'PME pour X Office', pointing out that, if there were any resemblance between the two softwares, it resulted from the fact that the plaintiff had designed his to function together with 'X Office'.

Electronic games

These products provide the players with computer-generated visual sequences. A Court of Appeal verdict had upheld the allegation of counterfeit between two games by tracing it back to similarities within image sequences that were acknowledged to be original. The defendants contested those grounds by claiming that counterfeit could be upheld only if there were similarities between the softwares, since similarities confined exclusively to sequences of images were insufficient to establish counterfeit.

The Court of Cassation (criminal division, 21 June 2000) dismissed that argument on the grounds that 'as the computer programming of an electronic game is indissociable from those combinations of sights and sounds that make up the various phases of the game, by assessing these components one can decide whether the counterfeit software is original in character'.

Similarities between the external features of programming languages (look and feel)

Are such similarities, which do not involve the softwares themselves, sufficient to establish the offence of counterfeiting? French case law does not answer this question clearly.

In a dispute settled by a Paris Appeal Court judgement on 10 May 2000 (see *Expertises Review*, July 2000), the court, along with the expert, found similarities between 'the user interfaces' and, more particularly, the 'ergonomic aspects' of the softwares being compared. But, contrary to the assertions of some

commentators, the appeal court did not rule on the principle of whether ‘look and feel’ was protected by copyright. Indeed, that same court held that the similarities brought to light were ‘normal’ – meaning not counterfeit – since the constituents reproduced or copied ‘originate in international standards’ – which comes down to denying them any originality protected by copyright.

On the other hand, the High Court of Marseilles, in its judgement of 7 September 2000 (*Expertises Review*, January 2000), found there to be counterfeit on the grounds that a comparison of ‘screens’ brought to light many profound similarities between the two softwares meant for the same public.

However, it should be noted that this very judgement further reveals that the software found to be counterfeit had been written by a former employee of the company that had produced the counterfeit software. So counterfeit could have been assumed on that basis alone. What we have here, then, is a one-off ruling, whose value should not be overestimated.

Online digital communication

Journalists’ copyright over digital editions of printed newspapers

A judgement by the High Court of Lyon of 21 July 1999, confirmed by the ruling of the Appeal Court of the same town of 9 December 1999, found for journalists on the newspaper in an action against their employer, the newspaper publisher.

In these decisions it was ruled that the newspaper-owners-employers were assignees of the copyright of journalists on their payroll only for the printed editions, and that those journalists remained endowed with their copyright for the online (Internet-type) digital editions of their articles published in the printed newspapers.

The publishers/employers had contended that their printed newspapers were ‘collective operations’ for which they, as publishers, held the rights of reproduction. So, according to the editors themselves, they were endowed with the right to digital reproduction without needing to arrange for that specific right to be granted. On a subsidiary level, the publishers contended that the contract of employment binding the journalist to the newspaper entailed, in itself, assigning the right to digital reproduction.

The journalists challenged these claims with the legal provisions of the French Code of Intellectual Property. These protect authors’ rights. The employment contract in itself did not involve any challenge to the rights of the paid journalist. The only assignments made on a regular basis were exclusively of those rights that applied over a contractually defined area, and current employment contracts made no mention of digital reproduction. They also mentioned Article L761.9 of the Labour Code, according to which the employer’s right to

publish articles in ‘more than one newspaper’ was made conditional on an explicit agreement being reached between employers and wage earners setting out earnings requirements to be met in order for the journalists to give their consent. However, an agreement of that type had never been concluded, and digital publishing resulted in newspapers that were different from printed newspapers.

The Lyon judges had accepted the journalists’ arguments without giving a clear explanation of what conclusions the publishers drew from their status as owners of a collective operation.

The ruling of the Appeal Court of Paris of 10 May 2000 concerning the newspaper *Le Figaro* (*Expertises*, November 2000) built on this solution, which was favourable to the journalists’ point of view. The Paris court, while adopting the reasoning given by the Lyon court, attempted to reply to objections based on the rights of the owners of a collective operation.

There are two aspects to this reply:

- Since Labour Law subordinated the lawfulness of electronic publishing to an agreement yet to be concluded between employers and wage-earners, ‘It matters little whether or not the newspaper constitutes a collective operation.’ In other words, the copyright that the law assigns to the employer who owns a collective operation cannot, under labour law, work to the detriment of wage-earners on the newspaper, in the absence of a collective agreement on publication ‘in more than one newspaper’.
- Online electronic publishing rules applied to articles by journalists which are individual contributions, and not to collective operations. Hence, whereas the court acknowledges that a newspaper may be termed a collective operation that unites journalists’ individual contributions into a single whole – a point on which the court declined to rule – the law on collective operations does not apply: electronic publishing concerns individual contributions (the articles) and not the newspaper itself. It therefore matters little whether or not the newspaper itself is termed a collective operation. Once the prerogatives that the publishers claimed they could infer from their status as owners of a collective operation had been set aside, the fact remained that, by virtue of the general terms of both copyright law and labour law, digital reproduction of articles was lawful only with the individual or collective permission of the journalists on the paper. The legal argument rested on the assertion that digital publishing produced a paper ‘other’ than the printed edition.

The responsibilities that providers of sites have towards authors

This is not exclusively a question of copyright law. It arises in the case of any cause of unlawfulness in the messages kept at a site. This unlawfulness may arise from unfamiliarity with public laws setting limits to freedom of expression, ruling

on offences against exclusive rights (copyright, neighbouring rights or trademarks), or more generally offences against third-party rights.

The case law we have looked at clearly shows that the main responsibility devolves on the publisher of the unlawful content. Only in the common law on civil liability deriving from Articles 1382 and 1383 of the Civil Code may we seek to clarify the responsibility of the site owner. For this law compels anyone by whose act damage has been caused to make good that damage.

Although several decisions have ruled thus, the Appeal Court of Versailles (8 June 2000, *Revue Internationale du Droit d'Auteur*, October 2000, p. 298) was the court that set out most clearly the rules to be applied in that instance regarding the online transmission of photographs infringing personality rights.

After recalling the prime responsibility of the site publisher, the court laid down that such responsibility 'does not preclude our inquiring whether any blameworthy behaviour on the part of the site provider may or may not have contributed towards bringing about the damage'. Indeed, 'the site provider has an obligation of watchfulness and circumspection, regarding the content of the sites he provides. That obligation, the court explained, was an obligation to use one's best endeavours, not an obligation to produce a specific result.

The court further explained the scope of that duty of watchfulness and circumspection. Quite apart from cases where the site provider was required by the public authorities to accomplish specific acts, he had to take diligent steps 'spontaneously', either as soon as he was informed of the illegality or the illicit or tortious nature of the contents of the site provided, or whenever circumstances were such that he suspected that its contents were prejudicial. That duty to take diligent steps did not require an overall inspection of the contents of the site provided, but had to manifest itself as active wariness when the contract for provision of the site was first formulated. (He was required to have identified the publisher of the site, and to have enabled the publisher to be identified by others; to have taken stock of his future legal obligations and of the need to respect the rights of third parties regarding the contents of the site.) He must again have shown due care when the contract for provision of sites was being applied (spotting any site harbouring illegal, illicit or prejudicial contents, in order, in that event, to put the message right or to close down the facility.)

Apart from such speculation, it cannot be held against the site provider that he did not check the content of a site when he could genuinely not have known of the illegal or prejudicial nature of its content.

Can the case law that we have just been analysing be maintained after the Law of 1 August 2000 had come into force? The legislator probably meant to elevate that case law into written law, but fell short of his aim through bungled legislating. The bill he prepared, which was passed by the Parliament with the proposed wording, provided that: 'if, once informed by a legal authority, they did not act promptly to block the access to the content [or if, once informed by a third

party deeming that the content was illicit or prejudicial to that party, they did not take the appropriate diligent steps].’

But after this text had been passed by Parliament, its constitutionality was checked by the Constitutional Council. In the process, the second of the two subparagraphs introduced by dashes (the passage between square brackets above), concerning the intervention of an injured third party, was excised. Indeed, the Constitutional Council deemed that the site provider could not be held to have incurred penal responsibility for not having taken ‘appropriate diligent steps’, since the latter terms were too imprecise to define an infringement of the criminal law in accordance with constitutional principles.

As a consequence of the excision of the second subparagraph introduced by a dash, the site provider’s civil and criminal responsibility was limited to the first such subparagraph, the one in which the site provider had not promptly obeyed a judge’s injunction; and this yielded a self-evident statement. If the text remained thus amputated of the subparagraph in question, the lucky site-providers found themselves virtually exempted from any liability for the content of the message put across the site they provided.

But this censure by the Constitutional Council was to be foreseen, since the wording ‘appropriate diligent steps’, in removing a prejudice that had merely been posited, was too vague to set up an infringement punishable by the criminal law to an extent proportional to that of the failure to take such steps. But let us admit that we cannot *a priori* rule out some interpretation of the amputated text on civil and criminal liability that would be compatible with the case law referred to above, and which could be the means of localizing the exclusively civil liability of the site provider on the common law ground of Articles I382 and I383 of the Civil Code. For the unconstitutionality of the second subparagraph introduced by a ‘dash’, and passed by Parliament, concerns only the criminal responsibility that it introduced. In other words, the principle that a special law (that of 1 August 2000) should give dispensation from a general law (the Civil Code) would not apply to the attempt to establish the sole responsibility of the site provider.

However, the jurisprudence of the French courts would not necessarily find this interpretation acceptable for acts committed after the entry into force of the Law of 1 August 2000: for under the provisions of a special text, it would allow a plurality of responsibilities with those deriving from common law.

Slovak copyright law

Ján Švidron*

Contents

General	52
Constitutional framework	52
General personality rights and specific personality rights of creators	52
Copyright and neighbouring rights in the framework of the law of intellectual property	53
Slovak copyright legislation	55
The international framework of Slovak copyright law	55
The Copyright Act 1997/2000 and the Act of 1992 on Collective Administration of Author's Rights and Neighbouring Rights	56
Subject-matter of copyright protection	56
Different categories of protected works	56
Subject-matter excluded from protection	57
Special categories of works	58
Conditions for protection	59
Ownership of copyright	59
Scope of exclusive rights	60
Moral rights	60
Exploitation rights	61
Limitations of and exemptions from copyright protection	61
Duration of copyright protection	64

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Neighbouring rights	64
Rights of performing artists	64
Rights of producers of phonograms	65
Rights of ‘producers of audiovisual fixations’	65
Rights of radio and television broadcasters	66

General

Constitutional framework

On 1 January 1993, the Slovak Republic became, as one of the successor states of the former Czech and Slovak Federal Republic, an independent and sovereign state. The constitutional framework of legal regulations with regard to intellectual property rights in the Slovak legal system is defined mainly by Chapter II of the Constitution (Articles 11 to 54) providing for the fundamental rights and freedoms. Article 20 contains general norms securing property rights, including intellectual property; Article 26 guarantees the freedom of expression and the right of information; of special importance with regard to intellectual property protection is Article 43 which guarantees the freedom of scientific research and of arts and defines that ‘rights to the results of intellectual creative activity are protected by the law’.¹ We should also specially refer to Articles 46 to 50 which, in general, guarantee the right for the court and other legal defence.

Moreover, pursuant to Article 7a of the Constitution (in its wording of 2001), the international conventions on human rights and basic freedoms ratified by the Slovak Republic and promulgated under statutory requirements shall take precedence over national laws.

General personality rights and specific personality rights of creators

Acts concerning intellectual property has traditionally been treated as *leges specialis* in relation to the Civil Code (CivC), the most general regulation of private law as *lex generalis*.² The Commercial Code (ComC)³ is also treated as *lex specialis* to the CivC. This is why any review of copyright legislation in Slovakia should also take into account the development of civil (general private) law. As for the rights of creators, the basis was the provision of § 17 of the original wording of the CivC of 1964. This provision was incorporated under the heading ‘Protection of Personality’ and is significant because it referred to the legal regulation of relationships arising from the creative activity and dissemination of

works of literature, science and art in the society. The general provision of § 17 CivC 1964 provided that products of creative activity represent ‘a specific form of personal expression’. Slovak legislation has traditionally regarded relationships arising from creative labour as personal relationships of a specific nature, yet they are not purely personal (creative) in nature since they also involve economic aspects (or vice versa).⁴

Provision of § 17 CivC 1964 was abolished in the large revision process of 1991, resulting from social and political changes of 1989. But also in CivC 1964/1991 we can find a provision contained in § 1 (3) according to which legal regulation of relationships arising from creative intellectual labour is the subject for special laws. Although this provision no longer appears under the heading of ‘Protection of Personality’, the Slovak theory of creator’s intellectual property rights continues to stress both the economic and moral nature of these rights granted only to creative physical persons. Thus, Slovak civil legislation recognizes both general personality rights (general protection of personality) in virtue of §§ 11–16 CivC, and the specific personal rights of creators (*droit moral*) granted by special laws. In addition to the Copyright Act (which refers also to performers), the specific laws providing for the creators’ moral rights include the Act on Inventions, Industrial Design laws and Rationalization Proposal, the Act on Utility Models, the Act on the Protection of Rights of New Varieties of Plant and Animal Breeds and the Act on the Protection of Semiconductor Topographies (all together named and referred as ‘law on creativity’).⁵

Copyright and neighbouring rights in the framework of the law of intellectual property

The law of the former Czechoslovakia as well as present laws of both Slovak and Czech Republics followed the continental European legal system (sometimes referred to as the civil law system), even during the socialist period between 1948 and 1989. Founded on French doctrine, which evolved from laws developed after the French Revolution (1791), the continental European legal system basically divides intellectual property into ‘literary and artistic property’ (copyright and neighbouring rights) and ‘industrial property’ (patented inventions, utility models, industrial designs, etc.). The recent tendency shows that such a division, although recognized under the most respected international treaties on intellectual property (such as the Berne and Paris Conventions), may become obsolete from the standpoint of modern legal theory. Instead of ‘literary and artistic property’, the idea of intellectual property rights with its emphasis on cultural aspects is used, and instead of ‘industrial property’, modern legal theory embarks on the intellectual property rights with its emphasis on economic aspects. Within the general framework of intellectual property legislation, both Slovak legal doctrine

and Slovak legislation recognize two principle groups of exclusive rights. The first group includes both personal and economic rights in respect of subject-matter arising from the creative intellectual labour (authors' rights, performers' rights, rights to inventions, industrial designs, etc.). The second group encompasses the exclusive rights in respect of other subject-matter of intellectual property produced without the creative labour but with a significant financial investment or with other economic value (rights of producers of phonograms and of broadcasting organizations, rights to denominations and branding).

However, there is no exactly definable ratio between the 'personal (creative)' and the 'economic' aspects of the rights to the result of creative intellectual labour. Personal (moral) aspects of legal protection play a more significant role for the rights in literary and artistic productions. In the area of copyright law and the rights of performers, an intellectual work and an artistic performance are the results of creative intellectual labour absolutely bound to the creators and no other person can claim that an identical result was achieved by him or her. If, for instance, Cervantes had not written *Don Quixote*, Goya had not painted his *Giant*, and Beethoven had not composed his Ninth Symphony, no one else would have created these unique works and they would never have become a part of world culture. If we do not take into account the so-called *Werke der kleinen Münze*⁶ (results of lowest or minimal 'creative labour'), where two or more very similar results may be produced by different persons (which in today, sometimes happens, for instance, in the field of so-called pop-music), an identical 'authors' work' would certainly be a case of plagiarism.⁷ This constitutes the most significant difference in the results of technical creative labour, where it is not unknown for the same results (technical solution) to be reached independently by different persons (that is why the right of priority is significant in the field of industrial property but unknown in the field of copyright and performers' rights).

In Slovak jurisprudence, classification of intellectual property rights is based mainly on the following criteria: (a) the nature of the subject-matter (material or immaterial object); (b) the nature of exclusive rights (personality and economic aspects or only economic aspects); and (c) the creativity (its presence or absence). Under these criteria, authors' and performers' rights bear both personality (creator's) and economic aspects; their subject-matter are the immaterial objects mentioned among the results of creative labour (a work or an artistic performance). On the contrary, so-called neighbouring rights (the rights of producers of phonogram and of broadcasting organizations) are not, in the direct sense of the word, 'neighbouring' to copyright, since the subject-matter (phonograms, broadcast programmes) bear no 'personal creative labour' aspect, they have only the economic aspects; therefore, they are not considered 'products of creative labour' albeit connected with them (more 'related to' than 'neighbouring'). The author of an intellectual work and the performer are always a physical person. A legal person is a notion created by law and such an entity cannot be a physical

author-creator; however, it can be a holder of rights in virtue of their being assigned to it, as the employer (publisher, film producer, etc). Within a legal entity only physical persons can carry out creative activities (either individually or collectively, for instance, as co-authors). Unlike authors and ‘neighbouring’ performers,⁸ the producers of phonograms and broadcasting organizations are legal persons, and the subject-matter of their exclusive rights is the material support embodying the product of a personal creative labour. Given the outlined principal differences, in more recent Slovak legal terminology the rights of producers of phonograms and rights of broadcasting organizations are referred to as ‘associated with’, ‘connected’ or ‘related to’ authors’ rights/ copyright. Rights ‘neighbouring’ copyright in the traditional sense of the word are only performer rights.

Slovak copyright legislation

The international framework of Slovak copyright law

The St Germain-en-Laye Peace Treaty of 1919, resulting from the First World War, was the principal influence on modern copyright law protection in Slovakia. At this time, Czecho-Slovakia, a successor state of the Austro-Hungarian Empire, adhered to the Berne Convention for the Protection of Literary and Artistic Works. After 1921, Czecho-Slovakia followed the standards established under the Berlin Act of 1908, and then the Rome Act of 1928, and, since 1974, the Paris Act (Czechoslovakia has not accepted the Brussels Act of 1948). From 1960, Czechoslovakia adhered to the 1952 text of the Universal Copyright Convention, and in 1980 to its Paris Act of 1971; the latest activities of UNESCO to promote the legal protection of creators of intellectual values⁹ are seriously researched and taken in account also by Slovak jurisprudence. In 1964, Czechoslovakia became party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention; it may be reminded that former Czechoslovakia was the first state in the world that provided for the protection of neighbouring rights yet by the Copyright Act 1953¹⁰), and in 1985 it joined the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms convention of 1971). In 1992, Czechoslovakia also joined the Treaty on the International Registration of Audiovisual Works (Film Register Treaty). As of 1 January 1993 the Slovak Republic is the successor of all international obligations arising from the conventions by which was bound the former Czechoslovakia. In virtue of § 2 (4) of the Copyright Act (CA) the provisions of the international agreements to which the Slovak Republic is party shall not be affected by the Act. In 1994, the Slovak Republic was among the states who signed the Agreement on Establishment of the World Trade Organization (WTO), and subsequently was

bound by its Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS).¹¹ The new history of the protection of copyright and neighbouring rights on the territory is bound to the signature by the Slovak Republic of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of 1996.

The Copyright Act 1997/2000 and the Act of 1997 on Collective Administration of Author's Rights and Neighbouring Rights

The fundamental source of copyright and neighbouring rights in the Slovak Republic is the Copyright Act of 1997 (CA).¹² The Audiovisual Act of 1997, which governs the specific activities related to the production, use and distribution of audiovisual works, is closely tied to copyright legislation. On 1 August 2000 Act No. 234/2000 entered into force by which the CA of 1997 was revised and amended. This Act attempted to define more precisely some of the legal terms as well as the content of the economic author's and neighbouring rights to make them in conformity with the WCT and WPPT. The revision and amendments concerned also the scope of limitations of copyright. The Act provides that in cases of reproduction of the works for personal purposes, a remuneration must be paid to the organizations of collective administration of corresponding rights. The Act also introduced a new part entitled 'Special Rights in respect of Databases' which implements in the Slovak copyright law the European Directive No. 96/9/EC on the Legal Protection of Databases.

The collective administration of authors' and neighbouring rights are governed by Act No. 283/1997 on Collective Administration of Author's Rights and Neighbouring Rights (CAA). This Act, which entered into force on 1st December 1998, provides for: the conditions for granting authorization to legal persons to perform the collective administration of the rights referred to in the Copyright Act and for their legal status; rights and obligations of the legal persons performing the collective administration; the rights and obligations of the users of the protected subject-matter. It governs the relations arising from the activities of collective administration organizations.

Subject-matter of copyright protection

Different categories of protected works

The Copyright Act does not provide for a general definition of the notion of a 'work'. However, § 6 (1) CA states that a work must be a product of an author's own creative intellectual labour and to be literary, scientific or artistic in nature.

§ 15 (1) CA specifies that the work must be expressed in a form perceivable by the senses; it also stipulates that the form of expression, the content, the qualities and purpose of the work are of no importance; it may be oral, written, drawn, fixed or not fixed in a material form. The legal doctrine in the field of copyright defines the notion of ‘work’ as a unique result of an author’s creative literary, scientific or artistic labour expressed in a form allowing its repeated sensual perception. The ‘inner substance’ of an author’s creative labour is expressed through its literary, scientific or artistic form, which is protected.

In virtue of § 6 (1) CA the subject-matter of copyright is in particular the following categories of works resulting from the author’s own creative labour: literary works and computer programs; works delivered orally, declaimed or otherwise performed, in particular as speeches or as lectures; theatrical works, namely dramas, musical dramas, pantomimes and choreographic works as well as any other work created for public performance; musical works with or without lyrics; audiovisual works, in particular cinematographic films; paintings, drawings, sketches, illustrations, sculptures and other works of visual art; photographic works; works of architecture, including buildings and works of city planning, work of garden and interior architecture and building design; works of applied art; work of cartography in analogue or any other form.

However, not all categories of works listed in § 6 (1) CA are defined by the Act. For those categories of works that are neither defined in the Act nor commented on in the legislative report, the courts should take into consideration the standards applicable to the relevant sphere of creative activity (literature, theatre, music, visual arts, cartography, etc.), the comments to the relevant international conventions, and also the legal expertise and jurisdiction in the relevant area of creativity (if they exist).

Subject-matter excluded from protection

The copyright act expressly provides for certain subject-matter, which is excluded from copyright protection. In virtue of § 6 (3) (a) CA the protection shall not extend to any idea, procedure, system, method, concept, principle, discovery or information, which was expressed, described, explained, illustrated or embodied in a work; and under § 6 (3) (b) CA excludes from the protection any legislation text, decision of administrative and legal nature, public or official documents, daily news and speeches delivered in the course of public events and the translations thereof; however, publication of a collection of such speeches requires the consent of the person who delivered them. There is a problem in applying these provisions: many terms employed in them were not clearly defined by the statutory laws; and the case law in the area of copyright in the Slovak Republic is not yet sufficiently developed.

Special categories of works

Computer programs

A computer program is defined in § 5 (17) CA as a set of orders and instructions used directly or indirectly in a computer. Orders and instructions may be written or expressed in source code or machine code. An inseparable part of a computer program is also the preparatory material necessary to its production which may be protected as a literary work if it confirms to the general terms of §§ 6 (1) and 15 (1) CA. According to the legislative report, the Copyright Act provides for the same criteria for the legal protection for computer programs as those applied to literary works.

It should be mentioned that computer programs have been subject to copyright protection in the Slovak Republic since 1990, following the international tendency in this respect. Nevertheless, not so many years ago, serious doubts were expressed, whether traditional concept of copyright protection was adequate for the protection of such a specific creative result as a computer program.¹³ As mentioned above, Slovak law follows the international tendency in this respect, in particular, the European Union's Council Directive No. 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs. However, there are actually also certain new considerations according to which patent protection for computer programs would be a better solution.¹⁴ But, the principal objection to patent protection of computer programs is that it is not a 'technical' solution, because a computer program by its nature is a mathematical and logical solution. If today certain specialists consider copyright protection of computer programs to be a 'Trojan Horse' (this expression was first used by A. Dietz) in copyright, there is a danger that it may also become one in the traditional concept of patent law. Although pragmatic reasons,¹⁵ developed at the international level,¹⁶ led in the 1980s and 1990s to copyright protection of computer programs in many countries, our opinion is that *sui generis* protection for computer programs, towards which WIPO tended in the 1970s and at the beginning of the 1980s would be a more adequate (albeit longer) way. It is time to return to the WIPO studies begun in 1971, and to the draft of the Treaty for the Protection of Computer Software (1983).¹⁷ Otherwise, the recognition of computer programs under the category of copyright works needs to be fully justified.¹⁸

Databases

A database is defined in § 5(19) CA. It is protected, irrespective of its form, the only condition is that it is original from the point of view of creative selection or arrangement of its content (§ 6 (2) CA). The legislative report relating to the original wording of the Copyright Act 1997 stated that it was in compliance with

EC Council Regulations concerning databases, which took into account the latest developments, technical and technological progress and the processes of database creation. However, significant amendments were made to the Copyright Act 1997 in 2000 (§ 52a to §52e CA of 2000), based on the European Directive No. 96/9/EC on the Legal Protection of Databases.

Conditions for protection

Formal requirements

The Slovak Republic being party to the Berne Convention, no formalities are required to be fulfilled for copyright protection under its copyright laws. Copyright subsists automatically upon the creation of an intellectual work; neither is a sign or notice required to be placed on a work as a *sine qua non* condition for protection. As provided under § 42 CA, the physical person whose name is usually indicated as its author shall, in the absence of proof to the contrary, be presumed to be author of the work. This provision also applies where a pseudonym is indicated on a work, leaving no doubt as to the real identity of the author. Although indication of the author's name is not required for copyright to subsist, it has an important effect in reversing the onus of proof of authorship (and thus of general ownership).

Substantive requirements

The only requirements for copyright protection under §§ 2, 6 (1) and 15 (1) CA are that: (a) the work must be expressed in a perceptible form; (b) the work must relate to the literary, scientific or artistic domain; (c) the work must be a result of the author's own creative labour; (d) the author must be a national of the Slovak Republic or to be permanently resident within its territory; the work is made public for the first time in the Slovak Republic, irrespective of nationality or permanent residence of its author; or it must be a work, to which the protection in the Slovak Republic is granted in virtue of the international agreement or convention to which the Slovak Republic is a party.

Ownership of copyright

The author (initial ownership)

The Copyright Act does not define the notion of the 'author'. However, after reading § 6 (1) CA it becomes clear that the author is the creator of a given literary, scientific or artistic work and that he or she is a physical person. A legal person cannot carry out the creative labour (see the first section of this article) and

therefore it cannot be recognized as the ‘author’ under the Slovak Copyright Law. But ownership of the economic rights comprised in copyright may be obtained by a legal entity in virtue of its assignment by a contract (primarily by a contract of employment) or, in certain statutory defined cases *ex lege* (namely, §§ 9 and § 17/3 CA concerning the collective works).

Works made under employment contracts

The Slovak Copyright Act establishes only in brief the regime of works created by an employee within the scope of his contract of employment (labour contract). In virtue of § 17 (5) CA, in case of works created by employees in execution of their duties and following the instructions of the employer, the initial holder of the exploitation rights unless otherwise provided by the contract, is the author; however, the Act also stipulates that the right to use the work is deemed to be transferred to the employer to the extent necessary for his customary activities. A different rule was established for computer programs only. §17 (6) CA provides that in case of a computer program created by an employee in execution of his duties even the initial holder of the exploitation rights shall be the employer, unless otherwise provided by contract.

Scope of exclusive rights

Moral rights

Slovak law is closely aligned with the legal systems of continental Europe. Therefore the concept of moral rights has a long tradition in Slovak copyright law.¹⁹ At present § 16 (4) CA provides that moral rights are ‘untransferable and unlimited in time’ (unlike economic rights, whose duration is limited by a prescribed term). This concept of *droit moral éternel* is inspired by French law, whereas German legislation provides the same term of duration for moral rights as for economic rights (seventy years after the death of the author).

As for moral rights § 16 (1) (a) to (c) CA deal with for the right of authorship and § 16 (d) with the right of integrity. In virtue of these provisions the author has the right to sign his work with his name or his pseudonym or not to sign it at all; his name or pseudonym must be indicated on all copies of his work in an appropriate manner, depending on the nature of its use. In virtue of § 16 (1) (e) CA, the author also has the right to decide on making his work public. The notion of ‘making public’ is defined by § 13 (1) CA: a work is made public if it is for the first time lawfully performed or displayed in public, published or otherwise communicated to the public. The fourth traditional moral right – the right of the author to withdraw a work from circulation after its publication – is

recognized under French copyright law but was not recognized in the Slovak Copyright Act.

Exploitation rights

As far as exploitation rights are concerned, a general statement on the content of exploitation (economic) rights may be found in the introductory sentence of § 16 (2) CA: ‘The author of the work shall have an exclusive right to authorize any use of the work.’

In virtue of § 16 (2) (a) to (j) CA, the author’s general right to authorize any use of his work includes, in particular, the right to authorize: (a) any reproduction of the work, its translation, adaptation, arrangement or other transformation; (b) distribution of the work or of its copies to the public by sale, rental or lending; (c) public display of the work or copies of it, public performance, broadcasting, cable retransmission, or other way of communication of the work to the public. § 31 CA also recognizes *droit de suite* (resale right) for visual artists. The content of these rights corresponds to the modern content of economic rights defined in international instruments on copyright and which may be found also in the modern national copyright legislations of other countries.

Limitations of and exemptions from copyright protection

In virtue of § 16 (5) CA the author has the right to remuneration for any use of his work; however, certain acts generally subject to the copyright owner’s consent may, in certain cases, be done without such authorization. There are two different regimes. In some cases neither authorization of the right holder nor payment of remuneration is required; in certain other cases, although the authorization is not required, however a remuneration must be paid.

These limitations of the copyright protection are established under §§ 21–28 CA. The free use includes reproduction of a work for personal purposes, quotation from the work, reproduction of a work for teaching purposes; reproduction for the needs of the visually handicapped, reprographic reproduction by libraries or archives; use of works for information purposes; certain cases of direct public display of the original work or its copy. Special provisions concern reproduction and adaptation of a computer program and its decompilation.

In virtue of § 21 (3) CA the authors and other holders of rights shall be entitled to payment of remuneration for the reproduction of their works recorded on a phonogram or audiovisual fixation and § 21 (4) CA provides that authors of works that can be, due to their nature, reproduced by printing or copying, by their transfer to another medium with the aid of reprographic or other technological

device, shall have the right to compensatory remuneration to be paid by the producer or importer of such devices, as the case may be. The new wording of § 21 (5) CA states that the compensatory remuneration shall be paid to the author or other right-holder by an organization for collective administration of rights. In virtue of this provision the manufacturer or importer of blank carriers usually used for reproduction of works for personal purposes mentioned under § 21 (3) CA shall pay 6 per cent of the sale price of such carriers; the manufacturer or importer of the devices facilitating the reproduction of phonograms or audiovisual fixations shall to pay 3 per cent of the sale price of such devices; the manufacturer or importer of the reprographic or other technical devices facilitating reproduction of a work shall pay 3 per cent of their sale price; and the legal or physical person providing reprographic services for the purposes of making a profit shall pay 3 per cent of the total income from these services.

However, in our view very serious questions arise in respect of the transparency of the collective administration of rights particularly as it concerns national and international financial transfers by the organizations of collective administration of the collected amounts and their equitable distribution to all the right-holders. In the Slovak Republic there is no form of effective system of state or public control of the distribution process whereas the considerable amounts of money paid by manufacturers, importers and other entities to the organizations of collective administration of rights concern the public at large. It is clear that the established percentage of the price is primarily paid by the citizen/consumer, since the manufacturer, importer and services providers calculate their sale prices, accordingly.

And here is the legal and economic crux. In virtue of § 3 (1) CAA, a ‘collective administration is a representation of right-holders in the execution of their economic rights granted under the Copyright Act’. This clearly concerns concrete private law relations. However, the above-mentioned ‘remuneration’ will be paid by the public at large. This is why the ‘income’ of organizations of collective administration of rights and the distribution process concern not only ‘private interests of holders of copyright and neighbouring rights’ but also (or primarily) the public at large, in other words, public law interests as well; it should be noted that it is the state that is bound by international conventions to ensure, on its territory, effective and adequate copyright and neighbouring-rights protection of all — identified — right-holders.

Moreover, the new wording of § 21 (8) CA 1997/2000 requires from the entrepreneurs (manufacturers and importers) mentioned in § 21 (5) CA to submit to a ‘competent organization of collective administration’ the information about the kind and the number of imported blank carriers and devices facilitating the reproduction of phonograms or audiovisual fixations and reprographic devices as well as about their sale prices’. However, there arise many interesting questions in this relation. Apart from the above-mentioned non-transparency of the financial

flows and the absence of any effective public control over the organizations of collective administration, the question of the protection of the business secrets in the meaning of §§ 17 et seq. of the Commercial Code of persons the manufacturers and importers mentioned under § 21 (5) CA is one of the most relevant.²⁰ The organizations of collective administration under Slovak law are ‘associations of citizens of a non-commercial nature’ (meaning legal persons under private law) and the persons mentioned under § 21 (5) CA are the entrepreneurs (primarily legal persons under private law); and private law is characterized by granting an equal position to the participating persons – physical persons and legal entities – it excludes any form of more advantageous position of one of the parties whereas a ‘competent’ organization of collective administration shall be the case).²¹

In virtue of § 4 CAA the collective administration can only be performed by a legal person ‘which is established for non-commercial purposes pursuant to corresponding legislation’ (Act No. 83/1990 on Association of Citizens) and to which the ‘licence’ for performance of collective administration (e.g. France, Germany) has been granted by the Ministry of Culture. In Europe, there are different ways in which states control the ‘non-commercial activities’ of organizations of collective administration while public interests are taken into account by national legislators.²² In the Slovak Republic, such an effective system of control has not yet been legally established. Perhaps this may be explained by the fact that the draft of the new copyright law originates among the organizations of collective administration.

The general public cannot be satisfied with only very general law provision according to which organizations of ‘collective administration’ warrant law, equity and public transparency while distributing and transferring the amounts they collect (both nationally and internationally), as provided under the provisions of § 7 (4) to (7) CAA.

These critical remarks in no way tend to argue about the justified interests of holders of all categories of exclusive economic rights recognized under the Slovak Copyright Act and international conventions. However, there is a need to start looking for effective ways and means of public control over the collecting organizations’ activities, which would take into account also the interests of consumers and entities in respect of moral and economic aspects of exploitation of the results of creative labour. There should also be exact definitions of protected subject-matter and more precise wording with regard to the extent and scope of exclusive rights. From here, our critical remarks concern the new category of works – ‘audiovisual fixation’ – described under ‘Neighbouring rights’ below.

Duration of copyright protection

As mentioned above, in line with the French legal tradition, protection of the moral rights under Slovak copyright law is unlimited in time (perpetual) (§ 16 (4) CA). Regretfully, the law does not define clearly the persons authorized to bring court action in a case of infringement of moral rights after the author's death; from this point of view, the Slovak Copyright Act, as is the case with the laws of many other countries protecting moral rights, seems to be *lex imperfecta*.

As far as economic rights under the Copyright Act 1965 are concerned the general term of protection was the author's lifetime and fifty years thereafter. But in virtue of § 18 CA 1997 (which entered into force on 1 January 1998), and which followed the European Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, the general term of copyright protection is the life of author and seventy years after his or her death.

Neighbouring rights

Rights of performing artists

The notion of 'performer' is defined by § 5 (11) CA: a performer is a singer, musician, actor, dancer or any other person who sings, acts, interprets, delivers or otherwise performs literary or artistic or works or works of folklore. In virtue of § 45 CA the subject-matter of the rights of performers is their artistic performance. Protection is granted to performers who are nationals of the Slovak Republic or who are not nationals but whose performances take place on Slovak territory or were incorporated in phonograms protected under the CA, or performances that have not been fixed in phonograms, but have been communicated in the form of broadcasts or original programmes distributed by wire and complying with the conditions required for protection under § 3 (1) CA.

As for the scope of exclusive rights, in virtue of § 46 (1) CA the provisions of § 16 (1) and (5) CA concerning moral rights of author shall apply *mutatis mutandis* to performers.

As for as the exploitation rights, § 46 (2) CA grants to the performer the exclusive right to authorize any of following acts: (a) broadcasting or other communication to the public of his/her artistic performance, except broadcasting of an already broadcast artistic performance; (b) broadcasting of a fixed artistic performance, communication to the public of an already broadcast artistic performance or communication to the public of a fixed artistic performance; (c) the fixation of his/her unfixed performance; (d) the reproduction of a fixation of his/her performance; (e) the distribution to the public of a fixation of his/her

performances or copy thereof through sale, rental, lending or other transfer of rights; and (f) the making available to the public his/her fixed artistic performance. In virtue of § 46 (3) CA the performer has the right to equitable remuneration for any use of his/her performance.

According to § 46 (1) CA, requiring *mutatis mutandis* application of § 16 (1) CA, the moral rights of performers are untransferable and are of unlimited duration. As concern exploitation rights, their general term of protection shall last fifty years calculated (with certain statutory defined exceptions) from the execution of the artistic performance.

Rights of producers of phonograms

The notion of ‘phonogram’ is defined under § 5 (16) CA and repeated in § 47 (1) CA as an exclusively aural fixation of sounds regardless of the method or the medium used for their fixation. The producer of a phonogram is defined under § 5 (15) CA as a ‘physical or legal person who initiated or otherwise facilitated the final making of the fixation’.

Under § 47 CA the producer of a phonogram is granted the exclusive right to authorize any of following acts: (a) reproduction of the phonogram; (b) distribution of the phonogram or a copy thereof to the public through sale, loan, rental or other transfer of rights; (c) broadcasting of phonograms or a copy by radio or television; (d) communication of the phonogram or a copy to the public by means of a technical device; (e) making available to the public of the phonogram. The producer has also the right to equitable remuneration for any use of phonograms or copies thereof.

The rights of phonogram producers shall last fifty years, generally calculated (with certain statutory defined exceptions) from the day of its production.

Rights of ‘producers of audiovisual fixations’

In Slovak copyright and neighbouring rights legislation the notion of ‘audiovisual fixation’ is a new, and the most problematic, one. We think that from the point of view of Slovak jurisprudence, it was a serious error on the part of the legislator to introduce the protection of this subject-matter under ‘neighbouring rights’. The international conventions concerning these rights, in particular the Rome Convention and the WIPO Performances and Phonograms Treaty (WPPT), do not provide for the protection of this subject-matter. Furthermore, the European Directives use the term ‘audiovisual work’ only (which is protected under the Berne Convention, that is, it enjoys copyright protection), and ‘the first fixation of a film’ as a subject-matter of the exclusive rights of its producer (see in particular

Article 2/1 of Council Directive 92/100/EEC on rental rights and lending rights and Article 3/3 of Council Directive 93/98/EEC harmonizing the term of protection).

The term ‘audiovisual fixation’ is defined vaguely in § 5 (17) CA as ‘a fixation of sounds and images that are aurally and visually perceivable regardless of the method or the medium used for fixing the sounds and images’ and ‘the producer of audiovisual work or any other audiovisual fixation’ is defined under § 5(15) CA as ‘the natural or legal person who initiated or otherwise facilitated the final making of the work or fixation’. These definitions are not at all clear from the viewpoint of their practical and economic consequences. They allow very ambiguous and diverging interpretations,²³ in particular as far as compensatory remuneration is concerned, which, according to § 21 (5) CA 1997/2000, must be paid to the ‘organization of collective administration’ and distributed to ‘the authors or other holders of rights’ under the Copyright and Neighbouring Rights Act (see the section on limitations of and exemptions from copyright preparation above).

According to § 49 (1) CA the producer of an audiovisual fixation shall have the exclusive right to authorize: reproduction of the original or a copy of his audiovisual fixation; distribution of the audiovisual fixation or copies thereof to the public through sale, rental, loan or other transfer of rights; broadcasting of the audiovisual fixation or copy by radio and television; communication to the public of the audiovisual fixation or copy by means of a technical device; making the audiovisual fixation available to the public. In virtue of § 49 (2) CA the producer has right to equitable remuneration for any use of his audiovisual fixation or copy thereof.

The duration of the protection of the rights of producers of an audiovisual fixation shall be fifty years starting on the day of its production (with certain statutory defined exceptions).

Rights of radio and television broadcasters

The term ‘broadcasting’ is defined under § 5 (14) CA as the communication of a work or a subject-matter of neighbouring rights by a radio or television broadcaster by wire or wireless means, including by satellite. Other term used in connection with the rights of radio and television broadcaster – ‘cable retransmission’, is defined under § 5 (5) CA as simultaneous, unaltered and unabridged transmission of already broadcast programs, affected by means of a cable or microwave system permitting reception of the initial broadcast.

According to § 50 (1) (a) to (e) CA a broadcaster or a person who communicates his programme to the public by wire has the exclusive right to authorize any of the following acts: (a) rebroadcasting of his broadcast, or

broadcasting or rebroadcasting of his programmes communicated by wire; (b) cable retransmission of his broadcast or his programme communicated by wire; (c) fixation of his broadcast or his programme communicated by wire; (d) reproduction of a fixation of his broadcast or his programme communicated by wire; (e) distribution of the fixation of his broadcasting or his programme communicated to the public by wire through sale, rental, loan or other transfer of rights; (f) the communication to the public of his broadcasting or his programme communicated by wire, if such communication to the public is realized in a place admissible to the public with entrance fee. The broadcaster has the right to remuneration for granting of such authorization (§ 50 (4) CA).

In virtue of § 50 (3) CA the term of duration of rights of broadcasters shall be 50 years computed from the first broadcast of a programme or its communication by wire to the public.

Notes

1. Ján Švidron, *Slovak Republic: Law of Intellectual Property*, The Hague/London/Boston, Kluwer Law International/International Encyclopaedia of Laws, 2001.
2. Act No. 40/1964 in its subsequent amendments.
3. Act No. 513/1991 in its subsequent amendments.
4. See Š. Luby, (ed.), *Osobnomajetkové práva*, Bratislava, SAV, 1968.
5. See Ján Švidron, *Tvorba a právo* [Creativity and Law], Bratislava, Veda, 1991; *Základy práva duševného vlastníctva* [Introduction in the Law of Intellectual Property], Bratislava, Jura 2000.
6. See K. Schraube, 'Werke der 'kleinen Münze'', *Urheberrecht, Archiv für Film- Funk und Theaterrecht (UFITA)*, Vol. 61, 1971.
7. For the history of the term 'plagiat', see R. Lambertini, *Plagium*, p. 47, Milan, Giuffrè Editore, 1980.
8. See C. Masouyé, *Guide de la Convention de Rome et de la Convention Phonogrammes*, Geneva, WIPO, 1981.
9. See in particular D. Lipszyc, *Copyright and Neighbouring Rights*, Paris, UNESCO Publishing, 1999.
10. See Luby, Š., *Práva príbuzné autorskému právu*, Praha, SAV 1963.
11. See R. Oman, *Future of Intellectual Property after Uruguay Round of GATT* (in Slovak translation *Budúcnos duševného vlastníctva po Uruguajskom kole GATT*), Bratislava, *Právny obzor* [Law Review], No. 6, 1994.
12. Act. No. 383/1997; see also P. Murí, *Autorský zákon – nový zákon s výkladom* [Copyright Act with comments], Ilina, EPP 1998; V. Sadlo ová, 'Das neue slowakische Urhebergesetz – Ein Schritt weiter in Richtung Europäische Union', *GRUR Int.*, No. 12, 1998.
13. See, in particular, A. Dietz, 'Copyright Protection for Computer Programs: Trojan Horse or Stimulus for the Future Copyright System?', *Archiv für Film- Funk und Theaterrecht (UFITA)*, Vol. 110, 1989.

14. See J. Laco, 'Patentability of Computer-Software Related Inventions', *Duševné vlastníctvo* [Intellectual Property Review], No. 3, July–September, 1998; F. van der Voort, 'Patentability of Computer Related Inventions (in Slovak translation, *Duševné vlastníctvo*, op. cit., No. 2, April–June, 2000).
15. See D. B. Barbosa, 'Logiciel et le droit d'auteur: un mariage de déraison', *Droit d'auteur*, Vol. 101, No. 4 (April), 1988, p. 311.
16. See, for example, the resolution of AIPPI - Q 57: 'AIPPI acknowledges that computer software is protectable as a written work within the framework of the copyright law', in *Annuaire 1989/II Congress – Amsterdam*, 1989, p. 303.
17. See WIPO, *The First Twenty-five Years of the World Intellectual Property Organization*, p. 43, Geneva, WIPO Publications 1992.
18. To compare the Belgian legislative solution of two separate Acts, see J. Corbert, 'La nouvelle loi belge sur le droit d'auteur', *RIDA*, No. 164, 1995, pp. 51 et seq., and A. Strouwel, 'La loi belge sur les programmes d'ordinateurs: vers un droit d'auteur sui generis?', *RIDA*, 1995, pp. 173 et seq.
19. See Š. Luby, *Autorské právo* [Copyright law], Bratislava, Vydavateľstvo SAV, 1962, pp. 44 – 68; see also A. Dietz, *Das Urheberpersönlichkeitsrecht vor dem Hintergrund der Harmonisierungspläne der EG-Kommission*, (in Slovak translation, *Právny obzor* [Law Review], 1993, No. 6; A. Dietz, 'Bedeutung und Funktion des Urheberpersönlichkeitsrechts im modernen Urheberrecht'; G. Boytha, 'Die Entwicklung des Begriffs des Urheberrechts aus der Sicht des Europarechts', *Duševné vlastníctvo v procese transformácie právneho systému – Geistiges Eigentum im Prozeß der Transformation der Rechtsordnung* – (Proceedings of the International Symposium held in Bratislava 23–25 September 1996, published by the Stefan Luby Foundation, *Dies Luby Jurisprudentiae* (Bratislava), No. 4, 1997).
20. See J. Švidron, 'Post-modernism, Abuse of Law and the New Slovak Copyright Act', *Právny obzor* [Law Review] (Bratislava), No. 6; 2000; J. Švidron, 'Protection against Unfair Competition in Relation to the Copyright Law', Bratislava, *Duševné vlastníctvo* [Intellectual Property Review], No. 2/3, 2001.
21. See Švidron, op. cit., footnote 1, paras 107–11.
22. See P. Katzenberger, 'Die Verschiedenen Systeme des Aufsichtsrechts über Verwertungsgesellschaften in Europäischen Staaten' (in Slovak translation: *Justi ná Revue*, No. 11/12, 1994).
23. See also G. Boytha, *WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights*, p. 15, Geneva, WIPO, 1981 – 'Audiovisual fixation: The simultaneous sound and visual recording of scenes from life or a live performance or recitation of a work in any appropriate durable material form permitting them to be made perceptible. Audiovisual fixation of a performed or recited work is usually considered to be reproduction of the same.' However, it is not clear how this definition stands from the point of view of the relation between the Berne Convention (Article 14bis) and conventions relating to neighbouring rights. Cf. G. Leroy, 'Vidéogramme et droit d'auteur', *Revue de droit intellectuel*, Vol. 72, No. 4/5 (April/May), 1982, pp. 49–63; G. Davies and M. E. Hung, *Music and Video Private Copying – An International Survey of the Problem and the Law*, London, Sweet & Maxwell, 1993.