

Record and Video Rental Meeting

(UNESCO Headquarters, Paris, November 1984)

From 26 November - 30 November, 1984 the Secretariat of UNESCO and the International Bureau of WIPO covered jointly a meeting of a "Group of Experts" on the rental of phonograms and videograms.

The mandate of this group was to examine the copyright problems arising from the rental of phonograms and videograms.

The experts invited in their personal capacity were nationals of Cameroon, Egypt, India, Japan, Mexico, Switzerland, USSR and USA. States which were parties to the Berne or UCC Conventions were invited and delegations from 25 countries including Australia attended. Also in attendance were representatives from one inter-governmental and 14 international non-governmental organisations.

The major document considered was a study prepared by the International Federation of Phonogram and Videogram Producers. The meeting also considered comments on this study received from Governments, and draft guiding Principles of Copyright Protection relating to the Rental and Lending of Phonograms and Videograms.

The IFPI study ranged over such topics as an assessment of the rental market; legal means of controlling rental (Distribution Right, Suing Retailers for authorising or inducing private copying); commercial means of controlling rental; public lending right and recent legislative developments.

The most relevant of the recent legislative developments were those of Japan and USA.

JAPAN

In Japan limited legislation which came into force on 2 June, 1984 provides that a person intending to lend a phonogram to the public for profit will first have to obtain permission from the right owners until one year after the first sale of the phonogram in

Japan. Rental to the public for profit without such authorisation constitutes an infringement. Rights owners may thus either authorise (under such conditions as they choose) or prohibit rentals within the first year of release. However, excluded from the scope of the legislation are phonograms not produced by Japanese nationals or first fixed in Japan. Representations have been made to the Japanese Government to increase the protection afforded, and in particular to extend protection to foreign repertoire.

USA

In the USA by contrast much wider and more satisfactory legislation has been enacted: The Record Rental Amendment of 1984 came into force in October 1984. Before the enactment of this new legislation the classic "First Sale Doctrine" of the Copyright Law allowed a person who purchased a phonogram to rent, lend or lease it without the consent of the owners of the copyright in the sound recording or the underlying musical work(s).

The New Commercial Rental Right

The new law amends the First Sale Doctrine to prohibit commercial record rentals - even after the first sale of a recording - unless authorised by the copyright owners. Thus a record retailer must obtain a licence under the new law in order to rent phonograms to the public on a commercial basis.

Evasive Schemes

Furthermore, the Record Rental Amendment applies to evasive schemes such as "sale and buy back" schemes and "preview" sales. It also extends to record "clubs" which lend records to mem-

bers without charging a direct rental fee while indirectly deriving rental income from a periodic membership or subscription fee.

Educational and Library Exemption

The new law does not apply to the non-profit activity of a non-profit library or educational institution.

Penalties for Infringement

Infringements are subject to civil infringement remedies provided by existing copyright statute. Criminal penalties are not applicable.

Anti-Trust Considerations

The new legislation does not require copyright owners to authorise commercial record rentals. Rather, each copyright owner of a sound recording is free to decide whether or not to permit rentals, so long as the decision does not otherwise violate the anti-trust laws.

Compulsory Licensing

If the copyright owner of the sound recording elects to authorise commercial record rentals, the rights of the owners of copyright in the underlying music are subject to a system of compulsory licensing similar to the existing mechanical licence. By complying with this compulsory licensing system, a recording company may authorise commercial record rentals without the consent of the music copyright owners. The recording copyright owner, in order to obtain a compulsory licence, is required to pay the music copyright owners a royalty fee for each authorised rental transaction. This fee is in addition to any fee paid under the mechanical licence. The royalty formula in the new law provides that the owners of copyright in the sound recording and the underlying musical work(s) share any rental revenues from a particular recording in the

same proportion as they share revenues from the sale of that record under the mechanical licence. The recording copyright owner may also enter into a voluntary licence with the music copyright owners and negotiate a rental royalty.

Conclusions of the Meeting of Experts

After five days of discussion and lively exchange of views the experts gathered at Paris:

1. expressed the view that authors should enjoy, under copyright law, an exclusive right to authorise the rental or lending of phonograms or videograms embodying or constituting their works;
2. further expressed the view that where phonograms or videograms are not considered to be original works or authorship, but where they are recognised as particular subject matters of protection under copyright laws or where their producers are protected by a specific right at least against the unauthorised copying of their phonograms and videograms, the producers of phonograms and videograms should, without prejudice to the rights of authors, have a similar exclusive right;
3. recognised that some exceptions to the said rights may be desirable in certain special circumstances;
4. recognised further that the soliciting and granting of licences may, especially where the number of right holders is great, require legislative measures which facilitate the negotiations of licences and their implementation, measures preferably resulting in the collective administration of the rights;
5. recommended that further studies should identify various alternatives for modalities and mechanisms for such negotiations and such administration;
6. further recommended that such studies should deal separately with phonograms and videograms and should deal also with the uses (copying, performance, etc.) to which rented or loaned copies may be put;

7. finally recommended that the Secretariate consider the desirability of extending the studies also to the rights of performing artists.

Victoria Rubensohn

Case Notes

(Con'd from PAGE 9)

television commercial licensees indicating that if the Volvo commercial was televised, the matter would be considered by the ABT at the next review of the particular station's licence. Although the ABT sent a subsequent telex making it clear that, in view of the Saatchi & Saatchi decision, it was a matter of individual judgment as to whether, pending the outcome of an appeal of that decision, the commercial should be televised, Morling J found that the licensee should not have any uncertainty in Saatchi's case pending the hearing of an appeal to the Full Court.

The ABT has appealed from the decision of Saatchi & Saatchi to the Full Court and that matter should be heard in the near future.

However, the Australian Government has indicated that it will, if necessary, amend the Broadcasting & Television Act to empower the ABT to make Television Standards regulating content of programmes, in order to overcome the Saatchi decision. The precise terms of any amendment have not been disclosed. However, it would seem that prompt legislative action will be taken, in the event that the Full Court affirms Beaumont J's decision. Stephen J. Menzies

Freedom of Information - Peter J. Byrne

This recently published book is an analysis of the Commonwealth Freedom of Information Act and the Victorian Freedom of Information Act. As well as providing an explanation of the provisions of the Acts, it includes a practical guide to using them. (The Law Book Company Limited)

BOOKS IN BRIEF

The Rights of Journalists and Broadcasters - Geoffrey Robertson and Andrew Nicol.

This book is a comprehensive guide to media law in the United Kingdom. Although parts of it relate to areas of law where Australian law has diverged from that of the U.K., such as contempt of court, official secrets and company law, there is still in the book a large amount of material which is of interest and assistance to Australian practitioners. These areas include defamation, obscenity, breach of confidence and copyright.

As those who are familiar with the hypotheticals run on the Channel 9 "Sunday" program are aware, Geoffrey Robertson is highly articulate. He, together with his co-author Andrew Nichol, has produced a book which not only conveys an immense amount of information without becoming stodgy, but is also extremely readable. (Oyez Longman)

The Law of Intellectual Property - Staniford Ricketson

This book was published late last year and was written by Sam Ricketson, a senior lecturer in law at the University of Melbourne. It is the only comprehensive guide to industrial and intellectual property in Australia and is useful both as a student's text book and for practitioners. Despite the numbering system so dear to the heart of the Australian publishers, this book is also easy to read and contains useful sections dealing with areas such as the relationship between intellectual property rights and consumer protection under the Trade Practices Act 1974, the registration of business names and a comparison between the new UK Patent Act and our current Australian Act. It is lengthy (over 1200 pages) but an invaluable tool. (The Law Book Company Limited)