Copyright

Monthly Review of the United International Bureaux for the Protection of Intellectual Property (BIRPI)

5th year - No. 4 April 1969

Contents

Pages

WORLD INTELLECTUAL PROPERTY ORGANIZATION

— Byelorussian Soviet Socialist Republic. Ratification of the WIPO Convention . . 79

GENERAL STUDIES

— The Copyright Concept of Intellectual Works in Modern Art (Eugen Ulmer) . . 80

— Original Manuscripts (Salvatore Loi) 82

CORRESPONDENCE

— Letter from Great Britain (Paul Abel) 85

CALENDAR

— BIRPI Meetings 92

— Meetings of Other International Organizations Concerned with Intellectual Property 92

© BIRPI 1969

Any reprodnction of articles and translations of laws, published in this periodical, is anthorized only with the prior consent of BIRPI

WORLD INTELLECTUAL PROPERTY ORGANIZATION

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

Ratification of the WIPO Convention

Notification of the Director of BIRPI to the Governments of the countries invited to the Stockholm Conference

The Director of the United International Bureaux for the Protection of Intellectual Property (BIRPI) presents his compliments to the Minister for Foreign Affairs of . . . . . and, in accordance with the provisions of the above Convention, has the honor to notify him that the Government of the Byelorussian Soviet Socialist Republic deposited on March 19, 1969, its instrument of ratification dated October 18, 1968, of the Convention Establishing the World Intellectual Property Organization (WIPO), with the following declaration:

" The Byelorussian Soviet Socialist Republic declares that the Convention Establishing the World Intellectual Property Organization regulates questions concerning the interests of all countries; and that is why it must be open to participation of all States, in accordance with the principle of their sovereign equality. " *(Translation)*

Pursuant to Article 11(4)*(b)* of the said Convention, the Byelorussian Soviet Socialist Republic has expressed the wish to belong to Class C.

The deposit of this instrument of ratification is in conformity with the provisions of Article 14(1)(ii) and of Article 5(2)(i) of the said Convention.

Geneva, March 25, 1969.

WIPO Notification No. 10

GENERAL STUDIES

The Copyright Concept of Intellectual Works in Modern Art *

I

Some months ago, an important monograph, rich in ideas, was published by Professor Max Kummer of Switzerland under the title *Das urheberrechtlich schützbare Werk* [1]. By analysis of the phenomena of modern artistic creation, the author tried to clarify the concept of a literary or artistic work and to free it from the confused notions with which it is burdened in traditional definitions.

Professor Kummer's study, which testifies to a vast knowledge of art and the theories of modern art, is followed by an illustrated appendix offering useful examples. He starts with a three-dimensional work, liable to shock classifical art lovers. Giving free rein to the artist's whim, the materials for this work were collected — in Professor Kummer's own words — from the debris of our modern civilization. This object is followed by a painting which was not produced by spreading paint over the front side of a canvas, but by cutting out gaping knife holes from behind. In addition, there are reproductions of optical art — compositions of the most extreme sobriety of form (straight lines, triangles, quadrangles, circles) in which any " romantic desire of expression " is repressed — as well as examples of commercial art, " computer drawings ", etc. Other illustrations, taken from music and literature, are to be found in the text itself; among them are poems that dispense with words and are composed merely of letters and numerical combinations. Mention is also made of the root of a pine found in nature: it is claimed that, because this root looks somewhat like a representation of a dancer, its uniqueness makes it a work of art.

Where do such objects stand in regard to copyright protection? What position should be assigned to these works in the legal provisions on literary and artistic works? For example, where do they stand in the provisions of the German Copyright Act, according to which " works " include only personal intellectual creations, or in the concept of " original creation " contained in the Swiss Law concerning copyright? The question applies to both literature and art, but Professor Kummer's investigation pertains more specifically to art. Can we still refer to objective standards in deciding whether or not the thing we are dealing with is a work of art? Or must we give up all hope of defining art and, in the last analysis, leave the decision and classification in matters of art to the artist himself?

In principle, Professor Kummer favors the second alternative. He rejects any possibility that standards of value can be applied in deciding whether or not a work may enjoy copyright protection. In the first place, he argues that the mere fact of being confronted with an individual object is what matters. He thus emphasizes individuality, which is in line with the theory I myself advocate; however, he deviates from this theory in that by individuality he does not mean literary or artistic individuality. He quotes certain passages from my *Urheber- und Verlagsrecht* [2], in which I note that a work of architecture differs from an ordinary apartment house by its artistic form, that a lecture or speech differs from mere conversation or a literary dissertation from a simple letter, by its literary form or formulation of thought. To Professor Kummer's mind, it is wrong that a specific qualification should thereby be required. In his opinion value judgments should be abandoned altogether. Also, he considers it irrelevant that a personal note or characteristic touch is recognizable, which identifies the work as bearing the author's " stamp ". Instead, he understands individuality in a purely statistical sense: a high degree of probability that someone else will not chance to make the same thing.

Consequently, Professor Kummer's ideas are the following: In those cases where an author keeps to the traditional paths of literary, musical or artistic production, the question whether an individual object results in a literary or artistic work can easily be answered in the affirmative. With modern developments, however, the answer is no longer so obvious. Roars and hisses are not music in the traditional sense of the word; a dented aircraft turbine is not a work of sculpture in the usual sense of the expression. As a substitute, the criterion has to be whether the author presents the object as being a work: " It is perfectly all right for a reporter to photograph a spatter of Indian ink on a wall and to publish the picture as being the place where two game cocks met in battle. If the same spatter is framed, put behind glass and presented by the author as a work of art, then copyright appears on the scene. Hence, the author must, as it were, make it known in some way or another that what he is presenting is a work of art, in so far as this is not obvious at first sight. "

II

The investigation Professor Kummer has made of the concept of an intellectual work is followed by a chapter entitled " Special Cases, " in which he examines a whole series of problems that arise in the field of literary and artistic creation. Since all of these problems cannot be discussed in detail, we shall merely look into a few of the basic

---

* This book review was published in German in the September 1968 issue of *Gewerblicher Rechtsschutz und Urheberrecht*. As translated by BIRPI, it is reproduced here with the kind permission of the author and the publisher.

[1] Max Kummer, Doctor of Laws, ordinary professor at the University of Berne, *Das urheberrechtlich schützbare Werk*, with 48 illustrations. In the series *Abhandlungen zum schweizerischen Recht*, Prof. Dr. Hans Merz, editor, Vol. 384, IX-229 pages, Verlag Stämpfli & Cie, Berne 1968.

[2] 2nd edition, 1960, p. 116.

problems raised by the theory propounded by Professor Kummer on what may be considered a work.

It is beyond doubt that Professor Kummer's book gives us valuable ideas and insights. It is certainly true that, if we are to do justice to modern art, we shall have to be as broad-minded and liberal as possible in deciding what constitutes a work for copyright purposes. Such formulas as "aesthetic excess" or "aesthetic content"[3], found in past and present German case law, should be discarded.

In defining the meaning of art in the copyright field, we run up against problems very like those encountered by specialists in constitutional law when they have to interpret, for example, the rules, in Article 5, paragraph 3, of the Constitution of the Federal Republic of Germany which provides that art and science are free. In the most recent literature on the subject, support is also found for the view that a qualitative concept of art cannot be used as a basis[4]. But is it possible in connection with copyright to dispense with all application of objective standards, to resign ourselves to depending upon the author himself for the decision whether or not his creation is a literary or artistic work?

1. If we consider what copyright involves from the equitable viewpoint, our first doubts are aroused. We think of the well-known provision of the American Constitution empowering Congress to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. Although our legislation does not display such rhetoric, it is nevertheless our unanimous belief that the purpose of copyright is to protect intellectual creation as it appears in works of literature and art. Proceeding from this idea, is it possible for us to allow the author himself to decide on the right to such protection? Individuality within the meaning Professor Kummer gives to the term, that is, statistical uniqueness, is rapidly achieved. It can result from the mere fact that a pen has squirted abundant quantities of ink, thus producing arbitrarily distributed blots, or that footprints have been left in some way on a support capable of preserving the marks, even though not the slightest requirements have been fulfilled as far as intellectual effort is concerned. Does it suffice, then, for the author simply to present the object in question as being a work of art, even if he is making fun of buyers who rely on such presentation?

2. As regards the question of quality, a well-known and long standing principle applies in the field of copyright, namely, that we do not pass judgment on literary or artistic value unless it is absolutely necessary.

Professor Kummer is right in pointing out that we avoid the question of quality where works conforming to the traditional concepts of art, literature and music are concerned: a painting that has flaws from the artistic point of view, a bad novel, Wild West stories, picture magazines, and so forth, are protected by copyright, too.

On the other hand, the problem of defining limits does not occur solely in connection with objects of modern art. In literature, we must draw the line in deciding whether letters, prospectuses, catalogues, business forms, model contracts, and the like, are eligible for copyright protection. As regards art, the problem of defining boundaries always existed with respect to architecture and applied art. These questions cannot be resolved by applying the criterion of individuality as it is understood by Professor Kummer. An apartment house may, through alterations and additions, have taken on such a peculiar shape that it has become unique from the statistical point of view, but this does not mean that it is a work of art. In the examples cited, we cannot even apply the criterion of presentation as a work of art. The only criteria left are the amount of intellectual effort exercised in the case of letters, business forms, etc., and the artistic expression present in the case of works of architecture and works of applied art.

Generally speaking, it is not always possible to avoid value judgments where copyright is concerned. For instance, in ascertaining whether copyright infringement or free use is involved in a case where it is perceptible that an older protected work has been used, the literary and artistic individuality of both the earlier work and the more recent work are among the elements taken into consideration[5]. Likewise, an adequate judgment of a parody can be made only if the amount of intellectual effort required for the antithematical treatment of the subject is assessed.

Experience has taught us that unrestricted renunciation of all value judgment is not possible in copyright matters. A judge who is incapable of making any literary or artistic evaluation would be a poor judge for copyright cases.

3. We cannot apply different standards; quite on the contrary, in principle we should start with a uniform concept of what a work is.

In this writer's opinion, presentation of a work as a work of art must be rejected as a criterion to be used in defining the boundary line, for it can only be applied in the realm of pure art, not in the field of architecture or applied art. Furthermore, according to a well-known rule, copyright protection exists from the very moment the work is created; even the preliminaries of the work, such as sketches or plans, enjoy immediate copyright protection. Yet, presentation necessarily takes place some time after the actual creation of the work or its preliminaries.

Of course, I fully agree that presentation can be taken into consideration as an indicator: by presenting his creation as a work of art, the author gives us to understand that he believes it to be an artistic creation. Although this is not a

---

[3] The formula at present used in German case law (which avoids the idea of "aesthetic excess" formerly used for works of applied art) indicates that what should be understood by a "work of art" is a personal intellectual creation produced through artistic expression by formative activity and reaching a sufficiently high aesthetic level, so that one can still speak of art on the basis of generally recognized concepts. Cf. BGHZ 16, 4, 6 = GRUR 1955, 445 — Zwischenmeister; 22, 210, 214, = GRUR 1957, 291 — Europapost; 24, 55, 64 = GRUR 1957, 391 — Ledigenheim — and 27, 351, 356 = GRUR 1958, 562 — Candida-Schrift. For criticism, see also Gerstenberg, *Die Urheberrechte an Werken der Kunst, der Architektur und der Photographie*, 1968, pp. 49 *et seq.*

[4] Cf. the thorough study on the concept of art in constitutional law by Wolfgang Knies in his work *Schranken der Kunstfreiheit als verfassungsrechtliches Problem*, 1967, pp. 118 *et seq.*

[5] Cf., for example, RGZ 169, 109, 114 = GRUR 1942, 373, which quite rightly says: "A work of greater originality is less likely to be absorbed by an imitation without leaving its characteristic mark on it than a work of lesser originality."

decisive judgment, it should not be overlooked. We have an obligation to the author to consider this point and to examine it carefully to determine whether or not there has been genuine and willful expression of artistic creation.

4. When speaking of artistic creation, we are inevitably confronted with the difficulty of defining art. Here the precedents should be viewed with care. The well-known formulas in copyright case law, "aesthetic excess" or "aesthetic content", are not applicable, if only because the concept of aesthetics cannot completely embrace the concept of art. In constitutional law, Friedrich Klein, interpreting the provision in the Constitution concerning the freedom of art in the von Mangoldt-Klein commentary[6], was the first to take up the definition given in the large Brockhaus[7], which says that art is the expression of a spiritual and intellectual substance through the intermediary of a form having inherent value in accordance with specific rules. Many, including the *Bundesverwaltungsgericht* (Federal Administrative Court), have followed him in this line of thinking[8]. But the uneasiness caused by such visibly pretentious definitions cannot be concealed. One is reminded, along with Knies, of Goethe's words: "For, when ideas are lacking, a word will appear at just the right time".

We have to be more modest; yet, we must not lose sight of the fact that there are limits beyond which the expression "personal intellectual creation" within the meaning of copyright law no longer applies. We must therefore be allowed to ask the question: is this the simple result of chance, whim or combination, or is it the result of a desire to create, inspired, by formative imagination? The expression "work of art" can be used only in the event that such a desire, visible also to others, has found expression.

Another criterion which I feel cannot be dropped is that of actual creation. This is why we cannot agree with Professor Kummer when he claims that the person who presents a pine root found in a forest as being a work of art is entitled to a copyright: this person is no more an author than the excavator who discovers ancient art treasures or someone who comes across an old manuscript. To be sure, Professor Kummer advances the argument of selection, well known in copyright: among the many forms created in nature, a root endowed by chance with a particular form has been chosen and exhibited as a work of art. However, displaying one specific form chosen from among countless others does not constitute creative achievement of selection as understood in copyright. There selection is combined with arrangement and refers to the intellectual effort required to compile a collection for publication. What is created in this case is the collection as an entity, the product of selection and arrangement, not the individual parts that make up that collection.

These are the reasons why we deviate from Professor Kummer's theory in our definition of a work. On balance, however, we are indebted to him for a valuable lesson. On another occasion, we shall return to certain important problems, especially the significant distinction in regard to automation and computers that Professor Kummer makes between machines with and without an aleatory process.

Prof. Dr. Eugen ULMER
Munich

[6] Von Mangoldt-Klein, *Das Bonner Grundgesetz*, Article 5, note X 3.
[7] *Der Grosse Brockhaus*, 16th edition, Vol. 6, col. 706, entry "Kunst".
[8] Cf. the documentation cited by Knies, *op. cit.*, p. 129.

Original Manuscripts *

The Intellectual Property Conference of Stockholm adopted a recommendation expressing the wish that the International Bureau of the Berne Union undertake a study of the questions raised by the proposed deposit of copies of literary, dramatico-musical or musical works by the publishers thereof, which copies would then be made accessible to the public.

In the spirit of the said recommendation and with a view to the possibility of including provisions relating to it in a future revision of the Convention, the Editors of Copyright *hope that the publication of this article will contribute to a better understanding of the problem on the international level.*

The Act revising the Berne Convention, adopted at Stockholm in July 1967, has entered what one might term the phase of interpretation.

In comparison with the earlier versions, the text has gained in clarity: while leaving ample margin for subtle and skilled interpretation, and revealing a certain hybrid character in some respects, it is lucid and logical in its fundamental provisions.

The question becomes more complex if one attempts to evaluate the Act in the context of the development of international copyright protection for many decades past.

It is beyond doubt that the Stockholm Act, as a whole, represents a weakening of the rights of the authors of intellectual works, although this assertion can be less forceful when the problem is considered in perspective and from a particular point of view.

In the field of dogmatic questions of principle, however, we can see that at Stockholm there was a definite strengthening of the moral rights of the author. And this results not

* This article was published in Italian in *Bolletino del Sind. Naz. Scrittori*, No. 3/1968. As translated by BIRPI, it is reproduced here with the kind premission of the author and the publisher.

only from the amendment to Article 6bis of the Convention, but also from the unanimously approved recommendation regarding accessibility of the original manuscripts of works, for purposes of consultation.

The attention of the central body of the Union has been drawn, in a concrete manner, to an extremely delicate problem whose existence (leaving aside the position that may be ultimately taken on this subject) could no longer be ignored [1].

Originally at Stockholm, a formal proposal was made for inserting an *ad hoc* rule in the text of the Act: in support of it, reference was made to the fact, which has been much lamented by the critics, that sometimes quite substantial differences had been found in various editions of a single work by a famous author; in fact, the problem mainly concerns the works of great authors. It was suggested that, as a compulsory requirement, a photocopy of the "earliest and most authentic" original should be deposited so as to be readily accessible for consultation by students and scholars.

The favorable views expressed were numerous and authoritative. Professor Ulmer, Chairman of Main Committee I which studied the substantive provisions of the Convention, rightly pointed out that it would first be appropriate to examine whether the matter could in fact be the subject of a copyright rule *stricto sensu.*

The Drafting Committee that examined this question considered that it would be premature to introduce a specific provision thereon in the Act, and suggested that a recommendation be made for the matter to be studied by BIRPI with a view to being specifically provided for *jure conventionis* on the occasion of the next revision conference [2].

The recommendation, which must be recognized as supporting the basic principle, was approved in the Committee and then unanimously adopted in plenary meeting. At the latter, the leader of the Italian Delegation, Ambassador Cippico, made a detailed and interesting statement in which he underlined the need to settle the problem in the public domain.

After this brief description of the basic facts, I shall try to comment in an informatory manner on this important recommendation approved at Stockholm.

First of all (it is appropriate to recall this), past experience in the Union has been that recommendations approved by the Conference have been given practical application in the countries of the Union and have even led to new agreements at the international level; we have in mind the *vœu* expressed at Brussels which inspired the 1961 Rome Convention [3].

The problem comprises two different aspects, depending on whether it concerns works in the public domain or works that are still protected.

The first case is nothing but a question of *de jure condito.* Once a work has fallen into the public domain, it is a matter of clear principle and of legal rights to allow critics and qualified scholars to have access to the original manuscript. Moreover, to prevent such consultation would in fact amount to exercising an economic and commercial monopoly (whether factual or merely potential, it matters not) on the part of organizations, persons or undertakings that are usually outside the circle of the author's heirs who, once the copyright term has lapsed, only retain an interest in the moral rights. And furthermore, this would appear to be in contrast with the rules of the European Economic Community, of which some of the most authoritative States in the Union are members.

It goes without saying that the law, which lays down specific conditions on the institution of the public domain for intellectual works, would be contradictory (and this is not admissible from the interpretative aspect) if it did not include in that institution the concept of the full accessibility of the work concerned.

The second case — that of works still protected — is a matter of *jus condendum* and this is open to a twofold interpretation.

On the one hand, it is maintained that there would objectively be an infringement, in the event, of a strictly private *quid* that is indivisible from the context of a work that is still protected, hence belonging to the author and destined to become *res communis omnium* (never *res nullius*) only once the term of protection has lapsed. On the other hand, it is argued that:

- effective publication of the work invalidates any requirement, or right, of reservation with respect to the content of the original manuscript;
- deposit at the appropriate time is the only way of avoiding the dispersion of so many *corpora mechanica* which are priceless cultural documents that will enable scholars to retrace in detail the process of creation of the work, from the spark of initial inspiration to ultimate poetic maturity, from the first draft to the not infrequent attainment of artistic perfection.

It should indeed be noted, for a comprehensive and logical explanation, that in the present era there may be great differences between the case of literary works (whose *corpus mechanicum* is often a typescript that may not need correction or may require only very few if the author has arrived at the definitive text after a number of drafts [4], or again may present numerous flaws that are the result of mere typing errors made by someone else) and that of musical works, which are usually incorporated in a handwritten *corpus mechanicum,* any corrections being in the composer's own hand.

In the light of the foregoing considerations, the problem can be formulated as follows:

1. For *works in the public domain:* no question, other than that of providing — where there are none — the necessary up-to-date regulations;

2. For *published works:* to provide for the deposit, whenever appropriate, of an authentic copy of the original manu-

---

[1] In this connection, see articles by Mr. Vaughan, Mr. Zini Lamberti, Dr. Roth and Professor Are in *Le Droit d'Auteur (Copyright)* (1962) and in *Copyright* (1965 and 1966).

[2] This has been convened for 1986 (coinciding with the centenary of the Union), in Berne.

[3] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

[4] Recently the winner of a major literary award said that it was quite customary for him to "rewrite" numerous pages of his works as many as fourteen times, to incorporate amendments and improvements.

script, complete with any hand-written corrections by the author (for all works or for any particular kinds) that are to be made by the printer (as justifiably foreseen);

3. Conservation of the relevant *documentation* — including acquisition of copies of "early" manuscripts — by a public Bureau[5]; with modern techniques (microfilms, etc.), this procedure would not give rise to any major practical problems either from the aspect of storage or from that of loan or consultation, whereas it would give sound guarantees for the preservation of precious documents, even if only in the form of copies;

4. Solution of the question whether access to the original manuscript should be permitted during the term of protection of the work: this could be presumed to be permitted as soon as the work has been published, unless the author expressly opposes it and so notifies the Bureau mentioned under 3 above;

5. Of course, to exclude from the procedure considered here any *unpublished works*, until the end of the term of protection.

It is emphasized that the study of manuscripts opens the way for the most serious and detailed annotated editions, which are very important works from the cultural aspect in that:

- they always concern the works of well-known authors;
- they are the fruit of very specialized study.

In my opinion, the authors should view the Stockholm recommendation in a positive way. It opens the way for the introduction of norms which, by sanctioning the possibilities described here, can facilitate:

- proper identification of the text of the work, through the above-mentioned annotated editions, thus respecting the moral interests of a deceased author and enhancing his memory;
- efforts of a high cultural value by ranking authors (which the philologist, the scholar or the musician who edit annoted editions always are);
- publication, by the authoritative publishers, of works of great value;
- objective and multilateral appreciation of whether or not such transcriptions are creative in character.

The above considerations go to support the recommendation. I should also like to add a few concluding considerations.

The rationale presented by Professor Ulmer brings out the need for a prior verification that can in fact be considered as having been met in the text drawn up by the Drafting Group. In my modest opinion, the recommendation that follows it should be viewed as a significant international suggestion of a technical character.

[5] The most appropriate would be, for Italy, the Bureau of Literary, Artistic and Scientific Property, under the authority of the Council of Ministers; for other countries, the corresponding Offices; provision might also be made for collection of the documentation concerned at a National (or University) Library designated by law.

There was some uncertainty as to whether it would be appropriate to introduce a specific provision in the Stockholm Act, because of the procedural criterion — considered over-riding — of adjusting *a posteriori* the Convention in order to bring it into line with the legislation of the States of the Union (statement by the Drafting Committee which speaks of the question as being "premature" for the Conference), even if such provisions could be included in the Act (prior question raised by Professor Ulmer).

In my view, a complete reversal in the interpretation of the above-mentioned criterion is unthinkable; it would cause the dynamic process of perfecting copyright to be frozen for the next 20 years — according to the usual periodicity of revision Conferences.

Hence the recommendation:

- represents acceptance of the principle under examination, having been approved unanimously;
- in its phrasing and structure, constitutes an invitation to the States to apply the principle of which the fundamental basis has been proclaimed by vote, subject to its being incorporated in a future Act revising the Convention, if such action is recognized as being appropriate from the aspect of copyright *stricto sensu*. It would seem to me that this is the meaning that should be attributed to the opinion expressed by the Drafting Committee and that otherwise the task assigned to BIRPI would not be comprehensible. Furthermore, in the event that — on more detailed examination — the conclusion is reached that the problem cannot be covered within the context of copyright *stricto sensu*, then it might be the subject of an *ad hoc* arrangement.

Naturally, a very delicate question (and one which I shall not deal with here) is that of the procedures and time required for the various individual States of the Union — and in particular the major producers of culture — to take up the problems arising from the Stockholm recommendation; their reactions will have to be carefully observed in order to gauge the point of equilibrium between the requirements of the general public and the safeguard of the rights of the individual.

My main concern has been to underline the high moral significance of the consensus reached in the Conference resolution. In my view, it constitutes a solemn recognition of the most noble and inviolable[6] of the rights of authors of intellectual works, and it meets the loftiest requirements of culture: of Authors and of Culture — I feel bound to specify — with a capital A and a capital C. And this inevitably brings to my mind the not always adequate consideration — I mean respect and support — which both receive in the context of modern society.

Salvatore LOI
Attorney-at-Law
Rome

[6] Under Italian legislation, the moral rights of the author are considered as being inviolable and are protected without limitation of time.

CORRESPONDENCE

Letter from Great Britain

dealing with copyright and related matters which occurred in 1968

Summary

I. *Legislation:* 1. The Theatres Act 1968. 2. Design Copyright Act 1968.

II. *Jurisprudence:* 1. X v. Evans ("Sunday Times") (No infringement of copyright. Fair dealing). 2. Denmark Productions Ltd. v. Boscobel Productions Ltd. (Assignment of copyright). 3. Inspector of Taxes v. Asquith (Copyright royalty contracts; no taxability on the recipient). 4. The Obscene Publications Act. 5. Authors' rights in fictitious or imaginary characters. 6. Board of Governors of the Hospital for Sick Children v. Walt Disney ("Peter Pan"). 7. Court Reporting. 8. The Net Book Agreement and the Resale Prices Act, 1964. 9. Maugham v. Entravor Ltd. (Ownership of copyright in a work made by an author in the course of his employment).

III. *The Performing Right Society (PRS).*

IV. Miscellaneous: 1. "Reprinting the past". 2. Films and cinemas. 3. Contracts dealing with copyright. 4. Various financial and legal questions. 5. British book, newspaper and record production. 6. The paperback revolution.

I. Legislation

1. — *The Theatres Act 1968.* In my last "Letter" (V, 12), I referred to the Report of the Committee dealing with the pre-censorship of the theatre. The Report, which recommended abolition of such censorship, was published in June 1967. The substance of the Report was introduced in Parliament as a Private Member's Bill, which was approved by the Government and was given an unopposed second reading in both Houses. The Bill became Law on July 26, 1968. It came into force three months later[1].

2. — *Design Copyright Act 1968.* On October 25, 1968, an Act "to amend the law relating to the copyright of the design of certain manufactured articles, and for connected purposes" was published in the Statute Book[2]. I refer to the instructive survey of the contents of that Act by Mr. William Wallace, C. M. G., Assistant Comptroller, Industrial Property and Copyright Department, Board of Trade, in the November 1968 issue of this Review. May I be allowed to quote from that study the passage defining the purpose of that Act, viz.: "Under [the] Bill [now Act], the copyright owner retained his power to sue, under the Copyright Act, anyone who *copied* his work; and this power continued for 15 years from the date he himself first marketed goods to which the work had been applied; and this was the case whether or not the design was registered. ... British firms ... can now claim protection under the Berne Convention in other countries which protect works of applied art under their copyright laws". Mr. Wallace refers in this connection to Article 2(5) of the Brussels text[3].

II. Jurisprudence

1. — *Re: X v. Evans ("Sunday Times") (No infringement of copyright. Fair dealing).*

Mr. X was the public relations consultant in England of a foreign government. He was contractually bound to send reports to that government. There was a provision in the contract imposing on X's firm an obligation of confidence never to reveal to any outside person any information on his work.

In mid-June 1968, Mr. X wrote a report of which ten copies were made; the original was sent to the head of the foreign government, nine copies were sent to high foreign government officers and the tenth remained in X's firm safe custody in London.

Mr. X heard, on September 19, 1968, that the *Sunday Times* might publish an article dealing with the said report on September 22. Thereupon Mr. X sued Mr. Harold Evans, editor of the *Sunday Times*, and that newspaper, asking for an injunction restraining the paper from publishing that article on the following day. The injunction was granted by the Court on September 21, and continued on September 25.

The *Sunday Times* appealed. The appeal was heard by the Court of Appeal on October 3, 1968. Counsel for the defendants stressed that the paper had not intended to publish the entire report, but only extracts therefrom. Counsel also referred to the "fair dealing" clause in the Copyright Act, 1956 (sections 6(2) and (3)*(a)*). The Court allowed the appeal and discharged the injunction.

Various reasons were given why the injunction should not have been granted, *inter alia*, that the judge did not know the content of the article complained of. I think I should omit the respective legal arguments save one, the question of copyright, closely considered by the Court. It was stated:

1. There was no doubt that Mr. X, being the author of the report, was entitled to *literary copyright* in it (emphasis is mine).

2. But the ownership was not in the information contained in it, it was only in the literary form in which the information was dressed.

---

[1] See the Home Office Memorandum on the Theatres Act; *The Times, Law Report*, February 24 and July 20, 1968; a note in *The International and Comparative Law Quarterly*, October 1968, pp. 1043-1044; in the *Sunday Times* by Mr. N. South and Mr. K. Pearson, "The Censor and a Religious Farce", and by Mr. A. J. W. Lembert, "Exit Censor" (January 26, April 14 and September 22, 1968, respectively); in the *Daily Telegraph* by Mr. W. Darlington (February 23, 1968); in *The Author*, Spring 1968); "Censorship and Juries" by Mr. C. H. Rolph.

[2] The wording of this short Act was printed in *Copyright*, 1968, p. 234.

[3] The new Act is also reviewed in the December 1968 issue of the *Monthly Reports* edited by the Trade Marks, Patents and Designs Federation. See as well the note in the *Board of Trade Journal* of November 1, 1968.

3. If the paper had intended to print the report *in extenso*, there might well be copyright infringement and a case for an injunction to restrain a breach of copyright.

4. However, counsel had said that the paper was not going to do that, but was going to print short extracts from it following up with a commentary. It was emphasized that this might be fair dealing in the sense of section 6(3) of the Copyright Act. The Court, not having seen what would have been published, said it must be assumed, according to what the paper's counsel had said, that it was not unfair dealing. It added that " there were some spheres of activity in which the public concern was such that the newspapers ... were acting in the public interest by making the matter public. Freedom of speech and expression are the foundation of it ". The Court arrived at the conclusion that there was no infringement of Mr. X's copyright in the report because the defendants had intended to act in a manner of fair dealing with matters of current events. It declared that the decision concerned the intermediate proceedings without prejudice to the decision after the trial of the case.

The injunction was discharged. Appeal to the Lords was refused [4].

2. — *Re: Denmark Productions Ltd. (referred to as " Denmark ")* v. *Boscobel Productions Ltd. (referred to as " Boscobel ") (Assignment of copyright).*

Boscobel owned the copyright in some musical compositions. They had concluded a contract with Denmark under which they should assign that copyright to Denmark against a fixed consideration. In breach of that contract they did not assign the copyright to Denmark, but to the director of Denmark, who refunded the paid consideration to Denmark. The latter company sued Boscobel for an injunction and damages, but — as I understand — unsuccessfully because the Court concluded from the evidence that Denmark had not suffered any damage.

3. — *Re: Inspector of Taxes* v. *Asquith (Copyright royalty contracts; no taxability on the recipient).*

The facts of this case being rather complicated, I shall try to simplify the same and to confine myself to a question of importance to authors.

Sir James Barrie, an author, received royalties from the copyright in his works. He bequeathed in his will a certain part of his royalties to Lady Cynthia Asquith who had been his secretary for twenty years. The latter was assessed by the Inspector of Taxes on the amount received under Sir James' will. On appeal, the General Commissioners considered that assessment not justified. The Crown appealed, but the appeal was dismissed. The Judge referred to some precedents, inter alia *Carson* v. *Peter Cheyney's executors*, and said that when an author, during the carrying on of his profession, entered into royalty contracts by which he ceded some royalties to a beneficiary, then, as long as he was carrying on his profession, the royalty payments to the beneficiary were receipts of that profession, taxable on the author but not also on the beneficiary. When the author ceased his profession, the Judge added, the royalty receipts were totally outside the scope of taxation, either in his or his executors' hands, as receipts which a retired author or his heirs receive as copyright royalties are, according to precedents, not taxable [5].

4. — *Re: Some obscenity cases (The Obscene Publications Act).*

(a) *Regina* v. *X and Y.*

In my last " Letter ", I reported in Section II, 12, the case of a novel, called by me " A ". Its publishers had been found guilty by a jury, in November 1967, of publishing an obscene book " A ", and had been fined £ 100.

The publishers appealed. The Court of Appeal set aside the fine and awarded the publishers costs of the appeal. The Judge said the Court did not propose to express any opinion as to whether the book was obscene or whether its publication was justified as being for the public good. These questions were wholly within the province of the jury. He added: " The book gives a graphic description of the depths of depravity in Brooklyn "; he then stated that " the summing-up by Judge Rogers at the trial had certain fatal flaws. . . . The Judge did not explain to the jury what the defendants alleged to be the true effect of the words in the book. . . . The Judge gave the jury little guidance as to the meaning of the Obscene Publications Act, 1959, dealing with public good. . . . The Court's view is that no proper direction was given to the jury. . . . It was impossible for the Court to be satisfied that the flaws in the summing-up had not let to a miscarriage of justice ". The judgment by Judge Rogers was quashed.

The hearing before the Court of Appeal had taken three days (July 23 to 25, 1968) and the reserved judgment was delivered on July 31, the last day of the law term [6].

(b) *Regina* v. *Butler.*

Case under (a) above was mentioned in the case *Regina* v. *Butler*, a bookseller at Brighton, who had published several books held to be obscene by the Brighton Magistrates' Court. Counsel for the defendant alleged that the books contained " material of culture ". To sentence the publisher would be a " blow to literary freedom ". The Court, however, found the books filthy; its chairman regretted that " responsible people, including members of the university faculty, have as witnesses defended the books ". The Court sentenced the publisher to the rather substantial fine of £ 230. The case has attracted much publicity [7].

5. — *Re: Authors' rights in fictitious or imaginary characters.*

Fictitious characters, such as " The Man from Uncle ", " Thunderbirds ", " Batman ", " Pussy Galore ", enjoy nowadays great popularity. What are the rigths of the authors of such fictitious or imaginary characters? That question has been considered in an article by Mr. Reginald C. Hargrave, London, a member of the Institute of Trade Mark Agents, headed " Character Licensing and Trade Marks ", published

[4] *The Times, Law Report*, October 4, 1968. See also the article by Donald Tyerman entitled " Press and Public " in the *Sunday Times* of October 6, in which the author comments on the peculiarities of the above case.

[5] *The Times, Law Report*, November 22, 1968.

[6] *The Times, Law Report*, August 1, 1968.

[7] See e. g. the *Daily Telegraph*, August 29, 1968.

in the *Law Guardian* of April 1968 [8]. Tbe first question which arises is protection by copyright. But copyright subsisting in a hook or film does not extend to the name or title of the "character"; only quite exceptionally copyright protection applies if tbe name or title is itself an original literary work in the sense of section 2(1) of tbe Copyright Act, 1956. Mr. Hargrave is, therefore, right in commenting that the author who has created a fictitious or imaginary "character" can, as a rule, not rely on copyright protection of the name or title of those "characters" [9].

In view of the unfavourable copyright situation authors have tried to obtain trade mark registration of tbe names or titles of the "characters" created by them. But the validity of sucb trade marks is doubtful. Mr. Hargrave refers to the decision concerning "*Pussy Galore*" *Trade Mark* (February 24, 1967) [10]. In that case, applications had been made hy a company for registration of the trade mark "Pussy Galore" in a large number of classes. The company claimed proprietorship of that trade mark by its association with the creator of that "character", by the late Ian Fleming who authorized the company to exploit that title not itself, but through others. The Registrar refused registration hecause, under section 17(1) of the Trade Marks Act, 1938, a trade mark to be registered must have been used or must be proposed to be used by the person claiming to be the proprietor of the mark or by a registered user (section 29(1)*(b)* of that Act). The Registrar found the application for registration of "Pussy Galore" not consistent with those requirements. On appeal the Board of Trade upheld the Registrar's decision [11].

In any case, authors of fictitious or imaginary "characters" are under tbe existing legislation insufficiently protected as to the names and titles of the cbaracters created by them.

6. — *Re: Board of Governors of the Hospital for Sick Children v. Walt Disney ("Peter Pan").*

In my last "Letter" I reported the ahove case (II, 6). I refer to the facts shown in that "Letter" and in my "Letter" of 1966 (II, 3). The Court of first instance had granted the Hospital an injunction restraining the defendants from objecting to the making of a sound film of the play "Peter Pan". As further reported, the Court of Appeal rejected the defendants' appeal. The *Law Reports* now published mention that the Court of Appeal based its decision mainly on a fundamental principle of private international law, of importance in particular in copyright cases. The defendants had contended that it infringed international law and international custom to grant an injunction against a defendant with his headquarters abroad (in the present case in California); the injunction should have been restricted to the United Kingdom. In its judgment of February 14, 1967, the Court of Appeal unanimously dismissed that argument in particular, stating that it knew no reason why an injunction should not have been granted against a foreign company, all the more so as the injunction could be enforced against assets of the defendants in England; it was not required to submit any evidence in that respect.

7. — *Re: Court Reporting.*

In my last "Letter" (I, 1) I referred to the Criminal Justice Act, 1967. That Act bars — with some exceptions — the reporting or broadcasting of evidence in committal proceedings, unless any one of the defendants asks for the han to be raised. On July 25, 1968, five defendants, accused altogether of 43 charges for various crimes, were in the dock before the Old Street Magistrate. One of the defendants who was involved in some only of the charges was David Gordon. His counsel asked for the lifting of reporting and broadcasting restrictions in respect of cases in which Gordon was involved. The controversy arose whether only charges which concerned Gordon or the whole proceedings should be freed from reporting restrictions. The Magistrate ruled in the first sense. Some reporters appealed. The Divisional Court decided on July 31, 1968, that tbe restrictions should be lifted in respect of the whole committal proceedings. The Magistrate, therefore, lifted on August 7, 1968, the ban as ordered by the Court [12].

8. — *Re: The Net Book Agreement and the Resale Prices Act, 1964.*

(a) In my last "Letter" (II, 9 and V, 15) I reported that, at tbe sitting of the Restrictive Practises Court on October 27, 1967, the Registrar of restrictive trading agreements did not oppose an Order of the Court declaring that the Net Book Agreement was not against public interest.

At its sitting on March 1, 1968, the Court formally confirmed its decision acknowledging the validity of the Net Book Agreement and that the following classes of goods were exempted from the han of fixed resale prices (resale prices maintenance) under the 1964 Act, viz.:

1. printed hooks, hooklets, brochures, pamphlets, leaflets;
2. picture hooks for children;
3. maps.

The application by the Publisbers' Association included a fourth category, namely, trade catalogues which the publishers issue to hookshops and customers. The Court, however, refused that application (see the article "The Net Book Agreement Ratified", in the *Bookseller,* March 1968).

(b) The British Phonographic Industry, the body which represents British record manufacturers, is fighting abolition of resale price maintenance. Referring to the above decision in the book trade they hope to retain the right to declare at wbich price their products (records) shall be sold in detail. The Industry is scheduled to appear before the Restrictive Practices Court in October 1969 to oppose the ban on price

[8] The article is reproduced in the Novemher 1968 *Monthly Report* of the Trade Marks, Patents and Designs Federation.

[9] Compare the same opinion expressed hy Professor S. Gerbrandy in his "Letter from the Netherlands" (*Copyright*, May 1968 issue). — Mr. Valerio De Sanctis says, in his "Letter from Italy" (*ibid.*, June 1968 issue — item 7), that Italian case law applies the general principles of copyright to the protection of fictitious "characters".

[10] *Reports of Patent, Design and Trade Mark Cases*, 1967, No. 10, pp. 265 *et seq.*

[11] The principles on which the ahove "Pussy Galore" decision is based have heen followed by the South African Registrar in the case of a trade mark application hy a Company whose sole object was investment in properties (*South African Patent Journal*, September 1968, p. 229).

[12] *Daily Telegraph*, July 27, 28, 31, and August 1 and 8, 1968.

fixing [13]. An article in the *Journal* (July 1968) issued by the Mechanical Copyright Protection Society Ltd. points out that, should the decision of the Court go against the manufacturers, it would no doubt be necessary to amend the wording of the Copyright Act and of the Board of Trade Regulations (it is not said in what respect). A possible answer, according to that article, would be to adopt recommended prices. . . .

9. — *Re: Maugham* v. *Entravor Ltd. (Ownership of copyright in a work made by an author in the course of his employment).*

(a) The Copyright Act, 1956, deals in section 4(2) with copyright ownership in a work made by the author in the course of his employment by the proprietor of a newspaper and the like and, in subsection (3), with copyright ownership in commissioned photographs, paintings or portraits; in all other cases subsection (4) applies, under which, where a work was made in the course of the author's employment by another person, copyright in the work is vested in that other person — subject always to agreement to the contrary (subsection (5)).

(b) In the case under review, Viscount Robin Maugham was engaged by the firm Entravor Ltd., Westminster, to rewrite the script of a film, "Robbie", to work to a three-week deadline. Viscount Maugham contended he had worked on it last July very intensively for three weeks. He issued a High Court writ against Entravor Ltd. claiming acknowledgment of his copyright in the redrafted film "Robbie" and alternatively damages.

The question will have to be decided whether, if the author has been engaged for a fixed work and for a fixed period only, subsection (4) applies or, to use a latin term, if there is *locatio conductio operis* and not *locatio conductio operarum.* The case is pending.

III. The Performing Right Society (PRS)

A. The Annual General Meeting

On July 4, 1968, the Society held its 54th Annual General Meeting. Mr. Roberts, Chairman of the Society's General Council, who presided in the absence of Sir Arthur Bliss, the President, reported that the gross income from all sources for the year 1967 had increased by £ 778,720 to a total of £ 6,823,864. The distributable revenue has increased by £ 750,677 to a total of £ 6,018,549. The General Royalties Account (that is, all royalties other than United Kingdom and Republic of Ireland broadcasting royalties) has increased by £ 492,669 gross and £ 477,035 net. The overall ratio of administrative expenses to gross proceeds was 10.62 per cent compared with 11.5 per cent for 1966.

The Chairman mentioned that the computerisation of the Society's accounts procedure had been almost completed; but this did not refer to the distribution work.

The Chairman discussed the concern of the Society at the decision of the Performing Right Tribunal in a dispute between the Society and the BBC over the terms of the licensing agreement between them, and also the Protocol to the Berne Convention adopted at the Stockholm Conference. These are matters which are mentioned below.

In June 1968, the membership was given 4,143.

As usual, the Annual General Meeting was followed by the Society's Annual Luncheon, at which the Right Honourable Lord Hill of Luton, Chairman of the British Broadcasting Corporation, was a guest of honour.

B. The PRS Journal "Performing Right"

1. — In the April 1968 issue of *Performing Right*, No. 49, a statement is reproduced from Massachussetts Copyright Law, as early as 1783, which should be the heading of every discussion on copyright, viz.: "There is no property more peculiarly a man's own than that which is produced by the labour of his mind".

2. — The learned General Manager of PRS, Mr. R. F. Whale, has published in that issue of the Journal a study entitled "Birth and Prospective Death of the Author's Right". Mr. Whale emphasizes that "the authors of literary, musical, artistic and scientific works play a spiritual and intellectual role in society which is to the profound and lasting benefit of humanity; the entertainment which we need to diversify our lives also flows from the author's inspiration". Mr. Whale describes the development of copyright protection in Great Britain from the Act of 8 Anne C 19 until present days. "By the early years of the twentieth century the author's right had appeared firmly established in all advanced countries. . . . The situation changed dramatically for the worse, from the copyright owners' point of view, when, with the demand for mass entertainment and mass education, . . . there was substituted as the exploiter of the author's work vast industrial enterprises, and finally the State itself." Mr. Whale then points out that, with the adoption of the Protocol at the Stockholm Conference, 1967, "the expropriation of the author's right has been given an immense impetus. . . . Yet, serious as the position already is, we must not despair at this stage. It remains as true as ever that it is in the interest of the people as a whole to encourage the production of literary, musical and artistic works". Mr. Whale concludes with a reference to the vast demand nowadays for works of the mind — for entertainment, for instruction, for broadcasting, for the press, for embellishment.

C. The Performing Right Tribunal

In my last "Letter" (III, 3) I reported the decision of the Tribunal of December 19, 1967, in the case *BBC* v. *PRS*. In *Performing Right* of April 1968, Mr. Denis de Freitas, M. A., declared that the Society considers the Tribunal's decision very unsatisfactory for a number of reasons and promised a critical examination of the decision and its unfortunate implications for creators of music in the next edition of *Performing Right.* Mr. de Freitas, the learned legal adviser of the PRS, has now dedicated a whole booklet of 38 pages (Supplement No. 1, October 1968) to examining most thoroughly the problem: "The PRS and the Performing Right Tribunal".

In the preface it is printed out that well considered representations were made to the Board of Trade, the purpose of

---

[13] *The Times, Law Report*, October 28, 1968. See the study by Mr. Ian A. Macdonald *Prices Maintenance* (Butterworth & Co. Ltd.). See also my "Letter" of 1965 (II, 15).

which was the alleviation of the wrongs which the Society's members had suffered by reason of the Tribunal's decisions. On July 22, 1968, the Society received a reply from the President of the Board of Trade rejecting all the Society's submissions. At a subsequent meeting between Mr. Grant and Mr. Wallace, from the Board of Trade, on the one side, and Mr. Whale, Mr. Freegard and Mr. de Freitas on the other, it was agreed that the Society should submit to the Board of Trade detailed proposals for the amendment of the Copyright Act on two points.

In view of the importance of the matter for the Society's members and the authors of intellectual works in general, the Society's directors have decided to publish the submissions in full. It is, of course, not possible to summarize such a long legal study; I will confine myself to reference to the headings. The report starts with a letter from the General Manager to the President of the Board of Trade (June 6, 1968). An article on the Tribunal, an assessment, follows. The Tribunal's functions in the Copyright Act are then examined. A highly instructive study of the decisions of the Tribunal comprises pages 13 to 18.

The postscript refers to the fact that the BBC's revenue is to be greatly increased by the raising of the receiving licences, so that restoration of the rights of which the Society's members have been deprived is all the more justified.

IV. Miscellaneous

1. *"Reprinting the past"*

"Reprinting the past" is the title of an article in the Winter 1968 issue of *The Author* in which the legal status is stated as follows (abbreviated):

(a) Where a contributor to a magazine or the like assigned his copyright in his contribution to a periodical, the latter can authorize reprinting without any restriction.

(b) Where there was a grant of first serial rights to the periodical, the periodical can use the material only once.

(c) Where serial rights are granted without restriction to first serial rights, the periodical may reprint as often as it likes or authorize reprinting, but only for serial publication, unlimited, however, as to language and territory.

Those statements of law are made by the Society of Authors, which points out that recently there has been a sudden development in facsimile reprinting.

2. *Films and cinemas*

(a) British made films have been winning international acclaim in recent years. I hear that they also have been making money. But 90 per cent of such films are backed by American, not by British cash. That statement is being made in the Report by the British Film Institute, published February 1968, headed "Outlook 1968". Mrs. Margaret Hinkman, the *Sunday Telegraph*'s film critic, has discussed the situation in that paper in an article of February 3, 1968, under the title "Does the dollar dominate British films?" American domination of the industry, Mrs. Hinkman says, is the chief concern of the above Institute, which urges greater Government support.

(b) The Cinematograph Films Council states in its 29th Annual Report of the year ended March 31, 1967, published in April 1968[14], that the number of cinemas open fell from 1,975, on March 31, 1966, to 1,851, on March 31, 1967, a net reduction of 124. Cinema admissions during the period under review are estimated at 287 million, that is 9 per cent less than during the preceding twelve months. The Council recommended that the screen quotas for the exhibitor's quota year beginning on January 1, 1967, should remain at their current levels, i. e., 30 per cent for first feature films and 25 per cent for supporting programmes.

(c) The West German Act of December 22, 1967, which contains provisions for the support of producers of German films, defines the term "German film" in the sense that a film remains a German one if not more than 2/5 of all collaborating persons are not German. That definition is of significance to British persons or persons of any other nationality collaborating in the production of a film in West Germany.

3. *Contracts dealing with copyright*

(a) As Professor Gerbrandy points out in his "Letter from the Netherlands" referred to above, "the Berne Convention affords to the author ... in each member country of the Union a right equal in scope and in effect to the right that the national legislation of that country affords to its own nationals". The Berne Convention has not created a uniform copyright, but the character of copyright is territorial. In the absence of provisions binding under international law, copyright is confined to the State on the statute of which it is based.

b) The territoriality of copyright does not solve the question which law applies (which law is "the proper law") in international copyright agreements, e. g. if the owner of copyright — a national of country A — assigns or licenses the copyright in his work to persons or organizations in one or more States — X or/and Y or/and Z, etc. Which law is the proper law in such agreements? In the first line, the law of the country which applies under a provision in the agreement. Failing such a provision, the law of the country will apply to which the matter has the nearest relations. Failing any specific country it will be most reasonable to apply the law of the country where the agreement has been concluded *(lex loci contractus)*[15].

4. *Various financial and legal questions*

(a) The Government grant to the Arts Council amounted to £ 7,500,000 in the financial year 1967-1968 and will be, in 1969-1970, £ 8,250,000. The figures are given in a memorandum submitted to the House of Commons Estimates Committee by the Department of Education and Science. The list

[14] See *Review of the Film Legislation*, Report by the Cinematograph Films Council (H. M. Stationary Office); see also Film Finance Corporation, Annual Report and Statement for the year ended March 31, 1968 (H. M. Stationary Office).

[15] Mr. D. Winter, LL. B., visiting lecturer at Surrey University, stresses that, in order to avoid complications, it is desirable to specify in all licensing agreements made between nationals of, or residents in, Great Britain and Soviet Union the law applicable in such agreements (see his article in *Product Licensing*, London).

of authors helped by the Arts Council from the Government grant is an impressive one. Awards are made to British authors of any age who have published at least one volume of prose or poetry in English and are given on the advice of the Literary Panel [16].

(b) As reported in my two last "Letters", the Arts Council has appointed a Working Committee to deal with the thorny question of public lending right. After careful consideration, the Committee decided to recommend that a scheme should be devised based on the Danish model, using book stocks as its foundation. A drafting Committee was entrusted with the task of drawing up a Bill embodying proposals for a Compensation Fund for British authors and their publishers. The details of that system are set out in a pamphlet "The Arts Council and Public Lending Right" (January 1968), and in a memorandum by the Society of Authors (February 1968). With the Winter issue of *The Author*, the subscribers received a "Pocket Brief for PLR" which gives the basic facts and arguments necessary for the campaign to introduce PLR.

(c) A note in the Summer 1968 issue of *The Author* draws attention to the Royal Literary Fund which celebrated the 150th anniversary of the granting of its charter. The Fund is at present spending over £15,000 a year in grants and pensions to authors whose circumstances "are realistically but sympathetically assessed."

(d) In November 1967, the British Music Information Centre was opened, established by the Composers' Guild of Great Britain with aid by the Arts Council.

(e) As stated in *The Times* of October 11 and 12 of last year, "the year 1968 continues to be a boom for art prices and in particular for paintings ... The most dramatic rises of prices are not only for impressionist paintings, but also for moderns".

In view of the fact that often there is a big difference between the price the artist receives at the sale of his work and the price fetched at later resales, at the Brussels Conference 1948, Article 14bis was inserted into the text of the Berne Convention, granting to the authors of original works of art and original manuscripts "the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author" *(droit de suite)*, but under paragraph (2) that protection may be claimed in a country of the Union only "if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed". At the Stockholm Conference 1967, that article, now numbered 14ter, remained unaltered (apart from some minor formal alterations) [17]. Very few countries — not including the United Kingdom — have so far introduced relevant legislation [18].

A note in the *Sunday Times* of May 19, 1968, by Mr. Tony Geraghty, refers to a plan by Mr. John Alexander Sinclair, campaign director of the U. K. Committee for Human Rights, to introduce in the United Kingdom some kind of *droit de suite* based on an international scheme of registration.

(f) In its Annual Report published in April 1968, the Publishers' Association considers, among other items, the question of photocopying, and characterizes quite rightly unauthorized photocopying as an "erosion" of copyright.

(g) Mr. Patrick Saul, in the Autumn 1968 issue of *The Author*, draws the reader's attention to the question of libraries for listening. He mentions that the first archive of sound recordings was founded in Vienna in 1899 *(Phonogrammarchiv der Akademie der Wissenschaften)* 22 years after Edison's invention of the phonograph [19]. As stated by Mr. Saul, the United Kingdom was rather late in establishing organized collections of sound recordings. Apart from specialized collections (for instance the collection of the English Folk Dance and Song Society), the British Institute of Recorded Sound was formed in 1947, assisted by the BBC Sound Archives. Our author describes the development of that Institute and its importance for authors and in particular poets who can hear there their own works. He sees in that Institute "a nucleus of a big national collection" of sound recordings [20].

5. *British book, newspaper and record production*

(a) As computed by the *Bookseller*, British book publishers issued in 1968 a record number of titles. The total of titles amounted to 31,420, of which 22,642 were new books and 8,778 reprints and new editions. Reprints and new editions have caused the increase. The output of new books was higher by 47 than in 1967 when it was 22,595. Art shows the biggest increase over all with 74 more reprints and 165 new editions. Law and public administration are the next most increased categories. A decline happened in travel literature.

Mr. J. Alan White, a well-known publisher, examines in the Summer 1968 issue of *The Author* the question: "Too many books?". More often than not, says Mr. White, people complain of the number of novels produced, but while the total number of all titles has more than doubled since 1947, there were in 1967 only 4,163 novels. The author concludes his statement by emphasizing that "unwanted books would be greatly reduced if every author and publisher had to answer satisfactorily three preliminary questions: How is the new proposal (1) better, or (2) cheaper, or (3) different from anything already on the market?"

(b) Fewer newspapers but more periodicals are recorded in the 1968 edition of the *Newspaper Press Directory*.

(c) The *Board of Trade Journal* reveals that in the first ten months of 1967 a total sale of gramophone records of

---

[16] See *Grants to the Arts*, Report from the House of Commons Estimates Committee, Session 1967-1968 (H. M. Stationary Office). See also an article by M. Hastings, "Should authors get royalties on library borrowing?" in the *Evening Standard* of November 11, 1968.

[17] See *Copyright*, 1967, p. 169. See also the "Report on the Work of Main Committee I" by Professor Svante Bergström, *ibid.*, 1967, pp. 183 *et seq.*

[18] The new West German Copyright Act, 1965, contains in Article 26 a provision about the *droit de suite*. The right exists in any resale by an art dealer or auctioneer; the seller shall pay to the author one per cent of the sum realized, which should amount to a minimum of DM 500. I understand that up to now there is little experience of the effect of that provision.

[19] May I be permitted to mention that my late brother, Professor Dr. Emil Abel, happened to be the first Director of the *Phonogrammarchiv* in Vienna.

[20] See the article "British Institute of Recorded Sound" in *Performing Right*, October 1968 issue, p. 19.

British manufacture was 21 per cent down compared with 1966. The value of total sales in the same period in 1966 reached a figure of over £ 20,500,000 compared with over £ 18,800,000 in the said period in 1967 (see *The Recording Right Journal*, February 1968).

According to a communication in the July 1968 edition of the Munich *GEMA Nachrichten*, 713,583 musical records were imported in 1967 by the German Federal Republic into Great Britain, as compared with about 462,000 in 1966.

6. The paperback revolution

The novelist Brian Glanville considers in an article in the *Sunday Times* of May 19, 1968, the paperback revolution. Authors — he points out — benefit by the break through of paperbacks which provides the author with the means of contact with a very large public. The reader who found books too expensive is now able to get books in paperback at a much lower price. " The hardback fiction publisher has become little more than a parasite on the soft cover trade. " Mr. Glanville thinks that the hardhack publishers are undermined not so much by the public libraries as by the paperback industry. He estimates that at least in nine cases out of ten there is no case for publishing more than a token hardcover edition. Authors as well as the reader profit by the paperback industry.

Dr. Paul ABEL
Consultant on International
and Comparative Law
London

CALENDAR

BIRPI Meetings

April 14 to 16, 1969 (Berne) — Joint Ad Hoc Committee on the International Classification of Patents

Object: Practical application of the classification and revision of the European Convention — *Invitations:* Czechoslovakia, France, Germany (Fed. Rep.), Japan, Netherlands, Soviet Union, Spain, Switzerland, United Kingdom, United States of America — *Observers:* International Patent Institute — *Note:* Meeting convened jointly with the Conncil of Europe

April 17 and 18, 1969 (Geneva) — Paris Union Committee for International Cooperation in Information Retrieval Among Patent Offices (ICIREPAT) — Technical Coordination Committee (1st Session)

Jnne 9 to 12, 1969 (Ahidjan) — African Committee of Experts

Object: To draft model statutes for societies of authors in African States — *Invitations:* Congo (Kinshasa), Ghana, Ivory Coast, Kenya, Malawi, Nigeria, Senegal, Tunisia — *Observers:* Intergovernmental and non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

June 20 and 21, 1969 (Geneva) — Permanent Committee of the Berne Union (Extraordinary Session)

Object: Consideration of various questions concerning copyright — *Invitations:* Belgium, Brazil, Denmark, France, Germany (Fed. Rep.), India, Italy, Portugal, Rnmania, Spain, Switzerland, United Kingdom — *Observers:* All other member States of the Berne Union; interested international intergovernmental and non-governmental organizations

August 29, 1969 (Geneva) — Information Meeting of International Non-Governmental Organizations

Object: To appoint observers to the International Copyright Joint Study Gronp — *Invitations:* Interested Organizations — *Note:* Meeting convened jointly with Unesco

September 17, 1969 (Geneva) — Paris Union Committee for International Cooperation in Information Retrieval Among Patent Offices (ICIREPAT) — Technical Coordination Committee (2nd Session)

September 18 and 19, 1969 (Geneva) — Paris Union Committee for International Cooperation in Information Retrieval Among Patent Offices (ICIREPAT) — First Annual Meeting

September 22 to 26, 1969 (Geneva) — Interunion Coordination Committee (7th Session)

Object: Program and Budget of BIRPI for 1970 — *Invitations:* Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Denmark, France, Germany (Fed. Rep.), Hungary, India, Iran, Italy, Japan, Kenya, Morocco, Mexico, Netherlands, Poland, Portugal, Rumania, Soviet Union, Spain, Sweden, Switzerland, United Kingdom, United States of America

September 22 to 26, 1969 (Geneva) — Execntive Committee of the Conference of Representatives of the Paris Union (5th Session)

Object: Program and Budget (Paris Union) for 1970 — *Invitations:* Argentina, Australia, Austria, Cameroon, France, Germany (Fed. Rep.), Hnngary, Iran, Japan, Kenya, Morocco, Mexico, Netherlands, Poland, Soviet Union, Spain, Sweden, Switzerland, United Kingdom, United States of America — *Observers:* All the other member States of the Paris Union; United Nations; International Patent Institute

Septemher 22 to 26, 1969 (Geneva) — Council of the Lishon Union for the Protection of Appellations of Origin and their International Registration (4th Session)

Object: Annual Meeting — *Invitations:* All member States of the Lisbon Union — *Observers:* All other member States of the Paris Union

September 29 to October 3, 1969 (Washington) — International Copyright Joint Stndy Group

Object: To examine all questions concerning international copyright relations — *Invitations:* Argentina, Australia, Brazil, Canada, Ceylon, Czechoslovakia, France, Germany (Fed. Rep.), India, Italy, Ivory Coast, Japan, Kenya, Mexico, Netherlands, Nigeria, Peru, Philippines, Rnmania, Senegal, Spain, Sweden, Tunisia, United Kingdom, United States of America, Yugoslavia — *Observers:* Organizations to be designated — *Note:* Meeting convened jointly with Unesco

Decemher 10 to 12, 1969 (Paris) — Intergovernmental Committee Rome Convention (Neighboring Rights), convened jointly by BIRPI, ILO and Unesco (2nd Session)

December 15 to 19, 1969 (Paris) — Permanent Committee of the Berne Union (14th Ordinary Session)

Meetings of Other International Organizations Concerned with Intellectual Property

May 19 to 22, 1969 (Prague) — International Federation of Musicians — Executive Committee

May 25 to 29, 1969 (Vieuna) — International League Against Unfair Compctition (LICCD) — 21st Congress

May 31 to June 7, 1969 (Istanbul) — International Chamber of Commerce (ICC) — XXIInd Congress

June 9 to 14, 1969 (Venice) — International Association for the Protection of Industrial Property (IAPIP) — XXVIIth International Congress

June 23 to 27, 1969 (Paris) — Unesco — Subcommittee of the Intergovernmental Copyright Committee

July 1 to 5, 1969 (Moscow) — Moscow Jubilee Symposium 1969 (Industrial Property)

July 2 to 7, 1969 (Moscow) — International Writers Guild (IWG) — 2nd Congress

September 8 to 12, 1969 (Nuremberg) — International Federation of Musicians — 7th Ordinary Cougress