Copyright

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Azzeddine Bendiab, Head of Division, National Industrial Property Office.

Observer

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J. Schokkaert, Assistant Counsellor, Ministry of Foreign Affairs and Foreign Trade.
Jacques Degavre, Administrative Secretary, Industrial Property Department, Ministry of Economic Affairs.
Edgard Hoolants, Director-General, Society of Authors, Composers and Publishers.
Albert Namurois, Legal Advisor, Radiodiffusion-Télévision Belge.

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Joracy Camargo, President, Brazilian Society of Authors of Dramatic Works.

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Cláudio de Souza Amaral, Attorney-at-Law.

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Ivan Ivanov, Director, Institute of Inventions and Rationalization.
Georgi Ossikowski, Head, Department of International Law and Trademarks, Institute of Inventions and Rationalization.
Vladimir Vassilev, Director, Department of Patents and Trademarks, Chamber of Commerce.

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Roy M. Davidson, Patent Office, Department of the Registrar-General.

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Jean-Charles Bonenfant, Parliamentary Library, Province of Quebec.
A. A. Keyes, Liaison Officer, National Film Board of Canada.
Roy C. Sharp, Q. C., Director, Canadian Copyright Institute.
Olivier Mercier Gouin, Canadian Broadcasting Corporation.

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Bruce C. McDonald, Faculty of Law, Queen's University, Kingston.

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Miloš Všetečka, Head, Legal Department, Office for Patents and Inventions.
Josef Conk, Office for Patents and Inventions.
Milan Reiniš, Czechoslovak Cultural Centre for Publications.

Counsellor

Blahoslav Penz, Attorney.

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Julie M. Olsen (Miss), Head of Department, Patent and Trademark Office.
Dagmar A. Simonsen (Mrs.), Head of Department, Patent and Trademark Office.
Knrt Haulrig, Judge, Court of First Instance.
Edvard Jeppesen, Head of Service, Ministry of Cultural Affairs.
Hans Jacob Kjaer, Secretary, Ministry of Cultural Affairs.

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Erik Carlsen, Director-General, Danmarks Radio.

Assistant Counsellors

Einar Jensen, Director of Economic Affairs, Danmarks Radio.
Axel Fischer, Head of Secretariat, Danmarks Radio.

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Observer

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Ragnar Meinander, Director of General Affairs, Ministry of Education.

Niilo Eerola, Deputy Director, National Office for Patents and Trademark Registration.

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Marcel Boutet, Attorney-at-Law; Vice-Chairman of the Commission for Intellectual Property, Ministry of State for Cultural Affairs.

Marcel Cazé, Head of the Department for Legal Affairs, Office de Radiodiffusion-Télévision Française.

Henri Desbois, Professor, Faculty of Law, University of Paris.

Roger Gajac, Legal Advisor, National Institute of Industrial Property.

André Kerever, *Maître des requêtes*, Council of State, Cabinet of the Minister of State for Cultural Affairs.

Roger Labry, Counsellor of Embassy, Ministry of Foreign Affairs.

Yves Mas, Counsellor of Embassy, Ministry of Foreign Affairs.

François Miquel, Cultural Counsellor, Embassy of France, Stockholm.

Paul Nollet, Inspector-General, Ministry of Industry.

Jean-Paul Palewski, President, High Council of Industrial Property.

Charles Rohmer, Head of the Copyright Office, Ministry of State for Cultural Affairs.

François Savignon, Director, National Institute of Industrial Property.

Robert Touzery, *Maître des requêtes*, Council of State; Head of Department, Ministry of Information.

Gérard Valter, Head of Service, National Centre of French Cinematography.

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Henri Calef, President, Film Authors Society.

Roger Fournier, Secretary-General, Chamhre Syndicale de la Production Cinématographique.

André Géranton, Legal Advisor, National Publishers Association.

Jean-Pierre Halévy, Attaché, State Secretariat for Cooperation, Ministry of Foreign Affairs.

Robert Lemaître, Legal Advisor, Legal Service, Ministry of Foreign Affairs.

Maurice Lenoble, General Delegate, National Association of the Phonographic Industry and Trade.

Jean Matthyssens, General Delegate, Society of Authors and Composers of Dramatic Works.

Jean Raux-Filio, Bureau of International Organizations, Ministry of Foreign Affairs.

Jean-Loup Tournier, Director-General, Society of Authors, Composers and Music Publishers.

Jean Vilbois, Secretary-General, French Legal Association for Copyright Protection.

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Kurt Schiefler, *Regierungsdirektor*, Federal Ministry of Justice.

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Aurél Benárd, Deputy Head of Service, Ministry of Justice.

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János Zakár, Senior Legal Counsellor, Hungarian Office for the Protection of Copyrights.

György Pálos, Legal Counsellor, National Office for Inventions.

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K. Krishna Rao, Joint Secretary to the Government of India, Legal Advisor, Ministry of External Affairs.
T. S. Krishnamurti, Deputy Secretary to the Government of India, Registrar of Copyrights, Ministry of Education.
S. C. Shukla, Deputy Registrar of Copyrights, Ministry of Education.

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Mohamed Amine Kardan, Attaché, Embassy at Stockholm.
Iradj Said-Vaziri, Legal Department, Ministry of Foreign Affairs.

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Counsellor

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Mosè Angel-Pulsinelli, Inspector-General; Patent Department, Ministry of Industry, Commerce and Handicrafts.
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Antonio Ciampi, Director-General, Italian Society of Authors and Publishers; Former Head, Literary, Artistic and Scientific Property Office.
Valerio De Sanctis, Attorney-at-Law; Legal Advisor, Italian Society of Authors and Publishers.

Counsellors

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Mario G. E. Luzzati, Attorney-at-Law; President of the Italian Group of the International Association for the Protection of Industrial Property.

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Massimo Ferrara Santamaria, Professor; National Association of Film Producers.
Mario Ferrari, Industrial Advisor.
Pietro Frisoli, Attorney-at-Law; Legal Advisor, National Association of Writers.
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Bunichiro Sano, Chief, Copyright Section, Cultural Affairs Bureau, Ministry of Education.

Counsellor

Yoshio Nomura, Member of the Governmental Copyright Council.

Experts

Shozo Matsushita, First Secretary, Embassy at Stockholm.

Yukifusa Oyama, Secretary, Copyright Section, Cultural Affairs Bureau, Ministry of Education.

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Expert

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Julio Delicado y Montero Rios, Head of the Technical and Administrative Office, Industrial Property Registration Office.
Florencio Fiscowich de Fries, Counsellor of Embassy at Stockholm.

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Joaqnín Agusti Peypoch, President, Cinematographic Distributors Association, National Entertainment Trade Union.
Eduardo García de Enterría, Legal Advisor, Cinematographic Exhibitors Association, National Entertainment Trade Union.

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Love Kellberg, Director of Legal Affairs, Ministry for Foreign Affairs.
Ulf Nordenson, Head of Division, Ministry for Justice.
Seve Ljungman, Professor, University of Stockholm.
Svante Bergström, Professor, University of Uppsala.
Claës Uggla, Legal Advisor, Board of Appeals of the National Office for Patents and Registration.
Saul Lewin, Chief Engineer, National Office for Patents and Registration.
Lennart Myrsten, Head of Division, Ministry for Finance.
Reinhold Renterswärd, Head of Section, Ministry for Foreign Affairs.
Eric Essén, Deputy Judge at the Court of Appeal of Skane and Blekinge, Ministry for Justice.
Stig Strömholm, Professor, University of Uppsala.
Christer Sylvén, Head of Section, Ministry for Foreign Affairs.
Gunnar Karnell, Professor, Institnte of Economic Science, Stockholm.

Experts (alphabetical order)

Yngve Andersson, Sculptor, National Federation of Artists.
Ola Ellwyn, Attorney-at-Law, Legal Counsellor to Film Producers.
Jan Gehlin, Judge at the Court of First Instance; Chairman, Swedish Writers Association.
Arthur Hald, Swedish Society of Industrial Arts.
Gunnar Hansson, Head of the Legal Service, Swedish Broadcasting Corporation.
Bengt Lassen, Former Judge at the Court of Appeal of Västra Sverige; Swedish Publishers Association.
Karl Gustav Michanek, Editor, Swedish Federation of Journalists.
Sven Wilson, Director-General, Swedish Society of Composers, Authors and Music Publishers.

Secretaries

Britt Grüting-Bentata (Mrs.), Head of Section, Ministry for National Education and Cultural Affairs.
Tor Kvarnbäck, University of Uppsala.

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Hans Morf, Former Director, Federal Bureau of Intellectual Property.

Deputy Head of Delegation

Joseph Voyame, Director, Federal Bureau of Intellectual Property.

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Pierre Cavin, Judge, Federal Tribunal.
Rudolf Bührer, Head of Section, Federal Political Department.
Jean-Louis Marro, Head of Section (Copyright), Federal Bureau of Intellectual Property.
Walter Stamm, Head of Section, Federal Bureau of Intellectual Property.

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Vitoon Hansavesa, Ambassador at Stockholm.

Members of Delegation

Kanit Sricharoen, First Secretary, Embassy at Stockholm.
Thongbai Sornkaen, Attaché, Embassy at Stockholm.

TOGO

Head of Delegation

Rudolph Apedo-Amah, Director of Legal and Administrative Affairs, Ministry of Foreign Affairs.

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International Alliance for Diffusion by Wire (AID)

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GENERAL STUDIES

The "right of putting into circulation" in relation to copyright
A study of comparative law

A. Introduction. State of the problem

1. An essential task in connection with researches in the field of comparative law is to examine the extent to which systems of national law have achieved, as Professor K. Zweigert has said, "identical solutions by different ways"[1]). Where copyright is concerned, this problem, generally speaking, does not arise as often as in the majority of other branches of private law. The reciprocal influence which the major national systems exercise upon one another, either directly or through the intermediary of international cooperation, the identical technical necessities in all countries, and finally a doctrinal tradition which is broadly common, have all resulted in making copyright a field in which oue is not restricted to seeking "identical solutions", but in which international harmony extends equally to the "ways" by which one arrives at these solutions.

It is not, therefore, without a certain amount of surprise that one is obliged to recognise that, at the very heart of copyright — in the definition of the exclusive rights granted to intellectual creators — there exists, between two systems otherwise so close to one another as the French and German laws, a difference which at first sight appears to be radical: one of these systems has long recognised, whereas the other does not recognise, an exclusive right of the author to put into circulation copies (or the sole copy) of his work.

According to Article 15, paragraph 1, of the German Act of 1965[2]), the author has the exclusive right to exploit his work in material form: this prerogative includes, among others, "the right of distribution". This right is defined in Article 17, paragraph 1, of the German Act as "the right to offer to the public or to place in circulation the original work or copies thereof". It is, according to various other provisions, subject to reservations and exceptions, to which reference will be made later.

A perusal of the French Act of 1957 reveals that this prerogative is absent from the system of patrimonial right granted to authors by this text. If it is true that, according to Article 21, paragraph 1, of the French Act, the author enjoys "the exclusive right to exploit his work under any form and to derive pecuniary profit therefrom", this right, nevertheless, is not unlimited in its extent. In the definition of the "right of exploitation" in Article 26 of the French Act, this right is divided into two elements — the right of performance and the right of reproduction — which rights are, in turn, defined in Articles 27 and 28. Performance, according to the first of these two texts, "consists in the direct communication of the work to the public" by certain processes, which are exemplified in the text and which have in common the fact that they do not require that the public, in order to have knowledge of the work, should have access to copies; on the contrary, these processes communicate the work directly to the vision or the hearing of the audience. In principle, there is ground for concluding that the "right of performance" does not apply to acts by which the public is enabled to acquire knowledge of the work through the intermediary of a copy placed in their hands. It is true that if one adheres strictly to the words employed in the text, the "public presentation" which figures among the examples of "direct communication" could, for example, include the putting on public sale of a picture (but hardly the simple putting on sale of a book). However, this possible interpretation — which would give the example in question the character of a radical and unforeseen innovation, and which has not received a good reception in legal writing[3]) — clashes with the definition of the right of "reproduction", which, in Article 28, paragraph 1, of the French Act is considered as a prerogative strictly different from the right of performance. In this latter text, reproduction is characterised as "the material fixation of the work, by all methods that permit of indirect communication to the public": the "indirect communication" must be concluded as comprising precisely the acts by which the public is enabled to have knowledge of a work through the medium of copies thereof.

Before continuing further, we would observe that the German text is not the only one in which provisions can be found relating to the putting into circulation of copies of a work. Thus, the recent texts of the Scandinavian countries[4]) grant to the author a special right in respect of the distribution of copies (the official translation of the Swedish Act of 1960, Article 2, paragraph 3, uses the term "to distribute"; elsewhere "public exhibition" — the term selected in the official translation to designate any *exposition* — forms part of the acts falling within the scope of this prerogative. However, it appears sufficient, in order to make evident the problems raised by the presence of a special right on the putting into circulation in certain legal systems, and the absence of such provisions from other legislations, to restrict oneself to the German and French texts.

2. These problems fall under two different headings.

First, it must be asked whether, and to what extent, we are confronted with a case where two legal systems have arrived at "identical solutions by different ways". If one starts with the hypothesis that the right of putting into circulation defi-

[1]) See Zweigert in *Revue internationale de droit comparé*, 1966, p. 5.
[2]) We will quote the official translation, published in *Copyright*, 1965, p. 251 *et seq.*
[3]) See Desbois, *Le droit d'auteur en France*, 2nd ed., Paris 1966, No. 259 (p. 296 *et seq.*).
[4]) See *Le Droit d'Auteur (Copyright)*, 1962, p. 76.

nitely meets practical needs and is applicable to certain concrete cases at least, the problem resolves itself into the question of knowing whether and, where necessary, in what manner and by what juridical means, French law makes provision for these same needs. In other words, are we confronted with a gap in the protection offered to authors by French law, or is it a matter of different technical solutions? In order to answer this question, it is first of all necessary to define, with precision, the contents and the limits of the prerogative granted to authors under German law, in order to be able subsequently to proceed to the examination of the solutions which French law provides in the conflict to which the right of putting into circulation gives rise.

This having been done, it is desirable to consider the international aspect. Here, hitherto, the right of putting into circulation has played a very minor part. We would recall that the Berne Convention, which is the principal international text in this matter, only mentions, as from the signature of the Act adopted at the Stockholm Conference (July 14, 1967) the *right of reproduction* of authors. Further, it maintains a complete silence as regards the diffusion of copies. Even if the programme for the Revision Conference convened at Stockholm in the month of June, 1967, envisaged the addition to the text of the Convention of a provision consecrating the right of reproduction, which was retained by the Conference, it did not mention a right of putting into circulation. Before the Conference, certain organisations representing the interests of authors, as well as the Italian Government, further proposed that there should equally be introduced into the text of the Convention provisions on the right of putting into circulation[5]).

In the course of the Conference, the French Government proposed a compromise solution: the right of reproduction should be defined as the right to authorise the reproduction of protected works " in any manner, in any form and *with a view to any destination whatever* " (document S/70).

Although these proposals were not crowned with success, they justify interest by serving to provide a glimpse of the possibility of future evolution in the course of which it would be necessary to ask oneself whether the systems of national law in which the prerogative in question is unknown are sufficient, without modifications, to satisfy the requirements of an international text establishing an autonomous right in respect of the putting into circulation of copies.

Returning, by way of this détour, to our first question, we can amplify it: the purpose of this study is to arrive at a solution of the problem of knowing whether, and to what extent, the right of putting into circulation has a useful function, and whether the constitution of an autonomous prerogative relating to this subject is the best technical method of ensuring the control by authors of their productions. For it must not be taken for granted that the recognition of a new right for authors is always the only means, or the best means, of improving their juridical position. Our study must not take the form of a legal process, where French law would, to some extent, be invited, under penalty of being pronounced inadequate, to take account of its failure to recognise a distinct right in respect of the diffusion of copies. It is quite possible that the solutions provided by French law are equal to those which consist in the creation of a right in respect of the diffusion of copies.

[5]) See document S/13 in the series of preparatory works of the Stockholm Conference (Observations of Governments on the Proposals for Revising the Substantive Copyright Provisions, January, 1967), p. 64 (in relation to Article 9, paragraph (1), of the Berne Convention).

B. German law

I. The concept of " putting into circulation "

3. The analysis of German law requires the examination of two concepts, which should be considered separately, in order to avoid the confusion that could result from a complete identification of the elements composing them: the notion of " putting into circulation ", as such, and the concept of " putting into circulation " as an act reserved to the author by virtue of his exclusive right. We shall see that this latter concept is, in several respects, much more restricted than the former one.

The notion of " putting into circulation " already possessed a long history, when a distinct right on this process of communication was introduced, in 1901, into German legislation. The earlier Act of June 11, 1870, penalised (Article 25) professional putting into circulation, but only when it involved *infringing* copies. This principle, which was adopted in several earlier texts, constitutes a necessary complement to the definition of the offence of infringement and is only of secondary interest for the purposes of the present study.

The German legislator of 1901 did not put forward any very profound remarks in connection with the definition of " putting into circulation ". Basing themselves upon the interpretations given to earlier texts, the drafters of the governmental Bill restricted themselves to showing that this term applied " in accordance with the interpretation of the text in force (that of 1870) to every transfer of an actual copy, but not to the mere communication of its contents (recitation of a literary work, performance of a musical work) "[6]).

4. It is from case law and legal writing that the elements of a more precise analysis of the notion of " putting into circulation " must be obtained. However, the solutions proposed under the influence of the text of 1901 (and of the Act of 1907 on artistic property) have a limited value for the purposes of our study, since the jurists who concerned themselves with the interpretation of these laws were only interested in speaking of " professional diffusion ", reserved solely to the authors.

Before briefly analysing a few particularly interesting theoretical studies, it would be well, once and for all, to dispose of a problem which gave rise, at a certain moment, to a very lively debate, but which has actually lost its interest. The German text of 1901 (Article 11, paragraph 1) recognised an exclusive right in respect of the putting into circulation of the " *work* " — not of " copies of the work ". Now, the " work " being normally considered, as opposed to terms designating fixations, as the designation of the intellectual production, as such, certain interpreters have concluded that the " putting

[6]) Stenographische Berichte über die Verhandlungen des Reichstags. 10. Legislaturperiode, II. Session 1900/1902, Erster Anlageband, p. 396.

into circulation" or "diffusion" equally embraces certain acts of "direct communication" (to make use of the terminology of the French text of 1957). This broad interpretation was adopted, in particular, by the *Reichsgericht* in a celebrated case concerning the *broadcasting* of a literary work [7]). Approved by some legal writers [8]), but violently criticised by other jurists [9]), this solution was rejected by the *Bundesgerichtshof* and today can be considered as definitely abandoned [10]). We can thus start with the hypothesis that the "putting into circulation" only includes acts of "indirect communication".

Allfeld has devoted a particularly profound study to the interpretation of the concept of "putting into circulation". Enlarging upon the notion expressed by the drafters of the governmental project (see *supra*), he defined this act as being any measure by which "the work is rendered accessible to other persons, with a view to being utilised in accordance with its destination". This interpretation is sufficiently broad to apply equally, in harmony with the decision of the *Reichsgericht*, cited above, to the direct communication of the work. In the field of indirect communication, Allfeld draws, from the principle enunciated, the following conclusions (which are, in essence, supported by a case law which we shall not be able to follow in detail) [11]). It is sufficient for a single person to have received a copy — with or without transfer of property — provided that the circumstances are such that this copy can be freely passed to other persons, even within a closed circle; on the other hand, the sending of a copy under promise not to pass it to other persons does not constitute an act of diffusion. Distribution made, for example, to critics, or to members of an orchestra, who will copy it, constitutes "putting into circulation", but in as much as a copy only circulates among persons engaged in reproduction of the work and in preparations for putting it into circulation — for example, between a publisher and his employees or a printer — no diffusion has been realised. A public offer is not required in order to be able to speak of an act of diffusion; it is sufficient for the work to be placed on sale, ready to be delivered to the public. Within the field of letters and of music, mere display — for purposes of publicity or otherwise — does not suffice: it is necessary, in this case, that such display shall be effected under forms which enable the public to acquire knowledge of the work, according to its destination. One particular act of diffusion is formally excluded by the legislator: the exclusive right of the author does not extend to the lending of copies (Article 11, paragraph 1, of the 1901 Act).

The development Allfeld made of one special question of major importance — that of knowing whether a work has already been put into circulation by the action of the publisher in sending copies to booksellers — shows that it is certainly not a matter of defining, *in abstracto*, the meaning of a term utilised in a legal text, but of defining it in the light of considerations which are at the basis of the analysed text, in such a way that account is taken of the legitimate interests of authors, as beneficiaries of the protection provided by the text. Starting with examples which tend to show that these interests would be gravely injured by the adoption of a contrary interpretation, Allfeld affirms that the sending of copies to booksellers is not an act of diffusion; it is only at the moment when purchasers are put in a position to acquire copies for the purpose of reading them that the prerogative in respect of the putting into circulation is exercised. We would observe, in order to make clear the importance of this idea, that, according to the German conception, the right of diffusion *is exhausted* at the moment when it is excercised. We will return to this principle later.

Marwitz and Möhring, who accept most of the solutions put forward by Allfeld, but who are opposed to the assimilation of broadcasting with the putting into circulation of copies, criticise the idea according to which the author or the assignee of copyright would retain the exclusive right to the diffusion of copies until such time as copies actually reach the public [12]).

Professor Ulmer defined the putting into circulation as acts — having material fixations as objects — by which a work is placed on sale or sent to persons outside the field of the manufacture of copies [13]). In the discussion relating to the moment of the "exhaustion" of the right, he takes up a position (with modern decisions and the majority of writers) against the opinion of Allfeld: the putting on sale, even with booksellers, constitutes an act of sufficient diffusion, and the measures taken after this moment for the subsequent putting into circulation of copies no longer pertain to the exclusive right, provided, however, that the first diffusion is definitive — as, for example, sale as opposed to lending — and that the subsequent measures fall within the framework of this liminal circulation [14]).

The drafters of the governmental Bill from which the German Act of 1965 emerged support, in essence, the definition put forward by Professor Ulmer. Only the putting into circulation of copies (in the broad sense of fixations) is envisaged: only the transfer of the property of copies is considered as being sufficient to bring about the "exhaustion" of the right [15]).

5. We may now conclude. For the purposes of this study, it is sufficient to retain the following elements of definition, in respect of which modern German jurists are in agreement: the "putting into circulation" is the communication of an intellectual work to one or several persons, effected by putting copies of the work at the disposal of these persons — whether such copies are manufactured lawfully or unlawfully — provided that the sending of copies is not subject to conditions which prevent subsequent circulation to third parties.

7) Reichsgericht, May 12, 1926, in re "Der Tor und der Tod". Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 113, p. 413; Schulze, *Rechtsprechung zum Urheberrecht*, RGZ 5, with note Möhring.

8) See, for example, Allfeld, *Das Urheberrecht an Werken der Literatur und der Tonkunst*, 2nd ed., 1928, § 11, No. 4 (p. 143 *et seq.*).

9) See, for example, Marwitz-Möhring, *Das Urheberrecht an Werken der Literatur und der Tonkunst in Deutschland*, § 11, No. 12 (p. 113).

10) See Ulmer, *Urheber- und Verlagsrecht*, 2nd ed., 1960, § 38 II 1 (p. 192 *et seq.*).

11) Allfeld, *op. cit.*, § 11, Nos. 4 and 5 (p. 141 *et seq.*).

12) Marwitz and Möhring, *op. cit.*, § 11, No. 11 *et seq.* (p. 112 *et seq.*).

13) Ulmer, *op. cit.*, § 38 II 2 (p. 193).

14) *Op. cit.*, § 39 I 1 *et seq.* (p. 194 *et seq.*).

15) Entwurf eines Gesetzes über Urheberrecht und verwandte Schutzrechte, Deutscher Bundestag, 4. Wahlperiode, Drucksache IV/270, p. 47 *et seq.* We will speak about this project as the *Regierungsentwurf*.

II. The " right of putting into circulation " and its limits

6. The definition of the exclusive right to put a work into circulation would, if we seek to render it complete, call for the study of a large number of problems of detail, of delicate lines of demarcation, of nuances . . . Of these problems, it is desirable to deal only with those which are essential to enable us to reply, with precision, to the questions of knowing what are the practical functions of this right, and what are the concrete problems to which its recognition would bring a solution. It is upon this basis that it will be desirable to examine the solutions of French law.

In order to arrive at this end, we will first study the limitations imposed by the German Act of 1965 upon the right of putting into circulation, in order to proceed subsequently to the analysis of particularly important cases in relation to which this right comes into play, as specified by the text. Finally, there will be occasion to mention several general problems, the understanding of which is essential to the forming of a clear idea of the German system.

We would add that, where legal definitions are involved, it is sufficient to take account of the law actually in force; when we seek concrete examples, case law and legal writing prior to 1965 can also render important service.

7. A first delimitation of the notion of the right of " putting into circulation " already results from the distinction made by the German legislator between this right and the " right of exhibition ", by virtue of which the author of an artistic work alone may authorise public exhibition, in so far as the work has not been made accessible to the public (Article 15, paragraph 1, Article 18, Article 6, paragraph 1, of the German Act). This right, which is elsewhere subject to important exceptions (see Article 44, paragraph 2) applies to acts of communication, of which certain, at least, would fall, in the absence of this special regulation, within the definition of " putting into circulation " given above. The line of demarcation between exhibition and diffusion, which was debated in relation to the Act of 1907 on artistic property [16]), did not form the subject of observations in the preparatory work in connection with the text of 1965. Yet it is not without interest. The exclusive right to exhibit a work of art lapses, on the one hand, at the moment when the work is made accessible to the public, in any manner, and with the consent of the author; on the other hand, this does not apply in relation to the owner of the original of the work, even if the assignment in his favour does not constitute, *per se*, an act of communication to the public (Article 44, paragraph 2, of the German Act). It appears evident that, in this latter hypothesis, the author would not be able to invoke his right of putting into circulation in order to prohibit the exhibition of the work. But it would seem an inescapable conclusion, in relation to the first situation where the right of exhibition becomes exhausted, that the author of a work of art which has been made accessible to the public, for example, by an exhibition organised by the artist himself — and which therefore no longer forms the subject of an exclusive right as regards exhibition, as such — can prohibit exhibition which is, at the same time, a " putting into circulation ". That could, for example, be the case when the exhibition was held with a view to sale [17]).

The principal limit imposed upon the right of putting into circulation by the text of 1965 is, however, that which arises under Article 17, paragraph 2:

> If the original work or copies thereof have been distributed through sales thereof, with the consent of the owner of the right of distributing the work for the area within the jurisdiction of this Act, their further distribution shall be permissible.

It is the doctrine of the " exhaustion " of the right of putting into circulation, adopted by courts and writers under the influence of earlier texts, which has here found its expression in the text itself. We would observe that this right becomes extinguished only as regards the copies themselves (including the original) which have been the subject of the act of liminal diffusion; the author can invoke the right in relation to any other copy. We would also observe that only the putting into circulation realised by a transfer of property has the effect of causing the termination of the exclusive right. If the author, or the assignee of his patrimonial right, lends or offers for hire copies — as music publishers often do, who hire out requisite musical scores to an orchestra or to a theatre — the copies still remain under the control of the owners of the right, and the smallest act of diffusion, within the meaning defined above, effected by the person to whom the copies have been hired, constitutes not only a violation of the contract, but also an offence against copyright, subject to the same civil and penal sanctions as infringement. Contrary to the text of 1901, the new law makes no exception in respect of the lending of copies [18]).

In two respects, the author retains rights of certain importance, despite the exhaustion of the right of putting into circulation. We can limit ourselves to indicating these extensions of his right in respect of the copies, without going into the matter too deeply: they are only of secondary interest from the point of view of this study. On the one hand, there is the " droit de suite " (Article 26 of the German Act) by virtue of which the artist can claim a portion of the price of an original which is sold by auction or through the intermediary of a picture dealer (cf. Article 42 of the French Act), and there is the right to demand payment from persons who, professionally, hire out copies which, in accordance with Article 17, paragraph 2, are no longer subject to the right of putting into circulation.

The normal method of exploitation of the " patrimonial rights " of an author — that expression being used here, in accordance with continental tradition, as opposed to " moral rights " — is to grant to a third party a " right of usage ", e. g.

[16]) See Allfeld, *Kommentar zu dem Gesetze betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie vom 8. Januar 1907*, § 15, No. 10 a (p. 93).

[17]) Normally, this case is not of great practical interest for, according to Article 17, paragraph 2, of the German Act, the sale of the original, for example to a picture dealer, exhausts the right of putting into circulation. Before the work was sold, the corporeal property of the author was sufficient to prevent any unauthorised exhibition. But in a special case — when the work of art formed the subject of *seizure* effected at the instance of creditors of the artist, in accordance with Article 114, paragraph 2, subparagraph 3, of the German Act — the survival of the right of putting into circulation offers to the artist a protection which could not give the right of exhibition, which had been extinguished from the moment when the work was communicated to the public for the first time and became, by the same fact, subject to seizure.

[18]) Cf. *Regierungsentwurf*, p. 48, col. 1.

the right to reproduce the work and to put into circulation copies so manufactured. Article 32 of the German Act enunciates the principle that the rights of usage granted can be limited in space, in time aud as regards their content. This provision indicates, for example, the possibility of a division of territory among several concessionaires, each having the right to diffuse copies within the region defined by his contract with the author. But Article 32 equally reveals a problem to which it is necessary to return. As we have already indicated, every violation of the right of putting into circulation, even if committed by a person to whom the author has granted, in principle, a right of diffusing copies, involves the same sanctions as infringement. Still further, it can be observed that the right of putting into circulation, in so far as it is a constituent element of copyright, is opposable against third parties. If the penal sanctions pre-suppose bad faith on the part of the accused, it is not so in the case of civil sanctions; simple negligence suffices (see Article 97 *et seq.* of the German Act), and this can result in exposure of secondary accomplices such, for example, as booksellers or other distributors of a work, to such sanctions. Now, this fact gives rise to the question of knowing how far the author can limit the extent of a right of usage in accordance with Article 32 of the German Act. Let us define the question closely: there is no doubt that the author and his co-contractor can insert any restrictive clause in their contract, and that respect of these clauses is a contractual obligation upon the assignee. But must it be concluded that clauses which go as far as the " atomisation " of the right granted give rise not only to sanctions normally attached to the non-observance of contractual obligations, but also to those imposable for violation of copyright, as such? And — an even more important question — are those clauses opposable against third parties? Between these two problems there is an evident affinity: if one opts for the solution according to which any violation of a clause imposing limits upon the right of putting into circulation involves, at the same time, a violation of copyright, that amounts, logically, to saying that the limits in question are not only simple contractual restrictions which only concern the contracting parties, but are also elements of the definition of the " right of putting into circulation " granted, as such, and that, in consequence, respect for these limits is equally obligatory upon third parties. This, in German terminology, is the problem of the " real effect " *(dingliche Wirkung)* of contractual restrictions upon assigned rights. We will speak of this at greater length later on.

8. The right of putting into circulation accordingly defines itself, in modern German law, as the right to authorise and to oppose " diffusion ", in the sense defined above, of any copies of an intellectual work, up to the time when this particular copy has lawfully been the subject of alienation, which includes the right of putting it into circulation.

It is necessary to eliminate from this study a question which bears upon the definition which we have just given: what is the degree of publicity required to enable one to speak of a " diffusion " or of a " putting into circulation " (the two terms are employed here to convey the meaning of the German word *Verbreitung*)? This problem arises in connection with two elements of the definition. First, what are the acts which the author may prohibit? The question has been illustrated by several of the examples cited according to Allfeld, above. Then: what alienations are, at the same time, acts of putting into circulation, exhausting the right in question? Let us suppose that an artist makes a gift of a picture to a close friend, without conditions. Is this a diffusion within the meaning of Article 17, paragraph 2, of the German Act? That is doubtful, if one starts with the hypothesis that it is of the essence of " putting into circulation " that there should be an act of *communication to the public*, for the drafters of the Act of 1965 appear to have adopted the idea that the transfer of property, as such, is not necessarily a " publication " of the work (cf. Article 44, paragraph 2, of the German Act). But, on the other hand, it has nowhere been said that the diffusion spoken of in Article 17 of the German Act would, by definition, be an act of communication to the public.

The problem is not of very great practical interest, although the possibility of conflicts of a fairly special character in which it could arise can easily be seen. Thus, in the example cited above: does the artist retain a right of control over the diffusion of the work which he has given to his friend? Could he prohibit it from being placed on sale?

Here we must limit ourselves to raising the problem. We must now proceed to the examination of the practical functions of the right of putting into circulation, in the light of the definition of this right which has been given above.

9. The drafters of the governmental Bill which became the Act of 1901 considered certain clearly-defined situations when they proposed to introduce an exclusive right on the putting into circulation of copies, even lawfully made. In the explanatory statement relating to the Bill, they indicate several hypotheses where the interests of authors demand a protection which was not offered by earlier legislation: the diffusion in Germany of copies of a work protected in that country, which have been lawfully manufactured abroad and subsequently imported into Germany, was not affected by the Act of 1870, which only prohibited the putting into circulation of *infringing* copies. Similarly, a publisher could continue to sell books, even after the expiration of the publication contract, and an author could sell copies which he himself had caused to be manufactured before the conclusion of a publication contract, although such sale might injure the interests of the publisher to whom he had subsequently assigned his work. Finally, the absence of a distinct right on the putting into circulation provided obstacles to contracts by which an author wished to limit, geographically, the rights of a publisher: since the making of copies by the publisher was lawful, the diffusion of these copies in a territory other than that indicated in the contract was only a simple violation of contractual obligations and did not involve the civil and penal sanctions relevant to infringement of copyright [19]).

The drafters of the Bill touched upon the problem of the effect of restrictive clauses, without giving the matter deep study. Having enunciated the principle of " exhaustion " of the right of putting into circulation with the free transfer of copies, they affirm, in a general manner, that the limits as to

[19]) Stenographische Berichte über die Verhandlungen des Reichstags. 10. Legislaturperiode, II. Session 1900/1902, Erster Anlageband, p. 396.

duration and as to the place of authorised diffusion to which the author ultimately subjects the assignment of the right of putting into circulation retain their validity in relation to third parties. This recognises the "real effect" of the restrictive clauses. The drafters of the Bill go on to say that a consequence of this principle is that the author could prohibit, for example, by means of a reservation printed on the copies, the lending of the copies by public libraries. In order to avoid this result, which was considered excessive, a provision has been inserted into the text, according to which lending is not subject to the exclusive right of putting into circulation [20]).

It may be emphasised that, if it has been found necessary specially to mention *lending* (by definition, gratuitous), it is that this act, in itself, constitutes a putting into circulation; in the absence of reservations made by the author, lending, like hiring or sale, is free, under the régime of the text of 1901, once the copy in question has formed the subject of a first diffusion. The opinion of the drafters of the governmental Bill could not be considered as applicable, directly or by analogy, to the reservations imposed by authors as regards the forms of utilisation of copies which do not fall within the scope of the definition of putting into circulation. Thus, the prohibition, on a gramophone record, of its utilisation for broadcasting does not fall within the category of restrictions effective against third parties by virtue of the right of putting into circulation, since the diffusion by Hertzian waves is not an act of putting into circulation. In order to resolve the problems which such reservations pose, it is necessary to turn to other principles of law.

Allfeld endeavours to demonstrate by concrete examples the drawbacks of the theory according to which the right of putting into circulation already exhausts itself with the transfer of copies to booksellers by the publisher: if this principle is adopted, he says, it will be sufficient for the publisher whose right is limited as to territory or duration to transfer the whole of the copies that he has lawfully made to an intermediary, in order that all the limits imposed upon his right shall lose their validity [21]).

Marwitz and Möhring add to the list of cases in which the right of putting into circulation has a practical function the hypothesis in which the copies of a work are seized by the creditors of the author: the author's copyright — which is, in itself, not subject to seizure — prevents the copies from being sold after seizure, which makes the security right of the creditors illusory [22]). Marwitz and Möhring endeavour equally to prove that the misgivings of Allfeld on certain points are not justified, and that the idea according to which the right of putting into circulation would remain in force even after the sale of copies to booksellers produces unacceptable results: if this theory was adopted, say these jurists, the author would be authorised to prohibit the sale of copies to booksellers of good faith, since he would think that he had legal grounds for attacking the publication contract [23]). On the other hand, the author enjoys effective protection against fraudulent manoeuvres on the part of a publisher, since the right of putting into circulation is only exhausted by a lawful diffusion, that is to say, one which conforms to all the limits and conditions (e. g. in relation to the price of copies) imposed by the author upon the publisher [24]). However, Marwitz and Möhring refer, without furnishing concrete examples, to the possibility of contractual clauses which are denuded of "real effect", and which thus only exercise their effect between the author and his co-contractor [25]).

Modern evolution has posed a certain number of special problems relating to the delimitation of the right of putting into circulation, and courts and writers have brought about solutions, the discussion of which will not be without interest [26]). However, the main outlines traced by the authors cited above are sufficient for this study. Moreover, certain problems of detail have found their solution in the text of 1965.

10. We can accordingly define the practical functions of the right of putting into circulation. First, this prerogative permits the author to prohibit the diffusion, upon German territory, of copies of a work lawfully manufactured in a country to which protection of the work does not extend. At the present time, this hypothesis would only arise exceptionally, in view of the system of international protection created by the multilateral Conventions which exist in respect of copyright. Secondly, the right of putting into circulation permits the author to limit, in space, in time, and as regards content, the scope of the concessions of rights of usage which comprise the right to diffuse copies. There is no doubt that, in principle, such limiting clauses are invested with "real effect". This consequence flows from the text itself, which takes up the idea enunciated by Marwitz and Möhring (cited *supra*): the right of putting into circulation is only exhausted in relation to copies diffused "with the consent of the owner of the right of putting into circulation" (Article 17, paragraph 2, of the German Act). Now the concessionaire is only the owner of the right within the limits fixed by the author. Consequently, the bookseller who, in selling copies, effects an act of "subsequent diffusion", commits, objectively, a violation of copyright if the copies in question have been diffused by the concessionaire in a manner contrary to contractual limitations.

Thus, in order finally to indicate the third element of the proposed definition, the author retains, by virtue of his right of putting into circulation, a certain control on the destiny of the copies when these have definitely escaped from the reach of his co-contractor. It results from what we have just said above that, in principle, this control is assertable only outside of the limits which the author has drawn around the prerogatives granted to the concessionaire. The right of control exists equally in favour of such person, but only within the limits of the concession; in so far as copies put into circulation by the concessionaire himself are concerned, the right becomes exhausted with the definitive remission to other persons.

[20]) *Loc. cit.*
[21]) Allfeld, *op. cit.*, § 11, No. 4 (p. 142 *et seq.*).
[22]) Marwitz and Möhring, *op. cit.*, § 11, No. 13 (p. 115).
[23]) *Op. cit.*, p. 117.

[24]) *Loc. cit.*; cf. Hubmann, *Urheber- und Verlagsrecht*, 2nd ed., 1966, § 25 II 1 c (p. 131).
[25]) Marwitz and Möhring, *loc. cit.*
[26]) See Ulmer, *op. cit.* (p. 190 *et seq.*); Schulze, *Urheberrechtskommentar*, 1961, § 11 LitUrhg., Nos. 3 *et seq.*; Bussmann, Pietzcker and Kleine, *Gewerblicher Rechtsschutz und Urheberrecht*, 3rd ed., 1962, p. 368 *et seq.*; Huhmann, *op. cit.*, § 25 II (p. 130 *et seq.*).

It is in connection with this third element of the right considered that the problem to which we have already referred arises — that of the "real effect" of the limits imposed by the author upon the concessionaire of a right of putting into circulation. The principle according to which the author can exercise a certain control on the destiny of copies, even those in the hands of third parties, is subject to important reservations. Before finishing this outline of the German law, it would be well to cast a glance at these reservations.

11. "The author" say the drafters of the governmental Bill which became the Act of 1965 "can equally limit the content of the right of reproduction and of putting into circulation which has been conceded in such a way that a concessionaire can only manufacture a certain number of copies and can only diffuse them through a given outlet, e. g. to the members of a book club *(Buchgemeinschaft)*". But in these cases, it is essential for the limitation always to relate to the *content* of the right granted: as regards the right of reproduction, it is necessary that the limitation should have for its object, for example, the process of manufacture and the quantity of copies; when the limitation relates to the right of putting into circulation, it should be related to the process of diffusion. It is not possible to limit the right of reproduction or of diffusion in such a way that copies lawfully manufactured and diffused could only be utilised for specified purposes, e. g. for private use, since neither the right of reproduction nor the right of putting into circulation extends to the prerogative of exercising control on the use of copies lawfully manufactured and diffused [27]).

When the drafters of the Bill say that "it is not possible" to insert clauses of the type exemplified in the framework of a contract granting a concession, they are liable to exaggerate. As we have shown above, there is nothing to prevent the contracting parties from formulating the reservations which they wish: what is impossible is to invest these clauses with a "real effect", that is to say, to make them opposable against third parties in the sense set out above.

We cannot, within the framework of this article, analyse in detail the problem posed by the adoption, in German law, of the distinction between the "reality" and the "simply obligational" character of contracts and contractual rights in the matter of copyright. This is a question of general scope, which touches the very heart of a juridical method peculiar to German law [28]). On certain points, one is tempted to say that it only represents a manner of speaking borrowed from the terminology of the *Bürgerliches Gesetzbuch*; on other points, the distinction has real importance. The question which actually occupies us is of this latter category. But it seems possible to formulate it without importing technicalities into the study, in these terms: what are the limits imposed upon the opposability against third parties of the restrictive clauses inserted in the concession of a right of diffusion? Without having given at least an approximate reply to this question, one could not pass a judgment on the German system.

Let us first examine the rational basis of the principles which are liable to come into play. The German terminology directs attention towards private law in general and the considerations invoked, within this field, in support of the principle of *numerus clausus* of the so-called real rights. The author, like the owner of any right, has a strong interest in being able freely to specify, by contract or otherwise, the limits of this right, and to obtain the maximum of protection offered by recognition of the opposability of these limits against third parties. This is the most certain means of realising the optimum exploitation of the right. But this interest conflicts, with equal force, with the interest possessed by the public — and, more particularly, the section of the public which trades in the property which provides the material support of the right in question — of knowing where they stand, without being obliged to undertake researches, which might be difficult, into the juridical régime to which such property is subject. Where material property is concerned, this problem can be resolved in a relatively satisfactory manner, by two principles which assure publicity of the real rights: the adage "where movables are concerned, possession is equal to title", and the systems of more or less developed publicity pertaining to property which exist in most modern legal systems. It is manifest that the principles applicable to movable property are not capable of use where incorporeal property is concerned. Theoretically, the creation of public registers in which all contracts relating to intellectual works would be recorded would be an effective means of ensuring publicity for the contractual clauses opposable against third parties: it is known that in the field of cinematography a register of this kind exists in certain countries, especially France. But for the great mass of intellectual productions of more modest character or requiring investments that are less important, the costs and the complications of such a system would make its introduction impossible.

The problem which presents itself consists, therefore, in finding principles which, at the same time, take account of patrimonial interests and, to a lesser extent, the moral interests which authors attach to the maximum exploitation of their works, and the need for the *juridical security* of third parties. We would mention that this question arises in connection with every contract for exploitation in the field of copyright. But where the right of performance is concerned, it is less pressing: where "*petits droits*" of authors are concerned, the collecting societies have created a régime which, to a large extent, satisfies the need for security by exploiters and the general public; the exploitation of the "*grands droits*" normally calls for preparations of such a nature that the study of the legal problems capable of arising becomes a natural act on the part of the exploiter. It is in relation to the diffusion of copies that the question of the opposability of the restrictive clauses against third parties presents a special difficulty.

This question has formed the subject of a prolonged and profound debate in German legal writing [29]); also, there is a considerable body of decisions in the matter. The text of 1965, which established a distinction between "simple" and "exclusive" rights of usage (Article 31, paragraphs 1, 2 and 3, of

27) *Regierungsentwurf*, p. 56, col. 2.

28) For a more general analysis, see Strömholm, *Le droit moral de l'auteur* (Stockholm, 1967), Vol. II, 1, p. 112 *et seq.*, with references.

29) See, for a recent commentary, Strömholm, *Das Veröffentlichungsrecht des Urhebers*, 1964, p. 92 *et seq.*

the German Act) makes no contribution to the solution of the problem.

It is sufficient, in this context, to return to the proposals recently formulated by Dr. D. Reimer, in a study which was extensively documented; these solutions arc, in essence, in harmony with modern case law [30]).

The general principle, already formulated with clarity by Allfeld in connection with Article 8, paragraph 3, of the 1901 Act — a provision which envisaged the possibility of a partial assignment of copyright — is that only the limitations relating to the *extent* of the rights assigned (after 1965: conceded) are opposable against third parties, whereas the conditions which relate to the *modalities of exercise* of these rights are only valid *inter partes*. Among the conditions in this latter category, Allfeld enunciates those which are concerned with selling price, pulping, the sale in large shops, or by travelling traders, and the sale limited to certain classes of persons [31]).

As Dr. Reimer observed, the criteria that can be drawn from the distinction between " extent " and " modalities of exercise " are not always very clear: methods of utilisation might develop which are of such importance, and which are so clearly distinguishable from normal forms of exploitation, that there would be occasion to conclude that the concession did not include, *in dubio*, this new method, and that, as a consequence, a restrictive clause relating to it should be considered as a quantitative limitation rather than as a condition relating to the modalities of exercise. This is what has arisen in Germany in relation to the sale through the intermediary of book clubs [32]).

We feel able to adopt the following principles, proposed by Dr. Reimer (despite the objections of certain authors, whose arguments we are unable to criticise here) [33]):

In short, it can be stated that the possibility of bringing limitations, invested with " real effect ", to the rights of usage granted in the field of copyright depends upon the following considerations:

1. The limitations should be in respect of the extent of the right granted, as defined by the texts, and not in respect of the modalities of its exercise.

2. If third parties, independent of any relationship with the co-contractor of the author, participate in the exploitation of the work, it is necessary to require, in the interest of juridical security, that the splitting-up of the copyright does not lead to a juridical situation which is lacking in precision and which is difficult to analyse. The partial rights which arise by virtue of such " splitting-up " must have an independent importance, resulting either from the provisions of the law, or from technical or economic evolution or, finally, from trade customs.

3. Where trade customs are invoked in support of the possibility of limiting the " real effect ", account must be taken of the needs of juridical security of all categories of interested exploiters.

We need not study these principles in detail or examine to what extent they are in conformity with jurisprudence and preponderant opinions in doctrine. On certain important points, the elements necessary for such comparison are lacking but, in a general manner, the theses of Dr. Reimer summarise with clarity, as we have already said, the principles which can be drawn from case law and legal writing.

Having thus defined the position under German law, we can begin the study of French law. The comparison of the solutions and the criticisms to which it can give rise will find a place in our conclusions.

C. French law

I. The historical facts

12. As in the case of German law, it is advisable, in the first place, to examine to what extent the " putting into circulation ", as such, has been deemed by French jurists to be an act of utilisation, falling within the author's exclusive right. It is not necessary to insist upon the fact that this notion is unknown in the French texts which governed copyright before the coming into force of the Act of March 11, 1957. If it is true that the principal text — the decree-law of July 19-24, 1793 — grants authors the exclusive right " to sell, to cause to be sold and to distribute their works " in France (Article 1, paragraph 1), and that Article 425 of the Penal Code, which defines the concept of " infringement ", speaks of the " edition " made contrary to the laws and regulations relating to the property of authors, it is no less certain that it is *reproduction* wich has been considered, for a long time, as the principal element of the exclusive right of intellectual creation, side by side with the right of performance guaranteed by the legislation of 1791 relating to theatres. That does not mean to say that French jurists have not seen the fundamental importance of distribution, which is a natural purpose, from the economic point of view, of every reproduction of a work. But they have not, on a juridical basis, made any clear distinction between these two acts; their analysis of infringement is, if one may say so, *synthetic*: as is already apparent from the texts cited, the two successive operations by which a work becomes the subject of an " indirect communication " to the public (cf. Article 28, paragraph 1, of the French Act) are more often considered as a single unit. It is thus that one often finds in the reasons adduced in decisions, definitions of the right of reproduction which cause one to return again to this concept, e. g. the exclusive right " to sell, to cause to be sold, to distribute, to publish, to cause their work to be reproduced " [34]).

However, within the framework of this unit, it is reproduction which dominates. That appears particularly in the provisions of the Penal Code (Articles 425 and 426), which only repress the " edition " — interpreted by magistrates as a synonym of " reproduction " — of works protected without the authorisation of the author, that is to say, the selling and the introduction into France of infringing works. Accordingly, the protection of penal law does not normally extend to illicit manoeuvres undertaken with copies of which reproduction, as such, has no taint of illicit character (cf., however, Nos. 13 and 14, *infra*). Thus, in several matters, repressive jurisdictions have not welcomed actions taken against publishers who have placed on sale, without the authorisation of the author, or under forms which were not envisaged in the contract of

30) D. Reimer, "Schranken der Rechtsübertragung im Urheberrecht", in *Gewerblicher Rechtsschutz und Urheberrecht*, 64th year (1962), p. 609 *et seq.*, particularly p. 624 *et seq.*

31) Allfeld, *op. cit.*, § 8, No. 14 (p. 108 *et seq.).*

32) Reimer, *op. cit.*, p. 625 *et seq.*

33) *Op. cit.*, p. 627, col. 1.

34) Cass. req., February 27, 1918, S. 1918-1919.1.96.

assignment, copies which, *per se*, did not constitute infringements [35]).

13. On the other hand, French jurists have been brought in certain cases, either by interpretation of texts or by the analysis of facts, to examine the putting on sale or, more generally, the putting into circulation, as being a distinct act. This is to create, in the interests of authors, an autonomous the Penal Code, which made necessary an analysis of the notion of retail sale [36]). However, the criteria elaborated in this connection are not of great interest for the purposes of this study. The debates were concentrated, in particular, upon the questions as to which acts constituted a " retail sale " and in what conditions the good faith of the seller should be admitted. As it was necessary that the works in question should be *infringements*, the more subtle questions relating to the opposability against third parties of restrictions imposed on the circulation of copies lawfully manufactured could not arise.

Next, Article 426 of the Penal Code prohibited the introduction into France of infringing copies made abroad. Here, the problem of the validity, in relation to third parties, of restrictive clauses is effectively posed. Thus, Pouillet [37]) raises the question whether Article 426 is not only applicable to copies printed abroad without the authorisation of the author, but also when a French author has granted to an exploiter the right of publication abroad, whilst reserving to himself, or assigning to a French publisher, the exclusive right of publication in France, and where the foreign publisher introduces into this latter country copies lawfully published and sold in his own territory. It is certain, according to Pouillet, that this introduction falls within the scope of Article 426 of the Penal Code. In order to defend his thesis, Pouillet appeals, not to an exegesis of the Article cited — which, manifestly, would lead to a contrary conclusion, since the text explicitly demands that works *infringed* abroad are involved — but to the necessity of effectively protecting authors. " If Article 426 ", he says, " envisages the case, which will be the most frequent to occur, of the introduction into France of a work published abroad in violation of the rights of the author, it does not exclude the introduction in any other case. Infringement extends to any act which injures the exclusive right of the author, in his monopoly . . . The introduction is illegal, having taken place against the wish of the author and in spite of his rights." This is to create, in the interests of author, an autonomous right of putting into circulation or, more exactly, to grant to the restrictive clauses relative to the extent of the sale of copies lawfully manufactured the same penal protection as is granted to the prerogatives formally recognised to authors by the texts.

In a case which is already old, the *Tribunal correctionnel* of the Seine had occasion to pronounce upon similar facts to those evoked by Pouillet: a Parisian bookseller had placed on sale copies printed in France, and subsequently sold to foreign booksellers under the condition that they would not be reimported [38]). However, the *Tribunal* did not definitively decide the question of the opposability of this clause against third parties. Although it stated that, in principle, the act of the Parisian bookseller did not fall within the prohibition of Article 425 and the follwing Articles of the Penal Code, it added, *ex abundante cautela*, that this would be the case at least if it were established that the violation of the restrictive clause was not imputable to the accused. The *private law* aspects of the matter were not discussed.

Again, it is Pouillet who, on a third point, indicates situations where the effective protection of authors requires that the putting into circulation of copies lawfully manufactured should be subject to the control of the authors. Speaking of manuscript copies made with the object of placing them in a reading-room, he concludes that this would constitute a " definite edition, all the more dangerous since, with a very small number of copies, a very large number of persons desirous of becoming acquainted with the work could be satisfied " [39]). Now, that is enlarging upon the meaning of words. What is dangerous for authors is not the manufacture of one or several copies — which might possibly have occurred, initially, within the tolerance granted to copies made for private use — but the ultimate use made of copies. Under the circumstances, this use constitutes an act of distribution. Pouillet returns to the question in speaking of the hiring of infringing works [40]): on this point, he develops a definite theory of " sale " considered (according to an idea already enunciated by Renouard) as a term applicable to any communication of a work by means of copies. " Relinquishing the essential property of a volume ", says Pouillet, " or licensing its use, means the selling to the public of the right of becoming acquainted with the work, of assimilating it, of enjoying it . . . Now, a person who hires out an infringing volume causes the work to be known, and spreads it beyond the field permitted by the author." To this reasoning, Pouillet adds another argument, which illustrates precisely the " synthetic " conception of the right of reproduction which we have characterised above as typical of the French analysis of the problem. Pouillet says: To publish is to infringe. Now, manufacture is only one aspect of publication, which also embraces " the fact of spreading among the public the work which has been improperly manufactured ". Since hiring-out facilitates the diffusion of the work, it is an act of complicity in the offence of infringement.

We will finish this brief survey with a few expressions of the idea that the putting into circulation, as such, distinct from reproduction and irrespective of its lawful or unlawful character, constitutes, if not a subject of the prerogative of the author, at least an act involving his interests, and capable, for this reason, of having a bearing upon the provisions pro-

[35]) See Trib. corr. Seine, November 30, 1877, cited in Huard and Mack, *Répertoire de propriété littéraire et artistique*, 2nd ed., 1909, No. 497, Trib. corr. Seine, January 28, 1848, cited in Blanc, *Traité de la contrefaçon*, 1855, p. 183; Trib. comm. Seine, November 2, 1843, cited in Blanc, *op. cit.*, p. 159.

[36]) See, for example, Paris, April 30, 1932, *Gaz. Trib.*, June 16, 1932 (D. H. 1932, Somm. p. 39).

[37]) Pouillet, *Traité de la propriété littéraire et artistique*, 3rd ed. by Maillard and Claro, 1908, No. 604 (p. 634).

[38]) Béchet v. Crochard, Trib. corr. Seine, March 4, 1834, cited in Huard and Mack, No. 604. Cf., in this connection, Pouillet, No. 606 (p. 636 *et seq.*), where this case is considered as a problem particularly relevant to the interpretation of contracts and different from that posed by the introduction of copies lawfully manufactured abroad. We do not tbink this distinction between the two cases is logical.

[39]) Pouillet, No. 529 (p. 559 *et seq.*).

[40]) Pouillet, No. 602 (p. 630 *et seq.*).

tecting such interests. It may be mentioned, before concluding, that this idea attracted the attention of French parliamentarians in the 1930's. In the governmental copyright Bill deposited in 1936[41]), the Commission of Education and Fine Arts of the Chamber of Deputies inserted, in Article 15[42]), the following text:

> Copyright includes, in particular, for the benefit of the author:
> — the exclusive right to reproduce and to diffuse, as well as to authorise the reproduction and the diffusion of his works;
> — the exclusive right to authorise, under special conditions fixed by him, the use of one or several copies of his works by any persons making use of them, not for their personal use, but for acts of hiring, lending, or other acts of communication of the work to the public, if these acts have as their effect the realisation of benefits or a reduction in general costs ...

If these provisions[43]) — which did not re-appear in the French post-war Bills which resulted in the text of 1957 — had been retained, French law would have possessed a complete regulation of the problems relating to the putting into circulation of copies, and the greater part of the questions arising in both legal writing and case law in this matter would have found, in the law, a solution very similar to that of the actual German law. It may be observed that, in this text, "*diffusion*" must be understood to mean precisely the putting into circulation of copies; "*radiodiffusion*" is the subject of special regulation in Article 16 of the Bill.

14. The Bill of 1937 was not enacted; the examples cited above demonstrate sufficiently clearly that, despite gropings upon certian points, French courts and writers have neither developed a precise concept of the putting into circulation of copies nor, above all, a distinct right in respect of acts of indirect communication. The creation of such a right was much more difficult in that it found no support in the texts. In cases where, in the interests of authors, it was desired to attack an act of indirect communication, it was necessary to have recourse to somewhat roundabout interpretations. We have already given several examples of these types of reasoning in Pouillet's treatise. In conclusion, we would cite a decision of 1887 which seems to us to illustrate the difficulties which the judges encounter: a director of a theatre who had hired to a third party a manuscript score which he possessed legitimately, for his personal use, was declared guilty of a dealing which constituted infringement; Article 426 of the Penal Code, said the Paris Court, must not be construed in a restrictive sense, but must be applied to every diffusion of the work which is of such a nature as to injure the interests of the author[44]). Thus, in order to be able to attack an act of diffusion, it is necessary, to some extent, to declare as an infringement, *ex post*, a copy which has been lawfully manufactured.

15. It results from the absence that we have just indicated of legal provisions in the matter of putting into circulation that it is by *clauses inserted in contracts of assignment and seeking to limit the extent of the transfer of the right* that French authors must protect themselves against acts of distribution that they wish to prevent. This conclusion raises three questions.

(a) At the beginning, it must be emphasised that the more or less substantial need for such clauses depends to a large extent upon the principles adopted by judges for the interpretation of contracts of assignment. If these are interpreted narrowly, the auhor will not need to reserve to himself explicitly any given manner of exploitations; it is, on the contrary, the exploiter who will be interested in defining, with as much precision as possible, the kinds of uitlisation which he has acquired by virtue of the contract. Now it is certain, and this cannot be over-emphasised, that for a long time the French Courts have affirmed that contracts of assignment in the matter of copyright should be subject to a narrow interpretation, at least as regards the extent of the rights assigned[45]).

(b) Nevertheless, however firmly judges may adhere to the principle of narrow interpretation, the practical importance of this principle depends, manifestly and in the last resort, on the manner in which one defines the different elements of copyright. If one limits oneself to extracting two principal elements, for example, the right of performance and the right of reproduction, that a contract covers according to its tenor as regards one of these rights, and that in the course of time new techniques bring new forms of exploitation which fall within one or the other of the two categories, the principle of narrow interpretation could show itself as being relatively ineffective to safeguard the interests of the authors. The same applies if, by a term frequently used in contracts, such as "right of publication" or right of "edition", one means, in general, any manufacture and putting into circulation of copies. In a general manner, it appears evident that, in order to serve effectively to guarantee the interests of authors, the principle of narrow interpretation should be combined with the recognition of a maximum of the distinct prerogatives, which should be clearly defined. We will stop here as regards this question — one which has been posed and which has received fairly diverse solutions since the time when modern technique multiplied methods of utilisation unknown by authors and exploiters who had concluded their contracts in the period preceding that of great inventions in this field[46]). But sight must not be lost of the problematical question of the "scission"[47]) of copyright and that of the interpretation of contracts of assignment. We will furnish (at No. 16) certain examples which bear evidence of the importance of a "scission" introduced in an analysis of copyright.

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41) *Journal Officiel*, 1936, Doc. Parl. Chambre, Annex No. 1164.

42) See *Journal Officiel*, 1937, Doc. Parl. Chambre, Annex No. 3222, and 1939, Annex No. 5337, 1939 version — remaining without change in relation to that of 1937 as regards the provisions of interest to us — is equally reproduced in El-Tanamli, *Le droit moral de l'auteur sur son œuvre littéraire et artistique*, Paris, 1943, p. 349 *et seq.*

43) Consult, as regards the object of the proposed provisions, the report of M. Le Bail, presented to the Chamber in 1937 (Annex No. 3222).

44) Paris, May 13, 1887, in the *Annales de la propriété industrielle, artistique et littéraire*, 1887, p. 311; Cass., January 28, 1888, *Annales* 1890, p. 82 and D. P. 88.1.400.

45) See, for example, Pouillet, Nos. 239bis *et seq.* (p. 287 *et seq.*); cf. however, No. 251 (p. 297) on the application of Article 1162, Civil Code. *Contra*, Huard, *Traité de la propriété intellectuelle*, 1903, Vol. I, No. 75 (p. 119); see also Vaunois, Geoffroy and Darras, *La propriété littéraire et artistique* (Extrait du Juris-Classeur Civil, Annexe), Paris, 1929, Div. I, Nos. 47 and 48; cf. No. 45.

46) For a succinct summary of the questions and the principal solutions, see Strömholm, *Le droit moral de l'auteur*, Stockholm, 1967, Vol. I, p. 448, notes 39-42.

47) Cf. Huard and Mack, No. 1194 (p. 438).

(c) Finally, the most important question underlying our conclusions as to the means by which French authors can retain control over the circulation of their works concerns the effect of agreements or contractual clauses seeking to limit such circulation: to what extent have these the same effects as the recognition, in a text, of a distinct prerogative on the putting into circulation of copies? The elements which exist in the field of the diffusion of copies being insufficient to provide a reply to this question, it is necessary equally to consider certain conflicts relating to the effect of restrictive clauses which have other methods of utilisation as their object. The question of the juridical effects of contractual limitations on the rights of the assignee resolve themselves here, as in German law, into two elements: *(a)* to what extent are these limitations penally sanctionable, and *(b)* to what extent are they opposable against third parties?

Before examining these two questions, it will be well to cast a glance on the possibility of the " scission " of the rights assigned, as it appears in judicial decisions and legal writing.

16. The texts governing copyright before the coming into force of the Act of March 11, 1957, only recognised, as we have shown, the distinction between the right of performance and the right of reproduction. But it is evident that commercial practice was aware at an early date of a " scission " of rights which was asserting itself strongly within each of these two great categories. It is sufficient, in order to convince ourselves of this, to consult, in the French reports, certain cases bearing upon the interpretation or the effects of contracts of assignment. It is laid down in a judgment of 1844 that the owner of the right of reproduction of a drawing can sell to another person the right to reproduce the drawing in a given form and by a given process, and to others equally the right to reproduce it, but under different conditions and by different means [48]). Assignments of the right of reproduction, said the Paris Court twenty years later, should be construed narrowly; the assignee can only use the process specified between himself and the assignor; thus the assignment covering lithographic reproduction does not extend either to photography or to engraving [49]). The composer of an opera can impose upon the publisher the obligation only to sell the complete score [50]); copyright, it is affirmed, in principle, in a judgment of 1939, is made up of several distinct rights, and an assignment is only deemed to include those which have been indicated in the contract [51]). A decision of 1950 establishes the possibility of assigning only the right to publish a *de luxe* edition [52]), and in 1951 the Paris Court heard a case where the proceedings were concerned with the opportuneness of the assignment by the author of *de luxe* editions and popular editions to different publishers [53]). It would be easy to multiply these examples. It is certain that the freedom of contracts it total. There is neither *numerus clausus* of the rights assignable nor " named rights ", to which it is necessary to adhere. But this wealth of methods of utilisation, capable of forming the subject of distinct assignments, does not enlighten us upon the juridical consequences of violations of the limitations so freely traced; neither does it reveal whether it has resulted in the creation of " split-up " rights of a more stable character, which could serve as links in the formation of distinct prerogatives within the *summa divisio* between *droit de reproduction* and *droit de représentation.*

It is also certain that such rights are being developed, within limited fields. Where artistic property is concerned, the technical differences of reproduction offer objective bases for the recognition of distinct elements of the right of reproduction (see No. 18, *infra*). As regards literary works, the distinction between publication in the form of a book and publication in newspapers has equally received early recognition: authorisation to proceed with one of these utilisations does not include consent as regards the other. But these are only partial solutions.

In legal writing, and particularly in modern theory which is conscious of the problems which modern techniques of communication pose in respect of old contracts, efforts are made to arrive at an appropriate arrangement of the rights of the author. We would cite, by way of example, the themes developed by Huard, who enumerates, in principle, the limitations to which the right of the beneficiary of a " publication contract " can be subjected: limitations as to the manner of publication, the number of editions, the number of copies, the form of publication and the place and duration thereof, as well as the language in which the work is published [54]). But this list does not provide any reply to the question of the juridical effects of the limitations: as we shall see later (at No. 17), Huard scarcely seeks to establish a list of distinct prerogatives and leaves the determination of the *character* (real or " obligational ") of the rights assigned to other criteria. More pragmatic, certain other jurists extract different elements from within the right of reproduction. Mr. Rault restricts himself to adding to the rights of reproduction and performance those which have translation and adaptation as their object; in these categories, he groups the new rights on cinematographic and sound recording [55]). Mr. R. Striffling, in a study on publishing contracts, treats publication, performance, reproduction in newspapers and periodicals, translation, adaptation and " publication by mechanical processes " as including recording, cinematographic utilisation and radiodiffusion [56]) as methods of distinct utilisation. As regards these two authors, it is a question of knowing which of these methods of exploitation should be considered as being covered by a normal publishing contract, which only mentions the " edition " or " publication " of the work assigned. Finally, Escarra, Rault and Hepp identify, as " inherent faculties " in the patrimonial right of authors " *(a)* the right of reproduction (booksellers' edition, sound edition, etc.); *(b)* the right of execution, recitation, performance; *(c)* the right of adaptation; *(d)* the right of translation; *(e)* the right of radiodiffusion and of television;

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48) Paris, March 2, 1884, cited in Blanc, p. 263 (see also Huard and Mack, No. 1191, p. 437).

49) Paris, March 21, 1865, *Annales* 1865, p. 250 (Huard and Mack, No. 1193, p. 437). See, also, the decisions reported in Huard and Mack, Nos. 1192 and 1194.

50) Paris, December 9, 1905, D. P. 1911.2.362.

51) Paris, March 21, 1939, *Gaz. Pal.* 1939.1.886.

52) Angers, May 3, 1950, D. J. 1950.585.

53) Paris, November 7, 1951, *Annales* 1951, p. 309.

54) Huard, Vol. I, No. 75 (p. 119 *et seq.*).

55) Rault, *Le contrat d'édition*, Paris, 1927, p. 390 *et seq.*

56) Striffling, *Le contrat d'édition*, Paris, 1936, p. 84 *et seq.*

(f) droit de suite". The authors, however, emphasise that here it is a matter of *virtual* rights of exploitation and not of *actual* rights [57]).

It is known that this breaking-down of the rights of the author was retained in the French Bills of the 1930's and that in the post-war Bills, as well as in the Act of 1957, it appears, in the non-limitative enumerations, within the framework of the traditional *summa divisio*. With the exception of the Bill of 1937, cited in this study, these texts do not mention, any more than the classifications proposed by the legal writers now cited, a distinct right on the putting into circulation of copies lawfully manufactured. French jurists remain faithful to the "synthetic" conception of the right of reproduction, referred to above. The analytical method of German writing and case law remains foreign to them on this point. One judgment suffices to show that, despite the principle of the narrow interpretation of assignments, despite the freedom to "split up" the rights assigned and despite the doctrinal attempts to establish distinct prerogatives within the framework of the two main rights recognised by the texts, the courts have remained wedded to the idea of the unity of these rights. In a case in which the heirs of Halévy, Meilhac, de Carré and Philippe Gille took action against the publishing house of Heugel, to whom these authors had assigned, without further precision, the rights in their works, reserving only to themselves the rights of performance, the heirs contended that the contract did not have the effect of transferring to the assignees the right of phonographic recording, a procedure which was unknown at the time when the assignment was concluded. Having established, in accordance with the majority of courts and writers, that phonographic reproduction is a form of publishing — "to publish a work" is "to produce it and circulate it to the public by means of a material and durable fixation" — the Court finally formulated the principle that "the right of publication in respect of multiple objects constitutes a juridical universality, that as regards the authors represented in the proceedings by the appellants, the assignment of this universality is complete and absolute, that, in the absence of any reservation, such an assignment necessarily includes the right of reproduction by all mechanical or industrial processes" [58]).

17. This is not to say that the theoretical question of the nature of the assignment and of the rights transferred has not interested French jurists. Analyses can be found which bear precisely upon the problems which concern us, since they have as their object the question of knowing if, and to what extent, the assignees obtain a *right* of the same character as that of the author himself — let us utilise the German expression: a "real" right, opposable *erga omnes* — or whether they possess nothing more than an obligational right in relation to the author. This question can clearly be of considerable interest in the matter with which we are concerned, because if the author retains his "real right", and only grants an obligational right, penal and civil sanctions protecting the copyright remain at his disposal in relation to the assignee, as in the case of any third party, even were he of good faith. If, on the other hand, the author has parted with his right, and only admits an obligational right in relation to the assignee, his position *vis-à-vis* his co-contractor, as well as in relation to third parties, is quite different. At the same time, the practical importance granted to this distinction depends, manifestly, upon the juridical method adopted by the Courts. It must be placed on record, in a general manner, that if it is possible to cite judge-made solutions in support of one theory or the other relating to the juridical nature of the assignment, these decisions and judgments do not resort explicitly to arguments of a theoretical nature; it is only by virtue of rulings in conformity with the solutions put forward by theorists that they can be cited in this way. As it is impossible to measure with exactitude the influence of different theories upon the law as applied by Courts, it is sufficient to consider, by way of example, certain theoretical studies which are particularly interesting.

The idea according to which the rights granted by the author can be "real rights" or merely "obligational rights" is not often encountered in French writing. However, Huard deals with it in a similar manner to that of the German jurists: "Sometimes", he says, in relation to rights assigned by a publication contract, "it is a real right, property or usufruct which the publisher acquires; sometimes it is an obligational right, the author or his successors in title undertaking to ensure him the enjoyment of the work in respect of which the contract is concluded" [59]). This idea is taken up more amply by the following: "The author or his successors in title cast off in his (the assignee's) favour their property, or a right detached from this property, in which they undertake to assure to him the enjoyment of the work which forms the subject of the contract" [60]). What is important to establish here is that Huard is ready to draw practical conclusions from his analysis. Dealing with the question of knowing how the violation by the concessionaire of contractual limitations should be dealt with, as well as actions on the part of the author which are contrary to his engagements, Huard returns to the distinction which we have just referred to. In relation to the first category of these cases, he asks: "Are these conditions of publication, that the publisher undertakes to observe, or are they limitations of the right that the contract confers upon him? In the first case, the property of the work or, at least, the exercise of this property, belongs to the publisher; if he does not observe the contract, he only commits a contractual fault. In the second case, he must restrict himself within the limits which have been imposed upon him; otherwise, he can rightly be accused of usurping the property of others" [61]). Similarly, acts of publication realised by the author in violation of his obligations are contractual faults or injuries to the right of the concessionary, according to whether the contract has had as its object to assure to him the enjoyment of the work or to grant him ownership thereof [62]).

The French author who has absorbed the influence of the German theories most profoundly is Mr. Rault. After a thorough examination of the possible interpretations of the nature of the publishing contract — in the first place, of the contract to produce an edition — he supports the theories adopted by

57) Escarra, Rault and Hepp, *La doctrine française du droit d'auteur*, 1937, No. 10 (p. 23).

58) Paris, May 1, 1925, D. P. 1925.2.98, with note by Roger.

59) Huard, Vol. 1, No. 66 (p. 112).

60) *Op. cit.*, No. 74 (p. 118).

61) *Op. cit.*, No. 123 (p. 179).

62) *Loc. cit.*

the majority of German specialists, particularly by Allfeld: that the assignee becomes effectively the proprietor of a "slice" of the copyright [63]). However, Mr. Rault does not draw from this classification practical consequences which become apparent only when one of the contracting parties claims that the other has violated his obligation.

18. In the light of the small importance that judges and practitioners have given to the theoretical controversy which we have just evoked [64]), we can abandon it in favour of studying the question *to what extent violation of contractual limitations has been effectively considered as an infringement under the older French legislation.*

A fairly extensive case law exists on this question, although it particularly concerns cases which have no relationsbip with the limitations that may possibly be imposed on the putting into circulation of copies.

Upon certain points, the solutions already appear to exist. Even if the Paris Court decided, in 1843, that a publisher who had obtained the right to publish two editions of a work, each edition consisting of 10,000 copies, but who had manufactured, clandestinely, 15,000 copies of the second edition, could not be considered as an infringer, since, "having dealt with the author in the property of his work, he has himself become proprietor of it" [65]), the judges soon abandoned this opinion. Thus, it appears certain that the edition of a *number of copies* exceeding that which had been agreed exposed the guilty party to the penal sanctions provided to meet infringement [66]). Similarly, the violation of the conditions relating to the *duration* of the permitted exploitation has been considered punishable [67]). Certain decisions concerning authorisations to present cinematographic works on territory strictly defined in the contract placed the violation of *local limitations* among the offences punishable in relation to the property of authors [68]).

Certain other cases have been removed from tbe field of application of Articles 425 and 426 of the Penal Code. This has been so, particularly, in the case of conflicts where a publisher has suppressed or modified the *name of the author* [69]). For other conflicts capable of posing the question whether there has been infringement or merely a contractual fault, it is not easy to enunciate clear principles. Pouillet, in dealing with this problem, seems to be of the opinion that it is essentially a question of fact to be considered in each individual case. "Every violation of the contract" he says "should not be taxed with infringement. It could be that obscurity or ambiguity in the terms of the contract has misled the assignee, or that, without any obscurity in the terms, certain circumstances, certain actions of the author, have led the publisher to think that there was a prolongation or an extension of the contract. In any case, on a parallel occasion, the Courts will often find, in the circumstances of the case, a reason for admitting the good faith of the publisher without imposing correctional penalty, leaving the author to avail himself subsequently of civil remedies" [70]).

We think that the formulation of general principles could be carried a little further. This task, for which it appears possible to utilise to a certain extent the works of German jurists, is not, moreover, only of historical interest; the problem is capable of arising even under the provisions of the 1957 Act. We will consider certain decisions which do not come within the categories dealt with above.

Firstly, it seems certain that if, as Pouillet has said, the contract is capable of causing misunderstanding as to the extent of the rights assigned, or as to tbe modalities of their exercise, then correctional jurisdictions will declare themselves to be incompetent [71]). That is natural: in these cases, an error of fact that constitutes the possibly false interpretation of the terms of the contract by the assignee normally excludes bad faith, which is essential to establisb infringement. But these cases, which can relate to all conflicts capable of arising, including those which we have just analysed above, have no special interest from the point of view of this study.

In tbe following cases, which are of varying character, the judges have decided that *there was no infringement.* An author and a publisber bad entered into a contract in the terms of which the publisher only had the right to publish the first edition of the work in question: now, in order to facilitate the flow of copies from stock, the publisher published tbe work by instalments which were claimed to come from a second edition. Tbis manner of procedure was considered to be only a violation of the coutract [72]). In another case, the publisber, authorised to publish a new edition, presented it as "revised, corrected and augmented", although tbe author had not given his consent to this [73]). Another case, which is not so old (1905) touches more directly upon the problems of putting into circulation, that is to say, of the use made of a copy lawfully manufactured. A company, which bad printed a proof of a work, with the consent of the author, had subsequently utilised this copy in a manner prejudicial to tbe author's interests, witbout seeking his autorisation. The action by the author for infringement failed. The magistrates held that, since the proof did not have culpable origin, its employment for purpose contrary to the instructions of the author was not sufficient to make the assignee an infringer [74]). This decision may be compared with that cited above (No. 15, *in fine*), where the Paris Court, in order to strike at unfair acts involving a copy lawfully manufactured for the private use of its holder, so to speak "criminalised", *ex post*, the copy, as such: the two decisions make evident the difficulties which arise in the absence of a distinct right in respect of copies, and the judicial oscillations that this state of affairs can provoke. Equally, there is occasion

[63]) Rault, *op. cit.*, p. 384 *et seq.* (at p. 388).

[64]) We would add that in the deep-going analysis made by Professor Desbois (*Le droit d'auteur en France*, 2nd ed., Nos. 491 *et seq.*) of tbe assignment of copyrigbt, the problems treated by Huard do not appear.

[65]) Paris, October 18, 1843; see Pouillet, No. 500 (p. 526) and Striffling, *op. cit.*, p. 76 *et seq.*

[66]) Paris, March 9, 1848, Blanc, p. 158; Paris, April 24, 1843, Blanc, p. 112; Paris, April 7, 1892, *Annales* 1895, p. 218.

[67]) Trib. civ. Seine, May 15, 1868, *Annales* 1868, p. 184.

[68]) Bordeaux, February 11, 1930, *Gaz. Pal.* 1930.1.742 and D. P. 1931. 2.124; Trib. corr. Orléansville, May 12, 1949, *Gaz. Pal.* 1949.2.290.

[69]) Trib. civ. Seine, December 31, 1862, *Annales* 1866, p. 43; Trib. civ. Seine, December 6, 1923, *Gaz. Pal.*, May 22, 1924; Paris, May 23, 1874, *Annales* 1876, p. 366. See also Pouillet, Nos. 501 *et seq.* (p. 527 *et seq.*).

[70]) Pouillet, No. 499 (p. 525).

[71]) Paris, July 6, 1853, Blanc, p. 158. Trib. corr. Seine, November 30, 1877, *Annales* 1878, p. 95. Cf. Vaunois, Geoffroy and Darras, *op. cit.*, Div. L, No. 24, with references.

[72]) Trib. comm. Seine, December 30, 1834, Blanc, p. 104 and 158; Huard and Mack, No. 516.

[73]) Judgment of November 2, 1832, Blanc, p. 158 *et seq.*

[74]) Trib. civ. Seine, March 17, 1905, D. P. 1905.2.391.

to compare the judgment of 1905 with the decision of the Paris Court of February 26, 1931, which will be examined later (under this number).

In the following cases, *the violation of contractual clauses has been deemed to be infringement*. A publisher who had obtained the right to reproduce an engraving by means of lithography, proceeded to make photographic copies of it [75]). An industrialist, to whom the proprietor of a fashion journal had undertaken to supply, with exclusive rights, copies of engravings published in the journal, caused the engravings to be copied by photography, and he subsequently published these copies in the course of his advertising [76]). A printer, in the works of whom several journals were printed, had obtained the authorisation of the editor of one of these journals to utilise a column, appearing in that journal, in other journals, which he was printing. The consent of the author had not been given [77]). A composer of music had assigned the complete and entire property in his works. The assignee, who had been authorised to make arrangements of the music, not only made important modifications to the works assigned, but went as far as to borrow motifs from them, which he utilised in his new works [78]).

Finally, in a judgment of 1931, the Paris Court qualified as infringement the making by a manufacturer of gramophone records and the placing on sale of these records — which, in principle, be was authorised to manufacture — without applying to them the stamps indicating the authorisation of the beneficiary of the right of mechanical reproduction [79]).

It appears possible, after this glance at decisions, to formulate at least certain general conclusions. The cases in respect of which the judges have refused to apply the provisions of the Penal Code concern *the modalities of a utilisation which was lawful in principle, and which fell within the quantitative limits of the assignment.* In a general manner, these cases — with the exception of the case of 1905 cited above — related more to the moral interests of authors than to their pecuniary interests; it is the manner of the exploitation of the work rather than the exploitation, as such, which was detrimental to the rights of the author. Litigation in which the offence of infringement has been established relates to *the extent of the assignment*, either as regards the *technical processes* which it involved, or as regards *the object* of the contract: on one of these two points, the assignee went outside the limits imposed by the author and knowingly violated the *quantitative restrictions* to which his rights were subjected. This conclusion is, in essence, in harmony with the principles outlined by the German jurists: it is precisely between the clauses relating to the *extent* of the assignment and those which define *modalities* in respect of it that they have traced the boundary between the restrictive clauses which have "real effect", the violation of which is an infringement of copyright, and the limitations in respect of which contravention only constitutes a contractual fault. But there is not absolute conflict between "extent" and "modalities". When a method of utilisation, for example, the distribution of an edition by book clubs, is firmly established on the market, and has become a normal outlet, side by side with sale to booksellers, the problem arises of knowing whether the assignment extends to the exploitation of the two outlets together: it depends upon the extent of the right which was assigned, defined by the object of the reproduction authorised. This question has not been envisaged in a general form in French law.

The two cases of 1905 and 1931 (as well as the decision of 1887 cited at No. 14 *supra*) show the uncertainty which prevailed precisely in respect of rights in connection with copies lawfully manufactured. In these three cases, there is no doubt as to the legality of the reproduction, as such. In the case of 1887, the holder of the manuscript had violated, if not the restrictive clauses, at least the principles of the right relating to the extent of lawful use; his action was deemed to constitute infringement. In the case of 1905, it was equally a matter of the unauthorised exploitation of a copy, lawful in itself; the accused was acquitted. On the other hand, the company accused in the litigation of 1931 remained within the framework of quantitative limitations; only the modalities prescribed in the contract were unobserved; yet the judges applied the penal provisions.

Therefore, if one could say, in conclusion, that the French jurists — without taking too much account of the theoretical aspects of thc question, and particularly of the distinction between clauses having a "real effect" and limitations of which the effects are restricted to obligational rights — have found solutions, which resemble those of German law, the question whether and to what extent the limitations imposed upon assigned rights are subject to penal sanctions, must be subjected to a reservation precisely in respect of the cases which interest us, that is to say, those which concern the exploitation of copies lawfully manufactured.

19. The clarity which prevails, in part, in the field which we have just left changes into almost total darkness when one approaches the second main question which concerns us: that of *the opposability against third parties* of restrictive clauses. To our knowledge, the question has not been posed under this general form in legal writing [80]). Moreover, it is only one element of this problem which will occupy us here. What is to be understood by "opposability against third parties" [81]) ? The reply, determined by the conflicts which must be taken into account, varies according to the cases. Normally, the categories of third parties interested in the efforts of a contract or of a contractual clause are the creditors of the contracting parties and the persons who have acquired, from one of them, the object of the right to which the clause relates. It is in connection with these two groups that it is necessary to ask whether they are obliged to respect the clause, which they may have known about in advance, or not. Now, when it is a matter of contractual clauses which impose limitations upon the rights assigned by an author to an exploiter, we can restrict

[75]) Paris, March 21, 1865, *Annales* 1865, p. 250.
[76]) Paris, March 11, 1869, *Annales* 1869, p. 282.
[77]) Trib. civ. Seine, May 26, 1905; Pouillet, No. 500 (p. 527).
[78]) Paris, February 1, 1912, *Annales* 1913, p. 16.
[79]) Paris, February 26, 1931, *Gaz. Pal.* 1931.1.780. Cf. also *Gaz. Pal.* 1930.1.742.

[80]) Cf., however, the general study of M. Boulanger in the *Revue trimestrielle de droit civil*, 1935, p. 545 *et seq.*, especially p. 583 *et seq.*
[81]) For an analysis of this problem, see Roubier, *Droits subjectifs et situations juridiques*, Paris, 1963, p. 247 *et seq.*

ourselves to considering three groups. First of all, there are the persons who have acquired rights from the assignor, that is to say, persons to whom he transmits, subsequent to the first assignment, rights capable of coming into conflict with those claimed by the first assignee, and the persons — defined in the same manner — deriving title from the assignee. But the special character of copyright makes it necessary to envisage a further category: persons who, without acquiring any element of incorporeal rights, acquire from the assignee of the author the property of a copy. It is particularly in relation to the persons who derive rights from the assignee that we have an interest in asking, whilst availing ourselves of the method of analysis adopted by Huard and by German jurists, if such a restrictive clause has the effect of *limiting the right assigned* — of outlining, if it may be so expressed, the " slice " of the right which has been detached and assigned — or whether it only *imposes an obligation on the co-contractor of the author*, the observance of which could not be required of persons not privy to the contract. In the first hypothesis, the person deriving title from the assignee, if he does not respect the restrictive clause, infringes the right which has remained in the hands of the author, and finds himself in the same juridical situation as any infringer (whether of good or bad faith). If, on the other hand, it is a case of the second hypothesis, the person deriving title from the assignee incurs responsibility only to the extent of any third party who, knowingly or in good faith, becomes guilty of violation of a contract to which he is not a party. In order next to envisage the case of the person who treats with the author, after the author has parted with a portion of his rights, and to whom the author assigns a right of exploitation of a kind which has already been covered by the first assignment, it is interesting to ask if the controversial utilisation is the subject of a " real " right, or whether it is lawful for the first assignee, by virtue of the obligational right granted by the author. Now, cases of double assignment can only furnish a general idea of the " real " or merely " obligational " nature of the right obtained by an assignment of certain elements of copyright. Consequently, conflicts between two assignees are only of direct interest to us here in rather special hypotheses which, as far as we know, have not been brought before the Courts: let us suppose that the author has, in the first instance, assigned the right of publication, at the same time reserving certain methods of utilisation normally covered by this right, and that be subsequently signs a contract with another assignee, whom he authorises specifically to exploit the work according to the methods of utilisation reserved. In this hypothesis, the nature of the rights assigned only acquires importance if the first assignee encroaches upon the field reserved to the second. The question then arises whether the latter can take legal action for repression. In simple cases of double assignment, the principal question is to know whether the author who has acted dishonestly can be punished as an infringer.

When one finally encounters cases where an author has attempted, by imposing upon an assignee limitations relating to the use of copies, to retain control on the fate of these copies in the hands of their owners, who have not acquired any element of incorporeal right, it is necessary to draw a distinction between two distinct hypotheses. In the one, these limitations concern the methods of usage capable of falling within the definition of the exclusive rights of the author, which include, as in German law, certain acts which are grouped under the notion of " putting into circulation ", distinct from reproduction, or which may be considered, as is the case, at least to a certain extent, according to the " synthetic " conception, which is traditional in French law, as elements of the right of reproduction. In these cases, it is a matter of limitations on the distribution or, more generally, upon the *indirect communication of the work*, and the limitations have, as their object, acts which fall within the monopoly, but it must be stated once again — and the examples cited above (the cases of 1887, 1905 and 1931) already demonstrated this — that the absence of a distinct right on putting into circulation, or at least of a clear definition of the acts of distribution comprised within the right of reproduction, singularly aggravates the difficulties provoked by the conflicts which arise in these cases, and force judges, if they wish to protect the interests of authors, to bring controversial acts of putting into circulation within the framework of a " right of reproduction ", which thereby gains nothing in clarity. In the second hypothesis, the limitations imposed by the author (or his representative) do not concern acts of " indirect communication ", however broadly this notion may be interpreted, but rather what may be called the *material utilisation of copies*, particularly their utilisation for the purposes of direct communication. One cannot categorically affirm that the material utilisation of copies is not of interest in connection with the rights of the author. In effect, he was already protected on two points by French law prior to 1958, against acts of utilisation contrary to his interests: moral right prohibited injury to the integrity of the work[82]); the right of performance was assertable against the use of a copy for direct communication effected without the consent of the author. But for the purpose of this latter right, the identity and the origin of the *copy used*, as such, was immaterial: it would appear evident that if a person were duly authorised to perform the work, neither the right of reproduction nor a possible right on putting into circulation could be invoked to prohibit the utilisation of a copy lawfully acquired. The limitations imposed upon the utilisation of copies for other purposes than indirect communication fall outside the scope of copyright as it is actually defined even in those legal systems where it is most extensive.

However, let us begin with these simple cases, which at least provide some general indications on the reasonings of the Courts, and then consider those examples which exist of conflicts relating to the opposability against third parties of clauses limiting the extent of an assignment or seeking, in some way, to extend copyright by imposing restrictions on the use of copies put into circulation by an assignee.

We will omit from our study conflicts concerning the right of the author himself to reproduce and exploit a work already assigned[83]). We will equally leave aside the problems which can arise, in the case of double assignment, in relation to *proof*

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[82]) See, for example, Paris, March 6, 1931, D. P. 1931.2.88, with note by M. Nast (Camoin case).

[83]) Pouillet, Nos. 306 *et seq.* (p. 343 *et seq.*).

of the two acts. However, it may be indicated that this technical question is not without interest, or it illustrates *the problem of publicity* to which every contract relating to copyright gives rise, once it is invoked in relation to a third party. Pouillet contends that Article 1328 of the Civil Code, according to which simple contracts are only effective in date against third parties as from the date when they are registered, should be applied, and he cites two decisions — old ones, it is true, but one of which emanates from the Supreme Court — in the terms of which a first assignment, which has not been registered, cannot be invoked against the second assignee (of good faith) if it has not been registered, and if the second assignee has fulfilled this formality [84]).

Double assignments give rise to two questions. Can the author be an infringer? How can publication effected by the assignee be qualified? The reply to the first question, which does not interest us directly here, has long been available, after certain judicial hesitations [85]); the author who assigns the same work twice is an infringer, if the material and moral elements of the offence are combined. The principle remains valid under the terms of the Act of 1957 [86]). As regards the second assignee it is evident that he is often acquitted on account of his good faith: if he has dealt with the author himself, and received a manuscript of the work, the circumstances are often such that he had no occasion to suspect fraud [87]). In the event of bad faith, it would appear certain, on the other hand, that the second assignee will be regarded as an infringer, or at least as an accomplice in the offence [88]). There is an old decision in which repressive jurisdiction was declared incomptent to decide an action instituted by the first assignee against the second when, according to the judges, the case only related to the validity of contracts [89]), but this judgment cannot be considered a precedent. The judgment of the Supreme Court of March 25, 1957 (see note 88) excludes all doubt on this point. But if the courts thus affirm the "reality" of assignments of copyright *in general*, and apply, without conditions of publicity, the principle of *prior tempore potior jure*, this does not furnish the reply to the question of the opposability of *restrictive clauses* against third parties.

As far as we are aware, apart from cases of double assignment, there are no decisions except on the problem of the effect of restrictive clauses belonging to the category, dealt with above, of limitations upon the material use of the work. There are clauses by which authors, through their organisations, have taken action to prevent the utilisation of records for broadcast emissions, and which have attracted the interest of jurists. Now, even if it is true, as we think we have shown it to be, that these clauses fall outside the framework of a "right of putting into circulation" [90]), it is not without interest to examine the principal decisions in the matter.

These decisions, given in the case of Poggioli v. Salabert, had as their basis the following facts. The composer, Moretti, had assigned to the publishing house of Salabert, by successive contracts and for specified periods, the right to publish his works. Next, he assigned, by way of the guarantee of a loan made by Poggioli, the sums that would come to him from the Society for the right of mechanical reproduction (SDRM) which, by virtue of a contract with the broadcasting organisations, was collecting a supplementary royalty in respect of the broadcasting of recorded musical works. The publisher protested, claiming that the right to these royalties was an element of the right of reproduction. In the contract concluded between SDRM and the broadcasting organisations, the "surtax" was, in effect, defined as forming part of the "licence of reproduction". Poggioli, for his part, claimed that direct communication to the public formed the basis of the royalty, which accordingly was not included in the assignment of the right of reproduction. The publisher was successful before the Court and the Court of Appeal [91]).

It is clear that in the analysis that we have just made of clauses which have as their object the material utilisation of copies, monies collected in respect of broadcasting do not belong to either of the two categories of rights in question; it is not a matter of "scission" of copyright or of one of its two main elements. On the other hand, it is equally clear that the SDRM, as well as the judges, have considered the "right of compensation" as an element of the right of reproduction analysed — according to the "synthetic" tradition of French lawyers — as the right *to manufacture and to sell copies*. As Professor Desbois has shown, this analysis has certainly been founded upon the fact, of economic rather than juridical order, that the broadcasting of recorded musical works had, as its effect, a *decreased sale of records*, and could therefore be considered as prejudicial to the right of publication in the broadest sense [92]). "The surtax", said the Civil Tribunal of the Seine, "makes impact on the record in like manner as publication utilised with a special objective"; the Paris Court emphasises precisely the effect of broadcasting on the sale of records.

As a result of the foregoing, we find the decisions in the case of Poggioli v. Salabert open to criticism. Professor Desbois, basing himself upon a different analysis of the problems, arrives at the same conclusion [93]).

As far as our study is concerned, these decisions bring nothing which is decisive. If the analysis of the judges is adopted, assignment of the right of publication was total; the problem of the "scission" of the rights of the author did not therefore arise. But the judgment of the Civil Tribunal of the Seine indicates at least a tendency, and foreshadows, if one may say so, a solution which we shall find again in the 1957 Act: in admitting the possibility for the beneficiary of the

[84]) Pouillet, Nos. 285 and 286 (p. 324 *et seq.*).

[85]) Paris, January 29, 1835, Gastambide, *Traité des contrefaçons*, Paris, 1837, No. 109. Cf. also Paris, March 13, 1848, Blanc, p. 157.

[86]) Cass., December 19, 1892, *Annales* 1895, p. 207. For other judgments, see Pouillet, No. 487. For a decision given under the provisions of the new law, see Trib. grande instance Seine, May 7, 1963, in *Revue internationale du droit d'auteur*, No. XXXXI (1963), p. 159.

[87]) Judgment of August 5, 1846, Blanc, p. 95; Cass., June 18, 1847, D. P. 47.1.254; Paris, April 12, 1862, *Annales* 1862, p. 228; Paris, February 23, 1865, *Annales* 1865, p. 148.

[88]) Paris, November 28, 1826, cited in Huard and Mack, No. 510; Cass. (Ch. civ., 1re section), March 25, 1957, *Gaz. Pal.* 1957.2.154.

[89]) Trib. corr. Seine, July 21, 1852, Blanc, p. 94.

[90]) See also Desbois, *Le droit d'auteur*, 1st ed., Nos. 423 *et seq.* (p. 454 *et seq.*), and 2nd ed., No. 287 (p. 329 *et seq.*).

[91]) Trib. civ. Seine, October 25, 1943, D. C. 1944.127 with note Desbois, and *Gaz. Pal.* 1943.2.238; Paris, April 27, 1945, S. 1945.2.63, and *Gaz. Pal.* 1945.1.193.

[92]) Desbois, *Le droit d'auteur*, 1st ed., Nos. 420 *et seq.* (p. 452 *et seq.*).

[93]) *Loc. cit.* and note previously cited.

right of exploitation to retain a certain juridical control over *the purpose* of an edition, that is to say, over the use made of copies derived from it, the Tribunal referred to, rather than affirmed, the idea according to which the determination of the *destination* of copies falls among the prerogatives of the author. This is a radical prolongation of the "synthetic" conception of the right of reproduction, envisaged as a right to manufacture *and to distribute* copies. And one may perhaps conclude that there is also here, implicitly, a recognition of the opposability against third parties of restrictive clauses relating to the destiny of copies. For it is difficult to see the use of a right of control upon the utilisation of reproduction which cannot be exercised against third parties: it is unnecessary to show the complete validity, stemming from the principle of the freedom of contracts, of such clauses in relation to a co-contracting party who submits to them.

The elements at our disposal do not permit going beyond this conjecture, already precarious because it is only based upon a single judgment, the reasoning of which it extends. It would clearly be possible — and we think we have shown (at No. 7 *supra*) that it would be logical — to claim that the solutions adopted in connection with the determination of the penal responsibility of the assignee are equally applicable to the cases of hypotheses in which a clause imposing restrictions on the exercise of an assigned right, and particularly the circulation of copies manufactured by virtue of an assignment of the right of publication, should be opposable against third parties. But to say, where copyright is concerned, that such a limitation applies to all third parties, does not mean, by implication, that a person who violates it makes himself guilty of an offence against the property right of the author, that is to say, of the offence of infringement. Now this conclusion which, as far as we know, has not been reached in French legal writing, encounters at least one serious objection: the position of the third party who has no knowledge of the terms concluded between the author and the assignee from whom he derives his rights (or may be only a copy of a work) differs radically from that of the assignee himself. In a general manner, considerations of juridical security intervene with much greater force in favour of the third party.

20. Our examination of French law prior to 1958 must terminate with the conclusion *non liquet*, as regards one of the principal elements of the question which occupies our minds: in what respects has the author been able to "split up", *with full effect as regards third parties*, his right of reproduction in such a manner that he has been able to retain for himself, or assign to his various exploiters, as large a number as possible of methods of utilisation? One might well ask why this problem has not been raised in France, since it has been so long under study in Germany. In essence, the basic causes of conflicts must be the same. One possible explanation might be that, in France, the total assignments of the right of reproduction, within the framework of which the problem does not arise, are more frequent, and "scissions" of copyright more rare. Whatever may be the case, it must, in conclusion, be placed on record that a precise notion of the putting into circulation of copies has not been evolved and that, on a more general plan, the juridical effects of "scissions" of the right of reproduction have not been defined in a manner that is universally valid.

II. The Act of March 11, 1957

21. Since, as we have already shown, the new French Act does not make provision for a distinct prerogative having as its object the putting into circulation of copies lawfully manufactured, the questions which may be posed in connection with the new text are, in principle, the same as those which we have dealt with when discussing the law as it stood prior to the coming into force of this text: (1) to what extent can an author take action for infringement against an assignee who infringed a clause limiting, in one way or another, the exercise of the right assigned, especially as regards the putting into circulation of copies; (2) to what extent are the restrictive clauses opposable against third parties (in the meaning indicated in No. 19 *supra*)? The task of finding a reply to these questions, already made more difficult by reason of the fact that the judicial dicta and writers' opinions accumulated since the coming into force of the Act of 1957 are still few, would not differ in any way from the task we have just completed in respect of the old law, were it not for certain new provisions which, without explicitly relating to the problems of putting into circulation, nevertheless modify the French system completely and, further, make the problems at issue both more delicate and more important.

It is particularly to Articles 31, paragraph 3, and Article 66, paragraph 3, No. 3, that we make allusion. But before entering upon an examination of these provisions, it is necessary to consider the text in its entirety; it contains several other rules which merit consideration in this study.

22. Let us first indicate certain provisions which, although only interpretative or designed to provide examples, are capable of serving as a basis of the "scission" of the rights assigned. In Articles 27 and 28, the elements of the right of reproduction, and particularly of the right of performance, are enumerated. As regard publishing contracts concerning books, Article 36, paragraph 1, equally furnishes points of contact for an analysis of certain distinct methods of utilisation. Article 30, paragraphs 2 and 3, establish the traditional principle of the mutual independence of the two main rights: assignment of the one does not involve assignment of the other. As regards contracts covering public performance, Article 45 contains rules which go further and which establish certain "scissions" applied, as it were, *ex lege*, to the tacit interpretation of these contracts: the authorisation to broadcast a work does not include authorisation to record the work nor to communicate it to the public by loud-speaker or any similar instrument (paragraphs 2 and 4). The provisions relating to contracts within the field of the right of reproduction contain nothing similar. A close analysis of the Articles devoted to publication contracts would appear to disclose that, despite the breadth of the definition of such contracts (Article 48), many of these provisions apply exclusively, or in the first place, to publication in book form. One cannot clearly see, for example, the application of Articles 51, 59 and 60 to contracts having newspaper or magazine articles as their object. On the other hand, the legislator has specified in another Article,

where he only seeks to speak of works distributed by booksellers, that only publication in book form is involved (Article 36, paragraph 1), and this could furnish several arguments against the narrow interpretation of Article 48, *et seq.* Without extending the analysis of a problem which is not of any direct interest here, we consider that these latter Articles should be applicable to every contract falling within the definition of Article 48, but that certain derogations should be admitted when practical difficulties of an over-riding nature are encountered.

The juridical importance of the enumeration of the distinct methods of utilisation within the two principal rights manifests itself — in terms which are so categoric and general that the interpreter asks himself whether the more detailed provisions of Article 45, paragraphs 2 and 4, actually fulfil a useful function — in Article 30, paragraph 4, in the terms of which the extent of a contract which provides for the total assignment of the right of reproduction or performance is limited to the methods of exploitation provided for in the contract. The term "provided for", used in this text, is not itself free from problems of interpretation. If the parties are explicitly in agreement upon a given method of exploitation, and if it is only the assignment of this method that the assignment formally "provides for", Article 30, paragraph 4, would not be of much use: the normal methods of interpretation would amply suffice to protect the interests of the author. We think it is necessary to give the expression "provide for" a broader meaning: all that is "provided for" within the meaning of Article 30, paragraph 4, are the methods of utilisation to which, in the light of all the circumstances of fact within the framework of which the contract is formed, the parties — and particularly the author — have reasonably been able to give consideration. Thus, the writer who, without restrictions, assigns his "right of reproduction" or of "publication" to a company which only concerns itself with the booksellers' edition, has not "provided for" the publication of the work in newspapers, or for its sound recording. On this point, the analysis of German doctrine in relation to the "theory of finalised assignment" *(Zweckübertragungstheorie)*[94]) would appear capable of providing helpful indications.

In French doctrine, Mr. Huguet has considered the problem that arises from a comparison of Article 30, paragraph 4, of the French Act with Article 38; according to the latter text, the clause of the assignment which is designed to confer the right to exploit the work under a form which was not foreseeable, or was not foreseen at the date of the contract, should be express, and should stipulate co-relative participation in the profits of exploitation[95]). Whilst fully agreeing with the criticism which Mr. Huguet directs against mixing the words "unforeseen" and "unforseeable" in the 1957 Act, we think — in common with Professor Desbois[96]) — that it is methods of exploitation not yet used that the legislator had in mind.

We will equally adopt the solution proposed by Professor Desbois as regards the apparent contradiction of Article 30, paragraph 4, and Article 35, paragraph 1, of the French Act[97]): if, according to this latter provision, the assignment can be *total*, the contract must nevertheless respect Article 30, paragraph 4.

We will indicate, as a matter of secondary importance, two provisions which define the juridical nature of the assignment. Article 54, paragraph 1, deals with the well-established principle according to which the author has an obligation of guarantee towards his publisher. In the terms of Article 39, the partial assignment of copyright has the effect of substituting the person deriving title from the author "in the exercise of the rights assigned, as regards the conditions, the limits and for the duration provided for in the contract, and subject to rendering an account". Without stopping at the question which could be raised by the use of the word "exercise"[98]), we think it is justifiable to state that the provision cited affirms the "reality" in the hands of the assignee of the rights assigned. But it is not merely the matter of the affirmation of a general principle. As Article 39 certainly does not prevent contracts which are simple licences and which, precisely, do not substitute the co-contractor of the author for the author in the exercise of the rights forming the subject of the agreement, it brings no precise reply to the question of knowing whether, and to what extent, the "conditions" and the "limits" in which the "substitution" of the assignee is effected co-incide with the limits of his criminal responsibility, in the event of violation of the contract, nor as regards the question of the opposability against third parties of these conditions and limits. Even less does it resolve the problem of putting into circulation, since no right on this method of utilisation appears among those to which Article 39 applies.

Could it not be deduced from a provision relating to the publishing contract that putting into circulation constitutes, or could constitute, the object of a distinct prerogative? Let us consider Article 56, paragraph 6. According to this text, the publisher may proceed, after the expiration of the period specified in a contract of given duration, during the three years after such expiration, to the release, at normal prices, of the copies remaining in stock, unless the author himself prefers to buy them. Is this not tantamount to affirming that the right of publication is composed of two distinct elements: the right of reproduction — which, in the hypothesis studied in Article 56, paragraph 6, has, by definition, been exercised and exhausted — and the right of diffusing the copies? Now, it is precisely by the "synthetic" conception, traditional in French law, that the drafters of the provision in question take their stand: they start from the principle that once the assigned right of reproduction has expired, the right to sell copies is equally exhausted, precisely because it is an element which is indissociable from this first prerogative, which alone is recognised by the law. Is is only for practical reasons and reasons of equity that the interpretative rule to which we have just alluded was inserted.

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94) See Article 31, paragraph 5, German Act, and Ulmer, p. 292 *et seq.* Cf. in the opposite sense, Desbois, *Le droit d'auteur en France*, 2nd ed., No. 526 (p. 581).

95) See Huguet, *L'ordre public et les contrats d'exploitation du droit d'auteur*, Paris, 1962, No. 177 *et seq.* (p. 129 *et seq.).*

96) Desbois, *Le droit d'auteur en France*, 2nd ed., No. 529 (p. 585 *et seq.*).

97) *Op. cit.*, No. 523 (p. 579 *et seq.*); cf. Huguet, *op. cit.*, Nos. 171 *et seq.* (p. 125 *et seq.*).

98) See Desbois, *op. cit.*, Nos. 491 *et seq.* (p. 550 *et seq.*).

Thus, there is occasion to state, in relation to the provisions so far examined, that if they explicitly affirm certain solutions already adopted by the courts, if they bring clarity to a certain number of points which were previously in doubt — at the same time making somewhat obscure, by equivocal formulae, by terms of double meaning and by ill-co-ordinated repetition, an almost equal number of new points — if they introduce, in particular, elements for an objective delimitation of methods of exploitation in which the two major rights of the traditional *summa divisio* can be "split up"[99]), they do not contain, any more than the earlier texts, provisions which involve an analysis of or a recognition of putting into circulation of copies which have been lawfully manufactured. But one must not stop there. There are still several provisions which definitely import something which is new.

Article 31, paragraph 3, reads as follows:

The transfer of authors' rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer, and that the field of exploitation of the rights transferred shall be delimited *as to its extent and purpose, as to place, and as to duration* (the italics are ours).

We also quote Article 66, paragraph 3:

The president of the civil court shall also be empowered, in the same form [that is to say, by ordinance issued upon request, in accordance with paragraph 2 — our remark], to order:

. . . . .

The seizure, even at hours not provided by Article 1037 of the Code of Civil Procedure, of the copies constituting a reproduction of the work, whether already manufactured or in the process of manufacture, of the receipts obtained and of *copies unlawfully utilized* (the italics are ours).

. . . . .

These two texts are the real *sedes materiae* of the problem which interests us.

23. Article 31, paragraph 3, poses a problem of initial interpretation which will not detain us for long: is this a rule of proof or of form? The problem is raised on the one hand by the absence, in the provision under consideration, of any clear indication of the sanctions for failure to comply with it (cf., however, Article 31, paragraph 4), and on the other hand by the distinctions operated by the legislator, in Article 31, paragraph 1, Article 2, and Article 53, paragraph 1, between different contracts of assignment[100]). As regards this initial question, we associate ourselves with the conclusions of Professor Desbois: Article 31, despite contrary indications in its wording, enunciates a rule of proof[101]), which imposes itself upon the co-contractor of the author or his successors in title.

What are the contracts to which the requirement of a written act, specified in Article 31, paragraph 1, applies? In the light of the text itself, these are contracts for performance and publication defined in Part III of the Act of March 11. Professor Desbois proposes a wider interpretation: even global assignments of the right of reproduction or performance should be subject to the régime of a written act. If not, says this jurist, Article 31, paragraph 3, which requires distinct mention of the rights assigned, would have no justification[102]). The extent of the problem clearly depends upon the more or less broad interpretation that is given to the notion of contracts for performance and publication. Articles 43 and 48 admit fairly varied hypotheses.

Since we are not able, within the framework of this article, to examine this question in greater depth, we must limit ourselves to placing on record, on the one hand, that the field of application of Article 31, paragraph 1, and, further, the provision which interests us particularly — paragraph 3 of the same Article — is limited to certain important contracts: and, on the other hand, that it appears necessary, for reasons indicated by Professor Desbois, to define these contracts broadly. However broad these definitions may be, it is no less necessary to emphasise that if Article 31, paragraph 3, creates a right of control for the author — simply contractual, it is true, but imposed, practically, upon the co-contractor by the law — over the destiny of copies, *this important innovation only operates in one limited domain of copyright.*

Within this domain, it is necessary that the act of assignment should enumerate each right assigned and delimit the field of exploitation as regards its extent and its destination, as regards its locality and as regards its duration. Taken by itself, this provision only serves to confirm the right that authors always have had to limit the extent of an assignment. It is already very important that "scission" should henceforth be the normal procedure. As regards relationships between authors and exploiters, this is a change which effectively guarantees, in its field of application, the juridical security of intellectual creators. But can one speak of a "true right"? In order to answer this question, it is necessary to examine whether the legislator has taken care to match these contractual clauses, which he wishes to impose upon the parties, with the effects and sanctions which characterise the prerogatives recognised *ex lege*. In other words, are the clauses envisaged by Article 31, paragraph 3, opposable against third parties and do they equally carry sanctions?

But let us first briefly examine the nature of these clauses. The preparatory works are silent on this point. The delimitation of the rights assigned as to duration does not give rise to any problem. As regards the "extent" of the assignment, numerous categories of restrictive clauses spring to mind: the number of editions or the number of copies, processes of manufacture of copies, methods of performance, but also — and here we are in the domain of the German "right of putting into circulation" — outlets and methods of distribution. By reserving to himself the right to supply book clubs, for example, the author applies a limitation upon the "extent" of a right of publication granted. As regards restrictions as to locality, these can relate equally to places where the assignee can perform the work, as well as to the territory upon which copies can be lawfully diffused. All these limitations fall, in principle at least, within the categories that we have outlined above (No. 18) in connection with penal sanctions relevant to the restrictive clauses in the earlier law.

By imposing upon the parties mention of "destination", the legislator goes beyond this framework. The text neither

[99]) Cf., on this point, Huguet, *op. cit.*, Nos. 172 *et seq.* (p. 126 *et seq.*); Desbois, *op. cit.*, No. 528 (p. 582 *et seq.*).

[100]) See Huguet, *op. cit.*, Nos. 228 *et seq.* (p. 165 *et seq.*); Le Tarnec, *Manuel de la propriété littéraire et artistique*, 2nd ed., Paris, 1966, Nos. 100 *et seq.* (p. 108 *et seq.*); Desbois, *op. cit.*, Nos. 505 *et seq.* (p. 566 *et seq.*).

[101]) Desbois, *op. cit.*, No. 512 (p. 572).

[102]) *Op. cit.*, No. 521 (p. 577 *et seq.*).

speaks of the destination of the rights assigned, nor of that of the copies manufactured by the assignee, but of the destination of the "domain of exploitation of the rights assigned". But this somewhat inelegant expression will not cause any misunderstanding as to the meaning of the provision: it has, above all, the object of compelling the parties to indicate clearly the use which can be made of the reproductions [103]). This breaks through the precise and narrow limits traced in German law around the right of putting into circulation. It makes way, in contracts of assignment, for clauses which relate to *the material utilisation of copies.* Also, it is not surprising that it is the problem of the utilisation of records for broadcasting — a problem which we examined when speaking of the earlier law — to which Professor Desbois has given thought in his report on Article 31, paragraph 3 [104]).

Thus analysed, the provision examined goes a great distance. In particular, it poses the question of guarantees of the juridical security of third parties. How can this be resolved?

24. Unfortunately, neither the 1957 Act nor the preparatory works in connection with it furnish information permitting solution of the question whether, and to what extent, the "scissions" of the rights assigned, imposed by Article 31, paragraph 3, are opposable against third parties of good faith. Does this mean that our remarks on the earlier law retain their validity?

In order to be able to affirm that Article 31, paragraph 3, has really created, for the benefit of authors, a "*true right*" — as opposed to rights which contractual obligations between the parties can engender — equivalent to the German "right of putting into circulation", it would be necessary to recognise the opposability against third parties of the clauses envisaged in the Article considered, independently of any publicity given by the parties to what has been agreed. For — and this is the most serious practical problem posed by any copyright which extends to copies which have become the property of a third party — the prerogatives of the author are, in principle, opposable *erga omnes,* without any formality or any act of material transfer. In German law, this is so in the case of the right of putting into circulation, and this is why this prerogative has been so carefully delimited by legislation. Has the French legislator been prepared to admit this consequence in relation to the much broader "contractual" right of maintaining control as far as the destination of copies lawfully manufactured?

Professor Desbois does not appear to think so. This eminent specialist says: "In order to make the limitations which he proposes to specify opposable against third parties, it will be both necessary and sufficient for the successor in title to take precautions. Thus, by means of the putting of a mention on records, *radiophonic utilisation* would only be lawful by virtue of a special authorisation" [105]). And Professor Desbois, insisting upon the necessity of not abusing the good faith of third parties, calls for similar measures in respect of volumes, in cases where the author is opposed to their utilisation in a reading-room or a library [106]).

This amount to denying the opposability against third parties, *ex lege,* of the clauses mentioned in Article 31, paragraph 3; it also amounts to an admission that, even in its field of application, which is limited and otherwise difficult to encompass, there exist virtually unlimited restrictions, and that this provision indicates that the author does not enjoy a prerogative as effective as a legal right on the circulation of copies. Upon reflection, objections can be seen. We readily admit that juridical security calls for publicity measures once the contractual restrictions relate to what we have called above the "*material utilisation*" of copies, for example, their use in broadcasting. It is even doubtful whether such measures are sufficient in all cases to impose a check upon the rights of the proprietor. Can the author of a work of applied art, by means of a mere mention, impose upon purchasers of thousands of copies sold a restriction, no matter what it may be, upon the use of the object — a restriction possibly dictated by doubtful commercial motives or by pure eccentricity? Is it not sufficient that the *droit au respect* should safeguard his interests to the extent that the object will not be mutilated or put to a use which will be harmful to the moral right of the author?

But if one then admits the necessity of measures of publicity taken by the author in these cases — whilst reserving the right to doubt their efficacy in certain hypotheses — would it not be justifiable to opt in favour of the opposability against third parties, without such measures, in cases where the contractual limitations bear, not upon the material utilisation of copies, but upon *indirect communication to the public?* If one accepts the reasoning of Professor Desbois, who cites precisely a conflict of this type — the communication of the work by the hiring-out of copies — the answer must be in the negative. We have seen that this problem was not resolved under the provisions of the earlier French law. But that law admitted, in the limit, judicial extensions of copyright. The existence of a modern and complete text closes this "back door". With the silence of the text — and whilst awaiting the position that will be taken up by magistrates — it would appear preferable to incline before the arguments advanced by Professor Desbois as to the need for juridical security and to state, as a consequence, that even the restrictive clauses concerning the indirect communication of works by the circulation of copies requires, in order to be opposable against third parties, effective measures of publicity taken by the author (or his successor in title). Such a conclusion can give rise to practical disadvantages: the author who assigns a right of publication, limited as to place or duration, or the publisher who, with the consent of the author, sells a portion of the copies to a book club, which is authorised only to make them available among its members, should be careful to ensure that the copies bear a mention of the limitations agreed. This procedure is not unknown, in certain circumstances, but it should be made general.

To give a complete idea of the efficacy of the restrictive clauses envisaged in Article 31, paragraph 3, it is necessary to continue, in order to make a survey of the penal provisions, as well as of certain rules of procedure.

103) In like sense, Desbois, *op. cit.,* No. 528 d (p. 584).
104) *Loc. cit.*
105) *Loc. cit.*
106) *Loc. cit.,* note 1.

25. Article 71 of the French Act, which effects a modification of Article 426 of the Penal Code, qualifies as infringement any " reproduction, performance or *diffusion* " of a work made in violation of the rights of the author, as defined and regulated by the law. As far as we are aware, no interpreter of this text has cast any doubt on the understanding that by " diffusion " is to be understood " diffusion by any process whatever, by words, sounds or images ", which constitutes, according to Article 27, an element of the notion of *performance*. The redundancy of which the legislator could be accused, in this hypothesis, is explained by Professor Desbois, who specifically supports the above interpretation: " These two expressions have been coupled together, in order to emphasise the concordance between the field of application of penal sanctions and that of offences against the right of performance, such as it is, if not defined, at least tentatively exemplified in the enumeration of Article 27 [107]). The preparatory works contain nothing that helps to elucidate the meaning of the provision considered. However, in the explanatory statement of the governmental Bill deposited in 1954, it is stated that " infringement is not only a matter of reproduction, but equally of all means of performance or of diffusion " [108]). This formulation, which brings " diffusion " nearer to " performance " and contrasts these two terms with " reproduction ", gives no support to the interpretation of Professor Desbois. It dissociates " diffusion " from " reproduction " and groups it with " performance " in a manner which might tempt the conclusion that one has envisaged together the acts which comprise, in contradistinction to the preparatory act of reproduction, *the communication of the work to the public.* However, given that neither earlier theory, nor case law, nor the Act of 1957, recognise a distinct right on the *diffusion of copies*, the interpretation of Professor Desbois should be retained, were it not for certain features of the new text which disturb the apparent clarity of Article 71.

Thus, there can be found in Articles 48, 49, paragraph 2, 50, paragraph 2, and 55, paragraph 1, the word " diffusion " utilised to designate precisely the distribution of copies manufactured by a publisher. If Article 55, paragraph 1, does not give rise to any doubt, since it is explicitly indicated that it is the diffusion " of copies " that is involved, the same does not apply as regards the other provisions cited, where "diffusion", coupled with " publication ", can equally relate to the " work ". And in Article 57 it is evident that it is the " work ", and not the copies, which forms the subject of the " diffusion " realised by the publisher.

On the other hand, as we have already stated, " diffusion " appears in Article 27 as an element of the notion of performance. But it is well to indicate that in places where the word is understood in this sense, the legislator always speaks of the " diffusion of words, sounds or images " (Article 27, Article 45, paragraph 1) or of " radiodiffusion " (Article 45, paragraphs 1, 2 and 4). And this latter term does not apply only to emissions of *sound*, since Article 45, paragraph 2, prohibits the recording of the " radiodiffused " work by means of instruments carrying " fixations of sounds and images ", and Article 45, paragraph 4, reserves the communication to the public of the " radiodiffused " work, not only by loud-speaker, but also by " any other analogous instrument transmitting signs, sounds or *images* ".

Thus, if one adheres strictly to the text of 1957, and starting with the hypothesis that the terminology of this text is logical, coherent and free from redundancy, the mention of " diffusion " as a distinct element of the exclusive right in Article 71 should be understood as a reference to the indirect communication of the work. However, four arguments militate against this interpretation.

First, it is the absence, in the provisions defiuing the patrimonial right, of any reference to such a prerogative: it cannot be seen how a penal provision could sanction a right which is not recognised. The same objection could be raised, it is true, in relation to Article 70, paragraph 2, which represses the sale, export and import of infringing works, for one finds nowhere, in the definitions of exclusive right, a distinct right on the sale of works which form the subject of a right of reproduction. But here our historical study comes to the rescue: we have seen that in the French conception, the right of reproduction is analysed, traditionally, as the right to manufacture and place on sale. Moreover, it is natural that it is desired to strike at the sale of copies *unlawfully manufactured:* it is the most important act of complicity. This consideration does not arise in connection with the putting into circulation of copies produced with the consent of the author.

Secondly, examination of the text of 1957 reveals that the notion of " diffusion " has a double use, which makes impossible the conclusions based upon the idea that it would apply only to acts of diffusion envisaged in Articles 48, 49, paragraph 2, 50, paragraph 2, 55 and 57. Article 41, point 3, speaks of " diffusion ", even integral, by way of the press or " radiodiffusion " of a work. Here the term considered has an entirely general meaning: it includes all material operations by which a work can be *disseminated.*

Then, the idea according to which " diffusion ", in Article 71, would not be related to the acts defined in Article 27, because mention of these acts side by side with " performance " would constitute a redundancy, is refuted by the existence, in other provisions, of similar repetitions: thus, Article 66, paragraph 2, and Article 67, paragraph 1, speak of " public performauces or executions ", although " execution " falls among the methods of performance indicated, by way of examples, in Article 27.

Finally, the silence of the preparatory works admits, having regard to the state of French law prior to the Act of 1957, an argument which carries a certain amount of weight. For it appears somewhat improbable that an innovation so radical as the introduction of a penal sanction on the unauthorised putting into circulation of copies lawfully manufactured would have been introduced without offering a few explanatory remarks.

For reasons which we have just indicated, we should conclude that " diffusion ", in Article 71 of the French Act, does not relate solely to the indirect communication of a work, realised by the putting into circulation of copies [109]). On the

[107]) Desbois, *op. cit.*, No. 757 (p. 822).
[108]) *Revue internationale du droit d'auteur*, No. V (1954), p. 157.
[109]) Cf. our *Europeisk upphovsrätt, Stockholm*, 1964, p. 50.

other hand, we would doubt whether the word only envisages diffusion of sounds and images, an element of the concept of performance (Article 27). It is more probable that it is the general meaning of "dissemination" (Article 41, point 3) that should be given to this expression. This interpretation helps to explain the passage in the explanatory note that we have just cited, where "performance" — a term designating any *direct* communication to the public — is coupled with a word which equally covers, in its generality, acts of *indirect* communication. If this is the case, Article 71 would apply penal sanctions, among others, to the contractual clauses indicated in Article 31, paragraph 3, and would include, but without exclusively referring to them, the contractual "rights" established by this latter provision. This idea finds support in Article 66, paragraph 3, subparagraph 3, and Article 73, paragraph 1. These texts speak of seizure and confiscation of the proceeds of an unlawful reproduction, performance or diffusion. If the word "diffusion" only figured in these provisions as a reference, included superabundantly and as a precaution, to an important element of the right of performance, only proceeds from a reproduction or a performance would be subject to seizure and confiscation. If, on the other hand, "diffusion" in Articles 66 and 73 means "dissemination" within the meaning of Article 41, point 3, seizure and confiscation would apply equally to receipts derived from the putting into circulation of copies lawfully manufactured, realised in violation of the contractual clauses limiting a right assigned as regards locality and destination. This would be even more logical, since Article 66, paragraph 3, subparagrapb 2, contains a provision which permits, in these cases (as we will show at No. 26 *infra*), *the seizure of the copies themselves*. Now if, at the otber two places, where the combination of the words "reproduction, performance and diffusion" appears — Article 66, paragraph 3, subparagraph 3, and Article 73, paragraph 1 — the term "diffusion" has this wide meaning, it would seem to be beyond doubt that tbe tbird passage — Article 71, which falls between the two — should be interpreted in the same manner.

But the conclusion that the penal responsibility instituted by Article 71 comes into play in relation to indirect communication realised contrary to the rights of authors, that is to say, in violation of a restrictive clause included in a contract of assignment[110]), does not decide the question of the field of application of sanctions.

Since we have just shown that the restrictive clauses envisaged in Article 31, paragraph 3, are likely to be opposable against third parties only to the extent that such third parties have been warned of them by publicity effected by the author, and since it appears justifiable to affirm that third parties who have not been warned of a contractual restriction should, therefore, *a fortiori*, be placed outside the reach of penal proceedings, the cases of assignees themselves, and third parties who have knowledge of the restriction, remain to be considered.

Here, at least, it appears evident that the 1957 Act has shed some light. For once it has been admitted that Article 71 covers acts of indirect communication, the fact that Article 31, paragraph 3, imposes upon parties delimitation of the rights assigned should suffice to ensure that every violation, made in bad faith, of a restrictive clause of the type envisaged in this last provision, should be subject to criminal sanctions. Penal responsibility should, moreover, extend to acts which are contrary to a contractual limitation, even if such limitation does not relate to indirect communication, but to material utilisation of the work[111]). This extension is motivated — as Professor Desbois clearly shows — by the symmetry which exists, in the law of 1957, between the conditions required for seizure in respect of infringement and those subject to penal sanctions[112]).

In conclusion, it may be stated that the "synthetic" conception of the right of reproduction, which includes acts of sale into the orbit of that conception, is not dead, despite the partial autonomy which the 1957 Act has conferred upon indirect communication. It is true that the Paris Court, in a recent case[113]), has assimilated to illicit reproduction the putting on sale of certain cinematographic sound-tracks, which the owners wished to be destroyed. This case — which shows, like that of 1887 (No. 14 *in fine supra*), to which it bears resemblance, the difficulties which arise, in certain circumstances, from the absence of a distinct right on putting into circulation — could not be decided on the basis of the provisions which have occupied our attention, since there was no contract of assignment specifying the conditions of the circulation of the sound-track.

26. A few words only will suffice to show the importance of Article 66, paragraph 3, subparagraph 2, to which we have already referred: according to that text, the president of the civil tribunal can order the seizure of *copies unlawfully utilised*. It appears evidcnt that the provision envisages reproductions, the manufacture of which was legal, but the use of which is contrary to a restrictive clause. Professor Desbois cites examplcs of a book distributed outside of the territory agreed, or of a record utilised contrary to the stipulations governing its sale, for the purposes of radiodiffusion[114]). Thus, the procedural rule includes an indication of the effects that French legislation has sought to give to restrictive clauses in contracts of assignment.

D. Conclusion

27. The comparison of the "right of putting into circulation", as it has long figured in German legislation, and the provisions of French law which, as regards their practical functions, correspond to this prerogative of the author brings out, in relief, one predominant major question: how can the interests of the author be reconciled with the exigencies of juridical security which third parties may oppose to them? How is it possible to delimit the "reality" without publicity in respect of certain rights and fractions of rights which are liable to conflict, in particular, with the corporeal property of persons who are completely outside the network of contractual clauses which encompass the exploitation of an intellectual work?

110) Desbois, *op. cit.*, No. 749 (p. 815 *et seq.*).

111) In the same sense, Desbois, *op. cit.*, Nos. 730 (p. 795 *et seq.*), 749 (p. 815 *et seq.*).

112) *Op. cit.*, No. 730 (p. 796 *et seq.*).

113) Paris, January 21, 1963, J. C. P. 1963.II.13255, note Delpech.

114) Desbois, *op. cit.*, No. 720 d (p. 786 *et seq.*, with note 1).

The German solution has the advantage of clearness. It consists in the institution of a distinct prerogative on the "putting into circulation" of copies (or of the single copy) of a work. This prerogative, cleared of certain well-defined exceptions, expires precisely at the moment when conflicts with persons who are outside the contracts concluded with the author threaten to arise — at the moment when the transfer of the property of the copy to a third party is effected with the consent of the owner of the right. From this point, the author, as far as this particular copy is concerned, only retains the right of access (Article 25 of the German Act), the "*droit de suite*" which exists in relation to works of art (Article 26 of the German Act) and the right to receive a royalty in respect of the professional hiring-out of the copy (Article 27 of the German Act). Outside of these prerogatives, the moral right — with the exception always of the right of first publication (Article 12 of the German Act), normally exhausted with the first communication to the public — imposes certain limits upon the freedom of the proprietor of a copy to do what he wishes with it. From a practical point of view, the right of performance equally constitutes a kind of negative servitude over the copies. The utilisation of these copies is further subordinated to the limitations which result from the "neighbouring rights" recognised by the Act of 1965.

The recognition of a right which is absolute and opposable against third parties on the putting into circulation of the work resolves, as we have seen, a certain number of practical problems. On the other hand, the German legislator has done nothing more than furnish an outline of the desirable solution to the problem of the effect of "scissions" operated by contract in relation to this right, as in other prerogatives of the author. Here, courts and writers, basing themselves upon the principles recognised in the matter of real corporeal rights, have acquired a certain number of solutions which appear acceptable.

French solutions are more difficult to express in a few formulae. The right of putting into circulation is absent, and thus a group of "scissions" which are of practical importance are deprived of legal points of contact: this gap equally creates problems as regards practices which are manifestly improper, but which do not comprise either the unlawful manufacture of copies or the sale of copies so manufactured.

But the French legislator, desirous of protecting authors, has, so to speak, not only legalised "scissions", but has imposed them upon parties by a rule relating to the form of contracts, of which the field of application and the sanctions pertaining to them are not perfectly clear. Further, the legislator has not defined the effects, in relation to third parties, of the contractual clauses thus rendered obligatory. Uncertainty prevails, particularly as regards the publicity required to assure the opposability of these clauses against third parties. The application of criminal sanctions, on the other hand, appears certain, and also the possibility of seizure for infringement.

Despite the doubts which exist in respect of the effects of the clauses of limitation, these should bear, not only upon the extent, the territorial limits and the duration of assignments, but also upon the destination of copies, independently of the question whether these restrictions fall within the framework of the prerogatives of the author defined by the law, or whether they concern the material utilisation of reproductions.

If the question arises of international regulation of the control which authors should possess over the circulation of their works, we think that it should be in the direction of the creation of a distinct and well-defined right in respect of the diffusion of copies. Such a solution is clear, universal and relatively simple.

The practical question to which the French system brings a solution which will not be found in German law — and which one could not logically expect to find there, since it stems from the definition of "putting into circulation" — is that of *the radiodiffusion of records and other recordings*. One might say, in effect, that it is precisely this question that was present in the mind of the French legislator. Now, if it is desired to adopt the German system in the matter of putting into circulation, but to resolve that particular question in accordance with the French system, the matters to be regulated are so particularised and so clearly delimited that they could be established, side by side with a right of putting into circulation, by a distinct prerogative authorising or prohibiting the utilisation of certain recordings for certain specified purposes. We think it would be preferable so to resolve the problems, and to designate them by their names, rather than to establish, on their account, a régime of quasi-universal extent which, by reason of being ill-adapted to the totality of the matters subjected to it, would be liable to give rise to new problems, as numerous as the old ones which it solved.

Stig STRÖMHOLM
Professor at the Faculty of Law,
University of Uppsala

INTERNATIONAL ACTIVITIES

14th Session of the General Conference of Unesco

(Paris, October 25—November 30, 1966)

Declaration of the Principles of International Cultural Co-operation

Complying with the wish expressed by the Director-General of Unesco that the Declaration of the Principles of International Cultural Co-operation, adopted by the General Conference of Unesco on November 4, 1966, at its 14th Session, should be widely disseminated, we reproduce below the text of that Declaration. (Ed.)

The General Conference of the United Nations Educational, Scientific and Cultural Organization, met in Paris for its fourteenth session, this fourth day of November 1966, being the twentieth anniversary of the foundation of the Organization,

Recalling that the Constitution of the Organization declares that "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed" and that the peace must be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind,

Recalling that the Constitution also states that the wide diffusion of culture and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern,

Considering that the Organization's Member States, believing in the pursuit of truth and the free exchange of ideas and knowledge, have agreed and determined to develop and to increase the means of communication between their peoples,

Considering that, despite the technical advances which facilitate the development and dissemination of knowledge and ideas, ignorance of the way of life and customs of peoples still presents an obstacle to friendship among the nations, to peacefull co-operation and to the progress of mankind,

Taking account of the Universal Declaration of Human Rights, the Declaration of the Rights of the Child, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations Declaration on the Elimination of all Forms of Racial Discrimination, the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, proclaimed successively by the General Assembly of the United Nations,

Convinced by the experience of the Organization's first twenty years that, if international cultural co-operation is to be strengthened, its principles require to be affirmed,

Proclaims this Declaration of the principles of international cultural co-operation, to the end that governments, authorities, organizations, associations and institutions responsible for cultural activities may constantly be guided by these principles; and for the purpose, as set out in the Constitution of the Organization, of advancing, through the educational, scientific and cultural relations of the peoples of the world, the objectives of peace and welfare that are defined in the Charter of the United Nations:

Article I

1. Each culture has a dignity and value which must be respected and preserved.
2. Every people has the right and the duty to develop its culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

Article II

Nations shall endeavour to develop the various branches of culture side by side and, as far as possible, simultaneously, so as to establish a harmonious balance between technical progress and the intellectual and moral advancement of mankind.

Article III

International cultural co-operation shall cover all aspects of intellectual and creative activities relating to education, science and culture.

Article IV

The aims of international cultural co-operation in its various forms, bilateral or multilateral, regional or universal, shall be:

1. To spread knowledge, to stimulate talent and to enrich cultures;
2. To develop peaceful relations and friendship among the peoples and bring about a better understanding of each other's way of life;
3. To contribute to the application of the principles set out in the United Nations Declarations that are recalled in the Preamble to this Declaration;
4. To enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life;
5. To raise the level of the spiritual and material life of man in all parts of the world.

Article V

Cultural co-operation is a right and a duty for all peoples and all nations, which should share with one another their knowledge and skills.

Article VI

International co-operation, while promoting the enrichment of all cultures through its heneficent action, shall respect the distinctive character of each.

Article VII

1. Broad dissemination of ideas and knowledge, hased on the freest exchange and discussion, is essential to creative activity, the pursuit of truth and the development of the personality.
2. In cultural co-operation, stress shall he laid on ideas and values conducive to the creation of a climate of friendship and peace. Any mark of hostility in attitudes and in expression of opinion shall he avoided. Every effort shall he made, in presenting and disseminating information, to ensure its authenticity.

Article VIII

Cultural co-operation shall he carried on for the mutual henefit of all the nations practising it. Exchanges to which it gives rise shall he arranged in a spirit of hroad reciprocity.

Article IX

Cultural co-operation shall contrihute to the estahlishment of stahle, long-term relations hetween peoples, which should he suhjected as little as possihle to the strains which may arise in international life.

Article X

Cultural co-operation shall he specially concerned with the moral and intellectual education of young people in a spirit of friendship, international understanding and peace and shall foster awareness among States of the need to stimulate talent and promote the training of the rising generations in the most varied sectors.

Article XI

1. In their cultural relations, States shall hear in mind the principles of the United Nations. In seeking to achieve international co-operation, they shall respect the sovereign equality of States and shall refrain from intervention in matters which are essentially within the domestic jurisdiction of any State.
2. The principles of this Declaration shall he applied with due regard for human rights and fundamental freedoms.

NEWS ITEMS

FEDERAL REPUBLIC OF GERMANY

Inauguration of the New Headquarters of the Max-Planck-Institute for Foreign and International Law of Patents, Copyright and Competition, Munich

The *Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht* (Max-Planck-Institnte for Foreign and International Law of Patents, Copyright and Competition), and the *Institut für gewerblichen Rechtsschutz und Urheberrecht der Universität München* (Institute for Industrial Property and Copyright of the University of Munich) inaugurated their new headquarters in Munich, Siehertstrasse 3, on Octoher 17, 1967.

The ceremony was attended hy several hundred guests coming from some twenty different countries. Professor G. H. C. Bodenhausen, Director of BIRPI, was among the speakers who greeted the new Max-Planck-Institute and its Director, Professor Eugen Ulmer.

The Institute's new headquarters include spacious facilities for its lihrary which constitutes an exceptionally rich collection of works on intellectual property suhjects. The collection, containing approximately 15,000 volumes, is organized into sections hy countries, and each section is suhdivided according to the main hranches of the law of intellectnal property.

The Institute has some 50 collahorators, half of them with academic degrees. In addition to its scientific research tasks, the Institute lays great emphasis on the training of a new generation of scientists in the field of intellectual property law. In this connection, the Institute accepts also foreign scientists as guest collahorators.

The inauguration was followed by lectures given hy Professor Eugen Ulmer, Professor Friedrich-Karl Beier, Miss Barhara Ringer, and Mr. Gert Kolle.

OBITUARY

Jean Vilbois

It is not without emotion that the writer of these lines is performing the task suggested to him by Professor Bodenhausen in the name of BIRPI. His task is not simply to review the works of an author whose name and works, alone, are familiar to him, to approve unreservedly or to criticize the opinions of that author; he must render homage to the memory of a man who was his friend.

It has been many years since I first shook the hand of Jean Vilbois. It was at Lucerne, in the spring of 1948, when the International Literary and Artistic Association (ALAI) — taking up its activities again after the somber years of a merciless war — was holding a seminar prior to the Brussels Conference. And, as the result of a strange symmetry, the last stage in the cordial, trusting relationship I have always had with him had as its setting the city of Stockholm, where the Conference of Revision of the Berne Convention was held last summer. I shall never forget one evening in June when, in the company of Mr. Marcel Boutet, President of the ALAI, I saw him off at the railway station: he had just exhausted the last of his strength in the service of the French Delegation, for whom he acted as advisor; his health had become steadily worse and no longer allowed him to continue to offer the assistance to which he had wholeheartedly devoted both his intellect and his experience, despite fatigue and suffering. I shall remain haunted by a smile which, when the train started, was full of affection and, at the same time, regret and a horrible apprehension.

The entire life of this lost friend was dominated by copyright; he sacrificed himself unceasingly to copyright, with as much enthusiasm as selflessness. His vocation came to him very early in life, for, when he was a child, the problems raised by the protection of the works of the mind were often brought up in his presence by his father, who, in one of the provinces of the North of France, was the delegate of a large society of authors. It is not, then, surprising that, in 1928, having finished his law studies, which had been interrupted by World War I during the course of which he was seriously wounded at Mont Kemmel, he defended, before the Paris Faculty of Law, a widely remarked thesis on the subject "*le domaine public payant*"! In private, he was quite willing to describe the work that went into the preparation of his thesis and the ceremony of defense: the members of his jury were struck by the fullness of his information, the clarity of his statements, the originality and correctness of his views. More than once, I was present when he expressed his regret that circumstances had not permitted him to take the competitive "*agrégation*" examination. His professors had advised him to prepare himself for the teaching profession, for which he was naturally gifted as he so loved to study, explain and convince. At least his thesis did not add to the collection of papers that are stacked away on the dusty shelves of a Faculty library, never to have the comfort of a compassionate glance. It is just as interesting today as it used to be, for the problem — which was new at the time he so masterfully dealt with it — has never ceased to be current. In fact, the institution he described and defended was almost accepted by the French legislature, a few years before the Parliament took up the discussion of the bill which became the Law of March 11, 1957.

This work helped to decide the destiny of our friend: the chairman of the Intellectual Property Committee, Professor Jean Escarra, who, as early as 1945, had been entrusted with the preparation of a law on literary and artistic property, called for his assistance. From that time on, no one was as faithful as he to the meetings which became increasingly frequent over a period of twelve years: many are the provisions which, if not drafted by his hand, at least drew inspiration from his observations and advice. Numerous committees, meeting under the auspices of the Ministry of National Education or the Ministry of Arts and Letters, benefited from his valuable counsel. It was thus that he was instrumental in setting up the *Caisse Nationale des Lettres* (National Letters Fund) for the benefit of which an extension of copyright in respect of literary works was arranged: the idea behind the championing and exulting of the *domaine public payant* thus made its way in a different form.

It was, however, within the framework of the International Literary and Artistic Association that he demonstrated the full extent of his abilities. The secretariat, which he was in charge of for many years, provided him with a challenge which was equal to his capacities. He was not content to perform with exactness the daily tasks involved and to be constantly willing to serve those who sought counsel and information. His duties led him to attend most of the successive meetings of committees of experts and international conferences convened over the past twenty-odd years, whether in order to elaborate the Geneva Convention, revise the Berne Convention, or prepare the Rome Conference concerning neighboring rights or that of the Hague Agreement concerning "designs." Gifted with an impressive memory, he took in all of the subtleties of the debates. In fact, there is no denying that, in France, no one else had such a vast knowledge of the field of copyright. On recognition of this, he was awarded the Cross of Knight of the Legion of Honor and the rosette of Officer of the Order of Arts and Letters. His close friends used to urge him to put his knowledge and experience down in writing, but he was modest and — no doubt out of shyness — hated to be in the limelight. Everyone who knew him will regret losing him, for it was not enough for him to accumulate information: in the silence of his own office, he reflected at

such length that no question caught him unawares. With courage, and sometimes with an impetuosity indicative of a sort of religion concerning copyright, he defended his opinions, which he continued to hold despite the passing of time. All those who have had the privilege of conversing with him will remember his remarks, the originality of which was occasionally tinged with biting wit. He loved argument and readily cultivated a spirit of contradiction, in fact so much so that his friends used to amuse themselves by maintaining the opposite of what they really thought, so they could admit he was right while not being wrong themselves. This reflective man, who at times took on a solitary air, enjoyed the pleasures of conversation and social life: he could appreciate a good wine, the color of a flower, or the piquancy of a witty remark, just as much as the subjects of learned discourse.

His silhouette and personality were familiar to many of the readers of this review, for he had become their friend. All of them will unite in rendering homage to the memory of a good man who combined the erudition of intellectual property with conscience and an unwavering devotion to the causes he felt were just.

Henri DESBOIS
Professor at the Faculty of Law
and Economics, Paris

BOOK REVIEWS

Les conventions internationales [The International Conventions], by *André Françon*. Extr. Juris-Classeur de droit international, Droit international commercial, Propriété littéraire et artistique, Fascicule 563-B, No. 2, p. 28. Paris, 1966.

There are many works dealing, among other questions in the field of copyright, with the protection granted to authors at the international level. However, it is not easy to find such texts where the essential principles of protection are set forth so clearly and at the same time so concisely as in this case. Let us also add that the author of this excellent work did not merely bring out and comment the principles governing the protection under the provisions of the Berne Convention and the Universal Copyright Convention; he also made a comparison between the two. A separate chapter is devoted to Panamerican conventions and to the Rome Convention on neighbouring rights.

This work will undoubtedly prove to be very useful to all those who wish to get acquainted with the spirit and the machinery of the international copyright protection.

* * *

Urheberrecht der Sowjetunion — Einführung und Quellen [Copyright Law in the Soviet Union — Introduction and sources], by *Dietrich A. Loeber*. A volume of IX + 212 pages, 24 × 17 cm. Alfred Metzner Verlag, Frankfurt/Main-Berlin, 1966.

As indicated in the title itself, this book consists of two parts. The first gives a detailed survey of basic elements in this matter. After a general comment, the author examines in turn the following aspects of the Soviet copyright law: protected works, owner of copyright, author's rights, limits set to these rights, *droit moral*, term of protection, legal succession, consequences of infringements of copyright, relation to trademark law, and neighbouring rights.

The second part includes a detailed list of laws and regulations, a list of international agreements concluded by the Soviet Union, a collection of summarized court decisions, including not only the decisions of Soviet high courts and of the Moscow city court, but also a certain nnmber of cases laid before foreign courts. A bibliographical list contains, in two separate parts, books published in the Soviet Union and abroad, as well as other sources of law (official gazettes, collections of laws, collections of court decisions, legal periodicals). A selection of legal texts (reproduced both in the original and in German translation) is added at the end of the book.

In his introductory remarks, the author points out that the copyright law in 15 federal republics is essentially the same, notwithstanding the specific features in each of them. On the other hand, the number of legal texts dealing with copyright is increased by laws and regulations in the field of labour and administrative law. In his opinion, one of the most important peculiarities of the Soviet copyright law is that it includes certain elements of labour law. Another peculiarity of that law is that it is to a large extent penetrated by administrative elements; that is due to a highly developed system of centralized planninig in the field of literature, arts and sciences.

When speaking of the international aspects of the Soviet copyright law, the author emphasizes that the works of a Soviet citizen are also protected abroad, while the works of foreign authors are given protection only if they have been first published in the Soviet Union or, when unpublished, if they are situated therein.

The anthor does not agree with a statement according to which the Soviet literatnre on copyright law is relatively small. His own book is an important contribution to the foreign literature on the subject. M. S.

Pneumatiki Idioktesia [Law of Copyright], by *Georges Koumantos*. A volume of 347 pages, 24 × 17 cm. Athens, 1967.

The only purpose of this brief information is to draw the attention of our readers to the existence of an important new work on copyright in Greece. The author of this work is already well known, not only in his country hut also abroad, by several articles puhlished in international reviews.

A table of contents and a brief summary in French have been added to the book, so that its suhject matter does not remain entirely unknown to those who are not able to appraise its value by reading the original.

It is important to emphasize that one chapter of the book deals with the sources of copyright and the international protection. The major part of it is devoted to the two international conventions for the protection of copyright (the Berne Convention and the Universal Copyright Convention).

* * *

Copyright Thought in Continental Europe: its Development, Legal Theories and Philosophy — A selected and annotated bibliography, by *Francis J. Kase*. A volume of X + 85 pages, 28 × 21 cm. Fred B. Rothman & Co., South Hackensack, N. J., 1967.

According to the author's Preface, the purpose of this hibliography is to provide a list of works on the development of copyright thinking on the European continent, with particular reference to Germany and France. In actual fact, it is more than that. In the introduction dealing with the concept of copyright, the author also gives a summarized outline of the ten leading theories in this field.

The main body of the hook is divided into two chapters, the first one containing monographs, and the second articles. Each title is followed by a brief note on the content of the work. There is also a list of the bibliographies consulted, as well as an index of authors at the end of the hook.

In her Foreword to this hook, Miss Barbara A. Ringer writes: "For an American lawyer or copyright scholar, a careful reading of Frank Kase's monumental hihliography is likely to prove an unsettling as well as a rewarding experience." One should add that it will be equally useful to European readers. M. S.

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Le contrat d'édition musicale [The Music Publishing Agreement], by *Nicolas Rouart* (doctoral thesis). One volume of 311 pages, 26 × 20 cm. University of Paris. Facnlty of Law and Economics, Paris, 1967 (roneographed text).

The music publishing agreement occupies a very special place in the field of contracts relating to the various forms of using intellectual works. This is not only because of its special nature as regards publishing agreements in general hut also because it includes accessory stipulations concerning so-called subsidiary rights. In the opinion of the author of this dissertation, such an agreement is in actual fact an assignment. He therefore considers that, strictly speaking, this agreement is not confined within the framework of articles grouped together in Chapter II of the French Law of March 11, 1957, under the heading "Publishing Contracts." However, as the same legislative provisions must be applied equally to musical works and to literary works, the author was ohliged to hase his study on these provisions.

The first part of his study deals with the relations hetween the composer and the publisher (definition, conditions of the contract's validity,

obligations of the publisher and of the author, termination of contract). The second part, devoted to the publisher's relations with the users, is much more specific but also relates, to a large extent, to the structure of the societies of authors existing in France (SACEM, SACD, BIEM, SDRM), as well as to contracts for the hire of orchestral materials.

In conclusion, the author stresses that the role of music publishers has evolved considerably during the course of the past few decades. In contrast to the Ninetheenth Century when radio and phonograph records were still unknown and printing had to be done on a large enough scale to supply the greatest possible number of orchestras, it is now quite sufficient to print 50 copies provided that a publicity effort is made which will ensure the quasi-mechanical dissemination of the work to the general public.

On the other hand, the music publisher is able to obtain a substantial portion of the amounts paid by record manufacturers as mechanical reproduction rights.

M. S.

CALENDAR

Meetings of BIRPI

Date and Place	Title	Object	Invitations to Participate	Observers Invited
1967				
December 18 to 21, 1967 Geneva	Interunion Coordination Committee (5th Session)	Program and Budget of BIRPI	Belgium, Brazil, Ceylon, Czechoslovakia, Denmark, France, Germany (Fed. Rep.), Hungary, India, Italy, Japan, Mexico, Morocco, Netherlands, Nigeria, Portugal, Rumania, Spain, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom, United States of America, Yugoslavia	All other Member States of the Paris Union or of the Berne Union
December 18 to 21, 1967 Geneva	Conference of Representatives of the International Union for the Protection of Industrial Property (2nd Session)	Program and Budget (Paris Union)	All Member States of the Paris Union	United Nations; Council of Europe; International Patent Institute
December 18 to 21, 1967 Geneva	Executive Committee of the Conference of Representatives of the Paris Union (3rd Session)	Program and Budget (Paris Union)	Ceylon, Czechoslovakia, France, Germany (Fed. Rep.), Hungary, Italy, Japan, Mexico, Morocco, Netherlands, Nigeria, Portugal, Spain, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom, United States of America, Yugoslavia	All other Member States of the Paris Union
December 20 and 21, 1967 Geneva	Council of the Lisbon Union for the Protection of Appellations of Origin and their International Registration (2nd Session)	Annual Meeting	All Member States of the Lisbon Union	All other Member States of the Paris Union
1968				
March 25 to 29 1968 Geneva	Working Group — Patent Cooperation Treaty (PCT)	Questions concerning seaching, etc.	To be announced later	To be announced later
June 17 to 21 1968 Geneva	Working Group — Patent Cooperation Treaty (PCT)	Questions concerning formalities, etc.	To be announced later	To be announced later

Date and Place	Title	Object	Invitations to Participate	Observers Invited
Septemher 24 to 27 1968 Geneva	Interunion Coordination Committee (6th Session)	Program and Budget of BIRPI	To be annonnced later	To be announced later
October 2 to 8, 1968 Locarno	Diplomatic Conference	Adoption of a Special Agreement concerning the International Classification of Industrial Designs	All Member States of the Paris Union	To be announced later
November 4 to 12 1968 Geneva	Committee of Experts — Patent Cooperation Treaty (PCT)	New Draft Treaty	To be announced later	To be announced later

Meetings of Other International Organizations Concerned with Intellectual Property

Place	Date	Organization	Title
1967			
The Hague	Decemher 4 to 6, 1967	International Patent Institute (IIB)	94th Session of the Administrative Council
1968			
Bnenos Aires	April 15 to 19, 1968	International Association for the Protection of Industrial Property (IAPIP)	Presidents' Conference
Mnnich	April 22 to 26, 1968	Committee for International Cooperation in Information Retrieval among Examining Patent Offices (ICIREPAT)	Advisory Board for Cooperative Systems — Standing Committees I and II
Amsterdam	June 9 to 15, 1968	International Publishers Association (IPA)	Congress
Vienna	June 24 to 29, 1968	International Confederation of Societies of Authors and Composers (CISAC)	Congress
Tokyo	October 21 to November 1, 1968	Committee for International Cooperation in Information Retrieval among Examining Patent Offices (ICIREPAT)	8th Annual Meeting
Lima	December 2 to 6, 1968	Inter-American Association of Industrial Property (ASIPI)	Congress