Copyright

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INTERNATIONAL UNION

AUSTRALIA

Accession to the Brussels Act (1948) of the Berne Convention for the Protection of Literary and Artistic Works (with effect from June 1, 1969)

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An instrument of accession of the Commonwealth of Australia to the Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886, as revised at Brussels on June 26, 1948, was deposited with the Swiss Federal Political Department on April 1, 1969.

The said instrument was accompanied by the following declaration:

"The Government of the Commonwealth of Australia having considered the said Convention hereby accedes to it on behalf of the Commonwealth of Australia subject to the specific declaration that the Government of the Commonwealth of Australia accepts the provisions of Article 11 of the Convention on the understanding that it remains free to enact such legislation as it considers necessary in the public interest to prevent or deal with any abuse of the monopoly rights conferred upon owners of copyright by the law of the Commonwealth of Australia."

This accession is notified in accordance with Article 25, paragraph (2), of the Convention and will take effect on June 1, 1969, pursuant to paragraph (3) of the said Article.

Berne, May 1, 1969.

GENERAL STUDIES

Copyright, a new form of property

In the work just published under this title[1], I have tried to show that the theories at present in favour with doctrine and with the courts in Europe — the dualistic theory in France and the monistic theory in Germany — are abstract and unrealistic constructions. I have also shown the uselessness of the theory of moral right, invented towards 1880 because the traditional concept of property did not take sufficient account of the author's moral prerogatives.

The concept of property-creation that I expound is implicit in French legislation as in German legislation or in Anglo-Saxon law; it seems to me to constitute the true basis for copyright as it was originally in the eighteenth century; it makes unnecessary any recourse to the theory of the so-called moral right and the insertion of the latter into a dualistic theory or its incorporation into the monistic theory.

[1] Pierre Recht, *Le Droit d'Auteur, une nouvelle forme de propriété. Histoire et théorie.* Librairie de Droit et de Jurisprudence, Paris, 1969.

Chapter I. Basis of the author's right

One does not create the basis of a right, one acknowledges its existence. Now, the basis of the author's right is his objective right as conceived in his own individual conscience and which he succeeds in winning recognition for by the authorities.

1. The real sources

As we know, the rule of law is designed to safeguard certain interests and needs by force while taking account of certain interests. Such a definition calls for further comment:

The legislators represent certain groups, even if only the one formed of the majority of the people, and they pursue what they believe can further their interests (or passions). Only the Pharisees can deny that man is dominated by his own personal interest (and often still more by his passions than by his interest); but whether in a dictatorship or in a democracy, those who govern must to a certain extent take

account of the interests of those who lack force (power) and be convinced (or act as if they are) that their laws are of use to everybody, in order to gain the widest possible support; otherwise they risk being turned out of office. They must act as if they were defending the public good, the general interest; it is even useful that they should believe it, because faith strengthens conviction. Thus, in former times the aristocracy believed itself to be necessary for the common good.

Thus, in the eighteenth century, provincial publishers in France and Great Britain claimed they were defending the interests of authors and of the public by opposing copyright and advocating the public domain against the privileged publishers who also claimed it; they won their case with Louis XV and Queen Anne, once they had become sufficiently influential with the sovereigns, or more precisely with the Paris Parliament and the House of Lords. Today the European governments, which control television, and the American government, over which the broadcasting organizations and film producers have considerable influence, are tending to erode the authors' privileges and to favour the users, but the authors are successfully resisting because their prestige is undisputed in the Communist countries as well as in the liberal countries. The "public good" is invoked on both sides; today it is termed "dissemination of culture". Every pressure group invokes justice when bringing influence to bear on the authorities, but in 1968, like two thousand years ago, the law is laid down by whoever wields the club or the axe most strongly or most skillfully.

The true source of the rights of writers and artists lies in their strengtb — the strength deriving from their prestige and also from their organization and their influence on the authorities who formulate the rules of law, the "formal sources". This strength enables them to prevail and to obtain the protection of positive law (in other words, a legal status) which is the formal source of their rights. The subject of the legal status is thus a right which, before being recognized by law, was a subjective rigbt that developed in the mind of the holder (the author) in the limited field of his freedom, the inexpugnable stronghold of individualism, sheltered from any action by the public authorities.

Those who disagree with my theory are wrong when they affirm that the "moral imperative" of the Declarations of Human Rights constitutes a sounder basis than property, because it would afford better shelter for copyright from action by the authorities.

The provisions of the Declarations are only solemn promises to guarantee freedoms or "rights". When embodied in national constitutions or international conventions, they undoubtedly do constitute legal norms but the latter do not actually create the "right", for it preceded them. Some of the provisions are unreasonable and confusing — for example, Article 1 of the Universal Declaration of Human Rights dated December 10, 1948, affirms that "All human beings ... are endowed with reason and conscience", which is an absurdity!

Article 2 states that every person is entitled to the "rights and freedoms" set forth in the text, without explaining the difference between the two words; this certainly shows that the wording is confusing.

According to Article 27(2), "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". This has been seen as being the basis for the "fundamental right" of the author, which positive law is designed to safeguard. Now the Declaration is not the source of the subjective right, it is only a solemn proclamation, but it has its value.

An additional and much more substantial guarantee for the author is to be found in Article 17, which proclaims the right of everyone, whether individually or in association with others, to own property and declares that no one may be arbitrarily deprived of bis property. Under USSR civil law, copyright is a property right that may be expropriated only against compensation. It is all the more regrettable that doctrine in France and several other European countries should have deemed that autbors would be better protected if this concept were left aside. In this connection, it is nevertheless fortunate tbat the term at least has been retained in Article 1 of the French law of 1957; I note also tbat its importance has been realized in Germany. A decision by the Karlsruhe *Bundesgerichtshof* dated May 18, 1955, states clearly that the author's right constitutes property tbat is anterior to the legislation that guarantees it and that its exploitation is only the practical expression of such property.

Few juridical concepts have given rise to so much controversy as that of the subjective right. The law libraries and specialized periodicals contain a wealth of knowledgeable studies on the subject; the authors of such studies usually confine themselves to paraphrasing what someone else has already said, and disputing one or more particular points.

Yet tbere is no concept easier to understand if the jurist is not lured away from common sense by the desire to formulate his own definition.

Subjective right is such a clear term that any definition would resemble tautology.

According to the well-known definition by the most illustrious of German lawyers "the subjective right is an interest protected by law". How could one express oneself more clearly without playing on words? It comprises the substantive element as well as the formal element (legal proceedings). Yet von Ihering's definition has been amended bundreds of times and many lawyers have disagreed with this giant among them.

Not every power of the individual is a subjective right. If the right of property is a subjective right, the right to be a proprietor is not, for everyone is entitled to own property. If the right of artistic property is a subjective right, the right to create a work is not; and here I beg to differ with the many copyright experts who have seen the right to create, to write or to paint as being a prerogative of law that has incorrectly been termed a moral right.

This assertion by certain adepts of the pseudo-right called moral right is inappropriate, because they do not realize that this artificial and superficial juridism encroaches on the well-defined field of individual immunities and freedoms by reducing a freedom to the status of a simple positive right.

It is incorrect to say that I have the "right" to paint or to write; it is not a right in the legal sense, it is a faculty, it

is the fact of using a freedom or a fundamental "right" of the human being, such as the right to life, to existence, to honour, to found a family, the right to come and go [2] — and the exercise and protection of all of these is regulated as a positive right by means of legislation [3]. We are in a "situation of objective right" but we have no "subjective right" in regard to these fundamental pseudo-rights.

Freedom of the press gives me the right to write and to publish a newspaper article; it is not a subjective right; anyone who forbids me to write it will be infringing the law which is my assurance of protection for my freedom. Once I have written a book or painted a picture I shall have a subjective right over the book or picture. But I shall have to show proof of my capacity; if I am a writer or a painter, the proof will be the existence of the work I have created.

2. Explanation of the author's subjective right by "occupatio"

In order to understand how *occupatio* can give rise to property deriving from a creative work, one must first consider how property-possession has come into existence since archaic times [4].

Property-creation can be explained in the same way as the *occupatio* of olden times [5]. While this method of acquisition is no longer possible today so far as land is concerned, the situation is not the same with respect to conceptions of the mind whose fecundity is boundless.

Here again, the concept of possession precedes that of property. The author who has set his creative activity in motion makes the work his propetry — he appropriates it. He does what he pleases with it; he can even destroy his manuscript or smash the statue he has sculptured. No one can prevent him from doing so.

An "appropriation" of this kind is no different in nature from that of material objects. It is really the material fact of establishing and retaining mastery over something that is one's own; it is the *occupatio* of Roman law, or the taking possession, the primary mode of acquisition of archaic times (which is no longer possible today for material objects [6] with the exception of game and *res derelictae*).

It is no different in nature from primitive man's mastery over his garments and his weapons which are virtually part of himself, *quae assibus inhaerent.*

The author takes possession of his creation, he appropriates it by *occupatio* just as primitive man appropriates his weapon, his garment or his plot of land. He claims *de facto* mastery over his work.

Now, the human being who feels that a particular thing "is his" and his alone and resolves to defend it against any usurpation creates a subjective right, which precedes the objective right.

The latter can emerge only within the context of legislation recognizing it and often lagging far behind the subjective right, the juridical rule. This rule appears only when the subjective right encounters opposition not just once, but many times. "So long as there was effective mastery, the idea never emerged that any right was inherent in it. The possessor's only protection lay in his own powers (private justice) and it was only little by little that the idea of a right implicit in mastery over an object took shape. But if the object is snatched away from effective mastery, the person who has been robbed will develop a feeling of injustice, of breach of social equilibrium, the feeling of a subjective right to mastery and a resolve not to let himself be robbed. The *furtum rei*, the infringement of a right, will bring into being the actual concept of the right" [7].

The sentiment of a subjective right to mastery and the resolve not to let oneself be robbed were manifested well before the modern era so far as intellectual works are concerned.

The feeling that the author had a subjective right on his work existed in Rome even in the first century of our era. Most people know the famous epigram by the poet Martial against the plagiarist Fidentinus which concludes as follows: "*Indice non opus est nostris nec judice libris, stat contra dicit que tibi tua pagina: Fur es*". (My books need neither witness nor judge. Thy pamphlet turns against thee and says to thee: Thou art a thief.) [8]

Chapter II. Legal nature of copyright

I have thus shown how the basis of the author's subjective right (its true sources) is subsequently recognized by a legal status which makes it an objective right. We must now define the nature of this right; I shall show that it is a right of property and that this property is stratified and divisible.

1. Copyright is a real right of property

Before beginning to examine this question, one must endeavour to understand an aspect of the right of property that is ignored by ordinary civil law and is peculiar to our particular field: namely, the existence of two parallel properties and their continuing collision. On the one hand, we have ordinary property of the material object which embodies the work of art (marble, paint, a published copy, a record), and on the other hand, property of the immaterial thing that is the artistic content, that is to say, the literary or artistic work itself.

The two may belong to one single proprietor, but most often to two or more. The distinction is made clearly in Article 29 of the French law of 1957 and Article 44 of the German law.

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[2] The right to own property is sometimes added to these; if this right were a corollary of freedom, everyone should own property in countries where equality is a fundamental principle.

[3] The regulation of fundamental freedoms sometimes goes so far as to nullify them (military service, expropriation of copyright in a work) when the general interest so requires, but the freedoms are nonetheless quite separate from positive right; it is their regulation that forms part of the latter.

[4] The "different manners in which one acquires property" and which are provided for in civil codes (donations, inheritances and contacts) are in actual fact only ways of transferring the property acquired. They do not constitute the origin of property-possession.

[5] Westrup, "Quelques remarques sur la propriété primitive devant l'histoire comparative", in *Revue historique de droit français et étranger*, 1933, p. 229. See also Krase, *Eigentumsrecht*, Berlin, 1933.

[6] Cornil, *L'ancien droit romain*, 1930, p. 57.

[7] Westrup, *op. cit.*, p. 226. De Visscher, "Le fur manifestus", *Nouvelle revue historique*, XLVI, 442.

[8] Martial, *Epigrams*, I, 53.

Most civil law experts today customarily affirm that copyright cannot be a property right because the latter is a real right and real rights can pertain only to *res*, to material objects.

Their affirmations generally follow the meaning that the word *res* has taken on in the conventional vocabulary, that is to say the initial meaning that it had in Roman law; I must therefore refer briefly to the early centuries of our era.

We shall find that, whether in everyday language or in legal parlance, the word *res* was never reserved solely for material objects. This erroneous affirmation made by civil law scholars of today is not new; it dates back to the sixteenth century, to the early days of individualistic thinking and of subjectivist language. The term "real right" was therefore formulated relatively recently; the *Institutes* have been deformed; there is no Roman term corresponding to *jus in re*, and no Roman definition of a right of property; the Romans never defined the *dominium* as *jus in re*. The word "real" was used by commentators to translate the term *actio in rem*, as the antithesis of *personales actiones*[9], which was already in use during the Empire. From actions it was subsequently extended to the rights themselves[10].

What is certain is that the Romans were aware of the differentiation between material and immaterial objects[11] that we find in all civil law textbooks. The second commentary on the *Institutes* by Caius (II, 12) is based on this well-known differentiation, as is the second volume of Justinian's *Institutes* (II, 2 pr.). Seneca (Ep. ad. Luc. 6, 6 (58) 1) and others acknowledged the existence of intellectual concepts in the first century of the Empire.

Literary property existed in Rome but it was "unperceived and unguaranteed" because the need to protect authors had not yet been felt[12].

Even today, few lawyers acknowledge that an intellectual conception can constitute a real right. Edmond Picard appears to have felt sympathy for such an idea, but this eminent lawyer had too much respect for long-established things to consider changing the traditional Roman classification and, rather than broaden the class of *res*, he preferred to create a fourth category, a new one — "intellectual rights"[13].

Mr. Savatier, on the other hand, preferred to dismantle the traditional classification entirely rather than create a new category or acknowledge that an intellectual conception could be a *res*. He abolished the distinction between real rights and personal rights; the intangible property that he recognizes is neither one nor the other[14].

Now, an intellectual conception which is outwardly expressed and discernible is an appropriable thing; it can be a *res* and can become an item of property in the sense attributed to the term by civil law scholars. Copyright is therefore a real right, and this real right is a property right.

Admittedly, literary property is not identical in effect to the system of property applicable to tangible objects, which moreover varies depending on whether movable or immovable property is concerned. But the difference between property as regulated by civil law and the new forms of property, such as literary property, derives from the nature of the subject of the right and does not affect the fundamental nature of the right, which depends on the relations established between the owner thereof and other persons. It is a new form of property which is termed property-creation.

"Only by studying the history of law can one prevent the dangerous error of immutable law that is eternally frozen in the immobility of death."[15]

In reply to an opponent of the term property, M. Ulmer points out with great perspicacity that, in view of the fact that the German Constitution specifically forbids any expropriation without compensation, it would be inadvisable to give up the term[16].

Things become property, in the legal sense of the word, when they are appropriated[17]. Once an intellectual work has been created, it is an element of fortune or of wealth that can be appropriated to the author's profit; it is incorporeal property (Article 1 of the French Law of 1957); even if it is unfinished (Article 7), it is part of his patrimony, independant of any divulgation and hence even if it has not been the subject of any commercial transaction.

A fundamental error committed by personalists as well as by those in favour of the two-fold right and part of French case-law is to believe that a work becomes an object of property only after publication; prior to that, they maintain, only the moral right would exist[18].

2. *Property-creation*

It is beyond doubt that at the present time new forms of property are appearing. They fall into two distinct categories which should not be confused.

The forms in the first category are or tend to become offshoots (or more correctly subdivisions) of ordinary property-possessions[19]; examples are rural leases[20], commercial property, maintenance on the premises. The eminent domain, the entirety of the real rights that the lessor believed he was retaining over real estate leased by him, is eroded and dep-

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9 Actions that we term personal actions (recognizing claims). The Romans called them *actio in personam* because the debtor's name appeared on the document issued by the lender.

10 Planiol and Ripert, *Traité de droit civil*, I, 2162; Ulpien, *Digeste*, Vol. II, Chapter 16, fr. 178.

11 Raymond Monier, "La division des choses corporelles et incorporelles", *R. H. D.*, 1947, p. 374. Doctorate course 1946-1947 (Domat-Monchrestien). Villey also refers back to Scialoja, *Teoria della proprietà*, p. 233. Villey, *La justice distributive et l'idée du droit subjectif*, Paris, 1957.

12 Dock, *Etude sur le droit d'auteur*, Paris, 1963.

13 Picard, *Le droit pur*, 44, p. 76. He considered what is alleged to be the Roman category of *res* as a repository for everything that was not covered by a personal right.

14 Savatier, *Métamorphoses économiques et sociales du droit privé contemporain*, 1959, Nos. 468-478.

15 Cornil, *op. cit.*, p. 9.

16 Ulmer, "Lettre d'Allemagne", *Le Droit d'Auteur*, 1957, p. 14.

17 Planiol, *op. cit.*, I, 2170.

18 While defending the dualistic theory, De Sanctis expresses the same opinion as I do in this respect. "Once a work is created, perceptible, concretized and detached from its author's person, it has an economic value even if it is unfinished". It has, "independently of any legal protection, its own natural and one may say eternal existence, being clearly identifiable and having its own cultural and idealistic value" ("De la nature juridique du droit d'auteur", *Interauteurs*, 1962, No. 146, pp. 12 and 13).

19 Which economists and philosophers from the Middle Ages until the time of Locke, Portalis or Gide tried to justify by work, which is erroneous.

20 Since the lessee's right becomes opposable to third parties, it comes close to the "reality" of which it is the distinctive feature.

rived of its substance. His right to resume occupation is paralyzed by the right of renewal, and the lease in actual fact becomes a deed of usufruct. I mention these here only to avoid any confusion between these new forms of property and literary and artistic property, because such confusion is frequent.

The forms in the second category are property "created" from nothing: patents, trade marks, literary and artistic productions — in brief, everything that has been termed industrial property and copyright.

I consider that the justification of copyright by the work done applies only to the new forms in the first category. There, the work done is justification for compensation in return; such compensation may be granted in the form of a small portion of the property right; an example is the rural lease which is tantamount to a usufruct, that is to say a kind of *domaine utile* (use and enjoyment) leaving the owner with the eminent domain if one wants to apply that term to bare-ownership. The State recognizes that the worker deserves to be granted this new form of property because of his value to society or for moral considerations. A similar demonstration could be made for commercial property.

The explanation is not valid, however, for the new forms in the second category; work cannot be and is not a source of industrial property or of literary and artistic property. The basis of the latter is creative activity; the creator becomes master of his work by *occupatio* in the sense of early Roman law, and this mastery is the basis for his subjective right which will be recognized and regulated by a legal status.

The notion of property-creation is relatively recent, even very recent and is still not well understood. Few authors have perceived the justification for such a form of property [21].

In fact, property-creation often gives the owner thereof greater prerogatives than those deriving from property-possession.

Most professors of contemporary civil law still teach that copyright cannot be property.

It is not difficult to answer their objections:

(a) The tailor is not the owner of the suit he makes for a customer, but the artistic content is the property of the garment designer, and he is in fact protected by legislation on designs.

(b) The author's property is not a wage, if one understands the word as denoting the counterpart for work done under the supervision of a master, but his mastery over something he has created; it is a new and contemporary form of property: property-creation.

(c) Appropriation of an intellectual concept that is outwardly expressed and discernible is not contrary to the nature of things.

One may bear in mind the definition of literary and artistic property given by a Belgian lawyer: "It is a set of powers which enable their holder to derive from his work the entire economic benefit that it can yield, without ... third parties being able to order his actions, in our present system and subject to certain restrictions. Property is nothing else but that. Once a work is materialized and individualized, its author has over it a mastery of the same kind as that which he enjoys over the house that he owns" [22].

3. Copyright is stratified and divisible property

The principal obstacle to progress in the theory of copyright derives from the fact that the civil law scholars of today are paralyzed by the hidebound concept of full and entire property of the Roman citizen that they cannot conceive as being other than indivisible [23].

In actual fact, full and entire property has existed only three times in the history of law: at the beginning of Roman history, at the end of the Empire and from 1789 on. Today, facts are stronger than any legal code and the divisibility of property has become obvious. The farmer, merchant or tenant-occupier etc. have the use and enjoyment of a specified domain and hold a right that is extended to such a degree by law that their lease, which has already become a real right, separate and apart from the lessor's property right, is progressively becoming a right of property on the *domaine utile* of the original owner. The divisibility is less obvious for property-creations than for traditional property. Nevertheless, from the moment of publication, eminent property in the work belongs to the community and the author who "donates" it is no more than the holder of a *domaine utile* (use and enjoyment), a user who is entitled to protection by law during his lifetime for himself, and for his heirs for fifty years after his death.

If one acknowledges the reality of divisibility, everything becomes clear; if one denies it, the confusion in doctrine will continue.

Here a thought naturally comes to mind: the opponents of the unitary property right of the author can never refrain from making a differentiation, at the moment of publication, between the monopoly of exploitation and a right that is termed the moral right; this leads them into endless disputes because such a differentiation is not real. They have realized that copyright must be divided in order to justify the insertion of perpetual moral prerogatives, but they have tried, against all the evidence, to keep such a so-called moral right individual which is an impossibility. Up to the present time at least, they are not prepared to acknowledge that the true division of property which becomes perceptible upon publication is that between the eminent domain of the community and the *domaine utile* (use and enjoyment) that accrues to the author.

In order not to have to revert to this point again, I should like to note here that I am speaking of divided property and not of dismemberment of property, as one might be tempted to do because it would be the simplest solution. I prefer to use the term divided property rather than dismemberment; the reason is that between divided property and dismember-

[21] With the exception of the Italian law, which indicates very clearly that the source and justification of copyright is "creative work" (Article 6).

[22] De Harven, *Les mouvements généraux du droit civil contemporain*, 1928, p. 123.

[23] Roman law, after having been distorted by sixteenth-century commentators, continues to afford the fundamental basis of civil law treatises. It must be acknowledged, in defence of their authors, that they are teachers who have to expound law as practised by our courts; some of them, however, for example Planiol in his *Traité élémentaire* of 1925, never fail to insert references to the history of law, in order to restore the true legal situation.

ment of property — of which the classic example is an easement — there is an essential and fundamental difference. Dismemberment operates between one estate or piece of property and another; thus, for example, in the event of any assignment of reproduction rights, the author and the publisher exercise complementary rights on the same thing; the author's right of use and enjoyment is dismembered and accrues to the publisher. We shall not be referring to dismemberment of this kind in the ensuing considerations.

One can begin to speak of the author's property from the moment of creation of a work, even though, in practice, any exercise of that right may be non-existent or extremely rare. It is full and complete at the time the work comes into being, but its stratification already becomes apparent when the work is published. As Mr. Savatier has so poetically put it, it is then that the "phase of giving" begins; now, when one has given away something, one no longer owns it.

There is no need to make an artificial differentiation between pecuniary and non-pecuniary prerogatives, since they are all indissolubly intermingled; the prerogatives of the creator, the owner of the work, are clearly cut off by the assignment or granting of certain uses, for the inalienability of the so-called moral right is nothing but an exercise of words. The cutting-off is even expressed in the mere fact that the work is disclosed to the public; the general public that receives the work also has a "moral right", including the right to respect; it can thenceforth criticize the work and demand that any mockery be refrained from.

The eminent domain of the community was recognized even in 1791 by Le Chapelier, Rapporteur to the Constituent Assembly for the Entertainments Law of January 13, which mentions "public property" in Article 2.

"When an author has made his work available to the public, when the work is in the hands of everyone . . . it would appear that thenceforward the writer has associated the general public with his property, or rather has transmitted it to the public in its entirety. It is quite right, however, that those who cultivate the land of thought should derive some return from their labour; during their life and for some years after their death (five years), no one must be able to dispose of the product of their genius without their consent. After the term set has expired, then 'public property' commences."

The division of the author's property right at the time of publication between the community and the author is so evident that it has been acknowledged for more than a century, even by those who are reluctant to draw the logical inferences from that fact.

The right of expropriation with respect to private property in general has never been disputed, even during the period of the French Revolution when property was considered to be a natural and absolute right. It is a right of eminent domain, a sovereign property right, though ill defined, which enables it to dispose at will of any private heritage, in the interest of the common good.

For an understanding of this division of property between the eminent domain and the *domaine utile* (use and enjoyment), the best way is to compare the monuments of civilization — artistic and literary works — with the monuments of history. The latter are subject to limitations, which are (incorrectly) termed legal easements; for they do not constitute dismemberments of an estate, which would merely be a division of one single thing. Here the owner of the *domaine utile* is affected, not the object: it is a division of property, or more precisely of the right of property, between the State which has eminent property, and the individual person who owns a registered monument which is partially expropriated by bringing it under "protection" (moreover the term is incorrect because what is concerned is the cultural interest — the public is protected, not any inanimate object) [24].

In this case the division of property greatly resembles that in effect in the early Middles Ages: the yeoman offered his property to the lord, or squire, and received it back on tenure [25]; in return for what he brought, for the "gift", he obtained protection from the lord of the manor [26]. By the fact of publishing, the author "gives" his property to society which returns it to him forthwith for use and enjoyment; in exchange for the "gift", he is protected by society. The protection consists in the fact that the State recognizes his subjective author's right and ensures his exercise of it by a legal status, a "legal privilege" [27] as Mr. Savatier says, which enables him to enjoy and exercise in peace the monopoly of his "tenure".

The eminent domain of the State is not apparent during the author's lifetime; the State recognizes the author's subjective right by leaving him to exercise the right of eminent property. At his death, he entrusts it to his heirs or to his executors. The law may regulate inheritance of the various prerogatives in different ways (publication, working of the monopoly, ensuring of respect for property, etc.) as it does with respect to inheritance of real estate, by allowing the surviving spouse to have the use of the family home; there is no difference of nature between such provisions and those established by law for certain heirs of the owner of a work of art.

It is above all at the author's death that the stratification separating the eminent domain from the *domaine utile*, already glimpsed at the time of publication, becomes visible, but it is concealed by the fact that so long as the author's privilege is valid, society leaves him to exercise the prerogatives of the eminent domain.

The advocates of the dualistic theory, commenting on the French law of 1957, could not fail to perceive a stratification, but they give it another name. They make an entirely artificial separation between moral prerogatives, of which they make what is termed a moral right, and the right of exploitation.

The commentators on the German law of 1965 make just as artificial a separation between enjoyment and exercise, similarly to the separation between soul and body.

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[24] There are other known instances of divided property. In any sale on resolutory or suspensive terms or for future delivery, there are always two owners of the same thing: the current owner, and the potential or future owner.

[25] We shall leave aside the recognitory sense. One might compare it to the formality of copyright registration in countries where this exists.

[26] In the Middle Ages as today, man sought assurance and safeguards in the social group, be it only in order to acquire a "legal process" to which he could have recourse in the event of any injury to his interests. The author needs State protection.

[27] This is not a "privilege" in the pejorative sense attributed to those existing under the *ancien régime*.

4. The perpetual eminent domain

The proprietor of the eminent domain has the following prerogatives:

1. one essential prerogative, which comes into operation when the term of protection expires — namely, that of regaining possession of the *domaine utile* granted to the author in return for:

(a) recognition of his subjective right as author;

(b) legal protection of that *domaine utile* for himself and for his heirs for a certain period;

2. a certain number of perpetual prerogatives inherent in the fact of ownership, the exercise of which is left first to the author during his lifetime, then to his heirs or to other persons until the end of the term of protection, finally accruing to the State or to bodies designated by the State; these are:

(a) the right to recognition of authorship and to respect of property (Article 6 of the French law, Articles 13 and 14 of the German law);

(b) the right to disclose the subject of the property right (Article 19 of the French law, Article 12 of the German law).

The eminent domain is perpetual.

It is difficult to study separately the question of the community's eminent domain and that of the perpetuity of the right. They are interlinked because perpetuity is justified only by the eminent domain.

Indeed, it is at the moment when disclosure brings to light the stratification of property that one can perceive most clearly how perpetual it is. Once the community has received the work, it has it for ever, and if the work is a *chef d'œuvre* it will be immortal. Moreover, the law on legal deposit prohibits any measure that would eliminate the fact of publication, the deed of " giving ". As the English saying goes, " What is done cannot be undone ".

The supporters of the individual perpetual right of the author will always come up against reality: the perpetual property right belongs solely to the community which, after the author's death, must ensure respect for the work. Eminent property in the work begins to accrue to the community at the time of publication, even if for fifty or seventy years the positive law grants to the author a definite right to exercise eminent property on the work created by him. This is clearer still with respect to the so-called moral right than for the pecuniary right: only by belonging to the community can it be perpetual.

I do not believe that the scope of perpetual eminent property should be limited to a so-called moral right; clearly it also comprises certain pecuniary prerogatives as soon as it becomes public property, and *inter alia* this can justify the existence of what has incorrectly been termed the " *domaine public payant* ".

The mere fact that it could have been envisaged shows that the perpetual eminent property of the community may carry pecuniary as well as moral prerogatives and that perpetuity of the right cannot be justified except by the existence of an eminent domain. (As regards the *domaine public payant*, see my book, p. 265.)

5. The temporary " domaine utile " — use and enjoyment: grants, assignment and distribution

As from the moment when the author has " given " his work, the stratification of his right becomes evident.

1. First of all, the author enjoys an eminent domain which theoretically belongs to the community, but which he is allowed to exercise during his lifetime, because of his merits and his value to society; it carries prerogatives that are principally of a moral character.

2. Next, the author enjoys a *domaine utile* which is in fact a veritable property right similar to emphyteusis, which is a real right for a term of 99 years that is heritable and in every way resembles full and complete ownership.

3. The author has full sovereignty over the *domaine utile*, like any proprietor over his unencumbered property. Freedom to dispose of one's property is an essential attribute of proprietorship; the objects are alienable in their normal condition [28].

The author, like any proprietor, is entitled to derive from what he owns all the benefits inherent in it, the *usus*, the *fructus*, and the *abusus*.

He can perform certain legal operations with respect to his property; such operations always consist of transferring to someone else either the property in its entirety, or only the *usus* or the *fructus*.

(a) Usus. — The purchaser of a book, film, disc or work of art performs a twofold operation: he purchases the vehicle (ordinary property) at the same time as he acquires the right to enjoy the work *(usus)*; by purchasing the vehicle, he simultaneously acquires a real right on the vehicle and the right to use and enjoy the author's intellectual creation (the right of use is dismembered from the full right of artistic proprietorship). In this case the author can (and in practice does) stipulate that the work may not be performed or displayed in public [29].

(b) Fructus. — Like any proprietor, the author may transfer the *fructus*, in other words he may establish a real right, apart from the right of property.

The right of reproduction and the right of performance are part and parcel of the right of exploitation. It is of an absolute and exclusive character. It is general and applies to discs, films, translations, adaptations, arrangements and architectural works, etc.

So far as films are concerned, the right of distribution is specifically mentioned in Article 14 of the Berne Convention. It is not yet recognized for what are termed commercial records, and this was again refused at the Stockholm Conference in 1967. Yet this right is inherent in the right of publication *sensu lato*, that is to say in the right of reproduction

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[28] Admittedly, the owner sometimes loses the right to dispose of something validly hy transfer. Bnt this is not inalienahility. Even if it affects the owner "whoever he may he" it is not a real prohibition hecause it is always the owner who is affected; one may cite the example of the inalienahility in certain conditions of movable property or the dowry system (Planiol, *op. cit.*, 2340). It is true that copyright is inalienahle according to German legislation, but in that legislation copyright is considered to he a personal right. The inalienahility of the so-called moral right is provided for here hy the prohibition of any total transfer of the right.

[29] This is the case with respect to so-called commercial records.

as brilliantly expounded by Mr. Ganshof van der Meersch, Advocate-General of the Belgian Supreme Court of Appeal [30].

Assignment often has the character of constituting a limited real right, dismembered from the full right; its holder may even claim against the author; the latter infringes not a right that he has delegated, but a right that is someone else's. This is Article 31 of the German law.

The case of free transfer of the right of reproduction or performance reveals the mistake of those who do not want to consider this prerogative as being anything but a pecuniary right, as opposed to the so-called moral right which would comprise only non-pecuniary prerogatives: if I give permission for my work to be reproduced or performed free of charge, I am not exercising a pecuniary prerogative; I may perhaps be doing it by reason of vanity, desire for fame, etc.

(c) Abusus, or assignment of entire right. — Lastly, the author may assign his entire right to a publisher or agent, as if he were selling a piece of furniture, together with all the prerogatives (right of reproduction, performance, adaptation).

This possibility has sometimes been limited by law, by prohibiting total assignment (the German law of 1965; the French law prohibits any total assignment of future works).

The German law makes a distinction between enjoyment and exercise of the right and does not recognize, at least in principle, the alienability of copyright; it recognizes only grants and assignments, which are really grants affecting only the exercise of the right but not its " substance "; this unitary system does not avoid controversy any more than the French law which does not mention grants.

The system which I propose maintains the exercise of the author's eminent domain for fifty years following his death and solves all difficulties. It enables the author to enjoy all the sovereignty of a true owner with the power and tremendous scope of the social and other prerogatives inherent in the right of property.

The *domaine utile* of copyright shows better than that of ownership of material objects that if while assigning his entire right the proprietor may appear to assign the actual object concerned (thus exercising one attribute of property — *abusus*), in actual fact he only assigns his right of *usus* and *fructus* on that object. This right is total and perpetual only for he who exercises the eminent domain, but it is temporary and partial for the holders of dismemberments.

It is temporary even in the case of total assignment, since the perpetual eminent domain already exists virtually, though it is implicit until the author's death.

Moreover, this is the case in all sectors of civil law; " the holder of a dismembered right retains an eminent right that enables him to ensure that the party benefiting by the dismemberment respects the obligations incumbent on him with respect to exercise of the rights conceded " [31].

After the author's death, during the term of protection, the prerogatives of the holder of the *domaine utile*, which are generally pecuniary, will continue to be exercised by the heirs in the same way as the deceased owner would have exercised them. They will have the *usus*, *fructus* and *abusus*. Like him, they will be able to exploit the right of reproduction and performance, just as the farmer's son ploughs the field that his father left to him and gathers in the harvest.

When the legal term of protection expires, the *domaine utile* again becomes one with the eminent domain, and thenceforth for perpetuity the society has full and entire property on the work.

The latter carries broader prerogatives than traditional property, but this concerns the extent of the right and not its nature.

Chapter III. The so-called moral right

1. The separate moral right is a false notion

When the supporters of the so-called moral right speak of it, they adopt the attitude of a believer speaking of sacred things, or of Girondin reading out the Declaration of Human Rights. Admittedly, Article 6, paragraph 3, of the French law adopts this declamatory style, and yet the wording has no greater value than would have a statement that " All human beings are intelligent ", when one knows very well that this is not true.

The so-called moral right is considered inalienable in the extension conferred on it by the doctrinarians, whether personalists or advocates of dualism. I would refer the reader to their works or to my study (p. 281 *et seq.*).

The moral right is an unreal creation that, for the last century, people have been vainly trying to define in a congruous and utterly superfluous manner.

It should be noted first that the so-called moral right is not mentioned as such in the French law, and in the German law only in the heading of Articles 12 to 14; the two laws speak only of " respect for his [the author's] name, his authorship and his work " or of " his lawful intellectual or personal interests in the work ". It is the commentators who use this undefinable term, which is also to be found in the preparatory studies for the French law and the German law; the Parliaments were more cautious and wiser than the professors and the magistrates.

Of course, the notion began to develop towards 1880 that copyright could exist in respect of something immaterial, and two eminent lawyers — Pouillet in France and Kohler in Germany — have the great merit of having dared to say so in writing.

But in the spirit of that time, purely moral prerogatives could not yet derive from a right of property even an immaterial one, and Josserand recognized an extra-patrimonial right that was contiguous to the property right and inherent in personality. At that time, the theory of the general rights of personality was still dominant in France as well as Germany, and the so-called moral right was attached to it [32]. That

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[30] In conclusions written before the well-known decision of January 19, 1956, I expounded the question in *RIDA*, 1957, No. XVII, p. 123, and I developed this point of view in Recht, *Le droit d'auteur*, 1955, p. 114. For Mr. Ganshof's conclusions and the text of the decision, see *RIDA*, No. XI, p. 32 and No. XII, p. 114.

[31] De Page, *Traité de droit civil*, VI, 335.

[32] The controversy over the term *Persönlichkeitsrecht* was by no means of only theoretical importance. It enabled the German and Austrian authors to clarify in a definitive way the nature of the author's personal prerogatives in his capacity as author (which the German law does clearly in Article 14) and to make a distinction between them and the general rights of personality.

theory was abandoned only recently; in France, Mr. Nerson has rejected it but he has written a thesis which is often quoted, to prove the existence of individual extra-patrimonial rights. This opinion is opposed by Henri Capitant, who holds that there is no subjective right outside the patrimonial relations of individuals [33]. I share this view, but it goes without saying that such rights carry moral prerogatives. And, precisely, copyright is a new form of unitary property that comprises numerous pecuniary and moral prerogatives and is different from the ordinary property concept that was expected, but in vain, to solve all problems during the first half of the nineteenth century.

Today the historian finds that personality has entered irrepressibly into the right, to use Mr. Savatier's expression, and that it is necessary to include certain obvious moral prerogatives in this right of literary property [34]; hence the invention of a two-fold right and of the dualistic theory; this division of the right into two — the moral and the pecuniary — is a false concept, because experience has shown that the moral right can be pecuniary, and *vice versa*. In brief, it was realized that order had to be brought into this medley by making a division, and so an arbitrary separation was made between the pecuniary prerogatives and the moral prerogatives.

In my opinion, it is incorrect to say that the moral right protects personality and the patrimonial right protects the work. The right to integrity of the work protects the author as much as the work; it would be more accurate to say that it protects the community, because a right is a social relationship and does not "protect" things. Moreover, in the event of any dismemberment of the plenary right, the two rights remain indissolubly linked in the dismembered real right; the holder of the latter (an assignee, for example the publisher) has an interest in maintaining the author's reputation.

2. Prerogatives of this pseudo-right

The various prerogatives of the so-called moral right are indissolubly linked to the right of property and cannot be separated. They cannot in any case have the scope that some people would like to give them.

(a) The right to create. — Even if one accepts the broadest interpretation of the so-called moral right, one cannot attach to it the right to create which cannot constitute a rule of positive law any more than the alleged right to live or to think. It is the exercise of a faculty, of a human freedom. I shall not stress this point further because even the partisans of the moral right no longer insist on this piece of legal fantasy. The so-called right to create is, furthermore, generally linked to the right to publish.

(b) The right of publication is just as much a patrimonial as a moral right.

Disclosure or publication is a prerogative of any owner of a *res*. The owner of an object that he has made — whether a table, a cupboard, a pair of clogs, a painting or a statue — and of which he is proud, if only because of vainglory or vanity, exercises his proprietor's right by exhibiting it to the public, by disclosing or publishing it, by making the object of his right known.

Why create abstract concepts that are separate from reality? Assuredly, the painter has the advantage over the tailor of having a legal status which enables him to display two "properties" at the same time: the material vehicle of his work (which is ordinary property like the tailor's) but in addition the work itself to which he has given a form, a "material consistency" (intellectual property). In both cases, however, the "right of publication" is an attribute of the right of property.

As for the decision to disclose a work, this is an act of a psychic nature; it is one of the set of freedoms that are outside positive law; it concerns the creator's own personality and accordingly falls within what the Anglo-Saxons term the right of privacy, which guarantees respect for everyone's private affairs, the right not to see his own affairs made public.

Disclosure is thus an act that depends on the author's volition and is decided in his "freedom" as a free person; it carries consequences that are just as much patrimonial as moral, if not more so. This is the prerogative of the holder of a property right.

With respect to the right of publication, the German courts rightly based their decisions on the law on publishing contracts and the rules of the Civil Code on contracts [35], and they arrived at the same result [36] as Article 12 of the 1965 law which expressly recognizes the right of publication, but does not make it a moral right; it is the commentators who sometimes see it in this light. Article 19 of the French law also rightly abstains from conferring this epithet on it, and does not even associate it with the right of paternity and that of respect for a work (Article 6) which are traditionally considered to be so-called moral rights.

One may then ask what is the reason for the existence of Article 19 of the 1957 law and Article 12 of the 1965 law. The answer is simple. The concept of intellectual property was so distorted by various controversies in the nineteenth century that the legislator had to include special provisions in the legislation on copyright, in order to avoid any misunderstanding; it is specified that prior to publication, while the work is covered by the right of secrecy, only the author has the right to disclose the work, on which he has full and entire property.

(c) The right to oppose excessive criticism also falls within the category of legal fantasies.

(d) The right to repent is also an off-shoot of the so-called moral right; attempts have been made to pad it out in order to give it more substance.

The right to repent or retract or, more accurately, the right to withdraw from circulation a work already disclosed cannot be included in any moral right. Authors are not even in agreement on the definition of this pseudo-right to respect.

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[33] Capitant, *Introduction à l'étude du droit civil*, 1929, Nos. 91 *et seq.*; "Sur l'abus des droits", in *Revue trimestrielle de droit civil*, 1928, p. 372.

[34] Which Mr. Savatier refuses to consider as being a property right because, in his opinion, there can only be proprietorship of a material object.

[35] Ulmer, *Urheber- und Verlagsrecht*, Berlin, Göttingen, Heidelberg, 1951, p. 191.

[36] Supreme Court of October 15, 1930 (*UFITA*, 30, p. 633).

Their arguments are exaggerated, because whether one wants to protect the general interest of the community or simply the subjective right of one individual person, public order is not interested in protecting such regrets.

Even if one wanted to one could not, because formal deposit cannot be cancelled just to please a repentant author. The latter always has the possibility of giving a public explanation of the error he committed in making a gift to the community that he now considers to have been unfortunate or ill-advised [37]. The fanatic supporters of moral right would like to turn the author into a mandarin, a protected citizen to whom ordinary law would not be applicable.

The theoreticians are forever repeating that court decisions would have recognized the right to retract as part of the moral right. Such an assertion is inexact [38]. There is no decision in existence that has referred to it other than incidentally and without going into the principle.

Today, the French law of 1957 has confirmed the " fabulous and indeterminate myth " of which Sarraute spoke and has afforded to the author a discretionary, absolute, unilateral and total right, by a text that was adopted without discussion " despite the anomaly and audacity of the provision contained therein ". But neither the preparatory studies nor the text itself throw any light on the exact significance of the term retract or repent. Yet the fanatic supporters of the moral right affirm that the era of controversy in doctrine and in case-law is now over. Is that so sure?

For my part, I see it only as one more exception weakening the binding force of contracts. It is not in any way a so-called moral right that would constitute a prerogative that, furthermore, is not recognized by Article 6 of the French law.

The German law (Article 42) uses the term revocation of a licence *(Rückruf von dem Nutzungsrecht)*; it is not, however, a revocation according to the terminology of French civil law, but rather a termination. Commenting on Article 42 of the German law on the " right of revocation by reason of changed conviction ", Mr. Schulze writes: " This right does not permit the author to obliterate a conviction that he defended in the past. He cannot withdraw copies in circulation in the version that he no longer approves, nor prevent their being spoken of or quoted " [39].

In actual fact, a moral concept that is as useful as the stability of undertakings is sacrificed in the name of another allegedly moral concept that is of an exacerbated subjectivism.

(e) The author's right to respect of his name (right of authorship). — If one admits that copyright is a property right, it follows that the holder of control over an intellectual creation has the choice between two possibilities:

1. He must be able to identify himself if he wishes as being the creator of the work, just as any owner can do. This right is recognized in the interest of the author and not in the general interest.

I consider it useless to examine the question whether the right to authorship protects the author's personality or his pecuniary interests, just as it would be useless to try to ascertain whether the right of a proprietor to claim to be the proprietor of a building or of a picture gallery protects his ambition or his vanity or his comfort rather than his pecuniary interests.

One can find additional proof that the right of authorship is not a right peculiar to copyright in the fact that it was recognized very early by the courts, at a period when the theory of the so-called moral right had not been expounded, and when the theory of the right of ordinary property prevailed. Thus in 1836 it was considered that the author's name should appear on a work, even after the work had been sold.

2. The author must be able to prevent third parties from usurping his name in order to prevent plagiarism (or infringement). Plagiarism is theft; it infringes not only the so-called moral right but also the property right. Some authors engage in discussion as to whether plagiarism is injurious to patrimonial rights or to the moral right. Such a discussion is pointless, for how can the two be separated?

Why do lawyers concerned with copyright questions look for difficulties where there are none, by inventing a " moral " right of authorship to designate what simple common sense calls " blatant theft ", like the term used by Martial two thousand years ago: " *Tu fur es* " (Epig. I, 53)?

Are agreements on the right of authorship lawful? Can an author deprive himself of the right to his own name under a conventional commitment? Mr. Desbois believes that it is just as immoral as for a father to consent to renounce his capacity as such [40]. Comparison is not necessarily proof.

The right to claim authorship of a work must also carry the right not to claim it and to enter into an agreement whose subject is not unlawful.

These are general principles of civil law, not principles peculiar to copyright. The courts will decide according to the case.

The mere fact of writing or of daubing a wall is not creation of a " work "; if I do not want to create an original work, surely that is my own business. The law cannot tamper with it. It is my " freedom " — my prerogative — to create or not to want to create a work of art.

The objection could still be raised to an author who claims the right of paternity, after having relinquished it, that he is impairing the faith that everyone puts in contracts, and is thereby imperilling public order. Are the courts going to set themselves up to be art juries and decide that a piece of work which the author himself has considered to be without originality and unfit to be considered as a personal work is to become that very thing because, after having quarrelled with his employer and obtained all the pecuniary benefits that he could, he states that he has changed his mind?

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[37] Moreover, the greatest writers and artists say that they want to he judged on the hasis of their work as a whole; even if their convictions have changed, they do not renege the reckless creations of their younger days.

[38] In 1928, at the Rome Diplomatic Conference, when the so-called moral right was introduced into the Convention in the form of an Article 6bis, there was no question of adding thereto a right to repent. The Italian delegation had, however, proposed recognizing "the right to decide whether or not the work should appear", but the British opposed it (*Actes de Rome*, 1928).

[39] Schulze, "Copyright Reform in Germany", in *GEMA News*, Nos. 4-5, 1966, p. 38.

[40] Desbois, *Le Droit d'Auteur*, Paris 1950, p. 626. It is always the same puerile and false imagery that makes the work "a child of the author's mind".

Are authors always to be considered as children too young to look after themselves? I join with Mr. Lyon-Caen in asking: "Why should one treat authors as minors and forbid them to perform acts permissible for anybody else in respect of any kind of possessions and any kind of rights?".

3. *Right to respect of a work*

The right of respect entitles the author to forbid any amendment or change to his work without his consent. It guarantees the integrity of the work. In doctrine, it is considered to be the essential element of the so-called moral right; I consider it to be the *essential attribute of the eminent domain of literary and artistic property*. This right is of interest for the author-owner of the work, because any change in his creation can impair his reputation and contribute to giving an incorrect idea of his personality, but it is also, to some extent, of general interest because it is of concern to the public that works should not be distorted or mutilated at will.

In order to safeguard these two interests the law assures the author of exercising the eminent domain during his lifetime.

Article 6, paragraph 3, of the French law appears to be a legal heresy, of course, when it proclaims that a personal right is perpetual; it is a contradiction in terms to affirm that a right is attached to the person and is at the same time perpetual.

Be that as it may, so long as he lives the author enjoys exercise of the eminent domain, because, whatever the political régime, he is considered by the State as being the best guard of that fraction of the cultural heritage that he has created [41].

The German law of 1965 (Articles 13 and 14), like the French law of 1957, prohibits any actions likely to compromise the author's "intellectual or personal interests" and in general affords protection to the author in his "intellectual and personal relations to the work, and also with respect to the utilization of the work". But these provisions do not in any way create a special right, a so-called moral right.

It is on this delicate point that one perceives most clearly to what extent the theory of a copyright conceived as property-creation would be superior to the conventional theory; for example, Article 6bis of the Berne Convention requires the judge to consider whether the change is prejudicial to the author's honour, whereas this determination is not necessary in the case of repression of an infringement of property; the mere fact is sufficient. Moreover, the right to honour is one specific form of the general right of personality and belongs to every person, regardless whether or not he is an author.

The right to respect, if one examines it more closely, is the right of every owner. He may require that one should not injure what belongs to him, that one should not clip his hedges or steal his fruit, that one should not scribble on the walls of his house, even if the *graffiti* are inoffensive, that one should not in any way damage something that belongs to him and that gives him aesthetic and moral satisfaction; the court will decide whether or not the action done constitutes damage to his property. Any modification in a work impairs the artistic property of its author. I am in agreement with the French law which speaks only of "respect of the work". The court is not required to determine whether a distortion of the work is prejudicial to the honour or reputation of the author, but it may consider whether the prejudice deserves to be punished or whether it is merely a case of "undue sensitivity" [42].

The proprietor of a *res* should not have to show proof as to whether or not any distortion or mutilation of his work is prejudicial to him. *Once the judge has found that the mutilation has been committed, it is his duty to punish* the offender and he is not called upon to determine whether or not the mutilation is prejudicial to the author's honour or reputation.

Pierre RECHT
President of the National Copyright Commission
of Belgium

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[41] Cf. the considerations set forth in the decision handed down in the case of the postcards reproducing Millet's *Angelus* with alterations (Trib. Seine May 20, 1911): "It is in the superior interest of mankind that every work should be protected".

[42] Terms used in 1928 by Piola Caselli in the memorandum presented at Rome to the Conference revising the Berne Convention (*Actes de Rome*, p. 178). He added that Article 6bis should protect only a legal interest. Cf. Article 98 of the Civil Code of the USSR: "The author is entitled to the inviolability of his work" without having to show proof of anything else but an alteration thereto.

CORRESPONDENCE

Letter from Brazil

Contents

I. International Relations

1. *International protection of translators.* — Translation rights used to be considered by the general public everywhere as being limited to translations of novels and plays.

Realizing this, Unesco decided, in the context of its admirable cultural expansion programme, to convene a meeting of experts on translators' rights; the meeting took place at Unesco headquarters, in Paris, from September 23 to 27, 1968, and I was invited by Unesco, in my personal capacity, to attend as the Brazilian representative.

After five days of detailed discussions, a number of recommendations were adopted with the aim of strengthening the protection of translators in the developed countries and encouraging translations in the developing countries, thus opening up new possibilities for translation.

2. *Scope of protection "in fieri".* — In brief, the discussions were mainly focussed on the translator's autonomy of remuneration.

In Europe, the translation profession is already organized, and there is even an International Federation of Translators (FIT), which was represented at the meeting by its President, Mr. P. F. Caillé, as an observer; this fact demonstrates the keen interest shown in the discussions by the European countries represented there, namely Czechoslovakia, Denmark, France, Italy, United Kingdom and Yugoslavia. The main topic of discussion was the economic status of the translator in relation to the publisher.

The delegates agreed that the translator should be assured of equitable remuneration and, to the fullest extent possible, participate in all subsequent exploitations of his translation (Recommendation No. 1). In pursuance of this principle, which is based on Article 35 of the French Law of 1957, it was also agreed that, for purposes of contract interpretation, it should be assumed that only rights that had been expressly stipulated had been ceded by the translator (Recommendation No. 4). It was also considered that autonomy should be given to translations of scientific or technical works prepared in any industrial or commercial undertaking, so as to provide for remuneration in addition to the salary or wage, because for the latter to be deemed to absorb any translation rights would be an instance of abusive action that should be eliminated (cf. Recommendation No. 3).

3. *The status of translators in Brazil.* — In Brazil, as in other countries, translators do not constitute an organized profession, unlike music composers or playwrights who have their own associations to protect their economic and moral interests (UBC, SBACEM, SADEMBRA and SBAT). There is no professional organization of this kind in Brazil because, here, translation is not an autonomous gainful profession. In other words, in Brazil translation is a secondary activity engaged in by the translator alongside his principal activity as a writer, journalist, editor or public official. It is not organized as a profession, nor is there any prospect of its being so in the near future. The translator in Brazil is an amateur, who enters into a contractual arrangement with the publisher on the basis of a *service contract.* His remuneration is usually in the form of a lump-sum, and only in extremely rare cases is it based on a percentage of the sales price (publishing contract) and still more rarely on a percentage or share of the success of the translation. In this context, the recommendations approved at the Paris meeting can only be regarded, for Brazil, as a statement of principles, valid for the future *(de lege ferenda).*

4. *Two trends.* — So far as autonomous remuneration of the translator is concerned, the situation in Brazil, although the most advantageous in Latin America, was not very different from that described by the other developing countries represented at the Paris meeting, namely Ceylon, Ghana, India, Iran, Mexico and Senegal, whose representatives emphasized the uncertainty of translators' remuneration.

In these circumstances, the existence of two groups became apparent in the course of the discussions: the European, concerned with problems of translation at a much more advanced level, and that of the developing countries, which would like to have funds for payment of the royalties to authors whose works are translated. The latter group emphasized the great importance of translation as a factor for cultural development, particularly with respect to scientific and educational works. Consequently, a recommendation was adopted that draws the attention of governments, foundations, universities and other international organizations to the need to ensure, at their expense, the circulation of translations of such works and to guarantee adequate remuneration to the translators thereof (Recommendation No. 12).

5. *Conclusion.* — This meeting of experts was thus of a mixed character: at the technical and professional level for

translators in Europe, and concerned with the promotion of translation for the developing countries; it is curious to note this contrast in the resolutions adopted, similarly to what had happened with the recent Protocol to the Berne Convention, approved at Stockholm in 1967.

Observers from various organizations concerned with translation problems (FIT, publishers, etc.) took an active part in the Paris discussions, sometimes even more than the actual experts. The dominant personality at the Unesco meeting in Paris was, however, the Chairman, Mr. V. Strnad, Legal Adviser of the Ministry of Culture of Czechoslovakia, whose spirit of synthesis and able conduct of the discussions were admired and appreciated by all the fourteen other representatives.

In any case, translators' rights have been reaffirmed, and there is reason to hope that the recommendations approved at Paris will give a new standing to translation from the aspect of international protection of the translators[1].

II. Domestic Legislation

6. *Censorship of public performances.* — The Federal Constitution of 1891, and subsequently the much-discussed reform of 1926, did not impose any restriction on the principle of free expression of thought (Article 72, para. 12): each individual was held responsible for any abusive acts committed by him.

It is true that under Decree No. 18,527 of December 10, 1928, issued in implementation of Law No. 5,492 of July 16, 1928, on the organization of entertainment undertakings and the hiring of theatrical services, the programmes concerned were already subject to official censorship (Article 43); from the constitutional aspect, however, the principle of free expression of thought in respect of public performances was limited for the first time by the Federal Constitution of 1934, which made public performances and entertainment subject to censorship (Article 113, No. 9).

All the Federal Constitutions promulgated successively since that time — in 1937 (Article 122, No. 15(a)), in 1946 (Article 141, para. 5), and in 1967 (Article 150, para. 8) — have maintained the requirement of prior censorship for public performances.

Whether for fear of criticism, to preserve public morality and good order, or to maintain a public service already in existence, the fact is that in 1968 prior censorship of public performances had actually been in force for forty years, and there is no practical possibility of its being eliminated.

In my view, the problem of prior censorship is basically a matter of conflict between generations: on the one hand, the older generation of the censors, which is set in its bureaucratic ways, and on the other hand, the new generation of authors, composers, performers, playwrights and film producers.

A conflict on this kind broke out last year in Brazil, on the national scale.

To express their disagreement with a decision by the Federal Censorship Service prohibiting the performance of a rather daring play, actors from certain Rio de Janeiro theatres demonstrated in the streets and declared a strike. Intellectuals and students came out in support and took part in protest marches, and the movement spread to other cities in the country (Brasília, São Paulo, etc.).

The Government of the Republic was somewhat alarmed and hastily drew up draft legislation on official censorship. After some amendments by the Ministry of Justice, the draft became Law No. 5,536 of November 21, 1968, entering into force on January 22, 1969, subject to implementing regulations to be issued in this respect by the Executive.

7. *The new legislation.* — Under the new law, the fundamental criterion for censorship of theatrical or cinematographic works, serials and plays for broadcasting, is the minimum age of the audience (10, 14, 16 or 18 years) (Article 1, paras. 1 and 2); and, in addition to this fundamental criterion, Article 2 provides in general that the above-mentioned works must not be harmful to national security, to the representative and democratic régime, to public order and decorum, nor may they be offensive to any collectivities or religions, nor likely to encourage racial or class prejudice; this is therefore clearly tantamount to restricting free expression of thought.

Neither the fundamental criterion of the new law nor the detailed subsidiary provisions are new, however; they already existed under the earlier legislation (cf. Decree No. 20,493 of January 24, 1946, Articles 14, 37 and 41) which is still in force *(sic!)*. Thus, in practice, the new law will not prevent the opposition and protests that led the present Government to effectively revise and relax the prior censorship system. It nevertheless confirms the traditional difficulty of reconciling the principle of free expression of thought with the interest of the State in intervening between the author and the public in connection with the dissemination of works through public performance and entertainment (for more extensive comments on this matter, see our book *Direitos Autorais nos Invenções Modernas*, Rio, 1956, pp. 169 and 240).

The principal novelty of the law lies in the creation of the *Censorship Council* with the task of reviewing, upon appeal, decisions taken by the Director-General of the Federal Police Department on the censorship of works intended for public performance; in actual fact, the creation of this Council fills a noticeable gap.

Indeed, acting on the corrcct assumption that the police censorship authorities may not have the necessary discernment to evaluate the literary and artistic works (films, plays, text of songs, etc.) submitted to them for approval, the National Council approved in 1958 a law transferring the Federal Censorship Service from the jurisdiction of the Ministry of Justice to that of the Ministry of Education and Culture.

The fact is, however, that in addition to its specific functions the Censorship Service also exercises preventive protection of copyright, and this is a peculiarity of the Brazilian system. Thus, for approval of the programmes of all public performances, the Censorship Service requires the impresarios first to obtain a visa from the authors' and composers' societies (UBC, SBAT, SBACEM, SADEMBRA, etc.), and the visa is granted subject to prior payment of the royalties concerned. On the other hand, in cases where the users prove to be recal-

[1] The full text of the Recommendations adopted at the meeting was published in *Copyright*, 1969, pp. 38 and 39.

citrant, the authors' societies can successfully appeal to the police authorities, which have authority to prohibit any performance not authorized by the societies (see Decree No. 4,790 of January 2, 1924, Articles 3 and 6). This is administrative protection of copyright, which was considered in detail at the Madrid Symposium in 1966 [2].

In these circumstances, the transfer of the Censorship Service from the Ministry of Justice to the Ministry of Education and Culture amounts to eliminating this whole police and administrative system of preventive protection for copyright, because the Ministry of Education and Culture is not equipped to operate it. Consequently, under pressure from the authors' societies, combined with a celebrated torchlight procession to the Federal Senate building in Rio by theatrical, radio and television performers — though with the disagreement of some other intellectuals who considered that censorship should be under the responsibility of the Ministry of Education and Culture — the Vice-President of the Republic then in office vetoed the law that had been approved by Congress and supported in the Senate by Senator Gilberto Marinho (cf. *Diário da Noite*, Rio, of October 5, 1957), and the Censorship Service still remains under the jurisdiction of the Ministry of Justice.

Thus, the new law of 1968 maintains the existing system while creating the Censorship Council; it has given some measure of satisfaction to the intellectuals by making it possible for administrative decisions by the police censorship authorities to be reviewed by a body at an intellectual level superior to that of the civil police.

One can expect that, given the superior standing of the members of this future Council, more equitable and balanced decisions will be possible and that the Censorship Service will no longer merit the criticisms rightly voiced by Minister Nelson Hungria in the Federal Supreme Court judgment referred to hereinafter; however, only the future can confirm this expectation and the tolerant intentions of the new law, which is already indicative of a new approach to this delicate matter. One newspaper commented: " It is clear that a proposal of this kind must be tried out several times before one can form any reliable judgment as to its defects or qualities " (see *O Estado de São Paulo*, of November 30, 1968).

In the event that the Censorship Council fails to reach a unanimous decision, which will often be the case because its membership is fairly large, then an appeal may be made to the Minister of Justice who, from the administrative aspect, has the final word on official censorship.

8. *Judicial appeal.* — In any case, even after confirmation by the Censorship Council, the final administrative decision (by the Minister of Justice) may still be reviewed by the Judiciary.

There has already been much discussion as to whether the administrative decision by the Federal Censorship Service was binding on the local courts (see *Revista dos Tribunais*, 252/327) — in the case in point, as to whether the exhibitor of a film approved by the censors could nevertheless be the subject of proceedings for an offence against public propriety (Penal Code, Article 234, para. 1(ii)). In the view of one member of the Supreme Court, the late Mr. Ribeiro da Costa, it was iniquitous that a film exhibitor, after having complied with all the legal formalities and displayed the film approval certificate issued by the Censorship Service, which is projected onto the screen together with the film concerned, should subsequently suffer all the vexation of criminal proceedings. Notwithstanding this impressive argument, the Federal Supreme Court by a majority decision, with the dissenting opinion of Minister Nelson Hungria, rejected, on July 18, 1956, an appeal for *habeas corpus* on the grounds that " the censor's visa of approval does not expunge obscenity that makes it an offence to show a film or perform a play. The administrative criterion cannot prevent or preclude a divergent opinion on the part of the judicial authority. It is not admissible that the interpretation of the administrative authority should prevail in *res judicata* and that the judicial authority should have to give way. The judiciary has final and sovereign authority to interpret the law and to dispense justice " (*Diário da Justiça* of ex-Dist. Fed., of October 5, 1959, p. 3,425, and *Revista Forense*, 190/263).

This decision of the Supreme Court confirmed one handed down by the State (Provincial) Court of São Paulo on April 17, 1956, with reference to the French film " Un caprice de Caroline chérie ", whose showing was considered offensive to good conduct and public morality, because it contained some pornographic scenes. In rejecting the *habeas corpus* application, the São Paulo court had found that " if the film is designed to arouse lascivious feelings in the audience by presenting degrading scenes, with intentional licentiousness, then it has the characteristics of unlawful showing. What must be ascertained in each case is whether the film goes beyond the average concept of decency and good conduct in regard to sexual matters " (*Revista dos Tribunais*, 252/3-27).

Subsequently, however, on March 10, 1960, the *Tribunal de Alçada* of the State of São Paulo granted a writ of *habeas corpus* to the exhibitor of the French film " Les Amants " which had also been approved by the Censorship but had been considered obscene by the representative of the Public Ministry. Following a line of reasoning different from that of the Federal Supreme Court, the *Tribunal de Alçada* declared that prior censorship of public performances was typically an *administrative action*, within the sole competence of the Executive. Accordingly, the Judiciary could not interfere in any such administrative action, whether by revoking or confirming it, except at the risk of generating a conflict of authority. In summary, the decision was as follows: " The jurisdictional assessment of an administrative action is confined to the aspect of legality and does not extend to the desirability or not of the action. It therefore appears to be a contradiction for the State, through its Executive, to authorize a citizen to accomplish a normal action, such as to exhibit a particular film, and thereafter, through its Judiciary, to bring criminal proceedings against the same citizen on the grounds that he has committed an offence against public propriety " (*Revista dos Tribunais*, 301/362).

In my view, from the aspect of constitutional law, this would seem to me to be the more appropriate approach, while reserving the possibility for the Public Ministry to repress

[2] See *Copyright*, 1966, p. 179, and 1967, p. 28.

clandestine showings of pornographic films (for more detailed comments on this subject, see our notes " Obra Obscena " in the *Repertório Enciclopédico do Direito Brasileiro*, Vol. 35, p. 32), which is quite another matter.

III. Local Case-law

9. *Search and seizure of discs by the composer's assigns.* — Although authorized under article 672 of the Civil Code of 1917, the search and seizure of unlawfully reproduced works were imprecise under the previously existing system for civil proceedings. Apart from a few isolated cases (*Revista de Direito*, 73/124, or *Revista dos Tribunais*, 74/388 and 82/56), such action was considered possible only in criminal proceedings.

With the promulgation in 1939 of a new National Civil Code in which an entire chapter (Chapter V) is devoted to the special procedure for *preparatory preventive measures*, which have been studied in detail by Piero Calamandrei in an excellent monograph, all doubts have been dispelled and today it is quite common for the civil court to authorize precautionary measures.

Thus, claiming to be the assigns and publishers for six popular composers, the firm Edições Musicais Saturno Ltda. applied for and obtained, on January 11, 1968, from a local court of first instance, a search and seizure order with respect to a long-playing disc made by Fábrica de Discos Rozenblit Ltda. under the title " Os Versáteis e o Festival ", which reproduced four melodies by the composers concerned, without their permission having been given. The order was granted within 24 hours because, as the judge said, " it is designed to safeguard the petitioner's copyright interests, and enable him to take action ". Following the issue of the search and seizure order, 15 discs were confiscated in Rio de Janeiro stores, and 65 in São Paulo.

10. *Partial unauthorized reproduction on long-playing discs.* — The judge had not noticed, however, that the disc to be seized was of the long-playing type comprising 12 bands (6 on each side) and of these, 8 bands were in order and 4 constituted unauthorized reproductions. This new invention, a result of the slower rotation speed, as compared with the old speed of 78 r. p. m., gives rise to a new problem in that it opens the possibility for seizure of the *corpus mechanicum* of juxtaposed musical works, as in the case of long-playing records; in Italy, this point was covered by Article 161 of the 1941 Law which does not allow seizure " except in case of special gravity or when the infringement is imputable to all the co-authors ".

In my view, the correct solution — which was not envisaged by Piola Caselli in his commentary on this provision (cf. *Codice del diritto di autore*, 1943, p. 652) is to allow the entire disc to be searched and seized, because it would not be just if the rights of authors whose works have been reproduced without authorization were to be rendered inoperative by those of authors whose works have been properly reproduced: the manufacturer might have deliberately presented the works together, with the precise intention of avoiding seizure.

Thus, in granting the above-mentioned search and seizure order, although without taking into consideration the obstacle created by the new phenomenon of the long-playing disc, the judge of the 11th local circuit reached a proper decision.

The great advantage of the preventive measure is that it enables the petitioner to " take the pulse " of the main action, without compromising the basic right that will be determined subsequently.

Under Article 67 of the new French Law of March 11, 1957, the defendant can request the limitation of the effects of search and seizure, in the form of permission to resume the manufacture of unauthorized copies; this seems to us to be a flagrant contradiction, since it implies permission to continue the copyright infringement with the condonation of the Law!

11. *Action for compensation of the assigns. Preliminary defence.* — Following the preliminary stage of search and seizure, and within the legal time-limit of 30 days, the petitioner — Edições Musicais Saturno Ltda. — entered a claim for compensation against the infringer — Fábrica de Discos Rozenblit Ltda. — requesting that the latter be required to forfeit the seized copies and to pay the value of any other copies produced on the basis of their retail value or, in the absence of reliable evidence, on the basis of the value of 1000 copies, plus the interest on overdue payment and the court and legal costs.

In its own defence, the Fábrica first pleaded that the petitioner's case was unlawful, because it cited only private contracts assigning copyright and publishing rights, that had not been registered with the National School of Music, whereas the musical works covered by the contracts should have been so registered, pursuant to Articles 135 and 1067 of the Civil Code and Article 309 of Decree No. 4,857 of November 9, 1939.

In actual fact, the claim for damages was being brought not by the composers in person, but by their assigns and publisher, who had not published anything. In relation to them, the defendants had been a third party acting in good faith. In the absence of any registration, how could anyone ascertain who owned the copyright? All the more so because it was a well-known fact that among composers of popular music it was common practice for the same rights to be assigned twice, Thus, although registration of works was optional (Civil Code, Article 673), that could not be the case with respect to private contracts assigning copyright and publishing rights, whose prior registration was essential.

In view, however, of the personal intervention of the composers who had assigned rights, in support of the petitioner, the judge held that the preliminary case for the defence was not convincing and rejected it. He did not, however, consider the effects of registration in relation to a *bona fide* third party and accordingly the defendants submitted an appeal; a decision is to be taken on this in the course of 1969.

12. *Case for the defence: administration of affairs and good faith.* — As regards the substance of the claim for damages, the defendants pleaded that in actual fact they had engaged in administration of affairs, as provided for in Article 1,331 of the Civil Code; they had administered, in their own name, the affairs of another party — namely, the composers concerned — and that was lawful.

The matter concerned the recording of popular melodies that had won awards at the TV Record Festival, held at São Paulo in October 1967. To meet the demands of the young market for popular music, the winning songs had to be made available immediately in record form; moreover, the composers concerned had no fixed domicile or residence. In the absence of any registration of assignment and publishing contracts it was difficult if not impossible to determine who was the owner of copyright in the works.

In these circumstances, because of factual circumstances, the defendants had found themselves obliged to issue a long-playing record of the Festival without having first obtained express permission from the composers whose works were recorded; their good faith was, however, apparent from the fact that on the record covers and labels they had given the names of all the authors (author's moral rights) and had also included a reservation clause, as follows: " C. All rights reserved for the authors — or their assigns — of the musical works included in this long-playing record — 1967 ". Consequently, the publication could not be considered *fraudulent*, under Article 672 of the Civil Code, and the defendants' actions could be considered as constituting *administration of affairs*. It was therefore not a matter of *compensation*, falling within Article 669, but only of payment of *remuneration* due as for an ordinary publication, which the defendants had moreover offered to the petitioner, in writing, before the main action had been brought before the courts.

Despite supporting evidence, the judge rejected the defence argument because " there are countless technical and economic considerations which would be prejudicial to the artistic and commercial interests of the work if its reproduction were to be allowed without any effective supervision by the author " (extract from judgment by Dr. João Carlos Pestana de Aguiar Silva, of the 11th Civil Court, State of Guanabara, Rio de Janeiro, dated December 23, 1968). No complaints were made about the quality and artistic perfection of the record made by the defendants, who are in fact one of the best recording firms in the country. Following this rejection of the defence argument (administration of affairs), the defendants entered an appeal and the case is to be heard in 1969.

13. *Conclusion: amount of compensation due.* — The defendants were then ordered, by virtue of Article 669, sole paragraph, of the Civil Code, to pay, in addition to interest, court costs and legal expenses (NCR $ 500.00), compensation equivalent to one third of the value of 1,000 copies (NCR $ 2,833.33) having regard to the fact that of the twelve musical compositions recorded on the disc in question, only four had been reproduced without the authors' permission. Thus, contrary to what had happened on the occasion of the preventive measure of search and seizure, when no account had been taken of the bands that were lawfully recorded, the judgment made a proportional division of the value. It therefore applied the *rusticum judicium* advocated by Copinger and Skone James in *On Copyright* (London, 1965, para. 572).

It appears, however, that the application of this legal provision was not appropriate in this case, for two reasons: in the first place, because when the provision was drawn up in 1917 the Brazilian legislator only had in mind the publishing of books — at that time phonomechanical publishing in the form of discs was almost unknown; in the second place, because a proper basis for calculating the amount of compensation was lacking — i. e. the value of a *genuine* copy which in the event did not exist since the petitioner had not published any disc containing the musical works reproduced by the defendants! In these circumstances, there is reason to think that the judgment may be reversed by the higher court, and we shall report on this in our next " Letter ".

In brief, this seems to me to be the principal case heard in the local courts (of Rio de Janeiro) in the course of 1968. A number of others — on collection of royalties, brought by the authors' societies against recalcitrant users of musical works — were also commenced in 1968. Meanwhile, as they are routine applications, no special comment is necessary.

IV. Miscellaneous

14. *Parliamentary Commitee of Enquiry.* — Ever since our first book was published, in 1956, we have been denouncing, and showing proof of, abusive practices on the part of the societies that collect royalties, and this situation is certainly not confined to the Brazilian societies (see *Les abus de la société des auteurs, compositeurs et éditeurs de musique*, by Maurice Kufferath, Brussels, 1897).

In an interview published in the morning paper *Jornal do Brasil*, dated May 17, 1961, we draw attention to the increasing consolidation of the economic power of the societies, which were coming to resemble a monopoly, and this was confirmed in 1967 by the establishing of the *Bureau de Cobrança* (Collecting Office), resulting from an administrative merger of the principal societies already existing in Brazil (UBC, SBAT and the SBACEM-SADEMBRA Group) for the purpose of organizing unified collection [3].

In our most recent book, which is summarized below, we cite the existing indications that point to a *de facto* monopoly and propose remedies to correct the abusive practices already denounced (cf. *Violações dos Direitos Autorais*, Rio, 1968, Section VIII, p. 483).

Following our prophetic statements, since 1961 there had been an increasing number of complaints about the abusive practices of the collecting societies — to such a degree that in 1968 the Chamber of Deputies set up a Parliamentary Committee of Enquiry to examine the origin and substance of the complaints made by members, by composers and by users. In 1968, various important persons from the musical world gave evidence before it, but nothing positive has yet been determined. And having regard to the fact that the functions of the Legislature were recently suspended by the Executive, following the *coup* of December 13, 1968, it is impossible to foresee when the Parliamentary Committee of Enquiry will complete its work, which is of such particular interest for the practical aspect of copyright.

15. *Convention.* — With a view to restricting the effects of the *de facto* monopoly referred to ahove, the Association of Broadcasters of São Paulo (AESP) concluded a convention on

[3] See *Copyright*, 1967, p. 33.

the collection of royalties with the Independant Society of Musical Authors and Composers (SICAM) which is valid not only for the capital, but also for the entire State (Province) of São Paulo, the richest and most prosperous in Brazil. SICAM is a new collecting society, at the regional level, which operates independently of the Collecting Office referred to above. In addition to establishing a fixed monthly amount for each radio or television broadcasting station, the convention includes some very instructive clauses, such as clause 2 which reads as follows: " The signatory parties also recognize as being a factor highly prejudicial to musical culture, whether of an erudite or popular character, the collection of high fees for the utilizatiou of musical works; and that there should be a perfect balance between the incentives for production and for utilization of such works ". Needless to say, the Convention had a hostile reception from those with an interest in the *Bureau Único de Cobrança* (see *Diário de Notícias*, of July 9, 1968).

16. *Methods.* — In the course of last year we were consulted about copyright protection for cutting and sewing techniques and for children's basic teaching methods. These techniques and methods are described in printed pamphlets that have been registered with the Copyright Section of the National Library, pursuant to Article 673 of the Civil Code, and the enquirers wanted to know whether registration of the works conferred any exclusive rights on the methods concerned, so as to prevent their reproduction by any third party. The opinion that we gave was in the negative; we explained that a *method* is not a *work*, but rather an *applied idea*, in the sense of control or personal decision. Thus registration of a work that describes a method does not result in any exclusive right for the latter, but only for the work itself, so that anyone is free to reproduce the method, but not the work describing it. Moreover, the authoritative opinion of Professor Nicola Stolfi on this subject is identical (*Il Diritto di Autore*, third edition, 1932, No. 375). Prior to that, the local court had refused to grant protection to the author of a stenographic method. This is also the case with the registration of a scientific work, which does not carry with it any exclusive right in the *scientific idea* developed therein (cf. Washington Convention of 1946, Article IV, para. 3). There must be no confusion between protection of a work and protection of its contents or the idea underlying it.

17. *Collective works and partial unauthorized reproduction.* — We were also consulted about contracts for the co-authors of collective works such as dictionaries, encyclopaedias, anthologies, etc., which are very much in vogue because the culture of the new generations is a culture of condensation or compilation.

There is no problem in this respect: either the co-author signs a *contract of assignment* of copyright on his contribution, in which case he receives a lump-sum payment, or he signs a *publishing contract*, in which case he receives a fixed amount in respect of each edition or printing of the collective work, in accordance with a specified arrangement. In either case, the co-author is free to reproduce his own contribution separately (Civil Code, Article 650, sole paragraph). In a recent opinion, Professor Adroaldo Mesquita da Costa, Consultant-General to the Republic, stated that " Where there has been no formal transfer of ownership of copyright, the publishing contract — whether written or verbal — must be considered to relate only to the number of copies negotiated. A new arrangement must be made for any new edition " (*Diário de Notícias*, of August 28, 1968). This remark applies also to the publishing of collective works.

One particular case of partial unauthorized reproduction in a collective work has recently occurred, involving two articles written by ourselves. In connection with a Bill on copyright drawn up in 1961 by a Working Party appointed by the President of the Republic, we published in the *Jornal do Commercio*, of Rio, on August 19 and 23, 1961, two signed *newspaper articles* of a scientific character under the title: " Comments and suggested amendments for the Working Party ", with a sub-title reading: " Reform of copyright legislation ". Seven years later, the editors of a collective work, *Repertório Enciclopédico do Direito Brasileiro* (Encyclopaedic Catalogue of Brazilian Law), in the section " Draft legislation on copyright " reproduced under the heading " Criticisms by Hermano Duval " the two above-mentioned newspaper articles, but without having complied with the requirement of obtaininig our permission.

Were the editors of the collective work entitled to act in this way? Quite obviously, the answer must be no: under Brazilian law (Civil Code, Article 659, sole paragraph), the transfer of rights on a signed *newspaper article* of a scientific character is valid for a term of only 20 days; thereafter the author of the article recovers his full copyright. In these circumstances, it is clear that the article cannot be reproduced by a third party without the express permission of the author. Consequently, on account of this partial unauthorized reproduction, should one apply to the judicial authorities for a search and seizure order in respect of this particular volume of the *Repertório*, which comprised 52 other sections in good and due order, by 32 other co-authors? The case was a serious one because the other party could perhaps have invoked, as a general principle of law (Introductory Law to the Civil Code, Article 4) the special provision contained in Article 161 of the Italian Law of 1941 on which Mario Fabiani, in a monograph entitled " Esecuzione Forzata e Sequestro delle Opere dell'Ingegno ", 1958[4], made no comment at all. However, as Brazilian law is imprecise in this respect, in my view the search and seizure of unauthorized copies of a collective work should follow the general rule applicable to other works; thus, the work is liable to seizure in the same way as has been described above (section 10) in connection with the seizure of long-playing discs.

Thereafter, what would be the amount of compensation due? The answer is simple: the sales price of volume 42 of the *Repertório*, containing 355 pages, was NCR $ 25.00; accordingly, each page is worth NCR $ 0.07042253; three pages containing unauthorized reproductions together are worth NCR $ 0.21126759; and since the edition comprised 7,000 copies, the total amount of compensation due to the author would be NCR $ 1,478.87! This was the criterion used

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[4] See *Le Droit d'Auteur*, 1959, p. 94.

by the Court of the State of Guanabara for calculating the amount of compensation due in the case of unauthorized reproduction of a short story — " O Comprador de Fazendas " — by Monteiro Lobato, in the monthly magazine *Coletânea* which has now gone out of circulation (see H. Duval, *Violações dos Direitos Autorais*, Rio, 1968, No. 15).

18. *Bibliography.* — The most noteworthy event in 1968 was no doubt in the field of specialized publications on copyright theory. For the second time (the first occasion was in 1956), the national literature on copyright saw the addition of two books in one single year: *Violações dos Direitos Autorais*, by ourselves, which is the fruit of eight years' hard work — 567 pages, published by Borsoi, Rio de Janeiro; and *O Plágio em Música* by Edman Ayres de Abreu — 183 pages, small format, published by *Revista dos Tribunais Ltda.*, São Paulo. The fact is indeed worthy of mention when one knows how rare the publication of just one book is in our specialized field. Moreover, as it is not a very well-known speciality, local publishers are reluctant to venture into it!

In addition to these two books, volume 42 of the *Repertório Enciclopédico do Direito Brasileiro*, (Encyclopaedic Catalogue of Brazilian Law), also published by Borsoi, reproduced under the letter " P ", following the 70 sections already included, 2 further sections by ourselves and entitled: "Literary and Artistic Property " and " International Copyright Protection ", together with another by Mrs. Leda Maria Cardoso Naud under the title " Copyright Protection " which represents the first contribution to copyright by a Brazilian woman. This same volume 42 also reproduces the texts of two Bills on copyright: one was drawn up by former Deputy Humberto Teixeira, and the other, by the National Union of Book Publishers and by the Brazilian Book Chamber; the latter's " Statement of motives " was published in our recent book.

The book comprises ten sections, sub-divided into 30 chapters; in addition to a detailed study of international copyright protection, we examine the principal practical aspects of unauthorized reproduction, imitation and parody in literary, artistic, musical and dramatic works. The fundamental features of unauthorized reproduction are examined in the light of jurisprudence and doctrine, with ample references to cases heard by the Brazilian courts over a period of 30 years (case-law method), which is generally the guide-line for doctrine.

The other book, by Mr. Edman Ayres de Abreu, is a specialized work within a speciality because, as its title indicates, it deals with the delicate subject of plagiarism in music; his generalized remarks on art and aesthetics deprive the work, however, of some of its legal substance, so far as the specific problem at issue is concerned, and the necessary technical objectivity is lacking. Nevertheless, because of the individual cases mentioned, the work represents a useful contribution to information on this matter, which he examines with a heavy dose of subjectivism.

Thus, from the aspect of doctrinary formulation of copyright, 1968 was a very fruitful year in Brazil.

Hermano DUVAL
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BOOK REVIEWS

Le Droit d'Auteur, une nouvelle forme de propriété [Copyright, a new form of property], by *Pierre Recht*. A volume of 338 pages, 22 × 15 cm. Librairie générale de droit et de jurisprudence, Paris, and Editions J. Duculot, Gembloux (Belgium), 1969.

A new book on copyright has appeared written hy Mr. Pierre Recht which can he easily classified as a " theoretical work ". The author is well known among specialists in this field hoth at the national and international levels, notahly as President of the National Copyright Commission of Belgium, for his representation of Belgium at many diplomatic conferences such as those of Brussels (1948), Geneva (1952), and Rome (1961), and for his participation in certain meetings of the Permanent Committee of the Berne Union.

In the preface to his book, Mr. Recht reveals that the idea to write tbe book was of long standing, but that the actual decision was precipitated by recent developments, in which he saw a proliferation of attacks from all directions against copyright due to progress in the techniques of distribution and exploitation of works. Mr. Recht sets himself, then, to the delicate task of defining the legal nature of copyright, a question about which the widest possible variety of views exists among jurists.

In tbis regard be constructs a theory (which merits consideration) hased on the concept which he calls " property-creation ", wbich he furtber characterizes as a real right bearing on tbe ideas of the mind, and which be places next to the classical " property-possession ".

It is not possible to present here in a detailed fashion an outline of the contents of Mr. Recht's book, particularly since the author, himself, has undertaken that task in a separate article appearing elsewhere in this issue of the review. However, it is necessary to take note of the original idea put forward hy Mr. Recht who, in his concept of property-creation, distinguishes between a *domaine utile*, which has a temporary character and to which are connected diverse forms of exploitation of the work, and an eminent domain, whicb has a permanent character, and which permits the justification of a public domain of the State as well as the moral right of the community to safeguard the respect owing to works of art created hy human genius and to historic monuments. The part of the book which Mr. Recht devotes to tbe moral right equally merits special mention.

This work, which, prior to its theoretical exposition, contains an important and well documented historical section, is written at a bigh level and is of particular interest to specialists in the field. It is the reason why BIRPI, hy publishing the summary of the book made by the author, is calling attention to this new contribution to the history and theory of copyright. C. M.

CALENDAR

BIRPI Meetings

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

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

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

Object: Consideration of varions qnestions concerning copyright — *Invitations:* Belgium, Brazil, Denmark, France, Germany (Fed. Rep.), India, Italy, Portugal, Rumania, Spain, Switzerland, United Kingdom — *Observers:* All other memher States of the Berne Union; Unesco

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

Object: To appoint ohservers to the International Copyright Joint Stndy Group — *Invitations:* Interested Organizations — *Note:* Meeting conveued jointly with Unesco

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

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

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

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

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

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

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

Object: Annnal Meeting — *Invitations:* All member States of the Lishon Union — *Observers:* All other member States of the Paris Union

September 29 to October 3, 1969 (Washington) — International Copyright Joint Study Gronp

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

Septemher 30 to October 2, 1969 (Geneva) — Committee of Experts on the Establishment of a "Priority Fee" (Paris Convention)

Object: Implementation of the Recommendation adopted hy the Stockholm Conference — *Invitations:* Algeria, Argentina, Anstria, France, Germany (Fed. Rep.), Iran, Italy, Japan, Kenya, Netherlands, Rumania, Soviet Union, Spain, Sweden, Switzerland, Uuited Kiugdom, United States of America, Yugoslavia — *Observers:* Interested intergovernmental and non-governmental organizations

Octoher 21 to 24, 1969 (Mnnich) — Joint Ad Hoc Committee on the International Classification of Patents (2nd Session)

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

October 27 to 31, 1969 (Geneva) — Committee of Experts on a Model Law for Developing Countries on Industrial Designs

Object: To study a Draft Model Law — *Invitations:* Developing countries members of the United Nations — *Observers:* Interested intergovernmental and nou-governmental organizations

Novemher 3 to 8, 1969 (Cairo) — Arab Seminar on Industrial Property

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

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

Meetings of Other International Organizations Concerned with Intellectual Property

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

May 25 to 29, 1969 (Vienna) — International League Aginst Unfair Competition (LICCD) — 21st Congress

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

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

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

June 24 to 26, 1969 (The Hague) — International Patent Institute (IIB) — 101st Session of the Administrative Council

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

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

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