Copyright

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GENERAL STUDIES

Photocopying and copyright

By Xavier DESJEUX *

Photocopying is defined as " a process of rapid reproduction of a letter or document by instantaneous development of a photographic negative " (Larousse Dictionary).

Photocopying has become a widespread practice nowadays, and, owing to its continual application to intellectual works, it understandably arouses strong feelings among authors; occasionally, there has even been talk of " pollution of the publishing trade through photocopying ". A similar development may be observed in the field of sound reproduction (the tape recorder) or sound and visual reproduction (the videotape and the scopitone). Microfilm made it possible to make small-scale reproductions of works; photocopying may be used to reproduce certain passages of an article or book, or even the whole volume, in the same dimensions as the original work. A recent survey in the United States of America estimated the number of pages photocopied in 1967 at 1.2 billion in that country alone, while a survey carried out for the same purpose in the United Kingdom revealed that nearly 400 British libraries together made 1.2 million photocopies; the most seriously affected area was that of periodicals, particularly scientific magazines, which accounted for 75 to 85 percent of the photocopies. It is also known to be a regular practice in that sector to microfilm whole collections of a periodical with a view to setting up space-saving archives at firms which publish periodicals available in libraries.

In France, and no doubt also in other countries, photocopying has developed to such an extent that it can no longer be ignored by either authors or publishers. There are certain bodies specialized in the field, such as the documentation department of the *Centre national de la recherche scientifique (CNRS)* [National Scientific Research Center], which offer photocopying services by means of a descriptive bulletin containing summaries of a large number of French and foreign periodicals. The CNRS is said to produce almost a million pages of photocopies or microcopies a year for its clients.

Such practices are bound to have marked repercussions on the sale of the books and periodicals copied, so much so that, in fact, it is the authors and publishers who ultimately bear what may be a considerable proportion of the cost of something which is developing in direct violation of their right of reproduction as provided for in many national laws, in the Berne Convention and now expressly in the Universal Copyright Convention also.

And yet a way should be found of reconciling law with a practice which is now firmly established in everyday life; is the general interest, seen from the scientific and economic as well as from the cultural angle, leading to a disregard for the protection afforded by the law to the author of a literary, artistic or scientific work?

We shall first look at French law (I), then make a study of comparative law (II), and, after having outlined the principles of international law (III), we shall consider the elements of a solution (IV).

I. The right of reproduction in the French Law of March 11, 1957

The legislator states a principle, which is the right of reproduction (A), and provides for an exception, which is private use (B).

A. The principle

The author's right of exploitation includes the right of reproduction (Article 26). Reproduction is understood in the broadest sense, as it consists in the material fixation of the work by all methods that permit of indirect communication to the public, in particular by photographing or by mechanical, cinematographic or magnetic recording (Article 28). That photocopying constitutes reproduction in terms of the Law has never been seriously questioned; on the other hand, some have seen the problem in the scope of the exception.

B. The exception based on private use

When a work has been disclosed, the author is not entitled to prohibit copies or reproductions reserved strictly for the private use of the copyist and not intended for collective use (Article 41). The 1957 Law to a large extent codified previous Court decisions and practice. What it allowed was the work of the copyist — scholar, researcher or student — who copied all or part of an article or book, in longhand or with a typewriter, for his personal study. There is nothing to suggest that the legislator meant the exception to extend further. Indeed, there is no case law in this connection. Yet this is largely explained by the difficulty of detecting infringement in non-public places as soon as it occurs and of determining who committed the offense. The fact that an unlawful act is not punished does not make it lawful, and it would seem risky to claim an acquired right on the ground that the offense has been committed over a certain period of time and has become a regular practice.

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Note: This study was submitted to the Working Session of the International Literary and Artistic Association (ALAI) (Paris, July 3 to 8, 1972). It is printed here with the kind permission of the author.

1. *Case law and the "family circle".* — These strict-sounding affirmations are based on a unvarying case law in the adjacent field of the right of performance. After having asserted the exclusive right of the author to allow the performance of his works (Article 26), the 1957 legislator provided for an exception by way of symmetry: when a work has been disclosed, the author may not prohibit "free, private performances produced exclusively within the family circle" (Article 41, paragraph 1). Before the 1957 Law, there was room for doubt as to the extent of this tolerance: it was generally accepted that "private" meetings were not within the purview of the right of performance when third parties were invited by name and when no entrance fee was charged. This provided a loophole and enabled associations or meetings of former members of a school or regiment to enjoy musical entertainment without any compensation being paid to the authors of the works thus performed. The new Law sought to deal with this by making a specific mention of the family circle concept. Case law subsequently denied the benefit of the exception to a meeting of hockey players and their families after a match, to a gathering arranged by a mayor and his town council to celebrate an election victory and, more recently, to a company club where staff partook of refreshments and the common room of a children's home in which a record player was permanently installed.

The foregoing examples show how exceptions to copyright should be limited as far as is practicable.

2. *Private use by the copyist or by third parties?* — With regard to reproduction, there are two significant examples which come close to the usual photocopying practice and which may serve to illustrate the attitude of the Courts in defining private use as related to reproductions intended for professional use.

In the first instance, a radio engineer manufactured, on behalf of an advertising agent and without the consent of the authors, two publicity records containing melodies popular at the time. He was found guilty of infringement, as the reproduction was not made for his own personal use.

In the second instance, a firm undertook the enlargement of a photograph, without the consent of the author, for the private use of a client. The Courts condemned him on the grounds that, "... to escape repression, copies must be intended for the private use of the copyist, whereas, in the case in point, the copyist is a third party working for a salary".

The solution should be the same with photocopying where the owner of the equipment makes reproductions not for himself but for third parties. The CNRS provides an example to illustrate this: it makes a wrong application of the law when it requires its clients to write the following declaration on their photocopy order form:

Je désire commander une reproduction en lieu et place d'un prêt de publication ou d'une transcription manuelle et seulement à des fins de recherche. Je déclare sous ma responsabilité m'engager à ne pas faire un usage commercial de la reproduction demandée ci-dessous, usage qui constituerait une infraction au copyright. *Il est entendu que je n'achète pas la reproduction, mais que le droit payé couvre exclusivement les frais de la copie faite sur demande.*

This text appears to be a translation of the one which the Library of Congress makes its clients sign. It should be pointed out, however, that this Library (the largest in the United States of America), by order of the Copyright Office, issues reproductions only of such works as are not copyrighted under the United States Copyright Law.

By providing for this formality, the CNRS, while serving the immediate purpose of facilitating scientific research, overlooks the implications of such practices, which are a threat to the very existence of the high-level magazines and discouraging to their publishers in that the magazines, already very costly, risk the loss of an appreciable number of subscribers. In fact, it is science itself which will be the long-term victim of this situation unless there is some provision at least for equitable remuneration of the authors or publishers when photocopies are made; moreover, there is no evidence of the copies being issued free of charge, or even at the cost price; this seems to be a commercial operation in which the interests of authors are not taken into consideration.

3. *Generally accepted practice and conflict with the "normal exploitation of works".* — It is tempting to make a distinction between the person who makes a photocopy for a non-profit-making purpose, although perhaps on behalf of a third party, in order to release him from the obligation to pay the author royalties, and the one who makes a photocopy for either direct or indirect profit; moreover, additional reservations are made for individual cases through extensive application of the private use concept or even the claim, over and above private use, of educational purposes.

Thus, if these distinctions were to be observed, the only photocopies subject to copyright would be those made for direct profit. To do this would be to ignore realities: the volume of works reproduced by the process under consideration is such that, from now on, even widespread private use in the strict sense tends to merge with a certain kind of public use, and this applies *a fortiori* to all other uses.

All professionals, individuals or firms, already have or will have a photocopying machine for use in their offices or establishments. They will use it daily, either in connection with consulting work, or in a small research laboratory, or in a firm with several thousand employees. Libraries, irrespective of type (public or private) and purpose (profit-making or otherwise), are equipped with a photocopying machine, which belongs to them or is rented from a specialized firm, for use in their archives or for students, readers or other clients. Finally, photocopying is now an established feature of educational institutions, regardless of their size and the nature of the education they provide.

It is reasonable to draw the conclusion from the foregoing that the widespread practice of photocopying is a threat to authors which is bound to become more serious as time goes on, owing to the fact that the conflict with the normal exploitation of reproduced works is a reality which cannot but increase.

In any event, we must look at the situation as it is and come to terms with one thing: reproductions are made, and will continue to be made, without the author's consent. The

divorce between law and practice is consummate, and there is nothing to be gained by stressing the point further. Yet does this really mean that distinctions should be made between the photocopies which are tolerated and those which are not, thus officially allowing a number of illegalities? This does not seem necessary; moreover, it would be pointless and dangerous. The fact remains that any unauthorized reproduction is punished by French law. As soon as the infringement is discovered, it is for the author alone or his publisher to assess the advisability of bringing action, taking into account the seriousness of the unlawful act. Yet if, *de lege ferenda*, an overall solution of the problem were envisaged, embodying a generalized right of collection, it is hard to see why one photocopy, of all the millions made, would not conflict with the author's interests while another would. If ever a magazine should cease to be published for want of subscriptions, all the photocopies made from it will have contributed to its disappearance. In this respect, photocopying cannot be reconciled with the private use concept; the solution lies elsewhere. Before proposing the elements of a solution, however, some enlightenment should be sought in a study of comparative law.

II. The teachings of comparative law

There are many legislations which grant the author an exclusive right of reproduction in respect of his work, subject to one exception or another, generally relating to the " private sector ". There are certain national legislative and practical provisions, particularly in the Scandinavian and Anglo-Saxon countries, and in the Federal Republic of Germany, which should contribute towards throwing some light on the situation.

A. Photocopying and copyright in Scandinavia

The Swedish Copyright Law of 1961 recognizes the right of reproduction, but provides for an exception which is original for its double application: on the one hand, certain archives or libraries may produce copies of literary or artistics works " for the purpose of their activities " (Article 12), particularly, it would seem, photocopies of works for the benefit of readers; on the other hand, a few copies of disseminated works may be produced " for personal use " (Article 11, first paragraph). This is a broader concept than " private use ", and it comes closer to the " fair use " concept used by the Anglo-Saxons.

Objection has been taken to this extension of the exceptions on grounds of doctrine, but, in fact, the text of the Law is inseparably linked to an earlier institution which tends to mitigate violation of the right of reproduction: libraries do not pay royalties, but they must inform the Swedish Fund for Authors of copies made and books lent. Through the Fund, the State pays authors certain sums depending on the extent to which their works are lent or reproduced; it also grants bonuses to young authors and assists the older ones in times of need. The system, as a whole, works on a relatively small scale, and the interests of authors are not really neglected.

In Denmark also, the State intercedes on behalf of authors, and the approach adopted seems even more satisfactory; since 1946, the Minister for Education has granted Danish authors one crown per annum for each copy in excess of fifty copies of their works in public libraries. More than 25 million crowns have been paid in this way to date, which corresponds to more than 50,000 crowns to the highest-paid authors. The effort undertaken deserves to be mentioned, even though it does not enjoy universal support. The fact remains that infringement of the right of reproduction is compensated by financial aid on the part of the State.

B. Photocopying and copyright in Anglo-Saxon countries

The United States of America and the United Kingdom recognize the right of reproduction, deriving it, however, from an original conception. In 1909, at the time of the revision of the American Copyright Law, it was stated that:

> The copyright legislation established by Congress ... is in no way based on a natural right exercised by an author in relation to his works... but on the fact that the public welfare and the progress of science and the useful arts will benefit if authors are guaranteed, for limited times, exclusive rights in their writings... Two questions present themselves: to what extent will such legislation be an incentive to the author and therefore of greater advantage to the public? And what risk is there of the monopoly thus granted being prejudicial to the public? It seems clear that the judicious conferment of exclusive rights of this kind should bring the public advantages which will largely offset the drawbacks of a temporary monopoly.

The British conception of copyright is similar: it refers to industrial property rights and explains " fair use " and " fair dealing " as being a broader exception than that of private use. It is defined as the use of the work which normally must be allowed by the copyright owner, or indeed has been anticipated by him; practice shows that the benefit of this exception is strictly limited.

In the United States of America, Article 1*(a)* of the 1947 Copyright Act provides that the copyright owner enjoys the exclusive right " to print, ..., copy... the copyrighted work ". The private use exception is not expressly provided for: " fair use " has been introduced in practice in the interests of society. Normally, the tolerance applies only to reproduction for the purposes of personal study or for criticism. The Court of New York once condemned a professor who had distributed typewritten extracts of a copyrighted work to his students. By the same token, the Copyright Office states that copyright prohibits any photocopying which has not been authorized by the author, and the Library of Congress issues no photocopies of copyrighted works. And yet, the agencies specialized in the making of photocopies pay very little heed to the official doctrine. A survey has revealed that about 80 percent of libraries issue reproductions of copyrighted works without regard for the protection of their authors.

In order to lessen the risks of reproduction by a mechanical process, a " Gentlemen's Agreement " of limited scope was concluded as early as 1935 between the Joint Committee on Materials for Research and the National Association of Book Publishers, with a view to authorizing the institutions represented by the former to make microcopies for internal use

under certain circumstances. The solution could only be a provisional one, but it is generally acknowledged that it has created a beneficial atmosphere of mutual understanding between publishers and libraries. Since 1960, a large number of studies have been devoted to photocopying and other processes in the United States of America; while they differ with respect to the approach to be adopted, the majority of them recognize a right of equitable remuneration in favor of authors whenever an entity of any kind makes photocopies of intellectual works.

The principles of protection in this field are very similar in the United Kingdom. The Copyright Act of November 5, 1956, reproduces the provisions of the 1911 Act, specifying that:

> No fair dealing with a literary,... work for purposes of research or private study shall constitute an infringement of the copyright in the work.

This Act, which was drafted somewhat hastily, contains certain ambiguities; for instance, it does not define " fair dealing ", and it is important that it should be interpreted restrictively. Details given elsewhere in the Act speak in favor of this interpretation. Only official, non-profit-making libraries benefit from exemption. As in the United States of America, the user must specify that he will not use the copy for anything other than private study or research. The recipient of the copy must pay a sum which may not be lower than the cost of actual copying, and the Board of Trade " may impose such other requirements (if any) as may appear to the Board to be expedient " (Article 7(2)). Thus, the principle of the right to equitable remuneration in favor of authors, while not actually stated, at least does not seem to be ruled out.

The difficulty arises from the fact that the text is based on an agreement entered into by authors' and publishers' associations with scientific research institutions. A general license was granted, without monetary compensation, to firms which did not intend to derive profit from reproduction, but rather wished to make a copy of a scientific magazine for the purpose of internal study. This example should be seen as an expression of the will to seek an agreement on the part of interested circles.

A suggestion has been put forward which takes into account the double phenomenon of lending and photocopying intellectual works in libraries; a fee, even of negligible amount, should be charged; misgivings have been expressed, however, owing to the practical difficulty of charging for each sheet. Yet other methods of collecting could be considered; what is desirable is a reaffirmation of the principle of the right to equitable remuneration in respect of reproduction by any non-profit-making body, as this seems to be the price of the very survival of books or at least scientific magazines these days.

C. Photocopying and copyright in the Federal Republic of Germany

The Copyright Act of the Federal Republic of Germany, of September 9, 1965, proclaims the right of reproduction. It also embodies the very strict private use exception in the same spirit as the French Law, but it introduces a second, more debatable exception into the text of the Act: it substitutes a compulsory legal license for the exclusive right of reproduction when reproduction " for internal uses " (Article 54) is for commercial purposes. The adoption of such a radical position in a legislative instrument may indeed be wondered at.

On June 24, 1955, however, the Federal Court of Justice had asserted the right of the author or his successor in title to prohibit the photomechanical reproduction of magazine articles. Was there then no way of keeping in the Act the principle of the exclusive right subject to the conclusion of collective agreements with a view to serving the best interests of the parties concerned?

It is with this in mind that, as in the Anglo-Saxon countries, the *Börsenverein des deutschen Buchhandels* and the *Bundesverband der deutschen Industrie* entered, on June 14, 1958, into an important agreement: industrial enterprises may make photocopies against payment of a fee where publication does not date back more than three years. Payment is made by the affixing of a stamp on each page (10 pfennigs if the annual subscription to the magazine is less than 50 marks, otherwise 30 pfennigs). There are two variants of this system: payment of a quarter of the price of annual subscription to the magazine, with a limit of 120 photocopies a year; for greater numbers, a lump sum may be agreed upon. Monies are collected by a Central Fund, which distributes them equally between authors and publishers, not in the form of fees but in the form of pensions and other benefits.

In other cases, that is, when a photocopy is made for other than commercial purposes — for instance, in the case of private use — reference should be made to the resolutely novel provisions of the Act with respect to reproduction by tape recorder, where a similar situation has evolved in a similar way.

Article 53(5) provides that the author of a work which is likely to be reproduced for personal use, by tape recorder among other things (although the term is not used expressly in the Act), " shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration... This right may only be enforced through collecting societies ". Thus the principle of remuneration of authors " at source " is stated. The limits on the implementation of this provision consist in the impossibility of private agreement on the amount of the fee; for obvious reasons of convenience, it would be desirable to specify the rate of fees to be applied in a law or in regulations if the principle was to be extended to photocopying equipment, with the added indication that collection is to be made by a centralizing body.

This, then, is the valuable information which may be elicited from our all-too short analysis of comparative law. The problems which we have just discussed are also a subject of concern at the international level.

III. The guidelines provided by international law

For more than ten years, the highest international copyright authorities have been preoccupied by the implications of the technology of reproduction by photocopying and other

processes analogous to photography. At the request of certain international groups, such as the International Federation for Documentation and the International Federation of Library Associations, the Chairman of the Intergovernmental Copyright Committee placed the problem in an official context at Madrid in September 1961.[1] Joint meetings were subsequently held with BIRPI, which was also concerned at the situation.[2] It should be pointed out, however, that the studies undertaken do not concern the professional or commercial use which may he made of photocopies; this unquestionably remains subject to the right of reproduction. The problem turns on the reproduction of works particularly in libraries and research centers. At the Stockholm Conference for the Revision of the Berne Convention in 1967, where the principle of the right of reproduction was written into the text for the first time, exceptions to the right were also provided for:

It shall he a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author (Article 9(2)).

This formulation is too vague and has given rise to serious concern. The example given in the course of the preparatory work illustrates the dangers inherent in the text; it refers directly to photocopying:

If it consists of producing a very large number of copies, it may not he permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large numher of copies for use in industrial undertakings, it may not unreasonahly prejudice the legitimate interests of the author, provided that, according to national legislation, an equitahle remuneration is paid. If a small numher of copies is made, photocopying may he permitted without payment, particularly for individual or scientific use.[3]

In fact, it seems that, whatever happens, generalized photocopying either conflicts with a normal exploitation of the work or, in any case, prejudices the legitimate interests of authors. These considerations were not overlooked in the drafting of the revised text of the Universal Copyright Convention at Paris on July 24, 1971: at the same time as the principle of the right of reproduction was stated in paragraph 1 of Article IV^{bis}, a very flexible paragraph 2 provided as follows:

However, any Contracting State may, hy its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any State whose legislation so provides shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has heen made.

While it does not seem appropriate, in an international instrument, to make more detailed provisions to govern the question of the reproduction of works protected by copyright by processes analogous to photography — and more specifically hy photocopying — it should be made possible, by means of recommendations, to look for elements of a solution which follow the two main lines laid down as a result of the concerted efforts of Unesco and BIRPI:

... it is desirahle to strike a balance hetween safeguarding the rights of authors and puhlishers, in such a way that their works should not suffer competition on the market, and adjusting the right to reproduce works to the extent to which this was necessary for the promotion of research and culture,

... it is for national legislation to lay down conditions for the photographic reproduction of works protected hy copyright, and in so doing to aim at a fair halance hetween the interests concerned.[4]

IV. The rudiments of a solution

The generalized photocopying of intellectual works has taught us of the need for an overall regulation of the problem and of the impossibility for the author to give his consent in the majority of cases. Three situations may be distinguished:

1. Photocopying by firms for profit-making purposes (without reservation as to " internal " use).

The consent of the author is required in all cases except for that of the compulsory legal license. The author alone determines the advisihility of prosecution.

Iit practice, agreements should be sought hetween puhlishers and representatives of industry, on the lines of those concluded in the Federal Republic of Germany, the United Kingdom and the United States of America. Authorization and fees would he dealt with exclusively within the framework of collective agreements for a lump sum or on the basis of specific estimates.

2. Photocopying by a non-profit-making establishment for educational or research purposes (libraries, documentation centers) in a place accessible to the public.

Compulsory licenses may be suhstituted for the exclusive right.

In practice, this presupposes the existence or creation of a State or private collecting agency, designed according to the same principles as the Scandinavian establishments, for instance.

In the interests of simplification, it would certainly be desirable to have the supervisory and collecting work carried out by the body referred to in the preceding paragraph.

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[1] This question, which originally was included in the agenda of the Intergovernmental Copyright Committee, was also discussed hy the Permanent Committee of the Berne Union in the course of the joint meetings of the two Committees. On the completion of their work, they adopted a joint resolution concerning the photographic reproduction of copyright works hy or for lihraries, documentation centers and scientific institutions (*Le Droit d'Auteur*, 1961, p. 337).

[2] This relates especially to the joint sessions of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee which were held in New Delhi in 1963 and Paris in 1965. At the latter session, the two Committees recommended that the two Secretariats (that is, BIRPI and the Secretariat of Unesco) undertake a study of practices existing in certain countries, in particular the Federal Repuhlic of Germany and the United Kingdom, and that as soon thereafter as possihle a committee of experts he jointly convened hy the Director of BIRPI and the Director-General of Unesco to formulate recommendations in the matter (see *Copyright*, 1966, p. 14). The preparatory work resulted in a meeting of a committee of experts under the joint auspices of Unesco and BIRPI in Paris in July 1968.

[3] Report on the Work of Main Committee I (*Copyright*, 1967, p. 189, paragraph 85).

[4] For the full text of the recommendations made hy the Committee of Experts on the Photographic Reproduction of Protected Works (Paris, July 1968), see *Copyright*, 1968, pp. 199 *et seq.*

It should he mentioned in this connection that the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee considered, at their joint sessions in Novemher 1971, that the question was not yet ripe for international regulation, and that its study should he continued hy the Secretariats of WIPO and Unesco, with the assistance of experts from developed and developing countries. They further considered that, after this study, the matter should he regulated at the international level hy a recommendation, which could serve as a guideline for national legislations, and not hy an international convention.

3. Photocopying by an individual for his personal use, either private or professional. The respect of privacy rules out control on the spot, hence the impossibility of exercising the right of reproduction or even payment of a fee.

In practice, there should be provision in national legislation for a " deduction at source " on purchase of the equipment, the amount of the fee being specified by decree, if necessary. All equipment would be subject to this system, and the rate of the fee would be so fixed as to allow — in the situations considered in the foregoing paragraphs — for the fact that not all photocopies necessarily involve intellectual works. Sums thus collected would be paid to the centralizing body mentioned above, which in turn would distribute them among authors and publishers.

The right of distribution with special reference to the hiring and lending of books and records

By Dietrich REIMER *

I

In copyright, " right of distribution " means the right to put the original or reproductions of a work into circulation, either by sale or hire or in any other manner. Similarly, the putting on sale of copies of a work is generally included within the concept of distribution, in that it is a preliminary to such distribution.

Unlike the right of reproduction and the right of public communication, which are provided for in all the important copyright laws, the right of distribution is recognized only in certain countries as being an independent prerogative of copyright. These countries include the following:

Austria: Copyright Law of April 9, 1936, Article 16(1);

Germany (Federal Republic of): Copyright Law of September 9, 1965, Article 17(1);

Italy: Copyright Law of April 22, 1941, Article 17;

Sweden: Copyright Law of December 30, 1960, Article 2, third paragraph; similar provisions are in force in Denmark and Norway;

Switzerland: Copyright Law of December 7, 1922, with amendments adopted on June 24, 1955, Article 12, paragraph 1(2);

Turkey: Copyright Law of December 10, 1951, Article 23;

United States of America: Copyright Law of July 30, 1947, Article 1*(a)*.

On the other hand, the modern copyright laws of France and the United Kingdom do not provide for such a right. For instance, the French Copyright Law of March 11, 1957, does not mention, alongside the right of reproduction and the right of performance (Articles 26 *et seq.*), a special right which would correspond to the right of distribution. There is only one provision (Article 70) which specifies criminal sanctions for the sale, exportation and importation of unlawful reproductions. Similarly, the British Copyright Act of 1956 contains no general right of distribution. It confers on the author, in addition to the right to publish his work (Sections 2(5)*(b)* and 3(5)*(b)*), the right to prohibit — but only under certain conditions — the import, sale, hiring, putting on sale, exhibition or distribution of reproductions when the infringer is aware that the production of such reproductions is an infringement of copyright, or would have been, had it been effected within the territorial limits of the law's application (Section 5(2) to (4)).

II

In view of the differences of situation between developed States at the same high level of legal and cultural advancement, the question arises as to what reasons can be adduced in favor of regulating the right of distribution by law, and what advantages this would contribute towards effective copyright protection.

The reasons underlying the regulation by law of the right of distribution in Germany may be found in the circumstances under which the 1901 Law on Copyright in Literary and Musical Works, which preceded the 1965 Law, came into being. The first German Copyright Law of 1870 provided only for a prohibition on the distribution of unlawfully produced copies of the work. It did not recognize an independent right of distribution applying also to lawfully produced copies. This gave rise to certain drawbacks. For instance, the Law did not provide any means whereby action might be taken against the distribution in Germany of copies produced in foreign countries where there was no copyright protection. Moreover, in the case of geographically divided rights of publication, it was impossible to prevent copies lawfully produced and distrib-

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uted abroad by a foreign publisher from being distributed also on the German market, in spite of the assignment in Germany, to a German publisher, of an exclusive right of publication. Difficulties occured also in purely domestic situations, for instance, when a publisher, after the expiration of a publishing contract, distributed copies lawfully produced while the contract was still in effect. In order to overcome these difficulties, the 1901 Law introduced an independent right of distribution which applied also to lawfully produced copies.[1]

Austrian legislation, which recognized an independent right of distribution earlier than German legislation, namely by virtue of the Law of December 26, 1895, provides us with other examples illustrating the advantages of stopping the distribution of lawfully produced copies: for instance, when authorized copies produced for specified purposes, such as private use, are distributed without regard for the purposes so specified;[2] or where the author undertakes publication himself, and the printer or publisher is granted only the right of reproduction.[3] In addition, the case of copies lawfully produced under a compulsory license abroad being introduced into the country should be mentioned.[4]

It may be considered typical of the legal position of countries which, alongside the right of reproduction, grant an independent right of distribution, that this right applies in principle also to *lawfully* produced copies.[5] Nimmer[6] rightly considers it abnormal that the author should be able to prevent the distribution of unauthorized copies to the public, yet unable to do so in respect of lawfully produced copies which have been stolen or otherwise illegally obtained. Furthermore, the right of distribution is important to the action taken against the distribution of unlawfully produced copies. Its main advantage is that the author may proceed not only against the producer of the respective copies, but also against dealers, even when the latter have not taken part in the unlawful reproduction.

We can sum up the foregoing by stating that the recognition by law of the right of distribution is a useful adjunct to the protection which the author enjoys by virtue of the main right, namely the right of reproduction.

III

On the other hand, the legal recognition of the right of distribution must not have the effect of hampering the free circulation of lawfully produced books, records or other copies of works. In all countries whose laws grant the author a right of distribution, there arises the problem of the limits to be imposed on it in the interests of the free movement of goods and cultural exchange. This question is generally dealt with under the heading of exhaustion of the right of distribution. The accepted principle is to deny the author the possibility of controlling the path followed by the copies of a work between the first acquirer and the last purchaser, and of imposing conditions and limitations at will. The purpose of the right of distribution is not to give the author a monopoly on the distribution of his work. It should simply ensure that the distribution of copies is made subject to the consent of the author and that he receives remuneration for such copies as are put into circulation. The subsequent distribution of copies already put into circulation with the consent of the owner of the right should not, on principle, be subject to any copyright.

In certain countries, the principle of the exhaustion of the right of distribution is written into the law. The Law of Austria, for instance (Article 16(3)), and those of the Federal Republic of Germany (Article 17(2)) and Turkey (Article 23, third paragraph) provide for the free successive distribution of copies of the work which have been put into circulation by means of transfer of ownership with the consent of the copyright owner. The right of distribution does not, therefore, affect dealings in respect of such copies of the work. If, on the other hand, the author consents only to the hiring or loan of copies, the right of circulation will not be exhausted. This is particularly important in music publishing, where the hiring of scores is a common practice; it is also true of the film business, where copies are only hired. Scores or copies of films cannot therefore be re-hired or sold without the consent of the copyright owner.

Swiss and Italian case law and doctrine have the same conception of the exhaustion of the right of distribution.[7] The Swedish Copyright Law (cf. Articles 23 and 25) has a somewhat different system: it provides that further distribution is lawful after the work has been published and, with respect to works of art, also after the assignment of reproductions. According to Article 8, second paragraph, a work is deemed to have been published when copies of it have been lawfully placed on sale or otherwise distributed to the public.

The Copyright Law of the United States of America makes the "exclusive right to vend" under Article 1*(a)* subject to the limitations provided for in Article 27, which specifies that:

> ... nothing in this title shall be deemed to forhid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

Literal interpretation of this provision, which is based on the lawful obtaining of possession, would result in the legal possessor being allowed to distribute even in cases where he is not authorized to sell or effect other forms of distribution, which would apply to the custodian, the shipping agent or the

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[1] Stenographische Berichte über die Verhandlungen des Reichstages (10. Legislaturperiode, II. Session 1900/1902), Berlin, p. 396.

[2] Ludwig Mitteis, *Zur Kenntnis des literarisch-artistischen Urheberrechts nach dem österreichischen Gesetz vom 26. 12. 1895*, Stuttgart 1896, pp. 111 *et seq.*

[3] Altschul, *Erläuterungen zum österreichischen Urheberrechtsgesetz vom 26. 12. 1895*, 1904, p. 98.

[4] For the legal position in Sweden, see Bergström, in *GRUR Int.* 1962, 364 (372).

[5] See, for instance, for Switzerland: Federal Court (snpreme court of appeal) 6. 4. 1927, BGE 53 I 160 (165); for Italy: Piola Caselli, *Codice del diritto di autore* 1943, 102; for the United States of America: Nimmer, *On Copyright*, loose-leaf edition as from 1963, § 103.31; for Sweden: Bergström, *GRUR Int.* 1962, 364 (372).

[6] See footnote 5 above.

[7] See, for Switzerland: decision of the Federal Court 8. 12. 1959 Philips BGE 85 II 431 (440) = *GRUR Int.* 1961, 140 (142); Troller, *Immaterialgüterrecht*, Vol. II, 2nd Ed., 1971, Chapter 13, § 43 IV, pp. 872 *et seq.*; Uchtenhagen, *Schweizerische Mitteilungen über gewerblichen Rechtsschutz und Urheberrecht* 1961, 121 (123); for Italy: Piola Caselli, *op. cit.*, p. 301.

printer. [8] Case law and doctrine have not followed this restrictive interpretation, but have respected the purpose of the right to vend and the general interest; they have thus developed the doctrine of " first sale ", according to which the copyright owner does not enjoy a right of control over the use and the further distribution of copies sold or otherwise disposed of by him. It is essential to ascertain whether the author has retained ownership of a copy or has transferred it to the first purchaser, and also whether he has disposed of his property in such a way that he has received remuneration for its use. [9]

In short it may be stated that, in countries where the right of distribution is the subject of legal provisions, the limits of the right are more or less the same: it lapses in respect of copies of the work distributed with the consent of the author, granted in the form of a transfer of property.

IV

Another very important question is whether, and to what extent, the author may avoid or restrict the exhaustion of the right of distribution by the assignment of limited rights.

As with the shared publishing right, for instance, the right is transferred only in respect of specified countries, or the distribution of copies of the work is authorized through certain channels, such as book clubs or bookshops.

In such cases, does exhaustion of the right occur only to the extent that further distribution is covered by the assignment of the right? In other words, does limitation of the assignment of the right have an absolute effect in relation to third parties?

It is very difficult to answer this question, which not only the various countries but also the lawyers of one and the same country deal with in very different ways. On the whole, it may be said that, in the interest of effective copyright protection, preference should be given to maximum divisibility of individual rights with absolute effect. On the other hand, it is necessary for the security and freedom of trade that copies already distributed may continue to circulate freely. It is for the lawyers to find a fair balance between these conflicting interests.

The prevailing opinion in the Federal Republic of Germany is that limitation should relate to the scope of the right of distribution, rather than to the means of exercising it. Division should not lead to blurred and obscure legal relationships. The partial prerogatives so divided must have independent significance derived from the law, economic or technological development or business practices. [10] The right of publication, for instance, may be granted separately for different countries with absolute effect. Thus, the sale in the Federal Republic of Germany of books which a Swiss publisher has been authorized to distribute in Switzerland is an infringement of copyright. On the other hand, division of the right of publication with copyright effect is not possible within German territory. Moreover, it is possible to assign, with absolute effect, the right to distribute the work through book clubs separately from the traditional right of distribution by the publisher and bookshops. [11] However, the fixing of prices for printed material has no copyright effect, [12] so that the sale of books at less than the imposed price does not constitute a breach of copyright.

In Austria too, the absolute effect of the shared publishing right is expressly recognized. Article 16(3) of the Austrian Law states clearly that:

> The right of distribution shall not extend to copies of the work which, with the authorization of the person entitled thereto, have been put into circulation by transfer of the property rights in such copies; however, where such authorization has been given only for a specified territory, the right to distribute, outside such territory, copies put into circulation therein shall not be affected.

On the other hand, the Swiss Copyright Law provides expressly that there is no breach of copyright when lawfully produced copies are put into circulation outside the territory for which the owner of the copyright has authorized their sale (Article 58). It is true, however, that, considering Article 13(4) of the Berne Convention as revised at Brussels, this does not apply to mechanical instruments to which literary or musical works are adapted (third paragraph of Article 58). [13]

The second paragraph of Article 53 of the Swedish Law regards as liable to penal sanctions a person who imports into Sweden copies of a work for general distribution, if such copies have been produced outside Sweden under such circumstances that a similar production within Sweden would have been punishable. [14]

The case law of the United States of America contains a number of decisions concerning the limitation of subsequent distribution. On the whole, such a limitation binds only the parties to the contract and has no effect on third parties. If the copyright owner has transferred the " absolute title to the copy " to the purchaser, the limitation imposed on the latter with regard to the use of the copy does not prevent subsequent purchasers from reselling it free of all limitation. [15] This applies, for instance, to an edition of which the remaining copies can only be used as scrap paper, [16] or to records of copyrighted musical works which can only be given away with the sale of shampoo: the separate sale of records by a subsequent purchaser is not a breach of copyright. [17] In the case of *RCA* v. *Whiteman* [18] concerning the free use by the radio of records purchased through the trade, the Court found that, in

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[8] See Nimmer, *op. cit.*, § 103.323.

[9] In this connection, see the following decisions: *Henry Bill Publishing* v. *Smythe*, 27 Fed 914 (1886); *Fawcett Publications* v. *Elliot Publications Co.*, 46 F. supp. 717 (1942); *United States of America* v. *Wells*, 176 F. supp. 630 (1959); *Platt & Munk* v. *Republic Graphics*, 315 F. 2d 847 (1963); *Burke & Van Heusen* v. *Arrow Drug*, 223 F. supp. 881 (1964); *Blazon* v. *de Luxe Game* 268 F. supp. 416 (1965).

[10] In this connection, see my article in *GRUR* 1962, 619, 625 *et seq.*

[11] BGH 21. 11. 1958, *GRUR* 1959, 200 (202).

[12] Two decisions of the RG dated 16. 6. 1906, RGZ 63, 394 *et seq.*, and RGSt. 39, 108 *et seq.*

[13] See in this respect: Swiss Federal Court 8. 12. 1959, BGE 85 II 431 (440) = *GRUR Int.* 1961, 140 (142); Troller, *op. cit.*, p. 876.

[14] With regard to the prohibition of importation, see also Article 23, paragraph 2, of the Turkish Copyright Law.

[15] *Harrisson* v. *Maynard*, 61 Fed 689 (691) (1894); *Bureau of National Literature* v. *Sells*, 211 Fed. 379 (1914); *Independent News* v. *Williams*, 293 F. 2d 510 (517) (1961).

[16] *Harrisson* v. *Maynard*; *Independent News* v. *Williams*.

[17] *Burke & Van Heusen* v. *Arrow Drug*, 233 F. supp. 881 (1964).

[18] 114 F. 2d 86 (1940).

any case, limitations (in the case in point the notice "not licensed for radio broadcast") imposed on the use of movable property sold without restrictive conditions were *prima facie* invalid, and could only be justified under special circumstances. On the other hand, the absolute effect of territorial limitation of the right to manufacture and distribute records has been recognized. According to the law of the place of the trial, namely New York State, the owner of literary property could, by the insertion of a negative contractual clause, impose limitations on the use of that property where it is passed on to a purchaser; records licensed for Czechoslovakia could not be sold in the United States of America. [19]

V

Let us now return to the countries which do not recognize an independent right of distribution, of which France is a striking example. We shall examine how the problems associated with the distribution of copies are dealt with in this country.

It should first be pointed out that the right of divulgation provided for in Article 19 of the French Copyright Law of 1957 should not be confused — as it occasionally is — with the German right of distribution. The right of divulgation is derived from the *droit moral* and it concerns the author's competence to determine whether, when and under what conditions his work is to be made available to the public, either by the manufacture and distribution of copies, by so-called direct means of communication such as delivery, performance and broadcasting, or by any other means. Thus the right of divulgation is comparable to the German right of dissemination (Article 12 of the Copyright Law of the Federal Republic of Germany). On the one hand, it is of substantially broader scope than the right of distribution, since it concerns more than the mere putting into circulation of copies of the work, yet, on the other hand, it is ill-suited to the solution of the problems arising from the further distribution of copies once they have been put into circulation.

However, the distribution concept is closely related to the right of reproduction in Article 28 of the French Copyright Law and to the concept of infringement being subject to criminal prosecution. Thus the concept of "édition", which is a form of reproduction, comprises both reproduction and distribution, as is shown by the formulation of the following Court decision: "*Editer une œuvre, c'est la produire et la répandre dans le public par une fixation matérielle et durable.*" [20]

On the other hand, violation of the right of reproduction and actionable infringement are not dependent on subsequent distribution; this would apply, for instance, when a musical composition is recorded on discs, irrespective of whether or not the discs are then sold. [21]

Seen from this angle, therefore, distribution is the natural consequence of reproduction. It is an integral part of the right of reproduction, but is not the subject of an independent right which would make it possible to proceed against the distribution of lawfully produced copies. [22]

The 1957 Law extended the protection afforded by means of penal sanctions. It now covers not only unlawful reproduction and the sale, exportation and importation of unlawful reproductions of works *(ouvrages contrefaits)* (Article 70), but also "any reproduction, performance or dissemination of an intellectual work by any means whatever, in violation of the author's rights as defined and regulated by law." The term "dissemination" as used in this provision is not altogether clear, however. According to Article 27, it should mean broadcasting by radio, and not the distribution of copies of the work. [23] Moreover, it could be imagined that the expression "*ouvrages contrefaits*" in terms of Article 70 is supposed to cover only unlawfully produced copies.

However, largely on the basis of the theory of the specified purpose *(théorie de la destination)*, case law and doctrine have in many instances afforded or recommended, as the case may be, more extensive protection than is in fact apparent in the wording of the provisions quoted.

A noteworthy decision was rendered by the Cour de cassation on January 28, 1888; [24] a composer authorized a theater manager to make an orchestral score for use in his theater. The theater manager passed the score on to a music publisher, whereupon the latter hired it out to several other theaters. The Court found that the score was an unlawful reproduction, as it had been used to commercial ends and for a purpose other than that authorized by the composer. The music publisher was found guilty of marketing unauthorized reproductions. [25]

In another case, the sale in France of records of American origin was regarded as the sale of unlawful reproductions, although the manufacture and distribution of the records had been lawfully carried out in the United States. [26] The shared publishing right is also widely recognized by doctrine, with the result that the importation into France of copies of a work lawfully produced abroad is an actionable breach of copyright. [27] Pouillet [28] claims that there is liability to prosecu-

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[19] *Capitol Records* v. *Mercury Records*, 221 F. 2d 657 (1955).

[20] See, for instance: Cour de Paris 1. 5. 1925, *DP* 1925. 2. 98; Tribunal civil de la Seine 25. 10. 1943, *DC* 1944, 127; Jean Rault, *Le contrat d'édition en droit français*, 1927, pp. 391 *et seq.*

[21] Cour d'Angers 22. 11. 1956, *Ann.* 1957, 301.

[22] See Strömholm, "The 'rigbt of putting into circulation' in relation to copyrigbt. A study of comparative law", in *Copyright* 1967, p. 266 (273).

[23] See Desbois, *Le droit d'auteur en France*, 2nd Ed., 1966, No. 757, p. 822; see also tbe highly detailed doubting comments of Strömholm in *Copyright* 1967, p. 226 (285 *et seq.)*; likewise the note by Delpech on the decision of the Tribunal correctionnel de la Seine of 27. 11. 1961, *JCP* 1962 II 12669, in which Delpech explains that the "dissemination" concept used in Article 71 of the new law replaced the partly outdated "publication" concept, which would suggest that it covers also the putting into circulation of copies of a work. Moreover, Desbois' explanations in *RTCD* 1965, 409(411), unlike the notes in his book, follow the same lines.

[24] *Ann.* 1890, 82.

[25] An anonymous note criticizes this decision: a person does not become an infringer by using a lawfully manufactured product in a manner contrary to the author's intentions. Only "publication" would be an "infringement". The note alleges that the Cour de cassation had extended copyright protection too far.

[26] Decision of tbe Tribunal civil de la Seine, 19. 5. 1956, in *RIDA*, No. XVIII (1958), p. 200, confirmed by tbe Cour de Paris on 4. 6. 1957.

[27] Desbois, *op. cit.*, No. 767, p. 929; Robert Plaisant, in *Juris-Classeur de la propriété littéraire et artistique*, fasc. No. 113; Pouillet, *Traité de la propriété littéraire et artistique*, 3rd Ed., 1908, No. 604.

[28] *Op. cit.*, No. 852.

tion even where there is no contract, but copies of the work have been brought into France, from a foreign country which does not afford copyright protection, without the authorization of the copyright owner.

In the well-known Furtwängler case, tape recordings made by Furtwängler with the Vienna Philarmonic Orchestra for the radio of the Third Reich were used by an American firm for the making of records which were brought into France by its French subsidiary and sold there. At all three levels, the French courts prohibited the importation and sale of the records in France and ordered the guilty party to pay damages. In the statements of reasons for the decisions, it was stressed that the performer has the right to prohibit the use of his performance for purposes other than those authorized by him. [29]

Finally, there is an interesting case involving damaged copies of films. These had been sold merely as raw material for the recovery of the chemical substances they contained, but the defendant, after having repaired them, distributed them again for public showing. The courts held that the restoration of the deteriorated copies of the films constituted unauthorized reproduction and their distribution a criminal offence. The judgment applied also to undamaged film sold for cinematographic use contrary to the purpose specified. [30]

In the second edition of his famous work *Le droit d'auteur en France*, Professor Desbois [31] finds the legal justification of the theory of the specified purpose in the third paragraph of Article 31, which provides that:

> The transfer of authors' rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer, and that the field of exploitation of the rights transferred shall he delimited as to extent and purpose, as to place, and as to duration.

According to Professor Desbois, the author may, in accordance with this provision, exclude certain uses, for instance, the use of records in radio broadcasts, which, under contracts in force in France, is only authorized against payment of an additional fee. Professor Desbois also attributes to the author the right to prohibit the hiring and loan of copies already put in circulation; this is a subject to which we shall revert shortly.

In conclusion, we observe that unconditional recognition of the theory of the specified purpose and reluctance to regulate the right of distribution by law result in a situation where the author is afforded protection greater than that available in countries which recognize the right of distribution but, at the same time, limit it by means of the exhaustion principle. Thus, it would seem that unconditional recognition of the specified purpose theory together with its absolute effect goes too far, if one considers the public's interest in the free circulation of copies put on the market. Elsewhere in his book, Professor Desbois [32] takes this point of view into account when he states that those who buy books and records are obviously bound by the specified purpose only when a notice prohibiting use is visibly placed on the copies. Finally, efforts are being made, in practice, to avoid too great a breadth of protection. We shall examine this in the next part, which deals with the hiring and loan of copies already in circulation.

VI

With regard to the hiring and loan of copies — mainly of books and records — the problem is whether the copyright owner still enjoys rights in relation to this use of his work even when the copies have been distributed with his consent and have therefore become the property of a third party. Although the French Copyright Law does not recognize the right of distribution, [33] it is nevertheless also acknowledged in France that copies which have not been distributed may not be hired without the consent of the copyright owner.

In countries where the right of distribution is recognized by law and where the exhaustion principle is applied (see under III above), copies once sold may not only be freely resold, but also hired and loaned. Only the Swedish Copyright Law makes the hiring of the scores of published musical works contingent on the author's consent (Article 23). However, this exception does not apply to other works, such as books, for instance. [34]

Hiring and loan make it possible to avoid buying books and records, and can thus cause a marked decrease in the sale of protected works and the royalties of the author. Furthermore, the party hiring the work is deriving income from the intellectual property of the author, and it is only fair that the author should have a share in this income.

The Copyright Law of the Federal Republic of Germany therefore provides that the lender is obliged to pay an equitable remuneration to the author if the lending was executed for the financial gain of the lender (Article 27(1)). The Federal Constitutional Court confirmed the validity of this provision in a decision rendered on July 7, 1971; [35] it contended that it was not a breach of the Constitution when a public library with non-profit-making aims was not compelled to pay royalties to the author. In a decision dated March 10, 1972, the Federal Court of Justice decided that the distribution of books to staff by the library of a firm was not a "lending" in terms of Article 27(1) of the Copyright Law when it was not effected against payment of a special fee. In view of its narrow scope, this provision was widely held to be in need of revision. To this end, an amendment to the Copyright Law was drafted; [36] the *Bundestag* passed it, and it entered into force on January 1, 1973. It provides that the loan of copies, in other words, the lending of them free of charge, also gives rise to the payment of a royalty when it is

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[29] Tribunal civil de la Seine 4. 1. 1956, *RIDA*, No. XI (1956), p. 139; Cour de Paris 13. 2. 1957, *RIDA*, No. XVI (1957), p. 129; Cour de cassation 4. 1. 1964, *Dalloz* 1964 I 321.

[30] Tribunal correctionnel de la Seine 27. 11. 1961, *JCP* 1962 II 12669, with note hy Delpech; Cour de Paris 21. 1. 1963, *JCP* 1963 II 13235, with note by Delpech; Cour de cassation 2. 12. 1964, RIDA, No. XLVII (1965), p. 217, with note hy Desbois in *RTDC* 1965, 409 (411).

[31] *Op. cit.*, No. 288.

[32] *Op. cit.*, No. 239, footnote 1.

[33] Desbois, *op. cit.*, No. 240.

[34] Bergström, *GRUR Int.* 1962, 364 (372).

[35] *Neue Juristiche Wochenschrift* 1971, 2165.

[36] See the SPD/FDP Draft, Bundestagsdrucksache VI 1076, published in *UFITA*, Vol. 58 (1970), 258.

executed for the financial gain of the lender or the borrower, which is the case with company libraries. The obligation to pay a royalty does not apply, however, when copies are lent in connection with employment or service relations, solely for the purpose of meeting obligations arising out of those relations. Moreover, equitable remuneration will have to be paid for the hiring or loan of other reproductions by public libraries, record libraries or collections. In any event, the claim to royalties can only be asserted by a collecting society.

In the course of work on the reform of the Austrian Copyright Law, it was also required that the author be guaranteed the right to equitable remuneration where copies of the work are loaned outside the owner's circle of family or friends. [37]

In Italy, it was not possible to impose the requirement of additional royalties. Article 69 of the Italian Law provides only for the obligation to obtain ministerial authorization where the loan is effected for profit. [38]

French doctrine, as we have mentioned, considers that the author could even prevent the hiring and loan of copies already in circulation by restricting the specified purpose. Professor Desbois, [39] however, makes the absolute effect of such a limitation contingent on the affixing of a notice prohibiting use in a place where it may be clearly seen. Robert Plaisant, [40] while defending the same basic view, foresees difficulties where copies of works are lent free of charge by libraries. In principle, of course, the fact that use is free of charge does not put it outside the purview of copyright, yet it would nevertheless be desirable for gratuitous loans to be tolerated, for instance, in educational or charitable institutions. Practice seems here to be somewhat behind doctrine: as far as can be judged, books and records are hired and loaned free of copyright in France.

Finally, it should be pointed out that there is a possibility, by virtue of special regulations, of setting up so-called writers' funds, which would be financed chiefly by the State and would afford assistance to authors and their families and heirs. The Scandinavian writers' funds have shown the way in this field. [41] They serve partly for the payment of royalties to the authors of books hired or loaned, and partly also to assist authors in need with the aid of public funds. Thus, the social purpose of the system is kept in the foreground. This solution, which has been written into a special law, provides the possibility — albeit a contested one — of assisting only national writers, whereas the Copyright Law, which has to take into account the national treatment principle imposed by convention rules, prohibits any discrimination against foreigners.

[37] Dittrich, *GRUR Int.* 1971, 50 (54).

[38] Giannini, in *Rivista di diritto industriale* 1955 I 11 (27 *et seq.*), describes this rule as inappropriate and superfluous, and considers that it should be removed.

[39] *Op. cit.*, No. 239, footnote 1.

[40] *Juris-Classeur*, fasc. 13, No. 9.

[41] See in this respect Torben Lund, "Le prêt et la location de disques et de livres", in *Annuaire de l'ALAI* 1961, 125 *et seq.* (Florence Congress); Fischler, "Der Schwedische Schriftstellerfonds", in *GRUR Int.* 1956, 6 *et seq.*; Dietz, "Büchereitantieme und Schriftstellerfonds im Ausland", in *GRUR Int.* 1971, 301 *et seq.*

The Netherlands have also adopted a similar provision, [42] whereas, in the United Kingdom, the introduction of the Public Lending Right, for which a long and bitter fight has been going on, is still awaited.

VII

At the international level, the International Literary and Artistic Association spoke in favor of the author's participation in the profits deriving from the hiring of books and records as long ago as in 1961, at the Florence Congress; following the regulation of the problem in several national laws, it was hoped that appropriate provisions might be formulated with a view to bringing about a solution at the international level also. [43]

At the 1967 Stockholm Conference for the Revision of the Berne Convention, a proposal for the introduction of the right of distribution was submitted by the Italian Delegation and supported by the Delegation of the Federal Republic of Germany. [44] It is not at all surprising that the proposal was not adopted when one considers that even the right of reproduction was introduced into the revised Berne Convention only at Stockholm.

In the Common Market context, the "Metro" or "Polydor" decision rendered by the European Court of Justice on June 8, 1971, [45] caused quite a stir. In terms of this decision, it is an infringement of the rules on the free movement of goods within the Common Market when a record manufacturer uses the right of distribution to prohibit, in the Federal Republic of Germany, the distribution of discs which have been sold by him or with his consent in France. The decision, which we cannot discuss in detail here, is to be endorsed in so far as the distribution of records on the French market took place without any limitation. Yet if the right of distribution was shared, and if the records could not, according to the decision of the holder of the rights for France, be sold elsewhere than in France, distribution in Germany could rightly be prohibited.

We shall end this study with the recommendation that, in the future, as many States as possible incorporate the right of distribution in their copyright laws, and at the same time establish its limits by recognizing the exhaustion principle. Then will come the time to introduce the right of distribution into the Berne Convention.

For the moment, however, it seems rather that the pursuit of more modest aims should be advised. I take the liberty of presenting some concrete proposals below:

1. Article 16 of the revised Berne Convention already provides that, in any member country, reproductions coming from a country where the work is not protected, or has ceased to be protected, are liable to seizure.

Enlarging on this provision, the author should be accorded the right to transfer his rights of exploitation to a limited

[42] Cohen Jehoram, "Il y aura bientôt aux Pays-Bas un droit de prêt" (typed manuscript).

[43] *Annuaire de l'ALAI* 1961 (Florence Congress), p. 161 *et seq.*

[44] Report on the Work of Main Committee I, paragraphs 72 and 74.

[45] *GRUR Int.* 1971, 450.

number of countries. Thus, the shared publishing right would be internationally recognized. The distribution of copies could be prohibited in countries for which the author has not assigned the right, even if it was lawful in the country for which the right was assigned.

2. It should be acknowledged that the author has to be paid equitable remuneration when copies which have been distributed with his consent are hired or loaned by a third party for profit-making purposes.

INTERNATIONAL ACTIVITIES

International Literary and Artistic Association (ALAI)

(General Assembly, Paris, January 26, 1973)

The International Literary and Artistic Association (ALAI) held its annual General Assembly in Paris on January 26, 1973, under the chairmanship of the President of the Association, Professor Henri Desbois.

Apart from administrative or internal matters, the General Assembly and the Executive Committee which preceded it had on their agendas a number of topical questions in the fields of copyright and neighboring rights. These included in particular the draft Agreement for the Protection of Type Faces and their International Deposit and problems relating to the transmission of broadcasts by space satellites.

After having heard an account of ALAI activities during 1972, the General Assembly decided to include in its program of work for the current year, in addition to the two points already mentioned, the consideration of the questions relating to the draft model laws in the fields of copyright and neighboring rights, the problems arising from the photocopying and audio-visual fixation of works protected by copyright, and the rights of translators.

Finally, a decision was taken to start publication of a bulletin which would contain contributions from the various national groups, as well as summaries of any court decisions that might be available.

WIPO was represented at the General Assembly by Mr. M. Stojanović, Counsellor, Copyright Division, and Unesco by Miss M.-C. Dock, Head of the International Copyright Information Centre.

CALENDAR

WIPO Meetings

March 19 to 23, 1973 (Geneva) — Working Group on a Copyright Model Law for African States
Participants: Experts invited in their personal capacity — *Note:* Meeting convened jointly with Unesco

April 9 to 13, 1973 (Geneva) — Committee of Experts on a Model Law for Developing Conntries on Appellations of Origin and Indications of Sonrce
Object: To study a Draft Model Law — *Invitations:* Developing conntries members of the United Nations — *Observers:* Intergovernmental and international non-governmental organizations concerned

April 25 to 30, 1973 (Geneva) — Patent Cooperation Treaty (PCT) — Standing Subcommittee of the Interim Committee for Technical Cooperation

April 30 to May 4, 1973 (Geneva) — ICIREPAT — Subcommittee on Organic Chemistry (STC)

May 2 to 4, 1973 (Geneva) — WIPO Coordination Committee — Extraordinary Session

May 2 to 4, 1973 (Paris) — Working Gronp on Photocopying
Participants: Experts invited in their personal capacity — *Note:* Meeting convened jointly with Unesco

May 7 to 11, 1973 (Geneva) — ICIREPAT — Technical Committee for Shared Systems (TCSS)

May 14 to 18, 1973 (Geneva) — ICIREPAT — Technical Committee for Standardization (TCST)

May 17 to June 12, 1973 (Vienna) — Vienna Diplomatic Conference on Industrial Property, 1973
Object: Adoption of *(a)* the Trademark Registration Treaty, *(b)* the Agreement for the Protection of Type Faces and their International Deposit, *(c)* an instrument establishing an International Classification of the Figurative Elements of Marks — *Invitations:* States members of WIPO, the Paris or Berne Union — *Observers:* Other States members of the United Nations or of a Specialized Agency; intergovernmental and international non-governmental organizations concerned

June 12 to 23, 1973 (Stockholm) — International Patent Classification (IPC) — Bureau of the Joint ad hoc Committee

June 25 to 29, 1973 (Geneva) — WIPO Legal-Technical Program for the Acquisition by Developing Conntries of Technology Related to Industrial Property — Provisional Committee
Object: To make proposals to the competent organs of WIPO — *Invitations:* Member States of WIPO or of the Paris or Berne Union — *Observers:* Other States members of the United Nations or of a Specialized Agency; intergovernmental and international non-governmental organizations concerned

June 26 to 30, 1973 (Stockholm) — International Patent Classification (IPC) — Joint ad hoc Committee

July 2 to 11, 1973 (Nairobi) — Committee of Governmental Experts on Problems in the Field of Copyright and of the Protection of Performers, Prodncers of Phonograms and Broadcasting Organizations Raised by Transmission Via Space Satellites
Object: Stndy of the problems — *Invitations:* States members of the Berne Union or of the Paris Union and other States members of the United Nations or of a Specialized Agency — *Observers:* Intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

July 4 to 6, 1973 (Geneva) — ICIREPAT — Technical Coordination Committee (TCC)

September 3 to 7, 1973 (Geneva) — Madrid Union — Assemhly and Committee of Directors of the National Industrial Property Offices
Object: Revision of the Regulations of the Madrid Agreement Concerning the International Registration of Marks — *Members:* States members of the Madrid Union — *Observers:* States members of the Paris Union, not members of the Madrid Union; Benelux Trademark Office

September 10 to 18, 1973 (Geneva) — Nice Union — Committee of Experts for the International Classification of Goods and Services for the Pnrposes of the Registration of Marks
Object: Amendments and additions to the International Classification — *Members:* States members of the Nice Union — *Observers:* States members of the Paris Union, not members of the Nice Union; Benelux Trademark Office

September 17 to 21, 1973 (Geneva) — Committee of Experts on a Model Law on Neighboring Rights
Object: To study a Draft Model Law — *Participants:* International non-governmental organizations concerned — *Note:* Meeting convened jointly with the International Labour Organisation and Unesco

September 24 to 28, 1973 (Geneva) — Suh-Working Group for the Mechanization of Trademark Searches
Object: Examination of tests carried ont concerning mechanized trademark searches — *Members:* Belgium, Canada, France, Germany (Federal Repnblic of), Netherlands, Spain, United Kingdom, United States of America — *Observer:* Benelux Trademark Office

October 1 to 12, 1973 (Abidjan) — Committee of Governmental Experts on a Copyright Model Law for African States
Object: To study a Draft Model Law — *Invitations:* African States — *Observers:* States members of the Berne Union or party to the Universal Copyright Convention; intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly with Unesco

October 8 to 19, 1973 (Geneva) — International Patent Classification (IPC) — Working Gronp IV of the Joint ad hoc Committee

October 22 to 27, 1973 (Tokyo) — Patent Cooperation Treaty (PCT) — Interim Committees for Administrative Questions, for Technical Assistance and for Technical Cooperation, and Standing Subcommittee of the latter

October 30 to November 2, 1973 (Bangkok) — Asian Industrial Property Seminar

November 5 to 9, 1973 (Geneva) — International Patent Classification (IPC) — Working Group V of the Joint ad hoc Committee

November 14 to 16, 1973 (Geneva) — ICIREPAT — Plenary Committee (PLC)

November 19 to 27, 1973 (Geneva) — Administrative Bodies of WIPO (General Assembly, Conference, Coordination Committee) and of the Paris, Berne, Madrid, Nice and Locarno Unions (Assemblies, Conferences of Representatives, Executive Committees)
Invitations: States members of WIPO, or of the Paris or Berne Union — *Observers:* Other States members of the United Nations or of a Specialized Agency; intergovernmental and international non-governmental organizations concerned

November 26 and 27, 1973 (Geneva) — Lisbon Union — Council
Members: States members of the Lisbon Union — *Observers:* Other States members of the Paris Union

November 28 to 30, 1973 (Geneva) — Working Group on Scientific Discoveries
Invitations and observers: To be announced later

December 3 to 5, 1973 (Paris) — International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations — Intergovernmental Committee
Note: Meeting convened jointly with the International Labour Organisation and Unesco

December 3 to 7, 1973 (Geneva) — International Patent Classification (IPC) — Working Group II of the Joint ad hoc Committee

December 3 to 7, 1973 (Geneva) — ICIREPAT — Technical Committee for Shared Systems (TCSS)

December 5 to 11, 1973 (Paris) — Executive Committee of the Berne Union — Extraordinary Session
Note: Some meetings with the Intergovernmental Copyright Committee established by the Universal Copyright Convention

December 10 to 14, 1973 (Paris) — ICIREPAT — Technical Committee for Standardization (TCST)

December 17 to 21, 1973 (Geneva) — Working Group for the Mechanization of Trademark Searches
Object: Report and recommendations to a Committee of Experts on mechanized trademark searches — *Invitations:* Australia, Austria, Belgium, Canada, France, Germany (Federal Republic of), Ireland, Japan, Luxembourg, Netherlands, Soviet Union, Spain, Sweden, United Kingdom, United States of America — *Observers:* Colombia, Benelux Trademark Office

UPOV Meetings

April 2 and 3, 1973 (Geneva) — Working Group on Variety Denominations

April 4 and 5, 1973 (Geneva) — Consultative Committee

June, 1973 (Avignon) — Technical Working Party for Vegetables

July 2 to 6, 1973 (London) — Symposium on Plant Breeders' Rights

October 9 to 12, 1973 (Geneva) — Council

Meetings of Other International Organizations concerned with Intellectual Property

March 19 to 30, 1973 (Brussels) — European Economic Community — " Community Patent " Working Party

March 30, 1973 (Paris) — International Chamber of Commerce — Industrial Property Commission

April 28 to May 1, 1973 (Valencia) — International League against Unfair Competition — Study meetings

May 3 to 5, 1973 (Brussels) — Union of European Patent Agents — General Assembly

May 7 to 11, 1973 (London) — International Federation of Musicians — Congress

May 20 to 26, 1973 (Rio de Janeiro) — International Chamber of Commerce — Congress

May 21 to 25, 1973 (Paris) — Unesco International Copyright Information Centre

May 22 and 23, 1973 (Malmö) — International Plant Breeders Association for the Protection of New Varieties — Congress

June 26 to July 17, 1973 (Washington) — Organization of American States — Committee of Governmental Experts on Industrial Property and Technology Applied to Development

September 10 to 14, 1973 (Stockholm) — International Federation of Actors — Congress

September 10 to October 6, 1973 (Munich) — Munich Diplomatic Conference for the Setting Up of a European System for the Grant of Patents, 1973

September 24 to 28, 1973 (Budapest) — International Association for the Protection of Industrial Property — Symposium

October 28 to November 3, 1973 (Jerusalem) — International Writers Guild — Congress