

# Copyright

Review of the  
WORLD INTELLECTUAL PROPERTY  
ORGANIZATION (WIPO)

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

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*WORLD INTELLECTUAL PROPERTY ORGANIZATION*

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**Staff Change in WIPO**

Mr. Joseph VOYAME, Second Deputy Director General, has resigned with effect on November 1, 1973, and returned to the services of the Swiss Federal Government.

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*BERNE UNION*

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**GERMANY (Federal Republic of)**

**Ratification of the Paris Act (1971) of the Berne Convention**

The Director General of the World Intellectual Property Organization (WIPO) has notified the Governments of member countries of the Berne Union that the Government of the Federal Republic of Germany deposited on October 18, 1973, its instrument of ratification dated September 17, 1973, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

The said instrument was accompanied by the following declaration: "the Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany." (*Original*)

Pursuant to the provisions of Article 28(3) of the Paris Act (1971) of the said Convention, Articles 22 to 38 will enter into force, with respect to the Federal Republic of Germany, three months after the date of this notification, that is, on January 22, 1974.

A separate notification will be made of the entry into force of Articles 1 to 21 and the Appendix, when the conditions provided for in Article 28(2)(a) are fulfilled.

On the other hand, the Government of the Federal Republic of Germany, referring to Article VI(1)(ii) of the Appendix to the said Act, has declared that it admits the application of the Appendix to works of which it is the country of origin by countries which have made a declaration under Article VI(1)(i) of the Appendix or a notification under Article I of the Appendix.

Pursuant to the provisions of Article VI(2) of the said Appendix, this declaration, made in writing, became effective from the date of its deposit, that is, from October 18, 1973.

Berne Notification No. 49, of October 22, 1973.

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# NATIONAL LEGISLATION

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## FIJI

### I

### Performers Protection Ordinance

(No. 13, of June 20, 1966)

An Ordinance to protect the interests of actors, singers and other public performers

#### Short title

1. — This Ordinance may be cited as the Performers Protection Ordinance.

#### Interpretation

2. — (1) In this Ordinance, unless the context otherwise requires —

“broadcast” means broadcast for public reception by wireless telegraphy (within the meaning of the Wireless Telegraphy Act, 1949), whether by way of sound broadcasting or of television;

“cinematograph film” means any print, negative, tape or other article on which a performance or part thereof is recorded for the purposes of visual reproduction;

“performance” means the performance of any actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play or otherwise perform literary, dramatic, musical or artistic works, and includes any performance, mechanical or otherwise, of any such work, being a performance rendered or intended to be rendered audible by mechanical or electrical means, and any performance of firewalking as is given in Fiji;

“performers”, in the case of a mechanical performance, means the persons whose performance is mechanically reproduced;

“record” means a recording of sound made by means of any record or similar contrivance for reproducing sound, including the sound-track of a cinematograph film.

(2) Any reference in this Ordinance to the making of a cinematograph film is a reference to the carrying out of any process whereby a performance or part thereof is recorded for the purposes of visual reproduction.

(3) For the avoidance of doubt it is hereby declared that this Ordinance applies as respects anything done in relation to a performance notwithstanding that the performance took place out of Fiji, but this shall not cause anything done out of Fiji to be treated as an offence under this Ordinance.

#### Penalization of making, etc., records without consent of performers

3. — (1) Subject to the provisions of this Ordinance, if a person knowingly —

- (a) makes a record, directly or indirectly, from or by means of a performance without the consent in writing of the performers; or
- (b) sells or lets for hire, or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, a record made in contravention of this Ordinance; or
- (c) uses for the purposes of a public performance a record so made,

he shall be guilty of an offence under this Ordinance, and shall be liable, on conviction, to a fine not exceeding two pounds for each record in respect of which an offence is proved, but not exceeding fifty pounds in respect of any one transaction:

Provided that, where a person is charged with an offence under paragraph (a) of this subsection, it shall be a defence to satisfy the court before which such person is charged that the record was made for private and domestic use only and not for sale or for any commercial purpose.

(2) For the purposes of paragraphs (b) and (c) of subsection (1) of this section, a record made in a country outside Fiji directly or indirectly from or by means of a performance shall, where the civil or criminal law of that country contains a provision for the protection of performers under which the consent of any person to the making of the record was required, be deemed to have been made in contravention of this Ordinance if, whether knowingly or not, it was made without the consent so required and without the consent in writing of the performers.

#### Penalization of making, etc., cinematograph films without consent of performers

4. — Subject to the provisions of this Ordinance, if a person knowingly —

- (a) makes a cinematograph film, directly or indirectly, from or by means of a performance without the consent in writing of the performers; or
- (b) sells or lets for hire, or distributes for the purposes of trade, or by way of trade exposes or offers for sale or hire, a cinematograph film made in contravention of this Ordinance; or

(c) uses for the purposes of exhibition to the public a cinematograph film so made, he shall be guilty of an offence under this Ordinance, and shall be liable, on conviction, to a fine not exceeding fifty pounds:

Provided that, where a person is charged with an offence under paragraph (a) of this section, it shall be a defence to satisfy the court before which such person is charged that the cinematograph film was made for private and domestic use only and not for sale or for any commercial purpose.

*Penalization of broadcasting and relaying  
without consent of performers*

5. — (1) Subject to the provisions of this Ordinance, a person who knowingly, without the consent in writing of the performers—

(a) broadcasts, otherwise than by the use of a record or cinematograph film, a performance, or any part thereof; or

(b) causes, otherwise than by the use of a record or cinematograph film or the reception of a broadcast, a performance, or any part thereof—

(i) to be transmitted to subscribers to a diffusion service; or

(ii) to be transmitted over wires or other paths provided by a material or heard in public,

shall be guilty of an offence under this Ordinance, and shall be liable, on conviction, to a fine not exceeding fifty pounds.

(2) For the purposes of the last preceding subsection, references to the transmission of a work or other subject-matter to subscribers to a diffusion service are references to the transmission thereof in the course of a service of distributing broadcast programmes, or other programmes (whether provided by the person operating the service or other persons), over wires, or other paths provided by a material substance to the premises of subscribers to the service; and for such purposes as aforesaid, where a work or other subject-matter is so transmitted—

(a) the person operating the service (that is to say, the person who, in the agreements with subscribers to the service, undertakes to provide them with the service, whether he is the person who transmits the programmes or not) shall be taken to be the person causing the work or other subject-matter to be so transmitted; and

(b) no person, other than the person operating the service, shall be taken to be causing it to be so transmitted, notwithstanding that he provides any facilities for the transmission of the programmes:

Provided that, for the purposes of this subsection, and of references to which this subsection applies, no account shall be taken of a service of distributing broadcast or other programmes, where the service is only incidental to a business of keeping or letting premises where persons reside or sleep, and is operated as part of the amenities provided exclusively or mainly for residents or inmates therein.

*Penalization of making or having plates, etc., for making records in contravention of Ordinance*

6. — If a person makes, or has in his possession, a plate or similar contrivance for the purpose of making records in contravention of this Ordinance, he shall be guilty of an offence under this Ordinance, and shall be liable, on conviction, to a fine not exceeding fifty pounds for each plate or similar contrivance in respect of which an offence is proved.

*Power of court to order destruction of records, etc.,  
contravening Ordinance*

7. — The court before which any proceedings are taken under this Ordinance may, on conviction of the offender, order that all records, cinematograph films, plates or similar contrivances in the possession of the offender which appear to the court to have been made in contravention of this Ordinance, or to be adapted for the making of records in contravention of this Ordinance, and in respect of which the offender has been convicted, be destroyed or otherwise dealt with as the court may think fit.

*Special defences*

8. — Notwithstanding anything in the preceding provisions of this Ordinance, it shall be a defence to any proceedings under this Ordinance to satisfy the court before which any person is charged—

(a) that the record, cinematograph film, broadcast or transmission to which the proceedings relate was made only for the purpose of reporting current events; or

(b) that the inclusion of the performance in question in the record, cinematograph film, broadcast or transmission to which the proceedings relate was only by way of background or was otherwise only incidental to the principal matters comprised or represented in the record, film, broadcast or transmission.

*Consent on behalf of performers*

9. — Where, in any proceedings under this Ordinance, a court is satisfied—

(a) that the record, cinematograph film, broadcast or transmission to which the proceedings relate was made with the consent in writing of a person who, at the time of giving the consent, represented that he was authorised by the performers to give it on their behalf; and

(b) that the person making the record, film, broadcast or transmission had no reasonable grounds for believing that the person giving the consent was not so authorised;

the provisions of this Ordinance shall apply as if it had been shown that the performers had themselves consented in writing to the making of the record, film, broadcast or transmission.

*Giving of consent without authority*

## 10. — (1) Where—

(a) a record, cinematograph film, broadcast or transmission is made with the consent in writing of a person who, at the time of giving the consent, represented that he was authorised by the performers to give it on their behalf when to his knowledge he was not so authorized; and

(b) if proceedings were brought against the person to whom the consent was given, the consent would by virtue of section 9 of this Ordinance afford a defence to those proceedings, the person giving the consent shall be guilty of an offence under this Ordinance, and shall be liable, on conviction, to a fine not exceeding fifty pounds.

(2) Section 9 of this Ordinance shall not apply to proceedings under this section.

## II

**Copyright (Broadcasting of Gramophone Records) Act, 1972**

(No. 25, of December 22, 1972)

An Act to clarify the law relating to copyright in connection with the broadcasting of gramophone records, etc.

*Short title*

1. — This Act may be cited as the Copyright (Broadcasting of Gramophone Records) Act, 1972.

*Copyright in radio broadcasts of records, etc.*

2. — Notwithstanding the provisions of any other written law —

(a) the manufacturers' and performers' copyright in a musical recording on gramophone records, tapes or

other mechanical contrivance, shall not be infringed if such a recording is broadcast, by means of radio or television, by the Fiji Broadcasting Commission;

(b) where a radio or television broadcast is made and a person by the reception of that broadcast causes a musical work or recording to be heard in public, he shall not thereby infringe the copyright in that musical work or recording.

## UNITED KINGDOM

**The Copyright (International Conventions) (Amendment No. 4) Order 1973**

(No. 1089, of June 20, 1973, coming into force on July 17, 1973)

1. — (1) This Order may be cited as the Copyright (International Conventions) (Amendment No. 4) Order 1973, and shall come into operation on 17<sup>th</sup> July 1973.

(2) The Interpretation Act 1889 shall apply to the interpretation of this Order as it applies to the interpretation of an Act of Parliament.

2. — The Copyright (International Conventions) Order 1972<sup>1</sup> (hereinafter referred to as “the principal Order”), as amended<sup>2</sup>, shall be further amended as follows:—

(a) in Schedule 1 (which names the countries of the Berne Copyright Union) Cameroon shall be indicated with an asterisk denoting that it is also party to the Universal Copyright Convention;

(b) in Schedule 3 (countries in whose case copyright in sound recordings includes the exclusive right of public performance and broadcasting) there shall be included a reference to Austria;

(c) in Schedules 4 and 5 (countries whose broadcasting organisations have copyright protection in relation to their sound and television broadcasts) there shall be included references to Austria and related references to 17<sup>th</sup> July 1973 in the list of dates in those two Schedules;

(d) in paragraph 3 of Schedule 7 (which sets out the modifications of Part III of the principal Order insofar as that Part is part of the law of Gibraltar) in the references in sub-paragraphs (a) and (b) thereof to the Federal Republic of Germany (and Land Berlin) for “(and Land Berlin)” shall be substituted “(and Berlin (West))”.

3. — Article 2(b) of the Copyright (International Conventions) (Amendment No. 2) Order 1973<sup>2</sup>, so far as it

amends Schedules 4 and 5 to the principal Order, shall extend to Gibraltar and Bermuda.

4. — (1) This Order except for Article 2(c) and (d) and Article 3 shall extend to all the countries mentioned in the Schedule hereto.

(2) Article 2(c) shall extend to Gibraltar and Bermuda.

(3) Article 2(d) shall extend to Gibraltar.

## SCHEDULE

*Countries to which this Order extends*

Bermuda	Isle of Man
Belize	Montserrat
Cayman Islands	Seychelles
Falkland Islands and its Dependencies	St. Helena and its Dependencies
Gibraltar	Virgin Islands
Hong Kong	

## EXPLANATORY NOTE

*(This Note is not part of the Order)*

This Order further amends the Copyright (International Conventions) Order 1972. It takes account of—

(a) the accession of Cameroon to the Universal Copyright Convention;

(b) the ratification by Austria of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

The Order extends, so far as is appropriate, to dependent countries of the Commonwealth to which the 1972 Order extends.

<sup>1</sup> See *Copyright*, 1972, p. 180.

<sup>2</sup> See *ibid.*, 1973, p. 109.

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## CORRESPONDENCE

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### Letter from Italy

by Valerio De SANCTIS \*

**Summary:** I. 1. Introductory remarks. 2. Questions concerning constitutional legality of certain provisions of the Copyright Law. — II. 3-4. Some interesting matters of ordinary case law. 5. Copyright matters. 6. Matters of rights connected with the exercise of copyright. — III. 7. Concluding remarks on the industrialization of intellectual productions.

#### I

1. My last "Letter from Italy" was published in June 1968<sup>1</sup>, so that there has been a break of nearly five years in my relations with readers of this review which had continued ever since 1943<sup>2</sup> when, following the death of Eduardo Piola Caselli, the editor of *Le Droit d'Auteur* had asked me to keep readers informed about major events occurring in Italy in our field of interest.

This silence on my part is attributable to several reasons, and not only to age or to the fact that I have not been "needed" sufficiently by the editor of the review!

First and foremost, I should mention that during this period I have written and spoken to the public a good deal about the evolution of copyright over the years. To name only a few instances of studies concerning Italy and addressed to an international audience: *Aspects du droit d'auteur en Italie*, a general report for the Franco-Italian legal seminar, held at Turin in June 1969; *Développements récents et perspectives d'avenir sur le plan national dans les pays autres que les pays francophones et anglophones* (for the lecture series organized by WIPO at Montreux in 1971); and, only recently, my contributions, now in course of publication, to the *Festschriften* in honor of Professor Henri Desbois (*La Cour constitutionnelle italienne et le droit d'auteur*) and also of Professor Eugen Ulmer (*Quelques considérations sur des problèmes juridiques en matière d'œuvres sur commande*).

From the psychological point of view, I have, as a result, experienced some uneasiness over being repetitious, even partially, on these various occasions. But the main reason for my silence here lies in the fact that legal developments in Italy in our field of interest can be considered to have been at a standstill during this period and that in case law (at least, so far as the Supreme Court of Appeal is concerned) there have been no particularly noteworthy events that would lead in directions substantially removed from the earlier interpretation.

Furthermore, I had to remember that I had begun my last "Letter from Italy" with a passage quoted from the "National Economic Program for the next five years — 1966-1970"

(Act No. 685 of July 27, 1967) and devoted to the reorganization of domestic legislation on copyright — a reorganization which has still not been accomplished.

True, this legislative inactivity in Italy is attributable in particular to the well-known events that followed on the Diplomatic Conference, for the revision of the Berne Convention, held at Stockholm in 1967, and to the uncertainty that they have caused for lawmakers in nearly all the countries of the Union, as well as to other fully justified considerations at the national level. But the non-implementation of what had been foreseen for copyright legislation under Italy's five-year economic plan gave me no encouragement to take up my pen again to write another "Letter from Italy".

If I do so today, in response to a kind invitation from the editor of this review, the reason is that, first of all, I feel it my duty, in order to provide a bridge between the past and the future — which is in the hands of the gods — and, secondly, because I should like to express in these lines some ideas on certain trends that are emerging in Italy in our field of interest and that can be discerned in several recent developments.

2. Above all, I would reiterate, there has been no legislative action on the matter during the period in question — not even any negative or indirect action, i. e., through decisions of the Constitutional Court finding any provisions of the copyright legislation to be inconsistent with the Constitution.

As readers know, in Italy constitutional control of the activities of the Legislative is entrusted to the Constitutional Court, established in 1956, in pursuance of Articles 134 to 137 of the Constitution of the Republic. Control of the constitutional legality of the legislative provisions made by Parliament, the Government and the regional authorities is exercised in Italy (taking into account the first decision made by the Court — No. 1, 1956 — on a fundamental legal problem) in respect of any legislative provision in force, even if such provision was published prior to the establishment of the republican Constitution (January 1, 1948). From the aspect of the exercise of constitutional control, the decisive legal significance is therefore given not at the moment when the provision comes into being, but at the moment when it comes into application, to the extent that it is "alive". Hence, the Court fulfils a veritable "selection" function in respect of old legislation, to the extent that the latter is still in force. It is because of this conception of control of legality that such control also extends to the provisions of the Civil Code and of the special Law on copyright and rights connected with the exercise of copyright, dating back to 1941-1942.

The Court does not exercise control of legality spontaneously, but only when the question arises before it in connec-

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<sup>1</sup> *Copyright*, 1968, p. 138.

<sup>2</sup> *Le Droit d'Auteur*, 1943, p. 97.

tion with legal proceedings, whether civil or criminal. On the other hand, the Court may have to examine, as a principle matter, questions of constitutional legality when so requested by the Government or by the regions. If the Court declares any legislative provision to be illegal, the latter ceases to be applicable as from the day following publication of the Court's decision. The Court's judgments are final.

Any objections raised by the ordinary courts and put before the Court as to the legality of certain provisions of the copyright legislation have been rejected by the latter, so that, to date, no changes have in this respect been made in the copyright legislation nor in any other provisions connected with the exercise of copyright.

Within the context of supervision of the constitutional legality of the copyright legislation in force, in my last "Letter"<sup>3</sup> I mentioned decision No. 25 of the Constitutional Court, dated April 18, 1968, rejecting a question raised by a judge in connection with Article 180, first paragraph, of the Copyright Law, concerning the monopoly to act as an intermediary granted, under the Law and in respect of the exercise of certain rights of authors, to the Italian Society of Authors and Publishers (SIAE), on the grounds that such a monopoly was in breach of the freedom of association guaranteed by Article 18 of the Constitution.

The decision in question, motivated mainly by the fact that the SIAE is recognized as being a public institution "in order to ensure, by whatever means the legislator deems best, the protection and exercise of copyright", has been followed by other similar solutions in that the Court, by a later decision, also rejected other and more numerous objections raised in regard to constitutional legality, and all concerning the legal regulations of the SIAE.

The above-mentioned decision was No. 65 of 1972<sup>4</sup>, by which the Constitutional Court rejected, as being not justified, questions of constitutional legality in connection with certain provisions of the Copyright Law; those questions had arisen from an Order dated April 1970 by the Praetor of Chioggia in proceedings brought against a dance-hall manager who had allowed public performance of light musical compositions without having obtained a licence from the SIAE. The provisions of the Law which, by his Order, the Praetor of Chioggia submitted to the Court for examination from the aspect of constitutional legality were Articles 15, 171(b), 180, first and second paragraphs, in relation to the following Articles of the Constitution: 3 (equality of treatment as between citizens), 24 (jurisdictional protection of the citizen), 41 (freedom of private economic initiative), 113 (jurisdictional protection of the legitimate rights and interests of the individual against actions of the public administration)<sup>5</sup>. This decision by the Court is also important in regard to the concept of "dominant position" in matters of market competition.

Among other decisions of the Constitutional Court dismissing questions as to the constitutional legality of certain legis-

lative provisions concerning copyright, I shall merely mention in this "Letter" (with a reference to the above-mentioned study in course of publication in honor of Professor Desbois) the decision of July 9, 1970 (No. 122), on the seizure of newspapers and periodicals<sup>6</sup>, and that of March 15, 1972 (No. 48), on the protection of photographs<sup>7</sup>.

Both of these decisions of the Constitutional Court, while dismissing findings by the judges as to the facts that certain legislative provisions were inconsistent with the Constitution, have thereafter given rise to decisions by the ordinary judge which, even if in my opinion they were not particularly well founded in motivation, certainly reflect some embarrassment on the part of the judges, not in regard to the structure of the 1941-1942 legislation, but in respect of certain "specific" provisions contained therein. Furthermore, one must not underestimate in this respect a certain erosion of this legislation over the years, particularly at a significant point in history, such as the present era of "contestation" of a number of principles which, even in the very recent past, had been accepted without much opposition.

In this connection, one cannot deny that the legislation in force contains certain gaps that have to be filled by applying principles of a general character, particularly following the ratification and bringing into operation of certain international instruments, above all the Brussels Act (1948) of the Berne Convention. On several occasions in my "Letters" since the 1945 one<sup>8</sup>, when I referred to the work being done in the Administrative Committee under the chairmanship of Mr. Massimo Pilotti, I have mentioned plans for revising the Copyright Law on certain specific points, but for a number of justifiable reasons those plans have not gone forward.

I shall comment, then, on the two afore-mentioned decisions of the Constitutional Court and, in the ensuing paragraphs devoted to decisions of ordinary case law, I shall mention two successive decisions by which the judges as to the facts cited Constitutional Court decisions as grounds for "interpreting" provisions of the Copyright Law in a way that differed from the earlier case-law interpretation.

In the first of those two decisions, which concerns the application, in regard to seizure, of the provisions of Article 10 of the Civil Code (image rights) and Articles 96 and 97 of the Copyright Law (rights in regard to portraits), the Constitutional Court dismissed a question of constitutional legality that had been raised in legal proceedings by an ordinance of the Praetor of Rome following an application for seizure of a periodical containing a picture of a certain person, on the grounds that such publication went beyond the scope of provisional emergency measures (Article 700 of the Code of Civil Procedure).

In its decision, the Constitutional Court stated that if properly interpreted, the general provision in Article 700 of the Code of Civil Procedure was not in contradiction with

<sup>3</sup> *Copyright*, 1968, p. 143.

<sup>4</sup> See *Il Diritto di Autore*, 1972, p. 194.

<sup>5</sup> On the legal structure and composition of the Italian Society of Authors and Publishers, see under the title "Configurazione giuridica della Società Autori" and among my most recent contributions, the publication *SIAE: 1882-1972*, Rome, 1972, pp. 87 *et seq.*

<sup>6</sup> For the text of the decision, together with a note by me entitled "In tema di libertà di stampa e diritto di autore", see *Il Diritto di Autore*, 1970, pp. 292 *et seq.*

<sup>7</sup> For the text of the Court's decision, together with a note by M. Fabiani entitled "Protezione dell'opera di autore italiano pubblicata all'estero", see *Rivista di diritto commerciale*, 1972, p. 72.

<sup>8</sup> *Le Droit d'Auteur*, 1945, p. 123.



Article 21 of the Constitution concerning freedom of expression as well as freedom of information and of the press. In that respect, the constitutional judge nevertheless held, in his legal exposé, that seizure was permissible only where publication of the picture concerned constituted an "offense" expressly provided for in the Press Law.

The second decision of the Constitutional Court, which concerns the protection of photographs under the Italian Copyright Law (Articles 87 to 92, Chapter V of Part II on rights connected with the exercise of copyright)<sup>9</sup> dismissed any question as to the constitutional legality of the provisions concerned, as raised by the ordinary judge (Order of January 19, 1970, of the Milan Court) in relation with Article 3 of the Constitution (equality of treatment between Italian citizens). The question was based on the fact that the Italian Copyright Law does not recognize the author of a photograph in general as having any entitlement to the "moral rights" (Article 20 of the Copyright Law) which extends, on the other hand, to the authors (who may sometimes be Italian) of "photographic works" published in a foreign country that is a member of the Union, the reason being that such works are within the purview of the international commitment established by the Brussels Act of 1948 (Articles 2 and 6<sup>bis</sup>), which was ratified and made enforceable in Italy by Act No. 247 of February 16, 1953.

In its decision, the Constitutional Court, while stating that the Berne Convention cannot, *per se*, introduce into Italy's legislation in any automatic and general manner protection for the moral rights in respect of "photographic works" in purely national situations, held, on the basis of other considerations, that the principle of equality and parity of treatment between Italian citizens, as set forth in Article 3 of the Constitution, was not involved in this case.

It should be noted in this connection that the Court is a typically "jurisdictional" organ. It never states that any particular legislative provision is "constitutionally legal" in absolute terms. It merely accepts or dismisses any question of constitutional legality that has been raised in relation with such a provision.

## II

3. In this third section, which records some particularly interesting decisions of *ordinary case law* in Italy in the course of the period I have referred to, I shall examine in some detail the question of seizure of a work and that of the moral rights of the author of a photograph; these were the subject of the two above-mentioned decisions of the Constitutional Court because, I would reiterate, the ordinary judges *successively* made decisions in this regard while *limiting themselves to interpretation of the Law*.

These decisions were as follows: an ordinance by the Rome Praetor dated July 8, 1971<sup>10</sup>, and a decision by the Milan Court (1<sup>st</sup> Civil Section) on December 19, 1972<sup>11</sup>, concern-

ing a case in which the legal proceedings had been suspended because the Court had raised the question of constitutional legality which, as we have seen, was then dismissed by the Constitutional Court.

The first case (Praetor of Rome) concerned the publication, alleged to be improper, of a photo-strip story, a work derived from a cinematographic work and which infringed the economic rights of the film producer and the moral rights of the director. The second case (Milan Court) concerned a publicity photograph which the judge held to be artistic because of the arrangement of the subject (a particularly well-dressed woman), the play of light and shade, the retouching and so forth, which had been reproduced with major alterations.

In his ordinance, the Rome Praetor dismissed an application for seizure of the photo-strip publication on the grounds that "seizure of what may constitute an infringement of copyright is not applicable in the case of a printed publication, which is a vehicle for expression of thought that is surrounded by particular safeguards under Article 21 of the Constitution". That was the finding of the Rome Praetor, giving a "restrictive" interpretation to the first paragraph of Article 161 of the Copyright Law (Chapter III of Part III, Section I entitled "Civil Protection and Sanctions"), without being obliged, in his view, to bring before the Constitutional Court any question as to the legality of the provision under reference. Under such an interpretation, any case of plagiarism and forgery in the form of a printed publication would be immune from seizure as a provisional emergency measure in the course of civil proceedings. It should be noted, in this connection, that seizure is not allowed under the same Article 161 of the Copyright Law (second paragraph) in the case of "works of collaboration". The first paragraph of Article 161 reads as follows: "For the purposes of the proceedings referred to in the previous Articles, the judicial authority may order an inventory, a report, an expert appraisal or the seizure of all matter constituting an infringement of the right of utilization".

Here again, it should be underlined that the case under reference did not concern publication in the press or in other information media. Moreover, as I have already pointed out on other occasions, emergency measures designed to afford effective protection to the rights of the authors of intellectual works have their origin and their justification in the general principle of freedom of expression from all its aspects — whether positive or negative — and that principle heads the Article of the Constitution. It is on the basis of such principles that Article 3 of the 1946 Press Law (No. 561), enacted immediately after the Fascist regime was overthrown, provides that "nothing is changed in regard to the provisions on civil protection and sanctions established for the safeguard and protection of copyright by the Law of April 22, 1941 (No. 633)". In my view, such a provision does not seem inconsistent with the later Press Law of February 8, 1948, which, moreover, in its list of repealed earlier legislation, makes no mention of the 1946 Law.

The Milan Court's finding in regard to the protection of photographs is of particular interest, in that, in order to apply the provisions on moral rights to artistic photography, the

<sup>9</sup> In this connection, regarding the protection of photographs under Italian legislation, see my remarks in *Enciclopedia del diritto*, Autore (diritto di) — Disciplina del diritto di autore e dei diritti connessi, Vol. 4, p. 433, Ed. Giuffrè, Milan, 1959.

<sup>10</sup> See *Il Diritto di Autore*, 1972, p. 474.

<sup>11</sup> *Ibid.*, 1973, No. 1.

judge takes up the general problem of the relationship between the Berne Convention and domestic legislation, while departing from certain principles that could be inferred from earlier case law and doctrine<sup>12</sup>.

This decision also departs from the concept expressed earlier by the same Milan Court, according to the ordinance raising the question of legality before the Constitutional Court, and also from certain *de jure* remarks to be found in the Court's decision.

In its decision, the Milan Court held that, from the text of the Berne Convention and in particular Articles 1, 4, 6 and 19, once that Convention had become enforceable in Italy the general principle could be drawn that, in the event of any gap in domestic legislation, appropriate provisions on the minimum protection afforded by the Convention were automatically to be inserted in the said legislation.

As a consequence of such a principle, the Court held that where a photograph was recognized as being an artistic creation (Article 2(1) of the Brussels Act), its author was eligible for protection of his moral rights in Italy as provided for in Article 6<sup>bis</sup> of the Berne Convention (Brussels Act).

Pending a possible appeal decision, I may have occasion at some future date to revert to the general problem of the relationship between the Berne Convention and domestic legislation, even outside the particular question of moral rights in photographic "works". Moreover, in my opinion, such a particular question specifically concerning photographs having a distinct artistic value (Article 92, second paragraph, of the Law) could have been solved on the basis of other considerations of an interpretative character. I shall merely note here, in respect of the general problem, that there can be no doubt that, on the basis of the Italian system, the provisions of the Convention regarding minimum protection of intellectual works are automatically inserted in Italy's legislation by implementing order wherever the legislation does not contain any provisions in that respect, or even where conflicting provisions exist. The question (and the problem) is, however, whether such provisions of private international law as can be drawn from the Berne Convention should *likewise* apply in situations where there is *no link* of a conventional character (country of origin, first publication, author's nationality), for example, in respect of foreigners ineligible for protection under the Berne Convention, but enjoying *only* the benefits of assimilation (equality of treatment) under other international agreements (bilateral treaties, Universal Copyright Convention, etc.). The legal uncertainty in this important field derives mainly from the fact that the Italian implementing order for the Brussels Act did not include the provision (as I had suggested at the time<sup>13</sup> (which, however, is to be found in the implementing order (Act No. 2701 of December 29, 1927) for the Paris Convention for the Protection of Industrial Property (The Hague Act), under which "all benefits accorded to foreigners under the Convention are automat-

<sup>12</sup> Concerning my views on this point, see my monograph entitled *La Convenzione di Berna per la protezione delle opere letterarie e artistiche*, Rome, 1949, pp. 8 *et seq.*; also, *Enciclopedia del diritto*, Vol. 4, pp. 422 *et seq.*

<sup>13</sup> See my monograph on *La Convenzione di Berna*, mentioned in note 12.

ically extended to Italian citizens". A provision of this kind was subsequently inserted in the domestic legislation on industrial property.

4. In the context of case law established by the ordinary judges concerning the interpretation and application of copyright legislation, I should like to mention some decisions of particular interest in regard to copyright (paragraph 5) and to rights connected with the exercise of copyright (paragraph 6).

5. Under Article 167 of the Copyright Law, the rights of economic utilization that are recognized by law may be judicially enforced by any person having "lawful possession" thereof.

By this specific provision, the Italian Act settled all questions raised in the past concerning the possibility of some category of "possession" in copyright matters, to the extent that the subject matter of copyright was not a material thing. Moreover, it was even alleged to seem impossible to envisage the concept of lawful possession of an intellectual work without it being linked to ownership of the rights pertaining thereto.

In this connection, I remarked long ago<sup>14</sup> that the intention of the Act, in Article 167 which is designed to allow the *bona fide* possessor to claim judicially the rights of economic utilization, particularly in respect of infringers, was not to upset the principles underlying copyright, and in particular those principles relating to the nature of an immaterial good and to the different ways of acquiring rights. Consequently, since the subject matter of copyright is not a material object, lawful possession is feasible only through the peaceful exercise of copyright. Similarly, by virtue of the fact that, in the Italian system (Article 2576 of the Civil Code and Article 6 of the Copyright Law), copyright is acquired by creation of a work resulting from an intellectual effort, acceptance of the legal concept of possession does not also lead to recognition of the concept of usucaption.

In a decision of the Milan Court of Appeal dated January 27, 1968<sup>15</sup>, which I did not mention in my last "Letter" but should like to draw attention to here, it was held, on the question of entitlement to bring legal proceedings for recognition of possession of rights of economic utilization in an intellectual work in terms of Article 167 of the Law, that it is sufficient if the judge can ascertain the existence of a body of conclusive acts and factual events. To that end, the Milan Court of Appeal held that, in order to obtain entitlement to act and to present proof of lawful possession of copyright, the following are sufficient: to have printed, published and put on sale the work in question some time earlier, and to have carried out the prescribed procedure for administrative deposit, in terms of Articles 103 to 106 of the Law. The Milan Court of First Instance had given a contrary decision, but the judge held that in such case the author could have invoked either Article 110 of the Law, requiring written proof of any transfer of utilization rights, or alternatively Article 167, providing for the exercise of *de facto* power of copyright in a work, in order to obtain entitlement to act.

<sup>14</sup> See *Contratto di edizione*, Ed. Giuffrè, Milan, 1965, p. 52.

<sup>15</sup> See *Il Diritto di Autore*, 1968, p. 176.

The work in question was *I love you*, by Archer, which the Francis-Day publishing firm had also published in an album of musical compositions in Italy; each composition bore the annotation "property of Francis-Day musical editions", and the Opus-Proclama firm had also included this unauthorized annotation in a publicity film.

On this same subject of lawful possession of rights of economic utilization, as a *de facto* relationship between the possessor and the *res*, the Rome Praetor had held, by an ordinance dated February 26, 1969<sup>16</sup>, that it was sufficient for there to be a relationship of availability of the *corpus mechanicum* (the negative of the film) comprising a lawful origin. As regards such origin, he was of the opinion that the existence of possession derived from a legal title was not indispensable, and that it was likewise sufficient for a *de facto* situation to exist which excluded any violence, clandestinity or precarity.

Although in the case concerned the judge did not recognize that such a situation of lawful possession existed, because the elements indicated above which should have characterized it were lacking, the decision of the Rome Praetor gives rise to well-founded doubts from the legal aspect, in particular because it underlined, for possession of copyright, the relationship with the material object and because of the qualification of lawful or unlawful origin of possession. Furthermore, it should be noted that the provisions of Article 167 tend to strengthen, rather than weaken, the protection of the author's rights<sup>17</sup>.

Let us turn now to another legal decision in a different field. On February 21, 1969 (decision No. 587)<sup>18</sup>, the Supreme Court of Appeals established some rather interesting legal principles in connection with a legal dispute that had been proceeding for a long time between Marta Abba, beneficiary under Luigi Pirandello's will of nine of this great Italian playwright's works, and the rightful heirs of Pirandello as well as at the same time the Mondadori publishing firm.

By the above-mentioned decision, the Supreme Court of Appeals referred the case back to the Turin Appeals Court for a new factual examination of the various questions involved. The Turin Court will have to observe the legal principles established by the Supreme Court.

The legal problems examined by the Supreme Court of Appeals concern the rights and limits of artistic criticism, to the extent that this is one of the aspects of freedom to express thought, while safeguarding certain personal rights of third parties, the author's proof-reading obligation and the use of the sign © — Copyright — on copies of the work. On this occasion, however, I shall merely draw attention to the question of publication of a writer's complete works, in relation to earlier publication of each individual work.

What had to be decided was whether Pirandello's heirs (and Mondadori publishers on their behalf) were also entitled to publish, as part of the complete works of Luigi Pirandello,

the plays in which Marta Abba had acquired the rights directly, namely on the basis of a specific right, to the extent that publication of an author's complete works constitutes a separate right, and hence is independent of any authorization received earlier by Marta Abba and subsequently disputed, in particular in respect of a compilation of Pirandello's letters.

Article 18, third paragraph, of the Italian Copyright Law states that: "The author shall, in addition, have the exclusive right of publishing his works in a collection". The right of publishing an author's complete works is thus considered to be a separate right, in the context of the general right of economic utilization. The Italian legislation differs from that of some other countries in that it does not establish any detailed provisions for the exercise of this right. *De jure condendo*, a proposal was made, during the discussion on the drafts for revision of the Law, for the introduction of a more detailed provision in the context of Article 18, third paragraph. Under such a provision and, even here, consistently with a principle adopted by the copyright legislation in certain cases of conflict of interest as between author and assignee, the right in question could have been exercised by the author and, after his death, by his heirs or legatees only, in respect of each work, after ten years had elapsed since first publication, and subject to payment of "equitable compensation" to the owner of the right in the work concerned.

In its decision on this matter, the Supreme Court of Appeals held that, in the Italian copyright system, the various forms of economic utilization of a work constitute the content of different exclusive economic rights, these being independent of each other. Having regard to the fact that the various rights of the author also include the right to publish his works in a collection, the ownership and exercise of this right may accrue to one particular person, even in respect of works owned by different persons in relation with any other form or any other means of utilization.

I shall now move on to some other interesting legal cases. In my "Letter" of 1962<sup>19</sup>, I mentioned a principle that had been clearly expressed by the Supreme Court of Appeals (February 1, 1962, No. 190) in connection with a psychological test (the *Baumtest* of the Swiss scientist Charles Koch) according to which copyright, to the extent that it protects the form of expression of a work, does not cover the "truths" that the work contains. The legal monopoly in scientific works therefore covers solely the formal expression, the "expressive solution of scientific discourse", but not the lesson to be drawn therefrom, which remains at the disposal of everyone, in the interest of the advancement of science and of culture in general.

These same principles can likewise be drawn from the most recent Italian case law.

One case in particular, that was the subject of a decision of the Naples Court of First Instance on March 15, 1972<sup>20</sup>, raises once more the problem of plagiarism of a scientific work, whether the latter is expressed in words, words and pictures, or by graphic signs of any kind. But this case (in

<sup>16</sup> *Soc. Praesidens v. Dora Film & Liverani*, *ibid.*, 1969, p. 537.

<sup>17</sup> For other comments criticising this decision, see Fabiani, in *Giurisprudenza di merito*, 1970, p. 62, and Galtieri, in *Diritto delle radiodiffusioni et delle televisioni*, 1969, p. 312.

<sup>18</sup> *Il Diritto di Autore*, 1969, p. 218.

<sup>19</sup> *Le Droit d'Auteur*, 1962, p. 270.

<sup>20</sup> *Il Diritto di Autore*, 1972, p. 455, with a note by Zara Algardi entitled "Considerazioni sul plagio dell'opera scientifica".

regard to a work recounting the result of research in the field of the propagation of electromagnetic waves) is particularly interesting, for it touches on problems that are becoming increasingly frequent in the world of today, concerning the creation of a work within a university scientific institute, as well as on questions in regard to collaboration and also the ownership of the publication rights pertaining thereto. Even though such problems were only mentioned during the Court hearing, because they did not constitute the direct subject of the Court's decision, and the Court merely found that plagiarism had occurred and drew the relevant consequences, there is nevertheless no doubt that the position of the director of a scientific research institute vis-à-vis his assistants and students, in regard to the formulation and communication to the public of the results and experience derived from research, is not comparable with that of any third party.

Even if works published within the framework of a research institute are the property of their respective authors where safeguard of the moral rights and of right to a name, in particular, are concerned, they are very often inspired by the head of the institute, who also follows the research process and the relevant compilations and sometimes contributes creative elements in the copyright sense.

These problems have very often been discussed in doctrine, and still more in recent times, whether in Italy or elsewhere, and it is not my intention to revert to them on this occasion. I merely wish to comment that from some aspects they have certain links with problems relating to creations "inserted" in industrial production (and I shall mention these in the last section of this "Letter") and also creations which, in the context of the domestic legislation of some countries, afford entitlement in favor of the State or other institutions (the so-called "State copyright")<sup>21</sup>.

To conclude this section, let us now turn to video cassettes.

The *de jure condito* as well as *de jure condendo* problems in the field of copyright (these problems fall within a broader framework, of an industrial, social and cultural nature) have been the subject of increasing attention in recent years in Italy, in the press in general as well as in the specialized press, and they have also been discussed at meetings of all kinds.

In Italian case law, there have been some decisions in this respect in the past few years. I may mention here a decision by the Naples Praetor dated May 27, 1971<sup>22</sup>, to the effect that an unauthorized recording on magnetic tape of a sports event broadcast on television, with a view to using the videogram on video cassette, was contrary to criminal law, with all the consequences ensuing therefrom, because such an action fell within the purview of the criminal sanction provided in Article 171 (f) of the Copyright Law ("Any person shall be punishable by a fine of . . . lire who, without having the right,

and for any purpose and in any form: . . . in violation of Article 79, retransmits by wire or by broadcasting, or records upon phonograph records or other like contrivances, radio-phonetic transmissions or retransmissions, or sells phonograph records or other contrivances which have been unlawfully made").

The fact which had given rise to the legal complaint was that unlawfully recorded telediscs had been offered free of charge to purchasers of videocassettes by a retailer of discs and similar articles.

In another case, by a decision dated June 3, 1970<sup>23</sup>, the Praetor of Ferrara had found that it was contrary to criminal law to sell to the public magnetic tapes in the form of music cassettes, recorded without the consent of the owners of the rights therein (infringement of copyright and connected rights). Since in this particular case the judge had only recognized the existence of the offense and not of any fraudulent action, the provision of Article 172 of the Law was applied, carrying a more lenient sanction.

There have been numerous meetings in Italy in recent years at which problems of all kinds have been discussed in relation with the production, lending and sale of video cassettes and videograms. Among the most interesting of these, I may mention the First and Second International Video Cassette Symposia, organized at Milan by the MIFED in April and October 1970, with the participation of several hundred persons from various countries; technical, industrial, economic, moral, social, psychological and also legal problems were discussed, the latter principally from the copyright aspect. In connection with the problems in this last category, I may also mention a meeting at Rome in 1970, on the topic *Le video cassette et il diritto di autore*<sup>24</sup>.

The problems of copyright in this field are well known and, in the case of the sale of unlawfully recorded magnetic tapes for use in the form of music cassettes or video cassettes, they are not very far removed from many other problems relating to forgery or, in general, to the unauthorized reproduction of protected intellectual works. I merely wish here, once more, to draw attention to the sale of blank tapes for use in video cassettes, and intended for recording by the private individuals who purchase them. People have spoken of private cinema today, with the use of "family equipment".

From some aspects, the situation is somewhat similar, from the legal point of view, to that resulting from the sale to the public of tape recorders and similar apparatus, or photocopying apparatus; but with the rapid advance of technology and the lowering of selling prices of such apparatus, the phenomenon may in time develop to an unforeseeable extent; authors and any other owners of a copyright should therefore not remain inactive in this regard.

During the above-mentioned meeting at Rome, in concluding my contribution concerning certain problems arising from video cassettes in relation to Italy's legislative provisions governing cinematographic works, I underlined the

<sup>21</sup> On this approach, see Vittorio M. De Sanctis, *Il carattere creativo delle opere dell'ingegno*, Ed. Giuffrè, Milan, 1963, pp. 135 et seq.; S. Loi, "Diritto di autore dello Stato e degli enti", in *Il Diritto di Autore*, 1971, p. 281.

<sup>22</sup> See, *ibid.*, 1971, p. 339, with a note by A. Fragola entitled "Videocassette in Pretura".

<sup>23</sup> See, *ibid.*, 1970, p. 247.

<sup>24</sup> The Rapporteur General was Me Léonello Leonelli. By the same author: "Le videocassette: nuovi problemi di diritto di autore", *ibid.*, 1971, p. 462.

unjust situation, particularly from the economic aspect, that results from the sale of unrecorded tapes which private individuals can then record for use in the form of music cassettes and telediscs. And, in this connection, I expressed the hope that the legislators would examine this problem, perhaps on the basis, and in order to arrive at an equitable solution, of the regulations laid down for tape recorders in the Federal Republic of Germany by the 1965 Act dealing copyright and related rights.

As regards the reproduction of protected works for private use, one can say that freedom of private use characterizes the exercise of performing rights. In respect of the "reproduction" of protected intellectual works on media such as magnetic tapes (that is to say, media suitable for public circulation), the concept of "freedom of private use" has not been retained either in the Italian Act (Article 68, first paragraph) or, more recently, at international level, in the Stockholm Act of the Berne Convention. Article 9 of the Stockholm Act, concerning protection of the right of reproduction, includes in such protection, on the basis of an exclusive right and in specific terms, "any sound or visual recording" (paragraph (3) of the Article), whereas under paragraph (2) "It shall be 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"<sup>25</sup>.

The domestic legislation of the countries of the Union need not, therefore, codify the principle, as such, of freedom of reproduction of protected works by private individuals and for private use, but should, where appropriate, draw up a list of *special cases* in which it is permissible to reproduce protected works on magnetic tapes, taking into account the above-mentioned general principles as set forth in Article 9, paragraphs (2) and (3), of the Stockholm Act.

Furthermore, if the author may be justified in abandoning his exclusive right in his creation in the event that intellectual works are reproduced on tape or some other device for family use and even for teaching purposes in order to promote the untrammelled dissemination of culture, there is nothing to justify the utilization of an immaterial good by recording it free of charge on devices that are then purchased at their fair market price by private individuals. If possible, a system of equitable remuneration for authors should be organized, even in a unitary and collective form.

6. In Part II of the Copyright Law, the Italian legislator established provisions in respect of "rights connected with the exercise of copyright".

In international parlance, one often speaks of "neighboring rights" of copyright, an expression that is never used in the Italian legislation. Under the Law, the creative element is required only to characterize the protected intellectual work, while all the categories of "connected rights" thus provided for are quite rightly distinct from copyright, *inter alia* in that the "creative" element in the copyright sense is lacking.

<sup>25</sup> In this connection, see my study entitled "La Conferenza diplomatica di Stoccolma sulla proprietà intellettuale", in *Rassegna della proprietà industriale, letteraria, artistica*, 1967, p. 97 of the off-print.

From this aspect, there is therefore no "neighboring" character.

Under Italy's legislation, and apart from the common "negative" element mentioned above, "rights connected with the exercise of copyright" do not constitute one single category from the legal aspect.

There are merely certain "connexities" of fact in the exercise of copyright, while the various categories of rights can, in my opinion, be grouped as follows<sup>26</sup>.

In a *first category*, one must mention the rights of performers, producers of phonograms and broadcasting organizations, whose protection at international level is the subject of the Convention signed at Rome on October 26, 1961, which entered into force on May 18, 1964. These are certain specific activities which, in relation to copyright, are the result of intermediary activities, often of an artistic kind, between the author and the public. The *second category* comprises productions that are on the borderline between intellectual creations and industrial productions (such as photographs in general, and engineering projects). The *third category* concerns the protection of news and information and of distinctive signs of an intellectual work, from the aspect of the illegality of reproducing them by accomplishing acts that are contrary to fair business practice. Lastly, the rights that can be classified in a *fourth category* (legal regime in respect of correspondence and portraits) concern the rights of personality and as such can limit the author's rights in his creation and in the exercise of the rights pertaining thereto.

In recent years, far more than in the past (see my earlier "Letters"), a fairly abundant case law has been built up on questions of the interpretation and application of the Copyright Law in regard to the rights of another person (Articles 93 to 98 of the Law) in relation with the provisions of ordinary law (in civil matters, those designed to prevent abuse of the image of another — Article 10 of the Civil Code — and, in criminal matters, offenses against personal freedom, moral freedom, the inviolability of secrets — Articles 605 to 623 of the Criminal Code) on the occasion of the publication and public dissemination of intellectual works.

In mentioning some other recent decisions on this subject and certain events that have occurred in my country during the period that we are considering today, I shall work backwards through the various categories of connected rights listed above, in other words, starting with the last of these.

On the occasion of several past "Letters" (1955, p. 26; 1956, p. 143; 1957, p. 169; 1964, p. 48), I have examined the question whether, in the Italian system, one can recognize the existence of a right of personality as such, on the basis of constitutional or legislative provisions and also doctrine. A decision of the Supreme Court of Appeals dated April 20, 1963, had constituted a turning-point, so to speak, by coming closer, from certain aspects, to the unitary idea that had been developed by German doctrine, in particular. Nevertheless, especially as regards the personal right of respect for the private life of another person and because of the fact that the general right of personality comes into conflict with the author's right

<sup>26</sup> See *Enciclopedia del diritto*, Autore (diritto di) — Disciplina del diritto di autore e dei diritti connessi.

to freedom of creation and with freedom of information, interests that are different, yet all legitimate, can conflict with each other. The task of the lawmakers is precisely to endeavor to harmonize them through specific rules. The Italian legislative system does not yet contain any legal provisions of a general character on respect for private life, similar to the French Law of July 17, 1970.

A symposium was held at Rome in January 1971 between Italian and foreign jurists on the topic "Limits of literary and artistic creation as opposed to the rights of personality". The meeting took place at the headquarters of the International Institute for the Unification of Private Law (UNIDROIT) and was convened on the initiative of the Italian Society of Authors and Publishers (SIAE) to honor the memory of Filippo Pasquera, who had recently died. Among the foreign jurists who participated, I may mention Professors Derenberg, Desbois, Françon, Ljungman, Spaić, Troller and Ulmer. Professor Mario Rotondi presided over the meeting, which was conducted on the basis of a general report prepared by Professor Adriano De Cupis<sup>27</sup>.

The questions connected with this particular aspect can be grouped under the chapters concerning different topics, such as respect of private life, respect of the honor and reputation of others, protection of the image and voice, respect of historical truth, and right of name. They arise in particular in connection with the creation of cinematographic works and in the context of historical works and information in general.

To mention only case law during the period under review, I shall note, in connection with the right of privacy, a decision by the Praetor of Forli dated October 23, 1970<sup>28</sup>. This concerned a request for prohibition of certain scenes of the film *Corbari* reproducing episodes in the life of a woman partisan during the last world war which would be prejudicial to her honor. The Praetor held that the scenes in question should be deleted if the film was to continue to be shown in public.

Two other decisions are worthy of mention: one by the Milan Court, dated October 2, 1969<sup>29</sup>, and the other by the Rome Praetor dated May 22, 1969<sup>30</sup>.

In the case that led to the Milan Court's decision, the judge found that the rights of personality had been infringed within the context of respect of private life, by the publication of a series of photographs of a well-known woman ("notoriety" in terms of Article 97 of the Copyright Law) which had been taken by means of a telescopic lens — needless to say, without her consent — and showed her in various attitudes of her private life.

In the case that was the subject of the Rome Praetor's decision, on the other hand, a request for protection of the

right of image was dismissed. The application had been brought on behalf of two professional boxers on the ground that pictures of certain moments during two fights at the Rome Sports Palace had been inserted, without the knowledge of the two boxers concerned, or at least without their consent, in a sequence of the film *Metti, una sera a cena*, produced by the Red Film Society on the basis of a stage play by G. Patroni Griffi.

The judge dismissed the application by the two boxers, stating that "in the overall story of the film, the fights in question are of purely marginal significance and without any particular meaning". He further remarked that "the image is an individuality, a concrete concept of the person in his physical features and, in order to be protected by law, it must fit into a representative process that can produce individualizing effects. If these characteristics are lacking, a reproduction of image loses all its significance in terms of right of personality". In connection with quite a different case, the same Rome Praetor expressed the opinion, regarding the need to protect the image because it is a means of identification of the natural person concerned, that "the display and putting on sale of a portrait, in which the image of the person concerned is, through the creative imagination of the painter, deprived of its identification characteristic because it is 're-created' in an artistic and abstract synthesis by the creator of the portrait, are not subject to the legal limitations regarding protection of image" (October 28, 1969, *Visetti v. Cacciabue*).

Lastly, as regards the right of respect for private life, while the Praetor of Forli, in a decision dated October 23, 1970, concerning a cinematographic account in which facts and episodes about a private person had been inserted, held that the person concerned had suffered injury, by another decision dated February 20, 1971<sup>31</sup>, the Rome Praetor pointed out that respect of private life presupposes that the fact concerned is of a "reserved character" and that, accordingly, notoriety precludes any right in that respect.

Fluctuations between freedom of information and freedom of artistic creation, on the one hand, and defense of the rights of personality of other persons, on the other hand, are clearly to be seen in Italy during this period.

In any case, the attention of the Italian public has recently been drawn to the need for more stringent legal provisions protecting individual private life, still from the aspect of protection of the rights of personality, as a result of the telephone-tapping scandal involving private detective agencies, in particular. The Constitutional Court recently made a decision in this regard to the effect that certain provisions of the Criminal Code were constitutionally illegal; and, as a matter of urgency, a bill was put before the Chambers in order to provide more severe penal sanctions in such matters and, at the same time, to limit the authority of the criminal examining magistrate to seek and evaluate the evidence while using such insidious technical facilities.

I would point out, nevertheless, that other private interests worthy of protection, such as the interests of freedom of creation, are not involved in the case of telephone-tapping.

<sup>27</sup> For the text of this report, for my contribution entitled "Considerazioni sul tema dell'incontro anche in relazione al pensiero di Filippo Pasquera" and also for numerous written reports by Italian and foreign jurists, together with statements made and a report on Italian case law on this subject prepared by Professor M. Fabiani, see *Il Diritto di Autore*, 1970 and 1971, respectively pp. 157 to 199 and 1 to 280.

<sup>28</sup> For the text of the decision, see *Giurisprudenza italiana*, with a note by Vita De Giorgi entitled "Cenni sul diritto alla riservatezza, nella giurisprudenza"; see also Giorgianni, "La tutela della riservatezza, in *Rivista di diritto e procedura civile*, 1970, pp. 12 et seq.

<sup>29</sup> *Foro Padano*, 1970, p. 209, with a note by G. Jarach entitled "Ancora del diritto della personalità e dei diritti di libertà".

<sup>30</sup> See *Il Diritto di Autore*, 1971, p. 264.

<sup>31</sup> *Ibid.*, 1971, p. 330.

That being so, intervention by the Italian legislator is a fairly simple matter, because what he has to do is, on the one hand, prohibit any private telephone-tapping and, on the other hand, regulate the use of these forms of spying which modern technology makes feasible so as to be permissible only on the part of the courts, and only in exceptional cases in connection with criminal proceedings.

A few words more about the rights connected with the exercise of copyright, which I classified above in the third category.

Article 102 of the Copyright Law provides as follows: "The reproduction or imitation of other works of a like kind, or of headings, emblems, ornamentations, arrangements of printing signs or characters, or any other particularity of form or color in the external appearance of an intellectual work, when the said reproduction or imitation is capable of creating confusion between works or authors, shall be forbidden as an act of unfair competition". This provision is frequently applicable, because it complements the means of protection of intellectual works as well as protection of titles (Article 100 of the Act).

As regards protection of titles in the Italian system, I have already on several past occasions presented the problems to readers of this periodical underlining that, in terms of the Italian Law, a title is not protected in relation with its value as a "creation", but above all in relation with its individualizing function in respect of the work. For this category of rights connected with the exercise of copyright, I shall merely mention here two instances of case law which, in my view, seem of particular interest.

The first concerns a decision of the Supreme Court of Appeals (1<sup>st</sup> Civil Section, dated October 24, 1969, No. 3483)<sup>32</sup>. A Bologna publishing firm had brought legal proceedings against another publishing firm in the same city because the latter, in the course of its business activities, was slavishly imitating the external graphic appearance of a series of small-size dictionaries published by the plaintiff. The Supreme Court of Appeals over-ruled the Appeals Court decision and found in favor of the plaintiff's contentions, declaring some interesting principles concerning the relationship between the provision of Article 102 of the Copyright Law and that of Article 2598, paragraph 1, of the Civil Code, concerning the general prohibition of acts of competition by confusion. *Inter alia*, the Supreme Court held that the concept underlying the two provisions is the same, namely that the prohibition of reproduction or of imitation must result from confusion between competing activities so as to give rise, in effect, to a possibility of diversion of clientèle. The difference lies only in the framework of the two respective spheres of application for, in terms of Article 102, the sphere of application is limited to the reproduction or imitation of the graphic aspect of an intellectual work<sup>33</sup>.

The second case that I wish to mention here relates to the utilization, in the title of a cinematograph film in course of

production, of an original wording that could be used later and might mislead the viewing audience.

An appeal was brought before the Rome Praetor in connection with an application for an emergency prohibition order (decision of July 10, 1971<sup>34</sup>) and citing Article 100 of the Copyright Law concerning protection of the title of an intellectual work in order to forbid the use of certain expressions. The judge considered, however, that the application was not relevant to the provisions of the Law affording protection to a title, but rather to measures of defense against unfair competition.

The plaintiff was the producer of a film that had been very successful with the general public, entitled *Quando le donne avevano la coda*. His complaint was that a competing producer had changed the title originally planned for one of his films, which had not yet been distributed to the public, into a new title: *Quando le donne facevano din don*. This was therefore a case of an application for prohibition of a title in respect of cinematographic works of the kind called film *filoni* in Italy.

The judge found that the prohibition application was justified; nevertheless, in order to exclude the applicability of Article 100 on protection of a title while accepting, on the other hand, the request for prohibition of an act of unfair competition (still from the aspect of parasitic competition), he stated as follows: "For the purposes of application of the legal provisions concerning protection of a title, there must be simultaneous existence of two intellectual works *already published*, the adoption of the *same title* by both as an individualizing element, the possibility of concrete confusion between the two works . . .". Leaving aside all other considerations, one can doubt the appropriateness of legal principles in regard to protection of a title in Italy (in this connection, see my earlier "Letters").

Among the connected rights in the second category I have included rights pertaining to engineering projects that constitute original solutions to technical problems (Article 99 of the Act). The right to equitable remuneration from those who realize such a project with gainful intent, without the consent of its author, is additional to the exclusive right of reproduction of the project, on the basis of copyright in the strict sense. The "connected right" concerning formulation of the project (its exercise is subject to filing) presents some analogies with the content of certain concepts of industrial property.

An interesting suggestion which, if the occasion arises, could be taken up by case law in Italy, is to be found in a recent study by Professor Gino Galtieri<sup>35</sup>.

Addressing himself to the fairly complex question of efficacious protection of computer software, Professor Galtieri draws attention to the possibilities that the legal concept of engineering projects, referred to in Part II of the Italian Law, dealing with connected rights, can offer for application in the field of protection of computer software.

<sup>32</sup> *Ibid.*, 1970, p. 43.

<sup>33</sup> In connection with Articles 101 and 102 of the Italian Law designed in particular to prohibit "parasitic" competition in the field of the creation and dissemination of intellectual works, see my remarks in *Contratto di edizione*, pp. 89 and 231.

<sup>34</sup> Decision of July 10, 1971, *Il Diritto di Autore*, 1972, p. 477.

<sup>35</sup> "Note sulla proteggibilità dei programmi degli elaboratori elettronici", in *Il Diritto di Autore*, 1971, p. 425. See also *Copyright*, 1972, p. 227.

I have thought it useful to refer to Professor Galtieri's suggestion in this "Letter", all the more so because I have been told that the parties concerned had already made an administrative filing of such productions, precisely in the context of Article 99 of the Law.

Before the 1941 Law was promulgated, the principle of a right to compensation for performing artists had already been recognized by the Law of June 14, 1928 (No. 1352), concerning the broadcasting of performances made in public places (theaters, concert halls, etc.). Under Articles 80 to 85 in Part II (connected rights) of the 1941 Copyright Law, falling within what we have termed the "first category" in our listing earlier in this "Letter", the matter was dealt with as a whole, but the performer was not granted any *exclusive* right in the reproduction of his performance (whether direct, indirect or secondary) and was recognized only as being entitled to equitable compensation, as determined by fairly complex provisions, most of them laid down in the implementing regulations for the Law (Articles 25 to 29). In regard to the right of personality, the moral requirement is safeguarded, under the Law, by the right of name conferred on an artist who plays principal roles (Article 83 of the Law) and by the right to object to any diffusion, transmission or reproduction of his performance which might be prejudicial to his honor or reputation (Articles 2579 of the Civil Code and 81 of the Law). Several provisions of the 1928 Law are still in force<sup>36</sup>.

Even if, under the Italian system, the subject of the protection of performers can be said to comprise essentially, in my opinion, the "artistic contribution" as qualified and described by the Law, where acquisition of the right at the initial stage is concerned, one must take account of the difference between copyright and the general rules in respect of the production of industrial goods. Consequently, for this purpose, the principle of specification and the principles pertaining to *locatio operis* and *locatio operarum* can be invoked. And case law has been unanimous in situating the contribution of a performer within the context of working relations of a subordinate<sup>37</sup>.

Having regard to this legislative and case law situation, one can appreciate why, until now and where the economic aspect of the problem is concerned, the conditions governing performances have been determined in individual or collective contracts, even in regard to utilizations subsequent to the first one where the physical presence of the performer is necessary. The legislative and *de facto* situation accounts for the delay, on the part of our country, in ratifying and putting into effect the Rome Convention of October 26, 1961, which entered into force on May 18, 1964. Among other considerations, it was necessary to preclude any reservations which the Convention allows and which had been introduced in the first ministerial draft of the ratification instrument, following representations by the performers' trade union organizations, and only a few provisions of a domestic character were added.

<sup>36</sup> On the rights of performers, see my compilation in *Enciclopedia del diritto*, Vol. III, pp. 173 to 182.

<sup>37</sup> Among recent decisions, see Supreme Court of Appeals, Second Civil Section, No. 1057 of April 15, 1970, *S. p. A. Ausonia v. Tronville*, in *Il Diritto di Autore*, 1972, p. 29.

The bill for ratification of the Rome Convention is now at last before the Chambers.

A civil action currently in progress (the first in this field) before the Milan Court, which was recently brought (January 29, 1973), by a performer of popular music (Archimede Tito Vailati) against the RAI-Radiotelevisione Italiana, has received some attention in the specialized trade union press because it concerns the interpretation to be given to certain provisions of Article 80 of the Copyright Law, in particular as regards the recording of a performance for broadcasting services.

Since the case is still pending, we cannot, of course, express any opinion on the matter, all the more so since contractual commitments are also involved here. One may merely note that Article 55 of the Law, also cited by the plaintiff and concerning recordings by a broadcasting organization, concerns intellectual works, not the contribution of a performer<sup>38</sup>. As already mentioned, the recognized rights of the performer are enumerated in Articles 80 to 85 of the Law. Article 25 of the implementing regulations for the Law states that, *in the absence of any negotiation between the parties concerned*, the evaluation standards and criteria for the determination and distribution of compensation in favor of the artist, wherever the Law recognizes entitlement to compensation, are to be established by the Presidency of the Council of Ministers in accordance with a prescribed procedure. It would not appear that, to date, any such general standards have been published.

Independently of questions relating solely to the economic aspect, matters concerning the right of name and respect of the honor and reputation of performers have been brought before the courts in several instances.

In this connection, I may mention a rather novel case that was recently settled by the Supreme Court of Appeals<sup>39</sup>. By its decision, the Supreme Court of Appeals quashed the decision by the judges as to the facts (Court and Appeals Court of Bologna).

The City of Parma had sued for damages the baritone MacNeil Cornell who had been engaged for a series of performances of the opera *Un ballo in maschera* at the Regio Theatre in Parma and who, during a performance, had walked off the stage because of the disagreeable attitude of the audience which was strongly opposed to his performance, and had also refused to take part in the next day's performance, although this had been agreed in his contract.

The Supreme Court of Appeals held, *inter alia*, that it follows implicitly from Articles 2579 of the Code Civil and 81, first paragraph, of the Copyright Law, concerning protection of the honor and reputation of the artist as qualified by Article 82 of the said Law, that the artist is entitled to insist that his performance be made in an environment in which he can fully express his abilities, his attitudes and his artistic possibilities. Considering therefore that the hostility expressed by part of the audience toward the artist had greatly affected his

<sup>38</sup> See, in this sense, Milan Court, October 4, 1952, in *Foro Padano*, 1953, I, p. 1118.

<sup>39</sup> Supreme Court of Appeals, First Civil Section, No. 3359 of December 9, 1971, *Mac Neil v. Comune di Parma*, in *Il Diritto di Autore*, 1972, p. 284.



performance, the Supreme Court of Appeals held that the theatrical agent's responsibility was involved, within the context of the principles set forth in Article 2087 of the Civil Code on the duty of the entrepreneur to take, in the exercise of his undertaking, all appropriate measures to protect the physical integrity and likewise the moral integrity of those who assist him<sup>40</sup>.

### III

7. In my last "Letter"<sup>41</sup>, I mentioned in passing a meeting of jurists that had taken place at Rome in May 1967, on the subject of the legal situation in regard to commissioned works.

As I have mentioned several times in earlier "Letters", the status of such works is not the subject of *specific* provisions in our Copyright Law, except in regard to photographs (Article 88), so that one must take doctrine and case law as a basis and also draw certain conclusions from the general principles of the Law.

A fairly recent decision of the Milan Court, dated May 22, 1972<sup>42</sup>, is of particular interest in that, following on certain principles that could even be drawn from the conclusions resulting from the above-mentioned symposium, the Court, "while taking into consideration the highly-authorized source of the Supreme Court of Appeals (July 16, 1963, No. 1938 — see my afore-mentioned "Letter"), did not deem appropriate to conform to it".

In its decision, therefore, the Milan Court therefore held that ownership of the economic rights in an intellectual work can accrue to parties other than the author *solely* by virtue of a *specific* act of transfer, whether the transfer of rights is in respect of a work already created, or whether it concerns a future work, namely a commissioned work in this case. Consequently, in order to establish the precise extent of transfer of copyright, one must always trace back to the relevant act. In the case of a commissioned work only, the rights allowing the objective of the commissioning to be attained may be considered as being transferred, while the burden of proof of a more extensive transfer still lies with the party invoking it; I would add that, in the Italian system, written proof of any transfer of copyright is always required (Article 110).

Pending a possible decision on appeal, I can only rejoice at the line of thinking that underlies such a court decision. To conclude this "Letter", I should like to voice a few other considerations which go beyond the question of commissioned works and concern certain effects in the copyright field of the modern industrialization of intellectual works, which have given rise to legal constructions on the part of highly authorized sources of doctrine that I should also like to mention.

In earlier "Letters" (among the most recent of these, see the 1964 one, p. 43) I had underlined that the large-scale industrialization of certain categories of intellectual creations, resulting particularly from the advancement of technology, also affected the concept of collaboration and, consequently, that of the relevant ownership. New problems

have arisen from new kinds of artistic productions, which it is sometimes extremely difficult to classify among the traditional forms, and also from the rate of creation, in particular "group" creations, and the increasingly numerous cases where copyright and connected rights (in particular the contribution of the performer) are closely intertwined. The work is recorded and reproduced in a number of copies which are put on sale and contain creative elements, elements of interpretation or technical elements furnished by the industrial undertaking where the production is born and achieved. This situation gives rise to new problems that are similar to those which first arose in the cinema world, years ago.

In my "Letter" published in February 1964, I also mentioned that, having regard to the dynamics of intellectual creation in several industrialized sectors concerned with the making and dissemination of intellectual productions, the author will have to defend his economic interests more actively, in order to be able to enjoy effectively the prerogatives which copyright legislation confers on him, in particular "at the source", on the occasion when he exercises the personal right of first publication and through the ever more detailed specific provisions which are included in contracts for exploitation of works and which the author cannot link to the exercise of this personal right.

In a study in depth<sup>43</sup>, Professor Giorgio Oppo, who holds the professorship of commercial law at Rome University, has examined with great perspicacity the legal problems relating to industrial "collaboration" in intellectual creation in the world of today, and concerning productions that can be considered to be "inserted" in an industrial undertaking. The problems relating to "activities involving creative work, whether independent or subordinate, performed in the interest of a right accruing to another party or to satisfy the latter" are examined in the context of an interesting general review that has been updated and also extended to industrial inventions and the rights pertaining thereto.

In that study, it is emphasized that in the world of today, the links between creative activity and the industrial undertaking (not merely a publishing, entertaining, broadcasting or advertising undertaking, but also a producing undertaking in general) are becoming ever more numerous in the form of work contracts or contracts covering works produced in association. These legal relationships are more and more taking the lead over the creation of a work. Consequently, in the perspective of legislative policy, one should no longer generalize, as Professor Oppo points out, the romantic concept of the "solitary" character of creative activity.

Although my personal thinking, which I have already expounded on other occasions, does not coincide with this way of looking at the problem, in particular as regards the consequences which Professor Oppo draws from "direct" attribution to the industrial undertaking of the right of economic utilization in an intellectual work, and also as regards the moment at which such attribution could take place, there is no doubt that his study deserves the full attention of jurists specialized in this field.

<sup>40</sup> For some critical comments concerning this decision of the Supreme Court of Appeals, see G. Moscon, "Diritti degli artisti interpreti e cortesie giurisprudenziali", *ibid.*, 1972, p. 285.

<sup>41</sup> Copyright, 1968, p. 144.

<sup>42</sup> *Soc. Publiradio v. Boneschi*, *ibid.*, 1972, p. 315.

<sup>43</sup> "Creazione intellettuale, creazione industriale e diritti di utilizzazione economica", *Rivista di diritto civile*, 1969, I, pp. 1 to 45.



## List of Participants

### I. Experts

#### 1. Experts invited by the Director-General of Unesco

T. I. Adesalu, Nigeria (A. G. Adoh, Adviser). E. Alihonou, Congo. Mr. Bereau, Central African Republic. Mr. Biahngana-Nunga, Zaire. D. J. Coward, Kenya (G. Straschnov, Adviser). B. Dadié, Ivory Coast (A. Aggrey, F. Coulibaly, K. L. Liguier-Lauhhouet (Mrs.), V. Meite, M. Zogbo, Advisers). G. Harre, Zambia. P. Hountondji, Dahomey. A. Kanno, Ethiopia. M. Maceri, Burundi. H. Moollan, Mauritius. N. N'Diaye, Senegal (S. Kandji, Adviser). S. Ngoumou Manga, Cameroon. B. W. Prah, Ghana. G. Sidikon, Niger.

#### 2. Other Experts

S. Ahada, Algeria. A. Chakroun, Morocco.

### II. Observers

#### 1. Intergovernmental Organization

African and Malagasy Industrial Property Office (OAMPI): P. N'Goma.

#### 2. International Non-Governmental Organizations

African Copyright Office (BADA): Mr. Legros. European Broadcasting Union (EBU): G. Straschnov. International Confederation of Societies of

Authors and Composers (CISAC): J.-A. Ziegler, D. de Freitas, F. Sparta. International Federation of Film Producers Associations (FIAPF): M. Ferrara Santamaria. International Federation of the Phonographic Industry (IFPI): I. D. Thomas, N. Thuro, A. Holloway. International Literary and Artistic Association (ALAI): J.-A. Ziegler. International Publishers Association (IPA): A. Higo. International Writers Guild (IWG): J.-A. Ziegler. Union of National Radio and Television Organizations of Africa (URTNA): A. Chakroun.

### III. World Intellectual Property Organization (WIPO)

A. Bogsch (*First Deputy Director General*); M. Stojanović (*Counsellor, Copyright Division*).

### IV. Secretariat

United Nations Educational, Scientific and Cultural Organization (Unesco): D. de San (*Copyright Division*).

### V. Officers

*Chairman*: B. Dadié (Ivory Coast). *Vice-Chairmen*: N. N'Diaye (Senegal); A. Kanno (Ethiopia). *Secretary*: D. de San (Unesco).

