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# Copyright

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## World Intellectual Property Organization

LIBYAN ARAB REPUBLIC

### Accession to the WIPO Convention

The Government of the Libyan Arab Republic deposited, on June 28, 1976, its instrument of accession to the Convention Establishing the World Intellectual Property Organization (WIPO).

The Libyan Arab Republic, which is a member of the United Nations, fulfills the condition set forth in Article 5(2)(i) of the said Convention.

Pursuant to Article 15(2), the Convention Establishing the World Intellectual Property Organization (WIPO) enters into force, with respect to the Libyan Arab Republic, three months after the date of deposit of the instrument of accession, that is, on September 28, 1976.

WIPO Notification No. 91, of June 28, 1976.

## Berne Union

LIBYAN ARAB REPUBLIC

### Accession to the Paris Act (1971) of the Berne Convention

The Government of the Libyan Arab Republic deposited, on June 28, 1976, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

This instrument of accession was accompanied by the following reservation:

"The Government of the Libyan Arab Republic declares that it does not consider itself bound by the provisions of paragraph (1) of Article 33 of the Berne Convention concerning the jurisdiction of the International Court of Justice." *(Translation)*

Furthermore, the said instrument of accession was accompanied by the following declaration:

"The Government of the Libyan Arab Republic also considers it necessary to declare that the provisions of Article 31 of the Berne Convention, providing for the possibility of the application of the said Convention to colonies and dependent territories, are in contradiction with the Charter of the United Nations and Resolution 1514(XV) of December 14, 1960, of the General Assembly of the United Nations." *(Translation)*

Pursuant to the provisions of Article 29(2)(a), the Paris Act (1971) of the Convention enters into force, with respect to the Libyan Arab Republic, three months after the date of this notification, that is, on September 28, 1976.

Berne Notification No. 81, of June 28, 1976.

## Conventions Administered by WIPO

### **International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations**

#### COLOMBIA

##### **Accession to the Convention**

The Secretary-General of the United Nations, in a letter dated July 12, 1976, informed the Director General of the World Intellectual Property Organization that the Government of Colombia deposited, on June 17, 1976, its instrument of accession to the International Convention for the Protection of Per-

formers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961.

Pursuant to Article 25(2), the Convention enters into force, for Colombia, three months after the date of deposit of the instrument of accession, that is, on September 17, 1976.

## National Legislation

#### HUNGARY

##### **Decree-Law of the Presidium of the Hungarian People's Republic on the protection of producers of phonograms**

(No. 19 of 1975) \*

*Article 1.* (1) The consent of the phonogram's first producer shall be required — within twenty years from the end of the year of fixation — to the making wholly or partly of duplicates of the phonogram for the purpose of producing receipts and for distribution against compensation or for the purpose of public performance for profit.

(2) The provisions of paragraph (1) shall not affect the rights of the authors, of the performers, of the Hungarian Radio and of the Hungarian Television guaranteed under the provisions of law concerning copyright with respect to fixations of sounds.

*Article 2.* The phonogram's first producer shall be entitled in case of infringement of the provisions of Article 1(1) to raise the claims due him under the Civil Law.

*Article 3.* This Decree-Law shall enter into force on the date of its promulgation.

\* Published in *Magyar Közlöny* of September 1, 1975. English translation communicated to WIPO by courtesy of the Hungarian Bureau for the Protection of Copyright (ARTISJUS).

## General Studies

### The protection of authors' moral rights in Israel

Michael OPHIR \*

It has long been recognized in various countries that the personality and integrity of an author are closely bound up with the tangible product of his intellectual creativity. The principle emerging from this is that, over and above the benefit of copyright as such, an author should also be protected against any unauthorized alteration or distortion to his original work that may prove to be prejudicial to his honour and reputation. This concept, known as *droit moral* or an author's *moral right*, arose from, what was often considered to be, the inadequacy of the economic rights in the field of intellectual property. Moreover, it was not only the author himself who was to benefit from such moral right but also members of the public, since the interests of the community at large were likewise considered better served by additional safeguards for preserving the integrity of authors' originality as reflected in their work.

In many parts of the world, particularly Europe, the development of copyright has, in fact, given rise to several facets. Of these, the two principal ones constitute an economic right in property of limited duration, and *droit moral* personal to the author but not necessarily terminating with the economic rights. Nevertheless, it was not until the Rome Conference in 1928, where Article 6<sup>bis</sup> was introduced into the Berne Convention, that the international blessing was first conferred on the doctrine of authors' moral rights.<sup>1</sup> Even at that time, the Sub-Committee on

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The author wishes to record his appreciation for the assistance given and constructive suggestions made by the Director General of the Israel Ministry of Justice, Mr. Mayer Gabay.

1 The text adopted at the Rome Conference in 1928 is as follows:

"(1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed."

Revisions to the text were made at the Brussels Conference in 1948 and, most recently, at the Stockholm Conference in 1967.

Moral Rights indicated that the Conference had considered it unnecessary to specify the various kinds of moral rights in detail since a comprehensive catalogue might lead to restrictive interpretation of the provisions. The Sub-Committee also stressed that Article 6<sup>bis</sup> purported "to leave to *national legislation and to the wisdom of the judicial tribunals*<sup>2</sup> the regulation as to the exercise, extent and conditions of these rights." The courts, it was felt, would find in Article 6<sup>bis</sup> the text which they previously lacked in order to safeguard the honour and reputation of authors.<sup>3</sup>

The provisions of Article 6<sup>bis</sup> are independent of the economic benefits conferred by copyright protection. Thus, moral rights, as envisaged by the Rome Conference, have a character that is clearly distinguishable from authors' pecuniary rights and the exclusive economic exploitation to which they are entitled on their original works. Every country that has ratified the Berne Convention and its various revisions is expected, therefore, to give practical recognition to a doctrine designed to operate separately from, and in addition to, copyright protection. As to the doctrine itself, the two main features that stand out in Article 6<sup>bis</sup>(1) are, first, the right "to claim

ence in 1967. The revised text of 1967 (and the current Paris 1971 text) is as follows:

"(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

<sup>2</sup> Author's italics.

<sup>3</sup> *Actes de la Conférence de Rome* (7 mai-2 juin 1928), p. 181.

authorship" of a work and, second, the right "to object to any distortion, mutilation or other modification of, or other derogatory action" in regard to a work whereby the "honour or reputation" of the author would be prejudiced. There is no doubt that, under Article 6<sup>bis</sup>, the "integrity" of a work may be adversely affected by unauthorized additions and omissions, or by any other material change made to the original without the author's knowledge and consent.

To a large extent Article 6<sup>bis</sup> endeavours, within the framework of a country's national laws, to establish uniformity among all the member States of the Berne Union. Each country, in fact, is required to consider whether, in a given case, alterations to a work are prejudicial to the author's honour or reputation. There is, too, some significance in the wording of Article 6<sup>bis</sup>(1) by its use of the word "or." Thus, for example, whilst the unauthorized modification of a work may not be deemed sufficient to injure the *reputation* of an author, such action may, nevertheless, still prejudice his moral interest or "honour" in the *integrity* of the work.

The importance attached to authors' moral rights by the member States of the Berne Union is reflected in the provisions of Article 6<sup>bis</sup>(3) which specifies that the rights conferred "shall be governed by the *legislation*<sup>4</sup> of the country where protection is claimed." In this context the first question that arises is whether, in a given country, Article 6<sup>bis</sup> can be enforced on a "self-executing" basis, or whether specific national legislation is required for that purpose. The answer to this will naturally depend on the constitutional system in force. In countries like France, for example, the constitution permits the judicial and administrative authorities to apply international treaties to individuals without the enactment of special legislation incorporating the terms of such treaties. It can reasonably be assumed that, for all practical purposes, those countries are fulfilling the "legislation" requirements of Article 6<sup>bis</sup>(3). In other countries, however, such as the United Kingdom and Israel, since international treaties, for the most part, bind the State alone, their provisions, as in the case of the Berne Convention, are inapplicable on an individual basis unless they are also embodied in domestic legislation. There, the terms of the Berne Convention are not "self-executing," and whilst various facets might possibly influence judicial or administrative decisions, the actual terms themselves are not legally binding in the national sense until such time as they are incorporated in the national laws of the countries concerned.

The second major point of interest concerning Article 6<sup>bis</sup> lies in the fact that the remedies enjoyed

by those entitled to moral rights are determined exclusively by the law of the country wherein protection of those rights is claimed. Thus, State legislation may prescribe such legal redress as damages, injunction and fines against a person who infringes an author's moral right. Furthermore, every remedy granted by a State to its own nationals under its domestic laws may be claimed by all persons seeking protection under the Berne Convention. It is seen, therefore, that, whereas the general principles giving rise to moral rights are covered by the first two paragraphs of Article 6<sup>bis</sup>, it is paragraph (3) which prescribes that the *extent* to which such rights are to receive protection must be governed by the law of each individual member State.

Whilst the doctrine of authors' moral rights is now officially recognized by numerous countries it is the French and German approach that furnishes greater protection in this area than that of many other countries. In France, for example, the duration of the rights is longer than the economic benefits conferred by copyright upon an author of an original work. This is based on the prevailing theory in France that an author holds two *independent* rights, namely, a pecuniary benefit in the economic exploitation of his original work, and a moral right protecting his honour and reputation as an author.<sup>5</sup> Nevertheless and notwithstanding a degree of recognition in the field of authors' moral rights, many other countries were not so quick to bring the principles involved within the framework of their copyright legislation. What the judiciary did in some of these States was to establish other ways to protect moral rights outside the sphere of copyright legislation. This was achieved by the application of specific legal principles already in existence, such as those found in contract, equity and tortious liability. The present position is that, in the vast majority of cases, modern legislation has taken cognizance of the need to safeguard the integrity of authors' literary and artistic works. Where, however, such laws have not been enacted (as in the common law countries) the same or similar protection has, by and large, been worked out by court decisions handed down by the judiciary.

Against this background it is possible, now, to consider the present attitude in Israel towards authors' moral rights in the light of a recent decision of the Supreme Court. On examination of the position it is noteworthy, first, that, notwithstanding Israel's ratification of the Berne Convention,<sup>6</sup> Article 6<sup>bis</sup> has not been incorporated into either the copyright

<sup>5</sup> As opposed to Austria, Germany (Federal Republic of) and Italy which recognize a single copyright the nature of which is "mixed" in that it contains both personal and economic rights.

<sup>6</sup> See 1 *Kitvei Amanah* 259 and 21 *Kitvei Amanah* 737 (Collection of Treaties in Hebrew).

legislation<sup>7</sup> or into any other law introduced by Order in Council during the British Mandate or by legislation enacted since 1948. The late Dr. A. A. Blum, who was one of the leading authorities on copyright in Israel, maintained<sup>8</sup> that, since a claim based on moral rights could not now be prosecuted either under the common law previously in force or under the present copyright legislation, its success (or otherwise) would depend on the applicability of Sections 33 (now 59) and 23 (now 58) of the Civil Wrongs Ordinance.<sup>9</sup> The first-mentioned Section concerns passing-off and operates only where it is proved, first, that the defendant intended to *deceive the purchaser* and, second, that the act complained of *has prejudicially affected the goods of the injured party*. These two conditions, in Dr. Blum's view, limit the possibility of total reliance on the tort of passing off in defence of authors' moral rights.

The second of the two Sections referred to above covers the tort of injurious falsehood. Dr. Blum considered that the provision in question might possibly lend itself to the enforcement of moral rights, but only in such cases where the injured party can prove both *malice* on the part of the defendant and a *pecuniary loss*. Here again, it seems that the ambit of the Civil Wrongs Ordinance is not sufficiently wide to cover every conceivable infringement of moral rights that might arise. The existence of malice, in the legal sense, is often difficult to establish, and pecuniary damage is, in any event, already included in the economic aspects of copyright. Furthermore, whilst an author's reputation and honour may be extremely valuable to him, these factors may not necessarily or readily be assessable in monetary terms. Indeed, as has previously been observed, it was mainly on account of the need to afford protection to intellectual creative activity that lay outside the purely commercial field that the doctrine of moral rights evolved. If, therefore, one is thrown back on economic considerations by having to invoke laws that, in part, apply monetary criteria as a yardstick, the basis on which the principle of *droit moral* is founded could be hard to apply in practice.

Dr. Blum's suggestions for clarifying the legal position in Israel were to broaden the scope of Section 59 of the Civil Wrongs Ordinance by extending

its operation to authors and to intellectual property or, alternatively, to introduce Article 6<sup>bis</sup> into the Copyright Law. All the States party to the Berne Convention, as Dr. Blum pointed out, are required to provide legislative measures on authors' moral rights. Since, as yet, no direct steps had been taken in Israel to this effect, Dr. Blum was forced to express some doubt whether, at the present time, the courts were able to furnish the complete protection for authors' moral rights as provided in Article 6<sup>bis</sup>. This is not to say, however, that the judiciary in Israel does not have means at its disposal to interpret the Civil Wrongs Ordinance in favour of authors whose moral rights have been infringed. The basic question in the present context is, therefore, whether the courts, within the present limits, are in a position to grant absolute or near-absolute protection according to all the circumstances as envisaged by Article 6<sup>bis</sup>.

Nevertheless, one can discern certain points of similarity between the position of Israel in relation to authors' moral rights and that of the United Kingdom.<sup>10</sup> As early as the 18<sup>th</sup> century,<sup>11</sup> Lord Mansfield extended legal recognition to the literary reputation of an author by holding that the common law on copyright protection continued to operate even after the author had divested himself of the right to publish copies of his work — a finding, however, that was later overruled by the House of Lords in another case.<sup>12</sup> Almost two hundred years later, the Court of Appeal in *Chaplin v. Lewis Frewin (Publishers) Ltd.*<sup>13</sup> held that an author only had a *proprietary* interest in his work, and once he had transferred such right he ceased to hold any further interest in the form, style and content inherent in that work. Although the *Chaplin* case was largely concerned with the judicial enforceability of contractual obligations undertaken by infants, the Court of Appeal held that, in general, an author has no legal right to control the publication of a work after he has assigned or otherwise transferred his copyright.

In the light of Article 6<sup>bis</sup>(3) it seems remarkable, at first, that, on modernizing the copyright legislation in 1956, the British legislature apparently considered it unnecessary to enact explicit provisions on moral rights.<sup>14</sup> Nevertheless, the laws on passing off, libel and slander of goods are open to wide interpretation in the United Kingdom so that these, at least in theory, can furnish a reasonable degree of protection

<sup>7</sup> This is the British Copyright Act, 1911, which, by Order in Council, was extended to Palestine under the British Mandate in 1924. The name of the Law was changed from its former title to "The Copyright Law" in 1953. Apart from certain other post-1948 amendments not relevant here, this Law is still in force today in its original form. As against this, the copyright legislation in the United Kingdom was modernized in 1956.

<sup>8</sup> See A. A. Blum, *Copyright* (Tel Aviv, 1957) 96 *et seq.* (in Hebrew).

<sup>9</sup> See (1972) 2 Laws of the State of Israel (new version) 5 — Official English translation of *Dinei Medinat Yisrael* (Nusach Chadash).

<sup>10</sup> See Copinger and Skone James, *Copyright* (London, 1971) paragraphs 242, 1131-1132.

<sup>11</sup> *Millar v. Taylor* (1769) 4 Burr. 2303.

<sup>12</sup> *Donaldson v. Beckett* (1774) 4 Burr. 2408.

<sup>13</sup> 1966, Ch. 71

<sup>14</sup> The only reference to moral rights in the legislation of the United Kingdom is found in Section 43 of the Copyright Act, 1956, which, however, does not confer paternity rights to authors but does make it an offence to ascribe such rights to a person other than the author. Rights of integrity are confined to artistic works.

in the area of authors' moral rights. Apart from these exceptions, however, the present law in the United Kingdom does not provide any *complete legislative* safeguard for authors' moral rights. This is of some interest since the expression "prejudicial to his honour or reputation" was probably adopted in Article 6<sup>bis</sup>(1) to satisfy the delegations to the Rome Conference from the British common law countries, who regarded that terminology as appropriate to their laws on libel. It appears, therefore, that even at that point the operation of the common law was considered sufficient to uphold the principle of *droit moral*.

In point of fact, the continental theory, in the main, goes further than the British common law concept of libel. Thus, whilst the term "honour or reputation," notwithstanding the wide discretion thereby given to the courts, has been criticized as lacking clarity, the proposal of any new formula phrased with greater "precision" is unlikely to be accepted by the United Kingdom if it fails to conform to the principles of common law.<sup>15</sup> It is noteworthy that the United Kingdom Copyright Committee<sup>16</sup> considered the question of authors' moral rights but, in its findings, concluded that the then existing legal provisions were adequate and that, accordingly, no substantial amendments to the 1911 Copyright Act were required. The Committee emphasized that, in the twenty years since the Rome Act had been ratified by Great Britain, no other country had complained that she lacked the means to fulfil the provisions of Article 6<sup>bis</sup>. Although a further twenty-three years or so have now elapsed since the Committee's Report was published, it is still by no means certain that there is real justification in the view that was expressed. Indeed, in the light of the *Chaplin* decision it has been suggested<sup>17</sup> that the opinion expressed in the Report of the Copyright Committee, to the effect that many of the problems with which authors are faced can best be solved by recourse to contract law and that, generally, the British common law provided adequate remedies in this field, was open to question and should be re-examined.<sup>18</sup>

The legal enforceability of authors' moral rights in Israel was recently examined by the Supreme Court in the case of *Amos Ettinger v. Dan Almagor and others*.<sup>19</sup> This action first came before the Supreme Court in 1970 when it was unanimously held, on appeal, that the modification and distortion of

<sup>15</sup> For example, an alternative wording to the effect that an author can prevent every mutilation which might distort the manner in which he seeks to present his work to the public.

<sup>16</sup> See Cmd. 8662, paragraphs 219-226.

<sup>17</sup> See J. Mummary, "The Rights of an Author" (1966) 82 *Law Quarterly Review* 471.

<sup>18</sup> See Cmd. 8662, paragraphs 224-225.

<sup>19</sup> (1975) (II) 29 *Piskei Din* 116 — Judgments of the Israel Supreme Court (in Hebrew).

liturgical poetry and its subsequent publication by the defendants constituted an infringement of the author's literary copyright in his original work. Damages were awarded by the lower Court, and in the appeal heard in 1975 the appellant asked for the reversal of the Court's previous decision against him both as to damages as well as to the finding of copyright infringement. This the appellant sought to do by the introduction of a novel point into the proceedings by contending that the finding of copyright infringement had been based entirely on authors' moral rights for which, he maintained, no protection or remedy were available under Israel law. Justice Cohn, in his judgment delivered on behalf of the Supreme Court, pointed out<sup>20</sup> that, pursuant to the Copyright Ordinance (Amendment) Law, 1953,<sup>21</sup> the Minister for Justice is authorized to confer copyright protection in Israel on any original work which is covered by a treaty to which Israel is a party. He added that the Minister, by virtue of such authority, has, in practice, granted the same copyright protection to works emanating from abroad that the law confers on works created in Israel.<sup>22</sup> These points, however, were only relevant to illustrate that the exercise of the ministerial powers, in the words of Justice Cohn, "does not, by reason of the Berne Convention, invoke any additional protection whatsoever on works created in Israel."

It seems clear, in Justice Cohn's view, that, until the introduction of Article 6<sup>bis</sup> into the Israel Copyright Law, that Law cannot grant protection to authors' moral rights arising in Israel. From this it follows that, in the case under discussion, the Supreme Court would, at the very least, cast considerable, doubts today on whether the modifications and distortions forming the basis of *copyright infringement* can be founded on the existing copyright legislation in order to give full effect to the doctrine of moral rights as envisaged by Article 6<sup>bis</sup>. Moral rights, in the opinion of Justice Cohn, might fall within the statutory law on tortious liability. It was, however, on this point (and in reliance of the view expressed by Dr. Blum) that the appellant took issue with the Court by maintaining that the infringement of authors' moral rights could not, in the present context, constitute passing off or injurious falsehood under the Civil Wrongs Ordinance. The correct setting of moral rights, it was submitted, was within the framework of copyright and if, as in Israel, the Copyright Law was silent on the matter, any alleged breach founded on such rights could not be upheld by the courts.

<sup>20</sup> At p. 118. There were no dissenting judgments.

<sup>21</sup> Section 6. See (1952/53) 7 Laws of the State of Israel 30 (official English translation).

<sup>22</sup> See (1953) Kovetz HaTakanot 348 — Ministerial Regulations pursuant to Laws enacted since 1948 (in Hebrew).

The appeal case under review has certainly revealed the possibility of certain lacunae in the law not dissimilar to those in the *Chaplin* decision, although the Supreme Court in Israel did not, in fact, accept the appellant's arguments. The rejection of these, however, did not so much turn on the weakness of the appellant's substantive submissions concerning the unenforceability of authors' moral rights, as on two other grounds: first, the question of *res judicata* (not relevant here) and, second, that the previous decision of the Court had not been based *solely* on the issue of moral rights but also on the Israel Copyright Law.<sup>23</sup> In his judgment, Justice Cohn emphasized that the appellant's infringement of copyright turned on his taking the poems composed by another person, modifying and distorting them, and then publishing the result as his own work. Such action, in the opinion of the Supreme Court, amounted to a breach of Section 1(2) of the Copyright Law and could not be regarded *merely* as a violation of moral rights.<sup>24</sup> At the same time, the learned Justice, whilst generally leaving open the question of moral rights for decision in the future, did comment on the fact that, despite Dr. Blum's recommendation formally to introduce the provisions of Article 6<sup>bis</sup> into appropriate legislation no positive steps in that direction had been taken so far.

The fact remains, nevertheless, that Justice Cohn, by implication at least, did agree in his *dictum* that the previous decision of the Supreme Court was to some extent founded on the concept of moral rights. If that is so, some contradiction is apparent concerning the doubts expressed as to the enforceability of these rights in Israel. This contradiction could possibly be overcome by holding that the main reason why the Supreme Court, in the present instance, found it unnecessary to reverse its previous ruling on this issue was because it felt that the provisions of the Copyright Law were entirely sufficient to sustain the whole of the copyright infringement claim. What is less clear is whether the Supreme Court would have adopted the same attitude if the Copyright Law had been wholly inapplicable and the case had rested entirely on authors' moral rights as provided in Article 6<sup>bis</sup> of the Berne Convention. That particular question did not have to be resolved partly because of the Court's treatment of the facts in issue and partly because of the dominant *res judicata* factor. The point is, thus, academic at the present time and must accordingly remain open.

It seems clear, therefore, that whether or not the provisions of Article 6<sup>bis</sup> are capable of full implementation under Israel law is a question to which no

positive answer can yet be given. Nevertheless, whilst the observations of Justice Cohn must be regarded as *obiter dicta*, there are indications, in view of the weight that must be attached to his opinion as well as to that of experts in the field of intellectual property,<sup>25</sup> that were the issue to come to future litigation, a claim held to be founded exclusively on the principle of moral rights might possibly not be successful except where the Copyright Law, Civil Wrongs Ordinance or the law on libel could, singly or in combination, be applied to the specific facts of a case — as was done in the Supreme Court decision under review.

It has already been observed that moral rights are designed to provide safeguards to authors of original works over and above the rights of economic exploitation emanating from copyright protection. Authors' moral rights have now gained widespread recognition, but whereas their implementation is deemed to have been accepted by all countries that have joined the Berne Convention, the finer details as to the extent and operation of the rights is left to each individual member State. It is clear, however, that all countries, by virtue of their having ratified the Berne Convention and its revisions, are implicitly required, within the framework of Article 6<sup>bis</sup>, to furnish "means of redress for safeguarding" moral rights by "legislation." One question that arises, therefore, concerns the meaning of the term "legislation" in Article 6<sup>bis</sup>(3). Must this constitute a specific statutory enactment, or is it sufficient to keep to the spirit, though, perhaps, not the letter of the Berne Convention by relying on case law and, possibly, legislative provisions only indirectly related to moral rights but which, in practice, tend to produce the same effect?

The answer to the above question lies partly in the position of the Berne Union countries which, for the present purposes, may be divided into four categories. First, there are States that have introduced clear-cut legislation on moral rights into their respective copyright laws. The position of such countries is unambiguous since they have created the necessary vehicle for the practical application of Article 6<sup>bis</sup>. The second category includes those countries which, though they have not provided any specific legislation on authors' moral rights are able, nevertheless, by virtue of their constitution, to give full legal and administrative effect to these rights on a "self-executing" basis. Whilst one would doubt whether, on a

<sup>23</sup> Author's italics. See Section 1 of the Israel Copyright Law, an English translation of which may be found in Drayton, *3 Laws of Palestine*.

<sup>24</sup> Author's italics.

<sup>25</sup> Such as Drs. Blum and E. Seligsohn. The latter-mentioned arrives at the same conclusions, in essence, as Dr. Blum and, likewise, expresses doubts whether the principle of authors' moral rights, as embodied in the Berne Convention, can effectively be applied by the courts in Israel. See E. Seligsohn, *Outline of the Law of Copyright, Trademarks, Patents and Designs in Israel* (Jerusalem, 1963) 18, 56 *et seq.* (in Hebrew with an introductory outline in English).

strict interpretation of Article 6<sup>bis</sup>(3), the "legislation" requirements are thereby fulfilled to the letter, very few would seriously dispute that both the spirit and the practical stipulations in the Article can be carried out in full by the States concerned.

Countries in the third category are those that have little or no legislation on the subject of moral rights and rely, almost exclusively, on the judiciary and operation of the common law in this respect. Provided that the common law is so geared that the terms of Article 6<sup>bis</sup> can be applied to the fullest extent, there would be little reason, if any, to regard this category as being any different from that of the States whose constitution allows them to give effect to treaties on a "self-executing" basis. Where, however, the common law cannot, or does not, wholly serve the requisite purposes in this context, considerable doubt must arise whether the requirements under Article 6<sup>bis</sup> are being fulfilled. This, in the wake of the *Chaplin* decision, seems to be the situation wherein the United Kingdom finds itself at the present time — a position that has provoked some criticism.

Israel, for the present purposes, falls into a fourth category, separate from the United Kingdom, since there are neither legislative enactments specifically designed for moral rights<sup>26</sup> nor a common law that can be invoked. It is for this reason mainly that the adoption of an identical standpoint in line with that of the United Kingdom is impossible since with the introduction of the Civil Wrongs Ordinance the common law in tortious liability ceased to apply in Israel. Thus, apart from the Copyright Law itself the only major legal provisions that might lend themselves to the protection of authors' moral rights are those set out in the Civil Wrongs Ordinance — provisions which, as seen, could prove to be inadequate for all contingencies. It could transpire that future cases on moral rights might be upheld by the courts in Israel if the specific facts are held to conform to the requirements of the Law in question. The certainty of this occurring, however, is not altogether clear. One is forced, therefore, to conclude that Israel, notwithstanding its accession to the Berne Convention, may not yet be in a position wherein full compliance with the requirements of Article 6<sup>bis</sup> can be ensured for every given circumstance envisaged.

The only point that remains to be examined is whether Section 1(2) of the Israel Copyright Law, as it stands, could itself be sufficient to uphold authors'

moral rights without recourse to any further legislation. This question is relevant because in the Supreme Court decision previously reviewed the distortion and subsequent publication of the liturgical poetry was held to constitute an infringement of the author's copyright in the original work. Could one then regard this case as a precedent for the legal protection of moral rights against "distortion, mutilation of or other modification" prejudicial to the honour or reputation of authors? To an extent the answer is in the affirmative and, on this level, the position of Israel would seem to be more unequivocal than that of the United Kingdom. The problems that arise, however, revolve around the fact that the application of Section 1(2) is not independent "of the author's economic rights," cannot be invoked for the benefit of authors after they have transferred their "economic rights," is not concerned with the right to claim authorship after such transfer and, finally, bears no relevance to "honour" or "reputation" within the meaning of Article 6<sup>bis</sup>. As long as there are circumstances covered by Article 6<sup>bis</sup> that fall outside the operation of Section 1(2) of the Copyright Law the judiciary in Israel may not be in a position to give the fullest effect to the provisions on moral rights as laid down in the Berne Convention.

One would suggest, therefore, that, in order to clarify the position in Israel, legislative means be adopted either as an amendment to the Civil Wrongs Ordinance or, preferably, by the incorporation of Article 6<sup>bis</sup> into the existing Copyright Law. In the light of the doubts cast in the Supreme Court, Article 6<sup>bis</sup>, both on account of its importance as well as its international implications, merits some positive action in the foreseeable future. What does seem clear is that it might prove disadvantageous for the authorities in Israel to adopt the same posture of inactivity on this issue as that taken in the United Kingdom. There, as seen, both the 1956 Copyright Act and the common law are a little better equipped than the present legislation in Israel to cope with many of the problems that could arise although even that is now questionable in the wake of the *Chaplin* decision. Accordingly, the further developments that one can reasonably anticipate in the present field are likely to arouse considerable interest. However, a conclusive position of Israel in relation to authors' moral rights will be achieved when the draft Copyright Bill, presently under consideration, is adopted by the legislature. The draft Copyright Bill includes a specific provision along the lines of Article 6<sup>bis</sup> of the Berne Convention.

<sup>26</sup> Compare Section 43 of the United Kingdom Copyright Act, 1956.

## Correspondence

### Letter from Italy

Valerio De SANCTIS \*

**S u m m a r y :** 1. Introduction. — I. Legislation. 2. Ratification of the international Rome Convention and related legislative measures. 3. Reform of broadcasting services (cable television and relay). 4. Protection of privacy. — II. Case law. 5-6. Photographic works and seizure of printed works. 7. Works of joint authorship - Successive collaboration. 8. Right of publishing - Derived rights - Model publishing contract - Future works, true value of the work, risk to be borne by the publisher - Successive alienation of utilization rights - Protection of newspaper and review headings. — III. National meeting in Rome on copyright questions related to technological progress. 9. Debate following the general report. 10. Changes in the creative process for certain types of works of the mind.

**1.** In my "Letter from Italy" published in November 1973 (*Copyright*, pp. 219 *et seq.*) I gave a number of reasons for my protracted silence on the most important events which had occurred over the years as regards copyright in my country and emphasized that one of the fundamental reasons for being silent was that legislative activity in the field of copyright in Italy could be considered to have been at a standstill during the period in question and that, likewise, there have been no particularly noteworthy events in case law.

However, today, in picking up again the dialog with the readers of this review, I am now able to report a number of new developments which have taken place over the past few years and which are of direct or indirect interest for our subject-matter.

#### I

**2.** On January 8, 1975, the Italian Government deposited with the Secretary-General of the United Nations its instrument of ratification of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), of October 26, 1961. Pursuant to its Article 25(2), the Convention entered into force as regards Italy and its international relations in that field on April 8, 1975.

The long period of time which passed between Italy's signature of the Convention, in Rome, and its

ratification may be attributed, as I have already had occasion to mention, to the opposition of the performers' professional associations to ratification accompanied by reservations on a number of important provisions of the Convention including, in particular, its Article 12. Once this opposition had been calmed down, the ratification was accompanied by a note containing a number of declarations (*ibid.*, 1975, p. 44) which did not, however, affect the substance of protection under the Convention and are justified by the structure of the Italian Copyright Law of 1941, which is still in force and which long since recognized protection of "rights connected with the exercise of copyright" (see, in this respect, my studies on the subject, particularly "Diritto di autore — Disciplina del diritto di autore e dei diritti connessi"; "Artisti esecutori," in *Enciclopedia del diritto*, Giuffrè, Milan, 1959, Fourth Volume, pp. 173 to 182 and 378 to 442; *La Convenzione internazionale per la protezione degli artisti interpreti o esecutori, dei produttori di fonogrammi e degli organismi di radiodiffusione*, Rome, 1963, pp. 22 to 34; see also, after ratification, L. Leonelli, "L'applicazione in Italia della Convenzione internazionale di Roma" in *Il Diritto di Autore*, 1975, p. 57).

The deposit of the international instrument of ratification with the Secretary-General of the United Nations followed the domestic Law of ratification of November 22, 1973 (No. 866), and the Decree of May 14, 1974 (No. 490), which was promulgated pursuant to the above-mentioned Law in order to update one or two points in respect of connected rights. The Decree in fact amended Article 73 of the Copyright Law by adding the following sentence: "The producer [of the phonogram] shall share equitably with the performers concerned the amount of the aforementioned remuneration" (secondary use of the phonogram — Article 12 of the Rome Convention). The Decree also amended Articles 23, 24 and 25 of the Regulations for the application of the Law, as regards these rights. It is also specified, in Article 3, that the connected broadcasting rights apply not only to sound broadcasting but equally to television.

Finally, a subsequent Decree of the President of the Council of Ministers, of September 1, 1975, promulgated pursuant to the general provisions of the

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Law of November 22, 1973, and of the above-mentioned Decree of May 14, 1974, set the share due to the performers at 50 percent of the equitable remuneration due to the producer for the public use of the phonogram, and laid down the relevant rate at 2 percent of the gross takings or the portion of such takings which corresponds to the public use of the phonogram as part of the activity of public establishments referred to in Article 73 of the Law. As for the direct use of the phonogram by the license-holder for the broadcasting public service (RAI), the Ministerial Decree is in preparation and has not yet been published.

It should be noted that, under Italian law, the equitable remuneration required from the user is paid to the producer alone, since such a procedure is permitted, without alternative, (to the performers or to the producers or to both) by Article 12 of the Rome Convention. The amount of the remuneration paid to the producers of phonograms and which is due to the performers must be deposited by the producers with a nationally recognized bank, at the disposal of the performers concerned.

As far as the title, from a legal point of view, to such right to remuneration is concerned, neither the doctrine nor case law have as yet pronounced on the subject in Italy. In my opinion, the person entitled is the producer with only an obligation *ex lege* towards the performer.

It should be pointed out at once that the same Ministerial Decree of September 1, 1975, fixes the rate of equitable remuneration in such a way that the producer is obliged to share it with the performers, and that the relevant conditions are only applicable in the absence of agreements freely and directly concluded between the parties concerned. The legislative act also recognizes the validity of collective agreements, thus safeguarding the contractual liberty of the parties through the intervention of the associations which represent them.

I have already mentioned the declarations accompanying the deposit of Italy's instrument of ratification of the Rome Convention. They are for the most part justified by the fact that, for the present, it is not wished to make structural and general amendments to the domestic law but to limit them to the strictly necessary changes.

In respect of these declarations, I would like first of all, to recall that in accordance with Article 16, paragraph 1(1)(a), of the Convention, "Italy will apply the provisions of Article 12 to use for broadcasting or for any other communication to the public for commercial purposes, with the exception of cinematography." In this connection, I may emphasize that, in my opinion, the declaration places no real restriction on Article 73 of the domestic Law as regards the treatment of international situations within the framework of the Convention, but merely provides a

detailed solution. Article 73 of the domestic Law recognizes a right to remuneration (whereas under Article 72 the producer enjoys an exclusive right of "reproduction" of the phonogram) for the *direct* use of the phonogram for profit by means of broadcasting or cinematography, or at dances and, generally, in any commercial establishment open to the public, i. e., uses which do not differ substantially from those mentioned in Article 12 of the Convention or, therefore, from the above-mentioned declaration. The reference in Article 73 to cinematography *is now in fact without practical significance* in a world of sound films, where the phonogram may be "reproduced" but not used "directly." Furthermore, it should be noted that under the Rome Convention the principle of equal treatment is combined with the principle known as "*Maximalschutz*" with the aim, primarily, of not upsetting the balance between the various protected rights (see, in this respect, my above-mentioned monograph on the Rome Convention, particularly paragraphs 19, 20 and 47).

The solution which Italy chose in respect of the content of the right of "direct" use of the phonogram when depositing its instrument of ratification represents, in my view, a provisional solution which will require updating when the Law is subjected to a general review. It could, however, already be used now for purely domestic situations in interpreting the internal Law as well as, obviously, for situations covered by the Convention, i. e., in relation to those countries which recognize, from the point of view of the Convention, the right of secondary use of the phonogram.

On the other hand, there is good reason to avoid as far as possible any differentiation within a given country, particularly in respect of rights to sheer remuneration for large-scale uses, and especially where these are basically of a formal nature, between the treatment of domestic situations and that of international situations. Any attempt to simplify, by whatever means, the interpretation of the relevant provisions is therefore most desirable in my opinion.

The remaining declarations accompanying Italy's instrument of ratification (paragraph 2(b) and (c) and paragraph 4 in respect of Article 5) stem from the same concern, namely that of not upsetting the structure of the national legislative system and of simplifying the application of the Convention in Italy. There is no question of altering the "basic" content of the right, but merely, as regards the treatment under Italian law, to provide a link between the highly complex principles laid down by the Rome Convention in respect of what is known as the "place of origin" in the copyright conventions, and the principles to be found in Italian legislation as regards the application of the law on connected rights. As is known, the conditions required under the Rome Convention for its effects to become operative, so that the

benefit of the Convention may be enjoyed in the contracting country where protection is requested, are generally different for each category of rights and constitute alternatives. In its declarations Italy has chosen, as regards phonograms (Article 5(1)(b) of the Convention), the criterion of "fixation of the sound" in a contracting country (concurrently with the final paragraph of Article 78 of the Italian Law) for which the place of initial recording is deemed to be the place of production. Italy has also made use of the option given to the contracting countries by Article 16, by excluding under national law the right of broadcasting organizations to communicate television programs to the public. Article 79 of the Italian law limits protection enjoyed by the broadcasting organization (as a connected right) to retransmission of the broadcast, recording of the broadcast for profit and use of these recordings for new broadcasts or new recordings.

Once an international convention becomes part of domestic law in Italy, following and pursuant to the order of execution, the relevant provisions concerning private rights are to be considered true provisions of the law in respect of situations where the international undertaking comes into play. The question of possible conflict between the provisions of domestic law and the binding and rigid provisions of an international convention would therefore, in cases of doubt, have to be resolved by the judge with an orientation towards direct application of the international convention as regards those situations. Article 10 of the Constitution now tends force to such an interpretation.

The judge's powers of discretion are, however, much broader in the case of flexible international provisions (i. e., as regards the Rome Convention, the provisions of Article 7 in which the protection provided by the Convention for performers is governed by the expression "shall include the possibility of preventing"). In this case, the provisions of domestic law, which remain as they were, i. e., are not explicitly amended by the internal order of execution, will also be applied by the judge to international situations by virtue of the general principle of assimilation to nationals, and any responsibility in respect of other contracting countries will fall under public international law. A situation comprising a number of similar aspects will arise in Italy at the entry into force of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, May 21, 1974 — the examination with a view to ratification is still continuing; see my study on the subject, written prior to the signing of the Convention, entitled "Satelliti spaziali di comunicazione e diritto di autore," in *Il Diritto di Autore*, 1969, pp. 1 to 26) which also affects the connected rights protected by domestic law and where the phrase used in Article 2 regarding the

undertaking of each State "to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal . . ." leads to a similar result, i. e., inasmuch as the judge will apply, even as regards situations governed by the Convention, exclusively national law in those cases where the relevant provisions are left to the discretion of the Contracting State.

Coming back to the application of the Rome Convention in Italy, it should also be noted that Article 189 of the domestic Law, contained in the part headed "Field of Application of the Law," has remained unchanged and lays down, *inter alia*, the general principle that rights in phonograph records or like contrivances, rights of performing actors or artists are protected by the Law when the works or products are created in Italy or may be considered national works within the meaning of the Law.

Summing up this information and these comments on the application of the Rome Convention in Italy, I must admit that I foster no illusions as to the attendant difficulties in spite of the efforts made to avoid departing too much from the general principles of the existing national legislative situation and I would express the wish that, at a future revision of the Rome Convention, the question of the greatest possible harmonization of the relevant laws be closely examined (in connection with this question in general, see my study, published prior to the Rome Convention, in *Mélanges François Hepp*, Unesco, Paris, 1955; particularly pp. 84, 85, 91 and 92). Such application could also be facilitated by collective agreements which might be negotiated in future in this field between national associations and associations belonging to countries in respect of which the Rome Convention will take effect. In this connection it should be noted, as regards the law applicable to such contracts, that under the Italian system the obligations stemming from the contract are subject to the general legal provisions anterior to the Civil Code (Article 25) and on the basis of which the obligations are governed by the contracting parties' national law if this be the same one or, failing this, by the law of the place where the contract was concluded, safeguarding in any event the will of the parties.

3. The Constitutional Court, as part of its constitutional control of the activities of the Legislative with which it is entrusted in Italy by Articles 134 to 137 of the Constitution (see my last "Letter," No. 2, as regards the functions of the Court), gave its verdict on certain constitutional aspects of carrying on broadcasting activities in Italy in two decisions delivered on July 10, 1974 (Nos. 225 and 226).

In the first decision (No. 225), the Court held that the State monopoly of public broadcasting services (which may be exercised by one or more bodies

licensed by the State but, in fact, is currently in the sole hands of the RAI) was not in contradiction with the Constitution, provided it was subject to conditions such as to ensure that the public monopoly was in conformity with its institutional aims, i.e., to broadcast complete and objective information, open to all cultural tendencies and constituting an impartial representation of the ideas expressed in society. The public monopoly should strive to create instruments capable of broadening the framework of effective expression of the pluralism of ideas currently present in our national society.

In the same decision, the Constitutional Court commented that the State's powers in this context also rested on the fact that the transmitting bands allocated to Italy were restricted in number. As regards the retransmission of programs originating from foreign broadcasting organizations, however, the Court observed in the above-mentioned decision that the possible installation and operation of relays could feasibly, from a constitutional point of view, have been excepted from the State monopoly and have been subject only to administrative authorization setting out the relevant conditions.

The Court made a distinction in its second decision (No. 226) between cable distribution at national and at local levels. The Constitution seemed to justify reserving distribution of broadcasts at national level for the State. On the other hand, however, distribution at local level could conceivably have been subject to a system of administrative authorizations in place of the State monopoly, by analogy with the above-mentioned constitutional decision in respect of the relaying of broadcasts originating from foreign broadcasting organizations, to the extent that any public interests can in this case be safeguarded by setting out appropriate conditions in the administrative authorizations. In its decision, the Court therefore declared a Decree of March 29, 1973 (No. 156), to be in conflict with the Constitution since it had extended the State monopoly to "all" distribution by cable and was thus contrary to the principles of the Constitution in respect of the liberty of the individual to express his own thoughts by any means of dissemination (Article 21) and of the liberty of private economic initiative (Article 41). The Decree was therefore repealed. Since then, penal actions instituted against the installation of relays for foreign television programs have been rejected as inadmissible by a number of magistrates in North and Central Italy (see in this respect: Praetor of Pontassieve, October 18, 1974).

As a result of the two decisions of the Constitutional Court described above (for the texts, see: *Il Diritto di Autore*, 1974, p. 243; and as regards the doctrine, for Italy, in the same review, see, *inter alia*: A. Fragola, "Autori e Tv via cavo", 1975, p. 295; Richiello, "La vicenda della Tv via cavo nelle sen-

tenze della Corte di Giustizia delle Comunità europee e della Corte Costituzionale," 1974, p. 180), a thorough reform of broadcasting services has taken place in Italy.

Following a Decree-Law of November 30, 1974 (No. 633), which failed to take effect due to non-conversion to a law by Parliament within the time limit set by the Constitution, a subsequent Law of April 14, 1975, and a Ministerial Decree of June 16, 1975, approving the implementing rules introduced a new regulation of the whole subject by, above all, affording wider powers to the Parliamentary Control Commission and providing in particular new rules for cable broadcasting and private relay transmission of programs originating from foreign, and even domestic, broadcasting organizations.

As regards the competence of the Parliamentary Commission for the control and general regulation of the public broadcasting service, I would simply like to make reference, in view of the potential importance of certain of the Commission's powers, listed in Article 4 of the Law, in the field of information, to the provisions concerning certain types of broadcasts, such as political debates between parties and radio and television news programs, and the provisions on the "right of reply" which is also to be applied wherever possible in the field of broadcasting.

But, of course, it is above all the new legislative regulation on cable broadcasting (sound and television distribution) and private wireless relay of foreign, and even domestic, radio and television programs to which the attention of readers of this review must be drawn.

The regulation is based, in accordance with the findings of the Constitutional Court mentioned above, on the principle that the broadcasting service is reserved exclusively to the State, with the justification that it is for purposes of general utility (Article 43 of the Constitution), and that this reservation may be limited in order to give a certain scope to private initiative, a principle also stated in the Constitution, while nevertheless regulating such activities by means of the law and on the basis of administrative provisions. Thus, the subject-matter of Title I of the 1975 Law is the "public radio and television broadcasting service," and Titles II and III lay down the principles for the "installation and operation of networks and distribution by cable" and the "installation of private wireless relays for foreign and domestic radio and television programs," respectively, and list the requirements to be met by the applicant to obtain an administrative authorization granted by the Minister for Posts and Telecommunications. As regards radio and cable television, the Law specifies the maximum extent of the service area which may be authorized in collaboration with the competent regional authority.

The field of copyright is indirectly affected by these new regulations, particularly by the fact that various limitations on the exclusive right of the author in respect of broadcasting are justified under the Copyright Law *solely* (Article 51) "by reason of the nature and purpose of broadcasting as a service reserved to the State" and that, therefore, the exclusive right re-emerges for any other broadcast of the protected work by virtue of the general provision in Article 16 of the same Copyright Law which stipulates that "The *exclusive* right of diffusion has for its object the use of any means of diffusion over a distance, such as telegraphy, telephony, radio or television broadcasting, and other analogous means." Interpretation, under the current Italian system, of the principle also contained in Article 11<sup>bis</sup> of the Berne Convention according to which authors enjoy the right to authorize all communication to the public, by wire or by rebroadcasting, of the broadcast of the work, when such communication is made by an organization other than the original one, would now seem easier under the new provisions of the Law on the broadcasting service which we have just looked at, in view of the presence of certain provisions in the Law of April 14, 1975. As regards cable broadcasting, Article 30 provides, *inter alia*, that administrative authorizations shall not be granted in place of other authorizations or licenses provided for by any other legislative provision currently in force, and Article 42 makes explicit mention, in respect of relays, of the responsibility of the holder of the administrative authorization as regards *even* the effects of the Copyright Law of April 22, 1941 (No. 633), and the Law of November 22, 1973 (No. 866), concerning ratification and implementation of the Rome Convention on the rights connected with the exercise of copyright.

Despite a few drafting blemishes as regards the coordination of the above-mentioned provisions, there is no doubt as to the particular importance of Article 42 in establishing a "direct" responsibility of the holder of the administrative authorization who has installed the relay, independent of the responsibility of the organization which originally broadcast the program or of the latter's possible consent to picking up and rediffusion of its program. The authorization of the copyright owner is duplicated in the case of a relay installation combined with cable distribution of the programs concerned.

The provisions laid down by the new Law of April 14, 1975, on radio and television broadcasting do not permit a direct solution to the remaining well-known, problems of radio and television in general (large and small collective antennas, the distinction between the right to broadcast and the right to communicate broadcast radio programs, which some have wished to assimilate in some way to the right of public performance, etc.); but, in the general context of

the Italian copyright law system, they will certainly assist in reaching a solution to the problems discussed by giving them a favorable orientation for the author in recognizing the general principle that the author should be associated in the economic success of the work he has created.

Apart from the relay stations and cable distribution which the new Law has regulated and which, in any event, could have been effectively controlled from the copyright point of view, certain general principles confirmed by the Constitutional Court have led private firms to set up hundreds of local radio stations, particularly in the North of Italy (free radio), which broadcast not only cultural news and political propaganda but also programs of music and publicity which, in my view, are to be considered abusive and illegal.

4. I have already spoken of the question of respect of private life when the general right of the individual conflicts with the author's right to freedom of expression and with freedom of information, in my comments on Articles 93 to 98 of the Italian Copyright Law, in conjunction, where appropriate, with the provisions of the Penal Code concerning the repression of certain violations of private rights related to personal liberty, moral liberty of the individual and the inviolability of secrets. This time, I would simply like to refer the reader to the written reports and the most interesting debates which took place at a meeting in Rome between Italian and foreign lawyers in January 1971 (see "Letter from Italy," *Copyright*, 1973, p. 226).

The general question (independent of its possible connection with copyright) of defending the right of privacy has become a pressing matter throughout the world, more particularly during the last few years, as a result of the technical development and use of devices which readily permit the private domicile to be penetrated. Although such legislation does not generally or directly concern copyright, there is, however, an indirect connection in respect of the lawfulness or unlawfulness of the sources of information entering into the creation of works of the mind. Furthermore, in Italy, the provisions of Articles 93 to 98 of the Copyright Law, which form part of the Title devoted to rights connected with the exercise of copyright, show that such is the concern of the Italian legislator even in the field of copyright.

In my preceding "Letter" (*ibid.*, 1973, p. 226), I already mentioned that, following the scandal of telephone-tapping by certain private detective agencies and a decision of the Constitutional Court declaring the unconstitutionality of certain provisions of the Penal Code giving the examining magistrate and the police excessive powers as regards seeking evidence by the use of highly insidious advanced technical facilities, the Government urgently tabled a relevant

draft law. The Law of April 8, 1974 (No. 98), on the protection of private life, individual freedom and the secrecy of communications has therefore brought to the Penal Code a number of amendments in this respect (Articles 615 and 617) and a number of additions (Articles 615<sup>bis</sup>, 617<sup>bis</sup> and 623<sup>bis</sup>), and has amended the Code of Penal Procedure by repealing the final paragraph of Article 226 and adding various new Articles (including 226<sup>bis</sup>, 223<sup>ter</sup> and 223<sup>quater</sup>).

These new provisions strengthen the protection of private life against the installation of devices intended to intercept or prevent communications or telegraphic and telephonic conversations, and strictly regulate this type of activity on the part of police bodies by restricting any interventions to cases involving the crimes "specified by the same Law."

The addition of Article 615<sup>bis</sup> to the Penal Code creates a new provision of a general nature related to the principles of repression of violation of the private domicile, which, from a penal point of view, can be used against the activities of anyone procuring by means of any type of device photographs or sound recordings, information or images relating to the private life of the individual. It is to be hoped that this provision will also have indirect repercussions on a certain, deplorable, form of reporting which takes as its pretext the general principle of freedom of information.

## II

5.-6. Latterly, there has been an ever-increasing number of court decisions relating, in one way or another, to the provisions of the Copyright Law of 1941 and which therefore point to the need for an overall revision of this Law, following the partial studies undertaken in the past at the Office of the Council of Ministers, which I have mentioned in earlier "Letters from Italy." A number of amendments have in fact already been made to the Law, including the very recent ones I have referred to in this "Letter," but there is still need for subsequent systematic coordination.

The problems of the protection of photographs and the seizure of printed publications which are in violation of copyright, to which I drew attention in my last "Letter" (*Copyright*, 1973, p. 221) have been raised again by judges in Italy in decisions which I would like to mention here at the start of this chapter on the ordinary case law of my country in view of their structural importance with regard to certain legislative provisions.

In a decision (No. 1940) given on April 16, 1975 (*Il Diritto di Autore*, 1975, p. 346), the First Civil Section of the Supreme Court of Appeal seems now to have settled the general question of the protection of photographs, apart from a number of special questions, such as that of the moral rights already dealt

with in the doctrine and also by judges independently of the question of the right to the name which is governed by the current Law (Article 90). The Court stated that a photograph, in itself, enjoyed legal protection under Part II of the Copyright Law, concerning connected rights (Articles 87 to 92), but that, where the photograph was a true work of art, protection was given under Part I concerning copyright in its strict meaning together with all the attendant prerogatives.

The decision of the Court of Appeal has raised some misgivings on account of the fact that, under the Italian system, there is a very clearcut separation between the power of interpretation of the law and the legislative power, and that only the Constitutional Court acting in accordance with its task of controlling legality has the power to tamper with the provisions of the law by declaring them, where appropriate, null and void by reason of their constitutional illegality without, however, being able to amend them directly.

It should be noted in respect of photographs protected under the Part concerning connected rights that the Law also takes into consideration photographs of "a technical or scientific character" or "having a distinct artistic value" (Article 92) but, however, does no more than afford them a longer term of protection. The list (given as an example) of the works protected by copyright in its strict meaning (Article 2) does not include photographic works. Complete incorporation into the copyright system of various categories of photographs (photographs constituting "a true work of art") should also comprise application of the normal term of protection. The Law would therefore seem to need clarification on this point.

There is no denying, however, that the wording of Article 92 is not altogether clear and that, quite apart from the changes which have taken place in this respect within the framework of the Berne Convention, Article 9 of the Italian Law on Cinematography of November 4, 1965 (No. 1213), has already given the "director of photography" a status similar to that of the authors of cinematograph films referred to in Article 44 of the Copyright Law (who do not include the authors of the photographs) as regards the "quality awards." It has been said in this connection that film making is the language of images by means of which an artistic concept may be expressed and that in this language the director of photography has his justified place.

However that may be, even if some feel the decision of the Court of Appeal has exceeded the strict limits of an interpretation of the law, there is no doubt in any quarter that the situation of photographs within the Copyright Law is now due for revision.

As regards the seizure, as an emergency measure, of books and other printed works available on the

market and which infringe the author's right of economic utilization in his work, the same Praetor of Rome who gave the decision I mentioned in my last "Letter" has recently again raised a further question of the constitutional legality of the second paragraph of Article 156 of the Copyright Law, in the light of Article 161 of the same Law in conjunction with Article 700 of the Code of Civil Procedure relating to emergency procedures, as regards the general problem of seizing any printed work of the mind where such seizure would be contrary to Article 21 of the Constitution relating to the freedom of the press.

The Praetor, in his Order referring the case to the Court (the text of the Order and of the suspension of proceedings were published in the Official Gazette of April 9, 1975, No. 93), raised the question, *inter alia*, to which interest precedence was to be given where there was a conflict between the individual interest of the author defending his right and the interests of the public at large.

Put in this way, even though in the context of emergency procedures, the question touches upon the legitimacy of the exclusive right of the author in his work vis-à-vis the public interest in free dissemination of cultural assets. I will return to these general questions of the author's exclusive right at the close of this "Letter," but it is already easy to understand why the findings of the Court were awaited with particular interest.

However, in its decision No. 60 of 1976 (which combined two quite distinct judgements as regards legality and was given on March 25, 1976), the Constitutional Court rejected, in particular, the interpretation given by the Rome Praetor to paragraph 3 of Article 21 of the Constitution on the basis of the latter containing no provisions excluding the applicability of the prohibition and seizure measures provided for in Articles 156 and 161 of the Copyright Law insofar as they contain an express clause and a precise description of the offense and that, in using the term "press law," the drafters of the Constitution were not intending to set up a special type of reservation of law. The State Attorney pointed out, according to his intervention mentioned in the Court's decision, that the Decree of May 31, 1946 (No. 561), which was implicitly maintained in force by the Press Law of February 8, 1948 (No. 47), approved by the Constituent Assembly, stipulated in its Article 3 that "nothing is changed as regards the provisions on the judicial defenses and sanctions instituted for the purposes of protecting copyright by the Law of April 22, 1941 (No. 633)."

As regards the constitutional question raised as such by the Praetor of Rome in respect of the preponderance of the principle of the freedom of dissemination of works of the mind over the individual right of the author of the work, the Court observed that nothing of juridical consequence as regards a

solution to the question of constitutional legality raised by the judge could emerge from examining whether Article 21 of the Constitution, intended to protect the liberty of expressing "one's own" thinking, could also have the indirect aim of protecting the expression of "someone else's" thinking when this happens without or against the wishes of the author of the work (a similar line of thought, also mentioning the 1946 Law, may be found in my study "La Cour constitutionnelle italienne et le droit d'auteur," published in *Hommage à Henri Desbois, Etudes de propriété intellectuelle*, Dalloz, Paris, 1974, in particular pp. 304 to 307).

The decision of the Court also stated that the questions of whether the 1941 Copyright Law meets or not the purpose of protecting private property within the meaning of the Constitution (Article 42), and of the relationship between Articles 42 and 21 of the latter, were also of no legal consequence for resolving the question of legality.

7. Under the Italian system of copyright law, outside the special case of so-called collective works (formed by the assembling of works having a character of self-contained creation resulting from selection and coordination effected for a specific purpose, such as encyclopedias, anthologies, newspapers and magazines — Articles 2 and 38 to 43 of the Law), "collaboration" exists either in the case of a work created by the indistinguishable and inseparable contributions of two or more authors (Article 10) or in the case of certain categories of composite works where the contributions are distinct (dramatico-musical works, musical compositions with words, choreographic works and pantomimes — Articles 33 to 37). The Italian Law contains no section on composite works *in general* nor any provision on the effect of completion of an unfinished work on the concept of "collaboration" (only one provision refers to uncompleted works: Article 121 in respect of publishing contracts).

The legal status of the first category of works of joint authorship is based on the general legal institution of *pro indiviso* community of rights (Articles 1100 to 1116 of the Civil Code) whereas that of the second category is governed, in the absence of individual agreement between the co-authors, by fairly complicated provisions laid down by the Law (Articles 33 to 37).

The duration of the rights of economic utilization enjoyed by the collaborators or joint authors is the same for both the first and second categories of works, and is determined by the lifetime of the last surviving co-author (Article 26). As for the duration of rights for the second category of works (composite works with distinct contributions *specifically* mentioned in the Law), successive collaboration could, in my opinion and in certain cases, exist on condition

that such collaboration concerned a work which was still protected.

The legal position of cinematographic works is subject to special rules (Articles 44 to 50 of the Law) as regards either the determination of authorship, or the powers of the producer who exercises economic rights in the film, or again the duration of rights. The Copyright Law names as co-authors of a cinematographic work the author of the subject, the author of the scenario, the composer of the music and the artistic director (Article 44) but does not contain any specific provisions as to the relationship between the various collaborators/co-authors. However, it is certain that the general principle of community of rights, particularly as regards the music recorded on the sound track, plays an essential role.

As regards the problems of collaboration affecting copyright in general and cinematographic works in particular which arise under Italian law, I refer the reader to my numerous studies in this field and, in the case of this review, to my comments of Italian case law published in my "Letters."

The First Civil Section of the Court of Appeal gave a decision (December 3, 1974, *Ortolani v. Oliviero*, in *Il Diritto di Autore*, 1975, p. 78) in which it rejected an appeal against a judge's decision on a question relating to the interpretation of the provisions of Article 103 of the Copyright Law, laying down "presumption" based on information contained in public registers, and stated that the music recorded on the sound track of a film (in this case the film *Mondo cane*) was always of a unitary and indivisible nature even if it was the result of collaboration between a number of authors and therefore the presumption of authorship by all the co-authors within the meaning of the above-mentioned Article 103 of the Law (in this case the music had been declared in the public register as a joint work of the composers Ortolani and Oliviero) could not be dismissed for the simple reason that it was possible to extract from the whole a single work or piece of a work of one only of the co-authors (in this case, the piece of music composed by Oliviero, entitled *Je m'en fous*).

The impossibility of distinguishing between and separating the various creative contributions as an essential condition for applying the general principles of *pro indiviso* community in works of joint authorship, and their *de facto* and *de jure* nature, is a subject that has been studied in the past in the Italian doctrine, particularly by the recently deceased Professor Paolo Greco in his study "Collaborazione creativa e comunione dei diritti di autore" (in *Il Diritto di Autore*, 1952, p. 14). In the said study, Professor Greco analyzed and interpreted in a less rigid manner the condition of "indistinguishability" required by Article 10 of the Law, making reference, *inter alia*, to similar views expressed by Professor Desbois (*Le droit d'auteur*, Paris, 1950, p. 203) prior

to publication of the new French Law of 1957 on literary and artistic property. In supporting Professor Greco's interpretation of Article 10 of the Law at the time, I emphasized the necessity, in any event, for the work to possess the character of an organic unit.

The revision of the whole chapter on collaboration and its effects in the creation of a work of the mind will also have to be given attentive consideration when the 1941 Law is reformed, particularly in view of technological progress. In this latter connection, I would like simply to mention certain forms of new music (concrete music, electronic music) and certain forms of contemporary industrial art (to which I shall return later in this "Letter") which are the result of many creative efforts and producers.

Some valuable clarification as regards the systematics of the matter has been provided in respect of the distinction between works of joint authorship under Article 10 and composite works, of which, as already mentioned, only a few categories are specifically regulated by the Italian Law, in a decision given by the Milan Court of Appeal on February 18, 1975 (*La Valle and Ed. Musicali Clan S. r. l. v. Caponi, Detto and El'and Chris S. r. l.* for the rights of economic utilization of the musical part of the song *Casa Bianca* which came second at the Eighteenth San Remo Festival — the text of the decision is published in *Il Diritto di Autore*, 1976, p. 51).

The highly complex question (due to the existence of successive contracts transferring copyright between various publishers) submitted to the judge was centered on the ownership of copyright in a song (composed by Mr. Detto) lawfully based on a musical theme created by another composer (Mr. La Valle).

The Court held that, in law, the subsequent creative intervention of a composer on a musical theme by another composer did not, in spite of agreements reached in that respect, meet the requirements of a work of joint authorship as provided for and governed by Article 10 of the Copyright Law, since such collaboration presupposes actual collaboration at the time of creating the work to produce a single result. In cases where the intervention of the second composer was consecutive and autonomous, and resulted in the production of a new work, this might possibly represent creative elaboration (Article 4 of the Law) but not collaboration within the meaning of Article 10 leading, juridically, to community of rights. Moreover, recourse could not be had (according to the judge in his decision) in such cases to the hypothesis of a composite work with distinct contributions (Articles 33 to 37 of the Law, already referred to) where contributions of differing types converge to create a new work but nevertheless remain distinct and separable.

I am not aware, at the moment, whether this decision of the Milan Court of Appeal has been put to the Supreme Court of Appeal.

8. Neither the Italian Civil Code (Articles 2575 to 2583) nor the Copyright Law contain any express reference, among the various rights of economic utilization of the work, to the right of publishing. Such a right is nevertheless to be regarded as falling within the same framework as the right of publication (Article 12), the right of reproduction (Article 13) and the right of distribution (Article 17) and therefore the Copyright Law, in the chapter on transfer of the rights of utilization, devotes a separate section to publishing contracts (Articles 118 to 135) governing contracts for publishing by way of printing and at the same time laying down provisions (Article 119) providing for much broader and more general subject-matter for such contracts "within the field of publication" (on publishing contracts, see De Sanctis, *Il contratto di edizione*, ed. Giuffrè, Milan, 1963).

In the section in question, the Italian Law gives a fairly precise indication of the solution to a number of questions which publishing contracts may raise in the relationship between the contracting parties (the author and his successors in title, on the one hand, and the publisher, on the other). The Law regulates, *inter alia*, the content of the contract, its form, contracts for future works, the nature of the obligations arising from the contract within one of the two sole categories of publishing contracts permitted by the Law (contract based on the number of editions and contract based on a certain period of time), the author's remuneration (his share), countersigning of the copies distributed, withdrawal of printed copies from commerce, the sale of copies below cost price or as waste. It also regulates certain "derived rights," i. e., translation of the work.

Some of the provisions concerning the publisher's obligations listed in the section on publishing contracts are optional (thus safeguarding individual contractual freedom), whereas others are mandatory in view of the fact that the author is generally the weaker party to the contract. In this connection, it has been held in the doctrine (*inter alia*, Piola Caselli and Arienzo) that the mandatory nature of *certain* of these provisions, particularly those concerning the author's share, on a percentage basis, in the sale of copies of the work to the public is justified by the concept of this type of remuneration being established to enable the author to receive due recompense for his intellectual work.

Before informing the readers of this review of some recent decisions given by Italian judges in this field (along the same lines as the numerous decisions referred to in my previous "Letters," which together form an indicative picture of the interpretation adopted by the judges), allow me to digress even more widely but, nevertheless, on a question forming part of the field of publishing contracts.

In June 1974, the writers' professional associations ("Sindacato nazionale scrittori" and "Sindacato

libero scrittori italiani") took the initiative of establishing with the publishers' association ("Associazione italiana editori") an "Economic agreement concerning the relationship between publishers and writers and a model publishing contract." This initiative, which is still in its development phase, was originated by the writers in the framework of the working relationship (including also provident arrangements on the part of the publishers in favor of the writers) and should have lead to the drawing up of a mandatory model contract for certain categories of works as regards publishing by way of printing for adoption by all the members of the contracting professional associations. This initiative is related, historically, to the "Collective economic agreement governing the model publishing contract on a sharing basis" concluded on March 18, 1939, between the National Union of Authors and Writers, the National Federation of Publishers and the National Federation of Production and Labor Cooperatives approved by the "Central Corporative Committee" on October 17, 1939, and promulgated by Decree of February 9, 1940 (Official Gazette of March 18, 1941, No. 66) for the purposes of regulating the relationship between writers and publishers in publishing contracts on a sharing basis within the meaning of the then valid Law No. 206 of March 20, 1930. Thus the 1939 agreement did not cover arrangements by which the author bore certain costs nor other forms of assignment permitted by the Law (see my above-mentioned work on publishing contracts, pp. 126 and 127, on the consequences of this agreement after the collapse of the corporative system in Italy and on various relevant decisions of the Constitutional Court of February 12, 1963).

One of the basic structural differences between the agreement now proposed by the writers' professional associations and the 1939 collective agreement is that no *erga omnes* effect is provided (as regards the professional categories concerned) in view of the fact that the corporative system no longer exists in Italy, but merely that it should be mandatory for the members of the contracting associations. Meetings between representatives of the two parties concerned (in which I myself was invited to participate) have been held at the invitation and under the auspices of the Services for Information and Literary, Artistic and Scientific Property of the Office of the Council of Ministers.

At present I will restrict myself to referring to two matters of a legal nature. The first concerns the possibility, in this field, of validly committing *each* member of the various associations by means of a collective agreement whereas the statutes of these associations, or at least some of them, only give the associations specific powers to intervene in relationships with their own members if these are working relationships.

The second point concerns the criticism levelled by the writers' professional associations at the clause safeguarding the "provisions to the contrary" stipulation found in some of the provisions of the current Law. It should be noted in this respect that the aim of the Italian lawmakers in 1941 was not to incorporate in the Law a model publishing contract but merely a number of provisions, under the general heading of the transfer of utilization rights in the work, governing, in particular, the field of publishing contracts, i. e., the assignment by the author to the publishers of the exercise of certain of the author's rights (license contract). It is therefore obvious that individual contractual freedom had to be maintained as regards a number of rules not affecting the principles which the legislator considered essential in order to protect, by means of public policy clauses, the authors as the "weaker party to the contract."

The question of "derived rights," which has been the subject of renewed discussions lately at a number of national and international meetings on a model publishing contract (see, *inter alia*, the work of CISAC), also forms part of this topic.

In my opinion, a model publishing contract for literary works should have as its subject the publishing, reproduction and distribution of the work and also its utilization, in part or in whole, by any means of dissemination to the public (including the new systems of audiovisual recording and presentation) and rules on "competitive works" by excluding certain forms of adaptation (with the exception of straightforward translation of the work into foreign languages) which, like film and television, presuppose an often profound creative transformation of the printed literary work. This type of derived rights can, of course, be the subject of agreements between the author and the publisher of the work but not, in my opinion, be included in a model publishing contract, since they represent an area where the contractual liberty of each author should be safeguarded to a maximum in view of the fact that uses of this sort are extremely varied and very frequently have personal and moral implications.

Still on the subject of "derived rights," other problems which may arise under many different aspects include those which now occur in the context of the so-called merchandizing of works of the mind and which may often fall under other branches of the legislation in a given country, such as the law on marks, on ornamental designs, on competition, etc. In this connection, I hasten to bring to your attention, since I see no mention of it in running through my previous "Letter," a decision which was a center of considerable interest at the time (Milan Court, March 28, 1968, *Soc. Gildron v. Soc. Impermeabili San Giorgio*, in *Foro padano*, 1968, p. 827) and which related to the use of the name of a

well-known fictitious character of thriller novels (*James Bond; James Bond Secret Agent 007*) in order to distinguish and mark various articles of clothing sold in the shops.

The judge held that the use for commercial publicity of even the name of a famous character in a work of the mind constituted an infringement of the right of economic utilization of the work, which the Copyright Law reserved to the author. Some doubts have been expressed as to this interpretation of Italian law, which I personally agreed with, in view of the fact that a fictitious character of a work of the mind which has become famous is inseparable from the work or series of works in which he exists and of which he often (in the words of the Milan Court) "constitutes the synthesis of the work, and occasionally, with time even becomes the symbol of all the author has represented through him." It has been observed in this respect (see G. Jarach, "Nome del personaggio di un'opera dell'ingegno e sua utilizzazione per una pubblicità commerciale," commentary accompanying the above-mentioned decision in *Foro padano*, 1968, p. 828) that "the name of a fictitious character considered in itself and devoid of any other physical characteristic or any other element linked with the events recounted in the work is merely a unique identification and cannot therefore enjoy a different legal treatment or wider protection than the title of a work of the mind" and the Italian Copyright Law protects a title as a unique identification (Article 100) and not as a part of the work.

Finally, after this long digression, I would like to bring to your attention in this "Letter" a number of recent decisions in the case law of publishing contracts.

In a decision of March 1, 1973 (*F.lli Fabbri editori v. Marotta*, in *Il Diritto di Autore*, 1973, p. 185), the First Civil Section of the Supreme Court of Appeal held that the quality and true value of the work which was the subject of a publishing contract for a work to be created could not be verified by the publisher at the time the latter undertook to publish it (the case in point concerned two scientific works entitled *Breve compendio di anatomia sistematica illustrata* and *Compendio di anatomia umana normale*). The Court of Appeal commented that no case law existed in Italy under the current legislation as regards this principle, but that it had been argued in the doctrine that one of the natural elements of a publishing contract was the fact that, failing a stipulation to the contrary, it was impossible for the publisher to verify the true value of a work (which even the author was unable to guarantee) provided that the work was of the type agreed by the contracting parties. This was a risk the publisher had to run since it was inherent to publishing contracts (see similar remarks in *Contratto di edizione*, mentioned above, p. 181). I

myself spoke of this decision at the International Symposium on Publishing Contracts organized in Amsterdam on April 26, 1974, by the Dutch Group of ALAI; see *De uitgever*, "Aspects du contrat d'édition," No. 3-4, 1974, p. 52).

Another rather interesting decision of the Court of Appeal (Third Section, January 11, 1974, No. 87 — *Il Diritto di Autore*, 1974, p. 66) concerned the concept, under Articles 133 and 134 of the Italian Copyright Law, of selling copies of the published work below cost price. The above-mentioned 1939 collective economic agreement set out a number of rules for the relationship between the contracting parties in this respect.

The Court of Appeal held in its well-founded decision that where copies of the work were sold below cost price by the publisher the amount thereby charged could not, failing the prior agreement of the author, be more than the cost of production; otherwise the sale at cost price or as waste would become for the publisher a means of making a profit, however modest, at the expense of the author who was bound to the publisher by a contract under which he received as his share a percentage of the normal public selling price of copies. The Court further held that (a) the impossibility of selling copies of the work to the public at the set price ought to be "objectively" verifiable and that selling at cost price could not be justified solely by momentary difficulties, and (b) failing prior notification by the publisher, the author had the right to claim damages.

From amongst the decisions of the courts, I have chosen two which would seem to be of general interest although I cannot say whether they have been appealed against or not.

The first decision (Milan Court, January 27, 1975, *Soc. Garzanti ed. v. Volponi and Soc. ed. Einaudi*, as regards publication of a narrative work by Paolo Volponi entitled *Corporale*) concerns a dispute between two publishers who had successively acquired the same rights. The Court found that, in cases of successive alienation of rights of economic utilization in a work of the mind, preference should, in principle, be given to the person who was first in time to buy the rights, irrespective of the moment of possession of the rights. In my "Letters," particularly in the last one, I have referred to the legal possibility, under the Italian system, of a concept in copyright of possession of rights of economic utilization despite the intangible nature of the work. However, in my opinion (see *Contratto di edizione*, mentioned above, p. 52), the immediate purpose of Article 167 of the Law, by virtue of which the said rights may be invoked in law by the person having legitimate possession of them, is to permit a person possessing in good faith rights of economic utilization to defend them in legal proceedings against unau-

thorized users of the work and against infringers (for this reason the article is to be found in the chapter on judicial protection and sanctions), not to overturn the principles of acquisition of copyright. In this connection, I might mention that Italian copyright law does not admit the legal institution of acquisitive prescription.

Thus the Milan Court in its above-mentioned decision — despite a decision of the Court of Appeal (Third Civil Section, November 13, 1973, No. 3004) which found that the principle contained in Article 1155 of the Civil Code — according to which "the acquirer in good faith having possession of the (moveable) property is preferred to other purchasers even of earlier date" — was applicable, and thus interpreted in a more restrictive sense this article of the Civil Code as regards its application to matters of copyright.

The second court decision I would like to refer to here (Rome Court, January 14, 1975, *Provinciali v. Casa ed. Giuffrè*, in *Giurisprudenza di merito*, 1975, p. 314, with a commentary by Professor Fabiani entitled "Rapporto tra proprietario di testata di periodico ed editore") concerns a dispute between the owner of the heading of a legal review who was equally its director, and therefore its author (Article 7 of the Copyright Law), and the publisher to whom he had entrusted the publication of the review. Following termination of the contract, the publisher had refused to hand over the list of subscribers to the review and the relevant administrative report to the owner of the review's heading. In this action, the Court found that (1) the contract by means of which the owner of the heading of a periodical entrusted a publisher with the publication of that periodical could be assimilated to a periodical publishing contract and (2), since the relationship had terminated, the publisher was obliged to return to the owner of the heading the scientific material and all other relevant documentation to enable the author to pursue his activity; therefore, the publisher was required to return the current list of subscribers but not the report, since this was a publishing contract and not a contract establishing a partnership between the parties nor a contract of administration and publication.

As regards the heading of a periodical (newspaper or review), I may mention that it is protected under the Italian Copyright Law (Article 102) within the part dealing with connected rights (protection against unfair competition). Consequently, protection of the heading, as distinct from the separate protection of the title, may be invoked when its reproduction, in whole or in part, even if disguised, may lead to confusion as to the work, the author or the undertaking. However, this legislative situation does not prevent rights relating to it from constituting the subject-matter of subjective rights.

## III

9. At the initiative of the Services of Information and Literary, Artistic and Scientific Property of the Office of the Council of Ministers and under the patronage of the President of the Republic, a national study meeting of lawyers, judges and representatives of the national institutions concerned, devoted to "Copyright and problems of culture and information in view of the new techniques of reproduction and dissemination of intellectual creations" was held on October 27 and 28, 1975, at the International Institute for the Unification of Private Law in the Villa Aldobrandini in Rome. Videodiscs and videocassettes, new audiovisual modes of recording, reproduction and dissemination of works of the mind, reprography, cable distribution of programs, electronic computers, microfilms and programme-carrying artificial satellites were among the new techniques of special interest for copyright highlighted in the discussions. The debates on these and similar questions were conducted with reference to national legislation and also the international conventions to which Italy is party, and a further aim was to receive suggestions of a general nature in view of the revision of domestic copyright law and other laws affecting information and culture.

The meeting opened with an address by the Minister-President, Mr. Aldo Moro, who emphasized the importance and the topical character of the chosen subject in view of the current social and economic life of Italy which was in the midst of rapid changes in ideas and structures. On October 30, a group of participants was received at the Quirinal palace by the President of the Republic who spoke a few words on the topic of the meeting, in reply to Mr. Renato Giancola, the Director General of the State Services referred to above.

The symposium was chaired by Mr. Giuseppe Flore, first President of the Supreme Court of Appeal, Chairman of the Permanent Consultative Copyright Committee. The general rapporteur was Mr. Alfredo Arienzo, President of Section at the Supreme Court of Appeal. The discussions were closed by the Chairman's summing-up and an address by Mr. Giancola, who stressed the importance of the debates and again highlighted the multitude of links which exist in the present-day world between copyright, on the one hand, and the dissemination of culture among the masses and the pluralism of information, on the other.

Presentation of the general report was followed by a number of interventions, some based on written communications, of which I mention the following: "Legal protection of works of art and science and its social function as an instrument for developing culture" (M. Fabiani); "Cable television" (A. Fragola); "Notes on data processing and copyright"

(G. Galtieri); "Public interests and private interests in the protection of copyright" (G. Giacobbe); "New utilizations of works based on the new technical facilities" (L. Leonelli); "The constitutional basis for protection of copyright" (E. Santoro); "Copyright, reprographic reproduction of works and the personal and collective interests of culture" (L. Sordelli). Finally, an intervention by Mr. Luigi Conte, Director General of the Italian Society of Authors and Publishers, drew attention to the problem of present-day piracy in respect of phonographic reproductions (the Acts of the Rome meeting are to be published by the competent department of the Office of the Council of Ministers).

In his highly remarkable and well-documented general report, Mr. Arienzo drew a most accurate picture of current developments in technology and of the special problems they generate in the field of copyright. I would like to mention here three points of a general nature.

The first relates to the relevant national legislation faced with the persistence of provisions and institutions which are inadequate for the new reality of Italian society and to the legislative acts in Italy subsequent to the pre-war codification on which the 1941 Copyright Law is aligned. The notion of copyright on a purely individualistic basis would no longer seem in harmony with this new situation. More particularly, the absolute right of economic utilization of an intellectual creation (independently of the right of personality whose purpose is to protect the creative act) should henceforth be regulated in the light of copyright's social role and, consequently, its diminishing function as a power of self-determination of the author to protect his own property interests, this social role being accentuated by the constitutional principle requiring each citizen "to pursue, each according to his possibilities and choice, an activity or function which contributes to the material and spiritual progress of society." To place this kind of restriction on the free realization of his own interests certainly means a weakening of the author's rights and would therefore seem to require action by the State to guarantee the proper interests of the author by means of legal instruments which could replace private initiative and would be capable of regulating the interests thus protected inasmuch as they represent a justified possibility of making a profit.

The second point from Mr. Arienzo's general report refers to the consequences of the author's incapability, in the situation as it stands today, of controlling *in certain cases* (i. e., in the field of reprography) the unauthorized use of his work and the resultant necessity, in order to protect the author from the ensuing economic prejudice, of abandoning the exclusive concept of the right and having recourse to

equitable remuneration for subsequent use of a work already published.

The third point relates to the highly complex demands of contemporary industrial production, particularly in view of the new inventions affecting the various means of production and dissemination of works of the mind and public entertainment, and to the intermingling of relationships between the various collaborators and assistants in the producing and making of the work and the often difficult task of identifying a single author to whom the various legal situations would be applied. This state of affairs renders even more critical the problem of assigning exclusive rights to the producer or the vendor of the product placed on the market by analogy with the legal situation of the producer of a cinematographic work under the Italian Copyright Law.

Personally, I took the floor immediately after the oral exposé of the general rapporteur in order, primarily, to lend support to Mr. Arienzo's diagnosis, if I may call it that, of the copyright situation at the present time, and, particularly, in the context of the rapid progress of technology. However, as regards Italian legislation more particularly, although agreeing with the need now felt to revise it completely and not limit revision, as had been done in the past, to a few amendments to certain provisions, I nevertheless voiced the question whether it was necessary to change the fundamental structures.

I recalled, in this connection, that, following the interventions of Eduardo Piola Caselli in the pre-war debates in the Senate of the Kingdom on the draft of the new Civil Code, the question of intangible property was separated from the institution of property by removing all references to this chapter of law in order, as Piola Caselli commented at the time, not to compromise the legal nature of rights in intangible property. Finally, the inclusion of the legal discipline of copyright and also of industrial inventions, designs, unfair competition and the industrial and commercial undertaking, under the heading of "work" in the Civil Code has permitted — and still permits today — much more flexible legislative approaches, as it will also in future, thus opening up the possibilities of incorporating regulations taking account of current social, technical and economic realities. *Inter alia*, the legislative confirmation, in the Civil Code and the specialized Law, of the principle of acquisition of copyright being constituted by the creation of a work as the specific expression of intellectual work permits, by acknowledging this legal fact, the individual creative effort to be related to the problems of cultural development and freedom of expression.

As regard the exclusive right and the right to equitable remuneration, the Italian Law has endeavored, both in the part on copyright and in the extensive and detailed part devoted to the auxiliaries of intellectual creation and the production of goods

in trade resulting therefrom, to strike a balance between private interests and the interests of the community. In my opinion, therefore, it was simply a matter of aligning this legal discipline on the new political, social and technical requirements without, for all that, profoundly changing its fundamental structure.

During my intervention I also expressed my personal preference, as regards the system of equitable remuneration and the royalty system in general rather than State tariffs, for the system of negotiated collective agreements, at least where these were possible, with the intervention of public authorities being limited possibly to supervising and implementing the agreements.

10. The Rome meeting enabled clarity to be obtained at national level on a number of questions of current interest as a result of the technological developments affecting copyright, data processing and the dissemination of culture.

All these questions have been under discussion for some time already, not only within the national framework of various countries but also at meetings of WIPO and Unesco where it has been noted, however, that many of the problems are not yet ripe for a solution within the international copyright conventions since they are still liable to undergo changes, in some cases profound ones, due to the speed with which techniques evolve. In this connection it is sufficient to pick out, from among the inventions instanced in Mr. Arienzo's general report, the technical creations which appear every day in the field of automatic information and documentation systems, microfilms and microfiches, reprographic reproduction and computer storage.

In closing this "Letter" and referring the readers to recent legislative and case law events in the field of copyright in Italy, I would like to draw attention once again (see "Letter from Italy" of 1973, p. 237) to the profound changes which have also taken place in the creative process for certain types of works of the mind, particularly as regards music, cartoons, sound tracks, new forms of entertainment, productions specifically created for television, graphic, visual and sound publicity and other creations within the context of industry and commerce where teamwork — work for a salary — of authors and their assistants plays an ever-increasing part.

I have already referred in this "Letter" to a number of questions in this field which should be borne in mind when revising our legislation; in this connection, I would not like to forget industrial art (it is sufficient to point to the part played by design in contemporary industrial products) and the need to improve the coordination of its protection based on various laws: the Copyright Law of 1941 and the Law on Ornamental Designs (Article 2593 of the

Civil Code and the Decree of 1940 in conjunction with the general Law of 1939).

The Italian legislative concept, irrespective of any philosophical or esthetic notions, rejects, as is known, the doctrine of what is called unity of art on the basis of Article 2(4) of the Copyright Law which extends protection, *inter alia*, to "works of sculpture, painting, drawing, engraving and similar graphic arts, including scenic art, even when such works are applied to an industrial product if their artistic value is distinct from the industrial character of the product with which they are associated."

However, this concept (see my previous "Letters" published in *Le Droit d'Auteur*, 1956, p. 27, and 1957, p. 168) should, in my opinion and in spite

of its practical usefulness, be attentively reconsidered as regards its effective application, taking account also of recent studies and achievements, in the international field, of the various multilateral conventions on copyright and industrial property, and with the special aim of arriving at legal security in view of the coexistence of various sources of regulations (in connection with the current legal situation in the domestic Italian framework vis-à-vis the international conventions, see the recent monograph by M. Fabiani, *Modelli e disegni industriali*, Collection "Studi di diritto privato italiano e straniero" edited by Mario Rotondi, new series, Vol. XIX, Cedam ed., Padua, 1975).

(WIPO translation)

## International Activities

### International Broadcast Institute

(Conference, Bellagio, July 5 to 9, 1976)

A meeting on new technologies and intellectual property rights was convened by the International Broadcast Institute, in Bellagio, Italy. Participants in the symposium were specialists in problems of international copyright, representatives of broadcasting organizations and organizations active in the videocassette or space communications fields. They came from the following countries: Austria, Belgium, Canada, France, Germany (Federal Republic of), Netherlands, Sweden, United Kingdom and United States of America.

Mr. Clark Hamilton, Deputy Register of Copyrights, United States of America, was elected Chairman of the meeting, and Mr. Edward Ploman, Executive Secretary of the International Broadcast Institute, acted as Rapporteur.

WIPO, invited as observer, was represented by Mr. Claude Masouyé, Director, Copyright and Public Information Department.

The main objective of this conference was to provide an analysis of basic issues and concepts both as a contribution to the current debate on technology, communications and law, and as an attempt to stimulate the thinking in the field of intellectual property rights.

A broad exchange of views took place on a number of questions, particularly the present trends in the formation of policies for information and communications, the relationship between intellectual property rights and other branches of international law applicable to communications, the implications of new technological means on the exercise of copyright and the criteria for policies in that field.

The conclusions reached during the discussions relating to the protection of the creators, the social needs for information and the function of bodies interested in communications will be transmitted to the organs of the International Broadcast Institute.

## Book Reviews

**Die Pariser Revisionen der Übereinkünfte zum internationalen Urheberrecht**, edited by *Georg Roeber*, with contributions by *Elisabeth Steup*, *Erhard Bunker* and *Dimitrios S. Oekonomidis*. Preface by *Eugen Ulmer*. One volume of 463 pages, 21 x 15 cm. J. Schweitzer Verlag, Berlin, 1975. Schriftenreihe der UFITA, Heft 50.

There have already been a number of studies and publications on the signature, at Paris in 1971, of the Paris Act of the Berne Convention and of the revised Universal Copyright Convention. The publication of the above work in 1975 deserves to be mentioned for at least two reasons.

The first has to do with the reputation of the authors, some of whom were very actively involved in the Paris Conferences as members of the Delegation of the Federal Republic of Germany.

The second is the fact that we have here a very full account which, in addition to three remarkable studies on the preparatory work and the actual holding of the two Conferences, as well as on the changes made in the texts of the two Conventions, contains also the English and French versions and the official German texts of the Conventions, the German translation of the general reports of the two Conferences, and

the law of the Federal Republic of Germany of August 17, 1973, which approved the two Conventions, together with the statement of grounds and the memoranda relating to it.

**Conferencias de Revisión de las Convenciones de Berna y Universal (Paris, Julio de 1971) — Enfoque Argentino**, by *Delia Lipszyc*. One volume of 139 pages, 22.5 x 14.5 cm. Consejo Panamericano de la Confederación Internacional de Sociedades de Autores y Compositores (CISAC), Buenos Aires, 1975.

The aim of this "appraisal" is to describe the part played by Argentina in the discussion and drafting of the new provisions adopted at the Revision Conferences of the Berne Convention and the Universal Copyright Convention held in Paris in July, 1971.

After briefly sketching the background, the author describes the preparatory work done in Argentina, the proposals made by the Argentinian Delegation at the above-mentioned Conferences and the Delegation's position on the questions debated. This survey is completed with a brief analysis of the provisions adopted.

Parallel texts (old and new) of both Conventions, in Spanish, are annexed to this work.

## Calendar

### WIPO Meetings

#### 1976

**September 27 to October 5 (Geneva)** — WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union — Ordinary Sessions

**September 27 to October 8 (Rijswijk)** — International Patent Classification (IPC) — Working Group II

**October 11 to 18 (Geneva)** — International Patent Classification (IPC) — Steering Committee

**October 13 to 21 (Geneva)** — Nice Union — Temporary Working Group

**October 18 to 22 (Geneva)** — ICIREPAT — Technical Committee for Standardization (TCST)

**October 19 to 22 (Geneva)** — International Patent Classification (IPC) — Committee of Experts

**October 25 to 29 (Geneva)** — ICIREPAT — Technical Committee for Search Systems (TCSS)

**November 1 to 8 (Geneva)** — Patent Cooperation Treaty (PCT) — Interim Committees

**November 8 to 19 (Stockholm)** — International Patent Classification (IPC) — Working Group IV

**November 23 to 30 (Geneva)** — Paris Union — Preparatory Intergovernmental Committee on the Revision of the Paris Convention

November 29 to December 3 (Geneva) — Permanent Legal-Technical Program — Working Group on the Model Law for Developing Countries on Inventions and Know-How

November 29 to December 10 (Rijswijk) — International Patent Classification (IPC) — Working Group I

December 6 to 9 (Lusaka) — Diplomatic Conference for the Adoption of an Agreement on the Creation of an Industrial Property Organization for English-Speaking Africa

December 8 to 17 (Lusaka) — Conference on Industrial Property Laws of English-Speaking Africa, and of its Committee for Patent Matters and its Committee for Trademark and Industrial Design Matters

December 8 to 17 (Paris) — Berne Union — Committee of Governmental Experts on the Double Taxation of Copyright Royalties

*Note:* Meeting convened jointly with Unesco

December 13 to 17 (Geneva) — Nice Union — Committee of Experts

## 1977

January 17 to 21 (Geneva) — International Patent Classification (IPC) — Steering Committee

January 25 to 28 (Geneva) — Trademark Registration Treaty (TRT) — Interim Committee

January 25 to 28 (Bangkok) — Permanent Legal-Technical Program — Asian Seminar on the Rights of Performers, Producers of Phonograms and Broadcasting Organizations

*Note:* Meeting convened jointly with ILO and Unesco

February 16 to 18 (Colombo) — Permanent Legal-Technical Program — Regional Seminar on Industrial Property

February 21 to 24 (Colombo) — Permanent Legal-Technical Program — World Symposium on the Importance of the Patent System to Developing Countries

February 21 to 25 (Geneva) — Berne Union — Working Group on Videocassettes

*Note:* Meeting convened jointly with ILO and Unesco

March 7 to 11 (Geneva) — Permanent Legal-Technical Program — Working Group on Technological Information derived from Patent Documentation

March 14 to 18 (Geneva) — Permanent Legal-Technical Program — Permanent Committee concerning Cooperation for Development relating to Industrial Property (4th session)

March 28 to April 1 (Paris) — Berne Union — Working Group on Cable Television

*Note:* Meeting convened jointly with Unesco

April 18 to 22 (Geneva) — Nice Union — Temporary Working Group on the Alphabetical List of Goods and Services

April 25 to 29 (Geneva) — ICIREPAT — Technical Committee for Search Systems (TCSS)

May 2 to 6 (Geneva) — ICIREPAT — Technical Committee for Standardization (TCST)

May 12 to 14 (Geneva) — Paris Union — Ad hoc Coordinating Committee for Technical Activities

May 23 to 27 (Riyadh) — Permanent Legal-Technical Program — Arabic Copyright Seminar

*Note:* Meeting convened jointly with Unesco

May 23 to 27 (Geneva) — International Patent Classification (IPC) — Working Group V

June 6 to 10 (Geneva) — Permanent Legal-Technical Program — Working Group on the Model Law for Developing Countries on Inventions and Know-How

June 27 to July 1 (Geneva) — Paris Union — Committee of Experts on Computer Software

June 27 to July 1 (Geneva) — Nice Union — Preparatory Working Group on the Systematic Review of the Classification

September 26 to October 4 (Geneva) — WIPO Coordination Committee; Executive Committees of the Paris and Berne Unions; Assemblies of the Madrid and Hague Unions; Committee of Directors of the Madrid Union; Conference of Representatives of the Hague Union

November 2 to 18 (Paris) — Berne Union — Diplomatic Conference (or Committee of Governmental Experts) on Double Taxation of Copyright Royalties

*Note:* Meeting convened jointly with Unesco

November 28 to December 5 (Paris) — Berne Union — Executive Committee — Extraordinary Session

December 6 to 8 (Geneva) — International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations — Intergovernmental Committee — Ordinary Session (organized jointly with ILO and Unesco)

December 9 (Geneva) — Berne Union — Working Group on the Rationalization of the Publication of Laws and Treaties in the Fields of Copyright and Neighboring Rights

## 1978

September 25 to October 2 (Geneva) — WIPO Coordination Committee; Executive Committees of the Paris and Berne Unions

## **UPOV Meetings in 1976**

**Council:** October 13 to 15

**Consultative Committee:** October 12 and 15

**Technical Steering Committee:** November 17 to 19

**Committee of Experts on International Cooperation in Examination:** November 16

*Note:* All these meetings will take place in Geneva at the headquarters of UPOV

## **Meetings of Other International Organizations concerned with Intellectual Property**

### **1976**

**September 26 to October 2 (Montreux)** — International Association for the Protection of Industrial Property — Executive Committee

**September 27 to October 1 (Paris)** — International Confederation of Societies of Authors and Composers — Congress

**October 6 and 7 (Rijswijk)** — International Patent Institute — Administrative Board

**October 11 to 16 (Varna)** — International Writers Guild — Congress

**November 9 to 11 (Hakone)** — Pacific Industrial Property Association — International Congress

### **1977**

**January 14 (Paris)** — International Literary and Artistic Association — Executive Committee and General Assembly

**January 17 to 21 (Strasbourg)** — Council of Europe — Legal Committee on Broadcasting and Television

**May 1 to 4 (Amsterdam)** — Union of European Patent Attorneys — Congress and General Assembly

**May 23 to 27 (Rio de Janeiro)** — Inter-American Association of Industrial Property — Congress

**November 28 to December 5 (Paris)** — United Nations Educational, Scientific and Cultural Organization (UNESCO) — Inter-governmental Copyright Committee established by the Universal Copyright Convention (as revised at Paris in 1971)

