Willi Egloff

Copyright Stories

Sketches on the Political Economy of Copyright

Willi Egloff

Copyright Stories
Sketches on the Political Economy of Copyright

Willi Egloff

Copyright Stories

Sketches on the Political Economy of Copyright

Translation: Sadie Plant

The book was first published in June 2017

under the title

Geschichten vom Urheberrecht
oder: Skizzen zur politischen Ökonomie des Copyright

by Stämpfli Verlag AG Bern
www.staempfliverlag.com

ISBN 978-3-033-06835-3

advocomplex gmbh Bern
www.advocomplex.ch

DOI: 10.5281/zenodo.1412365

printed in
switzerland

Contents

Contents ... V
Abbreviations ... VII
Introduction ... 1
1. From printers‘ privileges to authors‘ rights ... 5
2. French dramatists win the first copyright laws ... 13
3. From permitted adaptations to the protection of derivative works ... 18
4. On music boxes and other mechanical musical instruments ... 22
5. The route to the Berne Convention ... 27
6. Where do literature and art begin and end? ... 36
7. Countering monopolies with legal licences ... 42
8. Music copyright becomes international ... 46
9. The neighbours rush to the table, and corporatism discovers the music industry ... 52
10. Swiss copyright law under French rule ... 59
11. After the Great War: cleaning up the mess ... 66
12. A new kid on the block ... 71
13. Germany implements levies; America discovers fair use ... 75
14. The Berne Union is elbowed out ... 81
15. Television jumps frontiers ... 86
16. All change: America relates copyright to trade ... 91
17. In with the EU, and the WIPO comes back ... 99
18. The EU harmonises its copyright laws ... 105
19. The digital world runs out of control ... 110
20. Resistance from the sciences ... 115
21. Switzerland’s route to copyright independence ... 120
22. The outlook: a host of open questions ... 126
Further reading ... 131

Abbreviations

AKM	Gesellschaft der Autoren, Komponisten und Musikverleger (Austria)
ASCAP	American Society of Composers, Authors and Publishers
BMI	Broadcast Music Incorporation
BIRPI	Bureaux internationaux réunis pour la protection de la propriété intellectuelle
CBS	Columbia Broadcasting Services
DRM	Digital Rights Management
CISAC	Confédération internationale des Sociétés des auteurs et compositeurs
EC	European Community
EDIFO	Société Générale de l'Edition Phonographique (France)
EIDA	Ente Italiano per il Diritto d'Autore
EEC	Eurpean Economic Community
EES	European Economic Space
EU	European Union
FIAPF	Fédération internationale des associations de producteurs de films
FIM	Fédération internationale des musiciens
GATT	General Agreement on Tariffs and Trade
GDT	Genossenschaft deutscher Tonsetzer

GEFA	Schweizerische Gesellschaft für Aufführungsrechte
GEMA	Gesellschaft für mechanische Aufführungsrechte (Germany)
GRUR int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil
IFPI	International Federation of the Phonographic Industry
ILO	International Labour Organisation
NAB	National Association of Broadcasters
NLM	National Library of Medicine (U.S.)
OMPI	Organisation Mondiale de la Propriété Intellectuel
PRS	Performing Rights Society (Great Britain)
RCA	Radio Corporation of America
SACD	Société des auteurs et compositeurs dramatiques (France)
SACEM	Société des auteurs, compositeurs et éditeurs de musique (France)
SIAE	Società Italiana degli Autori ed Editori
STAGMA	Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Aufführungsrechte (German Reich)
SUISA	Schweizerische Gesellschaft für die Rechte der Urheber musikalischer Werke (now: SUISA, Genossenschaft der Urheber und Verleger der Musik)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNO	United Nations Organisation
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performers and Phonogramme Treaty
WTO	World Trade Organisation
ZUM	Zeitschrift für Urheber- und Medienrecht

Introduction

Copyright law is still relatively new. Legal instruments comparable to today's copyright laws were quite unknown to antiquity or the middle ages. It was only in the modern period that specific privileges or more general principles relating to works of literature and art were recognised, and these mainly concerned the rights of printers or publishers to protect themselves against the reproduction of their works.[1]

This is rather curious. Art and literature were hardly foreign to the ancient world or medieval times: we continue to draw on the great artistic and literary achievements of these periods, and today's jurisprudence and legislation are marked by the knowledge of the Greek philosophers and the skills of Roman legal theorists. So why, as it seems, was there no need for the legal regulation of the use of literature, art, and other intellectual works in these times?

The answer is simple: it is only when works of literature and art become commodities to be bought and sold that copyright comes into play. "Artistic, scientific, and literary production has always come into focus with the emergence of commercial value and a market for its works."[2] At first this applied to the fine arts, although here it was not the finished work but the process of production that was bought and sold. The big change came only with the invention of printing. Books and art works could suddenly be manufactured in large quantities, copies began to be distributed by specialised book or art dealers, and the need for legal regulation emerged.

It was somewhat later that the social and economic basis on which music and drama were produced began to change as well. Until the collapse of feudalism, composers were supported by religious or secular patrons, and music and theatre were performed by travelling artists who lived from the income they earned along the way. A market for musical or dramatic works and, with it, the need for legal regulation emerged only when dramatists and composers were forced to make a living from the sale and distribution of their own works.

---

1 More detailed accounts of the history of copyright can be found, for example, in Peter Baldwin, The Copyright Wars, Princeton and Oxford 2014; Eckhard Höffner, Geschichte und Wesen des Urheberrechts, München 2010/2011; Fedor Seifert, Kleine Geschichte(n) des Urheberrechts, München 2014; Michael Walter, «Die Oper ist ein Irrenhaus», Stuttgart/Weimar 1997, pp. 204–251.

2 Artur-Axel Wandtke, Aufstieg oder Fall des Urheberrechts im digitalen Zeitalter?, in: UFITA 2011/III, pp. 649–684 (653).

Copyright was the legal response to these social, economic, and technical changes. Because circumstances and legal systems varied between countries, copyright did not develop as a uniform body of international law, but developed on a piecemeal basis on the national level and slowly assumed a transnational form. The various differing starting points remain visible today, and are particularly clear in the contrast between Anglo-American notion of *copyright* and the European *droit d'auteur.*[3]

The history of copyright law is therefore not simply a history of legal theory. It can not be explained purely in terms of the development of legal doctrines or the succession of legal norms: such theoretical foundations have undoubtedly had an effect on its development, but the origins and evolution of copyright law owe far more to the ways in which social, technical, and economic developments have played out in the field of intellectual work. Only in this context can the history of copyright be understood.

This holds for the present too: within a short period of time, copyright has developed from a specialised legal area of concern to a few experts to a matter of everyday importance for large sections of society far beyond the academic world. Once again, the reasons for this lie not on the level of ideas, but with the material realities of economic globalisation, the digitisation of text, sound, and images, and the development of the internet. These are the kinds of developments to which new kinds of copyright law seek to respond with decisions that are not made on a purely political basis, but again result from specific social and economic interests and technical circumstances.

The following sketches of copyright history draw attention to this political and economic background in an effort to provide some context and resources for current revisions of copyright law. An awareness of the ways in which copyright law has developed can provide insights into the origins of prevailing norms and so take us beyond the dogmatic pursuit of legal validity when considering their future development.

This work was inspired by *Autoren und Apparate*, Monika Dommann's highly informative study, published in 2014, which was the first to consider the close relationships between the development of photocopying, techniques of musical repro-

[3] Alain Strowel, Droit d'auteur et copyright. Divergences et convergences, Bruxelles/Paris 1993.

duction, and copyright over a long period of time (1850–1980)[4]. The results of this social-historical analysis are innovative and, from a legal point of view, surprising too. *Copyright Stories* draws on Monika Dommann's work in several ways, and would not have been possible without it.

Copyright Stories was first published in June 2017 for a Swiss audience and pays particular attention to the development of copyright in Switzerland. It has been partly revised and completed for the present English edition. The two chapters referring to Swiss copyright have been retained because they illustrate the strong influence of social and technical developments and the evolution of the law.

Sadie Plant translated the text, Veronika Anderson revised the notes and added references. Rafael Egloff sourced the illustrations and prepared them for print. I thank them all for their invaluable support.

4 Monika Dommann, Autoren und Apparate. Die Geschichte des Copyrights im Medienwandel, Frankfurt a.M. 2014.

1. From printers' privileges to authors' rights

Queen Anne, the last monarch of the House of Stuart who reigned 1702–1714, united England and Scotland by treaty to form the United Kingdom of Great Britain in 1707. From a copyright perspective, the significance of Queen Anne's reign lies not, however, in this union, but in the 1709 passage of "An Act for the Encouragement of Learning, by vesting the Copies of printed Books, in the Authors or Purchasers of such Copies, during the Times therein mentioned" (known as The Statute of Anne).[5] This is widely held to be the first copyright act in the world.[6]

The main content of the Statute of Anne can be summarised as follows:
- For a duration of 21 years from the date of the act, April 10th 1710, any book already printed can only be printed or published again by the author, as long as the author has not transferred the copy of the book to a publisher, bookseller or another person.
- For all future books, which are not yet printed and published, a limit of 14 years from the first publication is stipulated, during which only the authors or their assignees are permitted to reprint or reissue them.
- Anyone who prints, reprints, or imports a book in contravention of the statute may be required to destroy the copies. In addition a penalty of one penny per page can be demanded, half of which goes to the Queen and the other half to the claimants.
- Copyright protection applies only if the book has been entered in the Stationers' Company "Register-Book". Publication in the *Gazette* is sufficient should the Stationers' Company secretary refuse to register the book.
- Prior to publication, a copy of the book must be deposited in each of nine libraries, including the Royal Library, the libraries of the Universities of Cambridge and Oxford, the Library of Sion College in London, the libraries of the four uni-

---

[5] The Statute of Anne came into force in the first few weeks of 1710 (the years then turned on "Lady Day", March 25th), but most of its passage through parliament occurred in what was then still 1709. The history of the statute is extensively described in RONAN DEAZLEY, On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775), Oxford 2004, pp. 31-110; ALBERT OSTERRIETH, Die Geschichte des Urheberrechts in England mit einer Darstellung des englischen Urheberrechts, Leipzig 1895, reprinted in: UFITA 131/1996, pp. 171–274, and 132/1996, pp. 101–231, and in HÖFFNER, op. cit., Band 1, pp. 97–123.

[6] NORBERT P. FLECHSIG, Der englische Bach aus Leipzig und das erste Urheberrechtsgesetz der Welt heute vor 300 Jahren, in: UFITA 145/2010/II, pp. 445–475; see also MARK ROSE, Authors and Owners, Cambridge (MA) 1993, p. 4.

versities in Scotland (St Andrews, Glasgow, Aberdeen, and Edinburgh), and the library of what was then known as "the Faculty of Advocates" in Edinburgh.
– Books printed abroad in Greek, Latin, or other foreign languages are exempt.
– Once the 14 year period has elapsed, the right to reprint or disposing of a book reverts to the authors, if they are still alive, to whom an additional period of 14 years is granted.[7]

What was new about this statute? As early as 1533, in England, an edict from Henry VIII had already prohibited the overseas purchase and sale of printed and bound publications in an effort to give the crown complete control over the production and distribution of books.[8] After 1539, books in English could only be imported, published or sold with special royal permission. Under Queen Mary I, who reigned in England between 1553–1558, this privilege became a pure instrument of censorship, with the Catholic Queen primarily concerned to prohibit Protestant literature in order to eradicate the reformation in England. The censoring body was the Stationers' Company, which monopolised the printing of books for their own members and also assumed policing and judicial functions.[9] This censoring role remained the central function of the royal privilege under Queen Mary's successor, Queen Elizabeth I.[10]

The comprehensive and detailed nature of the controls which applied to the book trade is particularly clear from a decree issued by the English Star Chamber on July 11th 1637.[11] This decree stipulated that every book and pamphlet had to be officially approved and entered in the register of the Stationers' Company prior to printing. Comprehensive import controls were established in order to prevent the circumvention of this rule by printing overseas: books entering the country from abroad could only be imported through the port of London, where they were

[7] The Statute of Anne, 8 Ann. c. 19.

[8] An Act for Printers, and Binders of Books, 1534, 25 Henry VIII. c. 15.

[9] Flechsig, op. cit., p. 446; see also Melissa de Zwart, A historical analysis of the birth of fair dealing and fair use: lessons for the digital age, in: Intellectual Property Quarterly 2007, (1), p. 66.

[10] Cf. the detailed overview in Osterrieth, op. cit., pp. 189–223; see also Ann L. Monotti, Nature and basis of Crown copyright in official publications, in: European Intellectual Property Review, 1992, 14(9), pp. 305–316.

[11] Osterrieth, op. cit., pp. 227–231; see also de Zwart, op.cit., p. 66; John Rushworth, The Star Chamber on printing, 1637, in: Historical Collections of Private Passages of State, Volume 3, 1639–40, London 1721, pp. 306–316; British History Online: http://www.british-history.ac.uk/rushworth-papers/vol3/pp306–316.

subject to the controls of specially assigned officials, and the number of printing presses and printing houses and even the number of employees was also regulated in painful detail. All this makes it abundantly clear that the regulations applying to the printing and publication of books at this time had nothing to do with the rights of those participating in the trade, but were rather instruments of pure censorship.

Anne, Queen of Great Britain and Ireland, presented "An Act for the Encouragement of Learning, by vesting the Copies of printed Books, in the Authors or Purchasers of such Copies, during the Times therein mentioned" in 1709 (painting by Willem Wissing and Jan van der Vaart).

The obligation to deposit copies demanded by the Statute of Anne was also nothing new. This too had already been part of the 1637 decree, article 33 of which stipulated that a copy of every newly printed book was to be deposited in the library of the University of Oxford. Most subsequent decrees had extended this obligation, until nine copies were required in the Statute of Anne.

The real novelty of the Statute of Anne lay in the fact that it was now not only books that had already been printed that were the object of statutory regulation, but future works as well. "The Author of any Book, already composed, and not printed and published, or that shall hereafter be composed [...]" was now in receipt of a 14 year period of protection against reprinting from the date of publication of the work.[12] Since such books did not yet exist, statutory protection could not be linked to the production process as had been common in the past, but instead referred to the simple intention to write a book. This tied the protection directly and exclusively to the author, and referred to a future commodity over which, at least until its completion, only its author can have any rights. For the first time, the statutory rights of printers, which had served both to protect the booksellers' and publishers' guilds, and as an absolute instrument of censorship, were supplanted by the rights of authors over their own completed or envisaged intellectual works.[13]

It was this new relation to intellectual activity – the separation of the material work, the book, from its immaterial contents, the intellectual creation – that allowed the Statute of Anne to take the first significant steps towards the development of copyright law.[14] For the first time, legal protection was extended to immaterial objects, i.e. to texts which had not yet appeared as a printed book. At the same time this legal protection required a subject to which it could be attached, who would function as the bearer of this right and to whom these immaterial objects could be attributed in a meaningful sense.[15] In the Statute of Anne this was the author, as long as he or she has not already sold the work. The author thus remains author only as long as he or she has not disposed of the immaterial work he or she has created.

12 8 Ann. c. 19.

13 William Cornish, Part Five: Personality Rights and Intellectual Property, in Sir John Baker (ed.), The Oxford History of the Laws of England, vol. XIII, Oxford 2010, pp. 880-881; Flechsig, op. cit., pp. 452–454.

14 Sabine Nuss, Copyright & Copyriot, Münster 2006, pp. 184–186.

15 Nuss, op. cit., pp. 185–186.

The preamble to the Statute of Anne makes it clear that this new regulation is "for the Encouragement of learned Men to compose and write useful Books".[16] The aim was therefore to make the writing of books commercially viable. A Swiss dissertation by Johann Rudolf Thurneisen, completed in 1738 at the University of Basel,[17] described the need for such a regulation as follows: "If you are the author of a book, you try to sell your work to a bookseller for a fair price, to the exclusion of any other distribution to the public. The bookseller will praise the author's work if it is well written, but may not pay the author more because of the risk he is taking: his effort to acquire the book might not pay off if, shortly after the printing he has organised, someone else steals the book and prints it again and thereby sells it at a lower price, because he is spared the expenses that the first printer had with regard to the author of the book. In this way, an honest bookseller who, satisfied with a modest profit, seeks to promote the interests of science will be deterred from acquiring and publishing the work of even the most learned man in the future, unless this could be done for a very small price. But if the work and reflection of scholars is so poorly rewarded, there will soon be no one among them willing to write books that serve the public good and the sciences. Or if someone does put his thoughts on paper, they will mean too much to him to make him willing to sell them for a low price to a bookseller. He will instead prefer to keep them – which is bad enough and already often happens – in his own four walls, or only to allow his students, friends, and relatives to read them, so that the learned world will have to do without the benefits it could derive from them. This leaves many excellent ideas and ideas of scholars to rot and perish, which has no small consequence for science and the public good".

The clarity with which this lawyer, who worked only in Basel and seems never to have left the city, could see the concurrent economic and scientific interests that would later form the basis of copyright protection is remarkable.[18] It was clear to him even 300 years ago that copyright aimed at protecting both investment in the production of the work and the distribution of copies of the work. This was to be achieved by stating that works printed with the permission of the author could not be reprinted within a certain period. Exempt were books "which have been printed in distant regions in which our booksellers are not active", as well as out-of-print

[16] 8 Ann. c. 19.

[17] Johann Rudolf Thurneisen, De Recusione Librorum Furtiva, Basel 1738; a German translation by Hans Thieme is published in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 13–46.

[18] Hans Thieme, Zur Entstehungsgeschichte des internationalen Urheberrechts aus dem Kampf gegen den unerlaubten Büchernachdruck, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 1–46.

books from which no damages are incurred. The aim of these measures was not only to protect the "first printer", the publisher, from unfair competition and to secure a more or less appropriate payment for the author: they were more concerned with ensuring that texts could be published and made available so that the "learned world" would not "have to do without the benefits it could derive from them".

In this respect, Thurneisen was anticipating what late 20th century economic analysis[19] would highlight as the primary function of copyright law: "In a situation without copyright protection, in which the author would not be able to preclude non-paying consumers from using his work, the copyist would be in competition with the information producer and could offer the same product at the low cost of the copy. This competition between information producers and copyists would mean that the price to be obtained on the market would approximate the marginal costs of the copyist […]. Without the prospect of recouping the production costs from the future sales of a product, the economic motivation to produce such a product in the first place would be lost".[20]

Even in this earliest conception, copyright was therefore far from being simply an individual right, but was instead aimed at a wider public interest: access to knowledge. But Thurneisen's analysis remained purely theoretical. The need to use copyright protection to facilitate and encourage the dissemination of knowledge had not yet assumed the economic urgency that would later give it a political significance.

Early 18th century English legal thought, for which the Statute of Anne presented a big challenge, had no such rigorous understanding of the issues raised by copyright, and the legal basis on which a book yet to be published could be protected against reprinting was far from clear. Because there was no material object to be protected, the customary connection to the printed book was of no help, and many contemporary lawyers concluded that the regulation of an original literary work had to be deduced from common law. This view was based in particular on court judgements concerning the distribution of manuscripts which had been printed without the permission of their authors. Because these texts were not legally pub-

---

[19] Christian Kirchner, Ökonomische Theorie des Rechts, Berlin/New York 1996; see also Richard A. Posner, An Economic Analysis of Law, 9th edition, New York 2014; Hans-Bernd Schäfer/Claus Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, 3. Auflage, Berlin 2000.

[20] Georg Nolte, Informationsmehrwertdienste und Urheberrecht, Baden-Baden 2009, p. 39. Cf. Marcel Bisges, Ökonomische Analyse des Urheberrechts, in: ZUM 2014, pp.930–938.

lished, they did not appear in the register of the Stationers' Company, and were not therefore subject to the Statute of Anne's provisions prohibiting their distribution and allowing for their confiscation. The distribution of such works could be prohibited by the courts only on the basis that authors had a right independent of the Statute of Anne to determine the use of their work. The same applied to judgements of the Court of Chancery concerning works whose protection under the Statute of Anne had already expired. Here too the prohibition on reprinting could only be based on the author's exclusive rights to immaterial work complementary to the statutory regulations, and this had its legal basis in the common law, the body of court decisions recognised as binding norms.[21] That a notion of literary property could be derived from the common law in addition to the rights laid down in the Statute of Anne was expressly confirmed in the judgement Millar v Taylor by the King's Bench delivered on June 7th 1768.[22]

An appeal to the highest court in the United Kingdom, the House of Lords, was made by an unsuccessful defendant against a similar and later decision by the Court of Chancery on November 16th 1772. In the judgement Donaldson v Becket, made on February 25th 1774, the House of Lords overturned the decision of the Court of Chancery and the position of the King's Bench in the case Millar v Taylor (1769), with a declaration that there was no notion of literary property aside from that laid down in the Statute of Anne.[23] An attempt to overturn this judgement by the passage of a new statute was rejected by the upper house of the Parliament of the United Kingdom (the House of Lords) in the same year, and the common law notion of literary property deriving from natural property law lost its legitimacy for decades to come.[24]

The legal position of the House of Lords was also reflected in the US Copyright Acts. The 1776 Declaration of Independence had robbed the Statute of Anne of its validity for the new states, and although 12 of the 13 former British colonies

---

21 Deazley, op. cit., pp.122–132; see also Osterrieth, op. cit.., p. 108.

22 David J. Brennan, The root of title to copyright in works, Intellectual Property Quarterly 2015 (4), pp. 295-297; see also Deazley, op. cit., pp. 169–190; Osterrieth, op. cit., pp. 108–138.

23 Cornish, op. cit.; see also Deazley, op. cit., pp. 191–210; Hector Macqueen, The War of the Bookseller: Natural Law, Equity, and Literary Property in Eighteenth-Century Scotland, The Journal of Legal History, 35;3, 2014, pp. 231–237; Flechsig, op. cit., p. 467.

24 Brennan, op. cit., p. 300; see also Osterrieth, op. cit., pp. 138–159.

passed their own copyright statutes in an effort to fill this gap within a few years,[25] this local legislation was short-lived: in 1787 responsibility for such legislation was assumed at a federal level in the draft US Constitution, which came into force in 1789 and provided the basis for the Federal Copyright Act in 1790. As with the Statute of Anne, this federal legislation applied only to written works. The 1790 Federal Copyright Act also granted protection only to works which were registered with the District Court, and meant that all texts printed abroad were excluded from copyright law unless the author was a US citizen. In this respect the legislation aimed to protect the domestic printing industry as well as encouraging a local literary culture. The express goal of Article I § 8 cl. 8 of the 1787 US Constitution, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Investors the exclusive Right to their respective Writings and Discoveries", was fundamentally utilitarian.

The Statute of Anne and the subsequent US Copyright Acts turned copyright from a pure publisher's privilege into a simple extension of authors' rights to the production of literary works on home territory.[26] The recognition of the legal protection of immaterial objects, irrespective of their material form, and the vesting of the right in the author of a text, was an important step towards an independent copyright law. But in 18th century Britain and during the early years of the United States, the notion of copyright was far from a comprehensive ownership of intellectual works of the kind imagined by Basel's Johann Rudolf Thurneisen.[27]

[25] De Zwart, op. cit., p. 81; see also Heimo Schack, Die ersten Urheberrechtsgesetze in den Vereinigten Staaten von Amerika 1783–1786, in: UFITA 136/1998, pp. 219–231.

[26] De Zwart, op. cit., pp. 81-88; see also Cyrill P. Rigamonti, Geistiges Eigentum als Begriff und Theorie des Urheberrechts, Baden-Baden 2001, pp. 20–22.

[27] Nuss, op. cit., pp. 213–214.

2. French dramatists win the first copyright laws

On July 3rd 1777, a group of dramatists whose work had been accepted by the *Comédie Française* met to discuss how they could work together to defend their rights. They had been invited to the home of Pierre-Augustin Caron de Beaumarchais, who had just enjoyed a major triumph with his play *La Précaution inutile ou le Barbier de Seville,* but felt badly treated by the *Comédie Française*: in response to his demands for a higher fee after 31 successful performances, the theatre had abruptly closed the show.[28]

Beaumarchais had been charged by the King to deliver a report on the economic situation of playwrights, and had come to the conclusion that he and his colleagues were being systematically denied the royalties to which they were entitled from the *Comédie*.[29] It was generally accepted that an eighteenth of the net income generated by the performance of a one act play, and twice as much for a five-act drama, would go the playwright.[30] But the theatre's accounting practices ensured that payments were laughable, if made at all: income generated by subscriptions was not taken into account, and every possible expense was claimed. For his *Barbier*, Beaumarchais had received only 5,418 livres of the 78,166 received by the *Comédie*, a payment which he challenged in the courts.[31]

One reason for the dramatists' dissatisfaction was the fact that the law offered no protection against the performance of works without authorisation. French publishers had privileges intended to prevent the reprinting of works without the consent of the rights holders, but these did not extend to authors. Works produced for the stage were often not printed at all, but sold to a theatre which then used them on its own account. Authors received royalties from the particular theatre to which they had sold their work, but not from the numerous theatres outside the capital on which their plays were later staged.[32]

---

[28] Christian Sprang, Grand Opéra vor Gericht, Baden-Baden 1993, pp. 30–31.

[29] Artur-Axel Wandtke, Beaumarchais et la propriété intellectuelle. «Eine Nation ist nur dann wahrhaft frei, wenn sie sich dem Recht beugt», in: UFITA 2008 II, pp. 389–421 (399–401).

[30] André Bertrand, Le Droit d'Auteur et les Droits Voisins, 2. Edition, Paris 1999, p. 30.

[31] Sprang, op. cit., p. 30; see also Wandtke, op. cit., pp. 401–403.

[32] Walter, op. cit., p. 204.

The 21 dramatists who met at Beaumarchais' invitation resolved to withhold new works from the theatre until their demands were met. This allowed them to put the protection of performance rights on a completely new footing, and finally, after a three year boycott, the theatre directors gave in. In December 1780 the *Conseil du Roi* passed an *arrêt* which included a system of royalties more favourable to the authors of theatrical works.[33]

In the wake of the revolution, the Beaumarchais group petitioned the National Assembly to demand legal recognition of an exclusive right of authors to their works.[34] Only a few months later, on January 13th 1791, the National Assembly passed a law which met this demand in full.[35] Article 3 of this decree stated: "The works of living authors may not be performed by any public theatre in France without the author's formal and written consent; in the event of infringement, all proceeds from the performances must be collected in favour of the author."

The reasoning behind this law makes its ideological basis clear. The National Assembly was persuaded by the argument that "(t)he most sacred, personal property is that of a work that has arisen from a writer's thoughts. Since it is only fair that people who carry out intellectual work can draw certain fruits from this work, it is right that during their lives and for a few years after their death, no one else should have access to the products of their minds without their consent."[36] The report of the National Assembly gives clear expression to the idea of a property right in literary and artistic work.

Once again, this notion of intellectual property tied intangible goods to their authors rather than to their material form ("a work that has arisen from a writer's thoughts"). Unlike early 18th century England, revolutionary France also provided another precondition for the development of intellectual property rights: the separation of the original producers from the means of production.[37] Writers for the theatre no longer had the opportunity to perform their plays in their own theatres and with their own companies, but were authors only insofar as they sold their texts to theatre directors. A similar situation applied to the composers of musical works for the theatre. Those who could not support themselves from other activities or inherited wealth survived by selling their intellectual works as commodities to the

---

33 Bertrand, op. cit., p. 30; see also Wandtke, op. cit., pp. 405–406.

34 Sprang, op. cit., p. 32.

35 Bertrand, op. cit., pp. 31–32.

36 Bertrand, op. cit., pp. 31–32; see also Sprang, op. cit., p. 32.

37 Nuss, op. cit., p. 160.

The writer Pierre-Augustin Caron de Beaumarchais led the fight for the first copyright law (drawing by H. Rousseau).

owner of the means of production, i.e. theatre directors. Only these market freedoms – the lack of power of disposal over the necessary means of production on the one hand, and the lack of opportunity to earn a living other than by selling one's own labour on the other – creates the need to turn the results of intellectual activity into tradeable commodities. It is only on the basis of these social necessities that the legal requirement for the development of copyright arises.[38]

Since this notion of intellectual property does not refer to a discernible commodity as its object, it has to assume a special legal form, namely the exclusive right of use.[39] Unlike with the ownership of goods, the ownership of intellectual property is not something that can be transferred by moving a legal object, but rather by the reassignment of rights of use. This is precisely what Article 3 of the 1791 law stipulates: the work of living authors may only be performed with their formal and written consent. This grants authors the power of disposal over their intellectual creations: they decide which theatre is allowed to perform their work and on what conditions it may do so, and are therefore able to offer and sell their works as commodities.

It was only two years later that the National Assembly began to see performance rights for playwrights as part of a broader issue of rights of use applicable to a much larger circle of people: a general right of reproduction and distribution. The first article of a law passed on July 19th 1793 stated: "The authors of texts of all kinds, the composers of music, the painters and the draughtsmen who have their paintings or drawings printed, enjoy for their whole life the exclusive right to sell, have sold, to distribute and to assign ownership of their works or parts of it in the territory of the Republic."[40]

This recognition of literary and artistic property was not, it soon transpired, understood to be an absolute right, even in revolutionary France. Court decisions soon limited the applicability of these provisions to works which were first published in France;[41] all other works, including dramas and operas that had been published abroad or premiered outside France, remained unprotected and could be freely per-

38 Nuss, op. cit., p. 161.

39 Nuss, op. cit., pp. 183–184.

40 Bertrand, op. cit, pp. 32–33; see also Sprang, op. cit., pp. 32–33.

41 Pierre Despatys, Du droit de représentation des oeuvres dramatiques, Paris 1897, p. 216.

formed in French theatres without recompense. French theatres could use such works without their authors having any chance to defend themselves.

But the Beaumarchais group had at least won new and enforceable rights for local authors. It controlled theatrical schedules via agents who worked in all the major French cities, negotiated performance contracts on behalf of the authors and collected the royalties due to them.[42] The organisation became the *Société des auteurs et compositeurs dramatiques* (SACD) in 1829, and is still in existence today. From the start it committed its members to prescribed compensation rates in order to prevent competition in terms of royalties: authors who undercut the stipulated tariffs by making individual agreements with theatres were excluded from the society and therefore lost the social benefits it provided.[43] The Beaumarchais group thus not only won the struggle for the first copyright law worthy of the name, but also laid the foundations of the most important instrument of any collective exploitation of rights: the collecting society.

The significance of such societies for the enforcement of copyright claims was already clear, particularly in French musical circles. While the SACD succeeded in gradually extending the rights of dramatists and composers for the musical theatre by instituting or supporting court proceedings against copyright infringements, performance rights to other kinds of musical works existed only on paper for some time. Some music publishers took action against the illegal performance of works they had published, but composers themselves were rarely involved in such proceedings. The enforcement of these rights was also beyond their financial means. But this changed abruptly when composers of non-dramatic music got together with music publishers to found the *Société des auteurs, compositeurs et éditeurs de musique* (SACEM) in January 1851. This society began to represent its members to concert promoters, and quickly gained considerable clout in the enforcement of claims and in the extension of the protection of performance rights.[44] Both the SACD and the SACEM still exist today, and the division between dramatic and non-dramatic composition which they represent continues to inform contemporary copyright law.

---

42 WALTER, op. cit. p. 207; see also WANDTKE, op. cit., pp. 405–406.

43 SPRANG, op. cit., p. 72; see also WALTER, op. cit., p. 213.

44 SPRANG, op. cit., pp. 160–168.

3. From permitted adaptations to the protection of derivative works

In August 1824, Gioacchino Rossini took over the management of the *Théâtre Italien* in Paris. Rossini was already celebrated throughout Europe, and his reputation grew enormously in France when he composed the opera *Il viaggio a Reims* for the 1825 coronation of King Charles X. When the King appointed him as the *Premier compositeur du roi* and asked him to write operas in French, Rossini first reworked two previously published Italian works: he developed *Le siège de Corinthe* (1826) from *Maometto II*, which had premiered in Naples in 1820, and *Moïse et Pharaon* (1827) from *Mosé in Egitto*, which had premiered in Naples in 1818.

These versions of the operas put Troupenas, the music publisher who had won the race to acquire the rights to them from Rossini, at odds with his competitors. Aulagnier and Pleyel, for example, published several excerpts from *Maometto II* and *Mosé in Egitto* which they defined as "fantasies" or "variations" on the works, while at the same time acknowledging that the music itself was from Rossini's two French operas. Since the operas had been published in the original Italian version in Italy, they were not protected by French law, but were considered to be in the public domain. Troupenas lost the case he brought against his competitors: the court confirmed that there was no prohibition on the reproduction of works which had been published abroad by foreigners.[45]

The use of excerpts from foreign operas was commonplace in early 19th century Paris: a study published by de Place and Randier shows that most of the 1,870 musical works published in Paris in 1830 were transcriptions and arrangements of operatic arias.[46] Although such secondary exploitation of excerpts was onsidered to be legal at the time, it soon became a matter of another court dispute when the music entrepreneur Masson de Puitneuf began to stage open air concerts every evening on the Champs-Élysées in 1833 with orchestral performances of the most popular arias, and sometimes entire works, from the current repertoire of Parisian operas.[47]

In an effort to ward off such competition, opera house directors took legal action against Masson de Puitneuf. The main problem was that the law of 1791 made explicit reference to the protection of performances held in public theatres, and it

---

[45] Sprang, op. cit.., pp. 40–46.

[46] Adelaide de Place/Anne Randier, L'Edition musicale, in: Bibliothèque Nationale (éditeur), La Musique à Paris en 1830, Paris 1983.

[47] Sprang, op. cit., p. 57.

was by no means clear that this covered concerts too. Nevertheless, the court accepted the claimants' case and prohibited the performance of operatic excerpts at Masson de Puitneuf's concerts. In an attempt to bypass this decision, he no longer performed original works, but instead commissioned the conductor of his orchestra to write versions and arrangements which would fall outside the ban. This strategy backfired when Masson de Puitneuf discovered that the conductor was selling his arrangements to competitors as well. The conductor walked out, and won the backing of the courts in his insistence that Masson de Puitneuf could not use his arrangements without his consent: a judgement made in 1835 recognised that arrangers could own independent rights to their own versions of works, so that the use of arrangements required their prior consent. Masson de Puitneuf's company did not survive this last defeat, and ceased trading shortly afterwards.[48]

It was only a few years later that the same Parisian court was faced with another difficult question relating to the protection of arrangements. Victor Hugo's 1832 play *Lucrèce Borgia* had been enormously successful in both the *Comédie Française* and the *Théâtre de la Porte St-Martin*. The enthusiasm with which it was received brought it to the attention of Gaetano Donizetti, who – like many of his colleagues – was always on the look out for suitable operatic material. He ordered a libretto based on the story of Lucrèce Borgia from the librettist of *La Scala* in Milan, Felice Romani; this he set to music and performed to great acclaim on St. Stephen's Day 1833 in *La Scala*. The opera was also performed at the *Théâtre Italien* in Paris, from where it went on, using a French translation by Etienne Monnier, to be a triumphant success on many French provincial stages.

Victor Hugo opposed this use of his work, not least because he feared that the success of the opera would be at the cost of his own play. Theatrical works had often lost out to operas, he explained to the court: Beaumarchais' *Barbier of Seville*, for example, had been a very successful play before Rossini's eponymous opera was performed in French, after which no one wanted to see a *Barbier of Seville* without music, and Beaumarchais' comedy disappeared.[49]

Again, this conflict of applicable laws presented the courts with some difficult legal questions. Since French law did not apply to an opera which had been composed and first performed in Italy – and, conversely, since neither Habsburg nor Lombardy law protected Hugo's work, which had been first performed in France – it was

[48] Sprang, op. cit., pp. 57–65.

[49] Sprang, op. cit., pp. 100–117.

The Théâtre Italien in Paris, 1840 (Drawing by Eugène Lami).

unclear where copyright protection could be based. As he had done in many other cases, Monnier had simply translated the Italian libretto into French without ever seeing Hugo's play: this was not in dispute. And as Monnier's lawyer was keen to point out, it was by no means clear that an opera could be considered a counterfeit of a play.

In the light of these complexities, Hugo sued Monnier, the translator, and his publisher, but decided not to oppose the Italian-language performance of Donizetti's opera at the *Théâtre Italien:* this posed no threat to his work, he said. At first instance, this argument was entirely accepted, and the court prohibited any further use of the French libretto. While the *Court Royale*, which gave the final judgement, also prohibited the sale of books containing Monnier's libretto, its verdict was rather more ambiguous: only the purely French libretto could be considered a counterfeit, and all other uses of the opera were permissible. Although it was unsuccessful, this first attempt to achieve exclusive rights for authors over works derived from those they had composed themselves was of historic importance.

Hugo's failure to defend his rights to the drama *Le roi s'amuse* was more emphatic still. The work had served as the basis for Piave's libretto for Verdi's *Rigoletto*,

which premiered in Venice in 1851, so the constellation was almost the same as in the case of *Lucrèce Borgia.* This time, however, the court held that exclusive rights are lost forever to authors who had not objected to a counterfeit within three years of its printing or performance, and because he had not contested the French publication of the printed edition of Rigoletto, Hugo's case was dismissed and he had to pay the costs.[50] It was only in 1867 that a ruling by the *Cour Impérial* on a case brought by the widow of Eugène Scribe against the *Théâtre Italien* clarified this line of decisions in favour of exclusive rights for authors to derivative works in the form originally proposed by Victor Hugo.[51]

These developments demonstrate that although the concept of intellectual property, as an exclusive right of use attributed to authors on which copyright is based, was by now well-established, its implementation came up against the territorial limits of state jurisdictions. This soon led to a search for additional legal instruments, not least in an effort to deal with music, an art form which crossed national boundaries with particular ease.

Copyrighting music soon faced another challenge too: the development of mechanical instruments, to which we now turn.

[50] Sprang, op. cit., pp. 215–218.

[51] Sprang, op. cit., pp. 268–271.

4. On music boxes and other mechanical musical instruments

The protection of musical works against unauthorised performances in public theatres, as well as against copying scores without permission, was by now well-established in France. In the rest of Europe, however, musical works were often protected only against their unauthorised multiplication in printed form. As long as the musicians used lawfully purchased scores, or when the performance took place without scores, the law did not apply. In other words, legal protection applied only to printed music and not to the music itself.

The high status assumed by written music in the copyright debate is also clear from the fact that authors were defined not only as those writing music, but also as those collecting and transcribing traditional music that had never been written down. Such publications were also considered to be works of art, as Vesque von Püttlingen reasoned in his 1864 commentary on musical copyright: a publisher "has first recognised the artistic value of the work, and published it from this point of view; through his own mental energy he has drawn it out of obscurity and so created it anew for the musical public."[52] Musical composition was thus equated with the act of "putting music on paper", and no regard was given to the actual original creator of the music.[53]

But protections based on musical scores proved completely ineffective when it came to the mechanical reproduction of musical works. Although mechanical musical instruments had been produced for centuries, the music boxes which were first developed in Switzerland at the beginning of the 19th century were of unprecedented economic significance.[54] What began as the invention of a single Geneva-based watchmaker soon developed into a major Swiss export: by 1867, when music boxes were the subject of Switzerland's presentation at the World Exhibition in Paris, the annual production of these instruments was valued at CHF 2 million,[55] which corresponds to a current economic value of around CHF 1 billion.

The notion that composers might need to give permission for their works to be transferred to such instruments seems not to have arisen at first. The first music boxes were extremely limited in technical terms and thus regarded not as instru-

---

[52] Johann Vesque von Püttlingen, Das musikalische Autorrecht. Eine juristisch-musikalische Abhandlung, Wien 1864, republished in: UFITA 2001/I, pp. 137–277.

[53] Dommann, op. cit., pp. 40–42.

[54] Dommann, op. cit., pp. 43–46.

[55] Dommann, op. cit., p. 43.

The Voix Céleste music box manufactured in St-Croix, 1870

ments but ornaments: this was a form of reproduction that seemed to have nothing to do with the reprinting of scores and the copyright protection that applied to printed music.

It is therefore no surprise that the first legal disputes over mechanical musical instruments arose in France, where the *antiphonel*, a far more sophisticated device invented in 1846 by Alexandre François Debain, aroused the displeasure of music publishers. With the aid of what were known as *planchettes,* metal studded wooden keys, this mechanical piano was able to reproduce practically any piano piece note-for-note, or transpose it into another key. Much to the annoyance of the publishers, the *antiphonel* sold extremely well, especially in association with arrangements of popular operatic arias: by 1859, there were at least ten companies specialising in the manufacture of such instruments in Paris alone. This at least was the claim made by the lawyer representing the Escudier brothers, music publishers, when he applied for an order to confiscate all the *planchettes* in Debain's factories which were programmed with musical works to which his clients had exclusive rights.[56] The immediate occasion for this dispute was the Escudiers' acquisition of the exclusive rights to piano versions of Verdi's opera *Les vêpres siciliennes* in France.

[56] Sprang, op. cit., pp. 242–249.

In a rather free interpretation of the law, the court of first instance held that the production of such *planchettes* was to be equated to the publication of a score, and therefore required the permission of the rights holder.[57] The judgement did not, however, become legally binding, because, in the course of an appeal, the parties agreed a settlement in which Debain paid the music publisher compensation for the production of *planchettes* and in return received the exclusive right to reproduce these pieces on mechanical instruments. Debain subsequently became a tireless defender of the rights assigned to him, and he defeated all his competitors with a multitude of legal proceedings. The French courts imposed strict limits on the transfer of protected music to mechanical devices, defining such reproductions as performances, and considering the unauthorised manufacture of mechanical musical devices to be the production of counterfeits.[58] The transfer of protected music to mechanical instruments was therefore subject to stringent control.

The differing legal positions of Switzerland and France turned the music boxes exported by Switzerland into an ongoing point of contention in the politics of trade between the two countries. France demanded the recognition of exclusive rights for the works of French artists, but the enormous economic importance of the music box industry meant that Switzerland was not prepared to make any concessions regarding the protection of the musical works. The Franco-Swiss trade deal agreed in 1864 was therefore a compromise: on the one hand it established a thorough mutual protection of literary and artistic property, and on the other it expressly stated that music boxes should be excluded from these regulations.[59]

The importance of Switzerland's role in winning this exemption for music boxes can be seen from the way in which international agreements on the protection of literary and artistic works were later drafted in the form of the Berne Convention. The Swiss repeatedly insisted that the production and distribution of music boxes should not be subject to international regulation; a reservation to this effect was inserted in the final protocol of the founding congress which was held in September 1886

57 Sprang, op. cit., pp. 248–249.

58 Sprang, op. cit., p. 249.

59 Dommann, op. cit., p. 45; see also Ernst Hefti, Die geschichtliche Entwicklung des Urheberrechts und die Entstehung des Urheberrechtsgesetzes von 1883, in: Festschrift 100 Jahre URG, Bern 1983, pp. 1–13 (9).

in Berne,[60] and Switzerland successfully defended this exemption at the first revision conference in Paris, 1896.[61]

But the speed at which mechanical musical instruments developed in the second half of the 19th century meant that these comparatively simple music boxes and even Debain's mechanical pianos were soon left behind by a number of far more advanced instruments such as the *Drehorgeln*, the *Orpheone*, the *Herophone*, the *Symphonione* and a host of other such devices.[62] In view of these developments, the German Reichsgericht followed the direction which had decades earlier been taken by the French courts: in an 1888 judgement, it recognised that the transfer of music to mechanical instruments was equivalent to a performance and so caused the same kind of financial loss to the reproduced musical work.[63] The decision granted composers exclusive rights over this form of musical reproduction and so relieved the music box industry of its legal basis in Germany too. At the same time this move opened up a whole new area of rights and royalties which musicians and publishers were only too happy to exploit. The Swiss fought hard to keep the music box clause in the Berne Convention, but they were on their own and finally had to accept that the cause was lost. At German request, the exemption was removed during the second revision conference in Berlin in 1908, and the Swiss too signed the revised version of the convention adopted at the Berlin conference.[64]

In the meantime, far more efficient technologies for the reproduction of music had emerged: the phonograph, invented in the US by Thomas Edison in 1878, and the gramophone, patented in Germany by Emil Berliner in 1887. It became increasingly clear that the whole discourse around copyright and music technology had less to do with legal considerations than pragmatic nationalist interests: when the German parliament revised the Copyright Act in 1901, self-playing pianos imported from the US under the name of Pianola were brought into the scope of the law, while the mechanical musical instruments then being produced in Leipzig remained ex-

[60] Jean Cavalli, Le rôle de la Suisse dans la genèse de la Convention de Berne, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 47–68 (67); see also Seifert, op. cit., pp. 211–212.

[61] Roland Grossenbacher, Die schweizerische Beteiligung an den Revisionsarbeiten von 1886–1971, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 69–84 (70).

[62] Dommann, op. cit., p. 45.

[63] Entscheidungen des Reichsgerichts in Zivilsachen, Band 22 (1888), pp. 174–183; Band 27 (1893), p. 60; see also Seifert, op. cit., p. 212.

[64] Grossenbacher, op. cit., p. 74.

empt.[65] The same thing happened to the economically much more important German gramophones, which were deliberately "exempted from the demands of the composers and their publishers", as the secretary of state made explicitly clear in the parliamentary debate.[66]

In the US, the Supreme Court was also grappling with the legal question of how mechanical musical instruments should be regarded in terms of copyright. In the 1908 case of White Smith Music Publishing Company v. the Apollo Company, the court reached the unanimous decision that a mechanical piano is not a copy in the legal sense. Since copyright protects only printed material, a copy can only be a product that can be seen and read.[67] This once again confirmed the principle that copyright was a means for protecting scores, rather than music itself. In a dissenting opinion, however, Judge Oliver Wendell Holmes made it clear that although he considered the decision to be correct, the consequences were not. His call, that the legislators should adapt the statutory definition of a "copy" to cover new technologies, was soon to be fulfilled.[68]

---

[65] SEIFERT, op. cit., pp. 212–213.

[66] DOMMANN, op. cit., pp. 71–73.

[67] US Supreme Court, White Smith Music Publishing Company v. Apollo Company (1908).

[68] Ibid., p. 20; see also DOMMANN, op. cit., p. 96.

5. The route to the Berne Convention

Together with its strong legal protections for works published or premiered at home, the thriving music scene in Paris and other French cities made France into Europe's leading musical nation. At the same time, French theatre and concert organisers had no hesitation when it came to plundering foreign music, which French law considered to be in the public domain. Those wishing to have their works protected in France were therefore forced to publish or perform them there, and many leading foreign composers, including the German Giacomo Meyerbeer or the Italian Giuseppe Verdi, did just this.

Other European countries tried to counteract these pressures, artistic and economic, with new regulations to protect their own artists. The Kingdom of Prussia passed a law "for the protection of ownership of works of science and art against reprint and reproduction" in 1837; the United Kingdom passed a Copyright Act in 1842; and Austria passed a law for the "protection of literary and artistic ownership against unauthorised publication, reprint and reproduction" in 1846.[69] As such titles make clear, however, legal protection continued to be attached to printed works and so, in terms of music, to musical scores. In Prussia, for example, there was an explicit composers' right to authorise performances of their own music only for works not yet published in printed form.[70] Performance rights were completely absent from the British Copyright Act of 1842 and the earlier US Copyright Act of 1831.

In order to strengthen the position of their own artists, many European states sought to extend the protection of literary and artistic property originating in their own countries to other states by means of agreements on reciprocal rights, i.e. the mutual recognition of works by authors from the other country. The first such agreement, between the Kingdom of Sardinia and the Empire of Austria, France's two most important rivals in the world of music at the time, was concluded in May 1840.[71] The city states of Lucca and Modena, as well as the Papal State, soon joined this agreement. France, for its part, tried to secure the protection of its music production abroad through bilateral agreements. In 1852 it issued a decree extending French protection against counterfeits to works published abroad,[72] and at the same time it

[69] Dommann, op. cit, p. 33.

[70] Elmar Wadle, Die Anfänge des Aufführungsrechts in Preussen und im Deutschen Bund, in: Elmar Wadle, Geistiges Eigentum. Bausteine der Rechtsgeschichte, Band II, München 2003, pp. 277–294 (290).68; see also Cavalli, op. cit., p. 49.

[71] Cavalli, op. cit., p. 49.

[72] Bertrand, op. cit., p. 34.

demanded that other states conclude bilateral reciprocal agreements to ensure the protection of works by French authors abroad.

France mustered all its economic power to these ends, making the conclusion of trade agreements dependent on the prior recognition of French intellectual property rights. It succeeded in concluding a reciprocal agreement with its French-speaking neighbour Belgium, which had long defended the interests of its own printers and music publishers who specialised in the unauthorised reprinting of French works against the recognition of foreign copyrights. And by 1858, France had concluded no fewer than 25 such bilateral agreements, more than all the other European states combined.[73]

Switzerland also tried to defend itself against the French offensive in the field of intellectual property. The new Swiss Federation had no competence in this field, so there could be no corresponding Federal laws, but at the same time it did not want French authors to be better placed than local artists.[74] Although the Swiss cantons adopted a concordat in 1854 providing minimal protections for literary and artistic property, only Geneva agreed to conclude a reciprocal agreement with France.[75] The canton of Ticino, which had already joined the Austrian-Sardinian agreement of 1840, enjoyed a special status.[76]

But the Swiss could not hold out for long. The French made it clear that a trade agreement between the two countries, which was crucial for Switzerland, depended on Swiss recognition of literary and artistic property rights of French authors. On June 30th 1864, Switzerland signed first this reciprocal agreement on authors' rights and then the trade agreement with France. The only success achieved by the Swiss delegation was France's concession that music boxes remained outside the scope of the agreement on intellectual property.[77]

Switzerland also had to reach an agreement with Belgium, which had invoked a most-favoured-nation clause from the settlement and trade agreement it had concluded with Switzerland in 1862; here too an agreement was concluded in 1867. In its report on these deals to the Swiss parliament, the Federal Council made it clear

[73] Cavalli, op. cit., p. 51.

[74] Hefti, op. cit., p. 6.

[75] Hefti, op. cit., p. 8.

[76] Cavalli, op. cit., p. 51.

[77] Cavalli, op. cit., p. 53; see also Dommann, op. cit., pp. 44–45; Hefti, op. cit., pp. 8–10.

that Switzerland had concluded this agreement reluctantly.[78] A few months later, the same thing happened again: when Italy made the Swiss demand for a trade deal dependent on the prior recognition of the copyright of Italian authors, Switzerland once again put its commercial interests above the desire for free circulation of intellectual works and signed a bilateral agreement on intellectual property.

On the basis that the Confederation was not competent to deal with copyright matters, Switzerland had refused to participate in the international Congress on Literary and Artistic Property to which the Belgian government had invited it in 1858.[79] The conference, attended by some 300 delegates from the government bodies and private organisations of 14 countries, adopted a resolution which foreshadowed many of the basic concerns of later international copyright agreements: the equal treatment of all artists, regardless of their nationality, according to the legal principle of *traitement national* and so the waiving of reservations in relation to reciprocity; the principle that the registration or official deposit of a work in one country has legal effect in the other countries; and the principle of a minimum binding protection for all countries.[80] This resolution was not, however, binding, and it took another twenty years for an international copyright protection movement to emerge.

Here again the impetus came from France, this time from the *Société des Gens de lettres de France*, which had been formed in 1831 to represent the interests of writers and journalists. On the occasion of the 1878 World Exhibition in Paris, this society held a congress on the theme of international literary property under the chairmanship of Victor Hugo, who had become a tireless campaigner for copyright protection. The congress resolved to establish an international association of writers, which initially constituted itself as the *Association littéraire internationale*, and was known after 1884 as the *Association littéraire et artistique internationale* as it rapidly expanded its field of activity beyond literature to artistic genres of all sorts.[81]

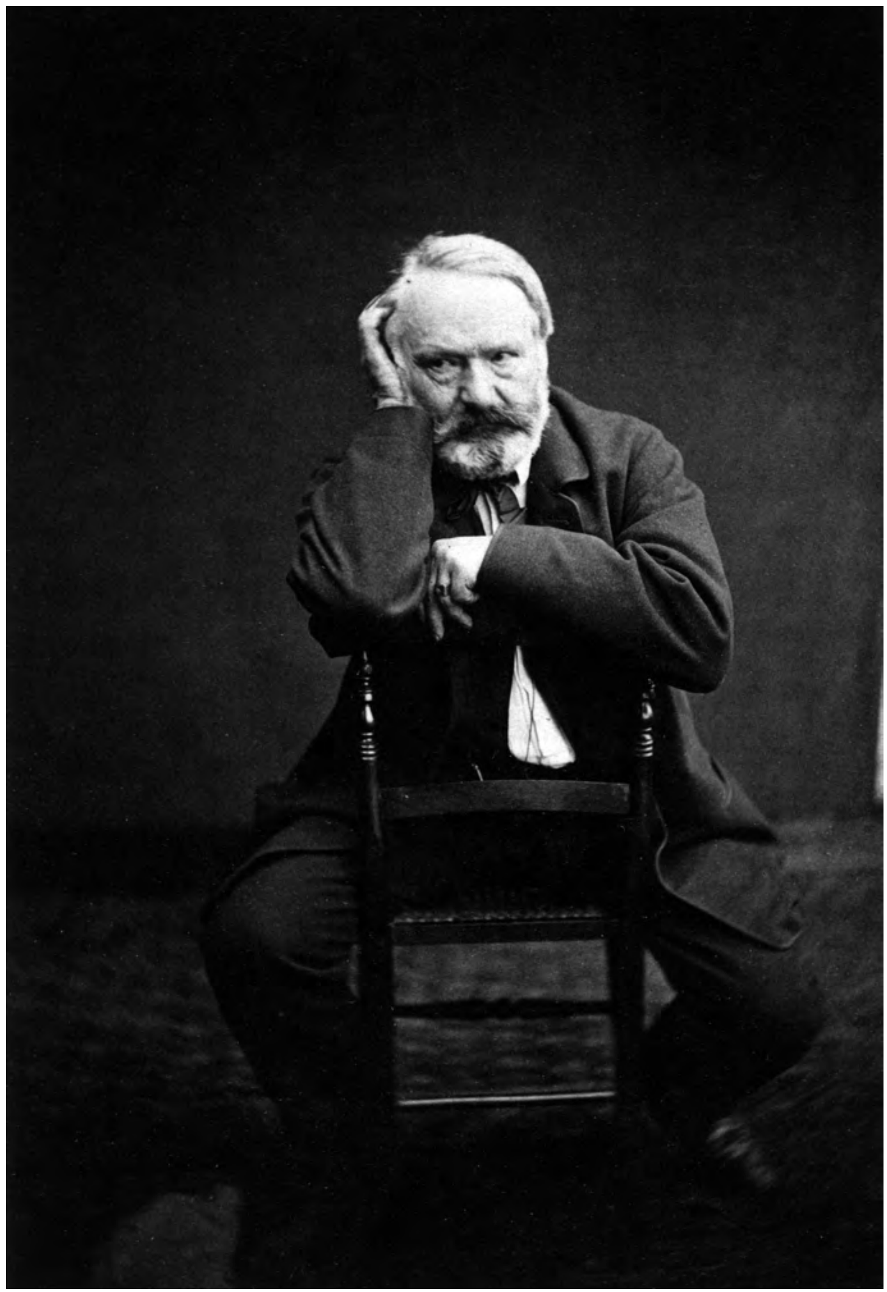
At a subsequent meeting in Rome in May 1882, the association committed itself to the establishment of a worldwide organisation for literary property. The Universal Postal Union, which was founded in 1874 and domiciled in Berne, was to serve as a model for the new body's organisational and legal structure. Although Switzerland itself had no presence at the congress, delegates from Germany, France, and

[78] Cavalli, op. cit., p. 54.

[79] Cavalli, op. cit., p. 51.

[80] Cavalli, op. cit., p. 52.

[81] Cavalli, op. cit., pp. 56–58.



The writer Victor Hugo was instrumental in the founding of the Association littéraire internationale, which initiated the Berne Convention (photography by Edmond Bacot).

Norway proposed that an initial conference should be held in Berne in September 1883, and this was accepted unanimously, again with reference to the international character of Berne as the seat of the Universal Postal Union.[82]

One of the co-presidents of the congress, the El Salvadorean ambassador to France, took responsibility for conveying this desire to the Swiss authorities, and made his request to his Swiss counterpart in Paris. Although the latter was aware of his government's objections to a Swiss engagement with international copyright protection, he recommended that the Federal Council should agree to the request and convene the conference in Berne. He also suggested that it should be organised by Edouard Tallichet, himself a member of the *Association littéraire internationale* and director of the Geneva based journal *Bibliothèque Universelle et Revue suisse*.[83] Numa Droz, then president of the Federal Council and himself an apprenticed engraver and professional journalist who was by no means unfamiliar with the subject, took up this suggestion and established a preparatory committee under the auspices of Edouard Tallichet.

The conference took place the following year and prepared a first draft of an international agreement. The meeting was still a private event, but Numa Droz had agreed to give an opening address in which he underlined the importance of copyright law, proudly referred to the first Swiss copyright law which had come into effect four months earlier, and declared Switzerland's willingness to convene a diplomatic conference for the creation of a global intellectual property organisation.[84] The official Swiss stance on international copyright protection had quickly turned from a petty-minded defensive stance to the exact opposite, a change of attitude which can be ascribed not only to international economic pressure, but also to the prospect of locating another international organisation in Berne alongside the Universal Postal Union.

The Federal Council moved quickly: barely two months after the preparatory conference, the Swiss proposed an international conference with the aim of creating an international intellectual property organisation. The conference, again headed by Numa Droz, began in Berne on September 8th 1884. It adopted a draft treaty, several additional provisions, recommendations for future legislation, and a final protocol. The texts were settled at a second diplomatic conference in September

[82] CAVALLI, op. cit., pp. 58–59.

[83] CAVALLI, op. cit., p. 59.

[84] CAVALLI, op. cit., pp. 60–61.

Federal Councillor Numa Droz led the diplomatic conference at which the Berne Convention was concluded in 1886

1885, again in Berne under Numa Droz, and were finally adopted a year later at a third conference in Berne that took place between September 6th and 9th 1886.[85]

The agreement committed the countries concerned to the constitution of an "association for the protection of authors' rights to their literary and artistic works".[86] They undertook to grant authors from other member states the same rights as those enjoyed by their own nationals, provided that the conditions of legal protection in the country of origin were met.[87] The agreement did not yet contain a real minimum standard for this protection: only rights to translate or have works translated were expressly regulated, with the period of protection limited to ten years.[88] The reproduction of newspaper articles[89] and the use of works for the production of readers[90] were also regulated with what today would be seen as limiting provisions. Finally, the agreement contained a number of administrative provisions, including one on the establishment of an office for the association, to be subject to Swiss Federal administrative oversight.[91]

The agreement became known as the Berne Convention. It was signed by nine countries: Belgium, Germany, France, Great Britain, Haiti, Liberia, Spain, Tunisia, and Switzerland. Because the accession of France and Great Britain also obliged their colonies to join, its ratification meant that a common legal framework for copyright protection was achieved for about a third of the world's population in one fell swoop.[92]

With the exception of the then British and French colonies and Haiti, the Americas were the one main region of the world to which the Berne Convention did not apply. The countries of north and south America reacted to the formation of the Berne Convention by concluding their own copyright convention, the *Tratado sobre Propiedad Literaria y Artística,* which was signed in Montevideo in 1889. This provided for the mutual recognition of works which enjoyed copyright protection in

85 Cavalli, op. cit., pp. 61–65.

86 Berne Convention (1886), Art 1.

87 Ibid., Art. 2.

88 Ibid., Art. 5.

89 Ibid., Art. 7.

90 Ibid., Art. 8.

91 Ibid., Art. 16.

92 Cavalli, op. cit., p. 65.

one of the contracting countries.[93] However, protection continued to be dependent on prior registration of a work, and no genuine minimum standard of protection was agreed: artists and authors from other countries simply won the same legal status as their local peers, and no country was expected to grant foreign authors better protection than that they had enjoyed in the country in which a work had first appeared.

In 1902, a pan-American intellectual property union was formed in Mexico to enable the international registration of patents, trademarks, and literary and artistic works. A subsequent congress, which took place in the Brazilian capital Rio de Janeiro in 1906, decided to establish such registration offices in Rio and the Cuban capital Havana.[94] Membership in this pan-American union was restricted to American states,[95] which meant that it offered no protection to European works in the Americas.

With this pan-American union, which included most of the Latin American states, the possibility of a global regulation of copyright law slipped away again. Although revisions of this Latin American copyright law in the years 1910[96] and 1928[97] were similar to those made to the Berne Convention, important differences remained. While the Latin American states rejected authors' exclusive rights of translation, and granted only limited translation rights which expired ten years after the first publication of a work,[98] these became part of the Berne Convention in 1928, and pertained as long as copyright protection itself. The Latin American legislation also continued to make legal protection subject to prior registration, a condition with

[93] Ernst Brem, Das Verhältnis der Berner Übereinkunft zu andern völkerrechtlichen Verträgen, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 99–114 (110).

[94] Isabella Löhr, Der Völkerbund und die Globalisierung geistiger Eigentumsrechte in der Zwischenkriegszeit, in: UFITA 2008/I, pp. 67–90. Fabricio Bertini Pasquot Polido / Mónica Steffen Guise Rosina, The Emergence and Development of Intellectual Property Law in South America, in: Rochelle Dreyfuss / Justine Pila (eds.), The Oxford Handbook of Intellectual Property Law, Oxford 2018, pp. 435–441.

[95] Ibid., p. 73.

[96] Convención de Buenos Aires sobre la Protección a la Propiedad Literaria y Artística del 11 de agosto 1910.

[97] Convención de Buenos Aires revisada por la Sexta Conferencia Internacional Americana de La Habana del 18 de febrero 1928.

[98] Sara Bannerman, International Copyright and Access to Knowledge, Cambridge 2016, pp. 99–118; see also Löhr, op. cit., pp. 83–86.

which the 1908 revision of the Berne Convention had dispensed.[99] These differences were to dominate the development of copyright at international level for much of the 20th century.

The conclusion of bilateral treaties and the creation of international conventions turned copyrighted intellectual works into commodities on an international market. The dominant force in this market was France, which, with its early recognition of extensive copyright rights, had an economic advantage especially in the field of music. As Chapter 8 shows, the French music business was the first to take advantage of the newly opened international markets. Two other aspects of the developing international copyright law should, however, be considered first: the public interest in limiting the law, discussed in Chapter 7, and the scope of the law, to which we now turn.

99 Art. 4 Para. 2 RBÜ (1908), now Art. 5 Para. 2 RBÜ.

6. Where do literature and art begin and end?

Conflict about the precise definition of the convention emerged at a second conference held in Berne in September 1885. The French delegation recommended that the international treaty should refer to "the protection of literary and intellectual property", and the Germans preferred an older formulation: the "protection of authors' rights". The Swiss suggested that it should be called the Agreement on the Protection of Works of Literature and Art, and while this met with general agreement,[100] it also raised the question of how "works of literature and art" should be defined. The long tradition of prohibiting the reprinting of books made it clear that all printed works should be included: literary and scientific works, prints and written music, not to mention dramatic works, theatrical scores, and works of visual art. The original focus on printed books also meant that all architectural, geographical, topographic and other scientific models, plans and drawings were regarded as protected works of art.[101] But the question of whether buildings themselves could be defined as works of art subject to protection did not arise, and this inconsistency between protected plans and unprotected buildings was only corrected at the 1908 revision conference in Berlin.[102]

Defining what should or should not be subject to protection became a matter of hot dispute in which diverging national interests came to the fore. An early area of contention was photography. French inventors had succeeded in fixing and reproducing photographs in the first half of the 19th century: the extremely elaborate procedures were perceived as a new way of producing art, and the resulting images were treated accordingly. It therefore seemed obvious that these products should qualify as works of art worthy of copyright protection, as had already been the case in the French courts as well as in the Kingdom of Bavaria, which incorporated the protection of photographs in its Copyright Act of 1865, and in Switzerland, whose first Copyright Act of 1883 provided for a five-year period of protection subject to prior registration.[103]

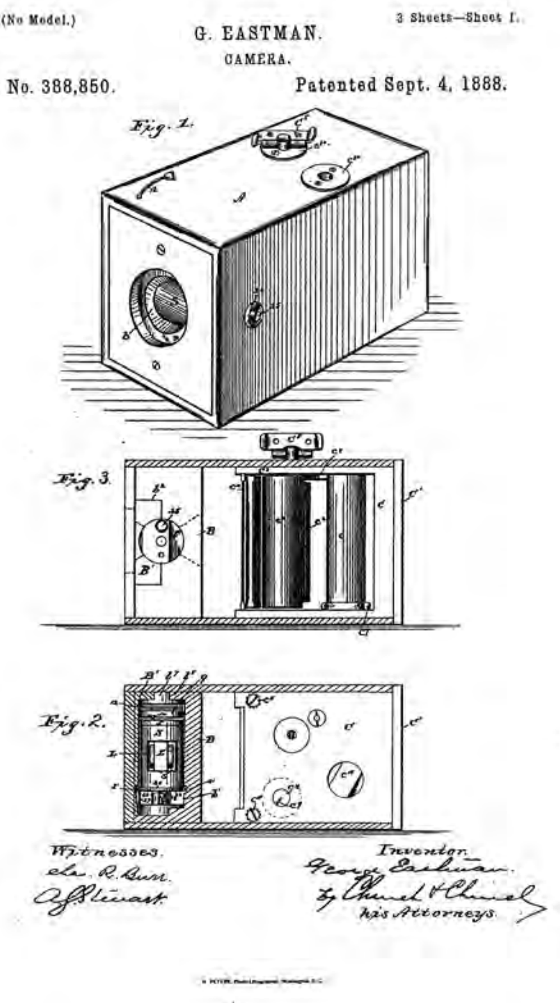
[100] Cavalli, op. cit., p. 65.

[101] Berne Convention (1886), Art. 4.

[102] Revised Berne Convention (1908), Art. 4.

[103] Lucas David, Die Werkbegriffe der Berner Übereinkunft und des schweizerischen Urheberrechtsgesetzes, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 181–200 (198); see also Hefti, op. cit., p. 12.

In the following decades, however, new technologies extended photography beyond the arts and into a new cultural industry. Cameras became much smaller and more mobile, photographic processes were simplified and, with the change from paper to celluloid as carrier material, photo materials began to be industrially produced. George Eastman developed the first mass-produced roll film camera in 1888, and countless amateurs joined the numerous professional photographers using the new devices, especially those developed in Germany and the US.



The camera patented by G. Eastman on September 4th 1888.

In the run-up to the negotiations on the creation of an international copyright convention, France demanded that any agreed protections should also apply to photographs. However, it encountered persistent resistance from Germany and Great Britain. The first version of the Berne Convention made no mention of photography, and the Final Protocol of the Conference of September 1886 merely states that the members of the Union are permitted to protect photographs as works of art in their national legislation as long as protection is also granted to the nationals of other signatory states.[104] Seeking to protect its emerging photography industry, Germany resisted later attempts to extend copyright protection to photographs at first revision conference in Paris in 1896.

The controversy over photographic images shaped subsequent revision conferences too. At the 1908 revision conference in Berlin, it was agreed that photography could be protected by copyright as well as by other legal means,[105] and this was accepted even by Germany, which had already hastened to introduce special protection for photographs limited to a period of ten years.[106] At the 1928 revision conference in Rome, Switzerland challenged this development by arguing that its photographers would suffer considerable damage if their works enjoyed a shorter period of protection in other countries, especially in Germany, from where postcards could be produced and re-imported into Switzerland to compete with the photographers' own postcards.[107] British and also Polish opposition swept this objection aside, and it was not until the 1948 revision conference in Brussels that photographs were included in the catalogue of works covered by the Berne Convention, thereby giving them the status of art works.

Similar arguments arose in relation to the applied arts. The suggestion that handicrafts should be defined as works of art was suggested by the German delegation to the Berlin conference in 1908 and vigorously opposed by Great Britain and Switzerland, the latter mainly because of fears for its souvenir industry and small-scale tourism-related trades.[108] As in the case of photography, the protection of crafts

[104] Section I. of the Final Protocol to the Berne Convention of 1886; see also DAVID, op. cit., p. 198.

[105] Revised Berne Convention (1908), Art. 3; see also DAVID, op. cit, p. 183.

[106] BRUNO MARWITZ, Die Photographie und das Urheberrecht, in: UFITA 6/1933, pp. 325–332.

[107] GROSSENBACHER, op. cit., p. 76.

[108] DAVID, op. cit., p. 183; see also GROSSENBACHER, op. cit., pp. 71–72.

was only a voluntary provision of the Berne Convention,[109] and it was not until the 1948 Brussels revisions that protection was extended to the applied arts. Even then, member states were still given the opportunity to shorten protection periods in order to overcome fierce resistance from Great Britain and Japan.

One kind of photographic work barely featured in these copyright discussions: the photographic practices of libraries and other archival institutions. European libraries had been photographing manuscripts, books and other written material for documentation purposes on a large scale since the beginning of the 20th century. The British had experimented with microphotography even before the turn of the century, and in the USA, many libraries used the photostat, a device that produced monochrome copies of originals that would not otherwise be available in libraries. Particularly in the field of scientific literature, these photographic techniques have led to the emergence of an enormous reproduction industry, some of which has been in direct competition with traditional book procurement.[110] At first, however, publishers saw these developments as neither threats nor opportunities. The copyright implications of these processes were not discussed until technical developments made the mass production of photocopies possible in the private sphere.[111]

The question of which types of work come under the categories of literature and art and are therefore subject to copyright protection continues to play a major role in the copyright debate today. In the first half of the 20th century, the controversies revolved around handicrafts and the kinds of everyday images and texts which German copyright scholars described as the “small change” of copyright law.[112] UK jurisprudence extended the protection to almost everything that appeared as the result of independent skill, labour and judgement, even if it did not show any originality, novelty or creativity.[113] A similar discussion emerged around the copyright worthiness of computer programs in the second half of the 20th century. And many

109 Revised Berne Convention (1908), Art. 2 Para. 4.

110 Dommann, op. cit., pp. 50–65.

111 See Chapter 13.

112 Marcel Bisges, Die Kleine Münze im Urheberrecht – Analyse des ökonomischen Aspekts des Werkbegriffs, Baden-Baden 2014; see also Gernot Schulze, Die Kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts, Freiburg i.B. 1983.

113 University of London Press v University Tutorial Press (1916) 2 Ch 601; see also Andreas Rahmatian, Copyright and Creativity, Cheltenham and Northampton (MA) 2011, pp.38–41.

genres of 20th century music and art had already put conventional concepts of literature and art at odds with the realities of the market for cultural commodities.

The tendency to extend the scope of copyright to everyday commodities soon provoked a reaction to what were perceived as the monopolistic tendencies of copyright protection and its disproportionate, market-distorting effects for "small change" works. Copyright scholarship sought to correct this disparity by focusing not only on the question of whether a work belonged to a particular category, but also on the quality of the work. This was done with a positive appeal to criteria such as individuality, originality or novelty,[114] and also negatively, by excluding certain kinds of content from the concept of works.[115] Max Kummer summarises these approaches with the formula that what can be regarded as worthy of copyright protection is:

"– what is thought, and imagination;
– what is expressed and perceived as expressed to the eye or the ear;
– what is 'literature or art' or is plausibly presented as such;
– what is a 'unique creation', understood as something individual (in the sense of statistical uniqueness)."[116]

The criterion of "statistical uniqueness" makes it clear that an objective yardstick is to be applied for the assessment of this individuality or novelty: only something that is objectively new, which has not yet existed as a materialisation of intellectual imagination, can claim the protection of copyright.[117] Exclusive rights are to be granted only to those who make something available to the public for the very first time.[118] A similar view informs recent case law in the EU and the US, where

---

114 Comprehensive discussions of the notion of "work" can be found in: MAX KUMMER, Das urheberrechtlich schützbare Werk, Bern 1968, and in IVAN CHERPILLOD, L'objet du droit d'auteur, Lausanne 1985.

115 See for example § 102 (b) US Copyright Act, which declares that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

116 MAX KUMMER, Der Werkbegriff und das Urheberrecht als subjektives Privatrecht, in: Festschrift 100 Jahre URG, Bern 1983, pp. 123–144 (124); see also WOLFGANG STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, in: GRUR Int. 2001, pp. 1–8; BRIGITTE I. SOMMER/CLARA-ANN GORDON, Individualität im Urheberrecht – einheitlicher Begriff oder Rechtsunsicherheit?, in: sic! 2001, pp. 287–303.

117 KUMMER, op. cit., p. 129.

118 FRANÇOIS PERRET, L'autonomie du régime de protection des dessins et modèles, Genève 1974, pp. 70–71; see also CHERPILLOD, op. cit., pp. 127–131.

intellectual works whose design is so strongly dictated by function or content that authors have no scope to make free creative decisions about it are excluded from copyright protection.[119]

This discussion of the scope of copyright law shows how notions of intellectual property tend to turn intangible goods into tradeable commodities, regardless of form they assume. This makes sense only where substantial immaterial content can be separated from its material form. Such substance may exist without representing an economic value beyond that of the formal production costs, in which case there is no need for independent legal protection. Copyright on such products would unnecessarily hinder the circulation of goods, leading to monopolies which could not be justified in social terms. From an economic and political perspective, the attempt to exclude obvious, banal intellectual creations from the scope of copyright law therefore seems quite appropriate.

Arguments against the monopolistic tendencies of copyright law were however first developed in terms of individual exceptions allowing breaches of copyright protection in the form of legal licences.

[119] Decisions of the ECJ of 16 July 2009 (C-5/08 Infopaq), paragraph 39, and of 1 November 2011 (C-145/10 Painer), paragraphs 87-94, and the decision of the US Supreme Court Feist Publications Inc v. Rural Telephone Services Co Inc 499 US 340. Due to the binding effect of the ECJ rulings on national jurisdiction, the "sweat of the brow test" still applied in English jurisdiction appears to be outdated (see Christian Handig, The "sweat of the brow" is not enough! – more than a blueprint of the European copyright term "work", in: European Intellectual Property Review 2013, pp. 334–340; Andreas Rahmatian, Originality in UK copyright law: the old "skill and labour" doctrine under pressure, in: International Review of Intellectual Property and Competition Law 2013, pp. 4–34). The fact that courts of lower instance repeatedly think they have to grant copyright protection to any banality does not change this finding. An example of this outdated case law is a Danish judgement of August 2014, which the Danish copyright expert Olav Torvund describes and convincingly exposes as being both factually and legally incorrect (Olav Trovund, Kan tre like toner utgjøre et åndsverk? [Can three equal notes make up a intellectual work?], in: Nordiskt Immateriellt Rättsskydd 2016, pp. 281–290).

7. Countering monopolies with legal licences

The ongoing extension and internationalisation of copyright protection risked the emergence of undesirable monopolies and inaccessible protected works. Because authors themselves had the right to permit or prohibit the translation of their works, this could mean that despite demand, works remained inaccessible to foreign-language readers. Because composers could license the transfer of their music to mechanical devices, individual producers such as Alexandre François Debain or the Escudier brothers could monopolise their works. Something had to give.

In the German-speaking world, however, the view that authors have the right to permit or prohibit the translation of their works was rare. Copyright protection in the German states continued to refer to the mechanical reproduction of printed material, and since translations were clearly not reproductions of this kind, they did not fall under the reproduction ban.[120] So German translation restrictions originally only applied to cases in which authors themselves had published the work in several languages. Furthermore, the publication of translations from Latin or Greek into German without the permission of the authors of the original works was prohibited in order to give publishers of scientific texts in Latin a commercial advantage. It was only as a consequence of state treaties with England and France that the German states were forced to prohibit translations from English and French, despite fierce resistance from the powerful *Börsenverein des deutschen Buchhandels*, which saw this move threatening access to foreign literature, particularly scientific books from Britain and France, and so its trade in translated works.[121]

A solution to this conflict was proposed in the first Swiss Copyright Act of 1883, which granted authors translation rights valid for thirty years as long as they were exercised within five years of the first publication of the work.[122] In practice, this meant that beneficiaries were forced to permit translations of their work as soon as there was a corresponding demand, because otherwise they risked that the work would be translated shortly afterwards without their permission – and so, in all likelihood, without payment. This quasi-compulsory requirement to permit translations was of great practical importance to multilingual Switzerland. A provision to this

[120] Ernst Brem, Übersetzungsrecht und Recht des Übersetzers, in: Festschrift 100 Jahre URG, Bern 1983, pp. 209–222 (212–214).

[121] August Schürmann, Der Rechtsschutz gegen Übersetzungen in den internationalen Verträgen zum Schutze des literarischen Urheberrechts, Leipzig 1860; nachgedruckt in: UFITA 134/1996, pp. 113–162.

[122] Brem, op. cit., pp. 214–215.

effect, but with an extension of the period referred to as the "conditional period" to ten years, was included in the protocol to the first revision conference of the Berne Convention of 1896,[123] but this was removed at the following conference in Berlin in 1908 and did not appear in the revised Swiss Copyright Act of 1922.[124]

The 1909 US Copyright Act took a different approach. Led by John Philip Sousa, American composers succeeded in extending copyright protection to all forms of recorded music. At the same time, however, parliament introduced a system of compulsory licences, according to which any musical work for which permission had been given for recording could also be used by any other person on mechanical instruments or records in exchange for a statutory royalty.[125] The granting of exclusive licences was thus made impossible from the outset, and this was the very purpose of the provision, which met the demands of the American Gramophone Company to contest the dominant market position of the Victor Talking Machine Company.[126]

The monopolistic tendencies which the US legislature sought to counter with this compulsory licence were countered in similar ways in Europe too. Although authors' organisations and music publishers raised ethical objections, the German record industry demanded the introduction of compulsory licences, and at the 1908 revision conference in Berlin, Germany and Great Britain, the two great powers of the burgeoning record industry, proposed the introduction of compulsory licences for music recordings. Fearing that this would mean the end of copyright law, France and Italy, with the support of the *Association littéraire et artistique internationale*, led the opposition.[127] By way of compromise, the Berne Convention was supplemented by a provision which, in its first paragraph, provided for an exclusive right of the composers to transfer their works to mechanical instruments and, in its second paragraph, allowed the member states to restrict these rights for their jurisdiction. There was however no explicit mention of compulsory or legal licences.[128]

---

[123] Grossenbacher, op. cit., p. 70.

[124] Brem, op. cit., pp. 214–215; see also Grossenbacher, op. cit., p. 72.

[125] Dommann, op. cit., pp. 96–97.

[126] Ibid., pp. 91–92.

[127] Ibid., pp. 98–100.

[128] Grossenbacher, op. cit., p. 70; see also Patrick F. Liechti, Les possibilités et les limites de licences légales ou obligatoires selon la Convention de Berne, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 377–385.

The American composer and conductor John Philip Sousa was on the front-line of the fight for the recognition of musical copyright in the US.

Predictably enough, Germany and Great Britain introduced the restrictions for which they had argued straight after the Berlin conference. The revised German Copyright Act of 1910 established a system of compulsory licensing, which stipulated only the obligation to grant licences,[129] and the British Copyright Act of 1911 introduced a system of legal licensing which also laid down the level of royalty payments. In the Copyright Act of 1922, Switzerland followed the German model of a compulsory licence and supplemented it with a provision according to which the performance of music by means of machines was completely excluded from the scope of the law.[130] Switzerland's music box industry had asserted itself for the last time.

[129] DOMMANN, op. cit., pp. 100–102.

[130] BERNHARD WITTWEILER, Die Auswirkungen der Berner Übereinkunft auf die schweizerische Urheberrechtsgesetzgebung, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 157–180 (163–164).

8. Music copyright becomes international

France's struggle for the recognition of French copyrights abroad was not only successful on paper: it also translated into hard cash.[131] Founded in 1851, the *Société des auteurs, compositeurs et éditeurs de musique* (SACEM) soon began to set up an international network of agents abroad to collect the compensation owed for concerts in favour of French composers. SACEM agents started to work in Belgium in 1878, and soon afterwards extended their activities to Switzerland, England, Italy, Austria and the US. Anyone performing French music could expect a SACEM employee to show up and claim royalties.[132]

In this respect SACEM agents acted only on behalf of their own members, and although it was also possible for foreign musicians and music publishers to become SACEM members, the society was largely French. It was therefore only a matter of time before similar societies were formed in other countries to represent the interests of their own composers. The *Società Italiana degli Autori ed Editori* (SIAE) was established in 1882, the Austrian *Gesellschaft der Autoren, Komponisten und Musikverleger* (AKM) in 1897, the *Genossenschaft deutscher Tonsetzer* (GDT) in 1898, and the English Performing Rights Society (PRS) and the American Society of Composers, Authors and Publishers (ASCAP) in 1914. All these collecting societies were conceived as self-help organisations whose activities included not only the collection and distribution of royalties, but also the establishment of pensions and relief funds for their members.[133]

Such cooperative structures called for precise membership criteria. Once again, the creation of music was equated with writing, "putting music on paper". For the SACEM, for example, the written publication of six musical works was a condition for admission, while the ASCAP required the submission of five written publications. There were also often entrance examinations, in which applicants had to write scores.[134] For those working in musical genres without written traditions, such as folk and jazz, membership was almost impossible.

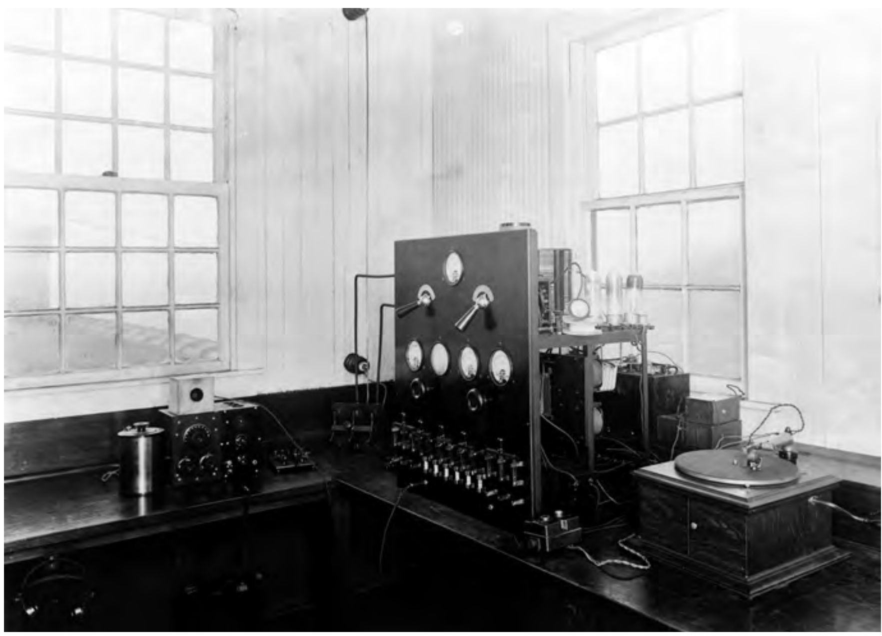
While the activities of these companies initially focussed on compensation for concert events, an additional field of activity emerged in the first decades of the 20th

[131] See Chapter 5.

[132] Dommann, op. cit., pp. 109–111; see also Franz Riklin, Das Verwertungsgesetz von 1940, in: Festschrift 100 Jahre URG, Bern 1983, pp. 45–71 (47).

[133] Dommann, op. cit., pp. 110–112.

[134] Dommann, op. cit., pp. 120–121.



Frank Conrad's radio studio in Wilkensbarre (PA), from which the first commercial radio station began to broadcast in 1920.

century, which proved to be decisive for the future: radio. The first commercial radio station began operating in Pittsburgh in 1920, and within a short time numerous other radio stations were established in the US and Europe. As technical developments made it increasingly easy to broadcast music in good quality, the programmes of these stations began to include an ever-growing share of music. This evolution drew the attention of the collecting societies, which sought to adapt their field of activities to the new media. In 1926, the European societies joined forces to form the *Confédération internationale des Sociétés des auteurs et compositeurs* (CISAC). As well as drawing on their own repertoires, these societies began to commission performances from each other too.[135] This put each society in a position to offer a Europe-wide repertoire, under exclusive conditions and on the basis of corresponding royalties, to the emergent radio broadcasters. In 1930, the CISAC also concluded a five-year reciprocity agreement with the ASCAP in the US; this was later extended, and enabled the national societies to manage a large

[135] Bertrand Moullier, Histoire de la CISAC. 90 ans au service des auteurs et créateurs dans le monde, Paris 2016, pp. 4–13.

part of the world's musical repertoire and represent it exclusively in dealings with broadcasting companies.[136]

This dominance was possible on the basis that permission to broadcast music was understood to be the exclusive right of its composer. A provision to this effect was inserted into the Berne Convention by the Rome revision conference of 1928,[137] and in turn the collecting societies obliged members to assign these rights to them. As a result, radio stations were able to broadcast music only with the permission of their respective national collecting societies and against royalty payments, some of which were fixed by law and others by contract.

As soon as the cooperatively organised collecting societies had established themselves on this international level, they were confronted with a new political development in Europe. Recognising the propaganda value of radio, the fascist dictatorships in Italy, Germany and Spain took control of its content through direct state interventions in the national collecting societies themselves. In 1933, for example, the privately organised German *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältitgungsrechte* (GEMA) was transformed into the state-approved *Staatlich genehmigte Gesellschaft zur Verwertung musikalischer Aufführungsrechte* (STAGMA) and obtained the monopoly for the exploitation of musical performance rights in the German Reich.[138] The exploitation of music thus became part of the National Socialist power structure, transforming collecting societies into para-state instruments led by committed National Socialists who excluded all "non-Aryans" – including around 8,000 Jewish musicians and other politically undesirable persons – from their ranks. In 1942, the Italian SIAE, led by Mussolini's ardent followers, was also transformed into the purely state-run *Ente italiano per il Diritto d'Autore* (EIDA), and so became integral to the fascist power apparatus.[139]

The development of a worldwide network of collecting societies, each able to offer an international repertoire to its own national sphere, was initially limited to the music sector and, in particular, to those genres represented by CISAC and ASCAP

136 Dommann, op. cit., p. 131.

137 Revised Berne Convention (1928), Art. 11*bis*.

138 Dommann, op. cit., p. 132; see also Benjamin G. Martin, The Nazi-Fascist New Order for European Culture, Cambridge (MA)/London 2016, pp. 25–26 ; Ludwig Wertheimer, Gesetzliche Lizenzen im Urheberrecht und die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst (1936/1937), reprinted in: UFITA 2008 II, pp. 479–492 (490–492).

139 Martin, op. cit., pp. 26–28.

members. A fierce dispute about the society's priorities arose only a year after the foundation of the CISAC. Because the impetus for the creation of the international umbrella organisation had come from the French SACD, and the initiators were all theatrical authors and composers, it was clear to them that the association had to deal primarily with the so-called "major rights", i.e. the performance rights for complete dramatic works with or without music in theatres rather than the "minor rights" to works of non-dramatic music.[140] Even at the first annual CISAC congress in Rome in 1927, this attitude had led to differences with the collecting societies for non-theatrical music, especially the economically dominant SACEM. The conflict was resolved by dividing the CISAC into two sub-groups: the *Fédération internationale des auteurs dramatiques et des compositeurs,* which included the authors of dramatic works, and the *Fedération internationale des sociétés des droits non théâtraux*, made up of all other composers as well as music publishers. These two organisations subsequently held their annual congress at the same time and place, and met for a joint conference at which common concerns were discussed.[141]

1932 saw the establishment of a third sub-organisation, the *Fédération des sociétés des droits de reproduction mécanique,*[142] which was composed of the societies administering the rights to transfer musical works to record or for radio broadcast. The rapid growth of the recorded music and radio industries had transformed these societies into strong economic organisations, and with their admission to the CISAC, the representatives of the non-theatrical music finally prevailed over their theatrical founding fathers.

It was only in 1935 that a fourth sub-organisation, the *Fédération des sociétés de gens de lettres*, was formed in order to unite collecting societies in the field of literature.[143] In the pre-war period, however, this body's activities were of little economic importance and it played only a minor role in the CISAC. This is surprising in view of the fact that radio also used literary works: in Germany, for example, the playwright Hugo von Hofmannsthal won the exclusive right to the broadcast of his works in 1926.[144] Nevertheless, neither the authors of literary or scientific texts nor their publishers succeeded in developing the same systems for their broadcasting rights as had been achieved in the field of concert music.

140 Moullier, op. cit., p. 14.

141 Moullier, op. cit., pp-15–16.

142 Moullier, op. cit., p. 17.

143 Moullier, op. cit., p. 21.

144 Reichsgericht in Zivilsachen, Band 113, 413 – Der Tor und der Tod.

Book publishers were also helplessly watching the emergence of another development of particular importance to scientific literature: mass photocopying in libraries. US libraries in particular initiated the copying of entire library stocks in Europe during the inter-war period in order to give their users access to scientific literature. At the same time, European libraries were also seeking to avoid the need to purchase multiple copies of books by microfilming and photocopying material in order to make their holdings available to several people at the same time.[145] Individual publishers did take steps to demand royalty payments for such copying, as was common in the music sector, but they met with little success. The then director of the Berne Union, Fritz Ostertag, publicly suggested that the unauthorised production of copies in libraries should only be permitted in the form of handwritten duplication,[146] but this impractical position found no substantial support.

The role of the fourth sub-organisation might have been assumed by the *Fédération internationale des associations de producteurs de films* (FIAPF), which had been founded in 1933. This was certainly the view of the CISAC's president, Charles Méré,[147] who argued that film score composers should receive a performance fee each time a film was screened, and film producers should be involved in the same way as music publishers. In contrast, however, the film producers considered themselves the sole claimants to the films they produced and were particularly opposed to the idea of an independent performance right for the film music. For them it was unthinkable that the screening of these films could be dependent on the prior consent of composers. The conflict was to last for decades and required a whole new legal basis before it could be resolved.

In the first half of the 20th century, therefore, the development of the collective exploitation of rights was almost exclusively confined to the music sector. The collecting societies, which merged in 1926 into the European and later the worldwide CISAC, were all active in the field of music. Audiovisual societies were not yet represented, and while literary and artistic societies had some representation, this was of little practical significance. This partisan focus on music had a big influence on

---

145 Dommann, op. cit., pp. 134–138.

146 Fritz Ostertag, Die Photokopie im Lichte des Urheberrechts, in: UFITA 9/1936, pp. 105–110. Ostertag's contribution was made in response to Heinrich Schreiber, Photokopie und Bibliotheken, in: UFITA 9/1936 pp. 41–59, who defended the position of librarians. Ostertag's impractical view was shared, even in 1954, by Alois Troller, Rechtsgutachten über die Vervielfältigung urheberrechtlich geschützter Werke oder von Teilen derselben durch Mikrofilme und Photokopien, Zürich 1954, p. 9.

147 Moullier, op. cit., pp. 25–26.

the later development of copyright law, and determined the course of neighbouring rights as well. Here too, the focus was initially confined to the rights of interpreters of music or record companies. Although the theatrical exploitation of films had already become a major industry, neither actors nor film production companies were able to play a significant role in these discussions.

9. The neighbours rush to the table, and corporatism discovers the music industry

Both the rapid rise of radio and the end of the era of silent film had profound effects on the ways in which music was used. The ability to record musical performances and play them as often as desired led to a rapid decline in the demand for live music: instead of engaging ensembles, records were played on the radio, and instead of pianists or entire orchestras accompanying films, music was integrated into film itself. Orchestras quickly became an unnecessary luxury.

These developments resulted in a drastic reduction in the opportunities for performing musicians, and unemployment rose.[148] Sales of records plummeted too, as radio stations made music accessible to a wide audience and required only a limited number of records to do so. Record companies had to face the fact that while the use of music was on the rise, their own turnover was in decline.

At the same time, radio gave the interpreters of music a prominence far beyond that afforded by traditional concert audiences. The stars of music broadcast on the radio were not composers, but performers: musicians and especially singers, and the question of why only composers were being compensated for the use of their music on the radio became unavoidable. For its part, the record industry was looking for ways to make up for at least some of its lost sales revenues by requiring broadcasters to pay for playing records on the radio.[149]

Musicians were in a position comparable to that of the authors of dramatic or musical drama works: they, too, provided an immaterial service and had no control over the means to produce records or to organise concerts; they too were therefore compelled to sell their labour, in this case their ability to perform musical services, to a production company in order to secure their livelihood. The record companies, on the other hand, needed only to sell the physical goods they produced. This meant that there were very different interests in play, and very different and sometimes antagonistic goals were pursued.

[148] Claude Masouyé, Guide de la Convention de Rome et de la Convention Phonogrammes, Genève 1981, pp. 7–8.

[149] Dommann, op. cit., pp. 170–175; see also Rasmus Fleischer, Protecting the musicians and/or the record industry? On the history of “neighbouring rights” and the role of Fascist Italy, in: Queen Mary Journal of Intellectual Property 2015, pp. 327–343.

One of the demands made by the musicians' organisations was for interpreters to be recognised as co-authors of works performed: they argued that musical works only become known to the public through interpretation, and that these interpretations are strongly influenced by the personalities of their performers.[150] Interpreters should therefore be considered as co-authors of the performed work. This view found some legal favour in countries such as Germany and Italy.

The existing collecting societies, however, particularly the French SACEM, vehemently resisted this expansion of the notion of authorship. They feared, with good reason, that royalties would have to be distributed among an increasing number of entitled persons, leaving composers with an ever smaller share. There were also concerns that exclusive rights for interpreters would make record distribution more difficult and so lead to a loss of earnings.[151] In support of their position, the societies foregrounded the fundamental difference between the production of music and its reproduction: composers are those who create new music by themselves, not those who reproduce the works of others, even to the highest artistic standards.[152] The argument prevailed. An Italian proposal to extend copyright protection to performers met with fierce French resistance at the 1928 revision conference of the Berne Convention in Rome and was finally rejected.[153] The whole question of the role of musicians was kicked into the long grass.

Diverting parts of composers' payments to musicians was, however, by no means the only way in which musicians' interests could be pursued. The call for a copyright protection of their own was also controversial among performers themselves, because it was seen to privilege soloists and conductors. The argument that personal interpretation is a form of co-authoring could only apply to performers who were given room to make such individual interpretation, and this was hardly the case for orchestral musicians, for example. Instead of individual rights, therefore, those musicians' organisations which were organised along trades union lines demanded a form of lump-sum compensation which could be used to finance free live concerts and thus provide unemployed musicians with opportunities to perform. Such

---

150 See for example WILLY HOFMANN, Das Urheberrecht des nachschaffenden Künstlers, in: GRUR 32/1927, pp. 69–72; JOSEF KOHLER, Autorschutz des reproduzierenden Künstlers, in: GRUR 1909, pp. 230–232.

151 DOMMANN, op. cit., pp. 174–175.

152 ALEXANDER ELSTER, Die wettbewerbliche und die immanente Begrenzung des Urheberrechts, in: GRUR 31/1926, pp. 493–502 (501).

153 ANKE BEINING, Der Schutz ausübender Künstler im internationalen und supranationalen Recht, Baden-Baden 2000, pp. 35–37.

compensation, it was argued, should be paid for the public performance of recorded music or its radio broadcast.[154]

Because the musicians did not have a powerful international body to represent their interests, and also as a consequence of the CISAC's vehement rejection of such proposals, various national musicians' organisations took their concerns to the International Labour Organisation (ILO), newly created in the wake of the foundation of the League of Nations.[155] In response to the high levels of unemployment among musicians, the ILO immediately acknowledged the need for political action, and called for a meeting with the *Bureaux Internationaux Réunis pour la Protection Intellectuelle* (BIRPI), then the governing body of the World Intellectual Property Organisation based in Berne. The ILO proposed the creation of its own system of interpreting rights. This was not intended to extend authors' rights to interpreters, but rather to develop a system of collective rights based on the principles of employment law. Although this meeting did not resolve the problem, the BIRPI recognised the ILO's responsibility for the development of such rights and thus strengthened its negotiating position.[156]

Both musicians and the fledgling record industry were hit by the economic crisis of the early 1930s. Production companies blamed falling turnover on the broadcasting of music and began to demand that playing records on the radio should be controlled and perhaps even prohibited.[157] These demands were pioneered by the *Confederazione Generale Fascista delle Industrie Italiane (Confindustria),* an umbrella organisation for Italian industry which invited record companies from all over Europe to a congress in Rome in order to discuss what steps should be taken to strengthen the record industry. The event was held in November 1933 under the leadership of Amedeo Giannini, a confidant of Mussolini, and culminated in the founding of the International Federation of the Phonographic Industry (IFPI), which was to be based in London.[158]

Giannini's goal was to assign co-authorship of musical works to record producers, not musicians. In an essay published in the journal UFITA, he argued that decisions about which works are selected for recording, who performs them, where and how they are recorded – including details such as the choice of the appropriate recording

[154] Fleischer, op. cit., pp. 329–330.

[155] Dommann, op. cit, p. 179; see also Fleischer, op. cit., p. 329; Masouyé, op. cit., p. 8.

[156] Fleischer, op. cit., pp. 329–330.

[157] Dommann, op. cit., pp. 182–183; see also Fleischer, op. cit., pp. 330–332.

[158] Ibid., pp. 183–185; see also Fleischer, op. cit., p. 332.

space and the placement of the microphones – make the production of a record an artistic achievement, a complex curatorial work in which many artistic elements "merge harmoniously into a whole". The work of musicians, on the other hand, was not considered "worthy of copyright": the economic rights to the performance of a work would fall instead to the employers, in this case the record manufacturers, as was the case with any other product.[159]

This posed a challenge to the very social basis of copyright itself. The object of copyright was now the tangible product itself, rather than the intangible content.[160] And those entitled to own it were no longer the producers of the immaterial content, separated from the means of production,[161][162] but rather the owners of the means of production themselves. From this perspective it was impossible to see what additional function copyright could bring to the existing ownership of the medium produced by the record company: such a duplication could not be justified, and Giannini did not even try to do so.

Hardly surprisingly, this view met with great resistance from the CISAC, whose members refused to countenance such co-authorship. In response, *Confindustria* invited not only the newly established IFPI, but also the CISAC to a meeting in Stresa in the summer of 1934.[163] In the meantime, supporters of corporatism such as STAGMA Director Leo Ritter and the Italian Minister of Folk Culture, Dino Alfieri, had attained central positions within CISAC, which was originally dominated by the French and had aimed at the voluntary collective exploitation of rights.[164] In fact, only representatives from Italy, Germany, and the United Kingdom attended the Stresa conference, and the CISAC leadership somehow neglected to inform its members of this conference beforehand. This did not prevent those present in Stresa from taking far-reaching decisions: in a joint declaration they called for the creation of a new state treaty which would grant producers an exclusive right to reproduce records and to claim for compensation for their use in film, radio and television. Many CISAC members only learned of this decision some time after the event.[165]

---

[159] Amedeo Giannini, Rechtsprobleme der Schallplatte, in: UFITA 1934, pp. 267–295.

[160] See Chapter 1.

[161] See Chapter 2.

[162] See Chapter 2.

[163] Fleischer, op. cit., p. 333.

[164] Moullier, op. cit., pp. 26 and 113.

[165] Fleischer, op. cit., p. 333.

The Italian Minister for Folk Culture, Dino Alfieri, who served as President of the CISAC 1935–1937, visits the National Socialist Leadership (photograph: Hugo Jaeger).

The Italian government used this declaration as the occasion to convene a diplomatic conference in Rome for December 1935,[166] but another political development intervened: Italy's invasion of Ethiopia in October 1935. This left Italy diplomatically isolated by the League of Nations and subject to economic sanctions. But while a diplomatic conference in Italy had become impossible,[167] Italy nevertheless implemented the plan itself. National legislation drafted by Amedeo Giannini gave record producers whose products were played in public places or broadcast on radio the legal right to compensation[168] at levels set by the state.

These concerted Italian efforts to support the music industry were not only based on the idea of promoting a particular economic interest: they also seem to have been directed against the International Labour Organisation, whose demands for freedom of organisation for workers put it completely at odds with the corporatist

[166] Martin, op. cit, p. 29; see also Valerio de Sanctis, Die italienische Jurisprudenz der letzten beiden Jahre auf dem Gebiet des Urheberrechts, in: UFITA 9/1936, p. 186.

[167] Fleischer, op. cit., p. 334.

[168] Eduardo Piola Caselli, Die Regelung der Konflikte zwischen dem Urheberrecht und manchen Nebenrechten oder ähnlichen Rechten, in: UFITA 11/1938, pp. 1–8 and 71–82.

ideals of the fascist and National Socialist governments. Corporatism was committed to uniting companies and the labour force in state bodies compulsory for each economic sector, and both Germany and Italy openly sought to replace the ILO with a new *Internationale der Arbeit*. The 1941 copyright law adopted by the Italian government, which for the first time enshrined interpreter and producer rights, was intended to demonstrate that the fascist notions of a corporatist, state-controlled economy could be practised successfully.[169]

Despite its diplomatic isolation, the fascist Italian government did not therefore give up on its efforts to regulate international producers' rights. When the ILO finally presented concrete proposals for an international convention on the protection of interpreters' rights in the spring of 1939, Italy responded by convening its own commission to draw up an international convention on the protection of musical interpreting and producing rights.[170] This commission was tasked with the development of a corporatist model to counter the ILO's proposals. The aim was to focus on producers' rights, with interpreters' claims extending no further than broadcast recordings.[171] The proposals were made by a leading Italian fascist, the diplomat, senator and then president of the Court of Cassation, Eduardo Piola Caselli.

The commission, which included Italian experts as well as specialists from Germany, the US, and Switzerland, met in the summer of 1939 in Samaden in the Engadine. It quickly produced a draft agreement, together with drafts of three other international treaties to regulate the protection of radio broadcasts, to regulate the protection of press publishers, and to regulate the introduction of a resale right for artists.[172] In these new points, as well, the commission moved far away from the economic function of copyright law – to turn the creative achievements of the authors of intangible goods, who did not have the means of production necessary to produce material media, into tradeable commodities. The proposals were instead aimed at granting market privileges to the owners of the means of production over and above their ownership rights to the material products manufactured. Amongst other benefits, this would have given them an enormous advantage over their foreign competitors.

These proposals, which became known as the Samaden Drafts, were sent for the consideration of the Belgian government, which had agreed to host the next Berne

[169] Fleischer, op. cit., pp. 334–335; see also Martin, op. cit., p. 29.

[170] Dommann, op. cit., p. 186; see also Fleischer, op. cit., p. 334.

[171] Fleischer, op. cit., p. 334; see also Piola Caselli, op. cit.

[172] Beining, op. cit., pp. 37–38.

Convention revision conference.[173] But the outbreak of the Second World War made further work on these projects impossible, and the attempt to extend the protection of musical copyrights to musicians and record producers ended in stalemate. Both parties had found powerful allies, but the opposition had proved equally strong, and a further interest group had come into play as the broadcasting organisations had begun to demand legal protection for their services to the communication of music. The outbreak of war left these conflicts unresolved, but they were of course merely postponed: in the post-war years the debates continued on very similar terms, with the addition of new challenges too.

173 Samaden Drafts, in: UFITA 14/1941, p. 57 ff.

10. Swiss copyright under French rule

Although the 19th century's most important international copyright agreement was made and deposited in Berne, Switzerland itself played no pioneering role in the history of copyright law. Authorities in the region of what is now the Swiss Confederation had granted rights to protect against the reprinting of books at a very early stage: in 1531 the city of Basel even issued the first general prohibition on reprinting in the German-speaking area,[174] although this was a purely commercial regulation which sought to grant the university city of Basel and the printing industry that flourished there an economic advantages over its foreign competitors, and did not protect any authors' rights.

The impetus for Swiss copyright came instead from abroad, specifically from France. In 1789 the government of the Helvetic Republic, established by the French, proposed for a general prohibition on reproduction, based on the model of the 1793 French law, but political turmoil meant that there was neither the will nor the time to implement such a project.[175] The 1815 restoration removed the economic and political basis on which French law could have been adopted. Only Geneva, strongly oriented towards France, and the Canton of Ticino, oriented towards Milan, felt it necessary to create protection for their own authors. From 1827 onwards, Geneva simply applied the French law, while Ticino enacted its own rather rudimentary copyright law in 1835.[176]

In the absence of a Swiss cultural goods industry of any great significance, it was hardly surprising that there was no need to enact copyright regulations prior to the founding of the modern state in 1848. A motion by the Canton of Geneva to grant the Confederation such competence in the new Federal Constitution was rejected by a clear majority,[177] and there was no great enthusiasm for a Federal Council proposal, made shortly after the establishment of the new federation, to regulate the matter by way of a concordat. Although a concordat granting authors exclusive publication rights and a thirty year exclusive right to their works was concluded in 1854, only 12 of the 25 cantons joined at first. Three other cantons followed later,

---

[174] Hefti, op. cit., p. 2.

[175] Hefti, op. cit., p. 3.

[176] Hefti, op. cit., p. 5.

[177] Hefti, op. cit., p. 6.

but Switzerland was still far from having a uniform copyright regime.[178] In several cantons, such as Neuchâtel, which had a thriving printing industry and specialised in the unauthorised reprinting of books from the German Reich and France, there was resistance to copyright of any kind.

Change came only as a consequence of massive pressure from abroad. As described in Chapter 5, France had become increasingly insistent on the recognition of intellectual property rights to works by French authors, and made the conclusion of its 1864 trade agreement with Switzerland dependent on the prior conclusion of a state treaty on the mutual recognition of intellectual property.[179] Switzerland, for which a trade deal was vital, had no choice but to agree.[180] This in turn led Belgium and Italy to demand Swiss recognition of the intellectual property of authors from their own countries, and the treaty with France was therefore followed by a corresponding treaty with Belgium in 1867, and one with Italy in 1868. Since these contracts were directly applicable to the entire territory of the Confederation, foreign authors in Switzerland were suddenly entitled to rights which their Swiss colleagues could not assert before their own courts.[181]

This was of course unsustainable. When the Federal Constitution was revised in 1874, responsibility for legislation on copyright was transferred from the cantons to the Confederation itself.[182] Legislation was approved by the two chambers of the Swiss parliament on 23rd April 1883 and came into force in 1884.[183] Compared with other laws of that time, this was a very user-friendly decree which, among other things, introduced a compulsory licence for the performance of musical and dramatic works, and limited the royalties to not more than two percent of the gross income of the performance in question.[184] Uses of works without compensation for charitable purposes and within the framework of not-for-profit events were

---

[178] Hefti, op. cit., p. 6; see also Aloys von Orelli, Das schweizerische Bundesgesetz betreffend das Urheberrecht an Werken der Literatur und Kunst unter Berücksichtigung der bezüglichen Staatsverträge, Zürich 1884, nachgedruckt in: UFITA 2006 III, pp. 741–860 (745–749).

[179] von Orelli, op. cit., p. 750.

[180] Dommann, op. cit., p. 45; see also Hefti, op. cit., p. 9.

[181] Cavalli, op. cit., p. 54; see also von Orelli, op. cit., pp. 758–760.

[182] von Orelli, op. cit., p. 760.

[183] Hefti, op. cit., pp. 11–13; see also von Orelli, op. cit., pp. 761–764.

[184] Art. 7 URG (1883); see also Ulrich Uchtenhagen, Die Urheberrechtsgesellschaften in der Schweiz, in: Festschrift 100 Jahre URG, Bern 1983, pp. 73–86 (75).

permitted, as was the transfer of musical works to music boxes and mechanical instruments. The major theatres and charities had ruthlessly and successfully campaigned to protect their interests, as had the still vibrant music box industry in the west of Switzerland.

Without having conducted any preliminary work, Switzerland was chosen by the *Association littéraire internationale* in May 1882 to host negotiations on the creation of an international copyright agreement, as described in Chapter 5. The Swiss government, and in particular the then Federal Councillor Numa Droz, seized the opportunity and agreed to make Bern the seat of a new international organisation intended to implement and further develop the future state treaty.

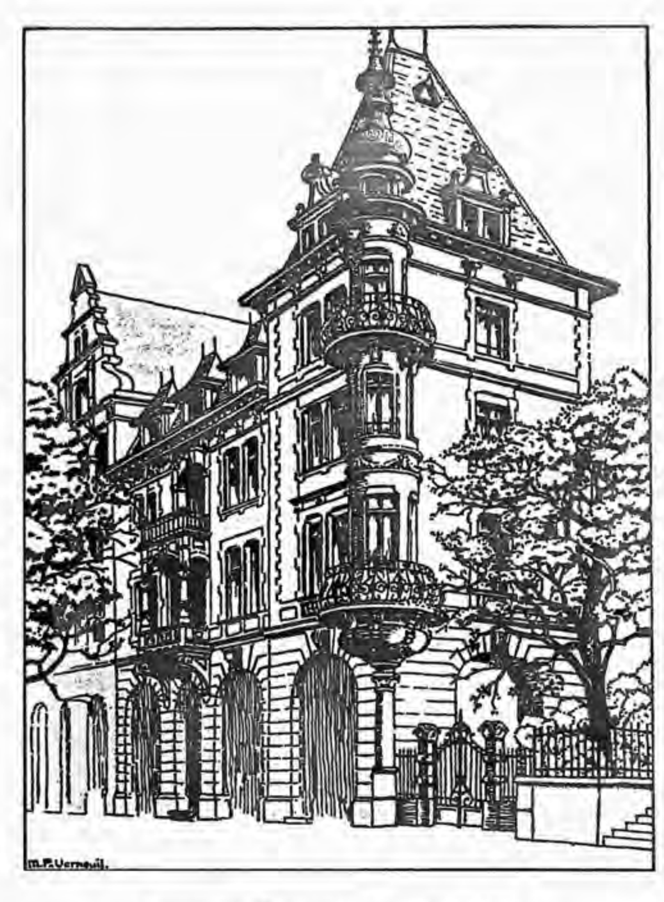
However, Switzerland's own copyright law fell short of the standards that were laid down three years later in the Berne Convention: Swiss compulsory licences for performing musical and dramatic works, as well as the exemption for charitable events, were incompatible with the convention, and further inconsistencies emerged when the Berne Convention was revised in 1896 and 1908.[185]

In 1912, the Federal Council therefore commissioned draft revisions to the law. This was the prelude to a fierce tug-of-war between divergent interest groups, which did not end until December 1922 with the enactment of a revised copyright law. The bill was fiercely contested in both houses of the Swiss parliament, but ultimately resulted in a legal text compatible with the revised Berne Convention of 1908. The compulsory licence for musical and dramatic performances was abolished, as was the exemption for not-for-profit events. The exception for the transmission of musical works on mechanical instruments was replaced by the system of compulsory licences permitted under the Berne Convention, and other provisions of the treaty were also incorporated into Swiss law.[186]

The Swiss *élan* in the field of copyright law did not last long. The Swiss supported and ratified the revision of the Berne Convention in Rome in 1928 but, not least because of the fact that there was then no effective representation of the interests of Swiss composers, Swiss law remained unchanged. Switzerland was merely appended to the collective exploitation of copyright by foreign societies: musical performance rights were administered by the French SACEM, which had already set up a Swiss agency in Geneva in 1876, and the French *Société générale des éditeurs*

[185] Wittweiler, op. cit., pp. 158–160.

[186] Roland Grossenbacher, Die URG-Revisionen von 1922/1955 und die Revisionsarbeiten bis 1983, in: FS 100 Jahre URG, Bern 1983, pp. 15–31 (16–17).



Helvetiastrasse 7 in Berne, the first headquarters of the Berne Union (drawing by Maurice Pillard Verneuil).

phonographiques (EDIFO) administered the rights to transfer musical works to record.[187]

[187] FRANZ RIKLIN, Das Verwertungsgesetz von 1940, in: FS 100 Jahre URG, Bern 1983, pp. 45–71 (47); see also UCHTENHAGEN, op. cit., pp. 82–83.

In an effort to defend themselves against such foreign dominance and better protect their own interests, the S*chweizerische Tonkünstlerverband,* the *Schweizerische Gesellschaft der volkstümlichen Autoren, Komponisten und Verleger* and the *Verband Schweizerischer Musikalienhändler und Verleger* decided to collaborate in the establishment of a Swiss collecting society. In 1923, under the name MECHANLIZENZ, they formed a society for the management of the rights to record protected works on phonograms and music boxes. EDIFO, which had previously been active in this area, reacted to this proposal by threatening to boycott the new company if it did not have a majority share. The extortion was successful: a French chair of the Board of Directors was installed, and MECHANLIZENZ was forced to adopt EDIFO tariffs and terms and conditions.[188] The company was Swiss on paper, but in practice it was completely dependent on the French and in no position to represent Swiss interests.

The same Swiss societies founded the *Schweizerische Gesellschaft für Aufführungsrechte* (GEFA) one year later, in 1924. Although it was established as an association, which mitigated against direct foreign influence, this new body also found itself overshadowed by the French SACEM. The latter was able to benefit from the fact that it did not have to base its claims on a Swiss copyright law, but was initially able to operate on the basis of the Franco-Swiss treaty of 1864, and later on that of the Berne Convention of 1886.[189] The rights it represented were not subject to compulsory licences under Swiss law – these were incompatible with the rules of the Berne Convention and therefore had to be disregarded in international relations. This gave the SACEM such an important competitive advantage over the GEFA that it remained by far the most attractive business partner for foreign companies.

This glaring imbalance meant that the GEFA was forced to transfer the management of the rights entrusted to it to the SACEM in 1929. As remuneration, it received a quarter of the income generated in Switzerland, which it was then able to pass on to its members. However, Swiss authors received no income from the exploitation of works abroad, and the GEFA continued to have no significant influence on the collecting activities within Switzerland. This remained the exclusive responsibility of the Paris-based SACEM.[190]

This foreign dominance was bound to meet resistance, especially at a time of heightened nationalist sentiment. This was initially expressed as massive criticism

[188] Uchtenhagen, op. cit., pp. 77–84.

[189] Uchtenhagen, op. cit., pp. 75–77.

[190] Uchtenhagen, op. cit., pp. 83–84.

of SACEM business practices, which were denounced as inefficient and opaque, but the Swiss *Tonkünstlerverband* was also at the forefront of demands for the establishment of a national collecting society subject to state control.[191] Collecting societies in Germany and Italy had in the meantime been transformed into instruments of nationalist cultural policy, and CISAC, the umbrella organisation founded in 1926, was largely dominated by fascist ideologues.[192] The desire to exert some control over the Swiss copyright landscape was therefore strongly influenced by a notion of "intellectual national defence" from the start.[193] The aim was to replace the SACEM, which dominated the Swiss market, with a Swiss-controlled organisation.[194]

The outbreak of the Second World War and the German occupation of France made it completely unacceptable for Swiss performances to require the approval of a society based in a foreign, hostile nation. In March 1940 – and arguing against this unacceptable foreign dominance – the Federal Council proposed a law on the exploitation of copyrights which would require the exercise of these rights in Switzerland to be subject to state licensing and administered by a purely Swiss society.[195] The law sailed through parliament and came into force on January 1st 1942. The GEFA had transformed itself from an association to a cooperative society under the new name of the Swiss Society of Authors and Publishers (SUISA), and the Federal Council approved it as the only authorised collecting society in Switzerland.[196] An emergency decree issued on December 31st 1941 authorised SUISA to exercise all performing rights to foreign works until further notice, even without the corresponding consent of the foreign companies. The SACEM was thus unable to continue its activities in Switzerland and had to close its Geneva agency overnight.[197]

The first (and only) director of the GEFA, Adolf Streuli, had played an important role in this dispute: when the GEFA had transferred the management of rights to

---

191 Riklin, op. cit., p. 47.

192 Moullier, op. cit., p. 113.

193 Symptomatic is the declaration made in a short presentation of the Swiss copyright law by Adolf Streuli, Urheberrecht in der Schweiz, Basel 1944, p. 31, Fn. 38: "It was wholly unacceptable that Swiss works could only be published in Switzerland with the agreement of a branch of a foreign authors' society."

194 Riklin, op. cit., pp. 48-51.

195 Riklin, op. cit, pp. 50–51.

196 Riklin, op. cit., p. 51.

197 Riklin, op. cit., pp. 56-57.

the SACEM in 1929, he had remained a director whilst at the same time becoming head of the SACEM legal department in Switzerland. He was, however, keen to put obstacles in the way of his new employer, and worked closely with the Federal authorities on draft legislation to curtail the powers of the SACEM.[198] No wonder, then, that he was elected as the first managing director of newly founded, state licensed SUISA.

Because the new law only applied to musical performance rights, and not to rights to transfer of musical works to other media, MECHANLIZENZ was unaffected by this dispute and remained under French influence for some time. In 1957 it began to move closer to SUISA, but this bid for independence led to a violent dispute with the German GEMA to which the Federal Council put an end with a decree of October 23rd 1978 extending the legal monopoly on exploitation and granting the corresponding licence to MECHANLIZENZ. Since 1980, when MECHANLIZENZ and SUISA merged, the exploitation of non-theatrical music rights has been administered by the body which was formed by the fusion of the two societies.[199]

---

198 Riklin, op. cit., pp. 49–51.

199 Riklin, op. cit., p. 58; see also Uchtenhagen, op. cit., p. 83.

11. After the Great War: cleaning up the mess

"Le respect du droit d'auteur ne s'est aucunement relâché dans la tourmente",[200] wrote Bénigne Mentha, the new director of BIRPI, in his wartime treatise on the effects of the war on international copyright law. Was this the expression of a legitimate hope, or was Mentha completely out of touch? The Second World War was clearly a turning point in the history of copyright: much of what had been put in place during the first half of the 20th century was thrown into doubt, and the whole social environment had seen fundamental change.

Its links with the Axis powers meant that the CISAC, which had hitherto been the leading international umbrella organisation for the collecting societies, emerged from the war with both its capacity to act and its credibility in tatters. Dino Alfieri, the Italian Minister for Folk Culture, had been elected president of the CISAC as early as 1935; Leo Ritter, the Director of the German STAGMA and a convinced National Socialist, and Emilio Bodrero, a philosophy professor who was one of the chief ideologues of Italian fascism, were the Vice Presidents.[201] From 1938 until the end of the war, the composer Richard Strauss, first president of the German *Reichsmusikkammer* and artistic figurehead of the Third Reich, held the office of President. Soon after the German occupation of France, the representatives of the Axis forces had forced the organisation to move from Paris to Berlin,[202] and although the CISAC was only based there during 1941 and 1942, this was enough to severely damage not only the credibility of the organisation, but also its financial position and its administrative capacities.

The relocation to Berlin was part of the strategy to push ahead with the cultural "reorganisation of Europe" which had been pursued by the German Reich since the beginning of the war. To this end, various cultural organisations such as the Permanent Council for the International Cooperation of Composers, the International Film Chamber, and the European Writers' Association were created in rapid succession and often together with fascist Italy, all of which were under German leadership and had their headquarters in Berlin or Rome. After the attack on the Soviet Union and the first successes of the Axis powers on the battlefields, this strategy was further expanded, to the exclusion of American and British represen-

---

200 Bénigne Mentha, La guerre et les Union internationales pour la protection de la propriété industrielle et des oeuvres littéraires et artistiques, Zürich/Leipzig, p. 1.

201 Martin, op. cit., pp. 91–93; see also Moullier, op. cit., pp. 26 and 113.

202 Martin, op. cit., pp. 210–211; see also Moullier, op. cit., pp. 31–32.

tatives.[203] In 1943, the STAGMA and the SIAE founded the *Vereinigung der europäischen Urheberrechtsgesellschaften*, an association of European copyright societies which was based in Berlin and designed to replace the moribund CISAC. Surprisingly enough, this move had the support not only of music collecting societies in occupied Belgium, France, the Netherlands, Hungary and Romania, but also of those in neutral Sweden and Switzerland.[204] This posed an existential threat to the CISAC, which was only able to survive because its administrator Madeleine Baugniet and the English music publisher Lesley Boosey succeeded in establishing a branch in neutral Berne that was able to continue some activities until the end of the war.[205]

At this point, the American Society of Composers Authors and Publishers (ASCAP) was the only strong and effective body within the CISAC. It invited the remaining national organisations to the first post-war congress in Washington in 1946, at which 19 countries were represented.[206] But it too faced an existential threat: its royalty claims against radio stations had involved it in an increasingly fierce dispute with the National Association of Broadcasters (NAB). In 1939, when negotiations between the ASCAP and the NAB collapsed, the NAB had founded its own collecting society in the form of the Broadcast Music Incorporation (BMI), which focussed on the jazz repertoire neglected by the ASCAP, as well as country music and other genres outside of classical music and mainstream entertainment. When the licensing agreement between the ASCAP and the NAB lapsed on 1st January 1941, American radio stations were only able to broadcast BMI music, and the entire ASCAP repertoire disappeared from the airwaves for several months. Only the intervention of the US competition authorities, which had initiated anti-trust proceedings against both the ASCAP and the BMI, brought the dispute to an end and led to a division of the market for royalties.[207]

A new difficulty emerged from the fact that the BMI was not a member of the CISAC, and probably could not have joined because of its purely commercial interests: according to its statutes, and in order to secure the exclusive right to represent the repertoire of all CISAC countries in their home market, its members were only al-

203 Martin, op. cit., pp. 183–223.

204 Martin, op. cit., pp. 211–212; see also Leo Ritter, Vereinigung der europäischen Urheberrechtsgesellschaften, in: UFITA 16/1943, pp. 3–8.

205 Moullier, op. cit., p. 32.

206 Moullier, op. cit., p. 34.

207 Dommann, op. cit., pp. 187–202.

lowed to conclude reciprocity agreements with other CISAC members. This made the division of the US market between ASCAP and the BMI incompatible with CISAC statutes, and because the body was not prepared to change this rule, ASCAP was forced to withdraw its membership in 1947.[208]

Rights management was greatly impaired by the war in other ways as well. In 1939, Italy had been the first state to grant compulsory licenses for the use of works originating from "enemy states", and similar measures were introduced soon afterwards by the United Kingdom for German and Italian works. In 1940 the German Reich followed suit for works from Allied countries, and also confiscated royalties paid to Jews and authors of "degenerate art". Under the Trade with the Enemy Act, even the US did not hold back: the authorities issued no less than 185 000 compulsory licenses for Italian and German works in the fields of literature, music and film.[209] These measures made a mockery of Bénigne Mentha's talk of *"respect du droit d'auteur"*.

The most important changes of this period played out in a rather larger geopolitical context: war had transformed the whole world order. Europe was no longer centre stage: the driving forces were now the US, the USSR, and the People's Republic of China, countries to which the Berne Convention did not apply. The former British, French, Dutch, and Belgian colonies were on a road to independence which took them out of the Berne Union, and although there were a few signatories to the convention in Latin America, the pan-American copyright organisation formed on the basis of the Treaty of Mexico, with offices in Havana and Rio de Janeiro, had been dominant there since 1902. The Berne Convention became confined to Europe.

It was in these circumstances that the revision conference originally scheduled for 1935, but postponed several times because of the war, finally took place in Brussels in 1948. It confirmed the validity of rights that had been acquired before the outbreak of the war and provided some important clarifications in relation to new technologies, particularly in the field of broadcasting. Cinematographic works, photographs, and the applied arts were now recognised as fully-fledged genres in their own right, albeit with the possibility of provisions for shortened periods of protection in these areas.[210] After lengthy discussions, agreement was reached on the controversial demarcation between broadcasting and retransmission. The *droit de suite* proposed in the Samaden Drafts, giving visual artists the right to share

[208] Moullier, op. cit., pp. 35 and 44.

[209] Moullier, op. cit., pp. 33–34.

[210] David, op. cit., pp. 185–186; see also Grossenbacher, op. cit., pp. 78–80.

in the proceeds from the resale of their works, was added to the Convention,[211] although member states were not obliged to implement this resale right and its application to foreign authors was only mandatory if such a regulation also applied in their country of origin.

Once again, all the voices that had campaigned for an expansion of the circle of beneficiaries to include musicians and the record industry in line with the Samaden proposals were silenced.[212] France, in particular, continued to block their requests. Musicians, record manufacturers, and representatives of European radio stations, who had formed the *Organisation internationale de radiodiffusion et de télévision* (OIRT) in 1946 and participated in the conference as a further interest group, had to be content with a simple wish list inviting member countries to "seek ways and means [to] ensure the protection of producers of instruments used for the mechanical reproduction of musical works, without prejudice to the rights of authors", or proposing the "protection of broadcasts carried out by a broadcasting body" on condition that the rights of authors should not be restricted. For performers, the outcome was even worse: for them, the conference merely expressed the hope that "investigations referring to copyright-related rights and in particular the protection of performing artists should be vigorously pursued".

On the whole, the conservative stance adopted by the Berne Union had largely succeeded in preserving copyright as an instrument for the commodification of intangible goods. Only the inclusion of resale rights, which referred not to an immaterial commodity, but to the material work of art itself, disrupted this notion of the protection of intellectual work. Since the sale of works of fine art involves the transfer not of the right to use an intangible asset, but the ownership of a material good, the resale right is not a matter of copyright, but rather falls under property law as it applies specifically to art.[213]

Another wish expressed by the conference was for copyright protection to be extended beyond the scope of the Berne Convention. Paragraph II of the final declaration of the Brussels conference expressed "the wish that an agreement be reached

---

211 François Dessemontet, Le droit de suite, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 343–355.

212 Alfred Baum, Die Brüsseler Konferenz zur Revision der Revidierten Berner Übereinkunft, in: GRUR 31/1949, pp. 1–44; see also Beining, op. cit., p. 38; Dommann, op. cit., p. 186.

213 See Alois Troller, Vorentwurf der Expertenkommission für ein schweizerisches Bundesgesetz betreffend das Urheberrecht, Berlin/Frankfurt a.M. 1972, p. 60.

without delay between the States which will ensure the protection of copyright rights throughout the world". The signatory countries seemed to agree that such a global regulation would not be possible within the framework of the Berne Union, and that new instruments would be required. In this respect, the declaration was an acknowledgement that the Union had lost its hegemony over the whole discussion of copyright and its development.

This last hope was, however, fulfilled – perhaps even sooner than the Union had hoped. Under the auspices of UNESCO, the newly founded United Nations Educational, Scientific and Cultural Organisation, the Universal Copyright Convention, a parallel agreement to the Berne Convention, was adopted at a diplomatic conference held in Geneva in September 1952.[214] It too was based on the principle of equal treatment of foreign authors and their own nationals, but unlike the Berne Convention, it contained only a very rudimentary minimum level of protection, which had to be guaranteed by the member states.[215] Members of the Berne Union had good reason to be concerned that this new agreement would make the Berne Convention superfluous, as well as fixing international copyright protection at a much lower level. To counter this, a clause was inserted in the Universal Copyright Convention to the effect that members of the Berne Union were not obliged to protect works from countries which sought to leave the Berne Union after 1951 and would then be subject only to the new agreement.[216] In practice, this made it impossible for existing members to withdraw from the Berne Union.[217]

The great practical significance of this new Universal Copyright Convention was that it was joined by many more states than were united by the Berne Convention, notably the United States, numerous Latin American countries and, at a much later date, the Soviet Union. Although it was a major step towards the goal of worldwide copyright protection, this agreement also exposed the enormous differences in content between individual national legislation. In the long term, such diversity was to prove unsustainable.

---

[214] Wenzel Goldbaum, Welturheberrechtsabkommen. Kommentar, Berlin/Frankfurt a.M. 1956; see also Moullier, op. cit., pp. 44–46.

[215] Brem, op. cit., pp. 105–107.

[216] Universal Copyright Convention, Article XVII and Appendix Declaration relating to Article XVII. See also Goldbaum, op. cit., pp. 87–90.

[217] Brem, op. cit., pp. 107–108; see also Goldbaum, op. cit., p. 90.

12. A new kid on the block

The ongoing failure to extend copyright protection to performers of music and even to record manufacturers was confirmed once again at the Berne Convention conference of 1948. But although the attempt to turn the immaterial achievements of musicians into commodities seemed doomed, the social need to do so remained.

In the meantime, the situation had improved for musicians: they had created their own body to represent their interests in the form of the *Fédération internationale des musiciens* (FIM),[218] and in the wake of the defeat at the Brussels conference, this body requested the International Labour Organisation (ILO) to resume work on the creation of international protections for interpreting rights which had been suspended during the war.[219] In response, the ILO convened a conference in October 1949.[220] Vehement opposition came from the International Federation of the Phonographic Industry (IFPI) in the person of its new general director Brian Bramall, who called for further steps to be taken in cooperation with the Berne Union and on the basis of the 1940 Samaden Drafts.[221] This made it impossible for the ILO to continue: it was structured in such a way that decisions could only be taken with the agreement of the trade unions, employers' organisations and the state representatives. As an employers' body in the field of record production, this IFPI, was now free to block the ILO's work on a new state treaty to protect interpreting rights. At a meeting in October 1949, the ILO Secretariat was formally prohibited from taking further steps in this matter and informed that it should work with the BIRPI, which administered the Berne Union, and proceed on the basis of the Samaden Drafts.[222]

Despite its commitment to the 1940 draft treaty, which was marked by the spirit of corporatism, the IFPI's position had also changed. The idea developed by its Italian founding fathers, that a record was an "immaterial good", no longer played a role. Instead, the IFPI saw itself as music industry body which, solely on the basis of its financial investments in record production, claimed all rights to its products and the work of the musicians they involved. The same was true of the radio companies, which had been involved as a third interest group in the draft treaty of 1940.

---

[218] DOMMANN, op. cit., p. 186.

[219] MASOUYÉ, op. cit., p. 9.

[220] FLEISCHER, op. cit., p. 337.

[221] See Chapter 9.

[222] FLEISCHER, op. cit., p. 337.

The BIRPI convened an expert conference in Rome in the autumn of 1951, at which a new treaty on what were now known as “neighbouring rights” was to be developed. The aim was to establish a single instrument which would protect performing artists, record manufacturers, and broadcasting organisations too.[223] It soon became clear that one side of the argument would prevail: in the so-called Rome Draft of 1951, the record productions and broadcasting organisations were granted exclusive rights of their own, but interpreters, defined as employees of production companies or broadcasters with no individual rights of their own, were limited to collective compensation claims.[224]

The draft did not please everyone: in particular, the northern European copyright societies considered the agreements to be totally misguided in their approach to production companies and broadcasting organisations, and demanded more emphasis on interpreting rights.[225] As the international organisation of collecting societies, the CISAC was implacably opposed to the introduction of neighbouring rights, and continued to believe that the granting of exclusive rights to persons other than authors and composers would undermine their rights and damage their economic interests. There was, however, dissent within the CISAC itself: Valerio de Sanctis, the lawyer for the Italian SIAE and former pioneer of the corporatist regulation of neighbouring rights who had become the legal consultant of CISAC after the war, did not support the body’s opposition to these rights, but rather advocated the co-existence of copyright and neighbouring rights.[226]

In the meantime, the possibility of a second international treaty alongside the Berne Convention had become more concrete. The Berne Union attached great importance to the fact that a future international treaty on neighbouring rights should accord not only with the Berne Convention, but also with an agreement on world copyright law.[227] As the third umbrella organisation alongside the ILO and the Berne Union, UNESCO was enlisted to conduct further preparatory work.[228]

---

223 Matthias Kloth, Der Schutz der ausübenden Künstler nach TRIPs und WPPT, Baden-Baden 2000, p. 33; see also Masouyé, op. cit., p. 9; Georges Straschnov, Protection internationale des «droits voisins», Bruxelles 1958, pp. 19–21.

224 Fleischer, op. cit., pp. 339–340.

225 Fleischer, op. cit., p. 338.

226 Moullier, op. cit., pp. 49–51.

227 Straschnov, op. cit., pp. 25–32.

228 Kloth, op. cit., p. 33; see also Masouyé, op. cit., p. 9.

The large number of often conflicting interests led to the treaty being greatly reduced in scope. In 1956, the ILO invited interested parties to a meeting in Geneva, where detailed proposals for regulations were drawn up. A year later UNESCO and the Berne Union organised an alternative conference of experts in Monaco to draft a definitive text of the treaty. Finally, the three organisations decided to convene a joint meeting of government representatives in The Hague in 1960, where a report was to be drawn up and a diplomatic conference prepared for the adoption of the treaty on neighbouring rights. Surprisingly enough, the delegates did reach agreement on a draft treaty, and the text was finally adopted at a diplomatic conference in Rome on October 26th 1961.[229]

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations is a strange beast. As the Dutch copyright specialist Ernst Hirsch Ballin put it in an early commentary, the agreement "is essentially the result of somewhat cynical ways of dealing with conflicting interests often conducted behind closed doors, with the rights of creative people being used as stakes in a game on which the chance results of votes, cyclical power relations, pressure groups, and particular personnel all have a decisive influence."[230] The first article of the convention makes no positive statement, but instead establishes what the agreement should not do: the protection of neighbouring rights as laid down in the statute must in no way impair copyright, and no provision may be interpreted as restricting copyright.[231] The interests of authors take precedence, even when some protection is accorded to all three groups of beneficiaries: musicians are given the opportunity to prohibit unauthorised recordings of their interpretations,[232] record companies are granted an exclusive right to reproduce their productions,[233] and both can claim remuneration in the event that a recorded interpretation is broadcast or otherwise communicated to the public.[234] The broadcasters came out on top: they were granted exclusive rights to record and retransmit their programmes, reproduce such recordings and broadcast them.[235]

---

229 Masouyé, op. cit., p. 10.

230 Ernst D. Hirsch Ballin, Zum Rom-Abkommen vom 26. Oktober 1961, Berlin/Frankfurt a.M. 1964, p. 2.

231 Rome Convention, Art. 1.

232 Ibid., Art. 7.

233 Ibid., Art. 10.

234 Ibid., Art. 12.

235 Ibid., Art. 13.

One of the major controversial issues to arise during the preparation of the agreement concerned audiovisual material; this was dealt with by restricting the scope of the agreement. While the broadcasting organisations wanted to extend the protection originally designed for radio broadcasts to television broadcasts, film producers vehemently resisted any interference with the exclusive control of their productions. The agreement gave both parties rights: it extended the protection of broadcasting organisations to television, but audiovisual works were excluded from its scope. Those permitting their performances to be recorded on an audiovisual medium could not therefore assert any rights under the agreement.[236] On this point too, compromise had been reached at the expense of the interpreters, the group least able to assert their interests in Rome.

The Rome Convention brought decades of wrangling to an end, but a breakthrough in the matter of neighbouring rights was still to come. The number of signatory states was small, and even those which ratified the agreement had reservations about its scope.[237] The new kid on the copyright block remained an outsider, and did not enjoy greater recognition until the end of the 20th century.[238]

[236] Ibid., Art. 19.

[237] Bernard Geller, La protection de l'artiste musicien, Yverdon 1980, p. 23.

[238] See Chapter 16.

13. Germany implements levies; America discovers fair use

Radio studios and record companies began to use a new sound recording process shortly after the end of the Second World War: the tape recorder. Developed by the German military during the war, the recording of spoken texts and music on magnetic tape revolutionised the use of music, not least because it was so easy to use and made all kinds of manipulation of recordings possible. Tapes could be cut and reassembled; sections could be deleted and other recordings added; recordings could be distorted or completely transformed. Recording was no longer simply a matter of reproduction, but could now create new acoustic events.[239]

Grundig launched the first mass-produced tape recorder for domestic use in 1951. While this early version cost around DM 1,000, the introduction of the TK 20 model, in 1957, took the price below DM 400.[240] Recording equipment became affordable for a large number of households, and its distribution grew exponentially in the Federal Republic of Germany and indeed across Europe.

The home tape recorder made it easy to record interpretations of protected works during concerts and from radio broadcasts: any private person could make recordings anywhere, copy them, edit existing recordings, and delete them again. The use of protected works was, for the first time, in private hands. This led to the emergence of a new group with interests in the exploitation of intangible assets: the consumers of music. It was also a development which threatened to undermine composers' livelihoods, and called the business models of recording companies into question.

The German *Verwertungsgesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (GEMA), the successor to the National Socialist STAGMA, was aware of this danger from the first.[241] It was clearly not possible to control the use of these devices: recordings could be played in the private sphere, and simply be deleted if checks took place. In 1950, fearing that the recording of radio broadcasts and records would lead to a decline in sales and thus reduce its members' income, the GEMA demanded the introduction of a flat-rate levy on all owners of magnetic tape.[242]

239 DOMMANN, op. cit., pp. 208–214.

240 DOMMANN, op. cit., p. 211.

241 DOMMANN, op. cit., pp. 216–220.

242 ERICH SCHULZE, Das deutsche Urheberrecht an Werken der Tonkunst und die Entwicklung der mechanischen Musik, Berlin 1950, p. 39.

The Grundig TK 20 tape recorder was developed for private use and launched discussions about a levy on devices to compensate composers.

The German Copyright Act assumed that authors had exclusive rights to their own works,[243] but included an exemption for the reproduction of works of literature and art for personal use. The controversy concerning tape recording grew when the German Federal Court of Justice ruled on May 18th 1955 that this exemption did not apply to tape. Such technical possibilities, it argued, had not been not foreseen when the law was drafted in 1901. Rights holders were therefore entitled to prohibit the private copying of music and text on tape.

This decision turned what had by then become the widespread habit of recording music from the radio into an illegal activity. At the same time, the rights of authors had become practically impossible to enforce in view of the large number of uses on the part of consumers. In 1962 the government of the Federal Republic of Germany took the chance to intervene, proposing draft legislation to permit private copying, whilst obliging the owners of the devices to pay a fee. The German *Bundesrat*, one of the two chambers of the Federal Assembly, rejected this proposal on the grounds that it too would be unenforceable, as well as failing to take cultural policy considerations into account. The draft legislation was returned for further consideration.[244]

After detailed deliberations, the *Bundestag's* Legal Committee finally proposed that the claim for remuneration should not be imposed on the users of the equipment, but on the manufacturers: they were the ones facilitating copyright infringements, and were also in a position to pass on any levies to the actual users via the purchase price.[245] Although it faced some parliamentary opposition, this solution prevailed. Companies importing tape recorders were also included in the amended Copyright Act, which was approved by the German parliament on September 9th 1965, and upheld by the Federal Court when it rejected a complaint made by a tape recorder manufacturer on July 7th 1971.[246] This was the first time that a copyright levy had been imposed on a copying device.

A similar discussion took place in post-war America. This time it was not the tape recording of music, but rather the copying of scientific literature in libraries that was at stake. In 1947, Haloid had developed a new photocopying process involving the electrostatic charging of photosensitive surfaces. This process, known as xerog-

[243] Bundesgericht judgement of 18.5.1955, in: GRUR 1955, pp. 492–502; see also SEIFERT, op. cit., pp. 263–267.

[244] DOMMANN, op. cit., pp. 229–230; see also SEIFERT, op. cit., pp. 269–270.

[245] Bundesgericht judgement of 29.5.1964, in: GRUR 1965, pp. 104–108.

[246] Bundesverfassungsgericht decision of 7.7.1971, Band 31 (1971), p. 255.

raphy, made it possible to significantly improve the quality of the copying process as well as bringing down its costs, although the huge machines were initially so expensive that only very few institutions such as the Library of Congress or the National Library of Medicine could afford them.[247]

In December 1959, Haloid presented an improved machine, the Xerox 914, which was able to produce six copies per minute on standard paper and without the addition of any liquids. In order to accelerate the spread of these devices, which were still very expensive, they were now leased, as well as sold. The rental price was calculated on the basis of the number of copies made; this made the acquisition of such machines attractive for institutions with lower copying requirements,[248] and the devices spread very quickly, especially in libraries and state administration bodies. Unprecedented numbers of protected works were soon being copied in scientific libraries, which then moved from making copies themselves to making the equipment available for public use.

The economic impact of these devices was similar to that of the spread of tape recorders: it enabled consumers to reproduce works with minimal effort, and circumvented the monopolies held by book and magazine publishers on basis of their ownership of printing presses and distribution infrastructure. Scientific publishers became increasingly concerned. A 1962 study made at their instigation suggested that compensation should be paid to the respective copyright holders, with collections to be handled by a central accounting office operated by the Library of Congress. In the same year, the Registry of Copyrights proposed a corresponding amendment to the law, but this remained mired in parliamentary proceedings for many years.[249]

In 1967, with no end to the legislative process in sight, the medical publishers Williams & Wilkins Co. decided to act. They informed the National Library of Medicine (NLM) that they were happy to allow their journal articles to be copied, but requested royalty payments of two cents per page, without which copyright would be infringed. In response, the director of the NLM used an argument that would henceforth dominate US debate on copyright law: copying works for scientific purposes represented a fair use of copyrighted material, and library staff could continue to do so.[250] The court found in favour of the library, but subsequent pro-

[247] Dommann, op. cit., p. 241.

[248] Dommann, op. cit., pp. 243–247.

[249] Dommann, op. cit., pp. 252–254.

[250] Dommann, op. cit., pp. 254–255.

ceedings in the US Supreme Court failed to reach a decision when one of the nine judges had to abstain and the remaining eight were evenly split on the question of

Haloid's Xerox 914 copier intensified the dispute over the admissibility or otherwise of private photocopying.

the admissibility of photocopying in scientific libraries.[251] Although this meant that the first judgement was confirmed in technical terms, the substance of the dispute about the legality of photocopying remained unresolved.

Clarification came with the insertion of a provision establishing fair use as a general exception to the protection of copyright into the Copyright Act of 1976.[252] Reference was made to a verdict from the state of Massachusetts, which had dealt with the printing of George Washington's letters in 1841.[253] These had been published in a biography, and were then reprinted in another biography published later. In this case the judge had made the practically free legal finding, based on English jurisprudence, that the second work infringed the copyright of the first author because it was not fair use, but rather an unauthorised plagiarism. He had taken the nature and subject matter of the protected work, the quantity of material used, and the economic impact that this use might have on the distribution of the original work as criteria for distinguishing between permitted and unauthorised use.[254] The 1976 Copyright Act took this decision completely out of context: the same wording that had served as a criterion for distinguishing between permitted use and plagiarism was now used to permit a general exemption from copyright protection. This move, which disregarded both legal history and theory, had been made possible by the director of the NLM when he had invoked fair use as a justification for the mass copying of scientific literature.[255]

The relocation of reproduction to the private sector by means of inexpensive and thus affordable sound recording devices on the one hand, and publicly available photocopiers on the other, had thus led to two completely contradictory regulations: levies on devices in the Federal Republic of Germany, and very general and difficult to define exemptions from copyright in the US. While the impact of each of these moves was strictly limited to their respective national territories, they went on to exert a considerable influence on subsequent international debates about the nature and scope of copyright law.

---

[251] Williams & Wilkins Co. v. United States, U.S. Supreme Court 420 US 376.

[252] Manuel Kleinemenke, Fair Use im deutschen und europäischen Urheberrecht?, Baden-Baden 2013, pp. 101–107.

[253] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

[254] Lyman Ray Patterson, Folsom v. Marsh and its Legacy, in: Journal of Intellectual Property Law, 5(1998), pp. 431–452; see also Kleinemenke, op. cit., pp. 99–100.

[255] Patterson, op. cit.

14. The Berne Union is elbowed out

The geopolitical map was transformed in the first two decades after the war. The Cold War divided the world into two irreconcilable camps on which the US and the USSR, rather than Europe, had decisive influence. France and Great Britain remained European superpowers, but gradually lost their global positions as their colonies became independent states with no investment in the interests of their former colonial masters, and many Asian, African and Latin American countries sought non-aligned or neutral roles independent of the two dominant blocs.

These changes were directly reflected in the dwindling significance of the Berne Convention, which had once applied to a third of the world's population but was now confined to Western Europe, the main Commonwealth nations, and a handful of other countries. Although some of the former colonies declared their willingness to remain in the Berne Union with a so-called *déclaration de continuité*,[256] the Berne Convention was of little practical significance to the countries of the so-called Third World, and competition from the Universal Copyright Convention threatened to make the situation even worse.

Without enforceable copyright protection or control over the distribution and use of works, the European powers risked losing the newly independent countries as markets for their cultural assets.[257] It was therefore in the interest of the European states that the Berne Union should not only retain its existing members, but also encourage countries in the developing world to recognise the Berne Convention.

What could not, however, be ignored was that these countries had completely different interests to those of the existing member states. Most of them had only weak economies ill-suited to cultural export, and therefore perceived copyright protection less as a means of shielding the domestic economy than of hindering the use of foreign works. The Berne Union was also unattractive to nations with extensive oral traditions, because it offered no protection to such cultural assets.[258] And because most developing countries had no or only weak organisations to speak for

---

[256] Claude Masouyé, L'Union internationale au seuil de 1964, in: Le Droit d'Auteur 1965, p. 6.

[257] Ulrich Uchtenhagen, Die Berner Übereinkunft und die Entwicklungsländer, in: Festschrift 100 Jahre Berner Übereinkunft, Bern 1986, pp. 115–131 (119).

[258] Ulrich Uchtenhagen, Urheberrecht und Dritte Welt: Wem bringt das was?, in: Reto M. Hilty/Mathis Berger (eds.), Urheberrecht am Scheideweg?, Bern, 2002, pp. 43–57.

their authors, there was little political representation of their interests.[259] In most cases, therefore, pressure to join the Berne Convention came not from the potential beneficiaries themselves but from European countries.

The state bureaucracies to which these demands were addressed saw more disadvantages than benefits to such copyright protection: increased difficulties in accessing information; additional costs for educational institutions, research and broadcasting companies; and obstacles to the translation of literary and scientific works into the respective national languages.[260] The hoped-for advantage of international protection for the works of their own authors was of marginal economic and political interest. In the sober assessment of the then Director of the SUISA, Ulrich Uchtenhagen: "The developing countries have increasingly adopted the point of view of the consumers, who seek to use works from abroad with as few restrictions as possible without at the same time jeopardising the corresponding rights for their own citizens abroad."[261]

The 1967 revision conference on the Berne Convention in Stockholm tried to accommodate these concerns with the adoption of a Protocol on Developing Countries which was to become an integral part of the convention. Giving newly acceding countries the right to provide for derogations from the minimum protection of the agreement in their national legislation for an initial transitional period of ten years, this protocol included the possibility to:

- shorten the term of protection from 50 to 25 years after the death of the author;
- limit the right to translation to ten years for all those languages for which it had not yet been exercised. In addition, any country could provide for a compulsory licence for translations into an official national language if three years after the first publication a work had not yet been translated into that language;
- permit further compulsory licensing for the reproduction of a work for educational or cultural purposes, provided that it had not been made available for purchase in the developing country concerned three years after its first publication;
- permit the retransmission of transmitted works without restriction, as well as the communication to the public of broadcast works, provided that this communication was not connected with commercial purposes;

259 Uchtenhagen, op. cit., p. 51.

260 Moullier, op. cit., pp. 56–58.

261 Uchtenhagen, op. cit., p. 119.

– give all countries legal licences for the use of works of literature and art for teaching, study or research purposes.[262]

This Protocol was signed by 35 delegates in Stockholm on July 14th 1967, but 16 others, including the British, who had actively promoted the proposal during the conference, refused to sign, and the remaining four members of the Union were not even present. This lack of unanimity meant that nearly all the member states refused to ratify or implement the agreement. Countries with large cultural industries, in particular West Germany, France, and Great Britain, were not prepared to accept the envisaged restrictions on their market power.[263]

Although the proposed transitional arrangements offered them some concessions, most developing countries also continued to be reluctant to join.[264] The fundamental problem was that international copyright protection was biased towards prolific cultural production in industrialised countries and did virtually nothing to support the development of domestic production in the less developed countries. The transitional arrangements did nothing to address this point.[265]

The flaws of the Stockholm Protocol were soon, therefore, apparent,[266] and it became clear that such an approach would make it impossible to strengthen international copyright protection and broaden the scope of the Berne Convention. In response, some non-industrialised countries attempted to further restrict the scope of the Berne Convention by revising the Universal Copyright Convention in order to remove the clause which excluded works from countries which had once but no longer belonged to the Berne Union.[267] This would have made it possible for those states to leave the Berne Union and to derive a degree of protection for works from their own country from the Universal Copyright Convention. In many cases, such works would have been subject to higher levels of protection abroad than those they enjoyed in their country of origin. However, it was clear from the outset that the European countries would oppose such a change. Intervention in the growing markets for cultural goods would have been much greater and more costly than under the

262 Claude Masouyé, Guide de la Convention de Berne pour la protection des oeuvres littéraires et artistiques, Genf 1978, p. 164; see also Uchtenhagen, op. cit., pp. 120–121.

263 Moullier, op. cit., p. 58; see also Uchtenhagen, op. cit., p. 121.

264 Uchtenhagen, op. cit., p. 122.

265 Uchtenhagen, op. cit., pp. 52–53.

266 Masouyé, op. cit., p. 164.

267 Uchtenhagen, op. cit., pp. 122–123.

Ulrich Uchtenhagen, Director General of the Swiss Music Rights Society SUISA from 1961 to 1989, was recognised worldwide for the contributions he made to the establishment of collective management organisations (CMOs) and the strengthening of copyright and neighbouring rights in numerous countries.

Stockholm Protocol. UNESCO, the body sponsoring the Universal Copyright Convention, therefore agreed with the Berne Union on a different approach, according to which both treaties were to be revised at the same time in order to stipulate a standard minimum protection which developing countries would also have to guarantee. This would also have removed the deeply unpopular penalties faced by those wishing to leaving the Berne Union.[268]

The members of both copyright agreements agreed to these amendments which were discussed at revision conferences which took place simultaneously in Paris in July 1971. Some of the Stockholm amendments to the Berne convention were

[268] UCHTENHAGEN, op. cit. , p. 124.

reversed: it was agreed, for example, that the period of protection should not be shortened, and that the use of compulsory licences was limited to work for educational and research purposes; the abolition of translation rights after ten years of non-use, and the restrictions on broadcasting and retransmission rights were both removed.[269] With respect to the Universal Copyright Convention, provisions aimed at the improvement of minimum protections were inserted,[270] and the controversial exit penalty for members of the Berne Union was suspended on a temporary basis for countries defined as developing by the UN.[271]

The amendments to both treaties were approved in Paris on July 24th 1971, and came into force three years later. But they had little practical effect. Few countries took advantage of the concessions made to the members of the Berne Union, and accession to the Berne Convention was virtually non-existent. The exceptions made in the Universal Copyright Convention for developing countries existed only on paper. In Ulrich Uchtenhagen's pithy assessment: "the bankruptcy of Stockholm was followed by the fiasco of Paris".[272] Painstakingly developed over many years, the new regulations still failed to address the real problems faced by developing countries.[273]

So it was that the Berne Convention remained what it had become after the Second World War: a treaty confined to Western Europe, the Commonwealth, and a handful of other states. In the rest of the world, especially in those countries under the influence of the US or the USSR, the Universal Copyright Convention, with its much lower standards of protection, applied, or else there was no copyright protection at all. And even where they were included in national legislation, both conventions lacked teeth. The effort to establish global minimum standards of protection for works of literature and art through international copyright conventions had failed once again.

269 Masouyé, op. cit., p. 165.

270 Bannerman, op. cit., pp. 109–113.

271 Uchtenhagen, op. cit., pp. 124–126.

272 Uchtenhagen, op. cit., p. 126.

273 Bannerman, op. cit., pp. 128–164.

15. TV jumps frontiers

Experiments with black-and-white television had been made as early as the 1920s in the United States and several European countries. But it was only after the Second World War that this new medium became a means of mass communication. By 1952, there were TV sets in some 15 million American homes, as well as in 1.5 million of British households and some 100,000 in Germany and France. The coronation of Elizabeth II on June 2th 1953 was reportedly watched on live by 27 million British viewers; the transmission of the celebrations to Germany and France made this the first international acquisition of a TV broadcast.

In the US, national TV was developed by private corporations such as Radio Corporation of America (RCA) or Columbia Broadcasting Services (CBS) in the early 1950s.[274] In Europe, by contrast, television evolved from country to country, with para-state bodies implementing strictly regulated services.[275] This was partly because of a desire to assign the new medium a central function for the public exchange of information, but had more to do with the pressure on radio frequencies necessary for the nationwide television transmissions of acceptable quality: there were technical limitations on the number of operators who could broadcast in the same geographic area.

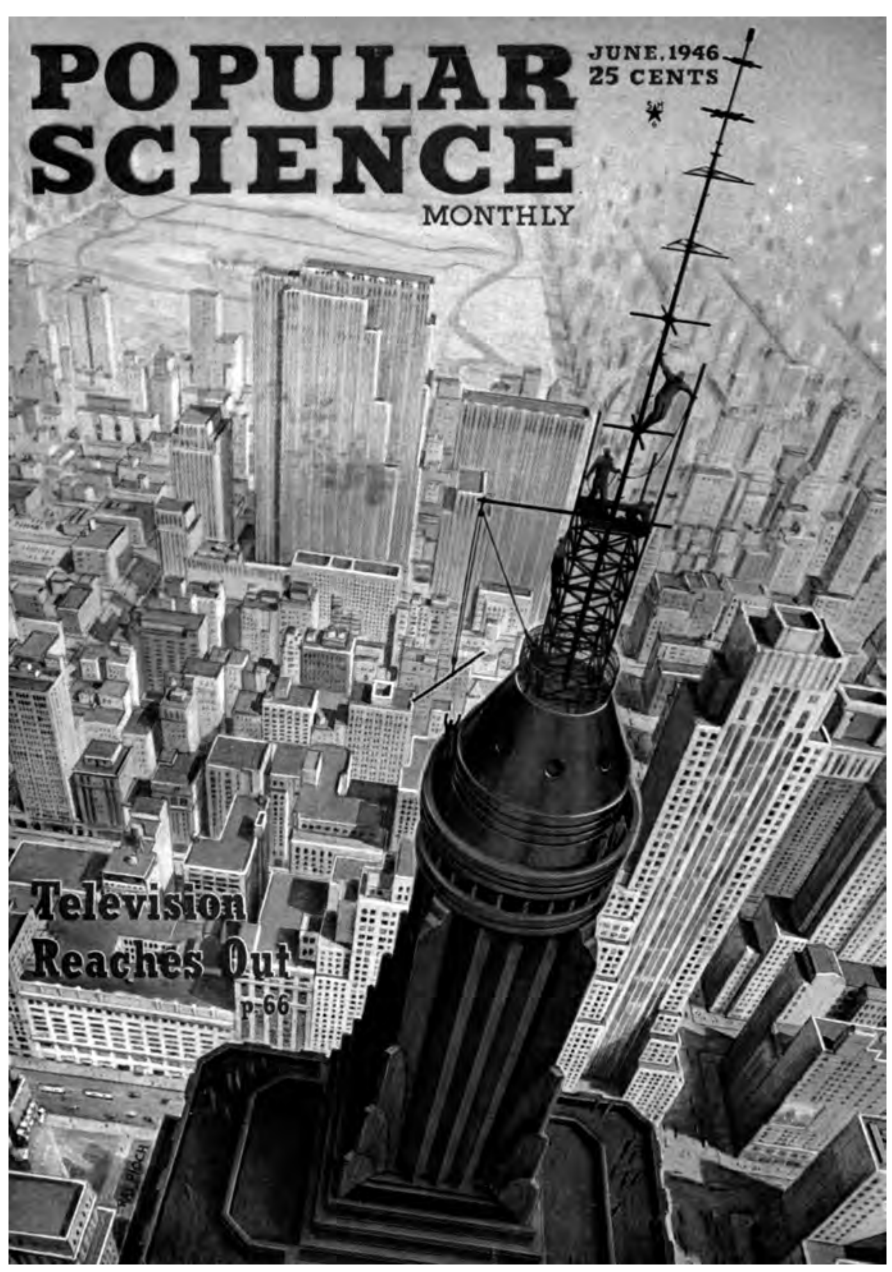
CBS launched the first colour television broadcasts in 1951, but these were discontinued after a few months for technical reasons: colour broadcasts could not be received on existing black-and-white sets, and the colour television distribution system used by CBS required a far broader range of radio frequencies than black-and-white TV. This costly failure led to great efforts to standardise broadcasting technology for national and even international colour television. Although these did not lead to a global standard – the US opted for the NTSC colour television system produced in their own country, while Germany favoured the PAL system developed at Telefunken, and France, the state-owned SECAM system – even these differences were no hindrance to the rapid worldwide diffusion of colour television.

In the 1970s, attempts to improve the quality and reach of television in the face of limited frequencies led to the search for alternative distribution options, and

---

[274] Ralph Engelmann, Public Radio and Television in America, Thousand Oaks et al. 1996, pp. 136–145.

[275] Michael Schanne/Werner Meier, Mehr Angebote – weniger Vielfalt, in: Fredi Hänni/Matthias Loreetan/Urs Meier (eds.), Schöne Fernseh-Aussichten. Die folgenreiche Demontage einer öffentlichen Institution, Basel 1988, pp. 64–77.



Television heralds a new era.

two different technologies emerged: extensive cable networks which could provide households with a large number of programmes without the need for the scarce radio frequencies, and the replacement of terrestrial antennae with satellite dishes, which allowed large areas to be covered by a single frequency. These moves overcame the technical limits to the number of channels, and paved the way for a massive expansion of the range of programmes and their international distribution.

The commercial stations in America were quick to take advantage of these technical developments. Many new providers entered the market, and the range of programmes was greatly increased. Film production benefitted too: the proliferation of programmes and the extension of broadcasting times created a huge new demand for audiovisual material and, in particular, broadcastable feature films. This added enormous value to the films held by American production companies and opened up completely new commercial opportunities for audiovisual material.

The European situation was different: the television market varied between countries, and linguistic diversity impeded the development of larger broadcasting areas, although national television programmes were increasingly broadcast to neighbouring countries in which the same language was spoken or at least in part understandable. These signals were usually distributed on cable networks, which were supplied with these programme signals via directional beam networks or telecommunications satellites. There were also some commercial broadcasters, but they too were slow to find audiences beyond their own linguistic regions, and much of their programming consisted of American films.

It soon became apparent that this kind of programming raised issues of copyright. Broadcasters acquired the rights to broadcast audiovisual works from the production companies which owned them, but these applied only to their own national broadcasting areas. The retransmission of programmes to neighbouring countries was not covered by this authorisation, and because it was carried out by a company other than the one responsible for the initial broadcast, these initial broadcasters felt no responsibility for the regulation of such addition use.

The response of European film production companies mirrored that of the French dramatists two centuries earlier: they formed collecting societies to administer their rights to audiovisual works. Some of these companies, such as Switzerland's *Suissimage*, were newly founded; others, such as the German *Bild-Kunst*, which had previously focussed on the visual arts and photography, were older societies which now extended their fields of activity to audiovisual materials.

The European internal market put other pressures on both music distribution and audiovisual production too: the EEC Treaty prohibited "quantitative restrictions on imports and all measures having equivalent effect [...] between Member States",[276] and liberal trade policies threatened national systems of exploitation, especially in the audiovisual sector. In 1971, the European Court of Justice had already ruled that free trade provisions should also apply to the record industry;[277] in 1980, the same point was made with regard to film.[278] Here the court relied on a principle of European Community law which meant that works offered in one member state could be resold freely in any other.[279] The territorial markets and prices which had once pertained to the audiovisual sector were no longer tenable within the EEC.

The European legislative response to both the fragmentation of the European television market and the the ever-increasing US dominance took the form of "Television without Frontiers", a Green Paper "on the establishment of a common market for broadcasting, in particular satellite and cable broadcasting". The paper saw television as a purely economic commodity which should circulate freely on the European internal market, and called for the establishment of a European audiovisual market, supported financially by an audiovisual industry that would in the middle term find itself on an equal footing with US production. The initiative led to Directive 89/552/EEC, which for the first time stipulated programme quotas for European audiovisual productions within the EEC.[280]

Once again, copyright hindered the implementation of these plans. European legislators saw that "the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of difference between national rules of copyright and some degree of legal uncertainty; whereas this means that holds of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular

[276] EEC Treaty, Art. 30.

[277] ECJ judgment of 8.6.1971 (Case 78/70 Deutsche Grammophon Gesellschaft mbH /Metro-SB-Grossmärkte GmbH & Co. KG).

[278] ECJ judgment of 18.3.1980 (Case 62/79 Coditel / Cine Vog I).

[279] Beining, op. cit., pp. 126–127.

[280] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

constitutes a direct obstacle in the free circulation of programmes within the Community".[281]

The European Commission soon found ways around these obstacles: although the possibility of standardising the various national copyright regimes at European level seemed unthinkable, two regulations overriding national copyright law were issued in the form of a directive: firstly, the whole process of broadcasting a television programme via satellite was deemed to be the right of the individual member state in which "the programme-carrying signals are introduced under the control and responsibility of the broadcasting organisation into an uninterrupted chain of communication leading to the satellite and down towards the earth."[282] This *Sendeland* principle meant that broadcasting companies only needed permission to broadcast works in their own country, and did not have to deal with the legal situation in other countries in which their broadcasts may be received. Secondly, the re-transmission of cable broadcasts became an exclusive matter of collective management through collecting societies. Individuals with rights over parts of a programme could no longer stop the transmission of their works or performances, but permissions for all works and performances were granted by authorised collecting societies.[283]

Television had a substantial impact on the growing world of copyright in two main ways. In the first place, it forced the creators of audiovisual works, who had hitherto operated almost exclusively on an individual level, to seek forms of collective rights management, and this in turn saw audiovisual collecting societies suddenly emerging as important partners of representatives of non-theatrical music, which had once been almost the only area working with collective rights. Secondly, the introduction of the *Sendeland* principle led to the introduction of a kind of supranational provision which greatly restricted the national legislative power of the EEC Member States in the field of copyright. Both of these developments occurred against the background of social and economic policies which were to bring about the far more drastic changes to the structure of copyright to which we now turn.

281 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Recital 5.

282 Directive 93/83/EEC, Recital 14.

283 Ibid., Recital 28.

16. All change: America relates copyright to trade

In the wake of the conferences in Stockholm 1967 and Paris 1971, it was clear that neither the Berne Convention nor the Universal Copyright Convention could secure effective and enforceable global copyright protection. The so-called developing countries were neither ideologically nor economically interested in such protection: they had no international cultural goods industry which might make any meaningful contribution to their own economies, but at the same time what they did have was a rapidly developing piracy business which included not only technical equipment and clothing, but also records and tapes.[284] The interests of these countries therefore lay less in strengthening copyright protection than in the implicit toleration of the thriving counterfeit economy. They were also keen to give their businesses access to foreign products protected by intellectual property rights at the best possible price.

The US, which had rapidly become a leading producer of software in the emerging computer industry, now found that its products had very little protection abroad. American computer software worth millions of dollars had been widely copied across the world, and although American manufacturing companies had already won court rulings in the 1960s in which computer programs had been deemed to be copyright-protected works,[285] this remained controversial in European jurisprudence. Nor were the international conventions of any help: they made no mention of the protection of software, since computing had played no role when they were agreed,[286] and parallels with literature and art could not be drawn since legal protection of software was not linked to authors, but rather to production companies.

The enforcement of the copyright protection of software at international level proved difficult, therefore, not least because countries with markets for pirated products were not inclined to give it their support. Japan, for example, was stubbornly opposed to treating computer programs as though they were literary works. In much of the world, copyright protection for software seemed impossible.

[284] Paul Katzenberger/Annette Kur, TRIPs and Intellectual Property, in: Friedrich Karl Beier/Gerhard Schricker (eds.), From GATT to TRIPs, Weinheim u.a. 1996, pp. 1–17; see also Alesch Staehelin, Das TRIPs-Abkommen, Bern 1997, pp. 14–17.

[285] Data Cash System v. A. Group Inc., 203 USPQ 735 (N.D. III 1979/1980).

[286] Paul Katzenberger, TRIPs and Copyright Law, in: Beier/Schricker (eds.), op. cit., pp. 59–92 (84).

Columbia TriStar fights piracy in the audiovisual market.

The pattern was repeated with music and film. The US had dominated these markets too[287] but was suffering from growing counterfeit production in Brazil, India, China and many other countries. Even where the notion that films and music were copyrighted works was undisputed, their protection could not be enforced. Many states, especially in Africa and Asia, were still unaware of copyright protection even in the 1970s, and the existing conventions did not contain provisions for effective litigation or efficient sanctions.[288] As a result, half of the world was watching American films and listening to American music without paying anything to do so.[289]

[287] Christoph Beat Graber, Handel und Kultur im Audiovisionsrecht der WTO, Bern 2003, pp. 45–46.

[288] Katzenberger/Kur, op. cit., pp. 10–16; Staehelin, op. cit., pp. 15–17.

[289] Raoul Duggal, TRIPs-Übereinkommen und internationales Urheberrecht, Köln 2001, pp. 23–24.

For the US, which was running huge trade deficits in almost every area except the software and film industries, the situation was unsustainable.[290] Pressure from these sectors and the music industry soon led to radical political change. Having long refused to join the Berne Union or to have anything to do with neighbouring rights, and having even played a major role in the emergence of competing systems of copyright protection, the US now called for the establishment of a single organisation for the protection of copyright with efficient mechanisms of dispute resolution and enforcement. Like France more than a century earlier, the US used all its economic prowess to achieve this goal. Because states with weak cultural industries but strong counterfeiting practices were not vulnerable to direct retaliatory measures, they were now to be brought to their knees by sanctions in other economic sectors[291] imposed on the basis of bilateral trade agreements, which provided for massive sanctions in the event of infringements of intellectual property and, most importantly, the GATT agreement on international trade and customs arrangements.

US and European companies had been unsuccessful in their attempts to introduce an International Anticounterfeiting Code during the 1973-1979 Tokyo round of the GATT negotiations[292] but in the subsequent Uruguay Round, the US used the concept of the "trade-related aspects of intellectual property" to make such protective measures an official negotiating point. The scope of this concept was highly controversial. The US considered virtually all trade in goods and services which, from its perspective, could be subject to intellectual property protection, to be trade-related and therefore relevant to trade policy. It also regarded EEC quotas for European films and television programmes as illegal trade barriers.[293] In contrast, most developing countries did not recognise the competence of the GATT negotiations to discuss substantive rules in the area of intellectual property law, and considered GATT to be confined to the fight against counterfeiting.[294] Disagreement on such fundamental issues was one of the main reasons why the Uruguay Round of the talks dragged on for so many years.

---

290 Graber, op. cit., pp. 45–46; see also Silke von Lewinski, Das Urheberrecht zwischen GATT/WTO und WIPO, in: UFITA 136/1998, pp. 103–127 (109).

291 Kloth, op. cit., pp. 53–55; see also von Lewinski, op. cit., pp. 106–108.

292 Duggal, op. cit., p. 25.

293 Graber, op. cit., p. 131.

294 Kloth, op. cit., pp. 55–60; see also Jörg Reinbothe/Silke von Lewinski, The WIPO Treaties 1996, London 2002, p. 2; Staehelin, op. cit., p. 20.

The US applied enormous political pressure in pursuit of its goals.[295] Several states, including the People's Republic of China, Taiwan, South Korea, Saudi Arabia, the Philippines, Egypt, Nigeria, Brazil, and Mexico were accused of large-scale piracy, and threatened with sanctions in other sectors of the economy.[296] In order to justify its focus on copyright protection in GATT rather than the revision of international copyright conventions, the United States accused the World Intellectual Property Organisation (WIPO) of the same failings and lack of relevance as the Berne Union.[297] In this it was supported by the European Community and its member states.

After long and tough negotiations,[298] the full package of measures, including the creation of a new World Trade Organisation (WTO), new agreements on trade in goods, a new general agreement on trade in services, and an agreement on trade-related aspects of intellectual property, was accepted by 111 countries in Marrakesh on April 15th 1994.[299] Known as the TRIPs Agreement, this put copyright on an entirely new footing.

A key element of the TRIPs Agreement was the requirement for WTO member states to incorporate the substantive provisions of the Berne Convention into their national law.[300] This meant that any country wishing to join the WTO had to relinquish their national copyright laws in favour of the minimum standard of protection enshrined in the 1971 Paris version of the Berne Convention.[301] The only exception to this was Article 6*bis* of the Berne Convention, which governs the protection of moral rights:[302] this too accorded with the will of the US, which had always rejected the protection of *droit moral.*[303] On another issue, however, America bowed to European demands: although this had long been the reason why the US had refused to join the Berne Union, the new TRIPs agreement meant that works received worldwide protection regardless of any formalities. Protection was no longer dependent

295 GRABER, op. cit., pp. 131–133.

296 KATZENBERGER/KUR, op. cit., p. 9.

297 KLOTH, op. cit., p. 53.

298 GRABER, op. cit., pp. 133–135.

299 GRABER, op. cit., p. 210; see also KATZENBERGER/KUR, op. cit., pp. 1–7; KLOTH, op. cit., p. 48; STAEHELIN, op. cit., pp. 5–7.

300 Art. 9 Para. 1 Satz 1 TRIPs-Abkommen; see also DUGGAL, op. cit., pp. 68–69.

301 GRABER, op. cit., p. 210.

302 Art. 9 Para. 1 Satz 2 TRIPs-Abkommen.

303 GRABER, op. cit., pp. 213–214.

Diplomats from all over the world sign the TRIPs agreement in Marrakesh in 1994.

on prior registration, but applied on a worldwide basis right from the moment of a work's creation.

Although the protections of the Berne Convention were limited with regard to moral rights, they were extended in other respects.[304] Article 10 of the TRIPs Agreement stipulates that computer programs are to be protected as literary works and that data collections are protected as long as they "constitute intellectual creations due to the selection or arrangement of their content". With regard to computer programs and cinematographic works, Article 11 of the TRIPs Agreement also prescribes the introduction of a rental right for which there was no provision in the Berne Convention.[305] On all these points, the US was able to write its commercial interests into the treaty almost without compromise.

America also had the say in the field of neighbouring rights. Contrary to the demands of the European Community and what had been agreed in relation to the

[304] Duggal, op. cit., pp. 69–71; see also Katzenberger, op. cit., p. 65; Staehelin, op. cit., pp. 33–40.

[305] Duggal, op. cit., pp. 71–74; see also Katzenberger, op. cit., pp. 86–89; Staehelin, op. cit, pp. 36–39.

Berne Convention, minimum standards were not set with reference to the Rome Convention. Instead it was the TRIPs Agreement itself that stipulated the exclusive rights to be granted to performers, the producers of phonograms, and broadcasting companies.[306] A number of exceptions and limitations to these rights were stipulated, including the possibility of replacing exclusive rights by the royalty entitlements enshrined in the Rome Convention, allowing the members of the Rome Convention to continue to apply the existing systems. Another exemption made it possible to avoid the protection of broadcasting companies; this relieved the US, to which this kind of protection was new, from the obligation to introduce it.

The cross-referencing of the TRIPs Agreement and Articles 1-21 of the Berne Convention also extended to the exceptions and limitations contained in these articles. The TRIPs Agreement added a blanket reservation, which is contained in Article 13 and obliges member states to enact only specific exceptions and limitations that do not restrict the normal evaluation of works or prejudice the legitimate interests of the rights holders.[307] Although this so-called three-step test was taken almost to the letter from Article 9 of the Berne Convention, its significance was quite new. Whereas in the convention the test refers only to possible future limitations to rights of reproduction, in the TRIPs Agreement it applies to all rights of use:[308] it is no longer a general clause concerning future additional restrictions, but instead amounts to a limitation on all existing or future legislative restrictions. Moreover, the criteria for judging the legitimacy of exceptions and limitations were now no longer the interests of authors, but those of rights holders.[309]

This amounted to a significant change to the very character of copyright law. What was originally intended to be a means of protecting the intangible goods assigned by authors to publishers and production companies was now reduced by the TRIPs Agreement to the pure commercial, profit-driven interests of production companies. The moral interests of authors became as insignificant as those of the general public: the new interpretation of the three-step test no longer defines the interests

306 Duggal, op. cit., pp. 75–77; see also Katzenberger, op. cit., pp. 65–66; Kloth, op. cit., pp. 62–67; Staehelin, op. cit., pp. 42–44.

307 Katzenberger, op. cit., p. 90; see also Staehelin, op. cit., p. 41.

308 Reto M. Hilty, Urheberrecht, Bern 2011, pp. 187–188; see also Martin Senftleben, Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest, in: Reto M. Hilty/Alexander Peukert (Hg.), Interessenausgleich im Urheberrecht, Baden-Baden 2004, pp. 159–186 (171).

309 Reto M. Hilty, Sündenbock Urheberrecht?, in: Ansgar Ohly/Diethelm Klippel (eds.), Geistiges Eigentum und Gemeinfreiheit, Tübingen 2007, pp. 107–144 (120–125).

of actual authors as the basis on which the admissibility of restrictions is decided, but only those of the rights holders themselves. The tone was set in the preamble to the TRIPs Agreement, which makes it clear that the overriding interest of the agreement is the protection of free trade. The effective and adequate protection of intellectual property rights is necessary, but not to the point at which it would hinder legitimate trade. The public interest is reduced to and equated with that of free trade.

The extension of copyright protection to computer programs and data collections also led to a stronger commercialisation of the very notion of copyright. From the start, copyright theory had assumed that only works that were in some way distinguished and perceived as new, individual, and original could be considered copyrightable,[310] but this notion of the quality of work now became unclear. Computer programs and data collections in particular were industrially produced without reference to individual authorship or unique design. In the political and economic context, this could have led to the abandonment of distinct protections for intangible goods in general and the limitation of protection to material works as objects in themselves. At first, however, it maintained the prevailing tendency, especially in German and English jurisprudence, not to judge works in terms of their individuality or novelty, but according to criteria such as the costs of their manufacture, their economic value, or even the reputation of their authors.[311] These views upheld the early notion of copyright as primarily a matter of protecting investments, but ignored the equally important aspects of copyright as both the protection of the original intellectual activity and of general interest as it had been defined in the preamble to the Statute of Anne: here, copyright protection had been confined to those intellectual creations considered to increase the stock of knowledge and art available to society.

This tendency to assess intangible goods in purely economic terms was therefore bound to fail. Rulings by the highest courts in the US[312] and the EU[313] hold that

---

310 See Chapter 6.

311 Marcel Bisges, Die Kleine Münze im Urheberrecht. Analyse des ökonomischen Aspekts des Werkbegriffs, Baden-Baden 2014, pp. 159–178. A similar economic notion is to be found in the “sweat of the brow” doctrine known to Commonwealth countries, in which a certain degree of effort suffices to qualify productions as works (see Rahmatian, op. cit., pp. 38-41, and Chapter 6, footnote 119).

312 U.S. Supreme Court, Feist Publications v. Rural Telephone Service (499 US. 340).

313 ECJ Judgments of 16.7.2009 (C-5/08 Infopaq, Rdnr. 39) and of 1.11.2011(C-145/10 Painer, Rdnr. 87–94).

copyright protection can only be extended to works arising from the free creative decisions of their authors. Copyright protection is limited to intellectual creations that reflect the author's personality and expresses his or her free and creative choices in the production of the work.

The TRIPs agreement was clearly an important turning point for copyright. On the one hand, copyright protection was now consistent and enforceable on a worldwide basis: the Berne Convention became a global treaty, recognised in more than 80 percent of countries, and counterfeiting could be fought more comprehensively and efficiently than ever before. On the other hand, this notion of copyright applied only to commercial interests in the circulation of physical goods. Other public and non-commercial interests, such as access to information, education, and the "encouragement for learning" which had headed the 1709 Statute of Anne, were no longer held to be relevant to copyright protection.

17. In with the EU, and the WIPO comes back

For almost four years, the Uruguay Round of the GATT negotiations was occupied with the question of whether copyright issues belonged to its remit at all. By 1989 it had become clear that the United States was in the strongest position to negotiate an agreement on intellectual property as part of the Uruguay Round. This prompted two other major players to act. One, the European Community, was new to the field of copyright law, and recognised the need to counter the threat of US hegemony with initiatives of its own. The other, long-established in this area, was the World Intellectual Property Organisation (WIPO), which realised that it risked sinking into obscurity if its central concerns were simply handed over to the World Trade Organisation.[314]

Within the EU, copyright had always been the responsibility of the member states, each of which had its own copyright laws and the freedom to design them as it saw fit. This changed when the European Court of Justice began applying the basic rules of the free internal market to the record and film industries, a development which intensified as certain aspects of copyright law became defined as "trade-related" in the TRIPs negotiations. Because trade was clearly a core responsibility of the EU authorities, whose central task was the regulation of the internal market and the removal of internal trade barriers, copyright suddenly fell under the jurisdiction of the European Commission.

It was therefore the American push for effective barriers against the production and distribution of counterfeited goods which spurred the European Commission to act.[315] In this respect it relied on Article 110a of the treaty which established the European Economic Community[316] and empowers the authorities to "adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". The protection of computer programs served as a test case: there was no protection in several member states, and a clear lack of consistency amongst those in which such legal protection did exist.

In its 1989 proposal for a directive on the legal protection of computer programs, the European Commission drew attention to the major differences between the var-

[314] von Lewinski, op. cit., p. 111.

[315] Claudio Deriu, Die Bekämpfung von Produktpiratierie auf EU-Ebene, in: UFITA 2015, p. 461–486.

[316] This disposition corresponds to Article 114 of the actual EU Treaty.

ious national legal systems, and the fact that in some cases no national regulations were in place at all: this meant that many questions about the application of these regulations were so unresolved that the outcome of any possible litigation were completely open. "Divergences and uncertainty concerning the scope of protection and the different duration of the exclusive rights may not only affect the free movement of computer programs in the Community, but may also influence the decision to establish new firms or commercial initiatives and thus create a distortion of competition", wrote the Commission in support of its proposal.[317] This view prevailed: in May 1991, well ahead of the conclusion of the TRIPs negotiations, the European Commission issued a directive requiring member states to protect computer programs as though they were literary works as defined in the Berne Convention.[318] At the same time, member states were given precise orders regarding the design of this copyright protection.

This policy has since been extended beyond computer programs. Directives have now been issued to harmonise several copyright issues at the European level, always with the justification that prevailing differences in national laws hinder free internal trade and lead to market distortions. A directive on the rental and lending of copyrighted works was published in 1992;[319] directives on copyright protection in the field of satellite broadcasting and cable transmission[320] and the harmonisation of the term of the copyright protection in 1993;[321] and a directive on the protection of databases in 1996.[322]

This last directive was a special case: it did not follow the provisions of the TRIPs Agreement, but was instead based on the conviction that the Community, now operating as the European Union, should be able to create its own instruments of economic policy. The Commission claimed that insufficient legal protection for such data collections resulted in the fact that there were far fewer commercial databases in Europe than in the US, and therefore suggested that databases, which lack the individuality that could qualify them as works within the meaning of copyright, should nevertheless be protected against unauthorised duplications and other uses. This could be achieved by the use of a special legal instrument called the "*sui*

[317] OJ Nr. C91 of 12.4.1989, p. 4.

[318] Directive 91/250/EEC, now codified as Directive 2009/24/EC.

[319] Directive 92/100/EEC, now codified as Directive 2006/115/EC.

[320] Directive 93/83/EEC.

[321] Directive 93/98/EEC, now codified as Directive 2006/116/EC.

[322] Directive 96/9/EC.

generis right. The commission responded to the misgivings expressed by many EU member states by agreeing to conduct a thorough evaluation of the impact of the directive after five years.[323] The result of this evaluation was devastating: in its report, the Commission found that the number of commercial databases within the EU had fallen by a quarter since the introduction of the directive.[324] The EU's unilateral approach had been a complete failure.

The other EU directives were clearly issued in response to developments in the negotiations on the TRIPs Agreement. As soon as a regulation which went beyond the minimum protection of the Berne Convention emerged, Europe tried to ensure its uniform implementation with a new directive. This gave the EU a central position in European copyright law, and meant that the focus on free trade and the maximisation of profit so central to the TRIPS agreement was increasingly integrated into European law. These priorities gradually supplanted the traditional approach of European copyright law, which had sought to strike a balance between the protection of authors and that of producers and distributors of intangible services, as well as to maintain the protection of the public interest as an overriding priority.

Alongside these legislative efforts at the level of the European Union, the World Intellectual Property Organisation (WIPO) was also seeking to renew the terms of the Berne Convention. As soon as it became clear that the future WTO agreement would also include substantial copyright provisions, the board of the Berne Convention set up a committee of experts to draw up an additional protocol[325] which would enable authoritative interpretations of unclear provisions and establish new mandatory standards in areas where the Berne Convention had gaps in relation to the TRIPs Agreement. The protocol route was chosen because a complete revision of the agreement did not seem feasible: the sheer number of very different interests involved made it clear that the unanimity of all member states required for an overall revision would be difficult to achieve, whereas a protocol would allow the WIPO to make conceptual clarifications and technical adjustments, at least for its consenting members.

---

[323] Matthias Leistner, Der Rechtsschutz von Datenbanken im deutschen und europäischen Recht. Eine Untersuchung zur Richtlinie 96/9/EG und zu ihrer Umsetzung in das deutsche Urheberrechtsgesetz, München 2000.

[324] Commission of the European Communities, DG Internal Market and Services Working Paper, First evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 12.12.2005. See Hilty, op. cit., p. 104.

[325] Reinbothe/von Lewinski, op. cit., p. 3; von Lewinski, op. cit., p. 111.

1986: Switzerland issues a postage stamp to celebrate the centenary of the Berne Convention.

Here again, the TRIPs negotiations set the agenda. The new protocol was intended to cover the qualification of computer programs and databases as copyrightable works, the introduction of rental rights to computer programs and audiovisual works, and the protection of record and film producers. On this latter point resistance was strong: as in earlier discussions on the protection of recordings and audiovisual media, both authors and the states in which they had a say were vehemently opposed to the inclusion of such protection in the Berne Convention. A second committee of experts was set up in order to deal with this issue;[326] in order to avoid them arriving at conflicting solutions, the two committees maintained close contact with each other, and both were headed by the Finn Jukka Liedes.

As digitisation and the development of the internet subjected the use of protected works and performances to increasingly rapid change, the work of the committee assumed even greater significance. Such technical developments had not formed

[326] Kloth, op. cit., pp. 188–189; see also Reinbothe/von Lewinski, op. cit., p. 4.

part of the TRIPs Agreement[327] or the Berne Convention,[328] and in the wake of the conclusion of the WTO negotiations, both the computer and the music industry pushed for them to be taken into account. The two expert committees set up by the WIPO put forward numerous proposals dealing with various aspects of digitisation.[329] Again, the US urged the translation of these issues into binding standards under the treaty as quickly as possible[330] and, at its suggestion, the chair of the committees was instructed to submit draft proposals for consideration at a diplomatic conference convened in Geneva in December 1996.[331]

Three detailed draft treaties were proposed: one dealing with copyright, one dealing with the rights of performers and manufacturers, and one concerned with the protection of databases.[332] Work on the latter was abandoned when it became clear that no consensus would emerge: a majority of states refused to accept the EU's favoured *sui generis* protection underpinning the relevant EC directive.[333] The theme of audiovisual performances was also dropped.[334] But negotiations on the remaining points were a complete success: on December 20th 1996, the Diplomatic Conference adopted a WIPO Copyright Treaty designed as a special agreement within the Berne Convention, and a WIPO Performances and Phonograms Treaty was adopted alongside the Rome Agreement. The first agreement entered into force in March 2002, the second in May 2002. The signatory states undertook to integrate the minimum protection afforded by these treaties into their respective national legislation.

The two treaties complement and substantiate the TRIPS regulations. The Copyright Treaty defines the protection of computer programs[335] and databases[336] and introduces a rental right for computer programs and audiovisual works.[337] The Performances and Phonograms Treaty guarantees the equivalent rental rights for re-

327 Graber, op. cit., p. 227.

328 Kloth, op. cit., p. 187; see also von Lewinski, op. cit., p. 111.

329 Reinbothe/von Lewinski, op. cit., p. 5.

330 von Lewinski, op. cit., pp. 112–113.

331 Reinbothe/von Lewinski, op. cit., pp. 5–6.

332 Kloth, op. cit., p. 190.

333 Reinbothe/von Lewinski, op. cit., pp. 486–489.

334 Reinbothe/von Lewinski, op. cit., pp. 469–476.

335 WCT Art. 4.

336 Ibid., Art. 5.

337 Ibid., Art. 7.

cordings on phonograms.[338] Both treaties provide for the so-called "making-available" right, which is the exclusive right to make works or performances accessible via the internet;[339] the protections of so-called Digital Rights Management were also anchored in law for the first time.[340] All signatory states are obliged by the two treaties to take civil and criminal measures against the removal or circumvention of digital protections embedded in individual copies of works in order to prevent their unauthorised use or to ensure the identification of those entitled to the work or its performance.[341] A special feature of the WIPO Performances and Phonograms Treaty is that the protection of performers also applies to folk music,[342] which means that for the first time in the history of neighbouring rights, interpreters' rights are protected in relation to interpretations of traditional music as well as to interpretations of works protected by copyright. Although developing countries had once again failed to extend copyright protection to unwritten music, this was at least a breakthrough at the level of neighbouring rights.[343]

---

338 WPPT Art. 9.

339 WCT Art. 8; WPPT Art. 10 and 14.

340 WCT Art. 11 and 12; WPPT Art. 18 and 19.

341 UTA VIEGENER, Die unterschiedliche Bewertung der Umgehung von Kopierschutzmassnahmen in ausgesuchten nationalen Rechtsordnungen, in: UFITA 2006 II, pp. 479–509.

342 WPPT Art. 2 Bst. a; see also BEINING, op. cit, p. 26; KLOTH, op. cit., pp. 195–196; REINBOTHE/VON LEWINSKI, op. cit., p. 248.

343 See also MARC-ANTOINE CAMP, Wer darf das Lied singen? Musikethnologische Anmerkungen zum rechtlichen Status traditioneller Musikkulturen, in: sic! 2005, pp. 307–315.

18. The EU harmonises its copyright laws

As soon as the TRIPS agreement was signed, the European Council in Corfu decided to implement it at the EU level rather than leaving its implementation to the member countries.[344] Uncoordinated national implementation would, it was felt, produce significant differences in levels of legal protection, restrict the free movement of copyrighted products and services, and so lead to legal inconsistencies and the fragmentation of the internal market. In contrast, a harmonised legal framework for the protection of copyright and neighbouring rights could provide a degree of legal certainty and, by maintaining a high level of protection of intellectual property, promote substantial investments in creativity, innovation, and network infrastructure, and so contribute to the growth and competitiveness of European cultural industries.[345]

These reasons were compelling,[346] but it soon became apparent that copyright harmonisation across the EU would be no easy task.[347] Each country's legislation differed in detail and form, and national laws[348] had developed over decades, sometimes centuries, and in relation to very different legal traditions. Exceptions to copyright protection were particularly distinctive: the regulations of many countries were part of their national fabric and could not simply be removed by the stroke of a pen. Traditional approaches to the collective exploitation of copyright varied widely too.

The European Union was also keen to maintain its strong position in relation to the global cultural economy. Especially for the film industry, there were content-related reasons why production could not simply be shifted to low-wage countries and why this economic sector was therefore of particular importance to labour policy. However, film also came under considerable pressure from the US, which pushed for the free movement of goods in the audiovisual sector.[349] This led the European Union to

---

344 European Commission, Green Paper – Copyright and Related Rights in the Information Society, COM (95) 382 final.

345 Directive 2001/29/EC, Recital 4.

346 Moritz Röttnger, Das Urheberrecht in Rechtspolitik und Rechtsetzung der Europäischen Gemeinschaft – vom Handelshemmnis zum « Espace européen de la créativité, » in: UFITA 2001 I, pp. 9–94.

347 Graber, op. cit., pp. 228–230.

348 Röttinger, op. cit, pp. 34–45.

349 Christoph Beat Graber, GATS 2000: Strategien für den Europäischen Film, in: medialex 1999, pp. 86–97.

invest heavily in MEDIA,[350] a film promotion programme, and to develop stringent systems of protection for intellectual property and neighbouring rights.[351] As the 2001 Directive on the harmonisation of certain aspects of copyright and related rights in the information society states: "If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment."[352]

In order to achieve these objectives, the directive set out rules for the harmonisation of the rights of reproduction, distribution, communication to the public, and making available. It defined these as exclusive rights[353] and produced a binding list of permitted exceptions. Even before the directive was finalised, however, such a *numerus clausus* seemed implausible: many member states were unwilling to forego the particular exemptions permitted by their own legal traditions. This is reflected in Article 5, para 3, section o, which guarantees the hitherto accepted position that national exemptions remain permissible "in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article."[354] This does not preclude the possibility that other directives may introduce new exceptions and limitations: one such new exception, adopted in 2012, concerns the use of orphan works in certain publicly accessible institutions and broadcasts.[355]

---

350 «Mesures pour Encourager le Développement de l'Industrie Audiovisuelle». The first five years' programme referred to the years 1991–1995.

351 Directive 2001/29/EG, Recital 4.

352 Directive 2001/29/EG, Recital 10.

353 Jörg Reinbothe, Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft, in: GRUR Int. 2001, p. 733 ff.

354 Frank Bayreuther, Beschränkungen des Urheberrechts nach der neuen EU-Urheberrechtsichtlinie, in: ZUM 2001, pp. 828–839; see also Willi Egloff, Die EU-Richtlinie zur Harmonisierung des Urheberrechtsschutzes und das schweizerische URG, in: sic! 2002, pp. 739–751 (745).

355 Directive 2012/28/EU.

In all, the Harmonisation Directive contains both the obligation to provide exemptions for temporary technical reproductions, and twenty optional restrictions for which member states may provide in their national legislation.[356] Some of these exemptions relate only to the right of reproduction, but the majority refer to all the rights with which the Harmonisation Directive deals. All exemptions are subject to the three-step test as defined by the TRIPs Agreement,[357] and are therefore permitted only if they relate to specific cases, do not hinder the normal exploitation of the works and performances, and do not violate the legitimate interests of the rights holders to an unreasonable extent.

Many of these exceptions are permissible only on condition that the claimants receive "fair compensation" in exchange for legally permitted uses. This concerns the flat-rate remuneration regulations, which were first introduced in Germany in 1965 with a levy on tape recorders and were later extended to include other recording and reproducing devices. These device levies, as well as charges on recordable media, were subsequently adopted by many other European countries. The directive makes such collective remuneration enforceable throughout the EU, and permits the restriction of exclusive rights on the basis of an overriding interest as long as they are linked to the payment of compensation.[358]

The directive also regulates the so-called "technical protection measures", i.e. restrictions on access and copying in the context of Digital Rights Management and information about rights to the works and performances. These safeguards are intended to ensure the secure dissemination of digital content on the internet as well as the distribution of media, for which the cultural industries had high hopes at this time.[359] The directive requires civil and criminal measures to be taken against circumventions of such technical measures, and prescribes the legal remedies available to claimants in the event of their infringement.[360]

In a further point, the directive contains a reservation in favour of national rules: Recital 18 states that it does not apply to the management of rights, such as extended collective licenses. This addresses the so-called "contract licence" or "extended

[356] Directive 2001/29/EG, Art. 5 Paras. 1–3.

[357] Ibid., Para. 5.

[358] Directive 2001/29/EG, Art. 6 and 7.

[359] Alexander Peukert, DRM: Das Ende der kollektiven Vergütung?, in: sic! 2004, pp. 749–757.

[360] Philippe Gilliéron, La gestion numérique des droits (DRM) dans les législations nationales, in: sic! 2004, pp. 281–297; see also Reinbothe, op. cit., p. 47.

collective licence", a legal instrument which was first introduced in the Scandinavian countries in the early 1960s, and remained in place when Denmark, Finland and Sweden joined the EU.[361] This form of licensing proceeds on the basis that a representative collecting society is able to permit the use of works and performances in certain areas, and to do so on behalf of persons who are not necessarily its members and so have not entrusted them with the exercise of their rights. This regulation was established as a tool for the administration of larger rights packages, and is taken to be less of an interference in copyright than would be the case with a legal licence. Although these licences are referred to as "extended collective licences" in international use, the term "contract licence", which remains common in the countries concerned (Denmark, Finland, Iceland, Norway, and Sweden), emphasises its distinction from a legal licence.[362]

The implementation of the directive codified copyright on a uniform basis across Europe. The fact that the European Court of Justice had authority throughout the European Union also made a significant contribution to the process of harmonisation.[363] This standardisation was further fuelled by the recent accession of many new Member States to the EU, which now encompassed a large part of Europe. After 2003, a largely unified system of copyright applied to this whole area, with its population of some 500 million people.

As in the case of the TRIPs Agreement, this harmonisation took place against the background of a highly economic, profit-led perspective, which brought it into conflict with many established business models. The regulations were designed for a single European market which did not even exist in, for example, the audiovisual sector, where products were exploited in cascade form by exploiting films first in cinemas, then on pay TV and in video distribution, and only later on public television. This process often moved from country to country with a long time lag, so that what were often very high evaluation costs were incurred on a staggered basis. This cascade system was brought into question by the efforts of the EU Commission to standardise and unite the internal market.[364]

---

[361] Willi Egloff, Extended Collective Licenses – ein Modell auch für die Schweiz?, in:sic! 2014, pp. 671–686.

[362] Egloff, op. cit., pp. 672–673.

[363] Christian Berger, Aktuelle Entwicklungen im Urheberrecht – Der EuGH bestimmt die Richtung, in: ZUM 2012, pp. 353–361.

[364] Johannes Kreile, Ende territorialer Exklusivität – Der EuGH als Totengräber?, in: ZUM 2012, pp. 177–187; see also Mathias Schwarz, Die Praxis der segmentierten Rechtevergabe im Bereich Film, in: ZUM 2011, pp. 609–706.

The limitation of the barrier regulations to a catalogue of predefined exceptions, often geared to certain technical processes, soon proved impracticable, and it was only a matter of time before resistance grew. At the same time, the directive increased the differences between European and US copyright protection by generalising the concept of fair compensation. For its part, the US put the provisions of the TRIPs Agreement and the two WIPO Treaties into national law with the Digital Millennium Copyright Act of 1998. Far more than Europe, the US relied on the individual enforcement of rights and used instruments of collective management in only a few exceptional cases. It also dispensed with the establishment of precisely defined copyright barriers, but retained the broadly formulated fair use clause, so that the details of rights limitations became a matter of legal application. Particularly in the audiovisual field, European and American ideas on the exploitation of rights continued to drift ever further apart.

19. The digital world runs out of control

Global players in the software and cultural industries had high hopes that Digital Rights Management would allow precise licences to be issued even for mass uses of works and performances, as well as facilitating the calculation and collection of the optimum compensation in each individual case[365] whilst at the same time putting an end to the unrestricted ability to copy digital media.[366] "The answer to the machine is in the machine", it was often said: the problems of registering the use of works and performances as well as of distributing compensation for their use were to be dealt with not by copyright, but other technical means.[367] Such automated procedures seemed to threaten the very existence of collecting societies.[368]

Things were different in practice.[369] Even in terms of the distribution of physical goods, for which Digital Rights Management had originally been conceived, consumers of music and films were angered by barriers to access and reproduction. Everyday functions such as the transfer of files from one device to another were suddenly no longer possible; copies which had been purchased correctly could not be played; and technical problems interrupted the enjoyment of music and audiovisual material. Programs designed to circumvent these barriers were soon available on the internet, and equipment manufacturers also adjusted to the new situation by integrating the capacity to play even encoded audio and video on worldwide basis.[370]

With the increasing relocation of works to the internet, concerns about issues of privacy and personal protection also grew.[371] The development of copying tech-

[365] Nuss, op. cit., pp. 60–61.

[366] Nuss, op. cit., pp. 198–199.

[367] Rolf Auf der Maur/Claudia Keller, Privatkopie: ein wohlerworbenes Recht?, in: sic! 2004, pp. 79–89 (87); see also Stefan Bechtold, Das Urheberrecht und die Informationsgesellschaft, in: Reto M. Hilty/Alexander Peukert (eds.), Interessenausgleich im Urheberrecht, Baden-Baden 2004, pp. 67–86; Rolf H. Weber, Traditionelles Urheberrecht: Sprengstoff für die Informationsgesellschaft?, in: Reto M. Hilty/Mathis Berger (eds.), Urheberrecht am Scheideweg?, Bern 2002, pp. 69–85 (72–76).

[368] Peukert, op. cit.

[369] Hilty, op. cit., pp. 374–377; see also Dominik P. Rubli, Das Verbot der Umgehung technischer Massnahmen zum Schutz digitaler Datenangebote, Bern 2009.

[370] Nuss, op. cit., p. 63.

[371] Willi Egloff, Revisionsbedarf beim urheberrechtlichen Eigengebrauch?, in: medialex 2006, pp. 35-45.

niques saw more and more uses of works and performances in the private sphere: everybody now had access to photocopiers and means of reproducing records and audiovisual material. This migration to the private sector became even more pronounced once virtually every household gained access to the internet. It was, however, far from clear that rights holders should be allowed to track uses of their work in this domestic sphere: a management system which would record, register and account for all uses of works and performances in the private sector seemed like an Orwellian nightmare,[372] and there was little desire to see the introduction of criminal and civil penalties which might even extend to the blocking of access to the internet.[373]

The concept of Digital Rights Management soon faced considerable political resistance. Several copyright regimes retained the deeply rooted notion that the use of works and performances in the private sphere was broadly permissible, and the widespread feeling that private sector copying should be allowed was reinforced, particularly in Europe, by the fact that rights holders were in a position to claim fair compensation for such private uses.[374] This compensation was implemented through collectively-managed levies on the purchase of copying machines and media, and it was not clear why it should be supplemented by controls on the use of works and performances in the private sphere.

Even in areas where private use was not an issue and individual rights exploitation was undisputed, the assertion and enforcement of copyright became increasingly difficult in spite of Digital Rights Management.[375] Rights holders were unable to intervene in the mass copying of music and films on the internet. Much illegal activity was occurring in countries where copyright protection did not exist or in which its implementation was difficult,[376] and these activities were usually anonymous.[377]

---

[372] EGLOFF, op. cit., pp. 42–43; see also ALFRED MEYER, DRMS können die Verwertungsgesellschaften nicht ersetzen, in: medialex 2004, pp. 67–68.

[373] Loi n° 2009-664 du 12 juin 2009. See also MARC WULLSCHLEGER, Die Durchsetzung des Urheberrechts im Internet, Bern 2015, pp. 178–183.

[374] Directive 2001/29/EC, Recital 35.

[375] MORITZ HENNEMANN, Urheberrechtsdurchsetzung und Internet, Baden-Baden 2011.

[376] VINCENT SALVADÉ, Service en ligne et violations du droit d'auteur: l'union incertaine de la territorialité et du réseau mondial, in: medialex 2000, pp. 143–150.

[377] MARKUS SCHÜRMANN, Das Urheberrecht – von Buchdruck bis Filesharing, Marburg 2009, pp. 61–71.

Even individuals who were caught could simply resume their activities with a new company under a different name. It was not easy to enforce the law online.[378]

Legal licences for works in the private sector soon drew the attention of companies keen to exploit these exemptions. The most important and sustainable of these phenomena were the peer-to-peer services[379] which allow network participants to provide and receive services amongst themselves and were particularly popular for the distribution of music and audiovisual files. Companies took the view that such file sharing is a private – and therefore permitted – use by individual peers, and industry statistics from 2005 estimated that, on average, some 8.9 million people worldwide were active in such networks at any given time, with around 2.2 billion files being exchanged within one year.[380]

The trailblazer was Napster, which had been active on the internet since 1999 and had grown to the point at which it supplied music to some 80 million users around the world. After some hesitation, the music industry intervened. Napster, they argued, was operating a central server on which searches could be made and was therefore functioning as a centrally controlled, profit-oriented company.[381] Even as this was being debated, however, less centralised systems began to emerge to which the legal arguments used in the Napster case did not apply.[382] Although it was always possible to close down particular sources, such cases were rare and did not alter the fact that practically the entire global repertoire of music and audiovisual material was available on the internet without authorisation and at no cost.[383]

What soon became known as "social media" also took advantage of the exemption for uses of works in the private sector. YouTube and Facebook established worldwide platforms giving private individuals the means to access any files online, with networks designed in such a way that the platforms themselves assumed no responsibility for content made available without permission. The removal of content clearly not intended for private use was extremely costly and sometimes technically impossible, and even when this happened, it was often short-lived: as soon as a file

---

378 Peter Hilgert/Rüdiger Greth, Urheberrechtsverletzungen im Internet, München 2014; see also Wullschleger, op. cit.

379 Nuss, op. cit., pp. 51–52.

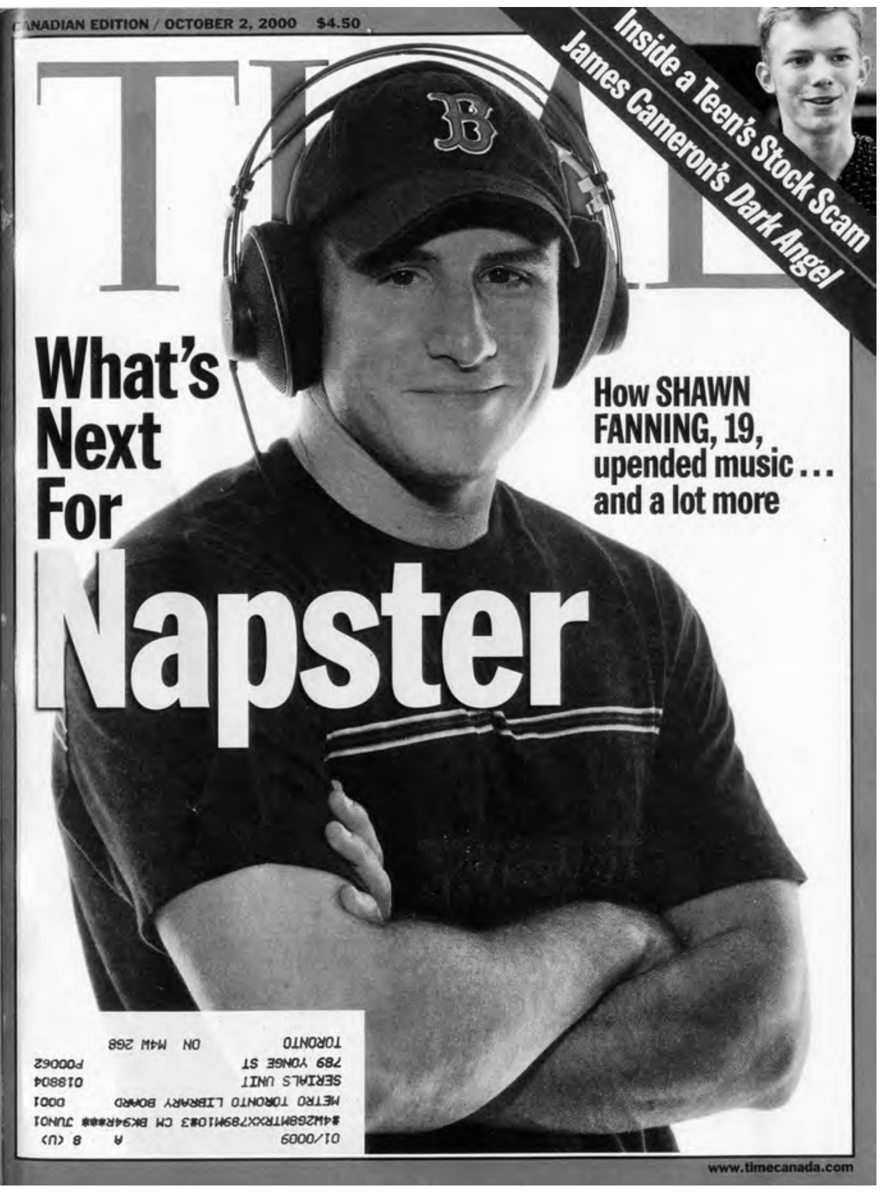
380 Egloff, op. cit., p. 35.

381 Nuss, op. cit., pp. 52–55.

382 Graber, op. cit., p. 230; see also Nuss, op. cit., pp. 56–57.

383 Nuss, op. cit., p. 59.

had been deleted, it would reappear at a new address on the same or a different platform.



Napster, the file sharing exchange, takes revenue out of the music industry.

These developments led to a situation in which the norms and reality of copyright became increasingly divergent. The exploitation of works and performances in the internet had spiralled out of control.[384] While it is possible to ban individual uses in certain cases and shut down specific services, hundreds of thousands of works and performances continue to be available free of charge and without the consent of the rights holders.[385]

As Sabine Nuss makes clear, the deeper reason for this loss of control lies in the easy accessibility of the means of production for digital goods. The distinction between producers of the immaterial goods and owners of the means of production disappears completely when digital products can be produced and distributed with nothing more than a computer and internet access. If digital goods of any quality and quantity can be made by anyone on a private computer, ownership of the means of production becomes irrelevant. The very notion of intellectual property and, with it, copyright, disappears.[386] Digital Rights Management should make it possible to control flows of data and "re-install"[387] manufacturers as owners of the means of production, but recent experience makes this seem unlikely.

---

[384] JACQUES DE WERRA, Défis du droit d'auteur dans un monde connecté, in: sic! 2014, pp. 194–211.

[385] SANDRA BRÄNDLI/AURELIA TAMÓ, Mainstream – Streaming als Nutzungsform der Gegenwart und der Zukunft, in: sic! 2013, pp. 651–662 (661).

[386] NUSS, op. cit., pp. 219-220.

[387] NUSS, op. cit., p. 224.

20. Resistance from the sciences

As well as new challenges to law enforcement in the private sphere and on the internet, the cultural industries also faced growing questions about the individualised and commercialised nature of copyright protection as such. These were raised above all in the field of scientific research, where demands for free access to scientific literature were made by scientists who had been accustomed to building on the results of previous research, developing it further in their own work, and then presenting their results.[388] As a rule, they were less concerned with generating revenue through the sale of their work, than being acknowledged and cited on a worldwide basis through the distribution of their works. This expectation soon came into conflict with new commercially oriented business models.

The strategy of maximising profits, which characterised copyright as an aspect of world trade, met with increasing resistance. A rapid growth in the production of scientific literature was accompanied by unprecedented rises in the prices of books and journals.[389] Scientific libraries could not afford to buy these works; on the internet they were kept behind pay walls and other access barriers;[390] and many publishers also prevented their authors from making works accessible on their own websites. Copyright suddenly emerged as an obstacle to the exchange of scientific information, and this was particularly disadvantageous to scientists in less industrialised countries with smaller budgets for education and research.[391]

Dissatisfaction was heightened by the fact that publishers' sole interest in profits was so blatantly reflected in the increasingly high prices of their publications. Scientific authors were mainly institutional employees who were not paid for their contributions, and the process of peer-reviewing manuscripts for their scientific

---

388 Karl-Nikolaus Peifer, Das Urheberrecht und die Wissensgesellschaft – Stimmen die rechtlichen Rahmenregeln für die Zukunft von Forschung und Lehre?, in: UFITA 2007 II, pp. 327–362.

389 Reto M. Hilty, Das Urheberrecht und der Wissenschaftler, in: GRUR Int. 2006, pp. 179–190; see also Sebastian Krujatz, Open Access, Tübingen 2012, pp. 40–43; Alexander Lutz, Zugang zu wissenschaftlichen Informationen in der digitalen Welt, Tübingen 2012, pp. 165–170; Georg Sandberger, Behindert das Urheberrecht den Zugang zu wissenschaftlichen Publikationen, in: ZUM 2006, pp. 818–828.

390 Hilty, op. cit., p. 184; see also Lutz, op. cit., pp. 168–170.

391 Jörn Heckmann/Marc Philipp Weber, Open Access in der Informationsgesellschaft, in: GRUR Int. 2006, pp. 995–1000; see also Michael Link, Open Access im Wissenschaftsbereich, Frankfurt a.M. 2013, pp. 21–23.

quality was also carried out at no cost to publishers by people from this same constituency. In addition, many journals were electronic publications that did not even incur printing costs. Nevertheless, according to a British study, the average selling price for scientific journals increased as much as 300 percent, even when adjusted for inflation, between 1975 and 1995.[392]

Nowhere is the transformation of copyright protection into an instrument of profit clearer than in this field of scientific publishing. The big science publishers became adept at interpreting this instrument to their own advantage. Market leaders Reed Elsevier, a Dutch-British group which controls some 40 per cent of the market, has operated at margins of more than 30 per cent since 2004,[393] and in 2015 reached 42 per cent.

It was against this backdrop that scientists began to seek ways out of this "publication crisis" at the end of the last century.[394] An initial breakthrough came in a statement issued in December 2001,[395] the Budapest Declaration, which called for the creation of a new model for the exchange of scientific research. "An old tradition and a new technology have converged to make possible an unprecedented public good. The old tradition is the willingness of scientists and scholars to publish the fruits of their research in scholarly journals without payment, for the sake of inquiry and knowledge. The new technology is the internet. The public good they make possible is the worldwide electronic distribution of the peer-reviewed journal literature and completely free and unrestricted access to it by all scientists, scholars, teachers, students, and other curious minds. Removing access barriers to this literature will accelerate research, enrich education, share the learning of the rich with the poor and the poor with the rich, make this literature as useful as it can be, and lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge."[396]

This call hit a nerve. It was signed by thousands of scientists, and was taken up at several further conferences. A meeting of biomedical experts in April 2003 resulted

---

392 Lutz, op. cit., p. 166.

393 Martin Paul Eve, Open Access and the Humanities: Contacts, Controversies and the Future, Cambridge 2014, p. 14; see also Link, op. cit., p. 22, Fn. 18.

394 Willi Egloff, Das Urheberrecht und der Zugang zu wissenschaftlichen Publikationen, in: sic! 2007, pp. 705–717 (706); see also Hilty, op. cit., p. 184; Krujatz, op. cit., pp. 40–43.

395 Link, op. cit., pp. 25–26.

396 http://www.budapestopenaccessintiative.org/.

in the Bethesda Statement on Open Access Publishing,[397] and the Berlin Declaration on open access to scientific knowledge was made in October 2003[398] in the wake of a conference which not only addressed access to scientific publications, but also access to the scientific heritage of archives and museums. The Berlin Declaration led to a series of annual conferences pursuing these themes and assessing the state of play.

In 2001, the Stanford Law School launched a programme allowing authors themselves to initiate and set the terms for accessing and using their images, music, and literature.[399] The organisation, known as “Creative Commons, designed a series of so-called “common-use licences” that allow authors to publicly announce that they consent to the use of their works within the scope of the licence. This gives users peace of mind that they will not be prosecuted for copyright infringement as long as they abide by the terms of the licence attached to the copy. Under the name “science commons”, these licences have also found their way into scientific literature. Together with a large number of similar other common-use licences mostly focussed on specific fields, they are now used worldwide on a large scale.[400]

However, these common-use licences soon began to be used by authors not only in relation to works protected by copyright, but also for works that had never enjoyed such protection. For example, Creative Commons licenses are now applied to data collections, statistical tables, automatically generated photographs, instruction manuals, and many other works that lack quality within the meaning of copyright law and therefore can not be protected by copyright.[401] Although the creative commons designation has no legal significance in these cases, it nevertheless serves to deter free re-uses of data, with the consequence that as well as promoting the use of scientific findings, these individually applied “licences” have also created an undesirable sense of uncertainty about the permissibility of the re-use of data and data collections.

The demand of scientists for open access to scientific knowledge led to new types of scientific publications. So-called “open access journals” make their content free-

[397] Link, op. cit., pp. 26–28.

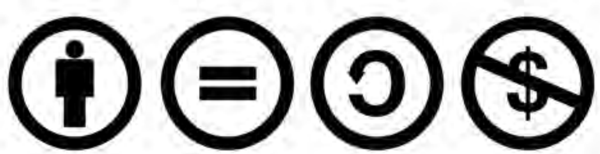
[398] Link, op. cit., pp. 28–32.

[399] James Boyle, The Public Domain, New Haven/London 2008, pp. 180–184.

[400] Melanie Bosshart, Das Creative-Commons-Lizenzsystem: alternativer Verwertungsansatz für Rechte an geistigem Eigentum im digitalen Zeitalter? Zürich 2013; see also Miriam Sahlfeld, Creative Commons, in: medialex 2007, pp. 72–80.

[401] Egloff, op. cit., p. 711; see also Lutz, op. cit., pp. 26–27.

ly available immediately after publication and refrain from further commercial exploitation of the published work. Users' obligations in relation to such publications are limited to acknowledging the source in case of any further use, as had been the case with conventional publications. The costs of publishing and disseminating research are understood as part of their respective research costs and are borne by the relevant scientific organisation, in some cases also in the form of contributions from non-profit making institutions. Numerous commercial science publishers also publish such open access journals, doubtless in an effort not to leave this growing market to scientific institutions.



The Creative Commons organisation launches the first "common-use" licences.

The difficulties of accessing scientific literature and research data have not gone unnoticed by research funding institutions. For example, the US National Institute of Health took the view that medical knowledge is a matter of public health and should not be privatised and began to make the allocation of funds for research dependent on the resulting data and publications being made publicly available.[402] Attempts by Elsevier to contest these conditions were rejected by both houses of the US Parliament.

Horizon 2020, the EU's central research program, also makes such stipulations: research projects supported by funds from this programme must publish their results in open access journals or at least make them available on freely accessible websites. Here too the aim is to make research results available to the public without having to pay compensation to private individuals for this access.

The difficulties of accessing and re-using publications and data have necessitated legislative adjustments too. The European Directive on the harmonisation of copyright already contained several exemptions in favour of scientific research,

[402] EGLOFF, op. cit., p. 711; see also LUTZ, op. cit., pp. 26–27.

but these are optional exceptions which, because of their selective integration into national copyright laws, have not led to any real harmonisation.[403] On the contrary, member states have developed national regulations to facilitate access to scientific literature. For example, the German Copyright Act introduced a provision that allows scientists to publish their works a second time, subject to a certain period of grace, regardless of other agreements, thereby making them accessible beyond the original publication.[404] Similar provisions were also made in the Netherlands.

It was obvious, however, that the problem could not be solved through national legislation. As early as 2008, a Green Paper on "Copyright in the knowledge-based economy"[405] published by the EU Commission, stated that differences in national copyright law constituted an obstacle to transnational research collaboration. Particularly problematic was the fact that researchers who carried out joint research activities at different locations were subject to different regulations. Similar difficulties arose with regard to the analysis of large volumes of documents: it was found to be impractical to subject the use of these documents to case-related licences. In December 2015 the European Commission also announced the creation of further exceptions and limitations to copyright in the sciences, especially in relation to particular cases of automated analyses of copyrighted data collections, images and texts, introducing a legal licence that allows the use of works for such purposes without the permission of rights owners.[406]

[403] Willi Egloff/David J. Patterson/Donat Agosti/Gregor Hagedorn, Open exchange of scientific knowledge and European copyright: The case of biodiversity information, in: ZooKeys 414 (2014), pp. 109–135.

[404] Art. 38 Para. 4 German Copyright Law. See Christoph Bruch/Thomas Pflüger, Das Zweitveröffentlichungsrecht des § 38 Abs. 4 UrhG – Möglichkeiten und Grenzen bei der Anwendung in der Praxis, in: ZUM 2014, pp. 389–394.

[405] European Commission, Green Paper on Copyright in the Knowledge Economy, 16.7.2008, COM (2008) 466 final. See Cyrill P. Rigamonti, Aktuelle Entwicklungen im europäischen Urheberrecht, in: sic! 2009, pp. 196–205.

[406] Sandra Sykora, Neues Urheberrecht gesucht – Die EU auf dem Weg zum digitalen Binnenmarkt?, sic! 2017, pp. 88–98.

21. Switzerland’s route to copyright independence

Although the *Schweizerische Gesellschaft zur Wahrnehmung musikalischer Aufführungsrechte* had a monopoly on the administration of copyright within Switzerland, even in the post-war period the Swiss cultural industries had little political significance. Both the literary and music markets were dominated by works from neighbouring countries, and later from Britain and the US too, and the Swiss film industry was small in size and of minor economic importance. Discussions on the future development of copyright were prompted less by the need to protect local authors than by demands for unfettered access to copyrighted works.

As host of the Berne Union, the Swiss government recognised the need to guarantee the minimum standards of copyright protection laid down in the Berne Convention. Following the 1948 Brussels revision of the convention and the 1952 ratification of the Universal Copyright Convention in Geneva, the Swiss Federal Council asked the relevant department to draft proposals to allow Switzerland to accede to these two treaties. This resulted in a 1953 proposal to revise copyright legislation only to the extent necessary to ratify the new treaties and postpone a more comprehensive revision to a later date.[407]

The Federal Council accepted this proposal, and in 1954 a bill of amendment was submitted to parliament which increased the term of protection to 50 years after the death of the author, recognised a broadcasting right and a right of retransmission, and adapted some rules of limitation.[408] These were the minimum adaptations required to allow alignment with the Berne Convention as it then stood. A far longer list of eventual changes to the 1922 copyright law and to the 1940 exploitation of copyright law was also published by the Federal Council for future consideration; this included the copyright protection of films, the regulation of privately produced photocopying, microcopying and tape recordings, the development of moral rights, resale rights in the fine arts, and numerous proposals for performance rights.

This approach allowed the Federal Council to avoid most of the conflicts which might have arisen from the revision procedure.[409] The need to adapt to the international standard of copyright protection was undisputed, and the bill passed with little parliamentary resistance on June 24th 1955.[410]

407 Grossenbacher, op. cit., p. 18.

408 Grossenbacher, op. cit., p. 19.

409 Bundesblatt 1954, Band II, p. 649.

410 Grossenbacher, op. cit., p. 19.

Rather more difficult was the path to a total revision of the law. Once again, there was insufficient political pressure to adapt to new technical and economic realities: users of works were content with the incomplete and outdated law, and authors were not in a position to make their demands heard. It fell to the government to act. In 1963 an expert commission, largely composed of university professors, was asked to develop a preliminary draft for a total revision of the law which would also include the adoption of the neighbouring rights enshrined in the Rome Convention. Switzerland had signed this agreement, but had been unable to ratify it because of the lack of adequate protections under Swiss law.[411]

After eight years of consideration, the commission finally made a proposal which did not, however, include provisions on neighbouring rights, and still failed to meet most of the concerns of authors. Reprographics, the use of protected works in the private sphere, library uses of works, the distribution of television programmes via cable, and many other urgent copyright issues remained unregulated.[412] Extensive opposition led to the expansion of the commission, and in 1974 a draft law on neighbouring rights was submitted for consideration in parallel with the revised copyright law. But the original concerns remained, and it was obvious that the drafts would not survive a parliamentary debate.

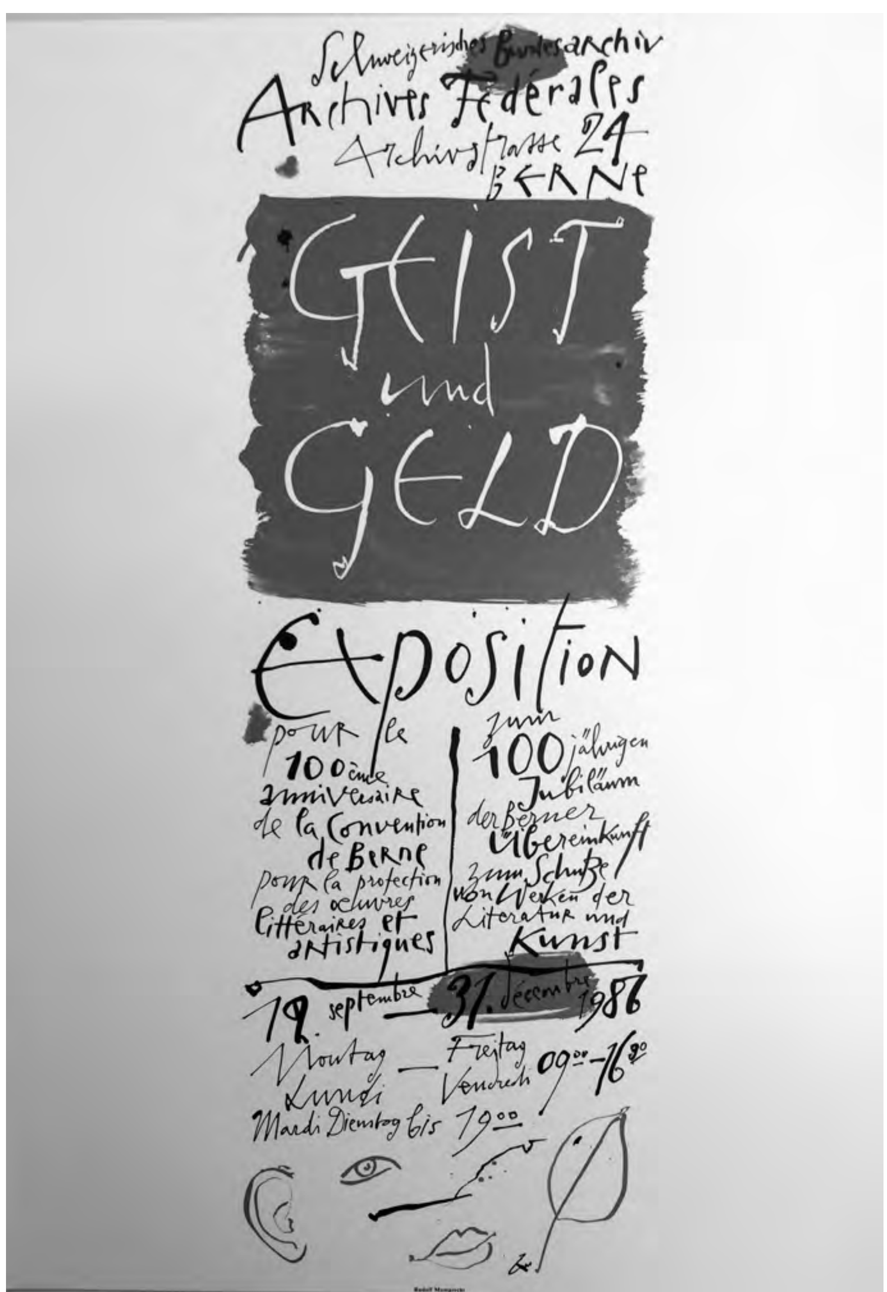
In the light of this political impasse, the competent federal office finally decided to address the most pressing issues with a draft bill of its own. The text, which was based on the preliminary draft of 1974 was developed without the input of those directly affected, and was not particularly forward-looking. In 1984 this too was sent back by the parliament for further consideration[413] in the hope that a new bill would be more practical, simplifying the regulation of the use of works in schools and libraries, incorporating the protection of interpreters, and giving a greater role to collecting societies. Consideration was also to be given to the protection of computer programs. The goal was to achieve an "alignment of contradictory positions with the aim of improving the consensus".[414]

411 GROSSENBACHER, op.cit., pp. 19–20; see also HILTY, op. cit. , pp. 58–60.

412 ALOIS TROLLER, Vorentwurf der Expertenkommission für ein schweizerisches Bundesgesetz betreffend das Urheberrecht, Berlin/Frankfurt a.M. 1972.

413 DENIS BARRELET/WILLI EGLOFF, Das neue Urheberrecht. Kommentar zum Bundesgesetz über das Urheberrecht und verwandte Schutzrechte, 3. Auflage, Bern 2008, p. V.

414 Amtliches Bulletin des Ständerates 1985 II 589 and Amtliches Bulletin des Nationalrates 1986 I 702.



1986: the Swiss Federal Archives commemorate the centenary of the Berne Convention with a poster by the Bernese artist Rudolf Mumprecht.

A third expert commission was established in 1987. This brought representatives of authors' associations and of economic interest groups as well as academics together for the first time,[415] and a bill which dealt with all the demands made by Parliament and on which all members of the commission were able to agree was finally passed. This success had less to do with a sudden willingness to compromise than with the urgency of the need to establish copyright protection for computer programs. As explained in Chapter 16, the US had demanded such protection in the Uruguay Round of the TRIPs negotiations, and the Swiss software industry faced sanctions and severe trade disadvantages if Switzerland did not comply. Pressure also came from the European Community, which announced a forthcoming directive on copyright protection for computer programs. Economic interdependence, especially in this high-tech sector, meant that a swift response was required if Switzerland was not to be cut off from the market. As long as it would include appropriate protections for computer programs, the revision of copyright law suddenly assumed a sense of urgency.[416]

Mistrusting this sudden consensus, federal officials tried to change the commission's proposals in favour of the interests of consumers, but they met with stern opposition. The commission had raised authors' hopes, and they now joined forces with the associations of interpreters and other interested parties to defend the position they had achieved. When a far weaker revision bill was submitted at the end of 1989, parliamentarians close to these bodies reversed the changes one by one.[417] A new copyright law which included the most of the points submitted by the third expert commission was passed on October 9th 1992, and Switzerland was now able to ratify the Stockholm and Paris versions of the Berne Convention as well as the Rome Convention.

International pressure had been crucial to these parliamentary debates. Provisions on the protection of computer programs were now consistent with European Community policies,[418] and in order to ease Switzerland's accession to the European Economic Area (EEA), parliament sought compliance with European legislation in other respects as well. Switzerland also adopted the system of statutory licences, accompanied by the flat-rate compensation for uses of work in the private and ed-

415 Hilty, op. cit., pp. 59–60.

416 Barrelet/Egloff, op. cit., pp. VI–VII.

417 Amtliches Bulletin des Ständerates 1991, Band II, p. 89 ff.

418 Barrelet/Egloff, op. cit, N. 23 zu Art. 3 URG.

The writer and translator Jochen Kelter headed the working group of authors, which successfully campaigned for a strengthening of copyright protection in Switzerland (photography by Felix von Muralt).

ucational sectors[419] which had evolved in Germany and then been applied in many other European countries.

When Swiss membership of the EEA was rejected in the 1993 referendum, the need to adapt to European copyright standards lost its urgency. Although the 2008 revision of the law made all the necessary adjustments to ratify the 1996 WIPO

[419] Art. 19 and 20 CH-URG. See Vincent Salvadé, Les droits à rémunération instaurés par la loi fédérale sur le droit d'auteur et les droits voisins, in: sic! 1997, pp. 448–457.

treaties, it did not adapt to the 2001 European Copyright Harmonisation Directive and, in several areas, Switzerland chose independent solutions that were not always compatible with EU law.[420] This was the case in relation to the protection of technical protective measures, where more consideration was given to the fact that these protective measures should not prevent permitted uses.[421] Switzerland chose not to introduce *sui generis* protection for databases as required by EU Directive 96/9:[422] the Swiss had no interest in such a scheme, and realised that its absence might even bring them some local advantage.

[420] PHILIPPE GILLIÉRON, Le monde de l'audiovisuel à l'ère numérique: enjeux juridiques, in: sic! 2009, pp. 755–777; see also HILTY, op. cit., pp. 60–62.

[421] Art. 39a Para. 4 CH-URG.

[422] BARRELET/EGLOFF, op. cit., N. 5a zu Art. 4 URG; HILTY, op. cit., p. 104.

22. The outlook: a host of open questions

This historical review suggests that copyright should be primarily concerned with the protection of authors' investments in the production and distribution of their work. Copyright has aimed at enabling authors to obtain a return on the circulation of their works over a period of time in order to reward the "effort and reflection"[423] they have made while, at the same time, ensuring that works can be published and made available to the public without delay.

The global copyright system has two roots: one of them is often referred to as the first copyright law, the 1709 Statute of Anne which applied to books and other printed works. The other is the first *droit d'auteur* law of 1791, which applied to theatrical works.

The system has been affected and refined by a host of social, technical and economic developments, and generations of theorists have endeavoured to give it ideological substance or use it in support of particular world views. But the basic idea has remained: the aim of copyright is to guarantee authors an income, protect the distribution of works against unfair competition, and make works available to the public. The need for such protections dates back to the point at which authors were first compelled to sell their intellectual creations in their entirety to production companies – a publishing house, a record company, or a broadcaster. The 20th century focus was on allowing the interpreters, broadcasters, and producers of audio and video media to benefit from such protection, and although their interests were often quite distinct, historical circumstances tended to group them together as neighbouring or related rights.

While literature was largely dealt with in terms of conventional publishing, the fields of music and theatre were marked by the formation of mutual societies, the first bodies to manage copyright at an international level. These collectives managed rights in music with an efficiency that was never achieved in literature or film, and it was therefore mainly to music that collective copyright applied.

The alignment of copyright to the principles of world trade shifted the balance of economic power to the producers of data, sound, and images. The legal focus moved as well, away from the copyright-based sale of intangible goods by their actual authors to the profit oriented brokerage of services and the distribution of physical products in which these immaterial goods had been materialised. Authors

[423] Thurneisen, op. cit.

were now at best involved in the proceeds of such services, and the general public interest barely figured at all.

Accession to the World Trade Organisation brought with it the obligation to ensure copyright protection in one's own country in accordance with the Berne Convention and also to enshrine protection of interpreters' rights. This led to a rapid globalisation of copyright law, a development expressed in such codifications as the British Copyright Design and Patents Act of 1988, the US Digital Millennium Copyright Act of 1998, and the 2001 EU Directive on the harmonisation of certain aspects of copyright and related rights in an information society.

These legislative moves nevertheless failed to turn copyright into a balanced instrument capable of protecting investments in intangible goods on the one hand, and access to knowledge on the other, as was originally intended. The focus on maximising profit extended copyright protection to countless trivial objects, which was detrimental to notions of a social body of knowledge and art: copyright protection is now invoked for the most banal computer programs, databases, photographs, instructions, and basic sequences of sound,[424] and always for the maximum periods allowed under national law.[425] But digital uses of works, in the form of the offline use of media and its online use on the internet, continue to fall outside of these controls. Countless anonymous platforms distribute material without permission, and so-called "social media" put unprecedented strains on the critical distinction between private use and public access to protected works. At the same time, public access to socially necessary information in key areas of knowledge is obstructed by pay walls and administrative hurdles. Convincing approaches to adapting copyright to the world of the internet remain in short supply.

This is also evident in terms of the copyright exemptions which are intended to ensure public access to the social body of knowledge. The US fair-use rule has turned out to be a very mixed bag, resulting in completely conflicting and unpredictable outcomes. At one extreme it results in an absolute prohibition of the copying of even a couple of sounds;[426] and at the other it enables Google to acquire and digitise entire libraries and make them available on the internet.[427] The well-known Amer-

---

[424] Haimo Schack, Weniger Urheberrecht ist mehr, in: Festschrift Axel-Artur Wandtke, Berlin/Boston 2013, pp. 9–20.

[425] Lawrence Lessig, Free Culture, New York 2004, pp. 133–135.

[426] Bridgeport Music, Inc. v. Dimension Films, 410 F. 3d 792, 804n16.

[427] Authors Guild, Inc. v. Google, Inc. See Sabine Hüttner, Flexibilisierung der urheberrechtlichen Schrankenregelungen in Deutschland, Berlin 2013, pp. 153–218.

ican lawyer and co-founder of the Creative Commons licences, Lawrence Lessig, aptly calls the fair-use rule “the right to hire a lawyer”. It confers no legal certainty, allows for no reliable forecast on the outcome of litigation, and so does nothing to serve the stated purpose of allowing the use of works and performances where a wider private or public interest applies.[428]

European copyright barriers also fall short of providing an adequate solution to the problem. They are often applicable only to analogue uses, geared to obsolete technical processes, or so abstract that they cannot be meaningfully implemented in the world of the internet.[429] Moreover, by linking these barriers to the TRIPs Agreement three-step test, they take little account of the interests of actual authors or those of the general public.[430]

To date, the most flexible and effective way of dealing with copyright has proved to be collective rights management. As the French playwrights of the 18th century had already realised, the enforcement of rights is only possible in collective terms. And this all the more valid in an era of the mass use of works and performances.[431] Several models are available. While the music industry and the American film industry swear by individual law enforcement and concentrate on the rights of a few private agents, collective rights exploitation in the area of broadcasting and interpreters' rights is dominated in Europe by mutual organisations, usually of a cooperative nature. Although EU guidelines on collective management seek to align collecting societies with market-based competition,[432] they remain particularly efficient where they are limited in number by public law and endowed with standard powers beyond those involving the direct representation of their own members.[433]

---

[428] Dana Beldiman, The Role of Copyright Limiting Doctrines in the Digital Age – Can their Vigor be Restored?, in: Reto M. Hilty/Alexander Peukert (eds.), Interessenausgleich im Urheberrecht, Baden-Baden 2004, pp. 187–206 (192–194).

[429] See, for example, Thomas Dreier/Ellen Euler/Veronika Fischer/Anne van Raay, Museen, Bibliotheken und Archive in der Europäischen Union – Plädoyer für die Schaffung des notwendigen urheberrechtlichen Freiraums, in: ZUM 2012, pp. 273–281.

[430] Hilty, op. cit., pp. 113–117.

[431] Olaf Hohlefelder, Kollektivierung und Opt-Out – Die neue Grundnorm des Urheberrechts?, Göttingen 2015.

[432] Egloff, op. cit., pp. 683–685.

[433] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ EU L84/72–96). See also Karl-Nikolaus Peifer, Umsetzung der EU-Richtlinie für Verwertungs-

There are however areas in which the whole social and economic basis of copyright is questionable. This is particularly true in the sciences. No contemporary scientists make a living from the distribution of their publications; nor do their employers finance their businesses (universities, research centres, administrations, industrial companies, etc.) from the proceeds of books and magazines. When it comes to protecting investments in the manufacture of products and services, more specific legal instruments such as patent protection or protection against unfair competition come into play. So why have copyright in the sciences at all? Recurring complaints about access to scientific information give this question a new urgency.

It should always be remembered that copyright has a dual purpose: on the one hand to protect investments in intangible goods, and on the other to ensure the accessibility of knowledge. It is of course necessary to prevent simple imitations of creative works and their unfair economic exploitation by third parties. But is it also the task of copyright to make it impossible to further develop such knowledge and use it to create new works? Should copyright really be deployed to prevent the production of parodies, collages, and other variations and interpretations? Who benefits when copyright obstructs knowledge-gathering techniques such as data mining, or the creation of works through the use of audio techniques such as scratching and sampling?[434] Such questions may not have arisen in the analogue world, but they surely need answers in a digital age.

The criteria of "normal exploitation" which underlies the three-step test is also questionable. Is it really the role of copyright to squeeze every economic advantage out of a work to the benefit of its rights holders, or should it rather be concerned to protect only exploitations that are "normal" in the traditional sense of the use of a work, and in order to compensate for the investments that have been made in its creation? Does "normal exploitation" really entail paying merely to see the contents of a scientific work long after its first publication? Is it "normal" to demand compensation for the reproduction of even the most trivial photographs with no claim to artistic worth,[435] or for the use of the simplest sequences of sound, and for such works to be protected for decades? Should press releases accessed through in-

gesellschaften in deutsches Recht, in: ZUM 2014, p. 453468, and Fabian Niggemeier, Vorschlag der Kommission für eine Verwertungs- und Online-Richtlinie, in: medialex 2013, pp. 65–73.

[434] Tom Petrick, Ist Sampling (noch) erlaubt?, Fürth 2016.

[435] Different approaches to the definition of photographic work can be found in: Gregor Wild, Urheberrechtsschutz der Fotografie, in: sic! 2005, pp. 87–95, and in: Mischa Senn, Wie aus einer Fotografie ein Bild wird, in: sic! 2015, pp. 137–154.

ternet search engines or in newspaper and journal catalogues be part of the "normal exploitation" of the press?

Europe is making great efforts to answer such questions. The European Commission has proposed revisions of the Harmonisation Directive that would provide stricter exemptions in favour of scientific research and promote the standardisation of European copyright law.[436] In Switzerland too, revisions of the Copyright Act that would also permit exemptions for scientific research and a more flexible use of rights management are underway.

The WIPO is also seeking to develop international copyright protection. A first step has already been taken with the creation of a Convention on the Protection of Audiovisual Performances[437] and a Convention on the Rights of Persons with Disabilities.[438] For several years the WIPO has also been working to develop exemptions in favour of less developed countries, and a treaty to protect the rights of broadcasting companies.

The whole world of copyright stands on the brink of change. The focus on maximising profits to the detriment of the public interest which has dominated the TRIPs era now seems to be losing its attraction, and social, technical, and economic developments, not least those relating to the internet, have become increasingly incompatible with the structures of copyright. Digitisation demands and facilitates a new balance between the need to protect investments in intellectual work and the social requirement for access to knowledge. As this survey of the last three centuries of copyright law suggests, the political and economic pressures are such that, sooner or later, such a balance will be found.

---

[436] COM (2016) 593 final, Brussles, 14.9.2016.

[437] Beijing Treaty on Audiovisual Performances (BTAP); see ERNST BREM, Der WIPO-Vertrag von Peking zum Schutz audiovisueller Darbietungen vom 24. Juni 2012 (BTAP) und die Schweiz, in: medialex 2013, pp. 6–11.

[438] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27th 2013.

Further Reading

PETER BALDWIN, The Copyright Wars, Princeton and Oxford 2014.

FRIEDRICH-KARL BEIER / GERHARD SCHRICKER (Hg.), From GATT to TRIPs, Weinheim u.a. 1996.

MELANIE BOSSHART, Das Creative-Commons-Lizenzsystem: alternativer Verwertungsansatz für Rechte an geistigem Eigentum im digitalen Zeitalter?, Zürich 2013.

JAMES BOYLE, The Public Domain, New Haven / London 2008.

DAVID J. BRENNAN, The root of title to copyright in works, in: Intellectual Property Quarterly 2015, pp. 289–327.

RONAN DEAZLEY, On the Origin of the Right to Copy. Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775), Oxford 2004.

MONIKA DOMMANN, Autoren und Apparate. Die Geschichte des Copyrights im Medienwandel, Frankfurt a.M. 2014.

RASMUS FLEISCHER, Protecting the musicians ans/or the record industry? On the history of “neighbouring rights” and the role of Fascist Italy, in: Queen Mary Journal of Intellectual Property 2015, pp. 327–343.

CHRISTOPH BEAT GRABER, Handel und Kultur im Audiovisionsrecht der WTO, Bern 2003.

MANUEL KLEINEMENKE, Fair Use im deutschen und europäischen Urheberrecht? Baden-Baden 2013.

MATTHIAS KLOTH, Der Schutz der ausübenden Künstler nach TRIPs und WPPT, Baden-Baden 2000.

LAWRENCE LESSIG, Free Culture, New York 2004.

SILKE VON LEWINSKI, Das Urheberrecht zwischen GATT/WTO und WIPO, in: UFITA 136/1998, pp. 103–127.

MICHAEL LINK, Open Access im Wissenschaftsbereich, Frankfurt a.M. 2013.

ISABELLA LÖHR, Der Völkerbund und die Globalisierung geistiger Eigentumsrechte in der Zwischenkriegszeit, in UFITA 2008 I, pp. 67-90.

HECTOR MACQUEEN, The War of the Booksellers: Natural Law, Equity, and Literary Property in Eighteenth Century Scotland, in: The Journal of Legal History, 35:3 (2014), pp. 231–257.

Benjamin G. Martin, The Nazi-Fascist New Order for European Culture, Cambridge (MA.) / London 2016.

Ann L. Monotti, Nature and basis of Crown copyright in official publications, in: European Intellectual Property Review 1992, pp. 305–316.

Bertrand Moullier, Histoire de la CISAC. 90 ans au service des auteurs et créatuers dans le monde, Paris 2016.

Sabine Nuss, Copyright & Copyriot, Münster 2006.

Albert Osterrieth, Die Geschichte des Urheberrechts in England mit einer Darstellung des englischen Urheberrecht, Leipzig 1895; nachgedruckt in; UFITA 131/1996, S. 171–274, und 132/1996, S, 101–231.

Karl-Niklaus Peifer, Das Urheberrecht und die Wissensgesellschaft – Stimmen die rechtlichen Rahmenbedingungen für die Zukunft von Forschung und Lehre?, in: UFITA 2007 II, pp. 327–362.

Andreas Rahmatian, Copyright and Creativity, Cheltenham and Northampton (MA) 2011.

Jörg Reinbothe / Silke von Lewinski, The WIPO Treaties 1996, London 2002.

Cyrill P. Rigamonti, Geistiges Eigentum als Begriff und Theorie des Urheberrechts, Baden-Baden 2001.

Moritz Röttinger, Das Urheberrecht in Rechtspolitik und Rechtsetzung der Europäischen Gemeinschaft – vom Handelshemmnis zum „Espace européen de la créativité“, in: UFITA 2001 I, pp. 9–94.

Pamela Samuelson, Ecocnomic and constitutional influences on copyright law in the United States, in: European Intellectual Property Review 2001, pp. 409–422.

Heimo Schack, Weniger Urheberrecht ist mehr, in: Festschrift Axel-Artur Wandtke, Berlin/Boston 2013, pp. 9–20.

Christian Sprang, Grand Opéra vor Gericht, Baden-Baden 1993.

Alesch Staehelin, Das TRIPs-Abkommen, Bern 1997.

Georges Straschnov, Protection internationale des „droit voisins“, Bruxelles 1958.

Alain Strowel, Droit d’auteur et copyright. Divergences et convergences, Bruxelles/Paris 1993.

Artur-Axel Wandtke, Aufstieg oder Fall des Urheberrechts im digitalen Zeitalter?, in: UFITA 2011/III, pp. 649–684.

Where has copyright come from and where is it going now? How and why has it seen such fundamental changes in the 300 years of its existence? Focussing on the technical and social developments that gave rise to independent intellectual work and so produced the need for copyright, the author considers the origins of the various international conventions so decisive to this history and describes the ways in which they have been implemented in different legal systems. «Copyright Stories» presents a fascinating picture of the social, technological, commercial and legal interactions which underwrite our notions of copyright.

Willi Egloff

Stories

Sketches on the Political Economy of Copyright

ISBN 978-3-033-06835-3

9 783033 068353