CHAPTER I

INTRODUCTION – PRINCIPLES OF COPYRIGHT PROTECTION

I should like to begin this lecture, devoted to the influence of technological developments on intellectual property, by stating that it would be entirely unnecessary to try to convince anyone that such developments exert a significant influence on the whole of the aforementioned subject, including copyright. We are not always aware, however, just how important that influence is, nor to what extent it touches on fundamental principles and on decisions taken under current legislation. We usually attempt *a casu ad casum* to apply legal regulations to new phenomena and new needs within changing social, economic and cultural relations, and forget to consider whether and to what extent basic legal assumptions and institutions, including copyright, should be changed, or at least differently interpreted.

In the lecture which I have to deliver, I do not intend to discuss all the issues which arise in connection with new developments in technology. Such a task would overstep the bounds both of my own competence and of the given subject of the lecture. I shall limit myself, firstly, to the question of copyright and secondly, to certain fundamental questions which I regard as being of particular importance. Thus I shall not give consideration to the question of industrial property, nor to the problem of the protection of scientific discoveries, although in this field, too, technological progress has brought new phenomena, faced with which the lawyer cannot remain neutral[1]. As far as copyright is concerned, however, I shall consider the following questions: (1) the object of copyright; (2) the subject of copyright; (3) the limits of the substance of copyright, with particular regard to the question of public and private use; (4) the principles of remuneration for the authors.

Thus, the point of departure for my lecture will be the assumptions and institutions of copyright. I shall concentrate on providing an answer to the question as to whether these assumptions and institutions require changing, and if so in what direction legal regulations should be amended. On the other hand, I do not intend to

present in detail questions arising in connection with particular methods of the duplication and distribution of works. Nor shall I discuss in depth either the problem of reprography or of transmission by satellite, cable television, video cassettes and computer art. However, I shall try to justify possible demands concerning changes in the present laws and international conventions with needs arising in connection with the aforementioned technological means in the field of the production and distribution of works. Each of these means, however, would require a separate study, and there is already a rich legal literature devoted to each. I shall also pass over technological problems, often highly complicated and demanding knowledge in the field of physics, electronics and information science. To anyone seeking to become more familiar with this problem I may recommend Ratzke's work[2]. It constitutes a fairly accessible exposition of technological issues and convincing arguments concerning the role of new means of transmission and the legal problems arising from their ever more universal use. The problems, however, are passed over rather cursorily, in a manner inadequate from the point of view of a lawyer. He properly stresses, however, that these new means should not be called means of mass communication, as is the case with the press, radio and television, for thanks to them the acquisition of information relies more and more on actions taken directly by the individual concerned[3]. The changes that have occurred here are not part of the evolutionary process but constitute a real technological revolution, which is fundamentally changing the flow of information and the possibilities of making use of knowledge, cultural developments and so on. Obviously, a lawyer cannot remain indifferent to these "revolutionary" phenomena, but on the contrary should consider into which legal framework they should be included in order to reconcile the interests of the authors, the distributors of information and the whole of society. In the course of the lecture, then, I shall try to consider the legitimate interests of the authors and of other individuals who play a part in the process of the creation and distribution of works, and the needs of a society with an active interest in the fast flow of information[4]. For I am of the opinion that it is necessary always to seek and to declare oneself in favour of the solution which best reconciles the interest of the authors with the needs of society for a fast information flow[5]. In particular, I believe not only that copyright is a means for stimulating creativity, but also that it plays a

significant informational role. Thus, in one respect it constitutes part of information law broadly conceived. And one more point: my lecture, though it will not omit practical issues, is primarily concerned with theoretical-cognitive considerations. It aims to encourage a re-thinking of the fundamental assumptions and problems of copyright rather than to evaluate the legislations of particular countries.

After a few introductory remarks, in which I underlined the programme of these lectures, I should like now to recall the fundamental principles on which copyright law has been based since the practice of the privileges extended to producers, in our case publishing houses, were replaced with laws granting authors the right to their own creative achievements. Only marginally to this consideration shall I recall that legal protection ran a fairly similar course throughout the whole area of intellectual property, understood broadly enough to include industrial property, which lies beyond the scope of my lectures. For always at the beginning of such protection there lay the practice of granting privileges which created a legal monopoly for the beneficiary. They began to be granted earlier in the field of industry, in connection with the production of material goods. This is evidenced by the privileges granted to, for example, Flemish weavers in the first decades of the fourteenth century, and to salt miners. This is understandable, if only because handicraft production, later introduced into institutionalized manufacture, considerably preceded the appearance of printing houses, which, thanks to Gutenberg's invention of movable printer's type, allowed the production duplication of the physical manifestations of literary and graphic works. As we see, then, at the basis of the development of this area of law from the very beginning there lay production conditions entirely dependent on technical production possibilities. This dependence should be borne in mind particularly when considering the influence of technological progress on the regulation of the law.

Of course, this is not the only circumstance that should be remembered; for it is also essential to consider social attitudes and views, particularly in evaluating the role and importance of human labour. It is rightly stressed that physical labour was distinguished and appreciated considerably earlier than mental labour, especially that which results in works rather than goods serving directly to satisfy man's material needs. Thus, even in such societies as Ancient

Rome, in which authorial creativity in the field of literature, fine art, etc., was highly developed, there was a general conviction that intellectual labour could not be, or at least ought not to be, a source of income. How characteristic of this conviction are the words uttered by Cicero on the subject of labour performed for gain and profit: "Illiberales autem et sordidi quaestus mercannorium omnium, quorum operae, non quorum artes enumerantur: est enim in illis ipsa merces auctoramentum servitutis." It required, then, a fundamental change in world outlook, *inter alia,* under the influence of Christianity, for human labour, not only physical but also mental, to obtain recognition in the field of laws relating to property. Thus, only then did labour which produces new works of the human intellect, in other words scientific, literary or artistic works, industrial inventions and so on, become the basis of new laws and a new "possession of non-material goods".

As I have already mentioned, these laws initially appeared in the form of privileges. Rulers granted them above all for profit, for it was necessary to pay for a privilege. If a ruler decided not to grant a privilege, he broke no laws, for this decision depended entirely on his will. For this reason, at this period, despite transformations in the sphere of social consciousness on the subject of the role and importance of labour, it is still not possible to talk either of the general protection of intellectual creativity, or of the recognition of the rights of authors, for the holder of the privilege was the producer and not the author.

As a reaction against the practice of privileges and abuses connected with their being granted, the thought began to germinate that copyright and invention laws ought not to be an act of royal favour, but an emanation of general law *(ius ordinarium)* serving the creator of a new work. In this respect there is significance in Luther's remark when his *Postylle* were reprinted without his permission. He condemned these practices as theft, emphasizing that a work should be a source of income for the author who has created it. Luther's idea, that a ban on reprinting should arise from general law, was however stifled by rulers, especially in police States. They defended the system of privileges partly because a privilege was only granted if the work was, in the opinion of the ruler, worthy of privilege, in other words if it had been previously approved by the censor; for the concept of the free flow of information was in that age quite foreign.

The reaction against this standpoint began in France in the eighteenth century, when the Encyclopaedists and, following in their steps, lawyers, criticizing the principle of privileges, began to call for unlimited and exclusive rights to be granted to the authors themselves. These efforts attained their full expression in the famous decrees of the French Revolution of 24 July 1793, concerning literary and artistic property. The idea of creative labour being a source of a most justified right of property was developed by many authors in the nineteenth century. Amongst them one may mention Mill, Say, Lamartine, Schopenhauer, Loboulaye, Laveley, Champagnac, and many others. To this idea, which still lies at the root of copyright laws, irrespective of the extent to which legal structures have changed, there was added the subsequent legislative factor lying in utilitarianism. To the principle arising from the idea of *suum cuique*, justifying the granting of exclusive rights to the author, pragmatic aims were added, such as the stimulation of creativity by ensuring authors appropriate material stimuli and the satisfying of their creative ambitions, and the concept of the satisfying of social needs by guaranteeing the receivers access to the works. In this way copyright became part of information law broadly conceived.

Summing up these considerations so far, then, let us stress that the aim of copyright is: *(a)* to stimulate creativity, *(b)* to satisfy social needs by facilitating access to works, and *(c)* to satisfy the material and spiritual needs of the author. These aims are to be served by the fundamental assumptions and principles on which copyright laws are based. This is all the more advisable since from the considerations to which I shall be devoting the following lectures, it shall appear whether and to what extent they require modification or at least a different interpretation to that usually made.

Amongst the principles of classical copyright law should be included:

(1) the principle that the subject of copyright is the author or co-author of the work;
(2) the principle that the author decides on the distribution of the work and that by virtue of the distribution he is due remuneration, the measure of which is the number of reproductions of the work in the form of physical manifestations of a work (e.g., copies of books or records) and by virtue of their being distri-

buted in another form (e.g., theatrical performances, concerts, radio or television broadcasts);

(3) the principle that the author enjoys legal protection as concerns both his moral interests (moral rights) and those related to economic interests (rights);

(4) the principle that copyright serves the author of each independently produced work, irrespective of whether the work has an apparently similar equivalent in the form of a work produced independently by another author;

(5) The principle that with regard to the interests of society the copyright enjoyed by an author is subject to limitation in the question of so-called public and private use;

(6) the principle that the subject obliged to pay remuneration to the author is the producer of the physical manifestations of the work (e.g., the publisher of books or the producer of phonograms) and the organization distributing the work (e.g., the organizer of a theatrical performance or a concert, a radio or television organization).

Let us now discuss in a little more detail the above principles and let us consider initially which of them require modification and why, with regard to new means of the creation, duplication and distribution of works.

(1) The principle that the prime subject of copyright is the author or co-author of a work is generally speaking accepted in all copyright laws; for it is generally considered that an author can only be a physical person and that copyright for his benefit constitutes the equivalent of his creative achievement. This assumption must not be denied legitimacy, nevertheless it is also undeniable that in connection with the progress of technology the creative process is often of a more complex nature. I have in mind here above all the production of such works as cinematic and television productions or computer programmes, about whose protection by copyright, as we shall see, there is a lack of agreement so far. The common feature of the aforementioned category of works is undoubtedly the collective nature of the creativity, requiring the co-operation of many persons. This co-operation may superficially argue for the structure of co-authorship. This solution, however, would not be appropriate; for it must not be forgotten that the contribution of individual persons to the production of the aforementioned works

varies, and what is more does not always bear the quality of creativity protected by copyright. It is sufficient to indicate the contribution of actors, who are universally regarded as artistic performers and who are protected by separate legal regulations, *nota bene* not so universally operative as the regulations of copyright law. What is more, the production of, for example, a cinematographic or television work requires the participation of persons who are neither authors nor performing artists, for their activity is of a technical or organizational nature (e.g., sound and lighting operators, the business manager). The question, then, arises as to whether, and if so which, rights should be granted to such people. In this way, regarding the person of the producer, the problem of creativity in employment is approached, similar but not identical to that of inventions in employment. The collective process of the production of certain works, then, requires firstly an organizer for the whole enterprise, and secondly considerable financial and material outlay in the form of equipment, laboratories and so on. The role of financial organizer of the whole project is taken by the producer. He naturally desires that his financial outlay should yield him an appropriate profit. Thus, current laws generally grant copyright over a cinematographic work to its producers, without, however, denying the co-authors of the work their own copyright over parts with an independent significance (e.g., to the musical work used in the film) and moral rights in relation to the whole work.

It appears then that the new methods of the creation of works require, in the case of certain categories of work, a departure from the generally predominant principle that the prime subject of copyright is the author. This is everywhere the case where works appear with an employment relationship or on the basis of a commission contract.

(2) The principle that the author makes decisions concerning the distribution of his work and that he is due remuneration at a level dependent on the number of reproductions made and the number of distributions made, also requires modifications in the face of new methods of duplication and distribution.

To be sure, they do not violate the generally predominant principle that an author should receive remuneration for use made of the work in every exploitational field, nevertheless the manner of calculating and paying the remuneration should in some cases be significantly modified, and the distribution itself made independent

of the prior consent of the author. The classical (traditional) system of remuneration is definitely the most just, for the author receives remuneration direct from the subject duplicating and distributing his work and the remuneration is calculated in relation to the number of reproductions and the field of distribution. It is then a system that takes into consideration as far as possible the success which the work enjoys and thus considers its value as a commodity. In order, however, to be able to apply this system, it is necessary to know the number of reproductions and distributions and the person performing these actions. This is easy to determine in the case of contracts concerning the publication of a book or of musical scores, the production of phonograms, and even in the case of radio and television broadcasts, which specialized copyright agencies can keep watch over in the interests of the authors. In spite of a fairly generally widespread view, the problem of the remuneration of authors, which constitutes a weighty factor in the stimulation of creativity, and the necessity of obtaining their prior consent, is not connected with the means of mass communication which are being developed with the progress of technology (radio, television), for the number and field of broadcasts may be defined relatively accurately, but above all with the new methods of the anonymous duplication and reproduction of works by persons who purchase the equipment necessary for this purpose or who avail themselves, either free or for a charge, of such equipment installed in places accessible to them, for example, in public libraries, information centres and so on. In all these cases, then, it is difficult to ascertain who reproduced or copied the work, whose work it was and in what quantity it was reproduced or copied. As an example of such actions that escape the control that would make it possible to calculate remuneration according to the classical system, one might mention various methods of the reprography of books and other printed matter, the recording of audio works on magnetic tape, the recording of images on video cassettes, the use made of works thanks to various teletext methods, etc.

Of course it is difficult to treat all the abovementioned situations identically, for slightly different problems appear, for example, with regard to reprography than to video cassettes, sound cassettes, satellite or cable transmission or the "reading" of computer programmes. This is the case because in each of these fields the possibility of determining the number of copies or even the fact of making

a recording or reproduction is different, and also because alongside the interests of the author there are sometimes fairly clear infringements of the interests of enterprises, for example, publishers, who not without reason complain that the ever more universal application of reprographic methods restricts the number and size of editions. It even happens that publishers, above all of scientific publications, are threatened with having to discontinue their publishing activities in the face of an ever-decreasing demand for periodicals. Of course, it is absolutely impermissible that publishing activities should be suspended, for in such a case the "raw" (basic) material necessary for further reprography would be lost, to say nothing of the social losses in connection with restrictions on scientific publications. As we see then, new methods of the duplication of works sometimes infringe not only the interests of authors but also of publishing houses, other enterprises and thus indirectly of the whole of society. Thus, all these aspects must be borne in mind by legislators thinking about the promulgation of such a system of remuneration for authors that would also take into consideration the interests of other subjects (e.g., producers of cinematographic works, cinemas, radio and television organizations) and the interests of the whole of society. This requires taking into account the whole information chain, the links of which are: producer (author) – distributor – receiver.

Finally, however, one more remark: in accordance with the principle of rightness, the remuneration of authors for each separate field of exploitation must not lead to double remuneration for the same field of exploitation simply because the number of intermediaries between author and receiver has increased. This apprehension is fully justified when one considers that technological progress increases the number of intermediaries and thus creates the phenomenon of so-called cascade transmission.

(3) The principle that an author should enjoy legal protection both of his interests related to economic rights and his moral rights (interests) should be fully guaranteed despite any changes that technological progress might bring. With regard however to the growing importance of creativity in employment, it seems that a clear distinction between copyright related to economic rights and moral rights is advisable. I believe, therefore, that this argues for a dualistic structure for copyright statutes. Certain laws are already based on such a structure, nevertheless the monistic structure had more ad-

herents amongst both legislators and copyright theorists. I believe that it is permissible here to expect changes in the approach to this problem.

(4) The principle that copyright serves the author with regard to every work produced independently, in other words irrespective of whether it has an apparently similar equivalent, that is a work in which the realm of features that determine its being granted copyright protection does not differ from the first work, is an expression of the concept of subjective novelty predominant in copyright. This concept constitutes however one of the fundamental differences between the copyright system and the system concerning inventions; for an invention which is eligible for a patent must be an objectively new invention. In practice this means that at the moment of claiming the priority the invention must be unknown. This leads in turn to further differences between the system of patent protection and that of copyright protection. For patent law protects "such" an invention as was submitted and to which a patent was granted after investigations had been carried out concerning the condition of the objective novelty of the invention, whereas copyright law always protects "that" work which was independently created. Thus, a work according to the rules of copyright is protected from the moment it comes into being, without the need for its being investigated and so without the need for any decision to be issued by an administrative organ, which in the case of inventions is the patent office. The system of copyright protection may thus be defined as a system of universal protection, protecting any work, while the system of patent law is a system of particular protection protecting only "such" an invention. The existing system of copyright protection must also be recognized as the right one from the point of view of new categories of works, for example, computer programmes.

(5) The principle that with regard to the interests of society copyright is subject to restrictions in the form of so-called permissible public and private use is recognized by all current copyright statutes. Of course regulation in particular countries varies, particularly with regard to the extent of permissible public use. The legal assessment of this problem is also varied. Some lawyers believe that permissible public and private use marks the limits of copyright, while others take the standpoint that here we are dealing with a statutory licence, the source of which is a regulation in the statute.

I must leave a discussion of the differences in doctrinal views and possibly in regulative conceptions, and a detailed presentation of permissible public and private use, to one of the following lectures. I shall, however, call attention to the fact that the idea of the free flow of information requires a somewhat different regulation of the institution of permissible use and that the principles of rightness argue for the establishment of payments to the author when use of the work should not depend on the prior permission of the author for such use.

(6) The principle that the subject obliged to pay remuneration to the author is the producer of the physical manifestations of the work and the organization distributing it requires changes and supplementation; for the persons carrying out the duplication of the work are very often the receivers of the work, who have at their disposal the relevant equipment, cassettes, tapes and so on bought in a "pure" state, in other words not yet recorded. Thus it seems that in this situation, too, the only possibility is created by an appropriate "taxing" of this equipment and including copyright remuneration in its selling price. The cost is then paid by the purchaser, who is in reality the subject paying copyright remuneration, while the collection of these duties is by the producer of the equipment. For this reason, the obligation to transfer an appropriate part of the profits received from the sale of recording equipment to the account of a relevant copyright agency must lie with that producer. The agency, on the other hand, on the basis of a fixed key, should pay money either into the hands of the authors, or to an appropriate association of authors, which then divides the profit between its members, or to transfer the money to a social fund which is reserved for grants or assistance to authors. Thus, technological progress in the area of the regulation of copyright has broadened the circle of those paying copyright remuneration, including in it the producers of the equipment, despite the fact that they do not constitute a link in the information chain, and have increased the tasks incumbent on copyright agencies. Thus complications have occurred not only in the method of determining the level of copyright remuneration, but also of its being collected and distributed. This makes necessary the regulation of the particular situation of copyright agencies as executors of the rights of authors. Despite the traditional provisions of copyright, they are partially being replaced by other methods and forms of entitlement to make use of works. The essence of the

matter, in my opinion, is in no respect to deprive the authors of remuneration, for this is required by the postulate of the stimulation of creativity.

I shall attempt to develop the issues initially touched on here in the following lectures. For the moment I have only discussed the basic principles of copyright, which in my opinion should be either modified or supplemented or more broadly interpreted with respect to the appearance of new categories of works and new ways of duplicating and reproducing them. These are conclusions which I shall try to justify in more detail, at the same time indicating steps taken by many legislators, in the course of the following lectures.