INTRODUCTION

Article 17 of the Charter of Fundamental Rights of the European Union states that "intellectual property shall be protected."[1]

As is well known, there are two major systems that protect authors' rights: continental European *droit d'auteur* and Anglo-American copyright, which have always been considered different. In continental law, forged on the French model, the authors' rights regime benefits the authors, as it celebrates their talent and gives them the moral and economic right to protection. The Anglo-American system, based on the right to reproduce copies, primarily promotes the dissemination of works to the public so that the largest possible number of people may have access to them.

In the United States up until 1978, protection was acquired once the work had been reproduced and published, and the necessary formalities completed to register and deposit it with the Copyright Office. Unpublished works were not protected and remained subject to common law. Under the Copyright Act of 1976, which came into force in January 1978, registration is only needed to file a civil action,[2] while in the European system *droit d'auteur* is protected regardless of formalities.[3]

The 1886 Berne Convention for the Protection of Literary and Artistic Works,[4] still in force today, was gradually signed by almost every coun-

---

[1]Adopted at Strasbourg in 2007 and given the legal value of a treaty by the Lisbon Treaty: *Consolidated Version of the Treaty on European Union* (2016/C 202/01), art 6.

[2]*Public Law 94-533 – Oct. 19, 1976, 90 Stat. 2541*, in *Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*, circular 92, Washington 2022, pp. 367-370.

[3]J.C. Ginsburg, 'Berne-Forbidden Formalities and Mass Digitization', *Boston University Law Review*, 96 (2016), pp. 747-774.

[4]The Berne Convention is the first multilateral international agreement governing copyright, which was enacted in Berne in 1886: *Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979* (respectively: Berne Con-

try, one notable exception being the United States, which only recently ratified it. What is interesting is that the Convention's fundamental provisions (e.g., authors' exclusive rights to economically exploit their work and a minimum term of duration of the protection after the author's death) are inspired by the continental European *droit d'auteur* of French origin, and in particular by the principles underlying the French Act of 1793.

There are evident signs that the two systems have been converging over the last fifty years,[5] especially since the United States joined the Berne Convention in 1989. The US now appears to be in line with European laws: indeed, works are protected for 70 years just as they are in the European system, and American court decisions, in a broad interpretation of the Lanham Act, tend increasingly to protect moral rights, namely paternity rights. More recently, however, as will be examined more fully in due course, a Supreme Court decision denied paternity rights to a television series.[6] Furthermore, the American Congress has re-examined moral rights issues, while the EU has charged member states with regulating them.[7]

A historic perspective helps to explain some aspects of the current tendency towards the convergence of the two systems. Indeed, they have a common European origin: the sources of both originated in Italy and subsequently developed in England and France, from where they branched out to form the two main systems of copyright and *droit d'auteur*, with the latter then spreading to almost all the other continental European countries.

---

vention, 1886, 1896, 1908, 1914, 1928, 1948, 1967, 1971, 1979). Today, 175 countries adhere to the Berne Convention. See J. Cavalli, *La genèse de la Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886*, Lausanne 1986; S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 3rd edn., Oxford 2022; also S. Ricketson, J.C. Ginsburg, 'The Berne Convention: Historical and institutional aspects', in D.J. Gervais (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham 2015, pp. 3-36.

[5] See now Y. Gendreau (ed.), *Research Handbook on Intellectual Property and Moral Rights*, Cheltenham 2023. More specifically, see chapter III, § 1.

[6] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003): see J.C. Ginsburg's remarks, 'The Right to Claim Authorship in U.S. Copyright and Trademarks Law', *Houston Law Review*, 41 (2004), pp. 263-307.

[7] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, whereas 19. For further details, see chapter III, § 4.

After the invention of the printing press, the publication of books in Europe was regulated by a system of royal privileges, rarely granted to authors, but generally to publishers, namely an exclusive right for booksellers and printers to exploit literary works through the privileges they were granted.[8] The exclusive right to exploit a work was linked mainly to booksellers' interests and not to those of authors.

At the end of the 15th century, Venice was the first place where a system of privileges was developed to protect printing,[9] and the various Venetian regulations contained the embryonic form of some of the aspects of authors' rights that were to develop at a later date: the attribution and exploitation of works, elements of property law, post-mortem rights, and even the obligation to deposit copies.

The approach was, however, essentially empirical, and did not build a comprehensive institution, which consequently did not develop adequately in Italy. The Venetian acts did have some degree of influence on the Duchy of Milan, but more than anything else they most likely paved the way for the construction, in England and France in the 16th and 17th centuries, of elements designed to protect authors.

During the 18th century, the foundations were laid for the establishment and initial organization of the two large systems of copyright and *droit d'auteur*. The first came into being in the early part of the century in England, where the main categories later developed in Anglo-American law were established. Towards the end of the century, *droit d'auteur* evolved in France and matured into a model that would spread throughout continental Europe. An outline will be given here of some of the aspects of these two major systems that protect authors.

---

[8]B. Dölemeyer, H. Mohnhaupt (eds.), *Das Privileg im europäischen Vergleich*, Frankfurt 1997-1999; R. Deazley, M. Kretschmer, L. Bently (eds.), *Privilege and Property: Essays on the History of Copyright*, Cambridge 2010.

[9]C. Castellani, *I privilegi di stampa e la proprietà letteraria in Venezia*, Venezia 1888; and now J.C. Ginsburg, 'Proto-proprietà letteraria ed artistica: i privilegi di stampa papali nel XVI secolo', in E. Squassina, A. Ottone (eds.), *Privilegi librari nell'Italia del Rinascimento*, Milano 2019, pp. 103-289, available at https://air.unimi.it/bitstream/2434/688055/2/4.pdf; E. Squassina, *Privilegi librari ed edizioni privilegiate nella Repubblica di Venezia (1527-1565)*, Milano 2022; A. Nuovo, J. Proot, D. Booton (eds.), *Competition in the European Book Market: Prices and Privileges (15th-17th Centuries)*, Antwerpen 2022. See also J. Loewenstein, '*Idem*: Italics and the Genetics of Authorship', *Journal of Medieval and Renaissance Studies*, 20 (1990), pp. 205-224; J. Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright*, Chicago 2002; M. Davies, *Aldus Manutius: Printer and Publisher of Renaissance*, Tempe 1999; A. Nuovo, 'Paratesto e pubblicità del privilegio (Venezia, secolo XV)', *Paratesto: Rivista internazionale*, 2 (2005), pp. 17-37.

With the Statute of Anne, enacted in 1710,[10] England became the first country to adopt an act that reduced censorship, largely replaced royal privileges, discouraged piracy, and encouraged people to write.[11] But the Statute did not satisfy some of the petitions that had hitherto been made in English case law[12] and legal scholarship, and that recognized the authors as owners of their works, thus equating intellectual work with tangible property.

Locke, in particular, considered authors' works to be their property. In his *Memorandum* on the Licensing Act—a work only published in the mid-19th century but known in Parliament thanks to the discussions about a new licensing act—he strongly opposed the monopoly of the press, asking for authors' names to be indicated in their books so as to ensure ownership. He also proposed that a term be introduced before authors' works came into the public domain.[13]

---

[10]*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 *The Statutes at Large*, IV, London 1769, pp. 417-419 (8 Annae c. 19).

[11]In addition to *Berkeley Technology Law Journal*, 25 (2010), entirely dedicated to celebrating the 300th anniversary of the Statute of Anne, and to the first part of L. Bently, U. Suthersanen, P. Torremans (eds.), *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace*, Cheltenham 2010, see also A. Birrell, *Seven Lectures on the Law and History of Copyright in Books*, London 1899; H. Ransom, *The First Copyright Statute: An Essay on an Act for the Encouragement of Learning, 1710*, Austin 1956; L.R. Patterson, 'The Statute of Anne: Copyright Misconstrued', *Harvard Journal on Legislation*, 3 (1965-1966), pp. 223-255; W.R. Cornish, 'Das "Statute of Anne" (8 Anne c. 19)', in E. Wadle (ed.), *Historische Studien zum Urheberrecht in Europa. Entwicklungslinien und Grundfragen*, Berlin 1993, pp. 57-65; W.F. Patry, *Copyright Law and Practice*, I, Arlington 1994, reprinted 2000, pp. 3-14; D.W.K. Khong, 'The Historical Law and Economics of the First Copyright Act', *Erasmus Law and Economics Review*, 2 (2006), pp. 35-69; L. Moscati, 'Lo Statuto di Anna e le origini del copyright', in *Fides Humanitas Ius. Studii in onore di Luigi Labruna*, VI, Napoli 2007, pp. 3671-3688; L. Moscati, *Diritti d'autore. Storia e comparazione nei sistemi di* civil law *e di* common law, Milano 2020, pp. 46-55.

[12]See *The Case of the Booksellers and Printers Stated: with Answers to the Objections of the Patentee* [1666], reprinted in S. Parks (ed.), *The English Book Trade 1660-1853*, I, New York 1975.

[13]J. Locke, 'Memorandum (ca. 1694)', in P. King (ed.), *The Life and Letters of John Locke*, London 1858, pp. 202-209, with the title 'His Observation on the Censorship (ca. 1694)' and in M. Goldie (ed.), *Political Essays*, Cambridge 1997 (used for citations). See L. Moscati, 'Un Memorandum di John Locke tra *Censorship* e *Copyright*', *Rivista di Storia del diritto italiano*, 76 (2003), pp. 69-89, and the subsequent works by J. Hughes, 'Locke's 1694 Memorandum', *Cardozo Arts & Entertainment*, 27 (2006), pp. 555-572,

The Statute of Anne was totally different. Even though it recognized some of the requests, such as the abovementioned term, it did not consider the author as the sole owner of the work. Instead, it recognized an exclusive right over the work for the author together with other recipients (printers, publishers, etc.).[14] The purpose of the act was to curb the monopoly of booksellers rather than to protect writers' ownership of their work. In this way, the Statute created, or re-established, the notion of common exploitation, because after a certain period of time the work of an author came into the public domain.[15]

This is how copyright started and slowly developed, leaving its impact on English and American law[16] and giving publishers priority over authors. There are significant differences compared to continental legal systems which, from the beginning, were characterized by the attribution to authors of economic prerogatives, immediately thereafter by the enhancement of creativity, and then by the laborious but gradual recognition of authors' moral rights.[17]

In fact, the abovementioned positions of English legal scholarship and case law, abruptly interrupted by the application of the royal Statute, developed successfully in France through the dissemination of Locke's ideas, which then spread throughout Europe.

As regards France, which heavily influenced other continental countries, it was only after the Revolution, with the abolition of privileges and the assertion of the freedom of the press, that rulers started to protect authors.[18] Soon, an economic type of protection was introduced,

---

and by L. Zemer, *The Idea of Authorship in Copyright*, Aldershot-Burlington 2007, reprinted Abingdon 2016, pp. 147-186. See also Moscati, *Diritti d'autore*, pp. 26-39.

[14]Only § XI allows the addition of a further term of fourteen years if the author is still alive and is appointed to be the only beneficiary of the exclusive right: 8 Annae c. 19, p. 419. See Moscati, *Diritti d'autore*, pp. 46-55.

[15]See L.R. Patterson, *Copyright in Historical Perspective*, Nashville 1968, pp. 143-150; M. Rose, *Authors and Owners: The Invention of Copyright*, Cambridge 1993, pp. 42-49; J. Feather, *Publishing, Piracy and Politics: An Historical Study of Copyright in Britain*, London 1994, pp. 49-63; R. Deazley, *On the Origin of the Right to Copy*, Oxford 2004; Deazley, Kretschmer, Bently (eds.), *Privilege and Property*.

[16]See, respectively, Rose, *Authors and Owners*; R. Deazley, *Rethinking Copyright: History, Theory, Language*, 2nd edn., Cheltenham 2008, and O. Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property. 1790-1909*, New York 2016.

[17]See chapter III, § 1.

[18]See, in particular, M. Dury, *La censure. La prédication silencieuse*, Paris 1995; G. Caravale, *Libri pericolsi. Censura e cultura italiana in età moderna*, Roma-Bari 2022; B. Edelman, *Le sacre de l'auteur*, Paris 2004, and especially L. Pfister, *L'auteur, propriétaire*

that is to say, the exclusive right of the authors to exploit their works, although without having moral rights over them. Initially, and for a long time thereafter, the nature of the protection granted was linked to property and not to individual rights.

The *droit intermédiaire* legislation, with the 1793 Act, which followed the 1791 Act on dramatic authors,[19] had not met the expectations of the *ancien régime*, but what it did grant was exceptional for that time. Indeed, authors had to be satisfied with recognition of their exploitation rights in the sphere of property rights, with the creation of a new type of property, or, more specifically, a time-limited property.[20] The 1793 Act would constitute the basis of French law, and, in many respects, of European laws in this field throughout the 19th and the first half of the 20th century.

The main issue neglected by the 1793 Act was the one connected with the effective nature of this right. This matter turned out to be strictly related to the question of codification, as examined in chapter II, where the reasons for the decision not to include authors' rights in the civil code will be outlined.

In the early 19th century, albeit with a number of unsolved problems, the law concerning authors' rights appeared on the European scene with two models of reference, the French and the English. The former prevailed entirely and shaped the legislation in continental Europe, while the latter was confined to the Anglo-American world. In recent times, the French system has prevailed, whereas in the past, the two legal systems were considered to be quite separate with few aspects in common.[21]

Adopted as a model, *droit d'auteur* spread through continental Eu-

---

de son œuvre? La formation du droit d'auteur du XVIe *siècle à la loi de 1957*, Strasbourg 1999; L. Pfister, 'La propriété littéraire est-elle une propriété? Controverses sur la nature du droit d'auteur au XIXe siècle', *Tijdschrift voor Rechtsgeschiedenis*, 72 (2004), pp. 103-125; see also L. Moscati, 'Alle radici del droit d'auteur', in F. Liotta (ed.), *Studi di storia del diritto medievale e moderno*, II, Bologna 2007, pp. 261-341; Moscati, *Diritti d'autore*, pp. 57-93.

[19]*Décret relatif aux spectacles du 13-19 Janvier 1791*, in *Bulletin des lois*, II, no. 27, Paris 1793, pp. 4-6 (French Act of 1791).

[20]*Décret relatif aux droits de propriété des auteurs des écrits, en tout genre, compositeurs de musique, peintres et dessinateurs, 19-24.7.1793*, in *Bulletin des lois*, IV, no. 615, Paris 1835, pp. 307-310 (French Act of 1793).

[21]For the progressive harmonization of the two systems, see G. Alpa, 'In partibus Angliae. Immagini del "common law" nella cultura giuridica italiana', *Materiali per una storia della cultura giuridica*, 32 (2002), pp. 25-57.

rope, taking root first in the countries subjected to occupation by Napoleon, and then in the other main European countries during the 19th century. The differences between the two models would have an undeniable impact in the future, as they evolved. The differences concern the addition or modification of specific aspects (the duration of post-mortem rights, the requirement of formalities, the greater or lesser breadth of the categories of the right holders) which, however, do not undermine the substance of the model. The legislation of each country presents its own peculiarities, while still exhibiting a fundamental coherence.

In addition to the abovementioned question, it should also be highlighted that a large number of issues closely related to the fate of intellectual property in Europe arose with the circulation of the French model.[22] I am referring, in particular, to problems of a more general nature, that is, the relationship between codes and special legislation; to substantive issues, especially with regard to tangible property connected to the development of immaterial categories; to lexical issues resulting from the conceptual evolution of terminology; and finally to topics of a 'global' nature, namely the creation of regulatory provisions which tend to be uniformly based on conventions. This initially happened between two countries and, subsequently, at a transnational level. These matters will be examined in depth during this work.

As far as the general aspect is concerned, the nature of the changes in *droit d'auteur* concerns the structure of the regulatory setting. In many countries, one or more articles of a general nature concerning *droit d'auteur* are contained in the civil code, while specific regulation is assigned to a special legislation, and in some cases the entire regulation is introduced into the code. Having this topic regulated by special laws allowed the general principle to remain unchanged while adapting the specific provisions to the circumstances in Europe. The relationship between code and special legislation is still of topical importance for the codification in civil law countries.

A further characteristic element of the fate of intellectual property in Europe is the dissemination of the French model and the expansionary force of the *droit d'auteur* system, combined with an enhanced international dimension that represents a peculiar aspect of the institution. As the Berne Convention shows, this is a right that more than any other is

---

[22]Further details in L. Moscati, 'Le Code civil et le destin de la propriété intellectuelle en Europe', *Droits. Revue française de théorie, de philosophie et de culture juridiques*, 47 (2008), pp. 149-171.

unrelated to the national structure of the territory, and as a general consequence a global concept of its real nature has been generated.

A historical analysis makes it easier to understand the issue. I am referring to the longstanding need for international agreements to regulate the subject matter. Some treaties derogate from individual national laws and, albeit through different approaches, they contribute to ensuring a substantial uniformity of the law in the major legal systems.[23] The first was the 1840 Treaty between the Kingdom of Sardinia and Austria,[24] aimed at stopping piracy and reprinting in other countries.

The Convention between Austria and Sardinia, which was signed by almost all the Italian states before unification, was also transposed in other countries, but, overall, it inspired similar bilateral and trilateral agreements amongst the major countries. The circulation of the European model of *droit d'auteur* had as its immediate effect the establishment of a considerable number of conventions, in particular with France:[25] this shows a common regulatory will, which formed the basis for subsequent international conventions still in force today. The ground was now prepared for a global reflection on the issue.

At the 1858 Brussels Congress,[26] which emblematically brought together the European countries and the United States for the very first time to study a common legislation on intellectual property, the request for perpetual literary property was again put forward, at a legal scholarship level. Emerging from the Congress's resolutions was a strong and concrete trend of harmonization and a unitary conception of all intellectual work.[27]

---

[23]See the interesting remarks of F. Ruffini, *De la protection internationale des droits sur les œuvres littéraires et artistiques*, Paris 1927, pp. 58-84.

[24]*Convention entre S. M. le Roi de Sardaigne et S. M. l'Empereur d'Autriche en faveur de la propriété littéraire, et pour empêcher la contrefaçon des productions scientifiques, littéraires et artistiques*, in *Traités publics de la royale maison de Savoie*, VI, Turin 1844, pp. 156-167 (Austro-Sardinian Convention of 1840). See also chapter II, § 2.

[25]The common path followed by various countries, starting with France and Belgium, is well evidenced by V. Cappellemans, *De la propriété littéraire et artistique en Belgique et en France*, Bruxelles-Paris 1854.

[26] See É. Romberg, *Compte rendu des travaux du congrès de la propriété littéraire et artistique*, Paris-London 1859; J. Delalain, *Législation de la propriété littéraire et artistique suivie des conventions internationales, nouvelle édition revue et augmentée*, Paris 1858.

[27]See Cavalli, *La genèse de la Convention de Berne*, pp. 104-106.

However, it was only with the 1878 Paris Congress, the foundation of the ALAI (*Association littéraire et artistique internationale*), the creation of the 1883 Berne Union, and especially with the 1886 Berne Convention for intellectual property, that a solution was found for some unsolved issues emerged during the century, namely: *droit d'auteur* as a special legislation; temporary and non-perpetual post-mortem rights accompanied by the establishment of time-limited property. Finally, in the 1928 revision, there was a significant recognition of the twofold nature, personal and economic, of the institution and, consequently, the recognition of a mixed right inherent to the different legal spheres.[28]

Authors' rights in the 20th century are characterized by many central problematic matters. In particular, I refer to the process of unifying the duration of exclusive and neighboring rights; to the surfacing of personal and moral rights and to the development of their protection at an international level; to the meaningful season of international conventions, which favored the internationalization of copyright law.

These aspects, regulated in the early decades of the 20th century, are still a topic of interest to many jurists and will be the main subject of this work: the relationship between civil codes and authors' rights, as shown by the most recently enacted codes; the extension of the term of protection of authors' rights by the EU directives of 2006 and 2011; the development of moral rights affected by the EU's decision to delegate their regulatory framework to member states, while the American Congress in 2019 called for their strengthening; the impact of international conventions with the US accession to the Berne Convention in 1988, fulfilling a long-held aspiration.

Finally, attention will be paid to the new paths of the 21st century, in which other countries are playing a more prominent role than the EU. Moreover, issues relating to Artificial Intelligence, which will impact the position of authors in the future, have been emerging over the last few years.

This volume brings together and revises some lectures and seminars given at Paris Panthéon Assas, Ottawa, and Zhongnan universities and at Columbia Law School between 2019 and 2023. It is intended for Sapienza and Zhongnan students of the History of European Law course. The editing, proofreading and name index work was carried out with skill and commitment by Dr. Milena Brusco, whom I warmly thank.

---

[28]See G. Alpa, 'Il diritto d'autore tra persona, proprietà e contratto', *Il diritto dell'informazione e dell'informatica*, 5 (1989), pp. 363-372.