



*Direttore*

**Stefania ERCOLANI**  
Presidente ALAI – Italia

*Comitato scientifico*

**Paolo AUTERI**  
Università degli Studi di Pavia

**Christian COLLOVÀ**  
LegalInternational – Studio legale

**Frank GOTZEN**  
President of Association Littéraire et Artistique Internationale ALAI

**Giorgio MONDINI**  
Studio Legale Mondini Rusconi

**Ferdinando TOZZI**  
Partner Studio Legale D'Andrea

## QUADERNI DI ALAI ITALIA



In the series "Quaderni di ALAI Italia", the Italian branch of the Association Littéraire et Artistique Internationale intends to offer an overview of the current issues in the field of copyright, also in a comparative and international perspective, in particular through the publication of the proceedings of ALAI's Meetings and Congresses.

The series is open to contributions from the community of scholars and practitioners involved in Copyright studies and research.

ALAI Italia applies transparency rules in the selection of the contributions, which may be in Italian or English. The Scientific Committee is in charge of the selection of the essays that are published and has the responsibility of the editorial guidelines. They are oriented in particular to the analysis and evaluation of the effects of technology on the creation and production of intellectual works, on their dissemination and economic exploitation and on the attitudes of the final users. The interactions between copyright and the development of the cultural industry are among the matters the series is focused on.

Il Gruppo italiano dell'Association Littéraire et Artistique Internationale (ALAI) è stato attivo fin dagli anni Venti del secolo scorso e si è formalmente costituito come ALAI Italia il 5 marzo 2015, con l'obiettivo di analizzare e diffondere i principi giuridici che assicurano la protezione nazionale, comunitaria ed internazionale del diritto d'autore e dei diritti connessi.

Inaugurando la collana "Quaderni di ALAI Italia", l'associazione intende offrire, in particolare attraverso la pubblicazione degli atti di incontri e congressi internazionali di ALAI, una panoramica dei temi più attuali in materia di diritto d'autore, anche in una prospettiva comparatistica e internazionale.

La collana è aperta ai contributi della comunità di studiosi della materia, con regole di trasparenza nella selezione dei contributi stessi, che possono essere in lingua italiana o inglese. Il comitato scientifico ha il ruolo di garantire le procedure selettive delle pubblicazioni proposte e il rispetto della linea editoriale, che dedica una particolare attenzione ad analisi e approfondimenti riguardanti gli effetti della tecnologia sulla creazione e sulla produzione delle opere dell'ingegno, sul loro sfruttamento economico e sulle modalità della loro fruizione. Saranno esplorate anche le interazioni tra diritto d'autore e sviluppo dell'industria culturale.



# Applied Arts under IP Law

The uncertain Border between Beauty and Usefulness

Proceedings of the International Congress  
of the Association Littéraire et Artistique Internationale (ALAI)  
Rome, 15–16 September 2016

## Les Arts Appliqués dans la Législation sur la Propriété Intellectuelle

La Frontière incertaine entre Beauté et Utilité

Actes du Congrès International  
de la Association Littéraire et Artistique Internationale (ALAI)  
Rome, 15–16 Septembre 2016

*edited by / sous la direction de*

**Stefania Ercolani**

### *Contributors*

Peter Adamsson, Fernando Carbajo Cascón, Gaetano Dimita  
Stefania Ercolani, Mihály Ficsor, Concepción Saiz García  
Gustavo Ghidini, Jane C. Ginsburg, Michael Goldmann  
Frank Gotzen, Tony Greenman, Anikó Grad–Gyenge  
Loredana Gulino, Mina Kianfar, Marshall Leaffer  
Delia Lipszyc, Thierry Maillard, Sam Ricketson  
Rosaria Romano, Keita Sato, Pierre Sirinelli  
Paolo Spada, Agnès Tricoire, Cahit Suluk  
Uma Suthersanen, Tatsuhiro Ueno  
Benoit Van Asbroeck





Aracne editrice

[www.aracneeditrice.it](http://www.aracneeditrice.it)  
[info@aracneeditrice.it](mailto:info@aracneeditrice.it)

Copyright © MMXVIII  
Giacchino Onorati editore S.r.l. – unipersonale

[www.giacchinoonoratieditore.it](http://www.giacchinoonoratieditore.it)  
[info@giacchinoonoratieditore.it](mailto:info@giacchinoonoratieditore.it)

via Vittorio Veneto, 20  
00020 Canterano (RM)  
(06) 45551463

ISBN 978-88-255-1578-7

*No part of this book may be reproduced  
by print, photoprint, microfilm, microfiche, or any other means,  
without publisher's authorization.*

1<sup>st</sup> edition: July 2018

# Contents

- 11 Foreword  
*Stefania Ercolani*
- 13 Opening speech  
*Frank Gotzen*
- 15 The International Framework of Copyright and Extra-Copyright  
Protection of Applied Art. Berne Convention, Paris Convention,  
TRIPs  
*Sam Ricketson*
- 53 Legal Review of Design in the European Union  
*Uma Suthersanen*
- 67 The French Approach. Unité de l'Art  
*Agnès Tricoire*
- 79 Utile et “futile” dans la propriété intellectuelle. La “valeur artis-  
tique” des dessins et modèles en droit italien  
*Paolo Spada*
- 91 The Supreme Court Fails to Un-“Twist” the Knot. U.S. Report on  
Copyright Protection for Applied Art  
*Jane C. Ginsburg*
- 115 The Latin American Approach  
*Delia Lipszyc*
- 125 Limits of Copyright and Design. Ideas, Functionality, Style and  
Fashion  
*Peter Adamsson*

- 133 Bienes inmateriales híbridos y concurrencia de protecciones. Formas de tutela de las obras aplicadas a la industria  
*Fernando Carbaño Cascón*
- 149 Protection of Applied Art in Israel through the Law of Unjust Enrichment  
*Tony Greenman*
- 153 Protection of Works of Applied Art under German Trademark Law  
*Mina Kianfar*
- 159 Business strategies and industry perspectives. The view of the Italian Government  
*Loredana Gulino*
- 163 Cumulative IP Rights in US Law  
*Marshall Leaffer*
- 169 How (un)availability of different kinds of protection affects marketing decisions  
*Michael Goldmann*
- 177 The protection of Form or Shape of Objects  
*Rosaria Romano*
- 185 Cumulative Protection for Applied Arts and the Role of Copyright  
*Tatsuhiko Ueno*
- 195 Applied Art Protection in Turkish Law and Strategies  
*Cahit Suluk*
- 201 Cumulation of exclusive protections (registration and copyright)? A dissenting opinion  
*Gustavo Ghidini*
- 209 Rapport de synthèse international. Impression 3D  
*Pierre Sirinelli*
- 223 Legal Framework for 3D printing in Spanish Law  
*Concepción Saiz García*



- 229 The EU legal framework for 3D printing and how it is clipping the wings of users and service providers  
*Benoit Van Asbroeck*
- 237 Exclusive right as a tool for 3D technology circumstances  
*Keita Sato*
- 243 3D printing Challenges and Solutions  
*Gaetano Dimita*
- 247 Right of Adaptation in 3D Printing  
*Anikó Grad–Gyenge*
- 251 Gestion des droits dans le domaine de l'impression 3D. Droits exclusifs ou droits à rémunération?  
*Thierry Maillard*
- 261 3D Legal analysis. Challenges and Solutions  
*Mihály Ficsor*



## Foreword

STEFANIA ERCOLANI\*

As it is customary, the conference proceedings of ALAI annual international congresses are published in a book. The proceedings of the 2016 ALAI congress, held in Rome, make no exception. Indeed, one of the purposes of the publication is the enlargement of the debate beyond the circles of scholars and practitioners that attend our congresses. It is my hope that, thanks to the high level of interventions and the wide range of the reports dedicated to the protection of Design, such a purpose will be achieved also by this book.

The book is published by ALAI Italia, the Italian branch of the *Association Littéraire et Artistique Internationale*, that had the honor to host the international congress in 2016, in coincidence with the 75th anniversary of the issuance of the Italian Copyright Act, one of the most long-standing copyright laws in the world.

The historical perspective is familiar to ALAI, founded at the end of 19th century in Paris. Thanks to its deep-rooted commitment in the legal protection of literature and art, embodied in its name, over the years ALAI has kept widening its horizons well beyond the original scope of the Berne Convention, in parallel with the evolution of Copyright. In fact, since that historical international treaty, Copyright has proved to be flexible enough to evolve with technology and capable to apply to new types of creations and innovative forms of exploitation. It is no surprise, therefore, that throughout the 20<sup>th</sup> century, Copyright has progressed on “the uncertain border between beauty and usefulness”, extending its coverage to software, databases and being confirmed among the tools for the protection of industrial design.

The legal implications of the interaction between art and industry were the leitmotif of the 2016 ALAI Congress. The legal protection of Design is at the crossroad between various branches of intellectual property, and naturally suggests for comparison and benchmarking of diversified experiences. In the different options available for the protection of Applied Arts and Design, it can be perceived the continuity of legal tools that follow par-

\* President ALAI Italia.

allel paths. In the field of Applied Arts, the distinction/separation between Copyright, Patents, Design and unfair Competition has particular contours, that are explored by the reports published here.

The dichotomy between the beautiful and the useful is not inherent to the concept of art. Ancient Greeks defined with the same word τέχνη art, skill and craft and it is not by chance that the terms “artist” and “artisan” contain the same root. The distinction between “fine arts” and minor arts was unknown during the Renaissance, when the relationship between art and artisans, between the artist and his workshop marked Western civilization. Let us just think of one of the absolute geniuses of humanity, Leonardo da Vinci, whose work harmoniously combines applied arts and fine arts, not to mention that his eclecticism led him to visionary intuitions, suggesting how creativity can open new paths to technical-scientific progress. We could even go so far as to say that, in some way, the “Unitè des Arts”, codified by the European Directive 98/71/EU of 13 October 1998 on the legal protection of designs has an ancient illustrious precedent in the Renaissance workshop.

The humanistic vision of Copyright does not imply, however, a nostalgic *Weltanschauung*. Copyright has been capable to reconcile the immaterial form with the physical embodiment of intellectual works and has then adapted to the dissemination of intellectual works in digital formats. Equally, the 2016 ALAI Congress ranged from history to the future, showing how we are on the verge of an impressive technological development involving intellectual property, as it is testified in the final part of this book, devoted to 3D technology and its impact on IP paradigms.

While Copyright adapts to unpredictable developments and new realities, its *raison d’être*, the protection of creativity in all its forms, remains firm. The final intent of the legal protection of intellectual works (and the bridge between copyright and *droit d’auteur*) is to give authors and artists the necessary moral and material incentives to undertake a creative career, therefore providing the main tool to increase our cultural heritage for the generations to come.

## Opening speech

FRANK GOTZEN\*

Ladies and gentlemen,

Dear friends and colleagues,

First of all, I would like to convey my own sorrow and, in the name of ALAI, offer our sincere condolences to the people of Amatrice and surroundings, so deeply affected by the recent terrible events.

Mon cher Victor,

Je suis très honoré, mais en même temps très embarrassé par les paroles trop aimables que vous venez de prononcer à mon égard. Succéder à un fin diplomate, artiste de surcroît, à quelqu'un qui, ensemble avec Yves Gaubiac, a dirigé l'organisation pendant vingt années n'est pas une mince affaire. Surtout quand on ne porte pas, comme lui, le prénom qui vous prédestine à la succession de Victor Hugo.

Il est vrai que l'honneur est grand de pouvoir s'inscrire dans la lignée de tant de présidents illustres qui ont marqué la vie de notre Association. Je pense notamment à Georges Koumantos, ou encore, avant lui, au Professeur Henri Desbois, qui, m'ayant reçu à bras ouverts lorsque j'étais encore étudiant, est devenu mon maître à penser. Jamais je n'aurais cru pouvoir un jour leur succéder.

Pensant à Victor Hugo il est bon pour notre association de se rappeler l'esprit dans lequel il a agi. Ainsi qu'il appert du très intéressant ouvrage historique de Jean Cavalli<sup>1</sup>, pour Hugo, les problèmes de droit d'auteur dépassaient les questions de bonne technique juridique. Il ne s'agissait pas seulement de bien figner des textes, il fallait surtout songer à améliorer la situation économique et sociale de ceux et de celles qui sont à la base des créations protégées, c'est-à-dire, les auteurs, personnes humaines. Il est bon de se le rappeler à l'heure des défis qui nous attendent dans la société de l'information.

Nous sommes très heureux de pouvoir à nouveau vivre un Congrès de l'ALAI en Italie. La dernière fois remonte déjà à 1987, qui était l'année du

\* Professeur émérite de l'Université de Leuven (KU Leuven), Président de l'ALAI.

1. J. CAVALLI, *La genèse de la Convention de Berne pour la protection des œuvres littéraires et artistiques du 9 septembre 1886*, Lausanne, 1986.

Congrès de Sorrento. Nous évitons ainsi, mais de justesse, la prescription trentenaire. Il nous fallait revenir en Italie, et finalement, puisque tous les chemins y mènent, venir à Rome.

Ayant vécu de près les péripéties de l'organisation d'un Congrès international dans mon pays, je sais que le poids de l'organisation tend toujours à peser sur certaines épaules plus que sur d'autres. À Bruxelles, c'était en premier lieu Fabienne Brison, aujourd'hui notre nouvelle Secrétaire générale. À Rome, maintenant, c'est sans doute en premier lieu Stefania Ercolani. Succédant à Mario Fabiani, ce gentleman que nous n'oublierons jamais, elle a porté sans crainte la charge la plus redoutable dans la mise en œuvre de ce congrès italien qui fait battre nos cœurs. Nous lui sommes tous reconnaissants.

È un grande onore e un piacere speciale per me, di essere in grado di aprire una conferenza in questa città, centro mondiale della cultura, e di poterlo fare nella lingua di Dante.