COMMISSION OF THE EUROPEAN COMMUNITIES

COM(84) 300 final

Brussels, 14th June 1984

TELEVISION WITHOUT FRONTIERS

GREEN PAPER ON THE ESTABLISHMENT OF THE COMMON MAI FOR BROADCASTING, ESPECIALLY BY SATELLITE AND CABLE

(Communication from the Commission to the Council)

Part Six

Pages 209-331

PART SIX

HARMONIZATION OF LEGISLATION

To avoid repetition, the reader's attention is directed to Part Four of this Green Paper, which deals with the situation in each country, for any information concerning the relevant national broadcasting system or broadcasting legislation, for an indication of the various provisions governing broadcasting and for an explanation of the abbreviations used for broadcasting organizations, etc.

A. Rules on advertising

Radio and television advertising (broadcast advertising) is subject, in all the Member States, to rules and regulations of various types. These are made up partly of the law applying to advertising in general and partly of provisions specific to radio and television advertising. The regulations differ in directness and severity; in two Member States, broadcast advertising is forbidden.

It is obvious that a ban of this type can inhibit trans-frontier broadcasting of advertisements, but even less stringent regulations can hamper it. Such is the effect especially of differing levels of regulation of advertising.

This section gives an outline of the categories of relevant national rules and regulations (I), examines their effects on the common market and the need for harmonization (II) and discusses the scope for harmonization (III).

I. National legislation

1. Overview

For the purposes of this Green Paper, the main national laws applying to radio and television advertising can be broken down into the following categories; first and foremost, there are the rules and regulations which specifically determine whether and how broadcast advertising may be carried on, restricting TV advertising time, dealing with the form and content of advertisements and separating advertisements from other programmes; the second category is that of general law on advertising, particularly the law on the prevention of misleading or unfair advertising; the third category is made up of the advertising regulations for specific branches, particularly food and beverages, tobacco products, pharmaceuticals, cosmetics and textiles and also takes in related labelling and advertising rules as well as regulations on advertising by certain professions. Lastly, radio and television advertising is subject not only to national statutory provisions but also to self-regulation of a general or specific nature.

For the purpose of achieving freedom to provide broadcasting services, these rules and regulations have varying degrees of impact. By far the most significant are the specific advertising regulations for broadcasting, which generally apply to all advertisements in the relevant sphere and forbid broadcast advertisements altogether at certain times if they have a specific content or take specific forms. They can be expected to be the most direct and most perceptible obstacles to the freedom to provide broadcasting services. They certainly need to be dealt with in any analysis of harmonization measures (see Section 2 below).

The situation is different for general law on advertising and advertising regulations for specific branches. The relevant rules do not apply specifically to broadcast advertising, but normally to all forms of advertising and to all media. Broadcast advertising as such is neither forbidden nor in general restricted by these rules. It is only from time to time that a particular statement made during a broadcast advertisement may happen to conflict with the provisions of general or specific advertising law, for example because it is regarded as misleading or flouting the advertising rules for medicines. Sanctions are directed only against that statement in the advertisement. Retransmission of the statement in question may be prohibited and, in the worst hypothesis, the advertiser may be punished. But broadcast advertising as a whole is not normally restricted by such rules.

The differences in general and specific advertising law may, in certain cases, act as an obstacle to cross-frontier broadcast advertising and hamper the dissemination of individual advertising messages across internal frontiers. Even so, they should be excluded from this analysis because, on the one hand, they do not act as obstacles generally but only in isolated, individual cases and, on the other, they can be dealt with only as part of a general and comprehensive harmonization drive. The proposal for a directive on misleading and unfair advertising, drafted in 1978 and amended in 1979,[1] thus covers "advertising" generally, defined in Article 2 of the proposal as "the making of a representation in any form in the course of a trade, business or profession for the purpose of promoting the supply of goods or services". Broadcast advertising transmitted via satellite or by cable is clearly caught by this definition.

The same applies to specific advertising rules for certain branches of the economy such as foodstuffs, pharmaceuticals, textiles and the like. Where moves towards harmonization have already been launched in those areas, they rightly extend to all forms of advertising, including broadcast advertising. Thus, Article 1(2) of the proposal of 13 April 1981 for a directive on the approximation of the laws in the Member Staes relating to claims made in the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer[2] gives the following definition of a "claim": "any statement intended to promote the sale of a foodstuff, transmitted by any medium, including generic advertising". Subsequent work on harmonization should also avoid any media-specific fragmentation of the relevant provisions. In the general and the specific law on advertising and competition, all advertising media should, as a matter of principle, be treated on equal terms. Any obstacles to broadcast advertising should be removed as part of the general harmonization process. We must, therefore, exclude from the following analysis of harmonization as it affects the individual media the general law on advertising and competition and the specific law in both areas as it is applied to particular branches of the economy.

However, one exception must be made: the bans on advertising applicable to specific goods and/or services, particularly tobacco products and alcoholic beverages. In some Member States, bans on advertising of this sort form part of the regulations relating specifically to broadcast advertising while, in others, they are contained in the general law on advertising or in the law on advertising in specific branches, which once again applies to specific media or is general in scope. Lastly, bans are imposed on advertising under semi-official or voluntary self-regulation arrangements. For the purposes of our harmonization study, it is irrelevant which laws or other arrangements provide for a ban on advertising. They must all be taken into account. This is because they not only have an ad hoc or sporadic effect in individual cases but also prohibit advertising for specific products and/or services in a general and absolute manner and can, therefore, be equated with a partial ban on broadcast advertising. Bans on advertising for specific products and/or services must, therefore, be dealt with after the media-specific

[1] OJ No C 70, 21.3.1978, p.4; OJ No C 194, 1.8.1979, p.3.
[2] OJ No C 198, 6.8.1981, p.4.

advertising regulations where they can be isolated from the specific law on advertising and are likely to have an appreciable effect on the cross-frontier provision of services (see Section 3).

In this context, special attention should be paid to regulatory arrangements, particularly self-regulation, whether they exist on a purely voluntary basis or whether they have been established by statute or in some other way with State involvement. General arrangements or arrangements tailored to specific branches are of less interest here. They are the counterpart to general and specific law on advertising and competition and they too have at best a sporadic and ad hoc effect on broadcast advertising; they can therefore be dealt with only as part of a general harmonization programme, and not as part of a harmonization process confined to specific media. Accordingly, the proposal for a directive on misleading and unfair advertising includes in its scope such self-regulatory arrangements as exist in the Member States (see Articles 5 and 6).

For the purposes of this Green Paper, it is the regulatory bodies set up specifically for broadcast advertising that are important; such bodies have been set up by a number of broadcasting authorities in particular or operate at national level though their responsibility is confined to broadcast advertising. These will be dealt with following discussion of the national broadcast advertising regulations (see Section 4).

2. Broadcast advertising regulations in the individual Member States

(a) Member States in which broadcast advertising is forbidden

Denmark

Although not expressly laid down, an advertising ban applies to Danmarks Radio, which broadcasts one national television programme and three national radio programmes, together with regional radio programmes. It is laid down in Section 6 of the Broadcasting Act of 1973 that Danmarks Radio is to be financed by fees levied for the use of radio and television receiving apparatus. Section 15 provides that the State may make grants for the fulfilment of specific tasks. The Act leaves no scope for revenue from commercial advertising.

Even in the cases where the Minister of Culture has given authorization under Section 3(2) for the trial operation of "active" local cable television, financing from advertising is not permitted. The cable programmes are financed by the cable subscribers and partly through contributions from local authorities and central government.

However, cable operators in Denmark are allowed to relay advertisements contained in foreign broadcasting programmes ("passive" cable broadcasting). This is apparent from Section 3(1) of the Act, whereby foreign programmes have to be transmitted unchanged and simultaneously. The following is an extract from the observations on the proposal amending the 1973 Broadcasting Act made by the Minister for Culture on 12 February 1984:[1]

"The Ministry of Culture has considered ... whether the /proposed/ wider transmission of foreign programmes /received via microwave links, long-distance cable and telecommunications satellites/ by Danish cable networks necessitates special provisions relating to responsibility for the content of the programmes relayed, including provisions on the content of any advertising. The Minsitry of Culture is, however, of the opinion that there is not at the moment a sufficient basis for proposals for such new provisions. In this connection, it would point out in particular that the synchronous retransmission unchanged of neighbouring countries' television programmes via Danish cable networks has not yet given rise to any problems of responsibility and that so far we have not experienced any problems of responsibility in connection with the transmission via Danish cable networks of foreign programmes beamed from telecommunications satellites".

[1] Lovforslag nr. L 42, Folketinget 1983-84 (2. samling) Blad nr. 43, S.9.

Under the Government's amending proposal, (private) companies, associations and the like will, in future, be able to broadcast television programmes in Denmark(alongside and independently of Danmarks Radio) provided they have been authorized to do so by a committee to be set up for this purpose. The intention is that they should be able to beam or broadcast their programmes throughout the country or on a regional basis using a new channel (TV2) and a new network of transmitters. These future competitiors of Danmarks Radio are to finance their programmes in whole or in part from a licence fee (in the same way as Danmarks Radio) and/or advertising revenue; if need be, they could also rely on revenue from subscriptions. The committee mentioned above will have the task of proposing rules on financing and on the authorization procedure.[1]

The observations regarding the proposed legislation contain the following:[2] "... the Ministry of Culture is of the opinion that programme activities on a new TV channel should not be financed solely out of revenue from licence fees. Financing from advertising should also be permitted to some extent so that advertisements could be broadcast in slots at fixed times. Rules should, however, be drawn up to ensure that advertisers are unable to influence programme content ... the Committee is to formulate proposals for more detailed rules on the production of advertisements, the overall ceiling for advertising time, the duration of advertisements and their placing, advertising guidelines and the setting up of a special advertising body ...

The Ministry takes the view that there is a clear case for advertising time on a new Danish TV channel being sold by a special company not dependent on those with responsibility for programme activities. Consideration should, however, be given to whether the prices charged for the blending in of advertisements should, in the final analysis, be fixed by the Folketing's Finance Committee ... . Advertising revenue should be restricted so that it accounts for the smaller share, e.g. 25% of total revenue."

Talks between the representatives of the parties in the Folketing have revealed that the part of the proposal dealing with the authorization of advertising will not find majority support and, as a result, will probably have to be dropped.

---

[1] Section 1(3) of the proposal on a new Section 19a(1)(2) to be incorporated in the 1973 Act; Lovforslag, loc.cit., p.2.

[2] Lovforslag, loc.cit., pp.5, 13 and 14.

Belgium

In the case of the RTBF and BRT broadcasting organizations,[1] advertising is banned under the Broadcasting Act of 1960.[2] By decree of the "Communauté culturelle française" of 8 July 1983, the RTBF has been allowed to broadcast non-commercial advertising since the beginning of 1984.[3]

The cable companies too are forbidden from relaying advertisements.[4] The Court's judgement in the Debauve case declared this ban to be fundamentally compatible with the EEC Treaty.[5] However, at the present time, the Belgian cable networks transmit a large number of Luxembourg, Dutch and to a lesser extent, German and French broadcasts which carry advertisements; some of the advertisements are directly aimed at a target audience of Belgian consumers. The reason given for the decision to continue relaying these advertisements is the technical difficulty of removing the commercial breaks from continuous broadcasts. By and large, the transmission of this advertising is tolerated. The authorities with power to prosecute refrain from so doing. Judgments in the Belgian courts have described the ban as having been "suspended".[6]

---

[1] There is also the Belgian "Rundfunk- und Fernsezentrum für deutschsprachige Sendungen (the German-language counterpart of the RTBF and the BRT).

[2] Article 28(3) of the Loi organique des Instituts de la Radiodiffusion.

[3] Télévision belge.

[4] Moniteur belge of 13 August 1983, p. 10305.

[4] Article 21 of the Arrêté Royal relatif aux réseaux de distribution d'émissions de radiodiffusion aux habitations de tiers of 24 December 1966 (Law relating to networks for the distribution of broadcasts to the residences of third parties).

[5] /1980/ ECR, at 833. See also the prior judgment by the Tribunal Correctionel de Liège of 23 February 1979 in Jurisprudence de Liège of 1 September 1979, at 309, and the judgment given, following the Court's ruling, by the Tribunal Correctionel de Liège on 27 June 1980 in Jurisprudence de Liège of 6 September 1980, at 210.

[6] Cour d'appel de Bruxelles, 17 May 1978, in Revue de droit intellectuel - Ingénieur-Conseil 1978, at 311. Tribunal civil de Bruxelles, 10 May 1978 in Journal des Tribunaux 1978, at 524 A.A. Tribunal commercial de Bruxelles, Jurisprudence Commerciale de Belgique 1977, III, 593.

Mention should also be made of the local radio broadcasting companies provided for in the Act of 30 July 1979.[1] The authorization and operation of such companies are defined in the Regulation of 20 August 1981,[2] which stipulates in Article 16 that broadcasts must not be in the nature of commercial advertising. It is debatable whether this provision is valid under the Belgian constitution. The same is also true for a similar provision in the decree by the Conseil de la Communauté culturelle française which reiterates the ban on advertising.[3] In practice, even local radio broadcasters have gone over to broadcasting advertisements. However, in its judgment of 27 September 1982,[4] the Tribunal Correctionel de Liège found against the local radio company "Radio Basse-Meuse" in a case brought by the public broadcasting authorities for violation of the ban on advertising contained in Article 16 of the Arrêté Royal of 20 August 1981 and ordered it to pay damages. The Liège court considered the provision to be valid and not in conflict with the EEC Treaty.

A "Projet de Loi relatif à l'émission de publicité commerciale par les Instituts chargés d'assurer le service public de la radio et de la télévision" (Bill on advertising broadcast by the Institutes entrusted with providing public-service radio and television broadcasting), drawn up in 1982, provides that only the public broadcasting authorities may transmit commercial radio and television advertising. It also states that legislation will be enacted banning advertising for specific goods and services and defining the days, times and maximum duration for advertisements. Advertising is to be clearly separated from the other programme material and must not interrupt programmes. Further provisions are to be enacted in regulations. A "Conseil de la Publicité" (Advertising Council) is to be created, under the Prime Minister, to draw up a code on the content and form of advertising, to ensure that the provisions are adhered to and to rule on disputes. Bodies with their own legal personality are to be set up to produce the advertisements. Any other person or body broadcasting advertisements or participating in their broadcasting, even as promoter or sponsor, will be committing an offence. The relaying in Belgium of foreign broadcasts may be forbidden by law where they do not meet the criteria laid down for national broadcast advertising.

---

[1] Loi relative aux radiocommunications, 30 July 1979 (Act relating to broadcasting).

[2] Arrêté Royal réglement l'établissement et le fonctionnement des stations de radiodiffusion sonore locale, 20 August 1981 (Act regulating the creation and operation of local radio broadcasting stations).

[3] Décret fixant les conditions de reconnaissance des radios locales, 8 September 1981, Article 8 (Decree determining the terms for the recognition of local radio stations.)

[4] Jurisprudence de Liège, 23 October 1982, at 382; Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1983, at 302, with observation by Henning-Bodewig (Industrial property rights and copyright).

(b) Member States in which broadcast advertising is permitted

Germany

Radio advertisements have been broadcast in Germany for more than thirty years. Nowadays, all the public land broadcasting authorities - with the exception of Westdeutscher Rundfunk in Cologne - carry advertisements on their radio stations. Radio advertising is the responsibility of privately organized subsidiaries of the broadcasting organizations, which also exercise supervision over their subsidiaries.[1] The basic rules on radio advertising are enshrined in a number of Land broadcasting acts and in the statutes of the broadcasting organizations.[2] The actual details of radio advertising are regulated by the Land governments or the broadcasting organizations. They vary from one broadcaster to another, but some degree of harmonization does exist. Radio advertising is broadcast in the mornings and afternoons until 1900 hours and on the Drittes Programme (service channels - third programmes) until 2100 hours, up to a maximum of ten minutes per hour. On Sundays and holidays there is no radio advertising. Some channels (BR 3, HR 3, SDR 2, SR 3, SDR 3 and SWF 3) broadcasting advertising blocks only while others (HR 1, SR 1 and SFB 1) transmit only advertising spots in the course of programmes. Both types of advertising are to be found on a number of channels (BR 1, RB 1, SDR 1 and SWF 1).[3]

Under Section 23(2) of the Charter of 6 June 1961 incorporating under public law the Zweites Deutsches Fernsehen (ZDF - second German television channel), the latter is required to cover that portion of its expenditure not financed from fees with revenue from television advertising.[4] Section 22(3) of the Charter stipulates that advertisements are to be kept clearly separate from other programme material. Total advertising time is laid down by agreement with the Land Prime Ministers. After 2000 hours and on Sundays and Federal holidays, advertisements are not allowed to be shown. There must be no question of advertising organizations or media influencing programmes.

---

[1] On the establishment of the advertising subsidiaries, see, for example, the Statute of Radio Bremen of 18 September 1981 (Section 3(2)), the Charter of 20 August 1980 concerning the Norddeutscher Rundfunk (Section 34(1)(i)), the Statute of the Norddeutscher Rundfunk of 20 March 1981 (Article 27), and Section 35(2) of Act No 806 of 1 December 1964 on the organization of broadcasting in Saarland (in the version of 1 August 1968).

[2] See Article 5(3) of the Act of 10 August 1948 on the creation and duties of a public-law organization, the Bayerische Rundfunk (in the version of 26 September 1973); Section 3(10) of the Act of 2 October 1948 on the Hessischer Rundfunk; Section 35(2) of the Charter of 20 August 1980 on the Norddeutscher Rundfunk; Section 35(1) of Act No 806 of 2 December 1964 on the organization of broadcasting in Saarland (in the version of 1 August 1968); Section 4 of the Statute of the broadcasting organization "Sender Freies Berlin", Annex to the Act establishing a broadcasting oranization, the "Sender Freies Berlin" (in the version of 5 December 1974).

[3] On the above, see the comparative report entitled "Rundfunkwerbung in Europa und in den USA - Eine Ubersicht, Media Perspektiven 1979, p. 210 (at 212); ARD - Jahrbuch 1983, Hamburg 1983, p. 357.

[4] In 1979, 41% of the ZDF's revenue was obtained from broadcast advertising. For the first television channel authorities, the figure was 31%. The situation remained unchanged in subsequent years; see also Part Four, at H.

In the final protocol to the Charter (No I.1), the signatory Länder undertake to impose on the authorities set up under the respective Land legislation governing broadcast advertising on the first television channel operated by them the same obligations as are imposed on the ZDF under the Charter and under the agreement between the Land Prime Ministers provided for in the Charter.

The Land Prime Ministers decided[1] that total advertising time on the first TV channel, which is produced jointly by the Länder broadcasting organizations,[2] and on the second channel should be set at an annual working-day average of twenty minutes. Up to five minutes per working day of unused advertising time may be carried over.

All advertisements are shown in four advertising blocks between 1730 and 1930 hours on the second channel (ZDF) and between 1800 and 2000 hours on the first channel (ARD 1). During the latter period the nine regional organizations making up the ARD broadcast their own regional programmes. There is no advertising on the third channel (ARD 2), which has only regional coverage and which the nine regional organizations also transmit.

The advertising subsidiaries of the Land broadcasting organizations have agreed jointly to draw up a high-quality framework programme for television advertising which is designed to attract viewers by entertaining and educating them but which must not contain any direct or indirect advertising.[3]

The provisions governing the duration and implementation of television advertisements are spelt out and supplemented by a special set of guidelines. Section 2 of the guidelines lists the public holidays on which no advertising may be broadcast. Section 6(1) stipulates that advertising shall be presented only for commercial reasons, but not for political purposes or for expressing religious views or ideological convictions. Advertisement in respect of writings, recordings, drawings, performances or objects which clearly cause offence of annoyance, put young people at risk or have been banned under criminal law because of their content are not permitted. Advertising spots must not violate laws, be offensive, have a harmful effect or cause embarassment. Special regard is to be had to the interests of children and young people (Section 7).

---

[1] Decision of 6 June 1961. See Section 3 of the "Richtlinien für die Werbesendungen des Zweiten Deutschen Fernsehens" (Guidelines for advertisements broadcast by the ZDF) of 14 April 1967. For Saarland, the detailed guidelines were reproduced in Section 2 of the Verordnung zur Durchführung des Gesetzes über die Veranstaltung von Rundfunksendungen in Saarland (Regulation implementing the Act on the organization of broadcasting in Saarland) of 22 December 1964.

[2] Cf. Agreement between the Länder of 17 April 1959 on the coordination of the first television channel.

[3] See Programmebeitragsvertrag (Programme contribution agreement), Section 1, in the version of 12 July 1977.

In order to investigate the effects of a wider supply of television programmes, trials with private and public "active" and "passive" cable television have been under way in Ludwigshafen/Vorderpfalz since 1 January 1984[1] and in Munich since 1 April 1984.[2] Two further trials are to be launched in Berlin[3] and Dortmund[4] in 1985. The trial programmes to be broadcast in Dortmund must not contain any advertising (Section 1(5)(2)). The rules governing the trials in Berlin (Section 51), Ludwigshafen Section 3(7)) and Munich (Section 9) permit advertising as a matter of principle.

In the case of the Ludwigshafen trials, advertising time must not account for more than 20% of total broadcasting time (Section 14(10)). The agreement on the Munich trials does not impose any such restriction (Section 9). In Berlin, advertising is to be permitted in continuous blocks lasting not more than nine minutes per hour of broadcasting time (Section 51(3)).

Under the draft Bavarian Act concerning the media,[5] cable companies are allowed to put together new radio and television programmes with local or wider coverage from contributions by (private) suppliers of material ("active" cable broadcasting). Advertising forming part of such new programmes must not account for more than a fifth of the supplier's broadcasting time (Section 30(2)). However, in the case of transmissions by suppliers with less than one hour's daily broadcasting time, the amount of advertising time may exceed the 20% ceiling (Section 30(4)(2)).

A 20% ceiling is also to be found in the draft broadcasting legislation for Lower Saxony,[6] Schleswig-Holstein[7] and Saarland[8] but not (as yet) in the

---

[1] Landesgesetz über einen Versuch mit Breitbandkabel, 4 December 1980, Gesetz- und Verordnungsblatt Rheinland-Pfalz, p. 229.

[2] Grund- und Gesellschaftervertrag für das Kabelpilotprojekt München, 16 July 1982.

[3] Entwurf eines Gesetzes über die Durchführung des Kabelpilotprojekts Berlin, sent by the Berlin Senate to the Chamber of Deputies on 30 March 1984, Abgeordnetenhaus - Drucksache 9/1718.

[4] Nordrhein-westfälisches Gesetz über die Durchführung eines Modelversuchs mit Breitbandkabel, 20 November 1983, Gesetz- und Verordnungsblatt Nordrhein-Westfalen 1983, p. 640.

[5] Entwurf eines Gesetzes über die Erprobung und Entwicklung neuer Rundfunkangebote and anderer Mediendienste in Bayern, adopted by the Bavarian Council of Ministers on 24 January 1984, Media Perspektiven 1984, p. 140.

[6] Entwurf Landesrundfunkgesetz Niedersachsen, sent by the Land Government to the Land Parliament on 4 May 1983, Section 38(2), Landtags-Drucksache 10/1120 of 5 May 1983.

[7] Entwurf eines Rundfunkgesetzes für das Land Schleswig-Holstein, sent by the Land Government to the Land Parliament on 29 March 1984, Section 24(1), Landtags-Drucksache X/450 of 29 March 1984.

[8] Referentenentwurf eines Rundfunkgesetzes für das Saarland, 9 April 1984, Section 44(2).

somewhat older draft legislation for Baden-Württembert,[1] which is being examined at the moment by the Land Government. The legislative instruments in question will grant each private individual, as a matter of principle, the right to broadcast, on the basis of an authorization or concession, radio and television via ground transmitters and to finance the programmes broadcast out of advertising revenue.[2]

Advertising may also be transmitted in the evenings and on Sundays and public holidays. It must be kept clearly separate from the rest of the programme. Advertisements may be shown in blocks at appropriate times. However, advertising time must not exceed 15 minutes per hour in Schleswig-Holstein and 15 minutes in the case of television and 18 minutes in the case of radio in Saarland. Moreover, in Schleswig-Holstein and Saarland, advertising blocks may appear only at the beginning or the end of a transmission. A television transmission may be interrupted on one occasion at a pre-determined moment if it lasts more than 60 minutes (Schleswig-Holstein), 80 minutes (Saarland) or 100 minutes (Lower Saxony).

Transmissions financed by a third party (sponsor or promoter) will be permitted but, in the case of Schleswig-Holstein and Saarland, only if their content is unrelated to the third party's business interests.

In Lower Saxony and Schleswig-Holstein, local and regional advertising, i.e. advertising not broadcast country-wide, is to be banned even from local and regional programmes ("Fenster"), the aim being to protect advertising revenue accruing to the local and regional press.

---

[1] Entwurf für ein Gesetz über die Neuen Medien, adopted as a discussion document by the Land Government on 16 March 1982, Section 26(1)(6), Media Perspektiven 1982, p. 202. Under this provision, advertising in any one hour may not exceed three minutes in the case of television and
[2] five minutes in the case of radio.
The draft acts also govern the re-transmission of existing programmes by cable ("passive" cable broadcasting).

France

The Act of 29 July 1982 on broadcasting and communications reorganized broadcasting as a whole and placed broadcast advertising on a new basis.

It permits broadcasting by private as well as by public organizations.

For public broadcasting organizations, the object, duration and conditions for broadcasting advertisements, and the permissible amount of advertising revenue are laid down in a so-called memorandum of conditions, which also sets the upper limit on the amount of advertising which can be accepted from the same advertiser (Article 66(1) and (2)). The memorandum contains the permanent provisions, laid down by decree, and the annual provisions, laid down by order (Article 32(1)). The new memoranda are to be published shortly; until then, the existing memoranda remain in force. The Régie Française de Publicité (RFP) is responsible for monitoring and implementing the provisions on broadcast advertising (Article 66(3)).

In addition, the Haute Autorité de la Communication Audiovisuelle, established under Article 12 of the Act, is responsible for ensuring that the public broadcasting organizations respect the fundamental principles governing the content of broadcast advertisements as derived from current laws, regulations and professional practice (Article 19(1)). To this end, the Haute Autorité recommends standards which it may publish (Article 19(2)). It also consults the Conseil National de la Communication Audiovisuelle on advertising decisions and recommendations (Article 27(2)). Should a national programme company seriously or repeatedly violate the memorandum of conditions or the acts, decisions and recommendations of the Haute Autorité with regard to broadcast advertising, the Haute Autorité requires the President of that company to take th necessary measures to bring such violations to an end (Article 26(3)).

With regard to the use of advertising revenue, each year when the Finance Act is voted, Parliament has to authorize allocation of the expected revenue from commercial television advertising (Article 62). Revenue is shared out between the domestic public radio and television broadcasting organizations (Article 63).

Private broadcasting companies require authorization (Article 78). However, for television broadcasting over the air to the general public, only public-law concessions can be awarded (Article 79). Local radio stations operating over the air are not allowed to carry advertising (Article 81(4)). They receive State support financed out of radio and television advertising revenue. The memorandum of conditions also determines the amount and object of the advertising which the applicant may carry on in order to finance the proposed service (Article 84(1)). Advertising revenue may not amount to more than 80% of total financing (Article 84(2)).

In April 1984, the President and the Government announced that the existing ban on advertising by local private radio (Article 81(4)) was to be lifted. Accordingly, a bill amending this provision of Article 81 will be laid before Parliament. If it is adopted, the close on 1 000 private local radio stations will then be able themselves to choose their statute and their broadcasting policy. If they opted for a non-profit-making status, they would undertake not to carry advertising. Instead, they would receive subsidies from a fund financed out of contributions from all public and private boradcasting organizations. If they opted for a profit-making status, they would not be eligible for public subsidies and would then be allowed to rely on advertising revenue. According to the Government, this is the only way to achieve the freedom of broadcasting provided for in 1982. The Government maintains that the ban on advertising had led to unsound practices, that those practices have become more widespread and that, in many cases, the press has meanwhile become involved in private local radio and has less need of protection.

Under the new legislation, advertising would be governed by the RFP's rules on radio and television advertising. Brand advertising is not broadcast on French radio, but it is possible to receive foreign broadcasts that carry advertisements.

According to the memoranda of conditions for the television stations TF 1 and A 2, brand advertising may be broadcast for an annual daily average of 18 minutes. However, on any particular day, up to 24 minutes of brand advertising is permitted. This does not include advertising transmitted between 1330 and 1900 hours or postponements caused by strikes. The FR 3 station is allowed to transmit up to ten minutes' brand advertising each day. No restrictions as to duration exist for "collective" advertising for, say, apples, milk and butter generally.

Commercials are broadcast in advertisement breaks between programmes, with each commercial lasting between 8 and 60 seconds and a break lasting up to 5 minutes. Television advertising is broadcast daily and is concentrated during evening viewing times. The organizations in France are not, therefore, subject to any restrictions as to the days on which, and the actual times at which, advertisements may be broadcast.

The 1974 Broadcasting Act stipulated that advertising revenue must not account for more than 25% of the total revenue accruing to any broadcasting organization. This provision has been superseded by the new Act of 1982, which does, however, impose a restriction of another sort that is spelt out in the memoranda of conditions (Article 66(2)), namely, that revenue accruing from a single advertiser must not exceed 7% of the advertising revenue of any programme company.[1]

---

[1] In this connection, see the comparative report by the European Broadcasting Union (EBU), Synopsis of replies to a survey on television advertising rules conducted among EBU active members, EBU Review, Programmes, Administration and Law, No 5, September 1983, p. 25.

Greece

Until now, radio advertising has been broadcast by twenty ERT and YENED regional stations and three private regional stations; all radio stations are fed into the same network.[1]

Radio advertising can be broadcast in the form of advertisement breaks between or within programmes, and individual commercials within a sponsored programme. Commercials last between 10 and 60 seconds; sponsored programmes can last for between 5 and 30 minutes. Radio advertising may be broadcast daily from 07.00 to 18.00, except on four public holidays. There is no statutory limit on the total duration of radio advertising broadcasts.[2]

Both ERT 1 and ERT 2 carry television advertising. ERT 1 and ERT 2 currently obtain about 25% of their revenue from advertising. ERT is permitted to broadcast up to 30 minutes of advertising a day, with not more than 10 minutes per break. Individual commercials or advertisement breaks are permitted both between and within programmes. The same commercial may not be repeated within the same programme, but otherwise up to three repeats are permitted daily. Individual commercials can last between 15 and 60 seconds, and an advertisement break up to 10 minutes. ERT groups its advertising into two ten-minute breaks and two five-minute breaks, which must be separated by a programme at least 15 minutes long, or 40 minutes long between 21.00 and 22.00. Sponsored advertising is not permitted on television. Advertisements are carried between 13.30 and 24.00 on working days and between 13.00 and 24.00 on Sundays. Television advertising is not permitted on Good Friday. Advertising may not exceed 7% of total transmission time in any one month.[3]

There are no special controls on broadcast advertisements.

No private television companies nor, in particular, cable companies are as yet known to exist.

---

[1] See report in Media Perspektiven 1979, p. 210 (pp. 214 et seq)
[2] See report in Media Perspektiven, loc. cit., p. 215.
[3] See the Order on television advertising which entered into force on 1 October 1979, amended in 1982; cf. also the time available for broadcasting advertisements, Official Government Gazette of 3 December 1976 and the report in Media Perspektiven, loc. cit., p. 215, and the EBU Report in EBU Review, loc. cit.

Ireland

About half RTE's revenue comes from braodcast advertisements. Section 20 of the Broadcasting Authority Act, 1960, and Section 14 of the Broadcasting Authority (Amendment) Act, 1976, contain more detailed rules on broadcast advertisements. The total daily and hourly time for advertisements is fixed by the Authority and is subject to the approval of the Minister for Post and Telegraphs. The Authority may not accept any advertisement which is directed towards any religious or political end or has any relation to any industrial dispute; the Authority may reject any advertisement presented for broadcasting in whole or in part.

"The RTE Code of Standards for Broadcast Advertising", May 1982, contains rules for broadcast advertising. No advertisement may include anything that states, suggests or implies, or could reasonably be taken to state, suggest or imply that any part of any programme has been supplied or suggested by any advertiser. This shall not apply to sponsored programmes (point 4). An advertisement must be clearly distinguishable as such and be recognizably separate from the programmes (point 5). Subliminal advertising is not permitted (point 6). In addition to general standards of behaviour, the Code contains special rules on advertising and children (Appendix 1), on the advertising of medicines and treatments (Appendices 2 and 3), on the advertising of alcoholic drink (Appendix 4) and on financial advertising (Appendix 5).

On the radio, advertisements are broadcast within and between programmes; the advertisement break may last between 2 and 3 minutes. Sponsored advertising is alos permitted for up to 15 minutes four times daily. Total advertising time is limited to 7 1/2 minutes in every hour or 10% of daily broadcasting time. Radio 1 advertising is broadcast daily, except on Sundays and on two public holidays, from 7.30 to 19.00 and from 23.00 to 23.45. Radio 2 broadcasts advertising on Sundays as well.

On RTE television, advertising time each day is limited to 10% of the total programme broadcast hours and there is a maximum limit of 7 1/2 minutes of advertising in any one clock hour. Advertisements are broadcast daily, except on Christmas Day and Good Friday, usually from 14.00 to 24.00 except during school holidays and when special events occur. The same product may not be advertised more than six times in any one day.

Advertisements are broadcast in the main at programme junctions and also at natural breaks in feature films, programmes of long duration (60 minutes or thereabouts) and in the ready-made "commercial breaks" in the popular TV series made and distributed internationally by major film companies. As a general rule programmes of 30 minutes duration are not broken for advertisements. It works out that normally there are three advertising segments per hour, either between programmes or at the natural breaks and the average duration is 2 1/2 minutes but may vary between 1 1/2 and 3 1/2 minutes. Slide advertising is used, but not sponsoring.

RTE also operates a local radio station in Cork, which broadcasts advertising for between two and three hours daily. Approximately one-half of the population of Ireland are now in a position to receive signals from all four British channels, including the advertisements broadcast by ITV.

Italy

The public service broadcasting authority RAI is financed from licence fees and radio and television advertising revenue.[1] Advertising carried by RAI is subject to limits determined by the Parliamentary Committee for the general guidance and supervision of broadcasting services in the general guidelines it issues on advertising and by the need to protect other spheres of information and the mass media.[2]

The Parliamentary Committee[3] is responsible for formulating general guidelines on broadcast advertisements for the purpose of protecting the consumer and ensuring the compatability of the requirements of productive activities with the objective of public interest and the responsibilities of public service broadcasting. Each year the Parliamentary Committee sets a ceiling on the RAI's advertising revenue for the following year. In order to do so, it takes into account the advertising revenue of the national press and the previous and current year's revenue from broadcast advertisements. The percentage changes in the revenue form the basis for setting the new ceiling, the intention being to guarantee the balanced development of the two media.[4] In 1980 advertising accounted for 21.66% of RAI's total revenue, and in 1981 for 21.80%.[5]

For RAI, advertising may not exceed 5% of transmission time both on radio and television.[6]

The Società Italiana Pubblicità Radiofonica e Televisiva (SIPRA) and the Società per Azioni Commerciale Iniziative Spettacolo (SACIS), two companies associated with RAI, are involved in the practical production of advertising carried on by RAI. Advertising time is sold by SIPRA. SACIS has produced a code of advertising standards and practice[7] which contains general provisions on advertising content and special rules on the advertising of specific goods and services.

---

[1] Broadcasting Act, Section 15, first paragraph; Section 21, first paragraph, first sentence.

[2] Section 21, first paragraph, second sentence.

[3] Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi, see Section 4, seventh paragraph; see also Regolamento Parlamentare 13 November 1975 - Regolamento della Commissione parlamentare per l'indirizzo generale e vigilanza dei servizi radiotelevisivi, Section 17, point 3.

[4] Section 21, third and fourth paragraphs; Regolamento Parlamentare 13 November 1975, Section 17, points 1 and 2.

[5] See the EBU report in EBU Review, loc. cit., p. 26.

[6] Section 21, second paragraph.

[7] Norme per la realizzazione della pubblicità radiofonica e televisiva- edizione 1.1.1979.

The programming of advertising is at the discretion of RAI, which has adopted voluntary rules governing its practice.[1] With regard to radio advertising, commercials are broadcast by RAI in advertisement breaks and sponsored advertising is not permitted.[2] Both RAI radio programmes carry advertising from 06.00 to 23.30 and the regional RAI network from 12.00 to 15.00.

Television advertising is also broadcast in individual commercials which are brought together into advertisement breaks and transmitted between programmes. Commercials last between 15 and 60 seconds, and breaks between 30 seconds and 5 minutes. On both RAI channels advertisements are broadcast from 13.00 to 23.00. No advertising is broadcast on Good Friday and on 2 November.

The Act permits private broadcasting companies in the first instance to transmit local single-channel radio and/or television programmes via cable, subject to a licence from the State permitting operation of the network and transmission of programmes (Sections 24 and 30). Broadcast advertisements, which must be reserved for local services and products, may not exceed 5% of total transmission time, excluding the time used for programme repeats broadcast within the past six months, and may not exceed six minutes in each hour of broadcasting (Section 30, fifth paragraph, subparagraph (a)). If the overall limits on broadcasting advertisements are exceeded, or in the case of the hourly limits are repeatedly exceeded, the licence is forfeited (Section 30, fourth paragraph, subparagraph (2)). No licence is required for non-profit-making cable systems linking no more than 50 subscribers; such systems lay not broadcast commercial advertising (Section 37, first paragraph).

The Minister for Posts and Telecommunications may also authorize private relay companies exclusively to receive RAI television programmes and retransmit them simultaneously and in full (Section 43).

Lastly, the Ministry for Posts and Telecommunications may also authorize the installation and operation of private wireless apparatus used exclusively to receive and retransmit simultaneously and in full, in the national territory, the normal radio and television programmes broadcast by the public service broadcasting authorities of other States or by other organizations authorized by the laws of those States, which are not established for the purpose of broadcasting programmes in the territory of Italy (Section 38, first paragraph). The authorization obliges the licensee to remove from foreign programmes everything in the nature of advertising, in whatever form (Section 40).

---

[1] EBU Review, loc. cit., p. 27.

[2] Media Perspektiven 1979, pp. 217 et seq.

In addition to the private cable companies and relay companies permitted by the law there are also the local private radio and television stations, permitted by a Constitutional Court judgment of 1976. In 1981 there were altogether 972 private stations, mostly financed from advertising revenue.[1] The carrying of advertising on private stations seems to differ in certain respects; there are virtually no statutory restrictions on advertising by local radio and television stations.[2]

As well as the Italian stations, we must also mention the foreign radio and television stations which broadcast direct to Italy (Monte Carlo, Capodistria/Yugoslavia, Malta, Lugano).[3] If the large number of private stations and foreign stations are also taken into consideration, it can be said that in Italy advertising is broadcast on a large scale and with virtually no restrictions.

[1] Rauen, Platz für zwei Networks: Medienkonzentration in Italien, in Media Perspektiven 1984, p. 161 (at pp. 162-165).

[2] Cf. report in Media Perspektiven 1979, pp. 217 et seq.

[3] Cf. Media Perspektiven loc. cit.

Luxembourg

RTL is financed primarily by advertising. According to the memorandum of conditions attached to the licence contract, RTL is allowed to organize advertising within the limits determined by the Government. As the Government has not determined limits, RTL runs its advertising on the basis of profitability. Voluntary self-restraint exists for television advertising (Code de Déontologie Publicitaire RTL-Télévision, June 1982). RTL also exercises voluntary self-restraint with regard to advertising time: advertising must not amount to more than 20% of daily broadcasting time.[1]

Radio advertising takes the form of individual commercials, advertisement breaks, sponsored programmes and special forms of advertising.[2] The French radio programme carries advertising daily from 05.30 to 03.00, the German programme from 06.00 to 19.00 and the English programme from 07.45 to 03.45, with the total duration of advertising broadcasts different for each of them.

The average number of commercial breaks in a day's broadcasting on the French-language programme is currently 18. A break lasts between 2 and 7 1/2 minutes, and 4 minutes on average. Individual commercials last between 15 and 60 seconds. The total time devoted to advertising averages 68 minutes daily. Broadcasting takes place between 12.25 and 23.00.

Sponsored programmes are no longer broadcast.

Since 2 January 1984 RTL also broadcasts a German-language television programme, "RTL-Plus". This programme can be received in areas in Germany close to the Luxembourg border (up to a distance of about 100 km from the transmitter). The programme, which likewise carries advertising, is broadcast between 17.30 and 22.45, or 17.00 to 24.00 at weekends.

Commercial breaks averaging 2 minutes are inserted between and during programmes. Individual advertisements last between 15 and 60 seconds. Most of the advertisements broadcast last 20 or 30 seconds. In March 1984 an average of 23 advertisements were broadcast daily, five of them before 19.00. Total advertising time averages 20 minutes a day on a week-round basis.

The voluntary self-restraint guidelines which govern French-language programmes are also applied to advertising on RTL-Plus.

---

[1] EBU Review, loc. cit., p. 27.

[2] Media Perspektiven 1979, p. 219.

The Netherlands

Under the Radio Act of 1967 (Article 2(1), subparagraph (g) and Article 50), one public organization, the Reclamestichting (Stichting Ether-Reclame, STER), is solely responsible for the broadcasting of radio and television advertising. No other body may carry out radio or television advertising either at national, regional or local level. The revenue earned by the Reclamestichting provides a major source of radio and television funding.

The responsible Minister allocates broadcasting time to the Reclamestichting (Article 20). In the case of radio advertising this is a maximum of seven hours a week and in that of television advertising three hours a week (Article 32(1)). This figure may be expanded by up to 50% for supporting material between advertisements and the like (Article 32(1)).

Advertisements must be recognizable as such and be clearly distinguishable from the programmes of the other organizations allocated broadcasting time (Article 50(4)).

The responsible Minister lays down more detailed rules on the advertisements broadcast by the Reclamestichting after making due allowance for the responsibilities of the Reclameraad (Article 32(2)). After consulting the Ministers for Economic Affairs, Agriculture and Health and the Reclameraad, the Minister may stipulate that no advertisements may be broadcast for certain types of goods or services (Article 50(2) and (3)). The Minister lays down the statutes of the Reclamestichting and appoints the members of the foundation's administrative board (Article 50(5) to (8)).

The Reclameraad lays down rules governing the content of the Reclamestichting's radio and television advertisements and ensures that they are complied with (Article 49(1)) subparagraphs (a) and (b)). The Reclameraad must consult the competent bodies on matters relating to radio and television advertising on its own initiative or at the request of third parties (Article 49(1), subparagraph (c)). The Voorschriften voor de nederlandse etherreclame of February 1980 (reprinted in March 1982) contains the current rules. This booklet sets out the rules, lists the bodies responsible for implementing them, and describes the working methods of these bodies and decisions taken by the Reclameraad.

As regards the practical side, the position in 1984 is as follows:

Radio advertisements are broadcast on the three national radio programmes, Hilversum I, II and III, since 1 April 1984 every weekday from 07.00 to 19.00 hours on Hilversum I and from 07.00 to 18.00 hours on Hilversum II and III. The maximum advertising time is 8 1/4 hours a week including supporting material. Advertising takes the form of individual advertising spots put together in advertisement breaks before and after the news. The advertising spots are 10 to 80 seconds long and the breaks between 50 and 80 seconds long. There is no sponsor advertising.

From 1 January 1985 national radio advertising is also to be broadcast by the regional stations.

Television advertisements are broadcast on the two national television channels, Nederland 1 and 2, between 19.00 and 24.00 hours for a maximum of 18 minutes each day. Commercials of an average length of 15 to 60 seconds are transmitted in advertisement breaks before and after the news. Sponsor advertising is not accepted on television. From 1 January 1985 television advertising time is to rise to 3 hours 36 minutes weekly, excluding supporting material.

The Radio Act allows regional broadcasting (Article 47). Seven semi-local broadcasting stations in the proper meaning of the word have so far been set up. There are plans to extend them to 12. The Act also allows cable companies to transmit national, regional and foreign programmes (Article 48). Neither the regional stations nor the cable operators may transmit their own advertising. This is the responsibility of the Reclamestiching.

United Kingdom

The BBC does not broadcast advertisements either on radio or its television channels.

Advertisements are, however, broadcast by the 20 or so local radio companies which operate commercially under the Independent Broadcasting Authority (IBA) and the 15 national and regional television companies (Independent Television - ITV). The main legal basis is the Broadcasting Act 1981.

The programmes broadcast by the IBA are produced by the individual programme contractors. They may include advertisements as expressly stated in Section 2(3) and Section 8(1) of the Act.

The following of the general programme principles covering all broadcasts are of particular relevance to advertising:

(1) Nothing should be included in the programmes which offends against good taste or decency or is likely to encourage or incite crime or lead to disorder to be offensive to public feeling (Section 4(1), subparagraph (a)).

(2) Subliminal influences, particularly images of brief duration, of which viewers are not aware are forbidden (Section 4(3)).

(3) No prizes or gifts of significant value may be made available only to persons receiving the programme concerned (Section 4(4)).

(4) No religious service or propaganda relating to matters of a religious nature may be broadcast without the previous approval of the IBA (Section 4(5), subparagraph (a)).

(5) Advertising for charitable or benevolent purposes is also prohibited (Section 4(5), subparagraph (b)). Section 8(7), subparagraph (a), does, however, allow references to the needs and objectives of any association or organization conducted for charitable or benevolent purposes.

The Act also contains special provisions relating to the broadcasting of advertisements (Sections 8, 9, 13 and 16 and Schedule 2 in the Annex, which is referred to in Section 8(3) and which may be amended by the IBA after consultation with the Secretary of State responsible (Section 8(4)) (see also Section 8(10) as regards the procedure to be followed)).

Orders for the insertion of advertisements may be accepted by the programme contractors either through advertising agents or direct from the advertiser but neither the programme contractors nor the IBA may act as advertising agents (Section 8(2)).

The IBA is required to consult from time to time with the Secretary of State as regards the advertisements broadcast and to carry out any directions he may give (Section 8(5)).

Section 8(6) contains a general ban on sponsor advertising (with relaxations in Sections 8(7), 8(8) and 8(9)).

The IBA is required to draw up a code governing standards and practice in advertising prescribing the advertisements to be prohibited (Section 9(1), subparagraph (a)) and to ensure the provisions of the code are complied with (Section 9(1), subparagraph (b)). The most recently published version of the code is the IBA Code of Advertising Standards and Practice - May 1981, reprinted October 1982. The IBA may impose requirements as regards advertising which go beyond those of the code (Section 9(2)). The IBA may, in the exercise of its duties, give general or specific directions to programme contractors to not broadcast a specific advertisement or type of advertisement (Section 9(3)).

The IBA may also give general or specific directions with respect to the times when advertisements are to be allowed (Section 9(4)) and in particular the greatest amount of time to be given to advertisements in any hour or other period (Section 9(5), subparagraph (a)), the minimum interval between advertisements and the number of advertisements to be allowed in any programme, hour or day (Section 9(5), subparagraph (b)) and the exclusion of advertisements from a specified broadcast (Section 9(5)), subparagraph (c)). The IBA may lay down different provisions for different parts of the day, different types of programmes or for differing circumstances (final part of Section 9(5)).

Radio and television advertisements are broadcast every weekday. Radio advertising is allowed at any time of the day but limited to nine minutes in any hour.

Television advertising is broadcast for 12 hours a day, from midday on weekdays and beginning in the morning on Saturdays and Sundays, for a maximum of six minutes on average and in any event no more than seven minutes in any hour.

Advertising spots of 15 to 90 seconds are allowed on radio, and on television spots of seven to 120 seconds are grouped together in advertisement blocks.

Schedule 2 in the Annex to the Broadcasting Act 1981 lays down further provisions:[1]

(1) Advertisements must be clearly distinguishable as such and recognizably separate from the rest of the programme (1(1)).

(2) Successive advertisements must be recognizably separate (1(2)) and must not be presented in such a way as to appear to be part of a continuous feature (1(3)).

(3) Audible matter in advertisements must not be excessively noisy or strident (1(4)).

(4) The amount of time given to advertising in the programmes must not be so great as to detract from the value of the programmes as a medium of information, education and entertainment (3)).

(5) Advertisements may not be inserted otherwise than at the beginning or the end of the programme or in natural breaks in the programmes (4).

[1] See EBU report in EBU review - Programme Administration Law, No 5, September 1983, p. 25 (at pp. 26 and 27).

(6) Rules must be observed as regards the classes of broadcasts, e.g. religious services, in which advertisements may not be inserted and the interval which must elapse between any such broadcast and advertisements (5(1)).

(7) Rules may also be laid down as regards the minimum interval between advertisements (5(2)).

(8) There must be no unreasonable discrimination in the acceptance of advertisements (6).

(9) No advertisements of a religious or political nature or which has any relation to industrial disputes may be permitted (8).

There are a number of alterations applying to advertising on the Fourth Channel (Section 13 of the Broadcasting Act 1981). Channel Four has been transmitting since November 1982. It is run by a subsidiary of the IBA. A maximum of six minutes in any hour of advertising is allowed.

A Specialist Advisory Committee has been set up in the IBA to give assistance on matters concerning advertising. Organizations, authorities and persons who have experience in the assessment of advertising and representatives of the public as consumers are represented on the Committee (Section 16(2), subparagraph (b)). The Committee among other things suggests alterations to the advertising code (Section 16(3)). A special advisory panel has been set up to deal with the advertising of medicines and treatment (Section 16(5) and (6)).

The IBA must also ensure that advertisements are referred to these advisory bodies before they are broadcast (Section 16(7)).

(c) Comparative analysis

A comparison of the legislation on radio and television advertising - with the exception of rules governing the advertising content (see points 3 and 4) - of the Member States in which radio and television advertising is allowed reveals the following areas on which legislation concentrates:

The relationship between advertisements and the rest of the programme

In some Member States (in Germany the ZDF and draft Länder legislation on the media, Luxembourg, Ireland, the Netherlands and the United Kingdom) there must be a clear separation of advertisements from the rest of the programme. The EBU has also made provision for such a principle.[1]

In many cases advertisements must be clearly recognizable as such (Germany - draft legislation in Baden-Württemberg; Ireland; the Netherlands and the United Kingdom). Subliminal advertising is forbidden (Luxembourg, Ireland, the Netherlands, the United Kingdom, the EBU),[2] and in some cases an express and general reference to the broadcasting of advertisements is even required (Germany - draft legislation in Baden-Württemberg; Luxembourg).

Admissibility of sponsor advertising

Sponsor advertising is allowed on radio in Greece and Ireland, on local stations in Italy, and in Luxembourg. It is prohibited or not practised in Germany, on Greek and Irish television, on the RAI in Italy, in the Netherlands and the United Kingdom.

Interruption of programmes

In many Member States advertising spots or advertisement breaks may only be inserted between the programmes of the station, i.e. before or after but never during programmes. In other words, they must not interrupt programmes (television in Germany and in draft media legislation in some Länder, France and the Netherlands). In Ireland and the United Kingdom advertisements may be introduced into continuous programmes but only in "natural breaks", as with the EBU.[3] In Ireland, and under draft legislation governing the media in several German Länder, particularly long programmes may be interrupted by advertisements.

---

[1] European Broadcasting Union, Declaration of principles regarding commercial TV advertising broadcast by DBS, 15.7.1983: point 12, EBU Review, No 5, September 1983, p. 31 (at 32). Likewise the Council of Europe Recommendation on principles on television advertising, R(84)3, 20.2.1984, point 7.

[2] EBU, loc. cit., point 11. Likewise Council of Europe, loc. cit., point 6.

[3] EBU, loc. cit., point 13.

Other Member States, however, allow programmes to be interrupted by advertisements (on radio in certain cases in Germany, on both television and radio in the pilot cable projects in Rhineland-Palatinate and Munich, and in Greece, Ireland and Luxembourg).

The arrangements applying in the different Member States are essentially based on the approach that commercial breaks should be integrated into programmes in such a way that the coherence, value and natural movement of programmes is respected. In practice this has produced the following typical arrangements:

- advertisements may interrupt programmes only at natural breaks;

- advertisements may be inserted before and after separate programmes;

- no advertising may be inserted in or around religious broadcasts (United Kingdom).

Advertising spots and advertisement breaks

In some Member States advertising spots are broadcast only in the form of advertisement breaks (Germany (television), France, Ireland (television), Italy (RAI), Luxembourg (television), the Netherlands, the United Kingdom (television). In other Member States both advertising spots and advertisement breaks are allowed (Germany (radio), Greece, Ireland (radio), Italy (local stations), Luxembourg (radio), the United Kingdom (radio)).

Total transmission time for advertisements

Transmission time for advertisements is restricted in most Member States, to a percentage of permissible broadcasting time for example (Germany: radio and television in Rhineland-Palatinate and draft legislation in Bavaria, Lower Saxony, Saarland, and Schleswig-Holstein, 20% of daily broadcasting time; Luxembourg 20% of television broadcasting time (self-restraint); Ireland 10%; Italy 5% for RAI and local cable operators; Greek television 7%); or to so much time in any hour (seven and a half minutes in Ireland; six to seven minutes for television and nine minutes for radio in the United Kingdom; up to ten minutes on German radio, nine minutes on radio and television in draft Berlin legislation), or so much time per day (Germany 20 minutes each working day for television; France, television 24 minutes daily, annual average 18; Greece, television 30 minutes daily); or so much time per week (in the Netherlands seven hours for radio and three hours for television).

There is no restriction on transmission time in Germany and Greece for radio, in Italy for private local radio stations, and in Luxembourg for radio and television.

The rules on advertising time in the Member States fall into three groups:

- a stated percentage of total broadcasting time;
- a stated length of time per day, per hour or per week;
- no limitation.

Ban on advertising on Sundays and public holidays

No advertisements may be broadcast on Sundays in Germany, or on television in the Netherlands or radio in Ireland. They are also prohibited on public holidays in Germany. In Greece no advertisements are allowed on radio on four public holidays and on Good Friday on television. In Ireland they are banned on two public holidays (in addition to Sundays) on radio and on Christmas Day and Good Friday on television. In the Netherlands there are no advertisements on television on Good Friday, Christmas or Ascension Day. In Italy no advertisements may be broadcast on Good Friday and on 2 November. Advertisements are permitted on Sundays and public holidays in the other Member States. In Germany, under the draft Land media legislation in Baden-Württemberg, Bavaria, Berlin, Lower Saxony, Schleswig-Holstein and the Saarland private broadcasters would be permitted to broadcast radio and television advertising on Sundays and holidays.

Daily transmission time for advertisements

There are three different sets of rules here. In some Member States advertisements are broadcast virtually throughout the overall transmission time (Greece (television), Ireland, Italy, Luxembourg and the United Kingdom); in others advertisements are transmitted solely during the evening viewing hours (the practice for television advertising in France, and the rule for television in the Netherlands), whereas in others no advertisements are broadcast in the evenings (there are no advertisements in Germany on radio between 2100 and 0500 hours, and on television after 2000 hours; on Greek radio after 1800 hours; and on Dutch radio after 1820/1830 hours).

Length of advertising spots and advertisement breaks

The rules relating to the length of advertising spots and advertisement breaks are to some extent related to those governing the total transmission time for advertising, although there is no necessary link.

According to the information received individual advertising spots are:

in Germany between 7 and 60 seconds long, in some cases even longer

in France 8 to 60 seconds long on television

in Greece 10 to 60 seconds long on radio
15 to 60 seconds long on television

in Ireland between 5 seconds and 3 minutes long on television

in Italy between 15 and 60 seconds long on RAI

in Luxembourg 15 to 60 seconds long on television

in the Netherlands between 15 and 60 seconds long on television
between 10 and 80 seconds long on radio

in the United Kingdom 15 to 90 seconds long on radio
7 to 120 seconds long on television.

Advertisement breaks are:

in the Netherlands 50 to 80 seconds long on radio

in Ireland 2 to 3 minutes long on radio
2 1/2 to 3 1/2 minutes long on television

in France an average of 3 minutes long on television

in Germany an average of 5 minutes long on television

in Italy between 30 seconds and 5 minutes long on RAI television

in Luxembourg 2 to 7 1/2 minutes long on television

in Greece up to 10 minutes long on television.

3. Bans on advertising for certain goods and services

(a) Tobacco

Radio and television advertising for tobacco, tobacco products and similar products is forbidden in Belgium under Section 2(1) of the Royal Decree of 5 March 1980.[1]

In Denmark the tobacco industry operates a voluntary restraint agreement

Under Section 22 of the German Foodstuff and Commodities Act[2] "radio or television advertising for cigarettes, similar tobacco products and tobacco products for the making of cigarettes by the consumer himself" is prohibited. Any infringement, whether intentional or the result of negligence, is punishable by a fine.[3]

In France, radio and television advertising for tobacco products is prohibited under Article 2(1) of the Act of 9 July 1976[4] and any contravention is punishable. Accordingly, Article 26 of the Rules governing the Régie Française de Publicité bans broadcast advertising for tobacco, cigars and cigarettes.

Advertising for tobacco products on Greek television and on the State-controlled radio stations is not allowed.[5]

In Ireland cigarettes and cigarette tobacco are excluded from broadcast advertising under Section 23(p) of the RTE Code of Standards for Broadcast Advertising.

In Italy, too, there is a general ban on advertising for tobacco products under Act No 165 of 10 April 1962, which stipulates that "advertising for any domestic or foreign tobacco products is prohibited". Any infringement is punishable by a fine. The ban is restated in the SACIS code of practice for radio and television advertising (Section 7(2)).

Luxembourg has no legal ban on tobacco advertising, which is allowed on the radio. On television, however, a voluntary ban is operated (Article X of the Code de Déontologie Publicitiare RTL-Télévision).

---

[1] Arrêté Royal concernant la publicité relative au tabac, aux produits
[2] à base de tabac et aux produits similaires.
Gesetz über den Verkehr mit Lebensmitteln, Tabakerzeugnissen,
[3] kosmetischen Mitteln und sonstigen Bedarfsgegenständen, 15.8.1974.
[3] Section 53(2)(1c, subparagraph 3).
[4] Loi no. 76-616 du 9 juillet 1976 relative à la lutte contre le tabagisme.
[5] See the report in Media Perspektiven 1979, page 214 and 215.

In the Netherlands both radio and television advertising for tobacco products are prohibited under the Ministerial Order of 22 February 1980[1] pursuant to Article 50 of the Broadcasting Act.

Finally, in the United Kingdom, broadcast advertising for cigarettes and cigarette tobacco is regarded as unacceptable under Section 17(h) of the IBA Code of Advertising Standards and Practice (1981/82).

The picture is thus largely the same everywhere: apart from Luxembourg and Greece - where there are only partial restrictions - broadcast advertising for cigarettes and similar products is not allowed in any of the Member States. In Belgium, France, Ireland, Italy and the Netherlands the restriction on advertising covers tobacco products in general.

[1] See "Voorschriften voor de nederlandse etherreclame", published by the Reclameraad, Article 18 (page 13).

(b) Alcoholic drink

In Belgium advertising for alcoholic drink is neither specifically prohibited by law[1] nor is there any code[2] of practice governing it. On the other hand, there is a general ban on commerical broadcast advertising.

Denmark also has a ban on any kind of domestic broadcast advertising With regard to alcoholic drink in particular, a voluntary code of practice agreed by manufacturers and retailers for all the media includes provisions forbidding approval of excessive drinking, reference to alcohol as a remedy for psychological or social problems, and encouraging the consumption of alcohol by young people or in connection with sport or driving.[3]

In Germany, there is no legal prohibition of broadcast advertising for for alcoholic drink nor are any restrictions imposed by the broadcasting organizations. However, the industrial associations concerned, acting within the German Advertising Council (the Deutsche Werberat), have established a voluntary code of conduct concerning advertising for alcoholic drinks[4] The code covers all forms of advertising, not only on radio and television. It is, for example, forbidden to encourage excessive consumption or abuse or alcoholic drink, to minimize its dangers, to encourage young people to drink, to portray competitive sportsmen drinking, to encourage drivers to drink, to make claims regarding illness, to claim that alcohol releases inhibitions or can help overcome fear or resolve conflicts, and to deride abstinence. Failure to comply with the code does not entail any legal penalty as such, but may involve censure by the Council, which is a supervisory body set up on a voluntary basis by the advertising industry.

[1] The Act of 29 August 1919 (Loi sur le régime de l'alcool) does not contain a ban on advertising.

[2] Cf. Brandmair, Die freiwillige Selbstkontrolle der Werbung, Rechtstatsachen - Rechtsvergleichung - internationale Bestrebungen 1978, p. 237.

[3] Cf. Consumers' Consultative Committee of the Commission of the European Communities, Opinion concerning consumers, alcohol advertising and codes of ethics of 6 July 1982, Mitteilungsdienst der Verbraucherzentrale Nordrhein-Westfalen 1982/2, p. 3(7).

[4] Verhaltensregeln über die Werbung für alkoholische Getränke, adopted by the Deutsche Werberat in June 1976.

In France, by contrast, advertising for alcoholic drink is restricted by law.[1] It is allowed for drinks belonging to categories 1, 2 and 4 (non-alcoholic drinks; wine, beer and fermented fruit juice, liqueur, anisette, rum, cognac and certain other spirits); only certain types of reference are permissible for category 3 (liqueur-based aperitifs, liqueur wine and fruit liqueurs); advertising for category 5 (pastis, whisky, vodka and gin) is completely forbidden. In its judgment of 10 July 1980[2] the Court of Justice declared these provisions discriminatory. New rules are being prepared banning all radio and television advertising for alcoholic drinks by law.

In actual practice, broadcast advertising for alcoholic drinks is not allowed under Article 25 of the Rules governing the Régie Française de Publicité.

In Greece there are no restrictions on broadcast advertising for alcoholic drinks.

In Ireland broadcast advertising for "hard" spirits in prohibited (Section 23(q) of the RTE Code of Standards for Broadcast Advertising). In addition Radio Telefis Eireann has adopted a special code of practice governing broadcast advertising for alcoholic drink (appendix 4 of the RTE Code of Standards for Broadcast Advertising). This code of practice reiterates the ban on advertising for whisky, gin, vodka, brandy and similar drinks (Section 1). Advertising may not encourage people - particularly young people - to drink, and must not concentrate on brand advertising (Section 2). Any depiction of the consumption of alcohol in company may not involve excessive merriment, and no more than six people, including serving staff, may appear (Section 2). Advertising may not be addressed specifically to the young; no one shown may be under 25. Drinking may not be linked with sport. Sound effects of drinking are not allowed. Attention may not be drawn to especially potent drinks. The consumption of alcohol may not be linked with sexual attraction or physical strength. Advertisements may not claim that alcoholic drink acts as stimulant or tranquillizer. They must not give the impression that people can drink and drive a car or operate a machine safely (Section 3). In addition there are further specific rules.

[1] Articles L 1, L 14 and L 21 of the Code des débits de boissons et des mesures contre l'alcoolisme. See the Opinion of the Consumers' Consultative Committee, Mitteilungsdienst der Verbraucherzentrale Nordrhein-Westfalen 1982/2, page 3(7).

[2] Case 152/78 Commission v France [1980] ECR 2299. For clarification of the implications of the Judgment see joined cases 314, 315 and 316/81 and 83/82 Waterkeyn [1982] ECR 4337.

Advertising for alcoholic drink is not prohibited or restricted by law in Italy. However, Article 22 of the voluntary code of practice of the advertising industry (Codice di Autodisciplina Pubblicitaria, version in force since 1 January 1977) lays down rules, which apply to all the media, on advertising for alcoholic drinks. Advertisements may not depart from the basic principles of moderation, proprietary and responsibility. They may not, for example, encourage excessive and immoderate drinking, depict a dependency on alcohol, appeal to the young, associate drinking with driving, or suggest that drinking fosters mental lucidity or physical strength while a refusal makes for physical, intellectual or social inferiority.

Infringements are dealt with by a disciplinary board which can publish its decisions. Advertising associations which subscribe to the voluntary code of practice are bound by the board's decisions. Those belonging to the scheme include RAI, SIPRA and the Associazione Nazionale Imprese Pubblicità Audiovisiva. The board can publicly censure anyone who fails to comply with its decisions.

Luxembourg, too, has no legal ban or restriction on advertising for alcoholic drinks. Under the Code de Déontologie Publicitaire - RTL Télévision (Article XI) advertisements may not encourage excessive drinking; they may not depice drinking by young people, sportsmen or drivers of motor vehicles. Furthermore, in the case of broadcasts aimed at neighbouring countries RTL endeavours to follow the law of the country concerned (Article XI in conjunction with IX). For example, advertising for alcohol is not broadcast on the French language radio programme because of the legal ban in France.

Broadcast advertising for alcoholic drink in the Netherlands is again governed by a code of practice rather than by rules laid down by law. However, this code is regarded as having semi-statutory force, since the authority which adopts it and monitors its application - the Reclameraad - was established under the Broadcasting Act (Article 49). Under Article 16 of the "Voorschriften voor de nederlandse etherreclame"[1] adopted by the Reclameraad, the rules in respect of alcoholic drink include the following: advertising may not be aimed at increasing consumption as such; it must be for a specific brand or trade mark and not for a type of drink in general; alcoholic drinks may not be contrasted favourably with non-alcoholic ones; advertisements may not encourage immoderate drinking nor may they show abstinence and moderation in a negative light, while the consequences of drinking should not be played down; advertisements may not link drinking with driving or sport and may not aim to influence young people who are under age; it is forbidden to link drinking with health or suggest that it can help reduce anxiety and resolve conflicts.

---

[1] February 1980 version, edition of March 1982.

Compliance with the rules is monitored in the first instance by the Reclamestichting; appeals against its decisions can be made to the Reclameraad.[1]

Finally, the United Kingdom also has no statutory ban on advertising for alcoholic drinks. Broadcast advertising is governed by the IBA Code of Advertising Standards and Practice.[2] The rules set out under Section 33(a) - (k) of the Code include the following: liquor advertising may not be addressed particularly to the young nor feature any personality who commands the loyalty of the young; advertisements may not imply that drinking is essential to social or sexual success or that it is especially masculine or that refusal is a sign of weakness; they may not foster immoderate drinking; they may not claim that drink has therapeutic, stimulating or tranquillizing qualities; they should not place undue emphasis on the alcoholic strength of a drink; they may not link drinking with driving and they may not suggest that regular solitary drinking is acceptable.

To summarize, then, advertising for alcoholic drinks is not prohibited by law in the Community, except in France. Restrictions do, however, exist in most of the Member States in the form of codes covering either advertising in general or specific media; these range from purely voluntary, non-statutory codes of practice to semi-statutory arrangements with a public law bias. In terms of their content, the restrictions are all basically similar, but they vary in detail and severity.

---

[1] Articles 22 and 26 ff.

[2] Edition of May 1981 (reprinted October 1982).

(c) Advertising for other products and services

Tobacco products and alcoholic drinks are the two most important groups of products which are covered by a specific ban or restrictions on broadcast advertising. Detailed consideration of other groups of products and services is unnecessary in the present context.

Firstly there are products and services for which advertising is subject to general, sometimes very complex rules laid down by law - such as medicaments and medicinal products.[1] As stated in I.1 earlier, it seems inappropriate to consider harmonizing only radio and television advertising for medicaments; any harmonization should cover the entire field, which would imply rules for broadcasting advertising. The same applies to any ban or rules on advertising for the liberal professions. In practice the latter are of little relevance in terms of radio and television advertising.

Secondly there are products and services which are covered by statutory or voluntary advertising bans or restrictions, although on a rather haphazard basis and in only a few Member States, in respect of which appreciable impediments to supernational broadcasting are generally unlikely to occur, in view of their nature. For example,[2] there are bans or restrictions on advertising for the printed media, immovable property and margarine in France; for contraceptives and games of chance in the United Kingdom and Ireland; for arms, slimming preparations, recording tapes, motor cars and motor cycles, boats, jewellery and furs, games of chance and horse racing, money lending, marriage bureaux, holiday companies, the printed media and pet foods in Italy (RAI); and for correspondence courses and sugar confectionery in the Netherlands. For the moment we shall have to wait and see whether this will have an adverse effect on cross-frontier broadcasting.

[1] See the EBU comparative report in EBU Review, loc. cit., p. 29.

[2] See the reports in Media Perspektiven 1979, pages 212 ff, and in EBU Review loc. cit.

4. Advertising codes, advertising control and voluntary restraint

Repeated references have been made above to codes for radio and/or television advertising, to the control of radio and television advertising by bodies specially set up for that purpose and, in particular, to voluntary restraint. Leaving aside the regulations already covered for tobacco and alcohol advertising, the situation in each of the Member States is summarized below, with the accent less on general voluntary restraint systems than on regulations and control systems specific to the media.

Belgium

Since advertising is forbidden there are no regulation and control systems specific to the media. The general voluntary restraint in the trade[1] seems to have had no effect on advertising broadcast into the country and relayed by cable there.

Denmark

Broadcast advertising is not allowed and there are no media-specific controls.[2]

Germany

The general system of voluntary restraint, the German Advertising Council consisting of the joint associations of advertisers, advertising agents and advertising media, bases its work both on the legal provisions and directives of the central committee for the advertising trade (ZAW) and the International code of Advertising Practice of the International Chamber of Commerce.[3]

[1] Brandmair, loc. cit., p. 237.
[2] For general self-regulation: Brandmair, loc. cit., pp. 238-239.
[3] See Section 8 of the working principles of the German Advertising Council, 1979.

Only a relatively small percentage of the cases[1] treated by the German Advertising Board - following complaints and in some cases on its own initiative - comes from radio and television advertising.

Special mention must be made of the "Code of Practice of the German Advertising Board for Radio and Television Advertising with and in front of children", which came into force in January 1974.[2]

According to this Code of Practice, advertising must not contain presentation by children of special advantages and features of the product that is not consistent with the child's natural expressions (Sec. 1); or direct appeals to children to purchase or consume (Sec. 2), or direct appeals by children and/or to children to encourage others to purchase a product (Sec. 3); advertising must not abuse the special trust children usually associate with certain people (Sec. 4); the way advertising is presented must not be misleading, must not entice through exaggerated claims, must not take advantage of the child's natural playing instinct, nor put pressure on children (Sec. 5); finally, advertising should not make criminal offences or other forms of anti-social behaviour seem exemplary or justifiable (Sec. 6).

Mention has already been made (3b) of the non-media-specific Code of Practice of the German Advertising Board on the advertising of alcoholic beverages.

There are no special control systems for radio and television in Germany. Broadcasting companies and their advertising subsidiaries carry out a non-institutionalized, informal preliminary check on advertisements. Regulations exist within the ZDF (second channel) which are more or less generally observed.[3]

France

Under former legislation broadcast advertising, where organized by the ORTF, was subject to comprehensive and institutionalized prior control by the Régie Française de Publicité (RFP).[4] The RFP was established in 1968/69 through a Decree and took the legal form of a limited company with the ORTF as the majority shareholder. It has public-law status. A "Commission consultative technique" was responsible for selecting advertisers permitted to advertise on radio and television. The "Commission de visionnage" was instrumental in checking the individual advertisements and ensured, in particular, that advertising codes and standards were observed. The committee was made up largely of representatives from the ministries plus representatives from the advertising trade and the "Institut National de la Consommation". The decision as to whether an advertising spot was approved or rejected lay with the general manager of the RFP. Appeals against his decision could be brought before the chief general manager.

---

[1] Only 27 of 325 cases handled in 1981, see ZAW, Werbung '83, p. 21.

[2] Reprinted along with brief explanations in "Spruchpraxis Deutscher Werberat", second edition - 1982, p. 250.

[3] Directives for Broadcast Advertising of the Second German Television Channel of 14.4.1967; see also 2b, bb - Germany.

[4] See Articles 15 and 22 of the Act of 7.8.1974 and Article 73, 72 and 53 of the specifications of the networks TF 1, A 2 and Radio-France.

A "Réglement de la Publicité radiophonique et télévisée" is used as a basis for control. This is a kind of code of practice based, in many of its parts, on the "Code de pratiques loyales en matiére de publicité" of the French general independent advertising control, which, in turn, is based on the international advertising directives of the International Chamber of Commerce.[1]

The content of this very detailed and comprehensive regulation can be briefly summarized as follows:

The fundamental rules of integrity, decency, morality and honesty must be observed; the public interest must be respected and advertisements must have maximum artistic, documentary and educational content (Article 3(2)). Advertising must inform the consumer and help to increase quality and reduce the prices of goods and services (Article 3(3)). Advertisements must not be vulgar, or in bad taste and must respect the proper use of the French language (Article 3(4)).

The content and wording of advertising must not contravene legal or other provisions, or decency (Article 5(1)).

There is provision for brand advertising for proprietary articles and services and for collective advertising in which individual types and makes cannot be mentioned (Article 5(2) and (3)).

Advertisements must contain no element likely to offend against the moral, religious, philosophical or political convictions of listeners and viewers (Article 5(1)) and must not appeal to charity (Article 7(1)). All subjects, arguments or allusions liable to damage respect for the state are prohibited (Article 8).

Trust and lack of experience must not be misused (Article 9). Advertisements likely to mislead are forbidden; advertisers and their agencies must, on request, substantiate the claims of the advertisements (Article 9(2-5)). (Articles 10-12, and Articles 20 and 28). In particular, certificates and recommendations must not be misleading and may not be used without approval (Article 10).

Copyright and a person's rights over his portrait must be respected (Article 13).

Articles 14 and 15 are concerned with the protection of children and adolescents: their right of privacy must be respected; they may only be used discreetly in advertising, their impressionability and credulity must not be exploited. Exaggerated sales appeals or appeals to make others purchase are forbidden.

Advertisements intended for women or in which women appear "must take account of the significant role they play in society and help to ensure their esteem and dignity" (Article 16).[2]

---

[1] Brandmair, loc. cit., pp. 235-236.

[2] See Comparative analysis by Rie, Regelungen fur Kinder und Frauen im amerikanischen und französischen Reklamefernsehen, Film und Recht 1977, pp. 590 et seq.

Advertising may not contain games of chance, lotteries, or radio or television games (Article 17).

Defamation is forbidden, especially disparaging comparisons and advertisements causing confusion (Article 18).

Irrespective of the method of selling used, distribution companies may advertise only goods and services which they themselves produce (Article 19).

Particular discretion is required in the advertising of medicines and treatments (Article 22). Advertising for medicines and the like requires ministerial permission (Article 23), as do advertisements for personal loans (Article 24), vocational training courses and correspondence courses (Article 27). Finally, the advertising of motor vehicles is subject to special requirements (Article 29).

Under Law No 82-652 of 29 July 1982 on audiovisual communication, the "Régie Française de Publicité" is responsible for the control and implementation of the advertising provisions in the specifications of networks and stations (Article 66(3)). The "Haute Autorité de la Communication Audiovisuelle" is responsible, in public-law broadcasting, for the observation of the principles regarding the content of advertisements (Article 19(1)). In this respect it can recommend standards (Article 19(2)) although it has not yet done so.

Greece

There are no special control systems and standards for broadcast advertising in Greece. There is a general independent control system operated by the advertising trade, but this does not appear to have any real effect on broadcast advertising.

Ireland

In Ireland the Broadcasting Authority laid down the RTE Code of Standards for Broadcast Advertising in May 1982.

These involve minimum standards; Radio Telefis Eireann reserves the right to impose stricter standards (introduction). Advertising must comply with Irish Legislation (Section 2). Misleading advertisements are forbidden (Section 3). Subliminal advertising is forbidden (Section 6). Audible matter in advertisements must not be excessively noisy or strident (Section 7). Advertisements must not without justifiable reason appeal to fear (Section 8). The superstitious must not be exploited (Section 9). Advertising depicting situations showing dangerous practices is likewise forbidden (Section 10). Testimonials must be genuine, not more than three years old, and related to the experience of the person giving it; this will be strictly controlled (Section 11). Disparagement is forbidden; comparisons with other products or services must be fair, capable of substantiation and in no way misleading (Section 12). Special regulations exist concerning competitions, guarantees, the use of the word "free", inertia selling, homework schemes, instructional courses, mail order advertising, direct sale advertising, hire purchase, and intimately personal products. Unacceptable are advertisements for money lenders, matrimonial agencies and correspondence clubs, undertakers, bookmakers, unlicensed employment services, weight reduction products or treatment, hair and scalp treatment, contraceptives, contact lenses, cigarettes and cigarette tobacco, "hard" liquor and others (Section 23).

In addition, there is a general independent control system practised by the Advertising Standards Committee which uses the Code of Advertising Standards for Ireland (May 1982).

Italy

Advertisements broadcast in Italy by RAI, a public-law broadcasting company, are subject to the "Norme per la realizzazione della pubblicità radiofonica e televisiva"[1] published by the RAI subsidiary "Società per Azioni Commerciale Imitiative Spettacolo" (SACIS). Prior control of radio and television advertising is carried out within SACIS.

The content of the standards can be summarized as follows:

> Advertisements must be informative, and the information must be consistent, pertinent, clearly formulated and readily comprehensible (Section 1). Advertisements must in no way be misleading; any claims must be capable of substantiation and, on request, documented (Section 2). Comparisons in general and disparaging comparisons are prohibited; comparisons which illustrate specific and concrete differences in the products are permissible, but they must be apt and not controversial (Section 3). Advertisements must not lead to mistaken identity (Section 4).
>
> Advertisements may not offend against the moral, religious or political convictions of the public or against membership of ethnic groups and social or professional categories (Section 5(1)); no references to ideological, religious, political or economic problems are allowed (Section 6(1)). Advertisements must not create unease, fear or bewilderment; violence, aggressiveness, eroticism and vulgarity are prohibited (Section 5(2)(5)). The impression must not be given that anyone not using the advertised product is a social outcast (Section 5(4)). Advertisements must not depict model behaviour that conflicts with social values and the public interest (Section 7(1)) or cause the public to neglect its responsibility in terms of safety, health and physical and moral integrity (Section 7(2)). Advertisements must not show economic potential or a standard of living higher than that generally found among the population (Section 7(3)).
>
> Advertisements likely to be seen or heard by children and adolescents must not threaten their safety or disturb their development and behaviour. Advertisements must not be geared directly to children and adolescents, arouse in them the desire for consumption or possession, cause them to be a nuisance to adults or exploit their inexperience. There are also restrictions on the appearance of children and adolescents in advertisements (Section 8).
>
> In addition to the abovementioned advertising of alcoholic beverages, there are special rules for the advertising of foodstuffs, dietary products, cosmetics, medicines, publications and instructional courses (Sections 9-15).
>
> Finally, there are restrictions on advertising with sales promotion methods.

---

[1] 1.1.1979.

In addition, and in particular with regard to advertisements broadcast by private radio and television companies, the general code of voluntary restraint by the advertising trade may be used,[1] which is based on the model of the international code of advertising practice issued by the International Chamber of Commerce. Although the code does not contain media-specific rules for broadcast advertising, Article 16 specifies that any judgment must be based on the respective advertising medium and that any advertisement that is acceptable for one medium need not be so for another.

Luxembourg

Television advertising in Luxembourg is subject to a voluntary restraint system ("Code de Déontologie Publicitaire RTL - Télévision - June 1982").

The code requires compliance with Luxembourg legislation (Article 1), the principles of decency, morality and honesty and the avoidance of vulgarity and bad taste (Article 2). Advertisements must take account of social responsibilities; they must be decent and not abuse the trust or lack of experience and knowledge of the consumer; they must not offend against moral or religious convictions, nor, without justifiable reason, play on fear , exploit superstitions or incite hatred and violence (Article III); Racial discrimination must not be encouraged (Article IV). Advertisements intended for women or advertisements in which women are presented must take account of the woman's role in society and must not suggest or imply the idea of inferiority (Article 5).

Special regulations protect children and adolescents (Articles IV to VIII). Advertisements must not exploit their natural credulity, lack of experience and loyalty; they must respect their right of privacy and not damage their development. Negative purchasing decisions on the part of parents must not be disparaged; nor must there be direct appeals to children to induce others to buy. Discretion is required for advertisements with low prices (Article VI). Advertisements must not put children or adolescents at the risk of mental, moral or physical damage or put them in dangerous situations (Article VI). Finally, advertisements must not be misleading (Article VIII).

Advertisements must be clearly recognizable and shown as such; confusion with other programmes must be avoided; subliminal advertising is forbidden (Article XIV). Advertisers must not allude to other programmes (Article XVI). The total duration of advertising must not exceed 20% of the daily broadcasting time (Article XVII).

Compliance with these rules and regulations is controlled before each advertisement by the advertising producer (Article 18). CLT has made arrangements for viewers' remarks on advertising to be received (Article XIX). A committee has been set up to adapt these rules to further developments (Article XX).

---

[1] Codice di Autodisciplina Pubblicitaria - Version of 1.1.1977.

Netherlands

Broadcast advertising in the Netherlands, which is organized centrally by the Reclamestichting (Advertising Foundation), is subject to prior control on the basis of the "Voorschriften voor de nederlandse etherreclame"[1] issued by the Reclameraad. Since the Reclameraad's work is based on law (Article 49 of the Broadcasting Act), on the one hand, and involves independent control, on the other, it is regarded as "semiwettelig" (semi-legal).

The "Voorschriften voor de nederlandse etherreclame" contain general and special rules for advertising as well as provisions for bodies and procedures.

> Advertisements must not be contrary to the law, public order or morals; nor must they be at variance with the truth or offend against good taste or endanger the public's mental or physical well-being (Article 1). They must not, without justifiable reason, play on fear (Article 2). Advertisements must in no way be misleading (Article 4). Imitation of other advertisements that could lead to confusion is also forbidden (Article 5). Particular discretion is required in the use of scientific terms and statistics (Article 7(1)(2)). No reference may be made to comparative tests carried out by consumer organizations (Article 7(3)). On request, the advertiser must prove the correctness of his claims (Article 7(4)). The misleading use of certificates and the like is forbidden; there are further provisions on this (Article 8), as indeed there are for advertising with a "guarantee" (Article 9). Advertisements intended for children must not clash with parents' rights and must not exploit lack of knowledge and credulity (Article 10).
>
> In addition to the alcoholic beverages and tobacco sectors already covered, there are provisions for competitions (Article 12), mail order advertising (Article 13), cures and slimming aids (Article 14), dietary products (Article 15), sugary sweets and chocolates (Article 17), and instructional courses (Article 19). Non-commercial advertisements are permitted, but not ideological and political advertising (Article 20).

Advertising is controlled initially by the Reclamestichting (STER); appeals against its decisions may be brought before the Reclameraad (Articles 22 and 27). The latter can deal officially with the acceptability of an advertisement passed by the Stichting (Article 40).

Given the extensive regulations for broadcast advertising, the general independent control system is practically insignificant.[2]

United Kingdom

The Broadcasting Act of 1981 contains, in itself and in the appended Schedule 2, a number of provisions on broadcast advertising (see II a b above). It obliges the Independent Broadcasting Authority (IBA) to issue a code of

[1] Version of February 1980, edition March 1982.
[2] Brandmair, loc. cit., p. 238.

advertising standards and practice and to ensure that they are observed (Sec 9(1) (a) (b)). The May 1981 "IBA Code of Advertising Standards and Practice" (reprinted October 1982) is currently valid. In the foreword the IBA classes itself as a public board and one of the country's official instruments of consumer protection (p. 2).

Leaving aside the areas of tobacco and alcoholic beverage advertising already covered, the Code can be summarized as follows:

> As a general principle, advertisements must be legal, decent, honest and truthful (Sec. 1). Political advertisements or advertisements in relation to industrial disputes are forbidden (Sec. 9), as are religious advertisements (Sec. 10) and advertisements for charities (Sec. 11).
>
> Advertisements must not offend against good taste or decency or be offensive to public feeling (Sec. 12). No advertisement may include an offer of any prize or gift which is available only to television viewers or radio listeners (Sec. 13). Advertisements must not without justifiable reason play on fear (Sec. 15) or exploit the superstitious (Sec. 16). Advertisements for a certain number of products and services, such as matrimonial agencies, undertakers, betting shops and private investigation agencies (Sec. 17), are not allowed.
>
> There is a prohibition on advertising likely to mislead, especially in connection with scientific terms and statistics; advertisers and their agencies must be prepared to produce evidence to substantiate any descriptions, claims or illustrations (Sec. 18). Comparisons, especially price comparisons, are permissible in the interests of vigorous competition and public information (Sec. 20). Denigration, however, is forbidden (Sec. 21). There are special regulations on artificial aids in reproduction techniques (Sec. 22). Testimonials must be genuine and not used in a manner likely to mislead (Sec. 23). Special clauses cover advertisements containing the word "guarantee" (Sec. 24). No advertisements are accepted from advertisers who send the goods without authority from the recipient (Sec. 25). Any imitation likely to mislead is forbidden (Sec. 26). Further provisions cover competitions (Sec. 28), home work schemes (Sec. 29), instructional courses (Sec. 30), mail order advertising (Sec. 31) and direct sale advertising (Sec. 32).
>
> A comprehensive special regulation covers "Advertising and Children" (Appendix 1). Further special regulations deal with "Financial Advertising" (Appendix 2) and the "Advertising of Medicines and Treatments" (Appendix 3).

The general independent control regulations[1] are of secondary importance to the special regulations on broadcast advertising.

To sum up, a number of Member States operate different types of broadcast advertising control systems, which, at their most developed stage, guarantee a high measure of protection against unlawful advertising and, in addition, against advertising inconsistent with the standards through institutionalized prior control based on special detailed regulations. Particular exponents of this system are France, the Netherlands and the United Kingdom. A

[1] Brandmair, loc. cit., pp. 35-97.

practical precondition is that radio and television advertising activities are concentrated and can be centrally monitored. As broadcast advertising becomes freer, especially with the admission of regional and local private broadcasters, the system of uniform prior control will become more difficult. The general independent systems that will then be required for control have so far been of relatively minor importance in broadcast advertising.

II. The effects of national rules on freedom of broadcasting within the Community; need for harmonization

1. Broadcast advertising

From the survey of rules on broadcast advertising we may conclude that the differences in the law are substantial and that they at least tend to act as obstacles to cross-border broadcasting in the common market. These obstacles are more appreciable with some rules than with others.

The clearest case is that of a total ban on broadcast advertising as in Belgium: domestic cable firms, for example, may then be prevented from relaying foreign advertising. The effect is similar where domestic advertising is permitted but advertising must be blacked out if foreign programmes are relayed within the country (Italy): discrimination against non-nationals is an additional factor here.

But less sweeping rules can also be an obstacle to cross-border advertising. The distinction between advertising and programmes is emphasized to varying extents in the Member States; in particular, advertising by sponsors of sporting events and the like is permitted in some countries but forbidden in others. This may result in legal steps being taken to prevent programmes which include advertising by sponsors and which are legitimately broadcast in one Member State from being relayed in another where such advertising is forbidden.

Differences in the rules on the way in which advertising is inserted in broadcasts can have the same effect: broadcasts with individual advertising spots can run into legal difficulties in countries where advertisements must be grouped in blocks; the same applies to commercial breaks which interrupt programmes being relayed in Member States which allow advertising only in intervals between programmes.

Obviously the rules governing advertising time can be a special barrier in the way of cross-border broadcasting. We have seen that the rules on advertising time in the Member States are very different, both as regards the total broadcasting time and as regards advertising on Sundays and public holidays, on the times at which advertising is broadcast, and on the length of individual spots or commercial breaks. Every broadcasting organization must first and foremost ensure that the programmes it proposes to broadcast in its home country comply with the rules in force there. The broadcast can then be relayed without difficulty in another Member State only if that country's rules are compatible with those of the broadcasting State, which means they must be identical or more tolerant. Otherwise cross-border broadcast advertising - and even other broadcasts - may be blocked for

certain periods. For in Belgium it has already proved technically difficult, costly and impracticable for the cable companies to black out advertising. In early May 1984 the Munich pilot cable communications company was compelled temporarily to suspend the relaying of the entire Sunday programme of the British company Satellite Television PLC because the London Sky Channel also broadcasts advertising on Sundays (via the telecommunications satellite ECS 1).

The danger that broadcasts from other Community countries may be blocked grows where a transmission is to be relayed in several Member States; given the great variety of laws observable it appears practically impossible that a broadcast could at the same time satisfy the rules on advertising time in the State in which it is broadcast and in two or more others; advertising time would have to be cut drastically or the advertising simply omitted. Thus, it will hardly be possible, particularly for those broadcasting companies entirely dependent on advertising revenue, to observe one of the EBU declarations of principle, namely that they will endeavour to have full regard for the domestic law of foreign countries which can receive advertising broadcasts by the DBS they use, even if such advertising is not intended for the audience in those countries.[1]

The obstacles to cross-border advertising also depend on the type and legal status of the rules governing broadcast advertising. On the one hand there are legal rules which apply to national broadcasters and to broadcasts of every kind that are retransmitted within the country. We may mention section 3 of the Lower Saxony Broadcasting Bill, under which orders may be made applying domestic advertising restrictions to relayed foreign radio and television programmes that are retransmitted in Lower Saxony "where the protection of the economic basis of the media so requires".

On the other hand there are rules which are not general, which apply only to specified domestic broadcasters; these rules may be laid down by law, or by order, or in an organization's founding documents, or adhered to voluntarily by the organization itself; between the general law and the specific organization's founding documents there are a range of intermediate forms. Rules which apply only to the particular broadcaster tend to pose less of a problem for foreign broadcasters as their activities are not covered.

---

[1] EBU, Declaration of principles of 15 July 1983, point 4(1), EBU Review, loc. cit., 31(32). See also the Council of Europe Recommendation on principles on television advertising, R (84) 3, 20 February 1984, point 3.

Countries tend to confine themselves to rules applying to a single broadcaster only where broadcasting, or at least broadcast advertising, is the subject of a monopoly. Once the licensing of broadcasters is liberalized, however, in particular where private broadcasters are licensed and authorized to transmit advertising, it is usually found necessary to establish a legal framework regulating broadcast advertising in general, and at that stage it is natural enough to include foreign broadcasts that are retransmitted within the country. The general trend in the common market, exemplified by developments in Italy and France, is to open up monopolies and to liberalize the licensing of private broadcasters.

We may therefore expect that advertising regulations which apply to a single broadcaster only will more and more be replaced by general legal arrangements which will also apply to cross-border broadcasts that are retransmitted within the country. The changes in prospect in Germany are perhaps a good example; while the rules on broadcast advertising in force hitherto applied only to the broadcasting organizations set up by public law, the only ones there were, and do not cover foreign broadcasts, the Land media bills now under consideration do make provision for the licensing of private broacasting companies, and therefore contain general rules on advertising, which may then apply also to the relaying of foreign broadcasts within the country.

The extent to which domestic rules on broadcast advertising impede cross-border advertising therefore depends on the method of transmission. As long as foreign broadcasts can be picked up over the air within a country, so that they can be received without difficulty in areas close to the border or with better aerials and equipment further away, domestic broadcasting legislation does not claim to be applicable to the intractable problem of foreign broadcast advertising, even where it does not comply with domestic rules on broadcast advertising (see above Part Five C III 3 (C) and V).

But the position changes drastically once the foreign programmes are received by domestic transmitters and relayed either as wireless signals or by cable. These relay firms are regarded as domestic broadcasters, even where they are distributing broadcasts originating abroad; they are subject to domestic broadcasting law, including the rules on broadcast advertising. They can be made to comply with domestic broadcast advertising rules in practice too, being based in the country; administrative measures, criminal proceedings and civil proceedings can all be taken against them, and judgments can be enforced. These firms have been the occasion of the recent disputes in connection with the broadcasting of foreign advertising, particularly in Belgium. Given the growing use of cables in the Member States, the liberalization of broadcasting, and the enactment of legal rules on advertising, the abolition of obstacles to cross-border broadcasting with cable relay has become an important and urgent necessity.

Developments in the field of direct broadcasting by satellite across borders are not as easy to judge. The ground has been cleared in international law, and there are plans for extensive cross-border broadcasting in the common market, in which broadcast advertising will certainly be applied if foreign satellite broadcasts are received and relayed domestically.

To sum up, the differences between the rules on broadcast advertising in the Member States are liable to place substantial restrictions on cross-border broadcasting activities, or even prevent cross-border broadcasting altogether. This can happen primarily where foreign broadcasts are relayed by wireless signals or by cable. We must begin looking for ways of removing these legal barriers to the free movement of broadcasting services. This will also be necessary in order to prevent the distortion of competition which is otherwise likely to arise; if broadcasts in the various Member States are subject to restrictions of varying severity, demand for advertising time will tend to be concentrated on certain countries, giving the broadcasting organizations located there an advantage over those located elsewhere.

2. Bans on advertising for drink and tobacco

What we have said under point (1) also applies to prohibitions or restrictions on the advertising of alcohol and tobacco: such restrictions may impede cross-border broadcasting. Within their particular field of application, bans on advertising which are confined to particular products have effects identical to those of general bans.

The differences in the law are not as striking in the case of alcohol as they are in the case of tobacco.

In the case of tobacco the principle of a total ban on broadcast advertising is the general rule in the Community, although in Luxembourg and Greece the ban is only partial. It applies primarily for cigarette advertising. In a large group of Member States there is a straightforward ban on advertising of any tobacco products.

In the case of alcohol, on the other hand, advertising may be broadcast in all Member States except France. But there are restrictions in most Member States, differing to some extent in their effect: for the most part they take the form of codes of practice applying to individual broadcasters, or voluntary rules of conduct adopted by the commercial groups concerned. It will be convenient therefore to consider drink advertising in the section dealing with advertising codes.

3. Advertising codes, supervision of advertisements, and voluntary self-discipline

The systems of voluntary control and self-discipline in advertising generally which exist in most Member States are of only limited relevance to broadcasting. Even where their place is not taken by supervision systems applying specifically to broadcasting, their effects are hardly felt in broadcast advertising. Thus they do not create serious impediments to cross-border broadcast advertising, and will not be considered further here.

Supervision systems applying specifically to broadcast advertising, however, such as those operating in France, the Netherlands and the United Kingdom, do merit attention. These systems can go as far as an inspection of all advertisements in advance, with any matter which does not comply with the rules being rejected. They need not however be expected to form any substantial obstacle to cross-border advertising. They apply to the broadcaster responsible for the first-hand transmission of an advertisement, or to institutions supplying or supervising advertisements to be broadcast first-hand by several different organizations. But they do not normally cover relays, and in particular relaying by the cable firms which distribute foreign broadcasts. These systems do not erect any specific barriers to cross-border advertising. If a television company in a particular Member State refuses an advertisement on the grounds that it does not comply with its rules, the item is not broadcast either at home or abroad; the question of free movement of services over the border does not arise. That question would arise only if a domestic self-restraint body were to take exception to advertising broadcast from abroad. Only a body supervising advertising generally might do this; but such bodies, as we have seen, are not usually very active in broadcasting.

However, apart from the question of the free flow of advertising across borders, there might be grounds for objection if a prior inspection system operating in broadcasting in one Member State were far less severe than one in force in another, so that advertising was encouraged in the first Member State and discouraged in the second; this could result in distortion of competition.

The specific supervision systems for broadcast advertising also merit attention in that they provide a suitable tool for aligning broadcast advertising in the common market on common standards so as to ensure that the liberalization of broadcasting traffic does not unduly damage the interests of business, consumers, or society as a whole. Those sections of codes of practice which lay down requirements for the form and content of broadcast advertising are particularly relevant here. As far as the rules of conduct for particular types of product are concerned, the main points of interest are drink advertising and the protection of children and young people.

III. The potential for approximating national laws

1. Rules governing broadcast advertising

(a) Starting point

As has been explained above in section II, the national rules governing broadcast advertising create major obstacles to the broadcasting of advertising across frontiers. With the further development of satellite and cable technology, these obstacles will make themselves increasingly felt. They threaten to hamper the development of cross-frontier systems and to discourage investments in this area. In addition, the legal disparities are liable to distort competition in the advertising industry and between broadcasting organizations, and to result in the various activities connected with broadcast advertising being attracted to certain Member States.

Under the EEC Treaty, all restrictions on freedom to provide services within the Community are to be abolished (Article 3(c), Article 59 and Article 62), and a system is to be instituted to ensure that competition in the common market is not distorted (Article 3(f)). In the light of the judgments given by the Court, these objectives are to be achieved through application of the prohibitions laid down in the Treaty (Articles 59 and 62) only in the case of rules which discriminate against foreign advertising. By contrast, in the case of restrictions on broadcast advertising that apply to domestic broadcasts as well, the objectives are to be pursued through harmonization of the various rules and regulations, since it is only in this way that legitimate interests of the general public (listeners, viewers, consumers) can be protected (Debauve judgment[1]). The aim of such harmonization is to facilitate

[1] Debauve at 856, ground 13 and at 857, ground 15.

the taking up (particularly establishment) and pursuit of activities as self-employed persons in the broadcast advertising sector within the Community (Article 57(2)), to eliminate distortions of competition in broadcasting and thus to allow the proper functioning of the common market in broadcast advertising (Article 3(h)).

In the light of the judgments given by the Court, liberalization through harmonization is therefore the task laid down by the Treaty as far as the law on broadcast advertising is concerned. "Either the other EEC institutions will ignore the Court judgments, or if they recognize them they will have no alternative but to adopt a directive".[1]

It remains to be examined, firstly, how this opening up of internal frontiers and this system of undistorted competition, i.e. conditions similar to those of an internal market, can be achieved in the Community through harmonization of laws and, secondly, what common level of protection such harmonization should aim to achieve for those on the receiving end of advertising and, above all, for the viewers and listeners of other programmes.

It is particularly on the second question regarding the level of protection that, understandably, opinions diverge. Thus, the European Bureau of Consumers' Unions expresses the following view in the abovementioned study:[2] "The only real protection faced with the reception of broadcasts from other Community countries, which is both inevitable and desirable, will be harmonization of advertising regulations at the highest level." The advertisers and the advertising agencies tend to some extent to take the opposite point of view. There is also an intermediate view, held in many quarters, not least by a large number of broadcasting organizations.

(b) Harmonization of the rules on conflict of laws by means of reference to the law of the broadcasting state, or harmonization of the substantive law of the broadcasting and of the receiving states?

One possibility would be not to harmonize the content of the law on broadcast advertising in the Community directive, but to specify that legal system which is to be applied by the courts and authorities to advertising from other Member States.

This type of conflict of laws solution would guarantee cross-frontier diffusion of broadcast advertising by making the advertising subject, also in the country in which the broadcast is received, solely to the law of the country of transmission; advertising lawfully broadcast in the country of transmission would accordingly have to be tolerated in all EEC countries in which it is received.

---

[1] European Bureau of Consumers' Unions (EBCU), "The impact of satellite and cable television on advertising," final report prepared for the Commission, Brussels, August 1983, p. 69.

[2] EBCU, final report, loc. cit.

However, this sort of solution, which would make do with settling conflicts between two legal systems that claimed to be applicable, would not be sufficient in the light of the Court's decision in Debauve. According to that decision, advertising frontiers are to be opened up only when advertising rules have been harmonized, that is to say when they offer equivalent protection everywhere. Only then will reference to the general interests within the country no longer be justified and admissible.

In point of fact, a solution that was limited to opening up internal frontiers within the Community would not be capable of ensuring that cross-frontier broadcast advertising complied with certain basic rules that are generally regarded as particularly important. Simply suspending the applicability of national advertising rules to foreign broadcast advertising retransmitted within the country could jeopardize the maintenance of the standards to be applied to domestic broadcasts if the relevant standards in the other Member State were significantly lower. This would create a bias and pressure in favour of laissez-faire solutions.

Opening up frontiers for advertising simply by declaring that the law of the broadcasting state alone was applicable would also not be able to remove existing or potential distortions of competition between broadcasting organizations and within the advertising industry. Member States could allow a prohibition in principle of broadcast advertising to continue to apply or could introduce one; only advertising coming from other Member States would need to be admitted.

Cross-frontier transmission of advertising would moreover be channelled as if in a one-way street; the two-way freedom of movement of broadcast advertising services required by the EEC Treaty would not be realized.

The end result would be that advertising in the individual Member States would remain subject to widely varying restrictions; a common market in broadcast advertising services would not be created.

In this connection, the question also arises of the attainment of freedom of establishment for firms that broadcast advertising in the Member States, a freedom provided for in the Treaty. The pre-condition for freedom of establishment is that the transmission of broadcast advertising be permitted in every Member State: it is only then that the further objective can be pursued of allowing nationals of other Member States access to this economic activity.

The solution whereby broadcast advertising that is permitted under the law of the country in which it is transmitted must also be accepted in other Member States can, however, above all neither allow free cross-frontier provision of broadcasting services (Article 3(c), Article 59 and Article 52) nor permit the institution of a system ensuring that competition in advertising in the common market is not distorted (Article 3(f)). A directive of this type would therefore not lead to such an approximation of the laws of Member States, as is required for the proper functioning of the common market that is to be established in broadcast advertising as in other fields (Article 2, Article 3(h)). In other words, it would not be able to ensure conditions corresponding to those of an internal market for the transmission of advertising within the Community.

(c) Extent of the harmonization of rules for domestic and cross-frontier advertising

After this outline of the harmonization objectives provided for in the EEC Treaty, reference must also be made to the Commission's often declared policy of avoiding any perfectionism in the area of harmonization of laws. This includes the area of broadcast advertising. The aim should therefore be to achieve only the absolutely necessary minimum of harmonized rules.

There will therefore have to be careful examination of where this minimum lies, i.e. to what extent, if the Community objectives are to be preserved, and hence also the freedom of broadcasting, the Member States can be allowed national options to apply their own stricter rules. Such examination is begun, but not completed, in the following sections. One of the main purposes of the Green Paper is to promote discussion of these questions and, through the results of such discussion, to provide one basis for subsequent decisions on the extent of harmonization.

The Commission does, however, already take the view that the standard to be arrived at by harmonization does not need to be uniform in every detail but can confine itself to certain basic rules. It is sufficient if a framework is laid down which, if adhered to, will permit advertising to be transmitted across frontiers. In accordance with what was said under (b), national advertising must also be permitted within a similar framework. In general, as far as details are concerned, it can be left to the Member States to build on the framework by laying down individual rules governing national advertising. The latter must not, of course, in the light of the EEC Treaty, be placed in an advantageous position by comparison with advertising from other EEC countries so that such advertising is discriminated against. Thus, in practice, the only rules that would be possible would be those which restrict national advertising more stringently to a minimum standard of liberalization. It will be necessary to return to this in detail when discussing the content of the planned directive.

The degree of freedom on the one hand and restriction on the other to be realized on the basis of this minimum standard must be determined according to the legitimate interests of industry, the consumer and the public at large. Equivalent conditions must be guaranteed throughout the whole of the common market for the development and protection of these three groups of interests.

(d) Prohibition or authorization of broadcast advertising?

This question has political, legal, economic, financial and cultural ramifications that are discussed briefly below.

The European Parliament has come out in favour of permitting advertising on radio and television throughout the Community as a matter of principle but takes the view that the necessary arrangements, and in particular the duration of advertising, its relationship to other programme material and the forms of advertising to be allowed should be harmonized by the Community. It "considers that outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to ..... establishing a code of practice for advertising at Community level".[1]

The opinion drawn up by the Political Affairs Committee for the Committee on Youth, Culture, Education, Information and Sport gives the following reasons why the law on broadcast advertising should be approximated:

"Unrestricted cross-border commercialization is dangerous, just as to ban certain broadcasts would run counter to the principle of free access to information. It is therefore necessary to formulate framework Community provisions ..... in order to preclude this danger. It will be very difficult for certain Member States to accept foreign satellites covering their territory and language area with programmes larded with advertisements. It would be totally unacceptable if the broadcasts consisted mainly of advertisements interspersed with the occasional programme. This could be prevented only by creating tight and harmonized Community legislation on broadcasting laying down arrangements for advertising for satellites used for broadcasting. ' The Political Affairs Committee gives its preference to a system .....: i.e. advertising spots at fixed times between programmes which do not interrupt broadcasts ... To ban advertising on satellite-broadcasts would be as unrealistic and perverse as to forbid advertisements in newspapers ... . Freedom of expression, however, cannot be the prerogative of the highest bidder and the Commission must therefore draw up a directive ensuring that commercial interests are channeled into a direction acceptable to the Community and made subject to certain conditions ... . Time is very short because the various Member States will undoubtedly take action which will make Community rules virtually impossible. At the same time such emergency national measures would make the chaos even worse because media policy can simply no longer be kept within a national framework."[2]

---

[1] European Parliament, Hahn Resolution of 12 March 1983 on radio and television broadcasting in the European Community, OJ No C 87 of 5 April 1982, p. 110 (point 7).

[2] European Communities, European Parliament, Working Documents 1981-1982, Hahn report, doc. 1013/81 of 23 February 1982 (PE 73.271/fin.), p. 21.

In the two Resolutions which it adopted on 30 March 1984, the European Parliament once again called for broadcast advertising to be allowed everywhere in the Community and for it to be subject to legal regulation, by means of the approximation of legislation through Community directives.[1] The new technologies, it argued, required a reasonable degree of commercial support through advertising.[2] All television companies had to operate on an equal footing.[3] Distortions of trade and shifts in trade flows had to be avoided in order to ensure the proper functioning of the common market.[4] "If current codes of conduct and commonly accepted standards of practice /for broadcasting/ are pursued", allowing advertising would not pose "a threat to quality or diversity".[5] There should be harmonization, by Community directive, of "the duration and time of advertising, its position in the programme schedule /and/ restrictions to be imposed to safeguard public policy (protection of young people), security (violence, weapons) and health (tobacco, alcohol)".[6] The legal basis for such harmonization was Article 56(2), Article 57(2) and Article 66 of the EEC Treaty.[7] There was also a need for "rules for advertising to ensure that revenue is apportioned fairly between the public and private sectors and the various mass media".[8]

---

[1] European Parliament, Arfé Resolution of 30 March 1984 on a policy commensurate with new trends in European television, OJ No C 117 of 30.4.1984, p. 202 (point 4); European Parliament, Hutton Resolution of 30 March 1984 on broadcast communication in the European Community (the threat to diversity of opinion posed by the commercialization of new media), OJ No C 117 of 30.4.1984, p. 198 (point 2); European Communities, European Parliament, Working Documents 1983-1984, Hutton report, doc. 1-1523/83 of 15 March 1984 (PE 78.983/fin.), p. 21.

[2] Hutton Resolution (point E), loc. cit.

[3] Hutton Resolution (point F), loc. cit.

[4] European Parliament, opinion of the Committee on Economic and Monetary Affairs (Draftsman: Mr E. Van Rompuy, PPE) delivered to the Committee on Youth, Culture, Education, Information and Sport and printed in the Hutton report, loc. cit., p. 46 (p. 48, point 15).

[5] Hutton Resolution (point G), loc. cit.

[6] European Parliament, opinion of the Legal Affairs Committee (Draftsman: Mr Marc Fischbach, PPE) delivered to the Committee on Youth, Culture, Education, Information and Sport and published in the Hutton Report, loc. cit., p. 49 (p. 56, point 4).

[7] Opinion of the Legal Affairs Committee, loc. cit., p. 60, point 3.

[8] Arfé Resolution (point 4(c)), loc. cit.

From a legal viewpoint, Article 10 of the European Convention on Human Rights has to be respected. This point is also emphasized by Parliament in the abovementioned opinions of the Political Affairs Committee and the Legal Affairs Committee and in the Hutton report drawn up on behalf of the Committee on Youth, Culture, Education, Information and Sport. That Article guarantees the principle of freedom of expression, even in the form of commercial advertising, whether broadcast within countries or across frontiers (see Part Five, B.III.1(c)).

The EEC Treaty provides for the abolition of restrictions on freedom to provide services within the Community (Articles 59 and 62). Prohibitions on the domestic retransmission of foreign advertising are such restrictions. However, according to the ruling in Debauve, the Treaty has not itself made such prohibitions inapplicable. Instead, their removal has to be secured through the approximation of laws. The prohibitions do not, therefore, simply disappear with nothing taking their place. They are replaced by other, harmonized rules brought together in the form of a directive that must pave the way for establishment of the freedom to provide services and facilitate the taking up and pursuit of activities as self-employed persons in the field of broadcast advertising (Article 57(2)) and that is not, therefore, based on a general prohibition. As stipulated in the Treaty, such approximation must also create undistorted conditions of competition in broadcast advertising and, in this way also, establish a common market that embraces all Member States (see points (a) and (b) above).

Lastly, the legal position in Member States is of considerable importance. Eight of the ten Member States permit domestic broadcast advertising as a matter of principle. Nine of the ten Member States allow the retransmission of foreign broadcast advertising by cable systems. This includes Denmark, where only domestic broadcast advertising is prohibited. Belgium has outlawed both domestic and foreign broadcast advertising but, in practice, has always tolerated the retransmission of foreign advertising. Consequently, radio and television advertising is permitted in most Member States and in some cases has been for decades. For the rest, it has come to people's notice by way of foreign transmissions.

From an economic viewpoint, the fact that radio and television advertising is transmitted across frontiers makes it a particularly apt instrument for promoting the free movement of the goods that are advertised and for speeding up the merging of separate national markets into a single European market. As a branch of economic activity, radio and television advertising is not only important on the domestic market, but also of considerable significance for economic integration.

For industry and commerce, radio and television advertising is an important means of boosting sales of goods and services at home and abroad. This is particularly true of a large number of branded goods.

Radio and television advertising accounts for a sizeable share of overall spending on advertising. Moreover, in a number of Member States the demand for advertising time easily outstrips the supply, making what little time is available more expensive and hampering access to radio and television advertising, especially for small and medium-sized firms.

From a financial viewpoint, advertising revenue accruing to most public broadcasting organizations in the Community has risen inexorably and is the second leg on which they stand. Private broadcasting organizations depend for their financing almost entirely on advertising revenue. Where no licence fees are payable or where the fees are inadequate, advertising revenue alone provides the financial headroom necessary to provide programmes.

The importance of advertising for the financing of broadcasting organizations and for trade and industry in the Community was discussed earlier (Part Three, A.I and II, B.II.2, D (at the end) and E (at the end)). Further details are given below.

Advertising that is honest and fair is not only a service at the disposal of advertisers, but in general also represents a means of informing consumers, making it easier for them to meet their requirements in terms of goods and services. This is true just as much for radio and television advertising as for other forms of advertising. For this reason, consumers are not fundamentally hostile to broadcast advertising. Thus, the European Bureau of Consumers' Unions (EBCU) is in favour of a Community directive that permits radio and television advertising as a matter of principle but imposes strict criteria and a prior monitoring procedure.[1]

From a cultural viewpoint, the prime objective is to protect those listening to or watching other programme material. It is a moot point whether this requires a general ban on broadcast advertising or whether rules to prevent advertisements from disrupting unduly the transmission of cultural programmes will suffice. Most Member States are content for broadcast advertising to be subject to certain limitations and to a measure of supervision.

---

[1] EBCU, Final Report, loc. cit., pp. 67-68, 69, 70, 72, 76-78 and 80. A similar view is taken in Pridgen, "Commercial Advertising on Television across National Frontiers: Issues and Strategies for Consumers", Report for the British National Consumer Council, London 1983, pp. 1, 4 and 33-34.

Taken together, these facts, considerations and viewpoints underscore the need for, but also the expediency and reasonableness of, the planned Council directive requiring Member States to permit radio and television advertising within certain limits. This would apply not only to the retransmission of broadcast advertising transmitted in another Member State but also to the initial transmission of broadcast advertising in the Member State concerned.

Authorization of broadcast advertising would apply to all broadcasting organizations that are not financed from public licence fees, payments or grants or from private contributions from their members (e.g. associations) or from payments from subscribers (pay-TV). In the case of such broadcasting organizations, many of which are private, a general advertising ban should not be authorized, since they cannot exist without advertising revenue.

In the case of the other broadcasting organizations, many of them public, each Member State would remain free to prohibit (or to continue to prohibit) advertising if sufficient advertising time is available via commercial channels.

This is the case with the BBC (advertising ban) and ITV (advertising permitted). No such alternative exists as yet in Belgium and Denmark, where the RTBF, BRT and BRF and DR respectively are not allowed to advertise. The advertising industry in those two countries (manufacturers and distributors advertising their goods and services, advertising agencies, producers of advertising media, advertising professions) is at a disadvantage compared with the advertising industry in the other Member States. This can result in advertising activity and the associated expenditure and revenue being switched to other Member States. An example of this is the transfer of broadcast advertising from Belgium to Luxembourg and other neighbouring countries. Conversely, the other Member States' advertising industries do not have the same scope for promoting their sales in Belgium and Denmark as they do in their home markets and as the Belgian and Danish advertising industries do there.

In the case of broadcasting organizations which (unlike the BBC, BRT, RTBF, BRF and DR) are financed not only from licence fees, but also from advertising revenue, each Member State would remain free to authorize (or to continue to authorize) advertising.

If broadcast advertising were authorize as a matter of principle, it would be necessary to lay down common rules governing a number of particularly important aspects of advertising. This question is discussed below. The directive would also have to stipulate that the Member States should not oppose the free broadcasting of such advertisements as satisfy the (minimum) requirements laid down in the directive. The following comment was made by the EBCU: "If the EEC directive does not arrive at an agreement on precise rules, it will have failed and opened the door to excessive competition for advertising revenue which could cause bad relations among the Member States."[1] The EBCU regards such precise rules as indispensable in view of the matters discussed at (e) and (g) to (k) and at points 2 and 3 above.[2]

For viewers and listeners, the main point of such harmonization is to ensure practical legal protection against a surfeit of advertising and against abuses in the domestic and foreign broadcasts which they are increasingly able to receive. For the advertising industry, the main point is to make possible and simplify the planning of advertising and to make the use of advertising cheaper in supra-regional and cross-frontier broadcasts, so that sales and in particular trade between countries in the goods and services advertised can be increased. For the broadcasting organizations, the main point is to allow the free flow of their advertising broadcasts and to secure their financial basis, which is dependent (or partly dependent) on advertising revenue, within the framework of a system which does not distort competition in the Community at their expense. For the press organizations, the main point is to maintain one of the main pillars of their activities and livelihood, namely their income from advertising.

(e) Extent of broadcast advertising

In almost all Member States, broadcast advertising time is restricted. Indeed, steps should be taken to ensure that radio and television, as important mass communication media, are not overloaded by advertising. Consideration for other advertising media, the press in particular, is another reason why broadcast advertising time should be limited.

On the other hand, broadcast advertising time should not be curtailed to such an extent that the role of broadcast advertising as a source of financial support for broadcasters is impaired, that advertising spots become too expensive in an unwelcome manner and that demand for broadcast advertising time becomes unreasonably excessive. It should be borne in mind that an undue shortage of broadcast advertising time usually results in extremely short advertising spots during which little detailed information of use to consumers can be given, over and above the sales pitch.

[1] EBCU, Final Report, loc. cit., p 72.
[2] EBCU, Final Report, loc. cit., pp. 72-74 and 76-79.

The fourth column of Annex 9 provides information on the percentage of finance which the television channels in Europe derive from advertising revenue. The figures show the economic importance of television commercials for the broadcasting organizations which are allowed to advertise.

The third column of Annex 9 shows the maximum amount of television advertising per day (in minutes) which the individual channels are allowed to carry. Annex 17 also shows the maximum permitted amounts of advertising time per day as percentages of total daily broadcasting time.

The demand for television advertising time is considerable and is increasing. In Germany, France and the Netherlands, it has for many years considerably exceeded the permitted amount of advertising time. In the ZDF, for example, the excess of demand over available broadcasting time has amounted to up to 200%.[1] A number of the ARD organizations have said they are in favour of an increase in television advertising time.[2] While advertising time has been and is being gradually increased in France and the Netherlands, it has remained unchanged in Germany since 1961. Moreover, broadcasting time was then significantly less than it is today. The German advertising industry in particular complains that the advertising time available on the ARD and ZDF is oversubscribed.[3] This is said to be the case in 1984 as well. The result, they argue, is that the meagre amounts of advertising time have to be allocated as in a centrally planned economy. Furthermore, they claim, the advertising log jam results in prices which are artificially inflated and not related to the service actually performed.[4] This aspect is also criticized by consumers.

Firms with well-known brand names see themselves as being at a particular disadvantage.[5] They argue that it has not so far been possible to make any additional advertising time available to them for new branded goods. If a firm wanted to introduce a new brand today, it had to withhold often indispensable broadcast advertising time from its other brands, resulting in lower sales for such other brands. Precisely in the markets which were the focus of attention in television, the introduction of a new brand was often impossible without television advertising. In view of the marked differences between the advertising media, it was in most cases not possible to rely on daily newspapers or other media instead of television advertising. The severe limits on television advertising time were at present creating a bottleneck in the economic expansion of the branded goods industry and the advertising industry.

---

[1] This is reported by the Deputy Director of the ZDF, Harald Ingensand, in his article entitled "Partnerschaft und Konkurrenz", in Fernsehkritik, Werbung im Fernsehen, Mainz 1975, p. 53.

[2] Reports in Markenartikel 1983, p. 266; ZAW-service No 115/116, November 1983, pp. 25 and 42; No 117, January 1984, p. 19.

[3] See, for example, Markenartikel 1984, p. 8; ZAW-service No 115/116, November 1983, p. 25; Markenartikel 1983, p. 586; Wirtschaftswoche 1984, p. 54.

[4] Pridgen, Report for the British National Consumer Council, loc. cit., p. 32.

[5] Markenverband, Werbefersehen und Tageszeitungen, Wiesbaden, November 1978, p. 8.

Recent laws, regulations, conditions, other measures and draft laws in the Member States have all tended towards a gradual increase in advertising time (France, Greece, Italy, the Netherlands and Ireland) or to the establishment of new and ample amounts of advertising time (United Kingdom and Germany).

A possible upper limit that might be considered as an initial working hypothesis would be to restrict the total time for advertising to 20% of the total amount of broadcasting per broadcasting day. At the same time, any minor shortfalls or overruns could be allowed to cancel each other out on successive days.

Limiting advertising time to 20% in this way might be considered appropriate for a number of reasons:

- The 20% figure for advertising is already applied in two member countries (in Luxembourg and in Germany, in the pilot cable scheme in Rhineland-Palatinate). In Germany, several Länder are at present introducing laws imposing this restriction on private broadcasting organizations (see I 2 (b) above).

- New providers of programme services will as a rule have to be financed solely from advertising revenue. Consequently, comparisons with the amount of advertising time for broadcasting organizations which are simultaneously financed from licence fees tell us little. If they had no licence fees, the existing organizations would have to have a substantially higher proportion of advertising. For example, the proportion of advertising in the Netherlands would have to be about 60 minutes a day instead of 15 minutes a day if all of the financing were to be provided from advertising. In Germany, the ARD organizations would also need 60 minutes of television advertising a day instead of 20 minutes. In France, 36 minutes would be needed instead of the present 18 minutes.

- It is to be anticipated that the new programme providers will have to compete with the existing organizations for a largely constant number of viewers. The increase in competition will result in a decline in audiences for each broadcaster. In view of the fact that the costs of producing television programmes are independent of the number of viewers, lower audience figures would as a rule mean higher "prices per thousand"[1] for television advertising. This in turn would worsen the competitive chances of the new suppliers against competing advertising media. It would therefore seem necessary to set the upper limit for the proportion of advertising in such a way that a supply of advertising time is available which would allow the new suppliers to compete in terms of prices.

[1] "Price per thousand" is the price per minute for each 1 000 TV sets switched to the channel.

- There is no reason to fear that a 20% figure for advertising time would result in unacceptable conditions for viewers, since each programme supplier has a vital interest in attracting viewers and in not driving them away. Moreover, RTL's experience shows that a 20% figure for advertising time is in practice accepted. It must also be borne in mind that, in Germany, the ARD and the ZDF accommodate their total permitted advertising time of 20 minutes within a period of only 120 minutes, i.e. during the early evening programme between 18.00 and 20.00 (ARD) and between 17.30 and 19.30 (ZDF). In the spring and autumn, the organizations are allowed up to 25 minutes advertising time in order to balance out their figures for the year, so that at these times of the year, within the period of 120 minutes, the proportion of advertising works out at a little over 20%. Even so, no complaints from viewers have been reported.

The figure of up to 20% would mean that, if cross-frontier broadcasts from other Member States were transmitted in full, each Member State would have to accept a maximum level of 20% broadcast advertising. If broadcasts were transmitted not in full but only in part, the percentage of advertising in the part transmitted should not exceed the relevant total daily transmission time, so as to preserve balance and to prevent, in the extreme case, a situation where nothing but advertising is transmitted from abroad.

Of course, broadcasting organizations would not be obliged, for example, actually to transmit the full amount of advertising permissible. The scope available to broadcasting organizations for including advertisements in their programmes is limited, especially where viewers and advertisers alike have a large number of different programmes to choose from. There is no reason to doubt that a surfeit of broadcast advertising irritates many viewers, causing them to switch to other programmes where the opportunity exists. Programmes that carry advertisements are thus exposed to natural constraints where viewers are able to switch to other programmes that do not carry advertisements.

However, a uniform upper limit does not take account of the varying role which advertising plays in financing broadcasting organizations. The situation of broadcasting organizations that rely on advertising revenue alone is not necessarily the same as the situation of broadcasting organizations which are only partly financed from advertising, with the remainder of their income coming from public licence fees or from contributions from their members or from payments made by their subscribers. The problem arises here of the equivalence of the legal conditions governing competition between broadcasting organizations with mixed financing and broadcasting organizations financed solely from advertising.

In Germany, the response to this problem has been to set maximum advertising time at 20% of daily transmission time in the case of the broadcasting organizations financed solely from advertising revenue and at a little over 3% in the case of the broadcasting organizations which are also financed from licence fees (for details, see Annex 17). A comparable maximum amount of permitted advertising time, set at a similarly relatively low level (3% to 5%), applies to broadcasting organizations with mixed financing in France, Italy and the Netherlands, though the level is higher in Greece (7%) and in Ireland (10%) (see Annex 17).

A view held in some quarters in Germany[1] is that the public broadcasting organizations there enjoy a three-fold advantage over their competitors: in contrast to the private companies, they have considerable income from licence fees; they also have substantial income from advertising; and they are already established, i.e. they have great experience in programme production, skilled news services that report events very quickly and high quality equipment.[2] Accordingly, it is argued, private television will not have any chance unless the necessary additional broadcast advertising time is allocated to the private organizations alone. The proponents of this view concede that the often repeated claim that public broadcasting should be financed exclusively from licence fees is unrealistic. However, the status quo could be allowed to remain, they argue, i.e. the advertising time allowed to the public broadcasting services should not be extended. This view is reflected in the laws and draft laws of several German Länder, as discussed under point 2(b) above.

The press puts forward a similar argument.[3] Dual financing of public broadcasting from licence fees and advertising revenue protects it from economic risk. The press, by contrast, is entirely dependent on market prices. As a result, competition is already distorted even now. Any extension of advertising time for the public broadcasting organizations, it is argued, increases this distortion of competition and consolidates their monopoly. This makes it very much more difficult for privately operated electronic media, which have to rely solely on advertising revenue, to get themselves established and operating.

---

[1] See, for example, Ernst Albrecht, Prime Minister of Lower Saxony, "Private Rundfunkprogramme durch Werbung finanzieren", Markenartikel 1983, p. 207; Bernhard Vogel, Prime Minister of Rhineland-Palatinate, Chairman of the Broadcasting Committee of the Prime Ministers of the Länder, Frankfurter Allgemeine Zeitung No 88 of 12.4.1984, p. 4.

[2] With regard to the third point, this view is also expressed in the Hutton report, loc. cit., p. 18, point 8.8.3.

[3] See, for example, the joint declaration by the Bundesverband Deutscher Zeitungsverleger (Federal Association of German Newspaper Publishers) and the Verband Deutscher Zeitschriftenverleger (Association of German Periodical Publishers) of November 1983, ZAW, Fakten, Dokumente, Analysen, Bonn, January 1984.

Opponents of this view point out that it is becoming increasingly difficult to introduce increases in licence fees in the Member States.[1] The public broadcasters must not, they claim, be deprived of the possibility of meeting cost increases through increased advertising revenue as well as by other means and of developing further with the help of advertising.[2] Dual financing from licence fees and advertising, it is argued, makes the public organizations more independent both from the State and from advertisers.[3]

The advertising industry points out that (in Germany and France) the privately operated electronic media would for years to come be able to gain access to only a very limited number of households.[4] They were therefore of only geographically limited importance for advertisers. The acute need for advertising time could for the time being be met only by the public broadcasting organizations. They must therefore be allowed more advertising time. The idea that advertising budgets could be set aside for the starting up of new media overlooked the fact that the real purpose of advertising was to promote the sale of goods and services. The major bottlenecks in television advertising created by the considerable restrictions on advertising time must not be maintained at the expense of advertisers.

---

[1] See, for example, Hutton report, loc. cit., p. 17, point 8.8.2.

[2] See, for example, the observations of Saarländischer Rundfunk of 10.4.1984 on the officials' draft of a Broadcasting Law for the Saarland of 9.4.1984, SR aktuell, Informationen der Pressestelle des SR, Saarbrücken; Medienpolitisches Aktionsprogramm 1984 der SPD - Medienkommission vom 14.2.1984, Media Perspektiven 1984, p. 149.

[3] See, for example, Dieter Stolte, Director of the ZDF, "Ein Plädoyer für den öffentlich-rechtlichen Rundfunk" in Fernsehkritik, Werbung im Fernsehen, Mainz 1975, p. 247.

[4] See, for example, Arbeitskreis Werbefernsehen der deutschen Wirtschaft (German Industry Working Party on Commercial Television), Markenartikel 1984, p. 8. The Working Party comprises leading advertisers, the Trade Mark Association, the Federal Association of German Industry, the General Association of German Retail Trade and the Central Marketing Association of German Farming.

On 30 March 1984, the European Parliament called upon the Commission "to formulate rules to ensure that public broadcasting monopolies do not seek to prevent private broadcasters and programme makers from fully contributing to the future developments ...".[1] The harmonization of national legal provisions and coordination of the different systems should include "rules for advertising to ensure that revenue is apportioned fairly between the public and private sectors and the various mass media".[2] Parliament "believes that a decision must be taken at Community level regarding the limits applicable to the use of advertising by public and private television companies, so that all television companies operate on an equal footing".[3]

In fact, the activities of the Community pursuant to the EEC Treaty include, in the broadcasting field as well as in others, not only "the abolition, as between Member States, of obstacles to freedom of movement or persons [and] services ..." (Article 3(c)), but also "the institution of a system ensuring that competition in the common market is not distorted" (Article 3(f)). As Article 90 confirms, this also applies in particular in the relationship between public and private undertakings. Without such a system or concept underlying the individual measures of legislative harmonization, the harmonization objective laid down in the Treaty cannot be reached, i.e. "the proper functioning of the common market" (Article 3(h)) for broadcasting organizations, broadcast advertising and the advertising industry.

Consequently, in setting the maximum amount of advertising time, account will probably have to be taken of the need to avoid any appreciable distortions in competition between broadcasting organizations with mixed financing and those financed solely from advertising revenue. The Commission would welcome the views of interested parties on this question.

[1] Arfé Resolution (point 6), loc. cit.
[2] Arfé Resolution (point 4), loc. cit.
[3] Hutton Resolution (point F), loc. cit.

(f) Limitation of advertising revenue

In certain individual Member States, permissible advertising activity is also limited by restricting the maximum level of revenue that may be earned from advertising.

It is obvious that such a restriction cannot be contemplated in regard to transmissions coming over the frontier from other Member States since that would constitute an encroachment on the internal organization of broadcasting organizations subject to foreign sovereignty. In addition, it would be scarcely practicable to subject foreign broadcasters to financial controls.

As far as domestic broadcasters are concerned, such a restriction of income in the case of private broadcasting organizations could cramp the possibilities of forming such companies and their financial viability in a way which would conflict with their equal entitlement to play a role in the liberalization of broadcasting in the common market, which is laid down in the EEC Treaty.

However, a limitation of advertising revenue could continue to be permitted in the case of public broadcasting organizations if, overall, an adequate supply of advertising time is available in the Member State concerned. As has already been explained, in the case of public broadcasting organizations, the total advertising time allowed should be more severely restricted anyway (see above under (e)); consequently, a reduction of advertising activity by limiting revenue could also be permitted under the same conditions.

(g) Advertising on Sundays and public holidays

As far as the widely differing rules governing Sundays and public holidays in the Member States are concerned, account must be taken of the fact that they are based on deeply rooted religious traditions and cultural and educational policy objectives. On the other hand, freedom to provide services should allow people to become more aware of other customs and other mentalities obtaining in other Member States. The individual listener or viewer should be afforded the opportunity of choosing an "advertisement free" programme on Sundays and public holidays. He should not, however, be compelled to do so.

A possible solution to the problem, therefore, would be to allow each Member State to prohibit advertising in national programmes on Sundays and official public holidays, while it would have to tolerate cross-frontier broadcast advertising from other EEC countries on those days also. Each Member State could then weigh up the importance from a cultural policy standpoint of prohibiting advertising on Sundays and public holidays on the one hand against placing its own national broadcasters at a competitive disadvantage on the other. From the point of view of the Community, the possible distortion of competition here and the disparities embodied in the standard do not appear unacceptable.

(h) Times of the day at which advertisements may be broadcast

As regards the times of the day at which broadcast advertising should be allowed, here again the differing national habits and customs should be taken into account. In principle, therefore, each Member State should be allowed to lay down in respect of its national programmes the rules that appear to it to be reasonable as long as the Community rules governing total advertising time (see above under (e)) are complied with. Cross-frontier advertising from the Community should, however, be tolerated even if it is transmitted at times of the day other than those permitted for advertising at national level.

(i) The blending in of advertising

In order to promote broadcasting in its role as a service in the public interest, to enhance the integrity of individual parts of programmes and to foster the clear separation of advertising from other programme material, broadcast advertising should be compiled and transmitted in such a way that it neither impairs the integrity and value of programmes nor disrupts their natural continuity and sequence. This dual requirement would protect the special character of certain transmissions (e.g. political speeches, religious events, funeral services) and would, by requiring that advertisements were blended in only where there was a natural break in the programme, ensure the continuity of all transmissions. The Member States should in particular authorize such cross-frontier advertising as is not transmitted too frequently and does not disrupt programme continuity.

(j) Individual spots and advertising slots

Under existing rules in the Member States, individual advertising spots are allowed in the case of radio, but in most cases only advertising slots made up of several spots are allowed in the case of television. The question of whether this distinction is in keeping with practical requirements needs to be examined further.

As far as the length of individual advertising spots is concerned, the practice of the Member States hitherto has been to lay down a maximum duration of between one and three minutes. It appears desirable that the individual advertising spots should not need to be made too short but that it should be made possible to provide interrelated information with some explanatory content. The Member States should therefore have to tolerate spots lasting up to three minutes.

Common rules on the minimum duration of spots do not perhaps appear appropriate; here, the requirements of advertisers and cost factors should govern the time limits.

With regard to the length of advertising slots, only a maximum limit should be contemplated, designed to prevent impairment of the rest of the programme material through excessively long advertising periods and upsetting the balance of broadcasts. If the maximum time limits applied hitherto are taken as a guide and if account is taken of the trend towards increasing advertising time, a maximum slot duration of 12 minutes would appear appropriate.

(k) Separation of advertising and other programme material; sponsored advertising

It is consistent with fundamental requirements relating to the protection of programmes, listeners and viewers that particular care should be taken when separating advertising from other programme material, a point borne out by the existence of appropriate rules in most Member States. The directive should therefore stipulate that advertising and other programme material must be kept quite separate and that advertising must be clearly recognizable as such and must not contain any reference to other programme material or appear in a form which blurs the dividing line betwen the two.

These rules should be binding for domestic advertising and for cross-frontier advertising transmitted from other Member States. As far as domestic advertising is concerned, each Member State could lay down further detailed rules aimed at keeping advertising separate and rendering it recognizable, including, say, an obligation to include a declaration concerning advertising in the subscription terms.

A question needing special attention is that of the sponsoring of broadcast programmes. Already business undertakings in the Community contribute to financing certain programmes or parts of programmes of the Community broadcasting organizations sometimes directly (by providing benefits to the broadcasters), sometimes indirectly (by providing benefits to independent programme producers, to the organizers of cultural, artistic or sporting events, or to listeners and viewers, for example in the form of prizes donated for guessing games etc.).

This applies both to private and to public broadcasting organizations and seems in most cases to be independent of the question whether or not the particular programme is also financed by advertising. Thus in France the new television programme on a subscription basis, Canal Plus, may obtain supplementary finance not from advertising but from sponsorship. Other Member States too are devoting increasing attention to the question of the conditions on which the assumed financing potential of sponsoring can be used to a greater extent than hitherto in the creation of new cable and satellite programmes.

The forms of sponsoring already known are numerous, and additional forms will develop. Any definition would involve the danger of excluding a priori certain important examples. The most important forms of sponsoring carried on at present include:

- Sporting events that are broadcast or televised. One or more business firms will place advertisements on hoardings in sports stadiums or sports halls, on the clothing of the players or on the sports equipment, so that they are clearly visible during the event. In these cases the amounts spent on the advertising go direct to the organizer, but they are often spent because the event is expected to be televised. Many kinds of sporting event (tennis, football, ice hockey, horse trials, motorcar and motorcycle racing etc.) could not take place without some outside financial assistance. The public seems to have largely accepted this situation.

- Cultural, artistic and entertainment events such as exhibitions, concerts, opera or theatre. In the last two cases in particular, sponsoring is much less common than in sport. Some such cases are only thinly differentiated from patronage, in which the patron does not seek any direct reward. The sponsor's name is mentioned discreetly either in announcements or in programme magazines.

- Fixed events like time signals or weather forecasts, provided by specific firms.

- Co-productions in which firms give material or financial assistance with the production of films or documentaries. In most cases the reward for the co-producing firm is the presence of its goods or services in a natural context, without any discussion or evaluation of them. In other cases, for example where the co-producer is a publishing firm, the film itself contains no express reference to the co-producer but deals with subjects chosen for their relevance to a book or other works. In both cases the co-producer is mentioned in the credit titles in the usual manner.

- Programmes, for example of an entertainment or educational nature in which prizes donated by specific firms are to be won (example: RTBF's "Visa pour le Monde", in which travel with a named airline is offered).

- Advertising spots in which several (three or four) products are combined under one heading (gardening, cooking, holidays, fashion) and presented in say three minutes by a commentator. This special form of advertising is designed to lift the advertising out of a series of unrelated individual spots which might be irritating and of limited efficacy. The three minutes could also be used by a single firm to present one or more of its goods or services.

- Programmes produced independently of the broadcasting organizations and offered to them for transmission. The essential point here is that the decision on acceptance and transmission of such a programme must remain fully under the editorial responsibility of the broadcasting organization. As the demand for new programmes increases it may be expected that the broadcasting organizations on purely financial grounds will be tempted or compelled to use such offers increasingly.

An absolute prohibition of all these and similar forms of sponsoring would not be in keeping either with present-day practice in most Member States or with the practical requirements of broadcasting as a medium of expression, information, education and entertainment. The broadcasting organizations' brief as a medium of information extends also to providing information on economic matters. This may well include information on the latest developments from individual firms, or in special circumstances on specific products and services made available by the manufacturers. Popular sporting and cultural events do not lose their informative value for the public simply because particular firms contribute to their financing in a way acceptable to viewers. The same applies in principle to good films and interesting documentaries in which products or services are shown in a natural context or form the starting point for further publishing or artistic activities. It would, for example, be totally unrealistic to prohibit the use of cars in television films or programmes because the spectator can easily identify them as the product of a specific manufacturer, even if the latter pays something for the advertising value.

A further point is that the broadcasting organizations are generally bound by the principle that programmes should pay for themselves. In some cases they are even bound by law to make use of all possibilities of saving costs. The production or acceptance of sponsored programmes is one element in reducing costs, an element likely to grow in significance as more and more programmes become available.

On the other hand sponsoring conceals certain dangers for the integrity of broadcasting programmes. For this reason rules should be worked out for inclusion in the planned directive which will ensure that broadcasting can continue to fulfil its task as a medium of expression, information, education and entertainment.

The starting point is the abovementioned principle of the separation of advertising from the rest of the programme. This means that advertisements must be clearly recognizable as such and must not appear to be a part of the rest of the programme. But in this context the only material to be regarded as advertising should be that prepared on the sole responsibility of the advertiser, and examined by the broadcasting organization only for observance of legal provisions and voluntary self-regulation, for the transmission of which the advertiser pays the insertion fee. In this way broadcast advertising contributes generally to the financing of the other programmes of the broadcasting organization.

In contrast, the benefits provided by a sponsor are directed to quite specific parts of the rest of the programme that are suited to his advertising objectives. It is the link of subject matter between the advertising interest of particular firms and the editorial interest of the broadcasting organization that constitutes the essential characteristic of sponsoring.There may thus be a need for special provisions to protect the other programmes of the broadcasting organization in order to counter the possible danger involved in this form of financing, namely that of the influence of external commercial interests on the formation of programmes by the broadcasting organization. It is also necessary to ensure, in the interest of broadcasting as a medium of expression, information, education and entertainment, that listeners and viewers are protected from a surfeit of advertising interests within the programmes.

In order to counteract this danger, a number of rules could be laid down to prevent the intermingling of editorial and advertising interests in the formation of broadcasting programmes. A particularly important principle must be the confirmation that the responsibility for the content and the transmission of the whole programme remains with the broadcasting organizations. They alone must decide, by reference to their task as programme producers from an editorial and journalistic point of view, whether particular programmes to which sponsors have contributed in one way or another are to be broadcast or not. Obviously these decisions will have to be taken in the light of the financial resources of the broadcasting organization. In no case, however, must there be any justification for an impression that the broadcasting organization allows advertisers to influence the programme content or accepts financial advantages in return for accepting specific programmes or parts of programmes.

Further principles would be that

- reports on happenings, events, places or things should not refer to specific firms, products or services in a way not strictly necessary for the report;

- business firms may be named as producer or co-producer of programmes only in the form of a credit title at the end and in suitable cases also at the beginning of the programme;

- the sponsor's products or services may not be advertised within such programmes or in immediately preceding or following programmes.

On the other hand it does not at present seem necessary to prohibit generally the transmission of sponsored broadcasts whose content has any relevance to the business interests of the sponsor. Such a prohibition would decisively weaken the financial potential of sponsoring since it would affect precisely those broadcasts in which the sponsors might be assumed to be most interested. Furthermore, if this were done the sponsor's special expertise could not be tapped and placed at the service of the public. The sponsor would be restricted to fields in which he is no more competent than other people. Above all, however, such a prohibition would disregard the responsibility of broadcasters in providing programmes. They have to decide by reference to editorial and journalistic criteria whether and how far sponsored films or documentaries meet the requirements imposed by the programme maker's brief in terms of quality, objectivity and balance. There may even be circumstances where the broadcaster's task as a provider of information imposes the duty to broadcast specific material. Thus, for example, an advertising spot in the making of which a famous pop star was burnt was shown by American television as part of the evening's news.

2. Restrictions on the advertising of specific products?

(a) Tobacco advertising

As indicated above, there is an almost total ban in the Member States on cigarette advertising on radio and television. It would be consistent with the consumer and health policies of the Community to make this prohibition general and binding on all Member States. Exceptions should not be permitted even in national advertising, in order to avoid distortions of competition.

Since substitution between tobacco products is a feature of the market, the advertising ban should cover tobacco products of all kinds as is already the case in a majority of the Member States.

(b) Alcoholic beverages

A total prohibition on the advertising of alcoholic beverages exists only here and there in the Community; however, most Member States have special rules governing the advertising of alcoholic drinks. This approach to regulation would seem the right one to take at Community level as well. This would mean that the advertising of alcohol would be permitted in principle in supranational broadcasting, but Member States would be free to impose tighter controls on alcohol advertising in national broadcasts or to ban it altogether. The important thing is that a move towards a general ban in the future should not be prevented by the regulations in individual Member States. As things stand at present, it would seem to be sufficient at Community level to have a code of conduct imposing certain restrictions on alcohol advertising in order to prevent abuse. This will be dealt with in the next section.

3. Control of broadcast advertising?

(a) Present position

As shown earlier at I.2(b), the trend in many Member States is to lay down a special code of practice for broadcast advertising and to introduce special monitoring arrangements to ensure compliance with its rules. The forms this can take range from statutory provisions through a variety of intermediate arrangements to systems of voluntary restraint.

It would probably be expedient to take up this approach. Such control would provide the necessary counterweight to the liberalization of broadcast advertising. The directive should, therefore, stipulate that Member States must introduce certain controls (see (b) below). A code of practice governing radio and television advertising which would have to be observed in all cases should also be established. The code should embrace general rules (see (c) below), special regulations relating to children and young people (see (d) below) and, finally, separate rules for the advertising of alcoholic beverages (see (e) below).

Such a code would thus cover the main common areas of regulation dealt with by Member States. The code of practice established at Community level would constitute a minimum standard. Cross-frontier advertising that met this standard would be permitted provided it was not in breach of general legislation. Member States would be able to lay down wider-ranging or more detailed rules for national broadcasts.

(b) Structure of controls

In considering the scope for controls at national level, a distinction must be made between original transmission and re-transmission of advertising. Monitoring prior to first transmission is feasible and already practised in many Member States. It is relatively simple to apply and highly effective and should be made binding by the directive. If monitoring reveals that an advertisement infringes the code of practice, its transmission would be prohibited.

In the case of re-transmission over the air or by cable, especially at the same time as the original transmission, prior monitoring is difficult or quite impracticable. Controls and sanctions can at best be imposed after the event. Once prior monitoring is established througout the Community, the need for ex post controls should be considerably reduced; in practice, such controls would be important only in the case of programmes transmitted from third countries. In such cases, however, general legislative provisions and voluntary restraint by advertisers would probably be sufficient, although Member States should still be at liberty to impose additional special controls on transmissions of this kind.

Accordingly, the need for rules at Community level is confined to the prior monitoring of advertisements to be broadcast for the first time in a Member State. The directive should make such monitoring binding on Member States. The practicalities should be left to the Member States themselves; in particular, they would be able to rely on existing monitoring arrangements. Controls might, therefore, be the responsibility of a statutory government body or take the form of voluntary arrangements. They could be centralized or implemented by individual broadcasters. The essential is that any spots found to infringe the rules should not be broadcast. Advertisements would be measured against the general and specific standards set out below.

(c) General standards

A comparison of the general standards included in Member States' advertising codes and in the International Chamber of Commerce's codes of conduct for advertising practice shows the following rules to be common to all of them. These rules could form the basis for prior monitoring, under the directive, of the primary transmission of broadcast advertising in all Member States:

- broadcast advertising must not infringe the law in the country where the broadcast originates;

- it must not offend against public morals or basic good taste;

- it must not be offensive to religious, philosophical or political beliefs;

- it must not play on fear without justifiable reason;

- it must not encourage behaviour prejudicial to health or safety.

It would be open to Member States to impose stricter and more detailed standards for advertisements broadcast for the first time within their territory. Advertisements transmitted from other Member States would be permitted if they complied with the above standards and did not infringe general legislation.

(d) Standards relating to children and young people

The codes of practice which exist in several Member States in relation to children and young people generally cover two overlapping areas: firstly, protection of children and young people against advertising aimed specifically at them and, secondly, the participation of children and young people in advertisements and the protection afforded to them and/or to those at whom the advertising is aimed. The latter may themselves be children or young people.

The following standards make up the core of the national rules and could be included in the directive:

- broadcast advertising must not directly exhort children to buy a product or exploit their immaturity of judgment and experience;

- it must not encourage children to persuade their parents or other adults to purchase the goods or services being advertised;

- it must not exploit the special trust children place in parents, teachers or other persons;

- children appearing in advertisements must not conduct themselves in a manner inconsistent with the natural mode of behaviour in their age group;

- advertisements featuring children must not abuse the feelings which adults normally have towards children;

- the above standards also apply to young people in so far as is necessary for their protection.

(e) Standards relating to alcoholic beverages

Most Member States have introduced special rules of practice for the advertising of alcoholic beverages. The basic aim of those rules, which the Community could incorporate in the directive, can be summarized as follows:

- broadcast advertising must avoid anything that might prompt or encourage young people to consume alcohol;
- advertisements must not link the consumption of alcohol to the practice of sport or to driving;
- they must not create the impression that the consumption of alcohol contributes to social or sexual success;
- they must not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- they must not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- they must not place undue emphasis on the alcoholic strength of drinks.

As mentioned at 2(b), Member States would be free to impose stricter limits on national broadcast advertising of alcoholic beverages or to prohibit the advertising of alcohol altogether at national level.

B. Public order and safety, protection of personal rights

I. Introduction

Sound and television broadcasts, as well as being subject to advertising and copyright laws in the Member States, are governed by a further body of national laws which can be subsumed under the general heading of public order and safety. It consists mainly of provisions in criminal and administrative law to safeguard rights which are considered, in the interests of society, to be particularly worth protecting. These can be summarized in the following main divisions:

- Laws to protect the integrity of the State, particularly with regard to treason and the betrayal of state secrets; protection of national flags and emblems as well as the organs of the State, especially the Head of State;

- Laws to protect public peace and order within a country and in relations with other countries, in particular relating to sedition, breaches of the peace, public condonement of criminal acts, the glorification of violence, incitement to racial hatred and revilement of religious communities;

- Laws to protect public morals in the sexual sphere, especially prohibitions on pornography;

- Special laws to safeguard minors, especially in the sphere of sexual morals, and to protect them against being brutalized by representations of violence.

To these can be added provisions to protect personal rights, particularly reputation, sometimes in the form of prohibitions carrying penal sanctions and sometimes in the form of civil law provisions to protect an individual's subjective rights. These include:

- Provisions under criminal and civil law to protect reputation, particularly in respect of libel, slander and defamation of character;

- Laws to protect privacy, particularly secrecy, confidentiality and the secrecy of the mails as well as of personal records;

- Laws to protect the use of one's own likeness, particularly the unauthorized use of pictures for commercial purposes;

- Laws relating specifically to the media, particularly the press, giving an individual who feels he has been misrepresented a right of reply.

The practical relevance of the abovementioned provisions to sound and television broadcasts, and specifically broadcasts emanating from another country, has so far been slight in most cases. These laws are mainly applied in other areas; it is rare for them to be applied to broadcasting. This is obvious, to take only one example, in the case of laws protecting the State. Since such provisions impinge only marginally on broadcasting, there is good reason not to pursue harmonization in this area, with one or two exceptions discussed below. Generally speaking, these laws are not likely to be a significant obstacle to the provision of broadcasting services between countries, or to distort competition.

There is also one further consideration. In nearly all cases these laws represent complex clusters of rules which only function properly when taken together. It would be difficult to separate out a number of provisions applying only to the media. It would thus not be appropriate to create, for example, a body of law protecting the State solely in sound and television broadcasting or to distinguish, in criminal libel, between "broadcasting offences" and other assaults on honour and good repute. Nor does it seem necessary or opportune to tackle the enormous problem of harmonizing such essential and substantial parts of the penal codes of the Member States as have been referred to here simply as the result of the institution of a free exchange of broadcasting services.

Greater relevance in media terms attaches to laws designed to protect public morals, in particular bans on pornography. These have mostly been applied, however, to cases involving the printed media, films, audio and video cassettes, stage performances and the like. Cases in the area of broadcasting have been very rare. For the reasons already outlined above, it does not seem necessary to harmonize laws to protect public morals specifically for the broadcasting sector or to approximate law in the whole of this field. A further factor is that each country's laws are closely bound up with national custom and ethical values. The trend in many Community countries at the moment is towards liberalizing current legal standards and dismantling statutory checks. In view of this change taking place in legal thinking on public morals, it seems reasonable to wait and see whether the different levels of restriction in general law will have a significant impact on supranational broadcasting in the Community. As things look at present, this can be considered unlikely.

There is, however, one area worth closer examination from the point of view of Community-level harmonization, and that is the law protecting children and young people against broadcasts which may be damaging to their moral

and intellectual well-being. Here it should be possible to identify an area within the general law on minors which is specific to the media and to produce separate harmonization proposals. Some kind of standards in this field could serve to back up the advertising rules protecting minors (see A.III.3.d above). A law protecting minors in relation to broadcasting with a European-wide minimum standard could prove to be a necessary corollary to liberalizing the provision of broadcasting services between Community countries. The subject is dealt with further under II below. This leaves the area of personal rights, particularly character and reputation, in civil law. The law in the various Member States has developed in different ways. Potential breaches of the law usually arise as isolated cases. A radio commentary, a critical television programme or a news broadcast may, as a result of incorrect and disparaging statements for example, damage the reputation and good standing of a particular person without being a repeated or continuous denigration. Legal remedy will not therefore consist of seeking an injunction but rehabilitation and compensation for damages. There is a correspondingly small danger that action for infringement of personal rights would impede the dissemination of programmes. With regard to damages, while compensation for material loss resulting from defamation of character is granted in all Member States, there are differences in the pecuniary compensation awarded for purely non-material loss.

Apart from the entitlement in civil law to the retraction or correction of defamatory statements, a remedy peculiar to the media has developed in the right to publication of a reply. Whereas the usual sanctions in the general field of personal rights - injunctions, abatement and damages - present wide differences and have wide-ranging implications which stand in the way of harmonization, an approximation of laws in respect of the right of reply seems feasible. This question will be discussed in III.

II. Protection of minors

1. National law

National law to protect minors in the Member States of the Community is primarily concerned with the dissemination of harmful books and periodicals, the projection of films and the access of young people to public bars and places of entertainment. Special provisions in the area of sound and television broadcasting do not exist in all countries; Denmark and Luxembourg, for example, do not have such laws. Where laws do exist, they deal with the problems in different ways. The different types of regulation are described below.

Some Member States have taken the general provisions to protect minors and extended them to cover broadcasting. For instance, Sect. 5 of Italy's Film and Theatre Censorship Act (No 161) of 24 April 1962 stipulates that films may be passed for public exhibition with restrictions on young people under 14 or under 18; under Sect. 11 of the Act, young persons under 18 may also be excluded from theatre performances. Sect. 13 extends this provision to broadcasting and provides that films and theatre performances forbidden to young people under 18 may not be broadcast on radio or television. A similar though less stringent approach is taken in the Netherlands. Under Sect. 12(2) of the Broadcasting Act of 1 March 1967 in the version of 13 September 1979, an indication must be given before a programme that it is forbidden to young persons under 12 or under 16.

In Germany, by contrast, the Young Persons (Protection in Public Places) Act in the version of 27 July 1957, regulating the exhibition of films to minors, does not apply to television broadcasts. It is still being argued whether the Act on the Dissemination of Publications Harmful to Young Persons, which also covers audio and audio-visual media, can be applied to radio and television programmes.[1] However, there are two provisions in the German Penal Code that protect young people and specifically include broadcasting. Under Sect. 184(1) of the Penal Code it is forbidden to make pornographic publications or pornographic audio and audio-visual products available to persons under 18; under Sect. 184(2) a penalty is similarly imposed on anyone disseminating pornographic material through the broadcast media. By analogy, Sect. 131(1)(3) makes it an offence to make available to persons under 18 any publication, audio or audio-visual product which represents cruel or otherwise inhumane violence against human beings, and thereby glorifies or trivializes such violent acts, or which incites to racial hatred. Sect. 131(2) imposes the same penalty on the dissemination of such representations through the broadcast media.

Some Member States have introduced provisions to protect young people which apply specifically to broadcasting. Normally these set out general principles, designate the authority which is to monitor compliance with the law and specify, where relevant, which body may issue more detailed regulations. Thus, France's Act No 82-652 on Audio-Visual Communication of 29 July 1982 provides in Sect. 14(1) that it is the responsibility of the High Authority for Audio-Visual Communication to cover the "protection of children and young people" in its recommendations affecting public service radio and television broadcasting. In making its decisions and recommendations, the High Authority is to consult the National Council for Audio-Visual Communication (sentence 2 of Sect. 27(3)).

In the United Kingdom, under Sect. 5(1)(a)(b) of the Broadcasting Act 1981, it is one of the responsibilities of the Independant Broadcasting Authority to draw up, and from time to time reivew, a code of rules to be observed in the showing of violence with particular reference to times of day when "large

[1] See Engle/Eckardt/Markert, Umfang und Genzen des Jugendschutzrechts für Neue Medien, in: Expertenkommission Neue Medien - Baden-Württemberg, Final Report Vol. II, Stuttgart 1981, pp. 88, 92 ff. The Act definitely does not apply to live broadcasts.

numbers of children and young persons may be expected to be watching or listening". The Authority is also to give special regard in regulating other matters to the timing of broadcasts in relation to children. The Independent Television Authority had already drawn up a code on violence in October 1971 under earlier statutes, after other similar codes had gone before.

Alongside general and specific restrictions on certain kinds of programme content, there are rules in some Member States that programmes potentially harmful to children should be broadcast at such a late hour that young viewers or listeners are less likely to see or hear them. Thus Sect. 12(2) of the Broadcasting Act in the Netherlands provides that television broadcasts which are unsuitable for children under 12 should not begin before 20.00 in the evening and those considered unsuitable for young persons under 16 not before 21.00. In Germany the broadcasting companies must observe the rule that "programmes of which the content or form, in whole or in part, are likely to be harmful to the physical, mental or moral upbringing of children and young persons" may not be broadcast before 21.00 in the evening.[1]

With regard to the ages and age groups on which protection of children and young people is based, the Member States seemed to concur that a special need for protection ends at the latest at 18.[2] In the age groups up to 18, the divisions vary. In Germany, "children" are considered to be those who have not yet become 14, while "young persons" are those of 14 or more but

---

[1] See Sect. 31 of the Act on Broadcasting Companies Governed by Federal Law of 29 November 1960 and Sect. 11(1) of the Broadcasting Act of the Saarland of 2 December 1964. A similar provision is contained in Sect. 10 of the Inter-State Agreement on a Second Television Channel (ZDF) of 6 June 1961; under II.4 of the programming guidelines for the ZDF, broadcasts not suitable for children and young persons must be clearly identified as such. The draft Media Act for Baden-Württemberg contains a complete ban on "programmes likely to be harmful to the physical, mental or moral upbringing of children and young persons" (Sect. 62(1)). The draft of a Broadcasting Act for Lower Saxony of 1982 falls between these two extremes: broadcasts with pornographic content are prohibited (Sect. 11(2)) while programmes likely to be harmful to the physical, mental or moral development of children and young persons are only forbidden "if no steps are taken, by timing of broadcasts or in another way, to ensure that children and young persons of the age groups affected do not hear or see the programmes". The draft goes on: "A broadcaster may assume this to be the case for programmes broadcast at times when children and young persons are not allowed to attend the public exhibition of films unaccompanied by a parent or guardian" (Sect. 11(1)).

[2] Apart from examples cited below, see Sect. 234 of the Penal Code of Denmark in the version of 1967.

not yet 18; the statutory divisions are set at ages 6, 12, 16 and 18.[1] In France a distinction is made for cinema admissions between minors not yet 13 and those not yet 18;[2] in Italy the division is between those not yet 14 and those not yet 18.[3] The television regulations in the Netherlands distinguish between those not yet 12 and those not yet 16;[4] in Belgium there is a single limit for films at 16 years of age.[5]

All these rules are primarily aimed at protecting children and young people in the area of sexual morals (pornography, obscene representations). The other emphasis is on the harmful effects of representations of violence.[6] In a number of Member States, a more general desire is expressed to protect children and young people against harmful influences on their development, which might be physical, mental or moral.[7]

2. Necessity and scope for approximation of laws

Do these provisions need to be approximated? The European Parliament "considers that outline rules should be drawn up on European radio and television broadcasting, inter alia with a view to protecting young people ...".[8] In this connection, the opinion of the Legal Affairs Committee given to the Committee on Youth, Culture, Education, Information and Sport contains the following:[9] "Community legislation on the media ... could not merely prevent distortions of competition [stemming from differences in the rules on broadcast advertising], regulate the freedom to provide services in this field [broadcast

---

[1] cf. Gesetz zum Schutz der Jugend in der Öffentlichkeit in the version of 27.7.1957, Sect. 1(3) and Sect. 6.

[2] Décret No 61-63 du 18.1.1961, Art. 1er.

[3] Legge 21.4.1962, No. 161 - Revisione dei film e dei lavori teatrali, Art. 5.

[4] Omroepwet Art. 12 Nr. 2.

[5] Loi du 1.9.1920 interdisant l'entrée des salles de spectacles cinématographiques aux mineurs âgés de moins de 16 ans, Art. 1er. Other provisions are based on reaching the age of 18, cf. Sect. 386 bis of the Penal Code (obscene pictures or objects) and Loi 15.7.1960 sur la préservation morale de la jeunesse (access to certain places of entertainment).

[6] cf. Kunczik, Media Perspektiven 1983, p. 338 ff., giving further references.

[7] A comparative survey of the latest research is given in Bonfadelli, Kinder/Jugendliche und Massenkommunikation, Media Perspektiven 1983, p. 313 ff., giving further references.

[8] European Parliament, point 7 of the Resolution of 12 March 1983 on radio and television broadcasting in the European Community, OJ No C 87 of 5 April 1982, p. 110.

[9] European Communities, European Parliament, Working Documents 1981-1982, Document 1-1013/81 of 23 February 1982 (PE 73.271/fin.), p. 28.

advertising/ and lay down provisions for the protection of consumers or the guarantee of copyright. It would also have to contain at the least ... provisions for the protection of youth." Such approximation is seen as a politically necessary counterpart of the opening up of frontiers to broadcasting in the Community.

From a legal viewpoint, national rules on the protection of youth that are not matched by similar rules in the broadcasting country (see Part Five, C.III.2) are, according to the case law, rules whose application to transmissions from other Member States that are re-transmitted in the receiving country can be justified "on the grounds of the general interest" (see Part Five, C.VI.1, and in particular at (b) and (c)). In such cases of divergent legislation, Member States remain free, therefore, to prohibit as an exceptional measure the re-transmission of foreign broadcasts within their territories, to require cable companies to black out programmes, or themselves to monitor transmissions.

First, this would pose technical, financial and practical problems for cable operators and for the authorities, who would have to insist that cable operators continually monitored programmes transmitted from abroad for compliance with the national rules on the protection of youth, that competent and trained personnel took the decision whether or not the programmes transmitted could be shown and that the decision taken was immediately implemented, where appropriate, by blacking out parts of programmes deemed inadmissible.

Secondly, such measures would impair the freedom of broadcasting within the Community.

Thirdly, the legal conditions governing the production, transmission and re-transmission of programmes would continue to differ from one Member State to another. A common market in broadcasting characterized by conditions similar to those obtaining on the domestic market, and by equivalent legal conditions governing competition in respect of programmes, could not be said to exist.

The conditions under Community law necessary for an approximation of such divergent provisions by way of a directive pursuant to Article 57(2) accordingly exist (see Part Five, C.VI.2(a)).

The object of approximating laws on the protection of minors would be that programmes meeting a minimum standard of protection applicable throughout the Community might be freely broadcast in all Member States. National legislatures would remain free to impose stricter rules for broadcasts within the country. However, supranational broadcasts from other Member States would be permissible if they meet the Community standards.

In deciding the content of a possible Community minimum standard, it would be necessary to take into account the different traditions and attitudes in the Member States. The various models from national legislation could be used, and combined into a Community code of practice.

The directive could embody the principle that broadcasts which might seriously harm the physical, mental or moral development of children or young people should not be permitted. This should include broadcasts involving "hard" pornography, cruel and inhuman violence or incitement to racial hatred.

Broadcasts of a less harmful kind, but which might still impair the physical, mental or moral development of children and young people, should be permitted only late in the evening.

The Member States should be left to deal with the practical implementation of the few rules in the directive. It would be necessary only to require them to arrange for their implementation in such a way that programmes infringing the rules would not be broadcast. For that purpose they could rely on existing broadcasting institutions or voluntary self-regulation.

III. Right of reply

1. National provisions

The legal situation in the Member States may be summarized as follows:

Belgium

Under the Act of 23 June 1961[1] any natural or legal person or group of persons to whom explicit or implicit reference has been made in the course of a broadcast has the right, provided that their personal interests are shown to be involved, to require that a reply (réponse) be broadcast free of charge, either to put right one or more incorrect statements relating to them or to reply to one or more statements or affirmations likely to damage their reputation (Section 7(1)). This right may be exercised on behalf of deceased persons by their relatives (Section 7(2)). Applications for a reply must be submitted within 30 days of the broadcast, must name the applicant, must identify the broadcast in question and the offending parts thereof, and must be properly justified. The time allowed for reading the reply may not exceed three minutes and the reply must not exceed 4 500 typographical characters in length (Section 8). Transmission of the reply may be refused if the latter bears no direct relationship to the offending broadcast or if it is itself offensive, illegal or immoral or involves third parties unnecessarily (Section 9). The right to reply lapses if a satisfactory correction has been made by the broadcasting body acting on its own initiative (Section 10). The reply should be broadcast during the next programme of the same series or of the same type, and at the scheduled time as far as possible. The reply is read, without comment or contradiction, by a person designated by the broadcasting body (Section 11(1)). If the broadcasting body does not agree with the text of the reply, it may make counter-proposals. Notice of the application's rejection should be given within four working days (Section 11(2) and (3)). An appeal against such rejection may be lodged with the judge presiding at provincial level, whose decision in the matter is final (Section 12). A recording of the broadcast must be kept until the period for replies has elapsed and for the duration of any legal proceedings (Section 13). Unlawful refusal to broadcast a reply is a punishable offence (Section 15). Exercise of the right to reply does not affect other legal remedies (Section 7).

---

[1] Loi du 23 juin 1961 relative au droit de réponse, modifiée par la loi du 4 mars 1977.

Denmark

Complaints against "Danmarks Radio", and requests for corrections in particular, are handled under Sections 16-19 of Act No 421 of 15 June 1973 concerning Danish radio and television. The competent body in the first instance is the Radio Council and in the second and final instance a Legal Commission under the auspices of the Ministry of Culture (Radionaevnet). Appeals against the Radio Council's decisions may be lodged with the said Commission within four weeks. The latter may instruct "Danmarks Radio" to broadcast corrections of any erroneous information which it may have transmitted. The Commission may determine the content, the form and the timing of such corrections. It may also deliver opinions and require them to be broadcast.

Germany

The right to reply is governed by various legal texts. The provisions invoked depend on the broadcasting body against which the complaint is lodged.[1]

The following arrangements[2] apply broadly speaking to the Zweite Deutsche Fernsehen and the federally-controlled broadcasting bodies: If a factual statement has been made in the course of a broadcast, the person or body directly concerned may request that a reply to this statement should be issued; this must be done without delay and in writing. The reply must be purely factual, may not contain any material which could give rise to prosecution and may not be substantially longer than the offending part of the broadcast in question. There is no obligation to broadcast a reply unless the person or body to whom the programme in question related has a justified interest in having this done. The reply must be broadcast without delay, over the same range as the offending programme, at an equivalent time and without insertions or omissions. No statement to counter this reply may be broadcast on the same day. The right to reply may be enforced through the ordinary courts of law.

Where the broadcasting bodies of the Länder are concerned, there used to be some controversy as to whether the Land legislation governing the right to reply to press publications could apply by analogy to broadcasting. This matter has now been settled and in most cases there is legal provision for the right of reply. The provisions in force differ in certain respects but they are essentially the same as the arrangements described above.

In its ruling of 8 February 1983,[3] the Federal Constitutional Court stated, referring to Section 12(2)(1) of the Staatsvertrags über den Norddeutschen Rundfunk, that it was incompatible with Sections 2(1)

---

[1] See Wenzel, Das Recht der Wort- und Bildberichterstattung, 2. Aufl. 1979, p. 400 et seq., for a summary and further references.

[2] Section 4 of the "Staatsvertrags über die Errichtung der Anstalt des öffentlichen Rechts Zweites Deutsches Fernsehen, 6 June 1961." Section 25 of the "Gesetzes über die Errichtung von Rundfunkanstalten des Bundesrechts, 29 November 1960."

[3] Gewerblicher Rechtsschutz und Urheberrecht 1983, 316.

and 1(1) of the Constitution, whereby the general rights of the individual are guaranteed, that a reply could only be requested within two weeks of the offending broadcast. The shortness of this period was an excessive restriction of the individual's rights under the Constitution, since, even if due consideration had to be given to the interests of the broadcasting authority, it presented an unreasonable obstacle to the exercise of the individual's right to reply as a means of effective protection for persons affected by broadcast material.

France

The right to reply (droit de réponse) is governed by Section 6 of Act No 82-652 of 29 July 1982 on audio-visual communications.

Any natural or legal person has the right to reply if, in the field of audio-visual communications, any statement is broadcast which might impeach their honour or damage their reputation (Section 6(1)). The complainant must specify the statements to which he wishes to reply and must provide the text of his reply (Section 6(2)). The reply must be transmitted under technical conditions equivalent to those for the broadcast containing the statements in question and in such a way as to ensure an equivalent audience (Section 6(3) and (4)). Applications to broadcast a reply must be lodged within 8 days of the date on which the statements in question were transmitted (Section 6(5)). If the application is refused or goes unanswered, summary proceedings may be instituted before the presiding judge of the Tribunal de grande instance (Section 6(6)); the latter may order a reply to be broadcast and may declare that the order should be enforced irrespective of any appeals (Section 6(7)). Each broadcasting body must appoint a person responsible for the broadcasting of replies (Section 6(9)). Specific rules are to be laid down by decree of the Conseil d'Etat (Section 6(10) and (11)); implementation is the responsibility of the Haute Autorité de la Communication Audiovisuelle (Section 14(III)).

Greece

The Greek law on the press provides both for the right of reply and for the publication of corrections; this does not apply to broadcasts, however. It is thought that the courts could order a reply to be broadcast for the protection of the individual under Section 57 of the Greek Civil Code.

Ireland

There is no special legislation on the right of reply.

Italy

Section 7(2) of the Broadcasting Act (No 103 of 14 April 1975) enables any person who considers his tangible or intangible interests to have been damaged by an untruthful radio or television broadcast to demand transmission of an appropriate correction (rettifica).
Application should be made to the director of the broadcasting station (Section 7(3)). The latter is obliged to have the correction broadcast without delay, provided that the correction contains no material which could constitute a criminal offence Section 7(4)). Except in cases of special importance, the corrections are broadcast in programmes specifically intended for this purpose (Section 7(5)). It is a punishable offence to refuse to broadcast a correction (Section 7(6)). The broadcasting of a correction does not rule out prosecution under the civil or criminal law. Section 34 provides for a similar entitlement to correction at the expense of local radio and television cable stations.

Luxembourg

There is no legal provision for the right of reply where broadcasting is concerned. The broadcasting body, the CLT, does however grant such a right on a voluntary basis under its own code of conduct, pursuant to Council of Europe Resolution No 74/26 of 2 July 1974.

The right of reply is granted to individuals who consider that their honour has been impeached or that their reputation or rightful interests have been damaged by a radio or television broadcast. Application should be made within 8 days of the broadcast in question. If the reply is accepted, it is read out by an announcer at the station when the next instalment of the programme in question is broadcast. The CLT may suggest changes in the text submitted; the complainant must take his decision on these changes within 4 days. If the application for a reply is rejected or if no agreement is reached on the text, the matter may be taken to a conciliation board, to which each party concerned appoints a member. This has no effect on civil proceedings. Applications are rejected if the reply does more than make the relevant correction, if it constitutes a criminal offence, if it damages the legally protected rights of a third party or if the applicant cannot show his justifiable interests to be involved.

Netherlands

Under Section 38 of the Broadcasting Act of 1 March 1967, as amended on 13 September 1979, any body which has been granted broadcasting time and which has transmitted an incorrect or misleading incomplete version of factual material may be required to broadcast a correction, on application by the party directly affected by the broadcast in question provided that the said party has sufficient grounds for requesting a correction (Section 38(1)). Summary proceedings are instituted before the presiding judge of the Amsterdam regional court who rules on the application as regards the nature and timing of the correction, having consulted the Government Commissioner and given the latter the opportunity to deliver his expert opinion (Section 38(2)). The broadcasting of the correction does not preclude criminal or civil prosecution for the original broadcast (Section 38(3)).

United Kingdom

According to Sections 53 and 54 of the Broadcasting Act 1981, the functions of the Broadcasting Complaints Commission include the handling of complaints of unjust or unfair treatment in sound or television programmes (Section 54(1)(a) or infringement of privacy (Section 54(1)(b)). A complaint may be made by an individual or by a body of persons, whether incorporated or not (Section 55(2)). Complaints may also be made on behalf of deceased persons (Section 55(3), (4)(a) and (b)). The Commission does not handle complaints which are the subject of proceedings in a court of law (Section 55(4)(b)) and may not entertain complaints in cases which could be taken to court (Section 55(4)(c)). The Commission does not accept frivolous complaints (Section 55(4)(d)) or complaints which it would seem inappropriate to entertain for any other reason (Section 55(4)) or complaints which have not been made within a reasonable time (Section 55(5)). Detailed rules govern the procedure to be followed by the Commission (Section 56). If the Commission considers a complaint to be justified, it may give directions to the broadcasting body concerned to publish, in any manner specified in the directions, a summary of the complaint together with the Commission's findings or a summary thereof (Section 57(1) and (2)). The Commission itself is also required to publish reports concerning its findings (Section 57(3)).

2. Necessity and scope for harmonization

Do the above rules require approximation? Our analysis shows that most Member States make provision for replies or corrections in the broadcasting sector, but that the rules take a variety of forms.

Secondly, there seems to be no explicit treatment of the question whether foreigners or persons resident abroad can demand a reply or correction.

Thirdly, however, as international broadcasting arrangements are liberalized, it becomes increasingly likely that citizens of other Member States will demand the right to reply to broadcasts. It would help to protect the interests of Community citizens if they could have recourse to uniform rules on the right of reply, applicable to all broadcasting organizations in the Community.

Fourthly, it would certainly "make it easier" for the broadcasting organization "to take up and pursue" their activities (Article 57(2)) if they had to comply throughout the Community with equivalent safeguards governing good repute.

On the other hand, these rules do not restrict international broadcasting or distort competition between broadcasting undertakings or programmes. Nor are the rules governing the right of reply made on "grounds of the general interest". They are intended to protect the good repute and personal credit of individuals, with the result that they cannot be relied on where they would act as an impediment to the re-transmission of foreign broadcasts nationally (see Part Five, C.VI.1, in particular at (b)).

The Commission doubts whether, at this stage in the establishment of the common market, equivalent safeguards are nevertheless needed in this field but it would like this matter to be discussed before taking any decision.

If this discussion were to show that harmonization is desirable, the directive pursuant to Article 57(2) might be on the following lines:

- The right of reply would be available to all natural or legal persons or associations of persons who are nationals of a Member State or who are established in a Member State. National legislation governing the rights of other complainants would not be affected.

- The right of reply would extend to all broadcasting organizations established in the territory of the Community.

- The right of reply would be exercisable only if the complainant's justified interests, and in particular his honour and reputation, have been damaged by a statement made during a radio or television broadcast.

- Application for a reply would have to be made in writing within 30 days of the broadcast concerned.

- The application would have to identify the complainant, specify the broadcast and the offending part thereof, show how the complainant's interests have been damaged and contain the text of the reply.

- The text of the reply would have to be as concise as possible and not normally require more than three minutes of broadcasting time. It would have to relate directly to the offending statement.

- The broadcasting organization would be entitled to reject the reply if its content might give rise to criminal proceedings, if the broadcasting organization would incur civil liability by transmitting the reply, or if the reply would violate standards of propriety.

- Otherwise, and if the above conditions relating to the reply and the application are fulfilled, the broadcasting organization would be obliged to transmit the reply using its own facilities and at its own expense.

- The reply would have to be transmitted, wherever possible, in the next broadcast of the same type, at the same time and with the same audience as the broadcast in question, but in any case within 30 days of the application being submitted.

- The reply would be broadcast in its entirety, without any comment or contradiction.

- The civil courts would settle any disputes between the complainant and the broadcasting organization concerning the reply.

- The right of reply would not affect any other legal remedies against the offending broadcast.

C. Copyright

I. Introduction

1. Nature and function of copyright

Copyright forms the basis for intellectual and cultural creativity in the field of literature and art. Its aim is to ensure for an author the economic fruits of his labour and to protect his moral interests in the work. The traditional means of affording such protection is to grant an exclusive right: the law confers on the creator of the work an absolute right to his intellectual property. As in the case of material property, the use of it is restricted to the owner of the right; he can exclude anyone from unauthorized use. The exclusive right makes it possible for the creator to market his work for reward. The author of a book, for example, concludes a publishing contract which permits the publisher to copy and distribute the work in return for payment; a playwright grants a television undertaking the right to broadcast a performance in return for payment.

Copyright thus also creates the basis for the development of an "economy of culture" concerned with the marketing of works of the intellect. Newspaper and book production, the recording and film industries, radio and television and many other branches of the economy are dependent upon an effective law of copyright.

Copyright as an institution also serves the public interest. It makes possible a varied, fruitful and innovative production in all branches of culture and intellectual life. The creative work of writers puts flesh on the skeletons represented by the freedom of the press, of broadcasting and of exchange of information and views. The availability of cultural goods is increased and improved - an objective entirely in accordance with that of the accelerated raising of the standard of living mentioned in Article 2 of the EEC Treaty.

The interests affected by copyright are complex and do not always converge. Thus on the one hand copyright facilitates cultural progress but on the other hand it must not impose such severe restrictions on the use of a work that the public cannot enjoy it to the extent desirable. The law of copyright achieves the necessary balancing of interests by a graduated system of rules. Where, for instance, it is thought necessary to restrict exclusive rights so that other undertakings may compete in marketing a work, provision is made for compulsory licences, as occurs in the record industry. In other spheres the free use of a work is made possible by a system of statutory licences, the author being compensated by a claim for remuneration, as occurs in many countries in the broadcasting sector. Finally the limit is reached where the right of the author ceases and the free use of the work without payment, especially in private, begins.

The following reflections on the creation of a free broadcasting system in the common market will take full account of this situation. The system of copyright protection must be maintained, and not modified any further than appears indispensable for the attainment of the objectives of Community law. From the range of possible restrictions, the one selected is always that which involves the least interference with the present system compatible with a practical implementation of Community policy with due regard to all the interests affected.

For the principle of a free broadcasting system to be applied in the common market, it is essential that authors and performers receive appropriate remuneration. In the long run, any disproportionality between their works or performances and the increasing scale on which these are marketed will have adverse effects on the number and quality of broadcasts available in the Community. As the audio-visual media expand further, the problem of providing them with programmes will become increasingly acute. If the Community countries do not possess the creative authors and skilled artists they increasingly need, the majority of programmes will come from outside the Community. This would increase our cultural dependence, accentuate the balance-of-payments disequilibrium and in no way alleviate the plight of those culturally creative individuals who are out of work.

Radio and television are nowadays among the most important media for marketing works protected by copyright. Every part of a broadcast may have copyright implications, whether it consists of speech, music, dance, pictures or a cinematographic projection of film or of a succession of individual images. In addition to copyright in the strict sense in such works, several Member States also recognize so-called "related rights" which arise from the work of performers, manufacturers of audio material and broadcasting undertakings. These related rights, which create either an exclusive right or a claim to remuneration in respect of the reproduction of works, must be taken into account in addition to any existing copyright. The most important such right in the present context is that enjoyed by broadcasting undertakings, which covers the whole field of radio and television irrespective of whether or not works protected by copyright are being transmitted.[1]

2. International copyright

Viewed from an international standpoint, the dominant feature of the law on copyright and related rights is the principle of territoriality; it is recognized in all Member States and forms the basis of the relevant international treaties. The principle of territoriality states that the copyright protection conferred in each state is limited to the territory

[1] See, on an international basis, Article 3(f) of the Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations; Article 5 of the European Agreement on the Protection of Television Broadcasts.

of that state and its prerequisites and effects are determined by the law of that state. If an author enjoys protection in other states, this simply means that he has acquired a bundle of territorially limited rights of copyright for all states in which he enjoys protection. This national restriction of rights applies even to the Member States; in the present state of development there is no uniform law of copyright for the common market.

An additional feature of the territorial limitation of copyright is that in practice rights of use are also usually granted only on a territorial basis. In the case of broadcasting rights this situation is already implicit in the fact that the author usually has to deal with broadcasting undertakings with a national or even a merely regional scope. There is however no legal necessity for authorization to use a work to be territorially restricted. Just as an author can enjoy a bundle of national rights, so the user can be granted a bundle of rights of use extending over several States, or indeed throughout Europe or throughout the world; such worldwide rights do in fact exist in practice in publishing and in the film industry. But the more extensive the territory over which the rights of use extend, the higher will be the payment demanded for granting them.

The protection of foreign authors is nowadays ensured by international treaties which apply in numerous States. The most important of these is the Revised Berne Convention for the Protection of Literary and Artistic Works of 1886, of which all the Member States are signatories, but the more recent revisions of the Convention do not apply in all Member States.[1]

Under the Berne Convention citizens of other Union countries are to enjoy the same protection as nationals (principle of national treatment). The Convention also lays down a minimum standard for the protection to be afforded (minimum rights). In relation to broadcasting this is to be found in Article 11 bis.

The Berne Convention has been supplemented by further international agreements. Those most relevant in the present connection[2] are the Rome Convention of 1961 on the protection of performers, producers of phonograms and broadcasting organizations, of which, among the Member States, Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom are signatories, the European Agreement of 1960 on the Protection of Television Broadcasts, among the signatories of which are Belgium, Denmark, Germany, France and the United Kingdom, the Agreement of

---

[1] In Denmark, Germany, France, Greece, Luxembourg and Italy the version in force is the Paris version of 1971; in Belgium, Ireland, the Netherlands and the United Kingdom (at any rate so far as the substantive law is concerned) the Brussels version of 1948; see the summary in Copyright 1983 8/9 (position at 1.1.83). See also Dietz, Copyright in the European Community, a study undertaken for the Directorate-General for Research, Science and Education of the Commission of the European Communities, Baden-Baden, 1978, pages 35 et seq.

[2] Another one which might be mentioned is the European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories. This however is not relevant to the questions now under discussion.

1974 on the transmission of programme signals relayed by satellite, to which Germany and Italy are signatories, and the European Agreement of 1958 concerning Programme Exchanges by means of Television Films, to which Belgium, Denmark, France, Greece, Ireland, Luxembourg, the Netherlands and the United Kingdom have acceded.

3. Copyright and freedom of broadcasting

Generally speaking, the principle of territoriality, international agreements and national law makes it possible for an author to conclude separate marketing agreements for each national market and thus improve his chances of obtaining appropriate remuneration. This partioning on a national basis of copyrights and rights of use may come into conflict with the objective of securing freedom to provide services across the internal frontiers of the Community.

As regards the direct transmission of radio and television programmes across national frontiers - which is already carried on to a substantial extent in the form of ordinary conventional wireless transmission - the copyright barriers have however been scarcely discernible. This is due to the fact that for reasons of practicability it was decided - albeit not without some dissentient voices - to regard only the act of transmission of the broadcast as the decisive event for the application of the principle of territoriality.[1] If an author has permitted a transmitter in country A to broadcast his work he cannot take action on grounds of copyright if the transmitter transmits it directly also into frontier regions of country B, since according to the prevailing opinion the event occurring in country B is not a broadcast but merely a reception, and this is irrelevant for purposes of copyright.

The situation is different however if transmissions by wire or cable are made across the national frontier and distributed in another country. In this case not merely the initial transmission but also the dissemination of the radio signals by means of wire or cable forms part of the act of broadcasting: hence the question of copyright arises not merely in country A, the country of transmission, but also in country B, the country of reception.[2]

The same applies when the broadcast transmitted in country A is picked up in country B and relayed, whether by wireless or by means of wire or cable, in country B. The retransmission is a new act with copyright implications, occurring in country B.

The link between the transmitter in country A and that in country B may also be created by means of a point-to-point satellite without the copyright situation being affected. A different conclusion would be possible only if the transmitter in country A was not transmitting the programme to the general public but only to the satellite, which then fed it into the tramsitter in country B. In that situation broadcasting would occur only in country B and not in country A, and only in country B would any question of copyright arise.

---

[1] See, among other works, von Ungern-Sternberg, Die Rechte der Urheber an Rundfunk- und Drahtfunksendungen, Munich, 1973, 101 et seq. with further references.

[2] Von Ungern-Sternberg, loc.cit. page 111.

No clear conclusion is possible on the effects of direct broadcasting via satellites. One widely held opinion is that the satellite must be regarded merely as an "extended antenna" of the transmitter which transmits the radio signals to the satellite; the only relevant country for copyright purposes is thus the one in which that transmitter is situated. According to another view the transmission of the radio signals to the satellite cannot be regarded as a broadcast in the sense relevant for copyright, since it is aimed only at the satellite and not at the general public; a relevant broadcast takes place only from the satellite. On this view the principle of territoriality can have no application, since the satellite is in outer space, which is not subject to the jurisdiction of any state, and it is difficult to treat such a satellite according to the "law of the flag" like a ship on the high seas. It has therefore been suggested that in such a case not only the law of the transmitting country but also the law of the receiving country should be applied, but this raises the question whether, in a case where there are several receiving countries, broadcasting is to be deemed to have occurred in each of them or only in one of them.

To sum up, it is clear that conflicts can arise, at any rate in the case of transmission across national frontiers by means of wire or cable and in the case of relaying of foreign broadcasts whether this is done by wireless or by means of wire or cable, whilst the situation in the case of direct broadcasting via satellite appears to be still unclear. Copyright is in conflict with freedom to provide services when the broadcasting undertaking which carries on the transmission by means of wire or cable, or the retransmission abroad, has not been authorized to do so by the copyright owner. The owner of the copyright or right of use for the territory of the state in which the broadcast has been disseminated without his consent can take action against such broadcasting by the means provided under the copyright laws. As a rule he can seek an injunction to stop the broadcast, and an award of damages; in some circumstances even criminal proceedings may be possible.

It is obvious that the exercise of powers under the copyright laws can thus restrict freedom of broadcasting within the Community. The Court of Justice, in its Coditel judgment,[1] has held that where the right to show a cinematograph film has been assigned to different persons in different Member States, the provisions of the EEC Treaty relating to freedom to provide services do not preclude an assignee of the performing right from relying upon his right to prohibit the unauthorized cable diffusion of a foreign transmission, provided that copyright is not used as a means of arbitrary discrimination or a disguised restriction on trade between Member States.

---

[1] Case 62/79 Coditel v. Ciné Vog Films (1980) ECR 881. See also the second Coditel judgment, Case 262/81 (1982) ECR 3381, in which it was held that an agreement whereby the owner of a copyright in a film grants exclusive rights to show the film in the territory of a Member State for a fixed period does not in itself infringe the prohibitions in Article 85 of the EEC Treaty. The judgment given on 30 June 1983 by the Belgian Court of Cassation, which had referred the question, (Revue de Droit Intellectuel 1983, p. 261) sends the case back to the Court of Appeal for an examination of whether the accompanying economic or legal circumstances permit application of Article 85. However, this examination is unlikely to take place, since the agreement on the cable transmission of television programmes in Belgium, which has since been concluded, contains agreed rules having retrospective effect.

The inference from this decision is that the exercise of copyright concerning the use of a work in a non-material form, especially broadcasting, is subject under Community law to different rules from those applicable to the use of a work in material form by the dissemination of copies, since the latter falls under the rules on free movement of goods.[1] If, for example, a copyright owner assigns to firm A the rights, limited to one Member State of the Community, to broadcast a work and also to record the broadcast on a cassette and market the cassettes in that state, and then assigns to firm B the corresponding rights in another Member State, firm A may take action to prevent the broadcast made by firm B from being retransmitted in the area for which firm A has the broadcasting rights, but cannot take any action to prevent the marketing in A's territory of the broadcast recorded on cassettes by B.

The purpose of the following reflections is to consider how the obstacles to the free dissemination of radio and television broadcasts arising from the territorial assignment and enforcement of copyright can be dismantled. In doing this it is essential to bear in mind both the Community law objective of attaining freedom to provide services and the interests served by copyright which are worthy of protection. The main subjects of concern are direct broadcasting across frontiers, especially by means of satellites, and the simultaneous and unaltered wireless or cable retransmission of foreign programmes. In the latter case the retransmission will not always comprise the whole programme. This study does not however extend to the transmission of modified versions, or any transmissions at a different time, since such practices have even more far-reaching copyright implications.

The first question to be examined is the ingredients of copyright under the various national legal systems (Section II.1), and who usually enjoys them (Section II.2). Possible solutions will then be discussed (Section III.1-4) taking into account both the existing national rules (Section III.5) and the law under international agreements in the copyright field (Section III.6). Finally a suggested solution will be advocated (Section IV).

II. National legislation and the law of international agreements

1. Synopsis of rights affecting radio and television

The first such right is copyright in its strict sense. The range of works enjoying statutory copyright protection differs to some extent from one Member State to another. However, the essence of the matter is similar, a situation reinforced by the definition in Article 2(1) of the Revised Berne Convention, which applies in all Member States.[2]

---

[1] Compare, on the freedom of movement of physical copies of a work, Deutsche Grammophon (1971) ECR 487; K-tel International (1981) ECR 147 (at 161); Imerco Jubiläum (1981) ECR 181 (at 197).

[2] cf. Dietz, loc. cit., pp. 60 et seq.

Accordingly, so far as radio and television are concerned, the following categories of works protected by copyright must be considered:

- Speech (e.g. speeches, talks, sermons, commentaries, reports, other documentary material, novels, stories, poems, radio plays, television plays, drama, quiz programmes, linking comments accompanying radio and television announcements, etc.
- Musical works (serious and light music in all its forms)
- Works comprising both speech and music (e.g. operas, operettas, musical comedies, serious and popular songs, etc.)
- Choreographic works and pantomimes, especially when linked with musical works (e.g. dancing, revues, pantomimes, etc.)
- Works of pictorial art, including photography (e.g. stage settings, paintings, graphics, sculptures, individual photographs on television)
- Films and (recorded or live) television programmes, i.e. a continuous series of pictures, usually in conjunction with speech and music.

Composite works usually give rise to several forms of copyright of equivalent ranking. A number of rights which are to some extent interdependent arise in connection with adaptations.[1] If for example a novel is dramatized by somebody other than its author and a translation of the drama is televised, copyright is enjoyed by the author of the novel, the author of the dramatic version, the translator and the maker of the television film.

In most Member States copyright lasts for 50 years after the author's death, but in Germany for 70 years after the author's death.[2]

In all Member States the rights of the author of the abovementioned protected works include broadcasting rights, in other words he has the right to prevent the works from being made the subject of (primary) wireless or cable broadcasting or television transmissions without his consent.[3] This right is partially diluted in Denmark, Italy and Luxembourg by the system of statutory licences; in the Netherlands the authorities have power to make regulations to similar effect. Copyright protection normally extends also to retransmission by wireless and public relay of broadcasts. The author as a rule also enjoys the right of retransmission by cable. This question has not however been finally clarified in all Member

---

[1] cf. Article 2(2) Revised Berne Convention; Dietz, pp. 68 et seq.
[2] See on this and the problems arising Dietz, op.cit., pp. 213 et seq.
[3] See Dietz, loc. cit. pp. 147 et seq. especially page 155.

States and some of them have modified it by legislation.[1] Differences mainly concern the distinction between collective aerials, against which there is no copyright protection, and cable transmitters and the treatment of the simultaneous retransmission by cable within the reception area of the original transmitter. On the whole however it must be assumed that where an independent cable undertaking in one Member State picks up and retransmits a broadcast from another Member State, this generally gives rise to questions of copyright in the original broadcast.

So far as international law is concerned, Article 11 bis (1)(i) of the Berne Convention (in the Brussels version) confers on the author of literary and artistic works the exclusive right to permit wireless broadcasting (original transmissions). In the case of original transmissions by wire, authors of dramatic, dramatic-musical and musical works are protected by Article II(1)(ii) of the Brussels version, authors of literary works by Article II ter (1)(ii) of the Paris version, the holders of copyright in films by Article 14 bis (2)(b) and the authors of filmed works by Article 14(1) of the Paris version.

The (secondary) rebroadcasting of works broadcast by wire or by wireless, that is to say the retransmission (whether contemporaneous or otherwise) by an institution other than the original broadcasting organization, is reserved to the author by Article 11 bis (1)(ii). Article 11 bis (2) provides that, within certain limits, national legislation may lay down the conditions for the exercise of broadcasting and rebroadcasting rights.

So far as related rights are concerned, the rules in the common market are less uniform. As stated above under I.2, the relevant international agreements do not apply in all Member States. In particular, among the Member States only Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom have acceded to the fundamental Rome Convention on the protection of performers, producers of phonograms and broadcasting organizations.[2] The Rome Convention, like the Revised Brussels Convention, is based on the principle of national treatment (see Articles 4, 5, 6). The minimum rights of performers include that of preventing the broadcasting of their performance without their consent, except

---

[1] See for further details Ulmer, Die Entscheidungen zur Kabelübertragung von Rundfunksendungen im Lichte urheberrechtlicher Grundsätze, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1981, 372 et seq; Walter, Telediffusion and Wired Distribution Systems, Berne Convention and Copyright Legislation in Europe, Copyright 1974, 302-315; Fuhr, Urheberrechtliche Probleme bei Übernahme von Rundfunkprogrammen in Kabelanlagen, Film und Recht 1982, 63 et seq; Dietz, loc. cit. 155 et seq; see also the contributions to the Symposium on Cable Television - Media and Copyright Law Aspects, Amsterdam, 16-20 May 1982 and the resolution adopted there, which advocates that copyright should in all cases apply to public cable transmission by anyone other than the original broadcaster. See also the synopsis of national laws given in the observations of the Commission in the Coditel case, [1980] ECR 881, at 894-896.

[2] Position as at 1 January 1982, see Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1982, 272 et seq.

where the performance used in the broadcasting is itself already a broadcast performance or is made from a fixation (Article 7(1)(a)). If however the performer has consented to the broadcast it is for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting (Article 7(2)(1)). If a phonogram is used for broadcasting, the user must pay a single equitable remuneration to the performers or the producers of the phonogram or both (Article 12).[1] Broadcasting organizations have under Article 13 the right to authorize or prohibit the rebroadcasting (defined in Article 3(g)) of their broadcasts; rebroadcasting however includes only wireless retransmission, not retransmission by cable.

The convention on the dissemination of programme signals relayed by satellite of 1974, to which among the Community Member States only Germany and Italy have acceded, does not substantially affect the transmission of broadcasts by cable undertakings. Putting it in a somewhat simplified form, the Convention affords protection only against the unauthorized retransmission of point-to-point broadcasts via satellites. If a broadcast is directed to a satellite and is intended to be retransmitted thence to a specific broadcasting organization, the Convention is intended to prevent a broadcasting organization for which the broadcast is not intended from "tapping" the satellite.

There is no protection however for the broadcasts transmitted from the original broadcasting organization, for broadcasts transmitted from the satellite to the general public, or for broadcasts picked up from the satellite by the organization for which they are intended and diffused by that organization. The prohibition on "tapping" of point-to-point broadcasts should not pose any problem for cable undertakings since, after all, broadcasts transmitted to the general public can always be picked up and fed into the cable network.

Of greater importance in this connection is the European Convention on the protection of television broadcasts of 1960. Among the Member States, it is in force in Belgium, Denmark, France, Germany and the United Kingdom. It protects the picture and sound (but not the sound alone) of all television broadcasts by broadcasting organizations which are established under the law of a Contracting State or transmit broadcasts in its territory (Article 1(1), Article 5). The protection extends inter alia both to wireless retransmission of broadcasts and to public transmission by means of wire. Under the original version of the Convention the protection against transmission by wire could be entirely excluded by means of a reservation. The amended version of 1965 provides that each Contracting State may exclude the protection against cable transmission for broadcasting organizations in its own territory and restrict such protection for broadcasts from another Contracting State to broadcasts lasting up to 50% of the average weekly transmitting time of the original transmitter (Article 3(1)(a), Article 10). Under Article 2(4) of the Protocol to the European Convention on the protection of television broadcasts of 22 January 1965 each State which has made

[1] Article 16 permits certain reservations concerning Article 12; such reservations have been made by Denmark, Germany, Ireland, Italy, Luxembourg and the United Kingdom.

use of the possibility of totally excluding the protection of broadcasts by means of wire may continue to do so. Belgium has made use of the reservation under the present version of Article 3(1)(a); the United Kingdom has made use of the reservation under Article 3(1)(a) in the original version.[1] The protection of the Convention may also be restricted by reservation to those broadcasting organizations which are established in the territory of a Contracting State under its law and carry on broadcasts there (Article 3(1)(f), Article 10)); Denmark and the United Kingdom have made such a reservation. The Contracting States are entitled to specify an institution for their territory to receive notification of cases where the right of public transmission by wire has been refused in an arbitrary manner by the authorized broadcasting organization, or has been granted on unreasonable conditions.

The significance of the Convention in the present connection lies primarily in the protection of the broadcasting right against cable transmission. On this point the European Television Convention goes further than the Rome Convention. But the protection it affords extends merely to the related right of the broadcasting organization; it does not affect the right of third parties, especially those of authors, performers and manufacturers of audio material. Any Contracting State may denounce the Convention by giving one year's notice.

National laws differ more markedly in the field of related rights than in that of copyright.[2] The protection afforded by the German Copyright Act of 1965 is relatively far-reaching. Under Section 76(1) the performance given by a performer[3] may as a rule be broadcast only with his consent; this applies also to retransmission.[4] If the performance is produced by an undertaking (e.g. theatre or concert promoter) the consent of the producer is also necessary.

---

[1] cf. Announcements of 14.2.1968 and 31.7.1969, Deutsches Bundesgesetzblatt 1968 II 134 and 1969 II 1471.

[2] See on the protection of performers the study prepared by Gotzen at the request of the Commission, Performers' Rights in the European Economic Community, doc. XII/52/78; see also on the right of manufacturers of audio material and performers, Davies/v. Rauscher, Challenges to Copyright and Related Rights in the European Community, 1983.

[3] E.g. singers, soloists and orchestral musicians, conductors, actors, dancers, producers; see the definition in Section 73 Copyright Act.

[4] Under Section 76(2) however the performer's right is limited to a claim to reasonable remuneration if his performance is broadcast not live but with the help of lawfully produced audio or video material. In the case of members of groups of performers such as chorus, orchestra, ballet and stage groups not involving soloists, the consent of the group committee or the leader of the group is sufficient, Section 80(1) Copyright Act.

Protection in principle for performers against the broadcasting of their performances is provided also by the Danish Copyright Act,[1] the Luxembourg Act of 23 September 1975 on the protection of performers, manufacturers of phonograms and broadcasting organizations,[2] the Italian Copyright Act,[3] Irish law[4] and the law of the United Kingdom.[5] In the other States protection may be available in certain circumstances under general legislation.[6]

There are substantial differences between national laws on performers' rights. Thus in several Member States the performer's right consists merely in the right to give or withhold consent to the retransmission of his performance, especially by cable - and consent to the latter is sometimes presumed from consent to the broadcast - while in other countries the retransmission is expressly declared to be free.[7]

Attention must also be drawn to the performing right of the broadcasting organization. Like the Rome Convention, the German Act confers on broadcasting organizations the right to permit or to prohibit the rebroadcasting of their broadcasts.[8] Protective rights are also conferred on broadcasting organizations in Denmark,[9] Luxembourg,[10] Ireland,[11] Italy[12] and the United Kingdom.[13]

---

[1] Reproduced in Gotzen, loc. cit. page 152.
[2] Reproduced in Gotzen, Annex V, page 154.
[3] See Gotzen, Annex VI, page 158.
[4] See Gotzen, Annex VIII, page 167.
[5] See Gotzen, Annex VII, page 161.
[6] See Gotzen, points 31 et seq.
[7] See on the individual laws Gotzen, points 79 et seq., where a Community solution in the form of the grant of a right to remuneration is proposed, see points 83-84.
[8] Section 87(1) Copyright Act. The term "rebroadcasting" is used in different senses. In the Rome Convention it means only wireless broadcasting (as also Article 11 bis (1)(i) revised Berne Convention) whilst under German copyright law it generally includes also the retransmission of a broadcast by cable.
[9] Section 48 of Danish Act No 158 relating to copyright in literary and artistic works of 31.5.1961.
[10] Sections 9 and 10 of the Luxembourg Act on the protection of performers, producers of phonograms and broadcasting organizations of 23.9.1975.
[11] Section 19 of the Copyright Act of 8.4.1963.
[12] Section 79 of the Copyright Act of 1941, which expressly confers protection against rebroadcasting by wireless or by wire.
[13] Section 14 of the Copyright Act 1956; see on this point also III.5.

Finally, as regards the manufacturers of audio material (records, tapes, cassettes, etc.) the United Kingdom is the only State of the Community which grants them the exclusive right to permit or to prohibit a broadcasting using the audio material.[1] The German Act confers on the manufacturer, in the case of broadcasting or rebroadcasting, merely a right to a share in the remuneration due to the performer whose performance is recorded on the material (Section 86). The Italian Copyright Act also gives as a general rule merely a claim to remuneration (Section 72 et seq.) as also do the Danish[2] and Irish Laws.[3] In Luxembourg law on the other hand, in the case of a broadcast involving the use of audio material, the manufacturer of the material has no claim to remuneration.[4] Here, as also in Belgium, France and the Netherlands, the only claims which might arise would be those based on general principles of law, such as the law on unfair competition.[5]

As regards cross-frontier broadcasting in the common market, it may be said in general that related rights are not likely to amount to obstacles to the same extent as does copyright in the strict sense, as was noted under I.3. Those least likely to pose any problem are the rights of manufacturers of audio material, since the latter enjoy - except under the law of the United Kingdom - no right to prohibit cross-frontier broadcasting but at most the right to claim remuneration. Performers on the other hand may in certain circumstances have the right to take action against broadcasting and rebroadcasting which they have not authorized. So far as broadcasting organizations are concerned the main factor to be considered is the European Convention on the protection of television broadcasting.

The right of performers and broadcasting organizations to prohibit broadcasting or rebroadcasting which they have not authorized is limited by the fact that some of the Member States have not acceded to the relevant international agreements, or have made reservations, and also do not accord such rights under their domestic law. As regards cross-frontier broadcasts which are picked up in a Member State which does not confer any protection on the performance involved, such rights cannot be enforced whether the broadcast originates from a Member State which grants such protection or from one which does not, since the principle of territoriality applies also to this type of rights. The rights in question are relevant only when the broadcast or retransmission is picked up in a Member State which confers protection on them, and the holder of the right enjoys this protection there either by international treaty law or under the domestic law applicable to aliens.

---

[1] Section 12 of the Copyright Act 1956; cf. Davies/v. Rauscher loc.cit. point 240.

[2] Section 47 of Act No 158 relating to copyright in literary and artistic works.

[3] Section 17(1)(b) of the Copyright Act of 8.4.1963.

[4] Sections 7 and 8 of the Act on the protection of performers, producers of phonograms and broadcasting organizations of 23.9.1975.

[5] cf. Davies/v. Rauscher loc.cit. point 284.
cf. Davies/v. Rauscher loc.cit. point 249 et seq.

2. Ownership of rights and the law of contract

Where copyrights in a Member State are affected by a broadcast or retransmission - whether direct or via satellite or cable - it is necessary for the owner of the copyright to permit such broadcasting for this Member State, which is usually done by granting the corresponding rights of use. The copyright owner under the laws of all Member States is normally the creator of the work.[1] The position concerning films is not completely uniform: according to the law of some Member States copyright does not in this case arise in the natural persons who participated creatively in the making of the film but in the film producer.[2] Similarly the laws of several Member States provide that in the case of employed authors the copyright originally arises in the employer, but the majority of Member States regard the employee as the author subject to a presumption that he grants the employer appropriate rights of use.[3] Owners of businesses, even when they are corporate bodies, may sometimes be the original owners of rights, particularly in the field of related rights and especially in the case of the performing right of broadcasting undertakings and of manufacturers of audio material.

As mentioned above under II.1, radio and television broadcasts can affect a wide range of protected works and performances, and the field of possible owners of rights whose consent to the broadcast must be sought is correspondingly large. Only a limited number of such rights are in the hands of the original owners or their heirs, since frequently such rights will have been granted to third parties to use or to protect. Depending on the facts of the particular case, it may therefore be necessary to approach third parties. Usually these are collecting societies, publishing houses or other users of works.

Thus the major part of the repertoire of copyright music likely to be considered for broadcasting in the Member States is entrusted to collecting societies, which also cooperate on an international basis.[4] This simplifies the situation for the user of the work. The collecting societies do not however usually manage the so-called "major rights" to the stage presentation of musical-dramatic works;[5] these, like the stage rights of verbal material, are often held by music or theatrical publishing houses - either for several countries or worldwide or simply for individual countries - in so far as the author himself has not retained them. In the case of cinematograph films the broadcasting rights usually remain in the hands of the film producer, who will grant broadcasting rights only in such a way that

---

[1] For a comparative survey see Dietz, loc. cit. pages 75 et seq., points 96 et seq., with references.

[2] See Dietz, loc. cit. pp. 85 et seq.

[3] See Dietz, loc. cit. pp. 100 et seq. who also refers to the frictions arising from a European point of view, page 103.

[4] See on this point and the following points Dietz loc. cit. pp. 271 et seq. and the same author, Das Primäre Urhebervertragsrecht in den Mitgliedstaaten der Europäischen Gemeinschaft. Legislatorischer Befund und Reformüberlegungen. Studie erstellt im Auftrag der Europäischen Gemeinschaften, 1981, SG-CULTURE/4/81, pp. 5, 193 et seq.

[5] Compare Dietz loc. cit. page 277.

they have no detrimental effect on other forms of marketing, particularly the showing of the film in cinemas. In the field of verbal material, works of pictorial art and related rights, the collecting societies are less highly developed than in the musical sphere; the rights of use now under discussion are often retained by the authors themselves.

It may well be however that the holder of the rights has already granted the broadcasting rights in question to a broadcasting organization in the Member State in which the broadcast coming from another Member State is intended to be picked up and retransmitted. A conflict of rights then arises between the broadcasting organizations concerned. In practice such conflicts might be expected to arise fairly frequently since broadcasting organizations, which mostly operate on a national basis, usually seek rights of use only for their own territory.[1]

The inconvenience of having to deal with numberous holders of rights and reach agreements with them if it is desired to pick up and retransmit a radio or television programme is only partially mitigated by the European Agreement concerning programme exchanges by means of television films of 1958. The Agreement has not entered into force for Germany and Italy. It is concerned only with the right to grant or withhold consent for the use of television films, a right usually recognized as being held by the broadcasting organization which made the film. But this applies only subject to any contrary agreement with those who worked on the film and does not affect the copyright in works of literature, drama or art on which the television film was based. Nor does it affect the copyright in accompanying music or any copyright in films other than television films.

3. Summary

The transmission of broadcasts usually affects a number of copyrights and, in most Member States, also related rights. The rights of use are only sometimes held by the original owners of the rights; sometimes they are granted to marketing undertakings or collecting societies. On the international level protection is granted in all Member States, with certain differences particularly as regards related rights. The rights are split up on a territorial basis; rights of use may be granted on the footing of territorial limitation to individual States. This situation can give rise to legal obstacles to cross-frontier broadcasting in the common market.

---

[1] On the law of broadcasting contracts in the Community see Dietz, Das primäre Urhebervertragsrecht in den Mitgliedstaaten der Europäischen Gemeinschaft, loc. cit. pp. 149 et seq.; compare, for a comprehensive survey of German law, Ulmer, Gutachten zum Urhebervertragsrecht, insbesondere zum Recht der Sendeverträge, compiled in response to a request by the Federal Minister of Justice, pp. 57 et seq.

III. Alternative models

The following section discusses several possible ways of resolving the problems arising from this situation for the cross-frontier transmission of radio and television programmes in the Community. In each case, it also examines the repercussions this has on the creativity and legitimate economic interests of authors and of the culture industries. After weighing the pros and cons, the Commission puts forward for discussion a model suited, in its opinion, to reconcile the freedom to broadcast across frontiers and the legitimate interests of authors.

1. Unrestricted re-transmission after legal primary transmission?

In considering ways of dismantling the copyright barriers to the free exchange of sound and television broadcasts within the Community, the first solution that suggests itself is the treatment of a similar problem in connection with the free circulation of goods, where the principle has of course been established that books, gramophone records, musicassettes and similar physical reproductions must be allowed to circulate freely within the common market in accordance with Articles 30 and 36 of the EEC Treaty provided they have been placed on the market of a Member State with the permission of the holder of the rights of exploitation (cf. I.3 above). It is argued that the work protected by the copyright is not affected by regulating the exercise of exclusive rights in this way. One could go on to suggest that it must therefore also be permissible to re-transmit broadcasts throughout the common market once they have been broadcast in one Member State with the approval of the copyright holder.

This line of reasoning was not followed by the Court of Justice in its "Coditel" judgment,[1] however, where it pointed out the special nature of protected works exploited in non-material form as distinct from those exploited in material form. A feature of exploitation in non-material form is that works are made available to the public by performances which may be infinitely repeated; in the case of a cinematographic film (as in the case at issue) the owner of the copyright and his assigns had a legitimate interest in calculating the fees due for authorization to exhibit the films on the basis of the actual or probable number of performances, and in authorizing a television broadcast of the film only after it had been exhibited in cinemas for a certain period of time. The rights of the copyright owner and his assigns to require fees for any showing of the film was part of the essential function of copyright in this literary and artistic work. While Article 59 of the EEC Treaty prohibited restrictions on the freedom to provide services, the Court said in summing up, it did not cover limits on the exercise of certain economic activities which had their origin in the application of national legislation to protect intellectual property, save where this constituted a means of arbitrary discrimination or a disguised restriction on trade between Member States.

[1] Case 62/79 /1980/ECR 4, p. 881, at 902-903 (grounds 13-15).

The scope open to a copyright owner to secure adequate remuneration for the exploitation of his work is different depending on whether it takes material or non-material form. In the case of books and records, for example, the fees can be based on the number of copies produced or sold and it does not matter ultimately where in the common market these copies are marketed. Where a contract is made for the broadcast of a protected work or performance, broadcasters normally pay the copyright holder on the basis of the potential audience they are in business to reach or the geographical area in which their programmes can be received. Broadcasting companies are usually financed in the first instance from the licence money collected from their audience but, where they depend on advertising revenue, fees are based on the number of households receiving the advertising. If other broadcasters were free to take a programme without payment for re-transmission outside the original reception area, the copyright holder would lose the chance of obtaining a fee covering the new audience. The fundamental principle that copyright holders should be able to obtain remuneration wherever their work is commercialized would be breached.

The problem is compounded by competition between different types of exploitation in non-material form. In the "Coditel" case an important factor was that the commercial return on exhibiting a film could be seriously impaired if it was shown at an early stage on television.

2. Conclusion of contracts on direct broadcasting by satellite?

An alternative to the approach described in 1 above (unrestricted re-transmission of legal primary broadcasts) would be to rely on current copyright laws in the hope that cross-frontier broadcasting can develop within the framework of private contracts. The chances of achieving regulation in this way vary depending on the type of broadcasting involved.

The most promising field for this would seem to be direct broadcasting by satellite (DBS). If it is accepted that satellites are merely an extension of the transmitter ("extended antenna"), conflict over copyright will be ruled out automatically, just as it is in cases where a transmitting station can be received directly through the ether in parts of another country outside the normal reception area it is intended to serve.

Yet even if DBS is thought to affect copyright in the receiving country, contractual solutions are conceivable. Broadcasters, if they do not want to be in breach of the law, would ensure that the holders of copyright and related rights grant them permission to broadcast to the additional areas they are able to reach directly with their programmes as the result of new technologies or new broadcasting strategies. The number of copyright holders they would have to sign contracts with is of course large; but broadcasting undertakings generally have to do this anyway for the "normal" reception area they serve. The only significant difference would be in the size of the area covered by such contracts.

Much the same applies to programmes distributed by wire or cable to neighbouring countries by the original broadcaster.

Nevertheless, difficulties could arise for broadcasters operating on the basis of statutory licences of national application who would have to enter into contracts covering other countries that do not have the statutory licensing system. Conflicts could also arise in cases where the copyright protection in the different Member States concerned is not identical; for example, a performing artist might not have his performance protected in the country of the original broadcast but be protected in a country which can receive the relevant programme via satellite. Complications could also arise between several broadcasting undertakings or similar programme presenters. Where a copyright holder, for instance, had assigned exclusive broadcasting rights to a broadcaster in one Member State for the area it serves, the same holder would no longer be able to grant a broadcaster in another Member State the right to broadcast to the first area; only the original broadcaster would be able to give such permission.

In addition to changes in the contractual relationships of broadcasters that intend to extend the geographical area they serve, particularly via satellite or cable, it will be important for there to be more collaboration between broadcasting companies themselves in the different Member States. Where authors and copyright holders do not retain broadcasting rights for themselves, it will be necessary for those exploiting the rights to agree among themselves. Standard forms of contract specifically designed to cover cross-frontier broadcasts are likely to play an important role and should be encouraged by the Community.

All in all, however, the difficulties and added complications do not seem to be either unreasonable or unamenable to solution. It would only be necessary to legislate if the contractual approach fails.

3. Conclusion of contracts on re-transmission by other undertakings via broadcast or cable?

Contracts are less likely to be a sufficient solution in cases where it is not the primary broadcaster which decides to transmit programmes to another country but a secondary undertaking, in particular a cable company. If it were accepted that transmission by cable is affected by a copyright, cable companies would typically be faced by the situation in which they do not hold the relevant broadcasting rights and will often not be able for practical reasons to acquire them in time.

Contractual agreements with the primary broadcaster will be of use only where the primary broadcaster itself holds the rights for the area concerned, that is its own and any other rights it has acquired, in advance, for the Member State in which the cable company is operating. Where the primary broadcaster has not been granted such rights, the cable company must turn to the copyright holders in each case whose rights are affected by a broadcast. This is potentially a large number of holders.

Acquiring their rights might be feasible if it is done through a collecting society but not if separate contracts have to be signed with each copyright holder. Since cable transmissions usually go out at the same time as the primary broadcast, it will be almost impossible to secure individual rights in this way. Usually the schedule of the primary broadcaster will not be known early enough to the cable company to give it time to find out who the holders of the rights are, to negotiate with them and to acquire the rights (leaving aside the problem of last-minute changes in programmes). Cable companies would be totally dependent on the readiness of several copyright holders to cooperate.

If the negotiations with just one were to fail, this could hold up the re-transmission of whole programmes. It is technically difficult to black out single programmes or parts of them; but the schedules of even the most earnestly dedicated cable company would inevitably contain almost more blackouts than programmes. This would certainly not help to create a free exchange of broadcasts within the Community.

The same considerations apply to stations picking up broadcasts from other countries and re-broadcasting them in the traditional way.

From the above it is clear that drawing up model contracts between primary broadcasters and collecting societies on the one hand and cable or other broadcasting undertakings on the other can only be a limited answer. Primary broadcasters can only grant rights they already hold and are allowed to transfer to others, while collecting societies are confined to the rights they represent. Even a standard contract would not give the re-broadcaster a guarantee that no third party will take proceedings to protect its copyright, by stopping re-transmission with an injunction or even prosecuting the secondary broadcaster.

A contractual solution offering more security would involve very complex collective agreements. Some attempts at this are already being made in some Member States (see, for example, supra., Part Five, AII4). One way would be for primary broadcasters to try to acquire Community-wide broadcasting rights so that they can make agreements with the secondary broadcasters. Additional problems might still arise in the not infrequent cases where a copyright holder has contracted with several primary broadcasters. Another enormous difficulty is how to determine, at the time the rights are acquired, what the remuneration of the copyright holder for the re-transmission is to be, since the new technologies are only just being introduced and traditional broadcasting, satellite broadcasting and cable transmission are likely in future to be overlapping and competing in constantly changing combinations.

In the final analysis, the most practical solution might be to concentrate all rights to re-transmission with a single Community collecting society or with a central association of all the national collecting societies supported by all primary and secondary broadcasters. Such a major concentration of power would be a cause for some concern in terms of competition law. In fact, however, experience has shown that it can be decades before a majority of all copyright holders in a given field can be persuaded to subscribe to a national collecting society. A comprehensive structure for the whole of the Community is a remote prospect at present. In the area of broadcasting rights particularly, fully-fledged collective exploitation of rights is a long way off. The necessary individual contracts will only accumulate slowly.

4. Obligation to use collecting societies, or statutory licensing?

It would seem, therefore, that there is no alternative to legislation. Several possibilities are open. One way would be to continue to grant exclusive broadcasting rights but to regulate their exploitation by statute. Another approach might be to impose statutory licensing on broadcasting rights or to reduce them to the status of a simple entitlement to remuneration. Features of both solutions could also be combined. The different possibilities are looked at in more detail in what follows, with special reference to cable re-transmission as being the most important aspect in practical terms.

The first possible solution would concentrate on collecting societies. If all rights affected by cable transmission in each Member State were placed in the hands of a single collecting society or a small number of such societies, it could be expected that agreements would be made with cable companies which gave adequate protection to the interests of both copyright holders and cable undertakings. The concentration of rights with the collecting societies could be achieved by introducing a provision that the right of an author to permit re-transmission by cable can only operate through a collecting society.[1]

As against offering simply an entitlement to remuneration through the compulsory use of a collecting society, a system of exclusive rights in full form would have the advantage that the level of remuneration could be negotiated between the parties without having to be laid down by statute or by the courts. Collecting societies would then be in a better negotiating position. The exploitation of rights solely through collecting societies would ensure that third parties are not able to stop a programme from being broadcast. They would have an incentive to transfer their rights to a collecting society.

---

[1] A solution of this kind, with collective multilateral contracts at national and international level, centralized exploitation of rights and obligatory use of a collecting society, is proposed in the resolution passed by the Cable Television Symposium held in Amsterdam between 16 and 20 May 1982.

Achieving free exchange of broadcasting services under this model, however, would mean that the competent collecting societies and the cable undertakings would have to agree among themselves. When one considers the variety of different types of rights involved and the fact that agreements would have to be made with the collecting societies of several Member States, some of which will still have to be set up, there is a danger that the desired freedom of broadcasting would not be attained until some remote time in the future.

The same objection could be made to a solution based on contractual relationships in the first instance, backed by legislation only if this approach fails.[1]

The second alternative would be to downgrade the power of holders of copyright and related rights to authorize re-transmission by cable so that it was merely an entitlement to remuneration, or to impose on broadcasting rights a statutory licensing requirement that permits cable transmission. Statutory licences would be preferable to the more complicated system of compulsory licensing, under which an entitlement to a licence has to be enforced, usually by a time-consuming procedure. Statutory licensing would have the advantage over the previous model discussed that cable transmission would become permissible on the basis of a simple change in the law, even if the question of fees would still have to be clarified.

It would probably be impossible to lay down the level of remuneration in legislation. The rights affected are too different and cable broadcasting is still very much in its infancy. Any legislation would therefore have to be confined to specifying "equitable remuneration" and giving criteria on which to calculate it, the hope being that fees would be negotiated collectively among the parties concerned; provision could be made for arbitration by the public authorities, the courts or an arbitrator if such negotiations failed.

If fees were fixed by collective agreement the problem of third parties would arise again, as well as the difficulty of including a wide variety of different types of work and performance and their related rights. The problem of those not party to such agreements could be resolved by making the claim to remuneration dependent by law on using a collecting society. A less acceptable solution would be to make the collective agreements binding on everyone since, in practical terms, it would mean that a substantial share of the rights in a given field would first have to be assigned to collecting societies so as to confer on them an official status.[2] This degree of organization has not yet been reached either for all types of rights or in all parts of the Community. Making collective agreements generally binding would also leave open the problem of actual payment. Cable companies could well be faced with claims from a large number of individual holders of rights.

---

[1] Cf. in this connection a draft set of model regulations drawn up under the Revised Berne Convention, the Universal Copyright Convention and the Rome Convention by ILO, WIPO and the Secretariat of UNESCO (Document BEC/IGC/ICR/SC. 2/CTV4 of 15 November 1982).

[2] Cf. Sect. 22 of Denmark's Copyright (Works of Literature and Art) Act No 158.

5. Models in internal law

Turning to current practice, one finds that in the United Kingdom the re-transmission by cable of broadcasts of the domestic broadcasters (BBC, ITV) is permitted virtually without restriction (Sect. 40 of the Copyright Act 1956). A similar provision has been made in Ireland (Sect. 52 of the Copyright Act of 1963). The re-transmission of foreign broadcasts requires a licence granted by mutual agreement. In the event of disputes, the terms of licences can be laid down in the United Kingdom by the Performing Rights Tribunal, which may determine that no remuneration is to be paid at all (Sect. 28).

The introduction of statutory licensing is being discussed in the Netherlands.[1] Under Sect. 17a(1) of the present Copyright Act, the Government may issue an order introducing statutory licensing for the wireless or cable re-transmission of sound and television broadcasts of literary, artistic and/or academic works. Moral rights must be observed and authors must receive equitable remuneration, to be determined by the courts in cases of disputes. No such statutory order has yet been made, however.

Similar draft legislation has been laid in Belgium, for example a bill amending the Copyright Act of 1886 to introduce licensing for the transmission of broadcasts by wire or cable, brought before the Senate on 18 June 1981 (Documents parlementaires, Sénat 1980-81, No 678/1). This bill was overtaken by the dissolution of Parliament at the end of 1981. A corresponding bill was presented again to the Senate on 3 March 1982 (Documents parlementaires, Sénat 1981-82, No 147/1, see also Chambre des Représentants 508 (1982-83) No 1 of 19 January 1983). This bill permits public transmission by wire or cable of broadcast works of literature and art at the same time as the original broadcast (Section 21b). The simultaneous, complete and unaltered transmission of national broadcasts is to be free of claims for remuneration (Section 21c). In all other cases, the courts are to fix the level of remuneration where mutual agreement cannot be reached (Section 21d).

A further example from outside the Community which might be mentioned is the 1980 amendment to the Copyright Act in Austria. This allows unrestricted re-transmission by cable of programmes of the "Osterreichischer Rundfunk" (ORF) within Austria. Cable re-transmission of programmes of foreign broadcasters is subject to statutory licensing. In the latter case, authors are to receive "equitable remuneration" which they can cliam only through a collecting society. The Act lays down guidelines for calculating remuneration.

[1] Cf. Eindrapport van de Commissie Incasso, Beheer en Repartitie Auteursrechtgelden, Ministry of Justice, The Hague, May 1982.

IV. Compatibility of the Directive with international law and Article 222

1. International copyright law

Whatever solution is chosen, it must be compatible with the international agreements to which the Member States are party, in particular Article 11 bis of the Revised Berne Convention for the Protection of Literary and Artistic works, which remains in force unchanged since the Brussels version and is binding on all Member States. Of special importance in this connection is Article 11 bis (2) regulating the scope of reservations entered by the signatories. This stipulates that the author's personal rights, especially the right to mention of his name and his protection against distortion of his work, may not be restricted.

This would be guaranteed pertinent national provisions were confined to rights of commercial exploitation and did not affect personal rights at all. The exercise of personal rights is unlikely to be a seriousobstacle to cross-frontier broadcasting anyway.

An author would also be assured the right to "equitable remuneration", to be determined in the first instance by mutual agreement. In the absence of agreement, remuneration would be fixed by the "competent authority". The introduction of a requirement that copyright can only be exercised through collecting societies would not conflict with the Convention[1] as long as an author can be sure that a "competent authority" (which may be a court or arbitration tribunal[2]) is able to determine whether the remuneration offered is equitable.

There is broad agreement, however, that Article 11 bis (2) in principle allows the introduction of statutory licensing in the law of countries of the Union in respect of cable undertakings,[3] although there is argument about some of the details. Arrangements of this kind would also be compatible with the Rome convention (cf. I.2 above).

Conflict with the Convention on the Dissemination of Programme Signals Relayed by Satellite could be avoided by stipulating that the freedom granted to cable undertakings to retransmit broadcasts would not include unauthorized "tapping" of point-to-point broadcasts via satellites. Should this way of "acquiring"

---

[1] See Nordemman/Vinck/Hertin, Internationales Urheberrecht, Art. 11 bis RBU, Rdz. 6.

[2] See Masouyé, Kommentar zur Berner Verbandsübereinkunft, Art. 11 bis, Nr 16 (S. 78); Bappert/Wagner, Internationales Urheberrecht, Art. 11 bis RBU, Rdz. 11.

[3] Nordemann/Vinck/Hertin, Art. 11 bis, Rdz. 6; Masouyé, Art. 11 bis, Nr. 15, S. 77; Bappert/Wagner, Art. 11 bis, Rdz. 8; Dittrich, Copyright 1982, 294 et seq with further references. See also Desbois/Françon/Kerever, les Conventions internationales du droit d'auteur et des droits voisins, 175, No 156.

broadcasts come to be of more practical significance in the future, especially as the result of technological progress, it would be worth considering whether the directive should require the two Member States party to this Convention (Germany and Italy) to give a year's notice to end it, as provided for in Article 11. It would then not be necessary to introduce the appropriate restriction.

The only major barrier in international law to the liberalization of broadcasting exchange is the European Convention on the Protection of Television Broadcasts. It applies only to television and not sound broadcasting and, rather than protecting copyright proper, is designed to protect related rights held specifically by broadcasters. Curiously, this protection of the technical and commercial aspects of broadcasting in the area of cable transmission is more developed than the protection afforded to the author of a creative production under the Berne Convention.

The Member States signatories to the television convention are Belgium, Denmark, Germany, France and the United Kingdom. Belgium and the United Kingdom have made the reservation permitting them to allow unrestricted cable transmissions from other countries, although Belgium has adopted the 50% solution allowed under the revised version of the relevant provision.

The other countries are no longer able to claim exceptions for themselves under the version which they have signed, since Article 10 of the Convention stipulates that this must be done at the time of signature or deposition of the ratification/accessior document.

Under the Convention, broadcasters are protected across the whole gammut of broadcast television regardless of whether copyright and/or related rights are affected. This gives broadcasters a commanding position. By not giving permission for cable retransmission, they can stop free broadcasting altogether even where there are no copyright barriers to a retransmission by cable.

Article 3(3) of the Convention allows the contracting parties to designate a body to consider, for their own territory, any casesin which cable rights have been arbitrarily denied by a broadcaster or granted only on unreasonable terms, but this does not seem to answer the problem. Even if this provision is interpreted to mean that contracting parties which are also Member States could designate a single body common to them all - such as the Commission - and a Directive were adopted committing them to do so, it would still be unclear what the powers of such a body would be. It is not even clear from the wording of Article 3(3) whether such a body is meant only to lend its good offices or whether it can regulate general as opposed to individual cases, such as by introducing a system of statutory

licensing.[1] In addition, it would always be necessary to await the outcome of negotiations between individual parties and these might be time-consuming.

Unless general agreements between primary broadcasters and cable undertakings are arrived at within a reasonable period, the only way to eliminate the barriers created by the Convention would be for the Member States which are parties to it, and have not availed themselves of the facility to liberalize cable transmission completely, to denounce the Convention. Under Article 14, one year's notice is required. Of course, the Community countries would be free to accede to a new Convention that made allowance for the free exchange of broadcasting within the Community. Indeed, under Article 14(2), the Convention will expire on 1 January 1985 for those countries which have not signed the Rome Convention and do not join it by that date. Belgium and France are currently the only Member States party to the television convention that have not signed the Rome Convention.

Apart from the restrictions imposed by the European Convention on the Protection of Television Broadcasts, there is nothing in international law to prevent the Community from introducing a Directive requiring the Member States to regulate cable retransmission at national level.[2]

2. Article 222 of the EEC Treaty

Since the individual rights of authors of literary or artistic works rank as property in all Member States, the solution chosen must also be consistent with Article 222, which reads as follows: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

The Commission has already examined in depth the significance of Article 222 in relation to the rights of a trade mark proprietor.[3] Its observations apply *mutatis mutandis* to copyright. The following points may be made.

---

[1] Nordemann/Vinck/Hertin, loc. cit., p. 379 f. This is in contrast to the report of a Working Party of the Council of Europe (Comité Directeurs sur les Moyens de Communication de Masse - Comité d'Experts Juridiques en Matière de Média, 12 August 1982 - MM-JU (82) 4, p. 38) which seems to attribute the same weight to Article 3(3) as to Article 11 bis (2) of the Berne Convention.

[2] See Dietz, loc.cit., p. 157 et seq.

[3] Commission of the European Communities, "The need for a European trade mark system. Competence of the European Community to create one", doc. III/D/1294/79, Brussels, October 1979, pp. 11-14; Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil 1980, p. 33 (pp. 36-37); International Review of Industrial Property and Copyright Law 11 (1980), p. 58 (pp. 68-71); Révue internationale de la propriété industrielle et artistique 1979, p. 339 (pp. 344-347); Rivista di diritto industriale 1980, p. 162 (pp. 171-174).

It will be seen from the wording of Article 222 that the EEC Treaty does not itself regulate the systems of property ownership in the Member States nor does it empower the Community institutions to do so. It leaves the national systems of property ownership as they are and accepts them.

Article 222 is similar to Article 83 of the Treaty establishing the European Coal and Steel Community and to Article 91 of the Treaty establishing the European Atomic Energy Community, but it is not restricted, as they are, to specific items of property. Article 222 therefore also covers the rules governing the system of ownership of literary and artistic property.

A study of the historical background to Article 222 shows that the Contracting Parties wished to protect themselves from interference by the Community in the matter of property ownership, which is of importance to their economic systems. Each Member State wished to retain the power to decide for itself whether the various means of production should be publicly or privately owned, or both. In particular, questions of expropriation of property so that it is held in public ownership and of transfer of property into private ownership were to remain the preserve of the Member States.

This is the meaning of Article 222 and of the words "rules governing the system of property ownership" used in it. This is a reference to the way in which property is owned and to the structure of ownership. Each Member State is to continue to decide whether literary or artistic works are to be private and/or public property, whether copyright should be expropriated or put into private ownership and, if so, for whose benefit and at whose expense.

"Rules governing the system of property ownership" are not the same thing as "ownership" or "proprietary rights". The latter are by no means unaffected by the EEC Treaty. On the contrary, a number of provisions of the Treaty and of the Community law derived therefrom govern the rights and obligations arising from ownership of movable and immovable property. They extend or limit not only the enjoyment or exercise of proprietary rights but also their scope and content.

The most noteworthy example is that of proprietary rights in undertakings. Under Article 54(3)(g), the Council and the Commission are obliged among other things to coordinate "the safeguards which, for the protection of the interests of members ....., are required by Member States of companies or firms ...". The purpose of this coordination by means of directives, which has already been partly achieved, is, in particular, to "make equivalent" the rights - including the proprietary rights - and duties of members of the various types of companies which exist in the Member States. The aim is to promote freedom of establishment, free movement of capital, investment in companies, their growth and undistorted competition between companies in the common market.

Articles 54(3)(g) and 222 show how the EEC Treaty itself delimits the powers. The content of certain proprietary rights and the limits to, or scope, of the protection afforded to them may be laid down by the Community to the extent required by its objectives, and in particular to the extent required for the proper functioning of the common market. On the other hand, the assignment of property to private and/or public owners, and hence the question whether property is to be expropriated from private owners or to be transferred from public into

private ownership, remain the preserve of the Member States. The established practice of the Commission and the Council in the field of company law confirms this interpretation of Article 222.

It can scarcely be that a different rule should apply to the field of copyright law. The free movement of broadcasting services and a common market in broadcasting are to be established by approximating the content of and limits upon the ownership of certain copyrights and performing rights. Following the ruling in Coditel, there is no other way in which the copyright restrictions on intra-Community broadcasting can be progressively abolished. Even in the field of literary and artistic property, Article 222 is not designed to prevent the Community from attaining its objectives. It merely obliges the Community in the course of its activities to respect property ownership in the Member States.

The planned directive must not, therefore, encroach upon the essence, substance[1] or existence of copyright ownership in the Member States. That would be an action analogous to expropriation and would prejudice the rules in Member States governing the system of property ownership.

In well-established case law, the Court accordingly distinguishes between the existence of intellectual property rights and the exercise of those rights. The exercise of proprietary rights is covered by the Treaty whereas the existence of them is not. In Consten/Grundig, the Court ruled that:[2]

"Article 222 confines itself to stating that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise ...".

Since then, the Court has not had occasion to consider Article 222, but it has stated, relying on Article 36, "that, although the Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty".[3]

---

[1] Case 4/73 Nold [1974] ECR 491, at 508, ground 14; Case 44/79 Hauer [1979] ECR 3727, at 3747, ground 23, and at 3749, ground 30.

[2] Joined Cases 56 and 58/64 [1966] ECR 299, at 345.

[3] In the first place, Case 78/70 Deutsche Grammophon [1971] ECR 487, at 499-500, ground 11, together with four other rulings, and then Case 3/78 American Home Products [1978] ECR 1823, at 1840, ground 9.

In Coditel II, it was held that "the distinction, implicit in Article 36, between the existence of a right conferred by the legislation of a Member State in regard to the protection of artistic and intellectual property, which cannot be affected by the provisions of the Treaty, and the exercise of such right, which might constitute a disguised restriction on trade between Member States, also applies where that right is exercised in the context of the movement of services."[1]

The Court also distinguishes in relation to the Community's law-making powers between acts depriving owners of the right to property and acts restricting the exercise thereof;[2] moreover, it places the following limits on restrictions on the use of property introduced by legal acts of the Community: "Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property ..., it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."[3]

Transforming the exclusive right of cable re-transmission into a right to remuneration enforceable only through collecting societies could not be regarded as an act depriving the holder of his copyright. This is because, first, it would not affect an author's moral rights, and in particular the right to be named and the right to protection against distortion. Secondly, the author's right to the economic exploitation of his creation would be guaranteed because he would be entitled to remuneration in respect of each performance of his work.

Such a provision would, therefore, relate to the exercise of copyright but would not encroach upon its substance. The Court takes the view that "the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright"[4] in so far as it involves the right to exploitation in non-material form (performing right). Such persons "have a legitimate interest in calculating the fees due in respect of the authorization to exhibit the film on the basis of the actual or probable number of performances and in authorizing a television broadcast of the film only after it has been exhibited in cinemas for a certain period of time".[5]

---

[1]
[2] Case 262/81 /1982/ ECR 3381, at 3401, ground 13.
[3] Hauer at 3746, ground 19.
[4] Hauer at 3747, ground 23.
[5] Case 62/79 Coditel/Ciné Vog /1980/ ECR 881, at 902, ground 14.
Coditel/Cine Vog at 902, ground 13.

A statutory licence to re-transmit by cable simultaneously and without changes radio and television broadcasts in the Community would not interfere with these interests. It would not impinge upon the right of authors to primary transmission and would thus leave them free to decide whether and when they wished to exploit their works on television. For every cable re-transmission in the Community, they would have a right to remuneration that could be enforced by means of a practicable procedure.

An arrangement of this kind is also necessary in order to attain the EEC Treaty objectives of general utility, in the case in point the cross-frontier movement of services. The principle of territoriality, international treaties and national law impede the re-transmission by cable of foreign radio and television programmes in the Community (see I.3 above). Contracts in themselves are not sufficient because they do not have the necessary coverage and are unable fully to resolve the practical problems that arise (see III.3 above).

Lastly, in view of the objective pursued, a statutory licence conferring entitlement to equitable remuneration would not place a disproportionate burden on the owner of the cable re-transmission rights. This is because an arrangement of this kind would expressly recognize the cable re-transmission of foreign programmes as involving questions of copyright and would thus remove the justification for certain transmission practices.

Naturally, in giving permission for the initial broadcast, a copyright holder would have to consider the possibility of re-transmission within the Community and arrange his marketing strategy accordingly.

In the final analysis, the disadvantages a copyright holder may suffer as a result of conflict between different forms of exploitation derive from the way the associated rights are segmented nationally; the need for this cannot be justified solely by technical imperatives such as different languages, patterns of viewing and listening, the organizational structure of broadcasting companies, etc. It should surely be the Community's appointed task to work against the commercial segmentation of markets in all fields, including the exploitation of intellectual property rights, and to promote a free exchange of services in the media industry so that in this area, too, a common market can be achieved.

As to the amount of such remuneration, there would have to be adequate protection of the interests of authors, with provision being made in particular to deal with the reduction in the market value of supplementary rights (such as film rights) which might ensue under a system of statutory licencing of cable transmissions.[1]

---

[1] See the critical remarks of Dietz in loc. cit., p. 162, although his attitude seems generally more positive in loc. cit., p. 268.

For the rest, the introduction throughout the Community of a right to remuneration for the cable re-transmission of radio and television programmes would enhance the chances that the owner of a right had of receiving equitable remuneration for each performance. In all the cases where it has not as yet been possible to conclude contractual agreements with cable companies, rapid enforcement of the right to remuneration could be expected if an arbitration procedure were introduced. Lastly, according to copyright experts, a central arbitration body with a highly qualified staff that kept under close review the growth of cable television in the Community, could be expected to consider as equitable a higher remuneration for the owners of rights than the owners themselves have been able to obtain in decentralized negotiations.

V. Ingredients of a solution

The object of the planned Directive should be to permit free movement of services between the Member States of the Community. It will, therefore, have to cater for those cases in which a cable company established in one Member State wishes to transmit by cable, either in its home country or in another Member State, a programme beamed by a broadcasting organization in another Member State.

However, if the cable company and the broadcasting organization are established in the same Member State, the cross-frontier supply of services will not normally be affected. Until such time, moreover, as a common market characterized by conditions similar to those obtaining on a domestic market also becomes an objective (something that will have to be discussed), there is no reason to introduce rules for purely national transmissions by cable.

The situation is different, though, if the cable network operated by the cable company that is established in the same Member State as the broadcasting organization reaches beyond an internal Community frontier into one or more other Member States. In this case too, cable transmission must be permitted in so far as it crosses an internal Community frontier.

Another possibility is that the broadcasting organization established in the same Member State as the cable company will transmit a programme only to one or more other Member States, and not within its country of establishment. In such a case, steps must be taken to enable the cable company also to "re-import" the programme across the internal Community frontier in question into its country of establishment and to disseminate it there.

By contrast, the Directive need not cover transmissions sent by a broadcasting organization established outside the Community, nor is there any need to ensure that cable transmissions can be broadcast in areas outside the Community.

Provided the rules set out in the Directive are applied in the manner described above, it should be of no consequence whether the transmission can also be received direct or whether the receiver is located in the broadcaster's service area. If receivability were the criterion, application of the rules would depend, in individual cases, on fortuitous factors associated with reception conditions and the technical development of receiving equipment and on other imponderables, and this would detract unreasonably from legal certainty. Thus, it would be unacceptable for, say, a cable company in a particular Member State to be exempt from the requirement to seek permission from the holders of the copyrights and the performers' rights where geographical areas with poor direct reception were concerned but not to enjoy such exemption in the case of areas with better reception. For the rest, the local re-broadcasting of programmes should not be afforded preferential treatment under copyright law, to the detriment of the long-distance transfer of programmes.

It should also be immaterial whether the cable company receives the signals transmitted by the broadcaster direct, via a microwave link handling a wireless satellite signal intended for the general public, or via cable. Nor should it matter whether the signals are picked up from a primary or a relay transmission. The rules should also apply to cases in which the cable operator is located at some distance from his receiving aerial, with the signals being sent from the aerial to the cable station as a wireless transmission, and in particular using a microwave link, or as a line transmission.

There is no way of identifying as yet the detailed technical developments that will take place. As a rule, what matters is that the signals should come from one Member State and be broadcast in another; the manner in which the signals cross the internal frontier is irrelevant. As explained above, the only exception should concern the "tapping" of a point-to-point satellite transmission not intended for direct reception by the general public, such "tapping" being prohibited under the Satellite Agreement; this exception should not be regarded as constituting a restriction on free broadcasting.

It is doubtful whether the Directive should attempt to define more closely the concept of cable company and/or cable (or line) transmission. Neither the Revised Berne Convention nor the Rome Convention nor the European Agreement on the Protection of Television Broadcasts contains any such definition. The member countries above all approach differently the questions as to how community antenna stations, which are irrelevant as regards the right to broadcast, are to be distinguished from cable companies and whether, in practice, the activities of cable companies within a broadcaster's reception area are to be equated with those of community antenna stations.

The latter question is of no consequnce for the Directive, which should, in any event, apply to the cases of cross-frontier transmission listed there, regardless of whether the signal could, at the same time, be received direct. The question as to the distinction between cable companies and community antenna stations need not be resolved in the Directive either but can be left to national legislatures. This is because the area which the relevant national legislation allocates to cable transmission (line broadcasting) will be liberalized under the Directive. The area allocated to community antenna stations is a priori exempt from copyright law since the right to broadcast is not affected as we are concerned here with reception rather than with its necessary corollary, transmission. As a result, the difference between

Community antenna stations and cable companies in the individual Member States is simply whether or not a fee is payable. It can be accepted that, to this extent, the dividing line will not be altogether uniform.

For the rest, the Directive should apply to both radio and television transmissions.

Rules aimed at liberalization might well be needed only in respect of simultaneous cable transmission as the main activity in practice of cable companies. Where programmes are recorded by a cable company for transmission at a later date, the right of exploitation is affected in not only its non-physical but also its physical form (reproduction); film distribution and the market in cassettes and records may also be affected. If a cable company wishes to record foreign transmissions with a view to broadcasting them at a later date, it can reasonably be expected to obtain the consent of the holder of the right.

This is not to overlook the fact that this solution will make it more difficult to adapt foreign transmissions (synchronization, sub-titles in the receiving country's language, reduction in length, inclusion of advertising spots, etc.). However, such interventions will a priori clash with the prohibition under copyright law on amendments to the work and with the author right to adapt the work and will, in many cases, justify objections based on the author's moral rights. As provided for in the second sentence of Article 11bis(2) of the Berne Convention, however, the moral rights of the author must, in no circumstances, be prejudiced.

All the above reasons provide justification for restricting the scope of the Directive to simultaneous cable transmission. After all, the purpose of the Directive is to enable the inhabitants of each Member State to receive the same transmissions as are broadcast at any given moment in other Member States. It should be as if each broadcaster were supplying the entire common market with its transmissions. However, the Directive's immediate objective cannot be to make the programmes so interchangeable that the cable companies are able to put together their own programmes as they wish and on the basis of their own schedule. If they wish to use recorded parts of foreign programmes for their own programmes, they must obtain the approval of the holder of the right to the extent that they do not benefit from special rules on ephemeral recordings.

By contrast, the partially simultaneous adoption of a programme, that is to say the adoption of individual, self-contained transmissions, should not be excluded.

A statutory licence might be recommended as the most effective means of achieving liberalization. Accordingly, the Directive would oblige Member States to amend their relevant laws by an appropriate date, e.g. within two years after the Directive's entry into force, in such a way that the right of prohibition enjoyed by copyright holders and, where appropriate, by holders of related rights, in so far as these confer rights of prohibition, in connection with cable transmission by radio and television organizations is repealed under the conditions described above although it must still be possible to invoke the author's moral rights. Each Member State can be free to decide whether it would also like to liberalize the transmission by cable of national or third-country programmes.

Action is also needed with regard to the related rights of television companies in those Member States in which the European Convention on the Protection of Television Broadcasts is still in force and has not been undermined by exceptions for cable transmissions. The Directive would require such countries to denounce the Convention as provided for in Article 14 so that its provisions no longer apply to them, and at the latest by the time limit set for the adaptation of their laws.

The interests of authors and holders of related rights should be protected by granting a right to equitable remuneration. The Directive should lay down criteria for determining such remuneration, with particular attention being paid to the following:

- the usual level of comparable contractual licence fees for cable transmission;

- the usual remuneration paid for the first broadcast;

- the number of receivers linked to the cable network and the level of the fees paid by them;

- the likelihood and extent of any impairment of other marketing opportunities, such as the showing of films.

To the extent that national laws that benefit, say, holders of related rights as yet provide for a claim to remuneration only, and not for a right of prohibition, such claims to remuneration should also be covered by the rules set out in the Directive.

The claim to equitable remuneration pursuant to the Directive should, in order to facilitate settlement, be enforceable only through collecting societies. This would help to aggregate claims and would protect cable companies from a host of individual claimants.

When it comes to deciding on the claim for remuneration, an attempt should first be made to bring about an amicable settlement between the collecting societies and the cable companies (or their representative associations). If no such settlement is forthcoming within a reasonable period, each of the parties concerned should be able, in accordance with the second sentence of Article 11 bis (2) of the Berne Convention, to appeal to an arbitration body to be set up for this purpose. The arbitration body would fix the level of remuneration and should have central responsibility for the Community as a whole in order to guarantee the necessary uniformity of the remuneration criteria and to prevent distortions of competition. Independent experts should sit on the arbitration body alongside representatives of the interests concerned.