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GREEN PAPER
ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY -

COPYRIGHT ISSUES REQUIRING IMMEDIATE ACTION

Communication from the Commission.

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CHAPTER 1 : COPYRIGHT AND THE EUROPEAN COMMUNITY

1.1. Emergence of important copyright issues at Community level

1.1.1 The development of copyright laws in the Community and elsewhere reveals a continual re-examination of those laws to achieve an appropriate balance, in the light of conditions prevailing at the time, between important objectives that are partially in tension. Protection of the economic interests of the author and other creators, the promotion of ready access to information, and the pursuit of cultural goals have all had to be pursued and reconciled. In recent years and with increasing frequency, this challenge has been raised, in terms of copyright [1] law and policy, at Community level.

1.1.2 The directly applicable provisions of the Community Treaty concerning the free movement of goods and freedom to provide services have produced a number of leading cases on the extent to which copyright, of necessity national in scope, may be relied upon if the result is to prevent goods and services being supplied across the Community's internal frontiers. As elsewhere in the field of intellectual property rights, the European Court of Justice quickly established the principle that, where goods are lawfully placed on the market in a Member State, copyright cannot be relied upon to restrict the free circulation of those goods elsewhere in the Community. More recently, it has been called upon to define more clearly the limits of that principle, for example, as regards the continuing possibility for right holders to rely on their rights in relation to performances of imported films and sound recordings and to the rental of video recordings[2].

1.1.3 Copyright issues have also emerged in other contexts. Reference must be made to initiatives taken to develop Community action in the cultural sector [3]; to possible applications of Community competition law to certain situations involving the exercise of copyright and industrial designs; to problems posed by the arrival of new technologies including television by cable and satellite [4], semiconductors [5], computer technologies [6], and new audio-visual recording techniques [7]; and to the important commercial problems caused to Community right holders by lack of effective protection for their rights in many non-Member States [8].

1.1.4. The emergence of all these issues at Community level within recent years is not due to pure chance. It is in large part a reflection of the profound changes which have been occurring in the world economy, involving as they do important structural adaptations not least in the industrialized countries.

1.2. The growing importance of copyright to industry and commerce

1.2.1. The structural adaptations that are under way can be said to be characterized by the following phenomena, all of which have served to emphasize the importance of copyright protection to industry and commerce.

1.2.2. First, a shift has continued in the economic activity of industrialized countries away from the production of goods having the character primarily of staple commodities and towards the production of goods to which considerable value has been added through the application of technology, skill and creativity. The superior performance and non-material attributes of such goods, such as their design or image, constitute their main competitive advantages. If some or all of those features can be readily appropriated by others through copying for commercial purposes at a fraction of the cost of developing a competing original, then the production and marketing of such high added-value goods is put at risk [9].

1.2.3. Second, the industrialized countries' manufacturing activities have often proved less dynamic than the service sector, of which the information and entertainment industries form an important part. Those industries are also particularly vulnerable to damage through misappropriation, in particular by unauthorized copying [10]. Thus the very activities which offer the best hope for economic expansion, and are consequently the subject of considerable new investment, are those which are particularly exposed to losses through copying and accordingly have been seeking appropriate forms of protection, including suitably adapted copyright laws.

1.2.4. Third, technological innovation itself paradoxically generates not only the possibility for new kinds of economic activity but, at the same time, the means whereby the results of the efforts of others can be readily misappropriated. In the field of semiconductor designs, for example, it has been estimated that the original development of a sophisticated chip could involve an investment of 100 million dollars, whereas reproduction of an existing design would cost between 50,000 and 100,000 dollars [11]. A complex computer program representing many man hours of work and other investment besides can be copied perfectly and almost instantaneously at the touch of a button. Multiple copies of a sound or video recording can be made with equipment little more sophisticated than that used in the average home.

1.2.5. In sum, the growing economic importance of the industries needing copyright protection [12] against ready misappropriation of their products, particularly by copying, has naturally produced pressure for the modernization of existing copyright protection systems at both national and Community level.

1.3. The Community's concerns in general

1.3.1. In the Commission's view, the Community's fundamental concerns in this field should be four-fold.

1.3.2. First, the Community must ensure the proper functioning of the common market. To the maximum extent possible, creators and providers of copyright goods and services should be able to treat the Community as a single internal market. This requires the elimination of obstacles and legal differences that substantially disrupt the functioning of the market by obstructing or distorting cross-frontier trade in those goods and services as well as distorting competition.

This matter is explored in greater detail in the next section of this chapter. It suffices to note here that significant differences in the protection available to particular classes of copyright works can clearly fragment the internal market in those works in an undesirable way. Similarly, if in a number of Member States, effective action is not taken to eliminate audio-visual piracy, the benefits of a Community-wide internal market will be denied to the European production industry since it will not be able to operate successfully in those parts of the market where it will be undercut by unfair competition from pirate products. Action at Community level is needed to remove differences in national laws and procedures creating problems of this kind and to prevent new and harmful divergences from arising.

1.3.3. Second, in framing measures to ensure the proper functioning of the internal market in copyright goods and services, the Community should develop policies that will improve the competitiveness of its economy in relation to its trading partners, particularly in areas of potential growth such as the media and information. In addition to project-oriented measures such as ESPRIT, accompanying measures are also needed, among them legislative initiatives in relation to intellectual property, so that European creators and firms can rely on legal protection for their products and activities at least as favourable to their development as that enjoyed by their principal competitors in their home markets.

1.3.4. The third general concern must be that intellectual property resulting from creative effort and substantial investment within the Community should not be misappropriated by others outside its external frontiers. It should enjoy a fair return when exploited in non-Member States. This is frequently not the case at present [13].

1.3.5. On the other hand, copyright is an exclusive right granted by legislation to an individual. One of its effects is inevitably to limit to a certain extent the normal freedom of third parties to compete by marketing similar products. In the more traditional domains of copyright applying to literary, musical and dramatic works, this has not posed a significant problem since independent works of the same genre can in law and practice still compete with each other quite fairly. In areas which have developed more recently, however, the restrictive effects of copyright protection on legitimate competition have on occasion risked becoming excessive, for example, in respect of purely functional industrial designs and computer programs. In such contexts, copyright protection without suitable limits can in practice amount to a genuine monopoly, unduly broad in scope and lengthy in duration.

1.3.6. It follows that, in developing Community measures on copyright, due regard must be paid not only to the interests of the right holder but also to the interests of third parties and the public at large, since, particularly with regard to products of an industrial character, works are placed on the market by a decision of the right holder himself.

1.4. Cultural considerations

1.4.1. The economic interests which copyright law aims at protecting are inextricably interwoven with cultural interests and cultural needs. New dissemination and reproduction techniques have developed with an ever-increasing speed and have added, at a corresponding rate of speed, to the complexity of this relationship. These new technologies have entailed the de facto abolition of national frontiers and increasingly make the territorial application of national copyright law obsolete, while, at the same time, permitting for better and for worse in every country ever more rapid, easy, cheap and high-fidelity reproduction. This has at one and the same time been a cause of satisfaction and concern.

1.4.2. Satisfaction has been expressed because the creator never before has enjoyed comparable possibilities of making his work known at the national, European or even global level at a speed which continues to increase. Thus, it is more and more commonplace that the audience, for a specific work or performance, consists of hundreds of millions or even billions of spectators. At the same time, it raises concern because new technologies render the control of the exploitation or use of a work difficult or even impossible, thereby reducing the value of copyright protection based on the provisions of national law and the existing framework of international conventions.

1.4.3. Seen in the perspective of the completion of the Internal Market, the Commission cannot but welcome the possibilities of rapid, simultaneous dissemination of intellectual creation in the Community. In any case, the trend to ever increasingly rapid dissemination cannot be reversed or repressed. The Community must meet this challenge.

1.4.4. Any action at the Community level is to be based on the following considerations. Intellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated.

1.4.5. In general, the protection of creativity implies that creators enjoy due respect for the integrity of their work and the right to authorize the use made thereof. Remuneration must be adequate and in general correspond to the use made of the work. To give a higher status to creativity implies the search for the appropriate means of rapid and extensive dissemination; and the stimulation of creativity implies that, in addition to the protection from which the work may benefit, the creator is offered additional advantages in terms of royalties, new ways of dissemination and exploitation, and new markets.

1.4.6. It is evident that the three objectives are at the one and same time interactive and contradictory. They are interactive since the purpose of protection can only be the search for higher status and stimulation. They are contradictory because undue protection may hamper the possibilities of dissemination as well as constitute the basis of unduly high remuneration. On the other hand, uncontrolled dissemination may make protection inoperative and thereby prejudice the possibilities of generating adequate income.

1.4.7. The Copyright Green Paper is intended to constitute the basis of a broad consultation of interested circles. For this purpose, the paper contains an analysis, legal and economic, of the various priority issues in respect of which new technologies have raised questions.

1.4.8. In each chapter a number of legislative or technical solutions have been suggested so that future political decisions can establish the delicate balance which needs to be struck between the conflicting objectives, thereby promoting at the Community level the protection, the increased status and the stimulation of intellectual and artistic creativity.

1.4.9. However, Community legislation should be restricted to what is needed to carry out the tasks of the Community. Many issues of copyright law, do not need to be subject of action at Community level. Since all Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works and to the Universal Copyright Convention, a certain fundamental convergence of their laws has already been achieved. Many of the differences that remain have no significant impact on the functioning of the internal market or the Community's economic competitiveness. Differences in national approaches to authors' moral rights, for example, do not in general produce situations which need to be addressed by Community legislation. For this reason, the matter can for the most part be left to be regulated by national laws within the framework of Article 6 bis of the Berne Convention [14]. The same applies to many other matters including, for example, the introduction of a public domain subject to payment and artists' resale rights.

1.4.10. The Community approach should therefore be marked by a need to address Community problems. Any temptation to engage in law reform for its own sake should be resisted.

1.5. The EEC Treaty and the Community's powers in relation to copyright goods and services

1.5.1. In law, the Community's objectives in the copyright field as in others are defined by the Treaty, which also specifies the means by which they are to be achieved.

1.5.2. The rights of authors, performers and others under national laws of copyright are not abstractions but are in practice exercised in respect of specific goods or services. Many provisions of the EEC Treaty govern the movement of goods and the provision of services; and in the absence of any explicit exception concerning goods and services subject to copyright protection, these are covered like all others by the provisions in question. An examination of the most important of these provisions shows that the general concerns set out above correspond to the Community's competence as defined by the EEC Treaty and that it disposes of the powers necessary to provide solutions.

1.5.3. The objectives of the Community as specified by Article 2 of the EEC Treaty (hereafter EEC) are to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the Member States. These objectives are to be realized by establishing a common market and progressively approximating the economic policies of the Member States.

1.5.4. For these purposes, the Community must carry out a number of activities listed in Article 3 EEC. These can be grouped under the following headings : first, the elimination as between Member States of quantitative restrictions on the import and export of goods and on all measures having equivalent effect; second, the establishment of a common commercial policy towards non-Member States; third, the abolition as between Member States of obstacles to freedom of movement for persons, services and capital; fourth, the institution of a system ensuring that competition in the common market is not distorted; and fifth, the approximation of the laws of Member States to the extent required for the proper functioning of the common market. In addition, Member States are under an obligation to facilitate the achievement of the Community's tasks and to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty. Also, within the scope of application of the Treaty, and without prejudice to any other special provisions, any discrimination on grounds of nationality is prohibited.

1.5.5. Many of the Community's tasks are further elaborated in subsequent provisions of the Treaty and the application, actual and potential, of all those provisions in the copyright field would occupy many pages. For present purposes, it suffices to concentrate on the elimination of all measures having equivalent effect to quantitative restrictions; on the approximation of the laws of the Member States to the extent required for the proper functioning of the common market; on the removal of obstacles to the free provision of services and, finally, on the establishment of a common commercial policy towards non-Member States and to other possible bases for common action as regards the Community's external relations.

1.5.6. Under the Treaty, quantitative restrictions on imports and exports and on measures having equivalent effect are prohibited between Member States (Articles 30 to 34 EEC). These provisions are widely interpreted by the Court of Justice. They are one of the most effective instruments of the Treaty for ensuring the free circulation of goods. They are, however, subject to certain qualifications. They do not, for example, preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of protection of industrial and commercial property, although such prohibitions or restrictions may not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (Article 36 EEC).

1.5.7. As already mentioned, cases concerning the free movement of goods subject to copyright or to similar rights have already reached the Court of Justice. Although the number of cases is not yet as great, nor the range of conflicts as wide, as those which have caused litigation in other areas of intellectual property rights such as patents and trademarks, it is already clear that, as regards copyright goods, the principles which forbid a partitioning of the market are applicable in copyright cases just as they are in cases where the industrial property right in question is a patent or a trade mark. However, those principles do not exclude the application of copyright to imported products where exploitation is through a performance of the work, unless reliance on the right constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States[15].

1.5.8. Accordingly, the effect of the provisions of the Treaty on free circulation of goods may be said to apply broadly, mutatis mutandis, to goods subject to copyright; and, in particular, recourse to copyright law as a means of artificially partitioning the market is as effectively prohibited, being equivalent in effect to a quantitative restriction, as recourse to patent or trade mark law. In addition, it follows that conditions may well arise in which harmonization of national copyright rules might be necessary. Such could be the case in particular where Article 36, and notably its exemption of restrictions justified on grounds of protection of industrial and commercial property, applies to national rules which would otherwise be contrary to Articles 30 or 34 EEC.

1.5.9. The Treaty confers on the Council the power and the duty, acting unanimously on a proposal from the Commission, to issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market (Article 100 EEC). Until recently, this power constituted the most likely basis for action at Community level in the field of copyright law. It is a vital instrument for the harmonization of differing national laws and for creating a standard throughout the Community, even where some Member States have no laws governing the subjects at issue. The provision was accordingly used as the main legal basis for the recently adopted directive on the legal protection of topographies of semiconductor products [16].

1.5.10. After the entry into force of the Single European Act, Article 100A EEC has become available for measures aimed at the establishment of an internal market. This provision permits such measures to be adopted by qualified majority. Accordingly, where differences in the copyright laws of the Member States affect the functioning of the internal market to the point that legislative action is required, the Community is now able to rely on this new possibility to remove the obstacles and distortions in question.

1.5.11. Performances subject to copyright and neighbouring rights protection may fall into the category of services within the meaning of the Treaty; this is the case if they are normally provided against remuneration and if they are not governed by the provisions relating to freedom of movement for goods, capital and persons. Consequently, they are covered by the provisions of the Treaty abolishing restrictions on freedom to provide services within the Community (Articles 59 to 66 EEC). While there is ample case law on the general application of these provisions, there is little in the specific field of copyright services. However, there is no doubt from such case law as is available that certain services relating to copyright goods are fully covered by the provisions in question. More particularly, they have been explicitly held to cover broadcasting services [17].

Article 57 EEC may accordingly have an important role to play as the legal basis for directives designed to facilitate the provision of services subject to copyright through the co-ordination of provisions regulating the taking up and pursuit of such activities. The copyright chapter of the proposal for a Council directive concerning broadcasting activities constitutes the first use of Article 57 EEC for this purpose [18].

1.5.12. Obstacles to inter-State trade in goods and services flowing from copyright have been brought to the Commission's attention in several fields. It suffices to refer again by way of example to problems that have arisen concerning broadcasting and the rental of video cassettes.

1.5.13. However, in addition to such obstacles, differences in copyright laws can clearly have other direct and negative effects on the functioning of the common market by distorting the competitive conditions under which enterprises operate in different parts of the Community.

1.5.14. In jurisdictions where copyright is difficult to enforce, for example, works will tend to be misappropriated more readily than in jurisdictions where copyright offers effective protection. Moreover, the illegally copied works will in many cases be produced at a lower cost than the originals and will then be able to undercut the latter in the market place. The functioning of the common market will be directly affected in that, in Member States offering relatively weak protection, illegally copied works will tend to occupy a bigger market share than they do elsewhere.

1.5.15. Moreover, the risk of such copied works finding their way onto national markets where the original is protected is a real one. The functioning of the common market is in this way further disturbed since works lawfully produced in one Member State, though legally copied, can circulate until action is taken to stop them in Member States where the original is protected by which time they may be in the hands of innocent economic operators. At the same time, the need to take action against imported goods that infringe copyright in the importing State tends to perpetuate controls at the Community's internal frontiers which inevitably produce adverse consequences for the movement of legitimate products.

1.5.16. Finally as regards the elimination of obstacles and distortions, it should be noted that the functioning of the common market is a broad concept embracing the movement of all the factors of production across the frontiers of the Member States including direct investment. Divergent levels of protection offered by copyright and other intellectual and industrial property laws will affect not only trade flows in the goods and services concerned but more fundamentally the scale and nature of the connected productive activities in different Member States and the investment therein.

1.5.17. Mention should also be made, in addition to the power to issue directives for the harmonization of national laws, to a further enabling power in the Treaty, which proves relevant to some areas of copyright law. If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and the Treaty has not provided the necessary powers, the Council has the power and duty to take the appropriate measures; and these measures may consist of directives, regulations or other instruments (Article 235 EEC). This is in the nature of things a supplementary means of action. It would not be appropriate as regards harmonization measures to complete the internal market for which Article 100A EEC provides a specific legislative basis, but it could well be one of the powers to be used in dealing with problems for which harmonization alone may well not provide an adequate solution, such as piracy. The Council Regulation laying down measures to prohibit the release for free circulation of counterfeit goods [19] constitutes an interesting precedent in this regard.

1.5.18. Turning to the Community's external relations, piracy in copyright goods is one of several ways in which copyright problems extend beyond the boundaries of the Community itself; and it is the objective of the Community's commercial policy to ensure the setting up of a uniform commercial policy in relation to third countries. The customs union is, as it were, the starting point for the common commercial policy, for by establishing a customs union between themselves, Member States aim to contribute to the harmonious development of world trade, to the progressive abolition of restrictions on international trade and to the lowering of customs barriers. But the common commercial policy also includes such matters as the conclusion of trade agreements and measures to protect and promote external trade. Tariff and trade agreements are increasingly used as instruments for further protecting goods and services covered by intellectual property rights. The new GATT round includes a consideration of possible action to address the trade related aspects of intellectual property rights [20]. In areas of this kind, Article 113 EEC may be relied upon to arrive at a Community position.

1.5.19. In addition, the provisions of the Treaty governing the common commercial policy also include a provision to the effect that Member States are required in respect of all matters of particular interest to the common market to proceed within the framework of international organizations of an economic character only by common action; and it is for the Commission to submit to the Council proposals concerning the scope and implementation of such common action (Article 116 EEC). This procedure has been adopted in relation to the World Intellectual Property Organization, in respect of negotiations on the Revision of the Paris Convention for the protection of industrial property and, if similar negotiations take place in the future concerning the Berne Convention for the protection of copyright or for other copyright or neighbouring rights conventions administered by WIPO, if necessary, similar procedures would apply. The need to rely upon Article 116 EEC will in any event diminish to the extent that the Community adopts legislation harmonizing the copyright laws of the Member States. In such circumstances, the legal basis for Community action will be the AETR decision of the Court of Justice [21].

1.5.20. A consideration of the legal powers of the Community pursuant to the EEC Treaty would not be complete without a reference to Article 222. This article provides that the EEC Treaty shall in no way prejudice the rules in Member States governing systems of property ownership. The Commission has already explained in some detail the interpretation to be given to this article in the field of intellectual property [22]. In essence, the contents of the provision are that the assignment of property to private or public owners and hence the question of whether property is to be nationalized or transferred from public to private ownership remains the preserve of the Member States. However, the content of proprietary rights, the scope of protection afforded to them and the limits on their use may be regulated 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. The scope for Community action thus remains considerable.

1.6. The Community's priorities : the purposes and scope of this consultative document

1.6.1. For some time now, the Commission has been keeping under review the copyright field as a whole with a view to publishing a consultative document that would deal comprehensively with the issues that have emerged as meriting discussion and decision at Community level. The European Parliament has also, on numerous occasions, in particular by submitting questions to the Commission[23], expressed its interest in learning the Commission's position on current copyright issues. The issues dealt with in this document are not the only ones requiring attention at Community level but constitute the issues considered most urgent.

1.6.2. In brief, they are piracy; home copying of sound and audio-visual material; distribution and rental rights for certain classes of work, in particular, sound and video recordings; the protection available to computer programs and data bases; and finally, the limitations on the protection available to Community right holders in non-Member States.

1.6.3. Other matters, such as problems in relation to the protection of designs and models, have not been forgotten. They will continue to be addressed both on the basis of the Treaty's directly applicable provisions and with a view to possible further legislative initiatives when the time is ripe. At present, however, it would be unrealistic to think that such legislative proposals could be launched with a reasonable chance of success. They would also require an allocation of additional resources. Even those initiatives that are proposed as a matter of priority will pose problems in this regard and will require a particular effort to be made to ensure that results are achieved within a reasonable period of time.

1.7. Summary

The scope of this consultative document has been limited to piracy, to the home copying of sound and audio-visual works, to the question of distribution and rental rights for sound and videorecordings, to the legal protection of computer programs, legal problems relating to the operations of data bases and to the external aspects of copyright protection.

1.8. Conclusion

The Commission would welcome the views of interested parties on the specific suggestions made in the ensuing chapters of this consultative document. To focus and facilitate the consultative process, the key issues on which views are sought have been listed in a summary conclusion to each chapter. However, all relevant comment is welcome, including reactions to the general propositions contained in this introductory chapter.

[1] When used without qualification, "copyright" in this document signifies the broad range of rights that are perhaps more correctly referred to as copyright and neighbouring rights, that is, in addition to authors' rights, analogous rights granted to, amongst others, performers, producers of audiovisual works, and broadcasting organizations. Different views exist as to whether some rights should be considered to be "copyright" even if it is used in this broad sense, for example, rights in designs and models or semiconductor topographies. For the purposes of this document, such rights are to be considered as being included unless the contrary is specified.

[2] See Chapter 4 below for further details.

[3] See Community Action in the Cultural Sector, Bulletin of the European Communities, Supplement 6/77, and Stronger Community Action in the Cultural Sector, Bulletin of the European Communities, Supplement 6/82.

[4] See the proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning broadcasting activities of 6 June 1986, O.J. No. C 179 of 17 July 1986, p. 4 and "Television without frontiers", a green paper on the establishment of the common market for broadcasting, especially by satellite and cable, COM(84) 300 final of 14 June 1984.

[5] See Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, O.J. L 24/36 of 27 January 1987.

[6] See Chapter 5 below.

[7] See Chapters 2 and 3 below

[8] See Chapter 7 below.

[9] The Community's textile industry constitutes a good example. See Chapter 7, paragraphs 7.4.4. to 7.4.8. below.

[10] See Chapters 2, 3 and 5 below.

[11] See Robert W. Kastenmeier and Michael J. Remington, Minnesota Law Review, Vol. 70 No. 2, December 1985 page 437-438.

[12] A number of attempts have been made in recent years to quantify the economic importance of copyright. Naturally such attempts have confronted serious definitional and measurement problems. Taken together, however, such studies suggest that, in the industrialized countries, copyright activities generate at least 2% to 3% of Gross Domestic Product and probably much more. Higher estimates are in the region of 5% to 6%. Available evidence also indicates unsurprisingly that these percentages are rising.
See, in particular, J. Philipps, The Economic Importance of Copyright, The Common Law Institute of Intellectual Property, 1985; J.S. Cramer, J.M. Meigering, T.J.M. Nijssen, The Economic Importance of Copyright in the Netherlands in 1982, Stichting voor Economisch Onderzoek der Universiteit van Amsterdam, 1986; A.H. Olsson, Copyright in the National Economy, in Copyright, World Intellectual Property Organization, April 1982; United States Copyright Office, Size of the Copyright Industries in the United States, Report to the Subcommittee on Patents, Copyrights

and Trade Marks of the Committee on the Judiciary of the US Senate, 1984; Office of Technology Assessment of the US Congress, Intellectual Property Rights in an Age of Electronics and Information, 1986.

13 See Chapter 2, paragraphs 2.2.2. to 2.2.31 below.

14 This approach was adopted, for example, in the proposal for a Council directive concerning broadcasting activities, loc. cit., Article 20. For one possible but limited exception, see Chapter 4, paragraph 4.4.4. below.

15 See Chapter 4, paragraphs 4.3.5., 4.3.6. and 4.9.1. below.

16 loc. cit.

17 Coditel v. Ciné-Vog Films (1980) ECR 881.

18 loc. cit.

19 Council Regulation 3842/86/EEC of 1 December 1986, O.J. No. L 357 of 18 December 1986.

20 See Chapter 7, paragraphs 7.2.5. to 7.2.8. below.

21 Commission v. Council (1971) ECR 263. See also Chapter 7, paragraphs 7.2.2. and 7.2.3. below.

22 Most recently in "Television without frontiers", op. cit., pages 323 to 328

23 See, for example, written question no. 1977/86 (O.J. no. C 124 of 11 May 1987, page 26), written question no. 1157/86 (O.J. no. C 149 of 9 June 1987, page 8), written question no. 656/87 (O.J. no. C 315 of 26 November 1987, page 3).

CHAPTER 2 : PIRACY

2.1. The nature of piracy

2.1.1. "Piracy" for the purposes of this chapter embraces the unauthorized reproduction of works protected by copyright or allied rights for commercial purposes as well as all subsequent commercial dealing in such reproductions. The commercial purpose and frequently the scale on which the activity is carried out are characteristic features which distinguish the practice from other forms of unauthorized reproduction or use such as home copying. Piracy in this sense includes "bootlegging", that is, the unauthorized recording of performances and the subsequent marketing of copies of the recording. It is frequently associated with "counterfeiting", that is, unauthorized use of a legitimate product's commercial presentation, in particular, its trade mark or some other protected indication.

2.1.2. Defined in this way, piracy includes the piracy of computer programs. However, since most discussion in recent years has concentrated on the question of whether computer programs could be or should be assimilated to works protected under copyright laws in force, it has been felt more appropriate to give an account of this discussion separately in Chapter 5. However, insofar as the trend in the Member States is in favour of the protection of computer programs through copyright or a neighbouring right, the observations made in this chapter are frequently applicable mutatis mutandis to computer programs also.

2.1.3. Similarly, commercial misappropriation of designs falls within this concept of piracy. In certain fields, such as textiles and clothing, piracy and counterfeiting constitute a significant problem for Community firms. However, since the production, though not the marketing, of such goods embodying pirated designs is taking place primarily outside the Community, the problem is considered for the most part in the context of Chapter 7 of this paper concerning the Community's external relations. Nevertheless, much of what is said in this chapter is also applicable to piracy of designs, in particular, observations concerning measures directed at imports into the Community of infringing products.

2.1.4. In recent years, piracy has emerged as a serious problem for copyright industries and for creative artists depending upon due respect of copyright for their living. It is thus not a coincidence that, in June 1984, Ministers of Culture, during their very first formal meeting at Community level spent considerable time on the subject preparing a resolution on measures to combat audio-visual piracy, a resolution which was adopted on 24 July 1984 by representatives of the governments of the Member States[1].

2.2. The importance of piracy by sector

2.2.1. The significance of piracy in practice varies from sector to sector and with the passage of time. Recent developments in the main sectors concerned can be summarized as follows though necessarily information on such illicit activities has frequently to take the form of informed estimates rather than rigorously controlled data.

Books

2.2.2. There appear to be no statistics available even on an estimated basis as to the scale of piracy of books within the Community, but the generally held view in the publishing industry is that the share of pirate books on the internal market is negligible compared to that of legitimate publications. Some sources have expressed apprehension as to the future, however, including fears as to the development of sophisticated reproduction techniques in parts of the world known as pirate-havens in respect of other products which might lead to increased imports into the Community of illegally produced books. At present, the problem does not seem to be significant.

2.2.3. In sharp contrast, outside the Community, the problem must be considered serious, especially for books in the Spanish, French and English languages, the latter forming the greatest part of the illegitimate traffic. Piracy occurs to such an extent in India, Pakistan, the Middle East, South East Asia, Latin America and Africa that publishers claimed in 1983 that their lost sales due to piracy corresponded to approximately 1 billion US dollars a year[2]. It is considered that this figure is still valid today [3].

Sound recordings

2.2.4. For many years, the sound recording industry has suffered considerable losses due to the piracy of records and tapes. The piracy problem has been an issue of constant concern to the industry which has made great efforts and taken numerous initiatives to improve the law and its enforcement in order to combat piracy as effectively as possible. Likewise, at the level of competent international organizations, piracy of sound recordings has been the subject of numerous conferences and discussions.

2.2.5. In order to obtain detailed information on the penetration of pirate products in the individual Member States and on specific legal problems connected with the protection of sound recordings, the Commission has commissioned studies and consulted experts in the field. On piracy of sound recordings, a study was carried out at the Commission's request by Gillian Davies, Associate Director-General of the International Federation of Producers of Phonograms and Videograms[4]. The study contains a wealth of information on the problem which need not be repeated in its entirety here. The following remarks on piracy of sound recordings are a reaction to that study and, in particular, to its conclusions as to the importance of the piracy problem as it affects sound recordings.

2.2.6. The tables in the 1984 version of the study showed alarming figures on the estimated losses caused by piracy in the Community and worldwide. For the purposes of this paper, those tables have to the extent possible been updated and enlarged to cover also the new Member States of the Community.

I. Estimated loss of earnings resulting from phonogram piracy - 1984
(In Millions of National Currency and US dollars)

Country	Authors/ Music Publishers	Performers	Distributors	Producers Of Phonograms
Belgium	BF 3.8 US$ 0.06	BF 7.1 US$ 0.11	BF 8.2 US$ 0.13	BF 8.2 US$ 0.13
Germany	DM 2.9 US$ 0.9	DM 5.4 US$ 1.8	DM 6.3 US$ 2.0	DM 6.3 US$ 2.0
Greece	Dr.224.0 US$ 1.8	Dr.320.0 US$ 2.5	Dr.480.0 US$ 3.9	Dr.480.0 US$ 3.9
Spain	Pst.4420.0 US$ 1.9	Pst.780.0 US$ 4.5	Pst.900.0 US$ 5.2	Pst.900.0 US$ 5.2
France	FF 7.8 US$ 0.8	FF 14.6 US$ 1.5	FF 16.8 US$ 1.8	FF 16.8 US$ 1.8
Italy	L6,720.0 US$ 3.5	L12,480.0 US$ 6.5	L14,400.0 US$ 7.5	L14,400.0 US$ 7.5
Netherlands	Dfl 1.3 US$ 0.4	Dfl 2.4 US$ 0.7	Dfl 2.8 US$ 0.8	Dfl 2.8 US$ 0.8
Portugal	ESC 308.7 US$ 1.9	ESC 573.3 US$ 3.4	ESC 661.5 US$ 4.0	ESC 661.5 US$ 4.0
United Kingdom	£ 0.8 US$ 1.0	£ 1.6 US$ 1.9	£ 1.9 US$ 2.3	£ 1.9 US$ 2.3

(The level of phonogram piracy in Denmark, Ireland and Luxembourg is considered to be insignificant).

Source : Information obtained from IFPI

2.2.7. Even if allowance is made for the fact that not every sale of a pirate product necessarily substitutes for the sale of a legitimate recording, the economic importance of the losses seems undeniable. Moreover, though the market share of pirate products within the Community has declined since 1978 (see Tables II and III), this should not be interpreted as indicating that the problem has been solved.

(3)

II. Unit sales of pirate phonograms as a percentage of the total market (pirate and legitimate markets) in 1978 and 1984

1978 ■ 1984 □

	Tapes	Discs LPs
Belgium and Luxembourg	15.0% ■ 3.0% □	3.0% 1.0%
Germany	9.0% ■ 5.0% □	2.0% 1.5%
Greece	78.0% ■ 64.0% □	Very low Very low
Spain	- 50.0% □	- -
France	12.0% ■ 5.0% □	1.0% 0.5%
Ireland	20.0% ■ 3.0% □	3.0% Very low
Italy	40.0% ■ 25.0% □	6.5% 7.0%
Netherlands	10.0% ■ 5.0% □	7.0% 3.0%
Portugal	- 80.0% □	- -
United Kingdom	7.0% ■ 5.0% □	2.0% 1.0%

Source : Information received from IFPI

III. Retail value of pirate phonograms as a percentage of the total market (pirate and legitimate markets) in 1978 and 1984

1978 ■ 1984 □

Belgium and Luxembourg	6% ■■■ 1% ▯
Germany	4% ■■ 2% ▯
Greece	38% ■■■■■■■■■■■■■■■■■■■■ 28% [□□□□□□□□□□□□□□]
Spain	- 26% [□□□□□□□□□□□□□□]
France	4% ■■ 1.5%▯
Ireland	6% ■■■ 0.5%▮
Italy	17% ■■■■■■■■▮ 14% [□□□□□□□□]
Netherlands	6% ■■■ 3% [□□]
Portugal	- 23% [□□□□□□□□□□□□]
United Kingdom	6% ■■■ 2% ▯

Source : Information received from IFPI

2.2.8. First, the decrease is partly due to the continuing efforts of the industry, sometimes under difficult circumstances, to suppress piracy. Second, while those efforts appear to have had positive results, a substantial part of the decrease during the last few years is probably due to the fact that pirates have been concentrating for some time on video products which, as will appear from what follows, at least for a period of time, have offered a more profitable and therefore more attractive target. Finally, it is important to bear in mind the particular characteristics of the sound recording industry. The overwhelming majority of sound recordings released do not make a profit[5]. The returns on the small proportion of profitable releases, which can be considerable, are used to finance new releases and maintain a breadth of repertoire that would otherwise be impossible. But the pirates of course target precisely the recordings which are already known to be in current demand and in this way the overall profitability of the recording industry is reduced.

2.2.9. Table IV gives an indication of the provenance of pirate sound recordings sold within the Member States of the European Community.

IV. Home markets of EEC Member States (except Portugal and Spain) - provenance of pirate products sold

Country	% Imported into the country	Provenance of imported product
Belgium and Luxembourg	40%	Mainly EEC
Denmark	100%	EEC & Row
Germany	40%	Mostly EEC (Belgium, Italy, Netherlands).
Greece	0%	
France	over 50% Arab repertoire low % of other repertoire	EEC & Row (in particular: Italy, Netherlands South East Asia).
Ireland	85%	50/50 EEC/Row.
Italy	5% tapes 80% records	Non-EEC (USA, Singapore).
Netherlands	99%	50/50 EEC/Row.
United Kingdom	very low	EEC & Row

Row = Rest of the world
Source: Based on information contained in Piracy of Phonograms, Gillian Davies, second edition 1984.

2.2.10. The cross-frontier nature of the traffic emerges clearly, both as between Member States and between Member States and non-Member countries.

2.2.11. Outside the Community, the Middle East is rife with piracy. Combined with Africa, the problem is estimated to be in the region of 355 million dollars of pirate products sold each year[6]. Equally important is the problem in the Far East, in particular, in India, Malaysia, Taiwan, Indonesia and, until recently, Singapore where new copyright legislation and energetic anti-piracy actions have considerably reduced the previous level of piracy. It is estimated that the value of sales of pirate products in this area amounts to 350 million dollars a year. On a worldwide basis, it is estimated that the value of pirate products sold represents 1,200 million US$ compared to a global turnover of about 10,000 million dollars. A considerable proportion of this pirate trade concerns recordings of European origin. In contrast to the position in the Community, the market share of pirate products in the areas mentioned does not show a tendency to decline.

Films and video recordings

2.2.12. Owing to video recording being a relatively recent phenomenon, available information concerning the industry and the piracy of films and other video products in the early years of the video recorder (VCR) is less extensive and less detailed. The magnitude of the piracy problem is clear, however. Illegitimate video recordings on the market both within and outside the Community have been found to such an extent that they sometimes outnumber those legitimately produced. In countries with relatively few video recorders the problem is less serious, but in the UK, for example, where the penetration of video recorders is high, the government made an estimate according to which the market share of pirate products in 1983 was 66%. After amendment of copyright law and its more energetic enforcement, it is estimated that the market share of pirate products has been significantly reduced, though to a still substantial 20% or so.

2.2.13. Table V shows the estimated penetration of VCRs in Community households in 1985 and 1986.

V. Penetration of VCR in homes (at year end)

COUNTRY	1985		1986	
	per cent of households	Number ('000)	per cent of households	Number ('000)
Belgium	14.9%	471	18.7%	595
Denmark	23.0%	430	28.5%	545
Germany	22.0%	5,250	26.0%	6,250
Greece	6.9%	200	8.3%	250
Spain	13.8%	1,500	18.4%	2,000
France	14.0%	2,800	17.0%	3,500
Ireland	22.0%	220	27.0%	250
Italy	3.0%	500	5.0%	800
Luxembourg	26.4%	24	34.0%	31
Netherlands	29.0%	1,500	35.0%	1,850
Portugal	10.0%	200	15.0%	300
United Kingdom	40.0%	8,500	46.0%	9,800

Source : Information obtained from IFPI

2.2.14. Table VI shows industry estimates of video piracy as a percentage of the market.

VI. Extent of video piracy in the Community

	Market share of video pirate products in the Community			
	1983	1984	1985	1986
Belgium and Luxembourg	30-40%	30-40%	25%	25%
Denmark	5-10%	5-10%	5-10%	5-10%
Germany	40-50%	40-50%	65%	45%
Greece	60-70%	60-70%	50%	50%
Spain	60-70%	40%	35%	30%
France	30-40%	20-25%	30%	25%
Ireland	80%	60%	40%	30%
Italy	50%	50%	50%	40%
Netherlands	50-65%	50-60%	45%	40-45%
Portugal	90-95%	90-95%	75-85%	70-75%
United Kingdom	60-70%	35-40%	under 20%	-

Source : Statistics provided by the Motion Picture Export Association of America for the Commission in October 1986.

2.2.15. As to the nature and origin of pirate products in the Member States, information provided by the industry gives the following picture of the main features of recent pirate activities.

2.2.16. In Belgium, piracy has decreased slightly since 1983 and is believed now to represent around 25% of the market. It is impossible to know how much piracy consists of copying by retailers but it is believed to be substantial. Most piracy, however, is industrial in character. Pirate copies available in Belgium are manufactured in the country as well as imported from the Netherlands which share a common language. Pirate products are also exported to the Netherlands. Some masters are imported from the United Kingdom or the USA but then need to be subtitled or dubbed before copies can be duplicated.

2.2.17. Denmark has the lowest incidence of piracy in the Community. Piracy is estimated to represent now around 5% of the market as compared to more than 50% some years ago. This striking reduction is probably due to the organization of the legitimate rental market[7]. A network of primarily rental outlets with an appropriate territorial coverage has been created and distributors organized within the Association of Danish Video Distributors (ADV) which covers the legitimate market in nearly its entirety. Membership of this organization and respect for its rules is in reality a condition for access to legitimate material. The Association of Danish Video Distributors has also been energetic in taking successful anti-piracy action. Nevertheless, piracy occurs and a substantial number of pirate cassettes have been seized during raids carried out as a result of investigation by the ADV. Pirate copies are believed to be imported from the United Kingdom or the USA.

2.2.18. In Germany, contrary to the trend outlined in other Community countries, video piracy was until 1985 on the increase and at that time still represented 65% of the total market. Two factors are reported as having contributed to a change in the picture. One is the creation in December 1984 of GVU "Gesellschaft zur Verfolgung von Urheberrechtsverletzungen" which is the German Federation against copyright theft based in Hamburg. The other factor is the 1985 amendment of copyright law which introduced heavy prison terms for piracy and made piracy a "public offence" enhancing police participation in investigation and detection. Through 1985, GVU became active and instigated more than 450 raids on outlets carrying pirate stock and obtained more than 500 convictions. As a result the market share of pirate products in Germany, domestically produced or imported from neighbouring German speaking countries such as Austria and Switzerland, is now reported to be on the decrease, for 1986 being estimated at 45% of the market.

2.2.19. In Greece, the video industry is still at a very early stage of development since only 8% of households own a video recorder. Piracy has, however, bedevilled the Greek video industry from the start. However, recent court actions resulting in heavy prison sentences and fines for the pirates have had the results of reducing the level of piracy quite noticeably to around 50% of the market.

2.2.20. In Spain, the market share of pirate products has now been brought down to around 30%. The decrease seems to follow the activities undertaken by ADICAN, a national distributors association formed by major companies engaged in the distribution of video products, which has been able to inspire a different approach to the piracy problem by the authorities and in particular the Supreme Court. In 1985, the Anti-Piracy Federation (FAP) was established under the stewardship of the Motion Picture Export Association of America. This organization has carried out a number of successful activities against pirates, thus succeeding in making the market share of pirate products decrease in a significant way.

2.2.21. In France, video piracy is estimated to represent 20% to 25% of the market. Pirate products are made almost exclusively in France. This is due to the fact that France uses the SECAM system which is different from the PAL system used in much of the rest of the world (apart from the USA which uses the NTSC system). This technical difference as well as the need to have many videos dubbed in French probably protects France from a higher incidence of video piracy than is currently the case.

2.2.22. In Ireland, piracy has decreased over the past few years and now accounts for 30% of the market. Pirate copies are made in Ireland as well as imported, mostly from the United Kingdom. Pirate copies are often made from private homes and then sold by video clubs or from market stalls or vans.

2.2.23. In Italy, video piracy is believed to account for 40% to 50% of the total market with a slightly decreasing tendency. This total turnover, however, is relatively small since the video market is in an early stage of development in Italy. There are only 800,000 VCRs in the country which represents a penetration of only 5% of households. The video market has developed more slowly in Italy than in most other European countries probably in part because of the superabundance of TV channels and the wider choice of entertainment thus available to the public. The less important form of piracy consists of copying by retailers. As regards the more serious industrial piracy, copies are made from masters of newly released feature films or even new films which have not yet been released. By and large, feature films are legitimately released on video one year after the theatrical exploitation. Pirate products thus consist mainly of films which are not yet released for video exploitation. Pirate copies are mainly manufactured in Italy, here again for language reasons. Only masters are sometimes imported from abroad.

2.2.24. As far as Luxembourg is concerned, piracy has not been reported as being a significant problem, though a number of anti-piracy actions were carried out in 1985 and 1986.

2.2.25. In the Netherlands, for a considerable time, pirate products had a dominant share of a market marked by the increasing penetration of VCRs, to reach a level in 1986 of around 35% of all households. The importance of the pirate trade in this well-organized and normally law-abiding society has tickled the curiosity of many people but indications that video piracy is in the hands of well organized criminal circles have been so constant and so numerous that they cannot simply be dismissed. Since January 1984 the fight against video piracy has however been increasingly successful. At that time the Dutch Cinematographic Association together with the Motion Picture Export Association of America, the N.O.S. (the Dutch television), the STEMRA (the Collecting Society for Mechanical Rights) and the NVPI (Nederlandse Vereniging van Producenten en Importeurs van Beeld- en geluidsdragers) formed a federation against copyright theft, the Stichting Video Veilig. The organization has with the assistance of STEMRA carried out a large number of raids leading to numerous convictions and important seizures of pirate material. Due to energetic action from right holders the level of piracy has now decreased to 40% to 45% of the market.

2.2.26. In Portugal the penetration of VCRs has reached 15% of households in 1986 according to the latest estimates. Pirate products dominate the market with a market share of 70% to 75%. It is difficult to explain clearly why the piracy problem is so acute in Portugal. There seems to be a variety of reasons of which two seem particularly important. First, a modern copyright law giving substantive rights to all right holders has only recently come into force. Second, the rental market in respect of legitimate products is not organized to the same extent as, for example in Denmark, and, as a result, rental outlets are not able to offer consumers an adequate choice of legitimate titles in all parts of the country.

2.2.27. The United Kingdom has also seen a striking decrease in the level of video piracy over the past few years, which is now believed to be around 20% of the market or less. FACT (the Federation against Copyright Theft) which has been actively engaged in anti-piracy actions, believes that it has now stopped the theft (or "borrowing") of newly released films from UK cinemas for piracy purposes. A system of "marking" films played a crucial role in stopping piracy of newly released films since those markings enabled police and FACT investigators to identify the cinema from which the copy had been "borrowed". Although two major rings of local video pirates have been broken, there is still a steady stream of imports of pirate cassettes from abroad, mainly transfers from the NTSC American format imported from the USA. There is also evidence of importation of films from the Far East with Malay, Chinese and Indian subtitles.

2.2.28. Most pirate video cassettes found on the market within the Community appear to be of Community origin. This is due to various factors. Language, technical equipment and know-how play a role, as do different colour television standards. The choice of London and Amsterdam as production centres in the early days of video piracy was due partly to the fact that the PAL system used in the United Kingdom and the Netherlands has widespread application elsewhere in the world. Moreover, a considerable proportion of the production most in demand is released relatively quickly on the United Kingdom market, for example, British television programmes, films and a large number of popular American productions. Productions in other languages are furnished with English subtitles when they are shown in the United Kingdom and can then be copied, not necessarily in the United Kingdom itself, and rapidly introduced on major markets all over the world.

2.2.29. The general trend in respect of a decrease in the market share of pirate products of the video market from 1983 to 1986 shown in table VI has continued during 1987. According to information provided by the Motion Picture Export Association of America to the Commission in November 1987, the estimated mid-1987 European piracy levels appear to be slightly lower than the figures for the preceding years.

2.2.30. Outside the Community, video piracy is naturally most prevalent in those countries with a high level of video recorder ownership such as the United States, Canada and Japan. Production of pirate products, however, is not limited to such countries, being found also in certain developing countries, for example, in South East Asia. A considerable proportion of the pirated works are of European origin.

Computer programs

2.2.31. Recently computer software and in particular computer programs have become a very vulnerable target for pirate activities. As long as the use of computers was restricted mainly to professional use in business and administration, the penetration of illegally reproduced programs was not alarming. Since the microcomputer has become popular the picture has, however, changed. Programs for computers and in particular games are sold over the counter as consumer goods like records and tapes. Programs are easily reproduced at costs which only represent a tiny fraction of the costs involved in their original development. This has caused considerable harm to the packaged software industry. For example, the Federation Against Software Theft (FAST) has estimated that sales of legitimate programs lost through piracy in the United Kingdom in 1986 amount to £ 150 million.

2.3. Main reasons for differences between sectors

2.3.1. The differences in the importance of piracy in the main sectors concerned are explained by a number of factors. Some of these are legal in nature and these are further considered below, but the principal factors appear to have an economic character. Thus the current prevalence of video piracy is undoubtedly due in large part to the considerable profit margin available to the illegal producer which is much greater than in the case of either books or sound recordings. Unauthorized reproduction of books, for example, permits royalties to be saved. These amount in general to about 10% to 15% of the retail price. But the books still have to be printed and distributed at costs similar to those of legitimate products. Likewise, even if sound recordings can be readily and cheaply reproduced on tape, their average retail selling price is much less than that of a video recording, which can also be profitably exploited through rental[8]. The video recording is thus a much more tempting target.

2.3.2. For some years too right holders in feature films undoubtedly contributed to the creation of a market for pirate products by witholding licences to market their works on video cassettes. Instead of welcoming this new medium as a supplementary source of income for productions already shown in cinemas, for productions which had not been a commercial success and for childrens' movies, for example, many producers were opposed to the new medium and tried unsuccessfully to resist it by refusing licences. They saw television and video as a threat to film production instead of as an important new outlet.

2.3.3. Another exacerbating factor contributing to the attractiveness of video piracy has been the normal distribution policy of film producers. Contrary to musical productions which are normally released simultaneously on all markets, new films are released on the various markets at different times, depending on when it is thought most lucrative to release the work. In addition, modern productions are often so expensive that a major publicity campaign has to precede the release of a film to maximize box-office receipts. The publicity campaign is meant to create a demand for the work and normally does so, but unfortunately also in areas where no immediate release will follow or where no release will follow on video cassettes. The practice thus creates a ready market for pirate copies and an almost irresistible temptation for racketeers. Whatever view is taken of national laws or agreements designed to ensure the exploitation of films in cinemas prior to their marketing as video recordings, by generalizing and institutionalizing the delay between the two forms of marketing, they contribute to the piracy phenomenon and accordingly reinforce the need for effective means to combat pirate activities.

2.3.4. The decreasing market share of pirate video products which has been observed in the last few years can be attributed, like the decline in piracy of sound recordings, to a variety of factors. Improved legislation and more energetic action by right holders are undoubtedly two important reasons. But probably most important of all are economic factors. The price of high quality pre-recorded material is falling dramatically. In the US the purchase price of a feature film on video cassette is less than 20$ and the "rental" [9] price less than 1$. Though prices in the Community generally are higher than in the US it is a fact that the profit margin for video pirates has been dramatically reduced in the last few years, taking away a major incentive to engage in the activity.

2.3.5. Piracy in respect of compact discs is so rare as to be unheard of, probably because the manufacture of CDs is too costly and technically complicated for pirates. However, the arrival of digital audio tape recording (DAT) may again stimulate audio piracy. Since DAT is considered, however, primarily to raise issues relating to unauthorized private reproduction, detailed discussion on DAT will take place in Chapter 3 on home copying. Nevertheless, the piracy aspect should not be overlooked.

2.4. Different bases for protection at the international level

2.4.1. Books, sound recordings, films and video recordings are not protected in the same way at the international level. The extent and quality of the protection varies from one sector to another, particularly as between books and video products on the one hand and sound recordings on the other. The basis on which broadcasts and cable transmissions are protected also has a particular character.

Books, film and video recordings

2.4.2. Books are protected as literary works at the international level by the Berne and Universal Copyright Conventions. All Community Member States are parties to the Berne Convention [10] and national laws of Member States accordingly vest in the author the exclusive right to authorize the reproduction of his work. Similarly, in conformity with the Berne Convention, cinematographic works are protected in all Member States, the ownership of the copyright being however governed by national legislation within the framework established by Article 14bis of the Convention. Video recordings appear to have been assimilated to films in accordance with the Berne Convention's definition of cinematographic work as including "works expressed by a process analogous to cinematography" [11]. Some contemporary legislation, however, expressly protects video recordings which, together with cinematographic works, are then sometimes referred to as audio visual works.

Sound recordings

2.4.3. The legal protection of sound recordings is much less uniform. Neither the Berne nor the Universal Copyright Conventions require protection to be given to sound recordings as such as distinct from the literary and musical works that may be recorded. Accordingly, they do not ensure protection of the performers and producers responsible for sound recordings. However, provision to this effect has been made by the International Convention for the Protection of Performers and Producers of Phonograms and Broadcasting Organizations signed in Rome in 1961, generally called the Rome Convention on neighbouring rights. The Rome Convention offers producers of phonograms the right to authorize or prohibit the reproduction of their phonogram for a period of at least 20 years from the first fixation. Performers are protected against inter alia the unauthorized fixation of their performances. This Convention has, however, been ratified by only the following Community Member States: Denmark, Germany, Ireland, Italy, Luxembourg, United Kingdom and France. A total of 31 States are members as of 1 September 1987.

2.4.4. The limited ratification of the Convention had two main causes : first, at the time of its adoption in 1961 it was in advance of many national legislations, so that most countries had to legislate before they could adhere to it. Second, it contains a non-obligatory provision on the right of performers and producers to receive equitable remuneration when records are played by radio and television or otherwise communicated to the public. This provision has been vigorously opposed from the outset by broadcasting organizations. On the other hand, the Convention has been actively promoted by the sound recording industry and performers' organizations who have constantly pressed for full protection under its provisions. Sufficient consensus to permit the adoption of legislation has accordingly sometimes been difficult to achieve.

2.4.5. However, the problem of piracy had become so acute by 1969 that the sound recording industry was obliged to seek protection by means of another international instrument in view of the limited application of the Rome Convention. As a result the Convention for the Protection of Producers of Phonograms against Unauthorized Publication of their Phonograms was signed in Geneva in 1971. This Convention allows States who are not in favour of the equitable remuneration of performers to subscribe to measures directed against piracy. The following Community Member States have ratified this Convention: Denmark, Germany, Spain, France, Italy, Luxembourg and United Kingdom. A total of 39 States are currently members.

2.4.6. In contrast to the Rome Convention of 1961, contracting States to the Geneva Convention are not required to adhere to the Berne Union or the Universal Copyright Convention. The Convention, dealing specifically with the unauthorized reproduction, importation and distribution of sound recordings, offers a choice of four possible methods of legal protection : copyright, a specific or neighbouring right, unfair competition law or penal sanctions or combinations of these possibilities. Community Member States who are parties to the Convention have chosen different methods of implementing it, as will appear in greater detail from the analysis below.

Broadcasts and cable transmissions

2.4.7. The protection accorded to broadcasts and cable transmissions as such, as opposed to that accorded to literary and other works when broadcast or transmitted, also falls outside the Berne and Universal Copyright Conventions [12].

2.4.8. The Rome Convention provides for national treatment to be accorded to broadcasting organizations in other contracting States. It also provides in Article 13 that broadcasting organizations shall enjoy the right to authorize the fixation of their broadcasts and, within certain limits, the reproduction of such fixations. Broadcasting is defined as wireless transmission for public reception of sounds or images and sounds. Transmissions exclusively by cable are thus not covered even if fixation of a broadcast signal re-transmitted by cable might nevertheless be regarded as an infringement of the broadcaster's right where the re-transmission is instantaneous.

2.4.9. The European Agreement on the Protection of Television Broadcasts of 1960 provides for broadcasting organizations to have the right to authorize any fixation of their broadcasts or any reproduction thereof. The protection applies to the visual and sound elements of television broadcasts, but not the sound element when broadcast separately (Article 5). No definition of broadcasting is given, but if broadcasting means wireless transmission as in the Rome Convention, then the Agreement would not appear to protect transmissions exclusively by cable against unauthorized fixation or any reproduction thereof. Belgium, Denmark, Germany, Spain, France and the United Kingdom are members of the Convention.

2.4.10. The legal protection available to broadcasts or cable transmissions as such is a matter of considerable and growing importance given the fact that they constitute a readily accessible source of access to a steadily increasing range of audio-visual works, some of which may not be protected otherwise. As with sound recordings, the existing international instruments leave a considerable degree of liberty to the Member States as the subsequent analysis will show.

2.4.11. Before proceeding to such an analysis, however, the conditions necessary for the repression of piracy should perhaps be summarized, if in somewhat idealized terms, as a basis for evaluating the strengths and weaknesses of the present situation in the Member States of the Community.

2.5. Necessary conditions for the repression of piracy

2.5.1. The necessary conditions for the repression of piracy are essentially four-fold: clear substantive legal provisions giving protection to the interests that piracy can damage; effective procedures for taking legal action against and proving pirate activity; adequate sanctions and remedies; and organized and co-ordinated enforcement efforts of interested parties and relevant public authorities. These conditions are to a certain extent inter-related. For example, procedures and remedies may well be dependent on the kind of substantive legal provisions enacted in a particular Member State. Nevertheless, considering each of them separately helps to clarify an analysis of the problem.

2.5.2. First, there must be clear rules of substantive law protecting the important economic interests in question from the main acts of piracy. The law should clearly specify what interests are protected and against what forms of activity. The main interests to be taken into account appear to be those of the authors of relevant literary, musical and artistic works; of the performers who have participated in the making of a sound or audio-visual recording or film; of the producers responsible therefor; and of broadcasters and cable operators. The main acts of piracy should also be clearly prohibited. These include not only unauthorized reproduction of the works in question, but also the importation, exportation and distribution, including possession for commercial purposes, of illicit copies. As regards performers, unauthorized fixation of live performances should be clearly prohibited.

2.5.3. Second, effective procedures for taking legal action against and proving pirate activity should permit right holders and relevant public authorities to begin legal proceedings with an adequate chance of success against those whom they have reasonable grounds to believe are engaged in piracy. In particular, provision should be made for search and seizure procedures enabling plaintiffs and prosecuting authorities to obtain interim orders, preferably on an ex parte basis, permitting them to enter the premises of the presumed infringer, search for evidence of pirate activity and, if necessary, seize such evidence pending trial of the action. Such procedures help to ensure that pirates cannot hide, destroy or otherwise dispose of pirated material once they know they are suspected. The evidence thus obtained not only proves the existence of the infringement, but also gives an indication of the scale on which the piracy is being carried out and thus contributes to the imposition of an adequate sanction. It also ensures that any pirate material seized cannot continue to circulate in the market. Safeguards against the abuse of such procedures are clearly necessary and can be readily incorporated, for example, by means of security requirements or undertakings to pay damages concerning losses thereby inflicted on innocent defendants. In addition, appropriate customs procedures enabling apparently pirated goods to be stopped on entry to the Community from third countries pending an adjudication on their legitimacy can play an important role. The opportunity exists for suspected goods to be controlled at this point much more efficiently than when they are passed further down the distribution system.

2.5.4. Third, the remedies and sanctions applicable after final judgement should be such as to ensure not only that adversely affected interests are compensated to the full extent possible, but also that pirate products can no longer circulate and that pirates are prevented or dissuaded from continuing their illicit activities. Damages to compensate the right holder for his losses clearly have a role to play, but difficulties may well arise owing to the plaintiff not being able to establish the real extent of his loss. In any event, sophisticated pirate enterprises may well be prepared to run the risk of paying damages, as and when proved, in the knowledge that this will frequently not be possible in practice and that, in any case, awards of damages can be avoided by ensuring that realizable assets are not available to meet them.

2.5.5. For this reason, damages to compensate right holders for loss need to be accompanied by other measures. Injunctive relief, damages not linked to proof of economic loss and criminal sanctions, including imprisonment for particularly serious or repeated cases, may all make a contribution in this respect. In addition, destruction of seized merchandise ensures that no profit will be made from it at the right holder's expense. Similar results can be achieved if seized merchandise is required to be rendered unmarketable or transferred to the right holder. Finally, destruction of the means of producing infringing copies ensures that new activity will not immediately begin using the equipment that led to the original infringements.

2.5.6. Fourth, whatever rights, procedures, remedies and sanctions are prescribed by law, they have to be applied in practice. Moreover, experience suggests that when piracy has been allowed to develop on a certain scale it becomes much more difficult to repress. Once relatively sophisticated organizations have been allowed to establish themselves, they tend to have the resources and techniques to avoid being easily caught. Also a public acceptance of their practices can develop that makes it harder for right holders and public authorities to eliminate the illicit trade. Accordingly, right holders have to equip themselves to be vigilant and active in their own defence and procedures must be established that facilitate co-operation between them and relevant public authorities, who have an equally important role to play.

2.6. Present situation inside the Community

2.6.1. The paragraphs which follow seek to analyse the present situation in the Community in the light of the model set out in the preceding paragraphs.

2.6.2. It should be emphasized from the outset that the present situation in many respects is materially different from the situation in July 1984 when the representatives of governments of the Member States were for the first time addressing the piracy issue and adopting a resolution on combatting piracy[13]. The resolution and its implementation were discussed on the 25 June 1985 during a special meeting of representatives of national authorities concerned with the fight against piracy within the framework of the Council (Working Party of Cultural Affairs Attachés). That discussion and subsequent events both demonstrate that substantial improvements in law and in practice can produce positive results.

Substantive legal provisions

2.6.3. In the area of substantive legal provisions, the protection given to books seems to give satisfactory results in practice. As regards films and audio-visual recordings, the situation could in some jurisdictions be improved. The main weaknesses, however, appear to concern sound recordings, broadcasting and cable transmission.

2.6.4. To begin with books, authors of literary works are clearly protected in all Member States and the normal contractual relationships between authors and publishers appear to enable the latter to act effectively against pirates in practice in so far as the need arises.

2.6.5. As for films and video recordings, these seem to be protected everywhere as cinematographic works or, in some recent laws, as audio-visual works or videographic works. However, the question of who owns the exclusive rights or who is presumed to be able to exercise the economic rights on behalf of all who have participated in the creation of the work is settled differently from one jurisdiction to another.

2.6.6. For historical reasons, the film producer does not normally represent the author of the film music. During the silent movie era it became practice that collecting societies representing the author of the music played as accompaniment to the film by a band or a piano player in movie theatres collected royalties for the use of the music actually played during shows. The arrival of the "talking movie" did not change this pattern. The authors of the film music still collect independent royalties through their collecting societies on the basis of box office receipts. This tradition may be expressed explicitly in the law as for example in France [14] and the Netherlands [15] but even when it is not, the same general pattern can be recognized in all jurisdictions. The film producer does not represent the author of film music, which has proved to be an important target for pirates even quite independently of the cinematographic work itself.

2.6.7. As regards rights in cinematographic works as such, one group of Member States grants the rights explicitly to the film producer who either acts as the sole right holder or the legal representative of all authors in respect of the collective work which the film represents. This group consists of Spain, Ireland, Luxembourg, the Netherlands, Portugal and the United Kingdom. Italy achieves a similar result since, though copyright originates with the persons who create the cinematographic work, within certain limits, the exploitation rights pass immediately by operation of law to the film producer. Another group of States consisting of Germany and France provides that, unless the contrary is proved, the rights of those who create the work are presumed to be transferred to the producer. Finally, in Belgium, Denmark and Greece, copyright is vested in the persons making an artistic contribution to the creation of the film. Transfer of these rights to the producer has a contractual basis.

2.6.8. In practice, even in those States where producers are not automatically granted rights, whether directly or by reason of a transfer by operation of law, contractual arrangements have frequently been reached which enable producers to act against pirates. The rebuttable presumptions applicable in some jurisdictions play an important role, but even in their absence the necessary rights are in practice frequently transferred to the producer by contract. Nevertheless, it would be preferable if, in all Member States, producers of audio-visual works had their own rights, though without prejudice to the rights of other persons, on the basis of which they can act against pirates. Such a result could be achieved either by the law granting such rights directly or through the immediate transfer by operation of law of the rights of those who have participated in the production. It is noteworthy in this respect that, as regards video recordings, the recent French and Portuguese laws directly grant just such a right to the producers of the new and separate category of audio-visual works.

2.6.9. The need to grant rights to persons other than the producer or his successor in title, in the context of the repression of audio-visual piracy, is less evident, though clearly other social and cultural considerations weigh strongly in favour of rights being granted to those who contribute to the creation of such works or perform in them. However, piracy is by its nature primarily an economic problem and it is the producer who normally assumes the economic risks involved in a production. He has the pressing economic interest in repressing piracy and above all needs a firm legal basis on which to act. For this reason, the rights of other contributors and of performers, important as they are, are not further considered in this context. Incidentally, it may be observed, that as regards performers, audio-visual bootlegging of live performances is for obvious technical reasons not a problem of the same practical importance as bootlegged sound recordings.

2.6.10. Turning to sound recordings, the Member States which are parties to the Rome Convention have enacted laws giving protection to producers of such recordings independently of the rights of the author of any work recorded. Likewise, they protect performers against the unauthorized fixation of their live performances though in the case of Ireland and the United Kingdom this is achieved by application of the criminal law alone. However, in November 1987, the UK government, within the context of a new copyright bill, has proposed to make civil remedies available to performers [16].

2.6.11. In other Member States, the situation is less clear and can give rise to problems.

2.6.12. In Belgium, where the copyright law dates back to 1886, no legal provision gives producers and performers a specific right to authorize reproduction of sound recordings. Instead producers and performers have sought protection, in particular, under the Law of 14 July 1971 on Trade Practices. Article 54 of this law prohibits acts contrary to honest commercial usage by which a trader harms or attempts to harm the professional interests of one or more other traders. Actions brought by producers and performers under this law have been quite successful and the system of protection is reported to be considered relatively effective by producers. Nevertheless, certain problems remain which would be solved if producers and performers were protected by a right analogous to copyright [17]. In particular, search and seizure procedures might become available facilitating the proof of an infringement and of its importance. This is discussed further below in paragraphs 2.6.27. - 2.6.40.

2.6.13. In Greece, there is no specific legislative protection for producers and performers against copying of recordings but in practice the Greek courts have accepted the view that the protection enjoyed by authors under copyright law has been assigned to phonogram producers by means of their contracts for mechanical reproduction. This has enabled producers to act on the basis of copyright law and such problems as arise in their regard concern primarily the adequacy of available sanctions. As to performers, legislation was passed in September 1980 providing amongst other things for performers to have the right to authorize or prohibit the recording or use of their performance in any manner[18]. Unfortunately, the necessary Presidential Decree to bring the law into force has not so far been issued.

2.6.14. Spain has ratified the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms but not the Rome Convention. The requirements of the Geneva Convention have hitherto been fulfilled through the provisions of the Decree of 10 July 1942 on the Protection of Phonographic Works confering upon the record producer the rights described in Article 19 et seq. of the law of 1879 on intellectual property. These rights included the right to authorize or prohibit the reproduction of the recording. These provisions have, however, recently been replaced by the provisions of Articles 108-111 of the 1987 copyright law [19] conferring upon the phonogram producer the right to authorize reproduction of phonograms for a period of 40 years computed from the production or publication of the phonogram. In respect of performers, however, it appears to be a question of interpretation whether the right for the performer laid down by Article 102 of the 1987 copyright act to authorize reproduction of his performances also applies in respect of recordings.

2.6.15. In the Netherlands, where no specific rights in respect of reproduction have so far been granted to producers and performers, protection against unauthorized reproduction has in practice to be sought by joining forces with the authors' society, STEMRA. This is due to the fact that the remedies available to producers and performers, namely, actions brought under the law of unfair competition place a heavy burden of proof on the plaintiff. He has first of all to provide proof of the illegal act, that is, the manufacture of or dealing in pirate, counterfeit or bootleg products. Further, he has to prove that the pirate acted in bad faith and knew or at least should have known that these acts were illegal. The actual prejudice suffered by the plaintiff must also be proven and quantified and also the fact that the prejudice suffered is caused by the acts of the defendant. These limitations and the alleged concentration of pirate activity in the Hague may thus be more than a coincidence. Fortunately, legislation appears to be in preparation to introduce specific neighbouring rights for record producers and performers[20].

2.6.16. Portugal is not a contracting party to the Rome Convention nor to the Geneva Convention but in 1985 it enacted new legislation [21] which puts it in a position to ratify the Rome Convention, if it wishes. By virtue of Article 178 of the law, performers are given the right to authorize the fixation of their performances and the reproduction of their fixed performances. By Article 184, producers of phonograms are given the right to authorize the reproduction and distribution of their recordings. The conditions for protection of performers as laid down in Article 190 are fulfilled when the performer is of Portuguese nationality; or when the performance is on Portuguese territory; or when the original performance is fixed or broadcast for the first time on Portuguese territory. Likewise for phonograms, protection is accorded to the producer on the condition that he is a Portuguese national or has his headquarters on Portuguese territory, or that the fixation has taken place in Portugal; or that the first publication has taken place in Portugal or simultaneously in Portugal with the publication for the first time elsewhere. The provisions giving performers and producers the right to authorize the reproduction of recordings is consequently of limited value to foreign right holders, except where protection in accordance with Article 193 follows from bilateral or multilateral arrangements [22].

2.6.17. Provision for producers' and performers' rights in relation to sound recordings in all Member States would clearly be an improvement. Moreover, there are particular factors at work in this sector which differentiate it from others and reinforce the case for such rights. Producers of sound recordings are not necessarily in a close, contractual relationship with authors holding rights in the works that they record. Statutory or compulsory licensing systems exist in some Member States (Germany, Ireland, the Netherlands, Portugal and the United Kingdom) which enable second or subsequent versions of recorded musical works to be made without the authorization of the authors. In the field of classical music, many recordings, involving considerable investment, will in any case relate to works on which copyright has expired. Finally, as regards performers, only the star performer may have a significant interest in pursuing bootleggers and securing the co-operation of authors may prove difficult.

2.6.18. Accordingly, quite independently of the question of the desirability of all Member States ratifying the Geneva and Rome Conventions in their entirety[23], the general introduction of producers' and performers' rights in sound recordings would appear to be a desirable development that would contribute to the effective repression of piracy and therefore merits serious consideration.

2.6.19. Turning to broadcasts and cable transmissions, protection against unauthorized fixation and reproduction for commercial purposes [24] exists only in part. Rights may often exist of course in broadcast or transmitted works, but this is not always the case. In these situations, the existence of copyright or a neighbouring right in the broadcast or transmission as such is of particular importance. Even when a broadcast or transmission concerns protected works, such rights provide a clear legal basis for the broadcasting or cable organizations to take action on their own behalf against pirates.

2.6.20. Ireland and the United Kingdom have long extended copyright protection to broadcasts both domestic and foreign in conformity with their international obligations under the Rome Convention and, as regards television in the United Kingdom, the European Agreement. In 1984 the United Kingdom modified its law to give explicit protection to cable programmes even when these have not been broadcast in the traditional way.[25]

2.6.21. Denmark, Germany, France, Luxembourg and Portugal accord broadcasters a neighbouring right through provisions virtually identical with those of Article 13 of the Rome Convention which provides that broadcasting organizations shall have the right to authorize the fixation of their broadcasts and reproductions thereof. Italy arrives at the same result through the provisions of Articles 79 and 203 of its copyright law.

2.6.22. In Belgium, which does not yet adhere to the Rome Convention, the protection of television broadcasts is based on the European Agreement ratified by Belgium by a law of 14 January 1968 pending new legislation which will allow Belgium to adhere to the Rome Convention [26].

2.6.23. Spain ratified the European Agreement on 23 October 1971. Further, the 1987 copyright law has conferred upon broadcasters a right to authorize fixation of their broadcasts and reproductions thereof for a duration of 40 years [27].

2.6.24. In Greece and the Netherlands, no specific protection is given to broadcasts or transmission as opposed to the works from which programmes may be composed, though reform is reported to be under consideration in the latter State[28].

2.6.25. Even in those Member States that provide for it, the extent to which protection accorded to broadcasting applies to transmissions by cable is frequently far from clear. Where a broadcast is being instantaneously re-transmitted by cable, a strong argument can clearly be made that unauthorized fixation of the cable signal is an unauthorized fixation of the broadcast. Where the cable transmission is not being contemporaneously broadcast over the air, however, or not broadcast over the air at all, such a conclusion is much more difficult to reach.

2.6.26. Accordingly, it would appear that, as with sound recordings, the introduction of rights for organizations engaged in broadcasting to authorize or prohibit the fixation of their broadcasts for commercial purposes would be desirable where they do not exist already. Similarly, given the likely development of cable systems carrying both re-transmitted and original material, clear provision prohibiting unauthorized fixation of cable signals and the reproduction thereof would also serve a useful purpose.

Procedures facilitating legal action and proof

Search and seizure procedures

2.6.27. Search and seizure procedures are available in most Member States, though their efficacity varies not only from one jurisdiction to another but depending on the nature of the rights being protected. A minority of Member States has not yet developed procedures of this kind.

2.6.28. In Belgium, Article 29 of the copyright law of 1886 provides for a seizure procedure on simple request of the right holder as regards works protected by copyright in its narrow sense and subject to the possibility of a guarantee being constituted by way of security in accordance with Article 31. This procedure is not available, however, under the provisions of the unfair competition law upon which producers of sound recordings and performers are still obliged to rely in the manner already described. Instead a provision is made under Articles 70 to 72 of that law for a seizure procedure in cases of infringements committed in bad faith within the meaning of Article 61. This procedure is dependent on the co-operation of the public officials responsible for enforcing the law and, in addition, the requirement that bad faith be shown limits its application.

2.6.29. In Denmark, search and seizure procedures were previously not available in the copyright field. In 1985, however, the copyright law was amended [29] to provide more effective remedies and sanctions for piracy. Right holders, including the producers of sound recordings and performers, are also now entitled to request the public prosecuting authorities to proceed against pirates. By virtue of Article 55 of the copyright law as amended in 1985 search and seizure procedures pursuant to Chapters 72 and 73 of the Law on Civil and Criminal Procedure [30] have been made applicable to cases of piracy.

2.6.30. In Germany, search and seizure procedures are available for violations of copyright and neighbouring rights under the general law of criminal procedure [31]. Whereas copyright infringement normally is subject to public prosecution only on request of an injured party, the 1985 amendment [32] of the German copyright law concerning the reinforcement of remedies introduced a system of public prosecution ex officio also if the public interest requires the involvement of public authorities. The wording of the new Article 109 shows that this will normally be the case where there is commercial piracy for which penalties have been laid down in Article 108a. The new provisions on sanctions have made normal procedures in criminal cases including search and seizure measures fully applicable to piracy.

2.6.31. Under Greek penal procedure, seizure can be ordered as an interim measure by law enforcement authorities.

2.6.32. In Spain, the police may in piracy cases under the terms of the Penal Code request a court order to search the premises of a suspect. If there is prima facie evidence of infringement taking place pirate copies will be seized and placed in custody of the Court.

2.6.33. In France, Articles 66 to 69 of the copyright law of 1957 provide for the summary seizure of illicit copies of works protected by copyright in its narrow sense on the simple request of the right holder, subject under certain conditions to the constitution of a guarantee by way of security. These procedures have been considered sufficiently valuable for the new law of 1985 to include provisions introducing similar though not identical procedures in the context of the new neighbouring rights granted to performers and producers of sound and video recordings and to audio-visual communications undertakings. The new law also provides for a procedure whereby officials of the National Centre for Cinematography may have access to accounts and records to establish the origin or destination of video recordings reproduced or distributed as well as the operating receipts of persons reproducing or distributing video recordings for private use by members of the public[33]. Such procedures clearly facilitate the task of demolishing complete networks for the distribution of pirate products, enabling action to be taken against all involved.

2.6.34. Section 27 of the Irish Copyright Act, 1963 contains provisions on search and seizure as to infringing copies of copyright works including sound recordings, but excluding cinematographic works. If the District Court is satisfied by information on oath that there is reasonable ground for suspecting that an offence is being committed on any premises, the Court may grant a search warrant authorizing a member of the police force to enter the premises, if need be by force, and to seize any copies of any work or any plates in respect of which he has reasonable grounds for suspecting that any offence is being committed. The same section also provides that the District Court, if satisfied by evidence that there are reasonable grounds for believing that infringing copies of a copyright work are being hawked, carried about, sold or offered for sale, may by order authorize a member of the police force to seize the copies without warrant and to bring them before the Court which may order them to be destroyed or delivered up to the owner of the copyright. The extension of section 27 to include cinematographic works is under active consideration. Orders of the Anton Piller type[34] are available in civil copyright proceedings before the Irish courts[35]. These can be obtained in cases involving cinematographic works. However, none of these remedies appear to be available to help performers combat bootlegging.

2.6.35. In Italy, for works protected by copyright in its narrow sense, search and seizure procedures are available in accordance with Article 161 of the copyright law. Notice to and hearing of the presumed infringer, though normally required, can be dispensed with in cases of extreme urgency (periculum in mora). A guarantee by way of security may be required except where proceedings are begun by the national organization representing authors[36]. As regards neighbouring rights, the possibility of relying on Article 161 is controversial. Case law exists denying the possibility[37], while certain commentators argue otherwise[38]. In any event, Article 700 of the code of civil procedure can be relied upon. This permits the court to order whatever measures it considers necessary in favour of any person who has reasonable cause to fear that during the period needed to establish his rights under the normal procedure, he will suffer a prejudice that in practice cannot be corrected.

2.6.36. In Luxembourg, no possibility appears to exist of search and seizure in copyright cases under criminal procedure. In civil proceedings, however, seizure may be ordered under Article 37 of the Copyright Act. Such a possibility does not apply to cases of infringement of the rights of producers of sound recordings or performers.

2.6.37. In the Netherlands, copyright owners can seize infringing copies under Article 28 of the Copyright Act. The procedure is subject to little formality, the order being granted on the request of the right holder to the president of the court. Seizure is also possible in copyright cases under the criminal law. However, since producers of sound recordings and performers, as has been seen, are at present not protected by copyright or a neighbouring right, none of these procedures appear to be available to them in their own right. It is understood, however, that the new law now in preparation introducing neighbouring rights for producers and performers will also introduce seizure procedures similar to those already applicable in copyright cases. Further, licensees will also be entitled to request seizure.

2.6.38. In Portugal, copyright infringement is subject to public prosecution. The law of 1985 provides for the seizure of all illegally produced copies as well as their packaging and any machines or other instruments and documents which are involved in the infringement. In flagrante delicto, various branches of the police and other enforcement authorities have the competence to proceed to seizure [39].

2.6.39. In the United Kingdom, following the decision of the Court of Appeal in Anton Piller KG v. Manufacturing Processes Ltd.[40], the practice has developed of allowing a plaintiff to obtain an interim order, without prior notification to the defendant, permitting him to inspect the latter's premises, take photographs, and seize materials infringing copyright and neighbouring rights in the defendant's possession. Naturally, such an order is only granted where certain conditions are met and subject to safeguards. Thus there must be a strong prima facie case that infringement has occurred, the damage to the plaintiff must be actually or potentially serious, and a grave danger must exist that vital evidence will be destroyed if the defendant is put on notice. In addition, the inspection must be carried out according to certain procedures and the plaintiff must give an undertaking in damages to compensate the defendant for losses resulting from inspections that prove unjustified. Associated interim orders may also be granted compelling the defendant to reveal relevant information to the plaintiff, including the names of persons from whom infringing articles have been obtained or to whom they have been distributed[41], and also preventing him from disposing of his assets[42]. By the Copyright (Amendment) Act 1983 [43] powers for magistrates to grant the police warrants for search and seizure on suspicion of piracy has been introduced for films and sound recordings and extended by the 1985 Copyright (Computer Software) Amendment Act [44] to computer programs. The Government has, however, now proposed these powers be extended to all categories of copyright material [45]. As for performers, these remedies are not available to combat bootlegging, since it has been held that the legislation making it an offence to make or distribute unauthorized recordings of a performance creates no civil rights of action [46]. The government has, however, now proposed this gap be closed by making orders for search and seizure available to performers also [47].

2.6.40. In summary, search and seizure procedures, subject to appropriate safeguards, could be made available more generally in Belgium, Luxembourg and the Netherlands. In particular, in those countries, they need to be placed at the disposal of both the producers of sound recordings and performers. The latter would also benefit from such procedures being made available in Ireland and the United Kingdom. Consideration might also be given to the more general adoption of powers such as those already found in France and the United Kingdom which require pirates to disclose from whom infringing copies have been obtained and to whom they have been transferred.

Customs seizure

2.6.41. Seizure by customs authorities is possible in some Member States though not in others. Moreover, where the systems exist, they vary as to the extent to which they can be used in practice.

2.6.42. Belgium and Luxembourg, which operate a complete customs union, give no legal powers to the customs authorities in relation to copyright or indeed to intellectual property generally. Customs authorities thus play little or no part in the detection or proof of piracy. However, consideration is now being given to a more active role for the customs authorities as regards counterfeiting of trade marks following the adoption of Council Regulation No. 3842/86 on measures to prohibit the release for free circulation of counterfeit goods [48].

2.6.43. In Denmark, there are at present no provisions in copyright or trade mark law enabling customs authorities to intervene to prevent the importation of pirate products. Again, however, action will now be taken to give effect to Council Regulation No. 3842/86.

2.6.44. In Germany, the law provides a basis for customs authorities to act to seize imports of goods with false indications of the source or the identity of products in addition to goods bearing trade marks without the consent of their owners[49].

2.6.45. In Greece, no specific provisions of Greek law authorize customs authorities to intervene to prevent importation of pirated goods. However, since the Berne Convention is considered part of Greek national copyright law and provides that infringing copies of works protected by the Convention shall be liable to seizure on importation[50], the Customs Investigative Service does intervene in piracy cases to seize illicit copies[51].

2.6.46. In Spain, there are no specific provisions under legislation currently in force which enable customs authorities to intervene to prevent the importation of pirated goods. In practice, however, the customs authorities are reported to have been co-operating with the Spanish Authors' Society (SGAE) and the record industry in the control of transborder traffic in copyright goods.

2.6.47. In France, importing articles which infringe French copyright law constitutes a criminal offence under the Penal Code[52]. This permits customs authorities to exercise a degree of control over imports of such goods. Since 1977, when a series of directives were drawn up on this matter, action has been regularly taken on this basis, at least as regards imported sound recordings[53].

2.6.48. Section 28 of the Irish Copyright Act, 1963 enables the owner of rights in any published literary, dramatic or musical work or sound recording, but not cinematographic works, to give notice to the customs authorities that he is the owner of the copyright in a particular work or recording, and to require them, for a fixed period of time, to treat copies of the work or recording as prohibited goods. This procedure enables the customs authorities to prevent importation, except for private and domestic use, of any infringing copy of the work or of the recording. The form of notices and the fees payable in respect thereof are included in matters prescribed in Regulations made under the Act by the competent customs authority. Arrangements have been made between right holders' organizations and the customs authorities to define the circumstances in which consignments will be inspected[54]. Similar provisions exist under the Irish trade and merchandise marks legislation.

2.6.49. In Italy, customs authorities have powers to prevent the importation of goods which have been deliberately misdescribed[55] or which bear counterfeit trade marks[56]. They have no specific powers as regards infringements of copyright or neighbouring rights.

2.6.50. In the Netherlands, no specific provision is made for customs authorities to intervene to prevent the importation of pirate products. Though they may inspect all goods in the course of their importation, their powers to intervene are limited to the control of import formalities, including the accuracy of the declared value of the goods. The customs authorities are also subject to obligations of secrecy. Customs intervention has thus not developed as an important instrument in the repression of piracy, though on occasions information has been passed on in appropriate cases to the police or to right holders' organizations[57]. The Interministerial Working Group makes no proposal on the involvement of Customs Authorities in its report on piracy [58], but action will now be needed to give effect to Council Regulation No. 3842/86.

2.6.51. In Portugal, Article 229 of the law on Industrial Property [59] confers upon customs authorities the power to seize counterfeit goods at the frontier. This provision is however applicable only where a trade mark or an appellation of origin has been falsified.

2.6.52. In the United Kingdom, section 22 of the Copyright Act 1956 provides that the owner of the copyright in any published literary, dramatic or musical work may by notice require the customs authorities to treat copies of a given work as prohibited goods and prevent their importation. This provision does not apply to sound recordings or cinematographic works, however. Similar provision is made as regards goods bearing infringing trade marks under section 64(a) of the Trade Marks Act 1938. This provision is of course available to producers who are owners of trade marks appropriated by pirates. In its copyright bill of October 1987 the government has inserted a provision aiming at the introduction of the same possibility in respect of films and records, though right holders will have to give an advance notice as to the time and place of the expected importation in respect of infringing copies of films and recordings [60]. These notice requirements can, however, limit the utility of these procedures from the point of view of right holders[61].

2.6.53. It would thus appear that, in many Member States, customs seizure at the Community's external frontiers could be developed as a more effective instrument in the repression of infringements of copyright. At the Community's internal frontiers, no control can be exercised after 1992. This does not, however, exclude customs seizure when the existence of illegitimate merchandise is brought to the attention of customs authorities or, when they, in the exercise of internal control functions, detect fraud. However, attention will have to be paid to the practical difficulties [62] involved if the customs services are not to be diverted from their principal tasks, while at the same time procedures cannot be so burdensome to right holders that they are of little or no practical use.

2.6.54. In December 1986, the Council adopted a regulation laying down measures to prohibit the release for free circulation of counterfeit goods, that is, goods to which a trade mark has been improperly affixed[63]. This regulation creates common rules on the procedure to be followed to prevent counterfeit goods being imported into the Community. The regulation is limited to goods bearing infringing trade marks but, as stated in the explanatory memorandum of the Commission's initial proposal, at a later stage, consideration might be given to applying the procedures to other intellectual property rights, in particular, copyrights. Such an extension of the regulation would ensure that customs seizure procedures made a uniform contribution to the repression of copyright piracy at the external frontiers of the Community.

Remedies and sanctions

2.6.55. A relatively comprehensive State-by-State description of the current situation would involve a considerable degree of detail. It seems preferable to concentrate on a limited number of important issues, namely the availability of damages or other financial relief to those whose rights have been violated; the availability of injunctive relief; the possibility of disposing of discovered pirate products and equipment used to produce them in ways which ensure that they will not continue to circulate to the right holders' disadvantage; and, finally, the possibility of imposing sufficiently dissuasive criminal sanctions, including imprisonment for serious offences.

Damages or other financial relief

2.6.56. As regards damages, where exclusive rights have been granted under the civil law, damages will of course in principle be available, as may an action for an account of profits. Similarly, where unfair competition law can be relied upon in a civil action, damages can be obtained for consequent financial losses.

2.6.57. On the other hand, as has been seen, certain important interests may not be protected by civil rights of action. This applies not only to cases where the interest is simply not legally recognized, such as those of the producers of sound recordings in the Netherlands, but also to jurisdictions which protect certain interests exclusively by the criminal law and without provision for compensation within the criminal framework. As has been seen, this is at present the case as regards the unauthorized recording of live performances in the United Kingdom and probably Ireland. The introduction of civil rights of action as already announced by the United Kingdom government would close this particular gap[64].

2.6.58. More generally, claims for damages are normally dependent on proof of the damage sustained or income foregone. In some jurisdictions, the damage may include damage of a moral character though this is normally limited to authors' and performers' claims. Only in Ireland[65] and the United Kingdom[66] is provision made enabling courts to award conversion damages equivalent to the full value of infringing copies detained or converted and, in flagrant cases, additional exemplary damages. Even so, awards of the former depend on proof of the number of copies in question and awards of the latter are subject to a number of restrictive conditions making them unusual in practice. Further, the UK Government has recently announced its intention to abolish conversion damages [67] which are regarded as objectionable in particular in the field of design copyright. Instead the powers of the courts to award additional damages will be strengthened by removal of existing limitations on their applicability.

2.6.59. The necessity of proving the damage sustained or income foregone can pose problems since the quantities of pirate products in fact sold may not be ascertainable with any degree of certainty, even where search and seizure procedures have been successfully used. In the case of bootleg records, the added difficulty arises that an estimation of the depressive effect of the appearance of a bootleg recording on sales of legitimate records is frequently speculative in character. These problems of proving the quantum of damages, as well as the practical difficulty of enforcing awards against the many pirate enterprises which are careful to keep their realizable assets relatively small, mean that damages need to be complemented by other remedies if pirates are to be effectively dissuaded from continuing their activities.

Injunctive relief

2.6.60. An important instrument in this respect is injunctive relief, that is, the availability of judicial orders which will enable continuing or future pirate activity to be subject to sanctions of a penal type. Such remedies are available in somewhat different forms in Belgium, Denmark, Germany, Ireland, Luxembourg, the Netherlands ("astreint" or "dwangsom") and the United Kingdom, subject of course to what has already been said concerning limitations as to the substantive rights conferred by the law and the availability of civil rights of action. They may also be available on an interim or accelerated basis which has the considerable advantage of enabling action to be taken that can prevent pirate products being placed on the market in the first place.

2.6.61. In Greece, injunctive relief is available and, under certain conditions, as an interim measure also[68].

2.6.62. In Spain, injunctive relief is available under the provisions of the 1987 copyright law and under certain conditions as an interim measure also [69].

2.6.63. In France, however, injunctive relief appears not to be available and it has been suggested that its introduction would in many cases be helpful, particularly to combat more sophisticated and persistent lawbreakers[70]. The new French law[71] does not alter this position, though it provides for other measures which are aimed at the determined pirate[72].

2.6.64. In Portugal, injunctive relief is not available under the legislation in force.

Disposal of infringing products and equipment used to produce them

2.6.65. Different techniques exist for ensuring that pirate products that have been discovered will not continue to circulate to the right holders' disadvantage.

2.6.66. Thus, under the rules of civil and criminal procedure in force in most Member States, proceedings for the infringement of rights in books, films and sound and video recordings may lead to the court ordering that infringing copies be destroyed or, in some cases, be rendered unusable or, in others be transferred to the right holder.

2.6.67. Likewise, provision is frequently made for equipment used to produce infringing copies to be destroyed with a view to preventing pirate activity from continuing in the future.

2.6.68. The main gaps in this area appear to be consequential on certain interests not being protected by the substantive rules of civil or criminal law rather than weaknesses in the procedural provisions alone. Some of these have recently been closed. For example, in France, the new law has introduced confiscation for sound and video recordings infringing the substantive neighbouring rights which the law now has introduced for performers and producers. Such a possibility has long existed for books and films [73]. Other gaps remain, however, notably those flowing from the absence of specific protection for producers of sound recordings and for performers in Greece and the Netherlands. In addition, the Belgian law of 1971 on Trade Practices which, as has been seen, plays an important role in the protection of sound recordings, appears not to permit confiscation or a similar remedy in either criminal or civil proceedings.

Dissuasive criminal sanctions

2.6.69. The nature of many pirate operations requires substantial criminal penalties to be available to dissuade those who seek to avoid the full effect of civil judgements and are skilful in so doing. In addition, providing for severe penalties, including imprisonment for more serious offences, gives a clear indication to law enforcement authorities of the need to act against piracy and a real incentive to do so. On the other hand, if these authorities know that even a successful prosecution will lead only to a small fine, which will probably be regarded by pirates simply as an irritating tax on their continuing activities, it is understandable that they prefer to concentrate their limited resources on other matters.

2.6.70. Many States have already recognized the importance of having an adequate range of criminal sanctions available to secure effective police involvement in the detection of piracy and the enforcement of law and also to constitute effective disincentives to pirates. Thus, in spite of the general tendency in the Community to reduce criminal penalties, in particular, those consisting of imprisonment, sanctions available in case of piracy have been substantially reinforced in many Member States in accordance with the objectives set out in the resolution by representatives of governments of the Member States of 24 July 1984 [74]. Whereas the United Kingdom had already increased its maximum penalties in 1983 [75], Denmark [76], Germany [77] France [78], and Portugal [79] have all introduced increased penalties in the past two years. In Italy the penalties introduced for piracy in respect of recordings in 1981 [80] were made applicable for film and video piracy in 1985 [81]. Further, an increase of penalties available is under active consideration in Ireland and the Netherlands. In short, deterrent sanctions are already or will be shortly available in Denmark, Germany, Greece, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

2.6.71. However, in the following cases in particular, the criminal sanctions applicable seem in need of reinforcement.

2.6.72. Thus, in Belgium, imprisonment is not possible for copyright infringement as such, whatever the nature of the right infringed or the scale or character of the offence. However, where conviction is obtained for counterfeiting or under Article 191, 498 or 505 of the Penal Code sentences of imprisonment may be imposed.

2.6.73. As regards producers' rights in sound recordings, as has been seen, these are not protected in the Netherlands and a fortiori penal sanctions are not available, though their introduction is being considered[82].

2.6.74. Finally, the penalties applicable to bootlegging in Ireland do not include imprisonment.

2.6.75. In addition, however, the effectiveness of criminal sanctions depends not only on the characteristics of the penalties, but also on the degree of certainty that they will in practice be applied. This in turn depends in large part on law enforcement authorities taking an active part in the prosecution of offenders. Substantial penalties, at least for serious or repeated offences, as has already been stated, act as an incentive for law enforcement authorities to act where they have power to do so. However, it appears that, in some cases, copyright infringements, though criminal offences, can be prosecuted only on a complaint from an injured party, as in Belgium and Luxembourg or even only by the injured party himself as in Greece.

2.6.76. The explanation for this state of affairs seems in part at least to be an understandable reluctance to give law enforcement authorities responsibilities in cases of the more classical and delicate type in which one author is alleging that another has plagiarized his work. However, modern, commercial copying is clearly distinguishable from such cases: the copies are complete or nearly so, no attempt being made to present the work as different from the original. Moreover, the scale of the phenomenon is such that it should rank as an economic crime of the first order damaging, not only to individual right holders, but also to the viability of important areas of economic and cultural activity. For these reasons, most Member States authorize law enforcement authorities to prosecute on their own initiative as regards large scale copying and traffic in pirate products or at least encourage public prosecution on request by the injured party. Such approaches should be adopted by all Member States.

2.7. The organizational framework for enforcement

2.7.1. The organizational framework for enforcement activities is complex and varies from State to State. It includes individual right holders, organizations representing such right holders and public authorities.

Right holders and their organizations

2.7.2. Authors are in all Member States organized in societies which are engaged primarily in the collecting of royalties for literary and musical works. Separate societies may exist for different classes of work, for example, societies dealing with dramatic and dramatic musical works are frequently distinct from those dealing with other forms of music and lyrics including popular songs. The national organizations are members of an international organization, CISAC[83]. Other right holders are also organized at national and international level. Thus producers of sound and video recordings are organized in all Member States and these national organizations, together wih others, form the International Federation of Producers of Phonograms and Videograms (IFPI). Film and video producers[84] and distributors[85] are also organized at national and international level as are publishers[86], broadcasters[87], and performers[88].

2.7.3. In an increasing number of cases, the current prevalence of piracy has led at both national and international levels to new initiatives, including the formation of ad hoc anti-piracy organizations bringing together different interest groups, to combine resources and operate with greater effectiveness. New techniques have been developed to facilitate enforcement such as the marking of films to enable the source of seized copies to be identified more easily.

2.7.4. For example, in the United Kingdom, the British Phonograph Industry (BPI) has been dealing with piracy of sound recordings, while the Federation Against Copyright Theft (FACT) was founded in 1982 and has since played an important part in reducing the market share of pirate video recordings. In 1983, a similar action group was founded to combat video piracy in the Netherlands known as Foundation Video Safe. In Ireland, the Irish National Federation Against Copyright Theft (INFACT) began operations in 1984 and from the beginning of 1985, the Belgian Anti-Piracy Federation (BAF) and, in Germany, the Society for the Prosecution of Copyright Infringement (GVV, Gesellschaft zur Verfolgung von Urheberrechtsverletzungen) have begun similar operations. These examples and, in particular, the success achieved in the area of video piracy in the United Kingdom have inspired the creation of similar organizations in other Member States: in France, l'Association de Lutte contre la Piraterie Audiovisuelle (ACPA); in Spain : Federación Antipirateria (FAP); and in Denmark, the Foreningen af Danske Videogramdistributører.

2.7.5. At the international level also, the producers of sound and video recordings have created an organization in co-operation with the International Chamber of Commerce and the Commonwealth Secretariat. The International Maritime Bureau of the International Chamber of Commerce contributes to the project its particular expertise in monitoring the transportation of goods. IFPI contributes amongst other things intelligence collected by its national and regional groups throughout the world. The organization, known as the Joint Anti-Piracy Intelligence Group (JAPIG), achieved significant results from the outset[89].

2.7.6. This concentration of anti-piracy interests at national and international level is a welcome development. By centralizing relevant information and activity on a limited number of focal points, it not only increases the effectiveness and efficiency of anti-piracy efforts, it should also facilitate the development of fruitful co-operation between rights holders and public authorities by providing a limited number of contact points which, without prejudice to the rights and possibilities of others, can develop particularly productive relations with relevant national administrations.

Public authorities

2.7.7. At national level, different agencies may be involved depending on the State in question including the customs, the police and public prosecuting authorities as well as agencies responsible for taxation and consumer protection.

2.7.8. As has already been indicated[90], limitations on the role and powers of some of these agencies sometimes exist, for example, as regards the police and the customs. Removing these limitations would increase the contribution that they would make to the repression of piracy. In particular, ensuring that customs authorities are in law and in practice able to inform right holders of possible violations of their rights so that the latter can act to protect themselves, where appropriate, seems to be a desirable objective.

2.7.9. However, this involves not only removing the legal limitations to which reference has already been made, but also ensuring that there are readily usable lines of communication between the authorities on the one hand and right holders' organizations on the other. As has been seen, the formation of ad hoc anti-piracy action groups is already making a significant contribution in this respect. To the extent that there may be weaknesses, right holders are in a position to improve the position in the short run for themselves by taking action along the lines already traced by others. In the longer term, attention might also be given to the creation of systems using modern information technology to ensure that useful information is made available to the parties at the lowest cost possible. Further reference will be made to this possibility subsequently.

2.7.10. Conversely, the effectiveness of the public authorities depends on their having the full co-operation of those interest groups which are adversely affected by piracy. The activities of public authorities are subject to inevitable resource constraints. The restrictive effect of those constraints can be significantly reduced to the extent that those immediately concerned can provide the authorities with information enabling them to act with efficiency. In the customs context, for example, one of the obstacles to more effective intervention is the difficulty and cost of establishing that goods are probably pirated and the identity of those whose rights have been infringed. The possibility of extending the Council Regulation, to which reference has already been made, on release of goods into free circulation, to include other forms of intellectual property, including copyright, depends in substantial part on solutions being found to these practical problems.

2.7.11. Again, modern information technology may help to provide the solution. From time to time, the suggestion has been made at Community level of the creation of a register of rights in cinematographic or audio-visual works[91]. This has been regarded primarily as an instrument to facilitate the financing of film production and up to now agreement on the creation of such a system has not proved possible [92]. However, a register of rights in respect of sound recordings, video recordings and films could also play a role in the repression of piracy by making it relatively easy to identify who has the right to exploit a work in a given jurisdiction. This could facilitate intervention by customs and other authorities since they should be able to establish more easily and rapidly whether merchandise seems likely to be infringing or not and would also be able to inform interested parties of consignments of apparently pirated products. Within the framework of WIPO-UNESCO, a Committee of Governmental Experts will discuss in March 1988 the setting up of an International register of audiovisual works. Depending on the outcome of the WIPO-UNESCO meeting, the work at Community level could be co-ordinated with future work at the international level.

2.7.12. In order to make such a system workable in practice from the point of view of customs authorities, right holders would need to notify those authorities periodically of works in relation to which a particular risk of piracy exists.

2.7.13. The Commission has in 1985 submitted to Council a communication on the co-ordinated development of computerized administrative procedures, the C.D. project[93], which the Council endorsed by decision of 4 February 1986[94]. The system envisaged could probably be used to orient customs checks in the piracy context. Detailed examination of this possibility would not be appropriate in the context of this paper but should form part of the work leading to the development of the system. As to the register itself, one of the main objections in the past has been the cost to the public of its creation and administration. But the question clearly arises as to whether it would not be possible for a register to be organized and paid for by those who will derive the benefit from it, that is, the right holders concerned. If such an approach were possible, Community involvement could be limited to ensuring that the register could be accessed by customs and other relevant authorities within the framework of the C.D. project and possibly to providing a simple legal framework to give the registry and the information that it contains legal recognition.

2.7.14. In addition to co-operation between public authorities on the one hand and right holders on the other, co-operation between relevant public authorities at national, international and Community levels is also important.

2.7.15. At the national level, Member States are in a position to take for themselves the necessary measures in the light of their particular administrative structures. However, a strong case can be made for the creation or designation of focal points having particular responsibilities in relation to piracy and associated problems. As regards the audio-visual field, the role of the Centre National de la Cinématographie in France constitutes an interesting example. Such focal points not only facilitate co-ordination of the activities of all public authorities concerned and co-operation between them. They can also perform the role of natural interlocutor for right holders and their organizations which, as has been explained above, are frequently in the process of creating similar focal points for themselves.

2.7.16. At the Community and international levels, procedures for co-operation between law enforcement agencies already exist which can be used in appropriate cases including, for example, the services of Interpol[95]. The general legislative tendency to sanction piracy as a serious offence punishable by imprisonment should make it easier to use these procedures since it makes it less likely that piracy will be perceived as a matter of minor importance.

2.7.17. The Interpol General Assembly at its 46th session in Stockholm in 1977 adopted a resolution on audio-visual piracy and has since made efforts to expand its activities to combat piracy. It should be remembered however that co-operation within Interpol consists of voluntary acts of mutual assistance and is based on the possibilities offered by national laws of its Member States, their national sovereignty being strictly respected. They retain power to decide whether or not to co-operate; they do not have to justify their decisions and no measures may be taken if they do not. These limitations on the co-ordinating possibilities of the Interpol are an important qualification on its ability to act in the repression of piracy.

2.7.18. For the future, at Community level, a logical consequence of the recent adoption of a Community regulation on the release into free circulation of counterfeit goods[96] might be to consider counterfeit as a matter that should fall within the mutual assistance regime created by the Council Regulation on mutual assistance between the administrative authorities of the Member States and co-operation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters[97]. This provides for both assistance on request and spontaneous assistance. If necessary, a relatively simple amendment could be adopted to clarify the position. It would also follow that if it proves possible to extend the regulation on release into free circulation to other forms of intellectual property infringement, including copyright, the mutual assistance regime could apply equally in such cases. Finally, the C.D. Project will provide the technical means whereby such mutual assistance can be efficiently managed.[98]

2.7.19. At the international level, the Customs Co-operation Council (CCC) has proved an efficient instrument for increasing co-operation between national customs authorities. In 1953, it adopted a Recommendation on Mutual Administration Assistance aiming at providing information on new methods or means of customs fraud and to offer on request of another Member State the maintenance of a special watch on particular consignments, on persons known to be engaged in smuggling or on suspect vehicles. Furthermore, in 1975, the Council adopted a Recommendation on the Pooling of Information concerning Customs Fraud. The information collected and subsequently communicated to States relates to persons convicted of smuggling or customs fraud, methods of smuggling and vessels involved in smuggling. These instruments do not relate directly to copyright goods, but they can play a role when trade in pirate products involves, as it often does, customs fraud. However, in 1983, the CCC embarked on a study of the role of the customs in implementing copyright and industrial property law. The aim of the study partly carried out by means of a questionnaire addressed to Member States and international organizations was to define the role of customs authorities in general anti-piracy action and how the participation of these authorities could be made more regular and effective. The study was completed in 1984[99].

2.7.20. The study has been discussed by the competent Committees of the CCC, that is the Enforcement Committee and the Permanent Technical Committee. The Enforcement Committee reached the following conclusions. First, customs enforcement of intellectual property law would be a permanent item on the Committee's work programme so that the Committee could continue to exchange views about developments in this field. Secondly, the CCC Secretariat should now propose practical means of assisting administrations which already have competence in this field. Thirdly, the Secretariat should continue to maintain contacts with the international organizations which are concerned with this question, and to co-ordinate the activities of the Enforcement Committee and of the Permanent Technical Committee which was responsible for the administrative aspects of the question. Fourthly, the Secretariat should further analyse the enforcement instruments of the CCC with a view to determining the extent to which they could be used for purposes of combating piracy and counterfeiting pending further consideration of a new instrument. The Permanent Technical Committee has finished its work in developing a model law which gives customs authorities power to act in counterfeiting and piracy cases.

2.7.21. The CCC's programme in relation to piracy and counterfeiting clearly merits the Community's full support.

2.8. The international context for future initiatives and developments at Community level

2.8.1. Before proceeding from the analysis set out above to a consideration of possible future initiatives and developments at Community level, the broader international context in which such initiatives and developments may be taken should be considered in so far as this context has not yet been covered.

2.8.2. The international organizations which administer the relevant copyright and related rights conventions have several times addressed the piracy issue to alert the public to the damage done to cultural activity by piracy and to promote, in the various parts of the world where piracy constitutes a serious problem, actions to combat pirate activities.

2.8.3. At the level of the Rome Convention[100], the Intergovernmental Committee in October 1979 adopted a recommendation to Member States of the United Nations in which the administering organizations recommended UN Member States to accede to the Convention[101]. This recommendation was renewed by the Intergovernmental Committee during its eighth Ordinary Session in November 1981[102].

2.8.4. At the WIPO level, a first worldwide Forum on the Piracy of Sound and Audiovisual Recordings was held in Geneva in March 1981. A resolution was adopted recommending steps to be taken both in developed and developing countries to bring into force appropriate legislation to prevent piracy and to ensure the application of such legislation[103]. A second worldwide forum was organized in WIPO in March 1983, this time on "Piracy of Broadcasts and the Printed Word". The resolution adopted as the conclusion of the meeting[104] expressed concern over the spread of piracy. It considered that the search for practical measures for combating piracy with more efficiency should continue and recommended that the Assembly of the Berne Union adopt a recommendation on the subject. The subject was addressed again at a meeting of government experts on 2-6 June 1986 organized by UNESCO/WIPO and a resolution adopted calling for stronger penal sanctions against piracy[105].

2.8.5. The Resolutions adopted within WIPO can realistically only aim at bringing to the attention of national governments the need to adopt appropriate measures against piracy at the national level. Even when taking a general position as to the piracy issue, the wording of a resolution must be chosen with delicacy if an important number of developing countries are not to find it too difficult to endorse. For them, the importance of due respect of intellectual property rights must normally be balanced against recognition of the need for ready access to copyright material.

2.8.6. The UNESCO Secretariat has prepared a document entitled "Analysis of the replies to the UNESCO questionnaire on the phenomenon of the piracy of printed material, phonograms, audiovisual material, films, and radio and television programs," which summarizes and analyses the replies to the questionnaire given by its Member States.

2.8.7. At the level of the Council of Europe, Ministers of Culture adopted a resolution in May 1984[106] inviting Member States to organize, at national and European level, action to repress audio-visual piracy. On 18 January 1988, the Committee of Ministers adopted a Recommendation[107] to Member States on measures to combat piracy in the field of copyright and neighbouring rights.

2.8.8. Within the GATT, the possibility of action on the trade aspects of counterfeiting has been actively discussed since 1982. In 1984, a group of experts was set up to pursue the matter. This GATT initiative aimed at providing a framework for the participation of customs authorities in the detection and seizure of counterfeit merchandise, which is at present defined as merchandise on which a trade mark allegedly has been placed without the consent of the trade mark owner. Insofar as pirates copy not only the work but also the packing, which for audio-visual works is frequently the case, this initiative is also of interest to the copyright holder. However, the work within GATT has not resulted in an agreement on counterfeit merchandise, because of opposition by numerous third countries, in particular developing countries.

2.8.9. This work had resulted in that at least one area of intellectual property rights could be dealt with by GATT. In September 1986, the Ministers of Trade of contracting States meeting in Punta del Esta decided that, in a more general sense, trade aspects of intellectual property should be included on the agenda of the multilateral negotiations, which they had just opened. Consequently, these negotiations will also include other issues of intellectual property, which have an impact on trade flows and trade relations. It is clear from the preliminary discussions on this issue which have taken place that there is a marked willingness at Community level to examine the possibilities of effectively reinforcing legislation on copyright and related rights within the framework of GATT, in particular to combat book, phonogram and videogram piracy, on the basis of the work already carried out on counterfeit goods.

2.8.10. Finally, it should be noted that the Community has recently taken up intellectual property problems with third countries, in particular as regards the barriers which certain intellectual property systems constitute in respect of trade flows and investment by Community enterprises. It appears worthwhile at this stage to consider the possibility of using these contacts more systematically to combat piracy. This question will be examined in more detail in Chapter 7.

2.9. Future developments and initiatives at Community level

2.9.1. The present situation as regards piracy in the Member States of the European Community and in the rest of the world can be summarized as follows. Although in several Member States substantial progress has been made in the recent past, piracy of sound recordings and audio-visual works remains a substantial problem both within and outside the Community. Piracy of books also remains serious, though in this case the problem exists essentially in certain non-Member countries.

2.9.2. Outside the Community, positive trends can be perceived only in Western European countries, the United States, Canada, Japan, Australia, Hong-Kong and recently Singapore. Many other countries do not take effective anti-piracy action and in some cases, display a degree of complacency that suggests connivance, even complicity. The external dimension of the piracy problem seems likely to remain significant for some time to come. The Community has a clear interest in using its collective weight to ensure better protection for the creations of its authors, performers and producers in non-Member States. The nature of possible Community actions to this end and the frameworks within which such actions can be taken is discussed in detail in Chapter 7.

2.9.3. Inside the Community, there is good reason to believe that progress recently made in repressing piracy can be maintained, even increased. Copyright laws have been amended or are under current review in many Member States. The Council Resolution of 1984 has drawn the attention of Member States to the piracy problem. As a consequence, reinforced legislation, deterrent sanctions and better enforcement procedures can now be relied upon in a number of cases. Further, right holders have in the recent past organized themselves in anti-piracy organizations and are actively taking action against piracy.

2.9.4. Nevertheless, many improvements remain to be made in particular jurisdictions. Moreover, it could be dangerous to relax too soon, particularly when new reproduction technology may give fresh impetus to pirate activity.

2.9.5. As stated in paragraph 2.3.5., pirate compact discs are virtually unknown due to the fact that the manufacture is technically complicated and requires high investments. The launch of the digital audio tape recording equipment (DAT) which offers the same sound quality as the compact disc may change the picture in respect of piracy of high fidelity sound recordings. Digital sound sources, whether compact discs or digital tape, can be perfectly reproduced and contrary to analogue copies, digital copies do not deteriorate by successive copying. On the basis of a "clone" copy, generations of copies may be reproduced, each copy serving as a master copy.

2.9.6. In an effort to reduce the piracy problem, Japanese producers have agreed to implement in full the standards of protection for digital recordings laid down in the R-DAT conference standard of 1986. Guidance from MITI has led all major manufacturers of DAT in Japan to accept the conference standard which includes the following measures : a sampling rate for digital recording (48kHz) which is different from the sampling rate used for compact discs (44,1kHz). This has the effect of excluding the reproduction of a compact disc through the digital input socket of the DAT recorder and thereby excludes the production of "clones" on the basis of CDs, unless a rate converter is applied. Further, the MITI guidelines provide for the use of detector circuitry to identify copy-inhibit codes inserted in the sub-codes of pre-recorded digital software, both CD and eventually DAT. This renders digital copying of CD onto DAT impossible but does not prevent copying via the analogue output of a CD player. MITI guidance also suggests that licence agreements with non-Japanese firms to produce DAT should maintain both these anti-copying measures.

2.9.7. The use of digital audio tape is seen by the recording industry primarily as a potential problem in relation to home copying and is consequently dealt with in Chapter 3 below where a number of possible protection measures are discussed. A piracy problem remains, however, since the described measures relating to the prevention of direct digital copying will not prevent the determined pirate from producing such illegitimate copies as the market may demand.

2.9.8. Mass production of pre-recorded digital tape will eventually take place by means of contact process printers allowing copies to be made many times faster than on a recorder. The danger that such machines, in the wrong hands, might be used to produce large quantities of pirate copies is real.

2.9.9. On the other hand, manufacturers of recorded music are limited in number and the identity of legitimate manufacturers in the Community is known to right holders and their organizations. Since considerable economic interests are at stake, consideration might be given to limiting the sale of DAT printers to professional users such as record companies and to making the sale to a user and his possession of the equipment dependent on a licence to be issued by a public authority of a Member State. This public authority would keep track of all machines sold on its territory to make sure that equipment is not subsequently transferred to non-licensed users. Licences could be revocable on proof that the user had engaged in pirate activity.

2.9.10. Since contact printing equipment is not yet on the market or at least in a very limited number only, such a measure would be effective and would not necessarily imply the introduction of unreasonably burdensome bureaucratic procedures. It could well be compared to the firearm licence in use in Member States with the qualification that the licence would be delivered to any person being a bona fide producer of pre-recorded DAT.

2.9.11. If a licensing scheme were to prove successful within the Community, consideration could then be given to persuading other countries to do likewise.

2.9.12. More generally, that piracy of copyrighted goods in the Community has a significant cross-frontier dimension is clear. A considerable proportion of pirate goods sold in the Member States have been imported from the countries both from within and outside the Community. In addition, even when pirate products are produced in the Member State of sale, the protected work may well have its origin in another Member State, having been procured or copied from a broadcast originating there. This last phenomenon is likely to increase as cross-frontier television broadcasting and cable transmission become increasingly common in the Community. Accordingly, strategies for the repression and prevention of piracy that are conceived exclusively within national frameworks are unlikely to prove satisfactory. Such approaches will not be able to tackle the source of much of the problem and, in so far as they will be obliged to confront pirate imports essentially at the national frontier, they risk having negative effects on legitimate commerce between Member States. They could accordingly have a direct, and adverse, effect on the functioning of the common market.

2.9.13. A strong case can thus be made for concerted actions at Community level to reduce to the maximum extent possible production of pirated works by sources within the Community and trade in pirate products of whatever provenance or origin. The main actions that might be taken follow from the analysis already made.

2.9.14. First, quite independently of the ratification of relevant international conventions, substantive rights should be enacted where they are lacking at present, in particular, in favour of producers of films and sound and video recordings, performing artists, broadcasters and cable operators. They should be entitled to authorize the fixation and reproduction for commercial purposes and the commercial distribution by way of sale [108] of their works (see paragraphs 2.6.3. to 2.6.26. above).

2.9.15. Second, effective search and seizure procedures, subject to appropriate safeguards, should generally be made available in both civil and criminal proceedings. Consideration should also be given to the general adoption of powers, again subject to appropriate safeguards, to enforce disclosure of sources and destinations of pirate products (see paragraphs 2.6.27. to 2.6.40. above).

2.9.16. Third, consideration should be given to extending the Council Regulation on prohibiting the release for free circulation of counterfeit goods to include goods infringing copyrights. Now that the regulation has been adopted, experience will soon be gained as to its operation (see paragraphs 2.6.41. to 2.6.54. above).

2.9.17. Fourth, as regards remedies and sanctions, appropriate damages should be available to those whose interests have been damaged; injunctive relief should be available to deal with persistent offenders; confiscation of infringing goods and equipment used to produce them should be introduced where they are not possible at present; and piracy should be treated as a criminal offence, subject to public prosecution and entailing the possibility of imprisonment for serious or repeated offences (see paragraphs 2.6.55. to 2.6.76. above).

2.9.18. Fifth, the efforts of rights holders and their organizations to develop structures enabling them to act effectively against pirates should be developed and encouraged, not least by the public authorities responding in a reciprocal fashion. This involves both the removal of certain formal constraints on co-operation between public authorities and rights holders and, in addition, practical measures to improve the effectiveness of such co-operation while respecting the inevitable resource constraints on public administrations. In this context, consideration might be given to the creation at national level of administrative focal points to facilitate co-operation both between concerned public agencies and between the administration as a whole and rights holders and their organizations. Consideration might also be given to the creation by right holders' organizations of a register or registers of rights in protected works in a computerized form. The possibility of exploiting this information in order to strengthen customs controls should be explored in the context of the C.D. project for the co-ordinated development of computerized administrative procedures (see paragraphs 2.7.10. to 2.7.13. above).

2.9.19. Sixth, co-operation between competent authorities should be promoted at national, Community and international level. In this context, at the Community level, consideration should be given to an extension of the mutual assistance regime to include first counterfeit and then copyright infringements (see paragraph 2.7.18. above).

2.9.20. Finally, at the international level, the initiatives within GATT and Customs Co-operation Council in this field should be actively supported by the Community, while duplication of efforts should be avoided. At the same time, consideration should be given to using more systematically the various channels open to the Community to influence countries which are known to be sources of pirate products to act against the producers (see paragraphs 2.7.19 to 2.8.10. above and chapter 7 below).

2.9.21. Some of the actions listed above clearly call for formal legislative activity by the Community's institutions, for example, the extension at the appropriate time of the regulation on the release of counterfeit goods and the mutual assistance regime. Equally clearly, some other actions are not legislative in character, for example, the creation of administrative focal points and the initiatives at the international level. In between, are actions as to which binding Community legislation would be possible, but as to which less formal, and probably less lengthy, responses may also be possible. Into this category fall the actions designed to assure the general introduction of deterrent sanctions in respect of piracy, for example. At this stage, however, the advantages in terms of legal security offered by a binding Community legal instrument seem to outweigh the advantages of other techniques in so far as measures concerning the availability and legal enforcement of relevant intellectual property rights are concerned.

2.10. Summary

Whereas measures to combat piracy outside the Community's jurisdiction is dealt with in Chapter 7 on the Community's external relations, the findings of the present chapter can be summarized as follows :

The repression of piracy of sound and video recordings in the Community requires the existence of clear substantive legal provisions in favour of authors, producers and performers and broadcasting organizations in respect of their right to authorize the reproduction for commercial purposes of their recordings and broadcasts.
Such substantive legal provisions must be accompanied by appropriate procedures facilitating legal action and proof against acts of piracy, in particular provisions on search and seizure.

Efficient remedies must be at the disposal of right holders in infringement cases and dissuasive criminal sanctions available for dealing with, in particular, organized professional piracy. Finally, an appropriate organizational framework permitting an effective cooperation between right holders and public authorities, in particular law enforcement authorities, must exist. Specific measures, such as the control of commercial tape duplication equipment, should be adopted where appropriate.

2.11. Conclusion

The Commission would accordingly welcome the views of interested parties on the following matters.

*** The intention of the Commission to submit to the Council as a matter of priority a proposal for a binding legal instrument :**

a) requiring all Member States to provide, through one legal technique or another, for rights for producers of cinematographic works, videograms and sound recordings to authorize the reproduction for commercial purposes of those works and their commercial distribution;
b) requiring all Member States to provide rights for performing artists to authorize the reproduction for commercial purposes of their fixed performances and their commercial distribution;
c) requiring all Member States to provide rights for organizations engaged in broadcasting to authorize the fixation and reproduction for commercial purposes of their broaccasts, as well as the commercial distribution of such fixed broadcasts and the introduction of similar rights in respect of signals transmitted by cable in favour of cable television operators;
d) requiring the introduction in all Member States of regimes making the possession of digital audio tape commercial duplicating equipment dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment.

*** The intention of the Commission to submit to the Council in due course a proposal for a regulation :**

e) extending Council Regulation (EEC) no. 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods to cover equally goods under copyright;
f) extending the mutual assistance regime to include first counterfeit and then copyright infringements;

*** The desirability of :**

g) recommending to Member States to provide for rights for authors, producers of phonograms and videograms and performers to request public prosecution in respect of acts of piracy;
h) recommending to Member States the introduction of minimum requirements as regards search and seizure procedures in cases of suspected piracy of copyright goods;
i) recommending to Member States the introduction of minimum requirements as to criminal sanctions and civil remedies;
j) creating at the appropriate Community or international level a register or registers, financed by right holders, of rights in sound recordings, video recordings and feature films, eventually linked to the C.D. project.
k) setting up an agreement at an international level on the seizure of counterfeit goods, applicable not only as regards the counterfeit of trade marks but also as regards other intellectual property rights including copyright and related rights.

l) the inclusion in such an agreement of measures relating not only to the importation of counterfeit goods but also on their exportation and of measures to be taken within the country where the goods are produced or commercialized.

2.12. Timetable for submissions

2.12.1. General comments on Chapter 2 should be submitted to the Commission no later than 1 December 1988. However, given the urgency of the matter, comments on the control of digital commercial duplicating equipment are requested by the end of July 1988.

[1] OJ No. C 204 of 3 August 1984, page 1.

[2] Statement by Mr. Clive Bradley of the United Kingdom Publishers Association to the WIPO Worldwide Forum on the Piracy of Broadcasts and the Printed Word, Geneva, March 1983 (PF/11/S/2).

[3] Statement of the United Kingdom Publishers Association to the Commission, 7 January 1987.

[4] Piracy of Phonograms by Gillian Davies, second edition 1984, Commission document SG/Culture/52/84.

[5] As many as 90% of releases do not make a profit, see Music and Video Piracy in the EEC, IFPI 1984.

[6] Source: Extent of piracy of sound recordings worldwide in 1984. IFPI 1985.

[7] See Chapter 4 on rental rights. There seems to be a clear link between a low level of piracy and the existence of rights of the author to authorize the rental of videograms.

[8] See Chapter 4.

[9] Since the rental may be considered illegal, many "rental" contracts in the United States present themselves as arrangements for pre-viewing prior to possible purchase.

[10] The Berne Convention for the Protection of Literary and Artistic Works is in the present context more important than the Universal Copyright Convention (UCC), to which all Community Member States also adhere, because the Berne Convention in contrast to the Universal Copyright Convention contains an important catalogue of minimum rights.

[11] Article 2(1).

[12] This chapter is concerned with piracy as defined in paragraph 1 above. It does not address itself to provisions concerning re-broadcast or re-transmission of signals which are discussed in the green paper "Television without frontiers", June 1984, COM (84) 300 final.

[13] See paragraph 2.1.4. above.

[14] See article 63-1 of Law no. 85-660 of 3 July 1985.

[15] See article 45 of the copyright law 1912 as amended by Law of 30 May 1985 (Staatsblad no. 307 of June 18, 1985).

16 Copyright, Designs and Patents Bill (H.L. 12) of 28 October 1987, section 175-177.

17 See Bill presented by Mr. Desmarets and others of 29 May 1986. Senate 1985-1986, p. 282 and Bill Nr. 615 of 18 July 1987 presented by Mr. Lallemand and others.

18 Law no. 1075/1980 of 23 September 1980.

19 Ley de propiedad intelectual no. 22/87 of 11 November 1987, Boletin Oficial del Estado no. 275 of 17 November 1987.

20 See also Piracy of copyright protected works, Interim Report of the Interdepartmental Working Group on Piracy, 1984, pages 28 and 29.

21 Code of Copyright and Related Rights (No. 45/85, 17 September 1985).

22 The question of the compatibility of the new Portuguese law with the EEC Treaty is not considered here. The matter is under discussion with the Portuguese authorities.

23 See Resolution of 24 July 1984 of the representatives of the governments of the Member States on measures to combat audio-visual piracy, OJ No. C 204 of 3 August 1984, page 1.

24 For a general discussion of issues related to recording for private purposes, see Chapter 3.

25 Cable and Broadcasting Act 1984, section 22.

26 See Bill of 29 May 1986, loc. cit.

27 loc. cit.

28 Letter of 9 November 1984 from the Minister of Justice to the Chairman of the Second Chamber; Piracy of copyright protected works, loc. cit. p. 28.

29 Law no. 274 of 6 June 1985.

30 "Retsplejeloven".

31 Section 94 and following of the Strafprozessordnung.

32 Law of 24 June 1985, Bundesgesetzblatt no. 33 of 27 June 1985.

33 Law no. 85-660 of 3 July 1985, article 52.

34 See the passage below concerning the United Kingdom, paragraph 2.6.39.

35 See House of Spring Gardens Ltd. v. Point Blank Ltd., (1980) FSR 359.

36 Societa italiana degli autori ed editori.

37 Pretura Roma, 9 May 1947 published in Foro Italiano 1947-I-871 and 1 May 1955 in Diritto commerciale, 1956-II-69.

38 Mario Fabiani, Il Diritto di Autore Nella Giurisprudenza, Cedam Padova 1972, page 220.

39 Law no. 45/85 of 17 September 1985, article 201.

40 (1976) 1 WLR 162. See also the Supreme Court Act 1981, section 72.

41 See EMI Ltd v. Sarwar and Haidan (1977) FSR 146 and the Supreme Court Act 1981, section 72.

42 See CBS United Kingdom Ltd. v. Lambert (1983) FSR 127 and the Supreme Court Act 1981, section 37.

43 Copyright (Amendment) Act 1983 (1983 c. 42), 13 May 1983.

44 Copyright (Computer Software) Amendment Act 1985 (1985 c. 41), 16. July 1985.

45 Bill (H.L. 12) loc. cit., sections 89 and 104.

46 See RCA Corporation v. Pollard (1983) FSR 9 and Shelley v. Cunane (1983 FSR 390).

47 Bill (H.L. 12) loc. cit., sections 177 and 183.

48 Council Regulation (EEC) No. 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods, O.J. No. L 357/1 of 18 December 1986.

49 See Article 28 of the Trade Mark Law of 5 May 1936, as revised on 2 January 1968 and Article 2 of the Law ratifying the Madrid Agreement for the Prevention of False and Misleading Indications as basis for customs seizure in some cases of piracy.

50 Article 16.

51 See Davies, op. cit., p. 69.

52 Articles 425, 427 et seq.

53 See Davies, op. cit., p. 63.

54 See Davies, op. cit., p. 71.

55 Article 57 of the Customs Law.

56 Law no. 1322 of 15 December 1954, Chapter II B 1 and 2; Article 303 of the Customs Law, no. 43 of 23 January 1973 and Article 483 of the Penal Code.

57 See Davies, op. cit., p. 81.

58 Piracy of copyright works, Interim Report by the Interministerial Working Group, August 1984.

59 Law decree no. 30679 of 24 August 1940.

60 Bill (H.L. 12), loc. cit. section 102.

61 See Davies, op. cit., p. 88.

62 For a possible solution to one of these difficulties, see paragraphs 2.7.13. and 2.7.18.

63 Council Regulation (EEC) No. 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods. O.J. no. L 357/1 of 18 December 1986.

64 See paragraph 2.6.39 supra.

65 Copyright Act 1963 sections 22 and 24.

66 Copyright Act 1956 sections 17 and 18.

67 Bill (H.L. 12) loc. cit., section 87.

68 See Article 682 and 691 of the Code of Civil Procedure.

69 Loc. cit., articles 123 and 126.

70 See P. Chesnais at p. 366 of International Copyright and Neighbouring rights, ed. S.M. Stewart, 1983.

71 loc. cit.

72 See paragraph 2.6.68. below.

73 See Article 57 of the law no. 85-660 of 3 July 1985 and Article 73 of the Law of 1957 on literary and artistic works.

74 O.J. no. C 204 of 3 August 1984.

75 Copyright (Amendment) Act 1983.

76 Law no. 274 of 6 June 1985.

77 Law of 24 June 1985.

78 Law no. 85-660 of 3 July 1985.

79 Law 45/85 of 17 September 1985.

80 Law no. 406 of 29 July 1981.

81 Law no. 400 of 20 July 1985.

82 See Piracy of copyright protected works, op. cit.

83 Confédération internationale des sociétés d'auteurs et compositeurs.

84 Fédération internationale des associations de producteurs de Films (FIAPF) and Fédération européenne des réalisateurs de l'audiovisuel (FERA).

[85] Fédération internationale des associations de distributeurs des films (FIAD).

[86] International Publishers Association and Organisation internationale d'éditeurs de presse.

[87] European Broadcasting Union.

[88] International Federation of Actors and International Federation of Musicians.

[89] Statement by the JAPIG representative to the Council Working Party; 25 June 1985.

[90] See paragraphs 2.6.41, 2.6.54. and 2.6.75 - 2.6.76. above.

[91] Proposal for a fifth Council Directive for the purposes of co-ordinating certain laws, regulations and administrative provisions concerning the film industry, O.J. No. C 106/23 of 23 October 1971.

[92] The Commission's proposal was formally withdrawn in 1981.

[93] O.J. No. C 15/1 of 16 January 1985.

[94] Decision 86/23/EEC, OJ no. L 33/28 of 8 February 1986.

[95] See Statement of Mr. A. Waldman on behalf of Interpol to the WIPO Worldwide Forum on the Piracy of Sound and Audiovisual Recordings, Geneva, March 1981 (PF1/15).

[96] See paragraph 2.6.54. above.

[97] Council Regulation (EEC) No. 1468/81 of 19 May 1981, O.J. No. L 144/1 of 2 June 1981.

[98] Paragraph 5.6.4.2. of the Commission's communication suggests, under systems interconnection, "real time exchanges of data required for mutual assistance and other purposes".

[99] Study on the Role of the Customs in Implementing Intellectual Property Law, 30 October 1984, TE7 - 80108.

[100] Administered by UNESCO, WIPO and, because of the element of protection of performers in the convention, by the ILO.

[101] Document ILO/UNESCO/WIPO/ICR 7/11 of 1979.

[102] Document ILO/UNESCO/WIPO/ICR 8/7 of 1981.

[103] WIPO PF/I/21 of 27 March 1981.

[104] PF/II/9 of 18 March 1983.

[105] Document UNESCO/WIPO/CGE/AWP/4.

[106] Council of Europe, Document CMC(84)6.

[107] Recommendation no. R(88)2 of 18 January 1988.

[108] For issues concerning rental, see Chapter 4.

CHAPTER 3 : AUDIO-VISUAL HOME COPYING.

3.1. Introduction

3.1.1. The term "audio-visual" is used throughout this chapter to denote both sound and visual works. Where reproduction without permission of protected audio-visual works takes place for commercial purposes, it is a clear copyright infringement. For this, the term "piracy" has been used in this document. The problem of piracy and possible Community responses have been discussed in the preceding chapter. The present chapter deals with the unauthorized reproduction of audio-visual material in the home, that is, reproduction by the individual consumer to satisfy his personal needs, without reference to the owner of the rights in the work for permission to copy. This chapter does not deal with reproduction of audio-visual material in the "semi-private" sphere, that is, for example, in institutions such as educational establishments. Copying of audio-visual material in such circumstances raises different issues from home copying and is relevant to the discussion of the issues raised in this chapter only in so far as the approach taken to home copying may have implications for copying in these other contexts.

3.1.2. Until recently, the audio-visual material in question consisted of sound and video recordings, radio and television broadcasts and cable transmissions. Recent technical developments seem likely to broaden the range of material to include various kinds of information, possibly together with images and sound, recorded digitally on a support of one kind or another. These developments need to be taken into account.

3.1.3. The topic of audio-visual home copying is ripe for discussion at Community level for a number of reasons.

3.1.4. First, some of the industries most concerned have brought claims to the attention of their national governments and to the Commission and other international bodies. These claims relate to the alleged economic harm done to their activities by the practice of home copying, to the negative effect on right owners generally and to the need for greater protection against what they consider to be infringement of rights. Recently, developments in technology such as digital audio tape recorders have given new impetus to such claims. In turn, the claims have provoked counterclaims from interests that view home copying as on balance positive.

3.1.5. Second, the claims for greater protection have resulted in a number of measures being introduced at national level by some, but not all, Member States, and by a number of trading partners among non-Member States, in order to compensate right owners by means of taxes or levies. This has created new divergences in intellectual property law among Member States over and above those already existing for long standing, historical reasons. Concern has been expressed that the divergences may have significant, negative effects on the functioning of the internal market.

3.1.6. Third, new technical developments are increasing the ease and attractiveness of home copying of audio-visual material : high speed copying, improvements in the quality of home made copies, and now the arrival of digital audio tape recording (DAT) with its capacity for making perfect copies both rapidly and cheaply have raised new questions as to how copyright laws should deal with the matter. In addition, in opening up new possibilities for the creation of innovative kinds of audio-visual work, technical developments have raised the question of how the considerable investment of time, effort and money needed for the creation of such works can be secured if an entire work on the scale of an encyclopedia can be perfectly, rapidly and cheaply copied by machines accessible to almost anyone.

3.2. The early development of home copying.

3.2.1. The early machines for playing phonograms were unable to make recordings of sound. They could only be used to play the phonograms which the consumer had purchased or borrowed. Home copying first became widespread when the marketing of cassette tape recorders permitted the ordinary consumer to obtain relatively cheap and easily managed equipment to transfer recorded sound from one support to another, perhaps editing it in the process.

3.2.2. The compact cassette also gave the consumer the freedom to carry sound recordings around from place to place and to compile selections of favourite tracks for use in cars or elsewhere outside the home. Compared with its predecessor, the black vinyl disc, easily damaged and requiring cumbersome playing equipment, or even by comparison with the reels of tape for use on reel to reel recorders, the compact cassette marked a revolution in the popular music field, soon gaining popularity at the expense primarily of the vinyl disc.

3.2.3. It was some time, however, before a full range of titles became available in pre-recorded cassette form. Moreover, the quality of blank tape used in the early stages did not always match up to the sound quality of the black vinyl record, and not surprisingly, the consumer soon learned to make his own cassette recordings using a better quality of blank tape to copy his own or borrowed records or to record off the air from broadcasts.

3.2.4. The video cassette recorder (VCR) permits the play back of pre-recorded material and the recording of both sounds and images, primarily, in the first instance at least, from television broadcasts.

3.2.5. In 1983 the launch of compact disc again re-introduced the concept of play-only machines, but with a greatly enhanced sound quality and durability compared with the vinyl record. Re-usable optical discs which would allow the transfer of material from one compact disc to another have not yet been commercialized for home use, although developments in this field seem promising.

3.3. The international legal framework

3.3.1. The Berne Convention [1] in its 1967 revised Stockholm text contains in Article 9(1) the basic copyright principle that authors shall have the exclusive right of authorizing the reproduction of their works in any manner or form. It was however clear, even in 1967, in spite of the emerging popularity of audio visual media and the corresponding risk of an increase in the practice of home taping, that this principle could not be upheld without exception, in particular in respect of private use. Therefore it was felt necessary to find a means by which copying which took place in the private sphere could continue. Such copying would be in any event, uncontrollable, but it was believed that Member States should be free to permit certain kinds of reproduction where the authors' interests would not be unreasonably prejudiced. The wording of the exception clause within the framework of an international treaty had necessarily to be fairly general to find approval by all signatory States. Consequently the following was laid down in Article 9(2) :

> "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

This wording leaves States which are signatories to the Berne Convention fairly wide room for manoeuvre and it is consequently not surprising that the legal position has developed in somewhat different directions in the Member States.

3.3.2. Thus, the absence of provisions in the older copyright laws of some Member States, and the failure of the Berne Convention to deal explicitly with the question of home copying should be situated in the context of the evolution of home copying described above. Even after the 1967 revision of the Berne Convention, it was some time before legislation was introduced in a number of Member States in response to growing pressure from the recording industry to provide remuneration for right holders for acts of home copying.

3.3.3. No actions have yet been brought by right holders against individual home tapers within the Community. In the absence of either express provisions in national legislations or of case law, the issue of the legality of home taping remains unclear in a number of Member States.

3.3.4. However, in those Member States which have introduced levy or tax systems to provide remuneration for acts of home copying, it would seem evident that in return for such payment, home copying is then permitted. There does not seem to be any indication of a trend in Member States towards expressly permitting home copying per se (without remuneration) within present interpretations of Article 9(2) of the Berne Convention.

3.4. The legal position in the Member States

3.4.1. The positions taken in Member States may be defined as follows :

- in one group of States, the position is undefined by national legislation or is defined so broadly that some interested parties have claimed that home copying might be interpreted as not permitted under the relevant provisions. There are no known cases to prove the validity of this interpretation, and given the likelihood that a Court in a Member State would prefer not to intervene in what an individual does in his own home, the situation in these Member States is at best theoretical;

- in a second group of States, express provision has been made to permit home copying, either free of charge under the general exception provision contained within Article 9(2) of the Berne Convention or against remuneration where levy schemes have been brought in.

Member States appearing to treat home copying as an infringement of copyright or relevant neighbouring rights

3.4.2. In Ireland and the United Kingdom, the producers of both cinematographic films, a concept that includes video tapes and discs, and of sound recordings have the exclusive right to authorize their reproduction. In addition, any recorded literary, musical and dramatic works are also protected against unauthorized reproduction subject to fair dealing provisions that are unlikely to be applicable to the activities of the typical home copier[2]. Belgium, Greece and Luxembourg make no provision for fair dealing or private use and accordingly unauthorized reproduction would appear to infringe relevant rights. Italy makes provision of a narrow kind for private copying of protected works for the personal use of "readers" provided the copying is done manually or by some means unsuitable for public diffusion[3]. It is difficult to see how the home copier of sound or video recordings could successfully rely on this provision.

Member States appearing to treat home copying as permitted under national legislation

3.4.3. In the Netherlands, home copying of audio-visual recordings is permitted. The copyright law provides for the making of a limited number of copies of protected works[4] for the sole purpose of the personal practice, study or use of the person who makes the copies or who orders them to be made[5]. The permission to cause a third party to make a copy for this private purpose does not extend to reproductions made by recording a work in whole or in part on an article intended for causing the work to be heard or seen. Nevertheless the result is that home copying of sound and video recordings by persons for their own personal use in not at this time considered an infringement of Dutch copyright law.

3.4.4. Similarly, in Denmark, Germany, Spain, France and Portugal copying of audio-visual recordings for private use is explicitly permitted by relevant legislation[6]. Moreover, in Germany, Spain, France and Portugal provision is also made for compensation of right holders other than broadcasting organizations for the private copying of their works.

3.4.5. Article 54 of the German copyright law, as amended by Law no. 33 of 27 June 1985 [7], provides that certain right holders can claim remuneration through a collecting society for the opportunity to make copies of their works for personal use on video or sound supports. The right holders in question are authors, performers and record producers. Broadcasting organizations have, however, been excluded from the scope of application of the provision [8]. This remuneration is financed by means of a levy both on recording equipment and on blank tape. The levy has been fixed at 2.50 DM (1.20 ECU) on audiorecorders and at 18 DM (8.66 ECU) on videorecorders. The levy on tape has been fixed at 0.12 DM (0.06 ECU) per hour playing time for audiotape and at 0.17 DM (0.08 ECU) per hour playing time for videotape. The proceeds of the levy are divided between the relevant right holders.

3.4.6. Title III of the French law of 3 July 1985 on the amendment of the copyright law [9] provides that right holders shall have the right to receive remuneration for the private reproduction of phonograms and videograms. The right holders in question are authors, performers and producers of phonograms and videograms. To provide a source of remuneration, a levy has been imposed on blank recording tapes, the proceeds of which are paid to a collecting society to be divided between the various right holders.

3.4.7. While the law establishes the principle that the levy shall be calculated on the basis of playing time, the size of the levy and certain technical details as to its collection and the distribution of the proceeds are decided by a commission composed of representatives of the various interests involved. This commission decided [10] that the levy is to be 1.50 FF (0.17 ECU) per hour playing time for audiotape and 2.25 FF (0.33 ECU) per hour playing time for videotape. For reproduction of audio material, authors are to receive one half, whereas performers and producers each receive one quarter of the total proceeds. From the levy on videotapes, the three groups mentioned each receive one third of the proceeds.

3.4.8. In Denmark, the Copyright Law Committee suggested in a report completed in 1982 [11] that a levy should be introduced on audio and videotape to compensate certain right holders for private reproduction. The right holders in question were, according to the proposal, to be authors, performers and phonogram producers. However, by Law no. 257 of 9 June 1982, the Parliament introduced a new fiscal measure applicable to both videorecorders and videotapes, subsequently repealed as to videotapes by Law no. 184 of 9 April 1987. No bill has yet been introduced concerning a copyright levy.

3.4.9. In Portugal, the new copyright law of 1985 [12] provides in Article 82 for a levy to promote cultural activities and compensate authors, artists and producers of phonograms and videograms but not broadcasters. The levy is to be imposed on all forms of recording and reprographic equipment and supports. The amount of the levy and the precise manner in which it is to be applied are to be fixed by a decree which has not yet been adopted. The provision thus at present has the character of a programme for future action rather than a directly applicable system.

3.4.10. In Spain a new comprehensive Copyright Law [13] contains in Article 25 provisions making reproduction for private use legitimate against compensation to right owners, to be financed through a levy on blank tape and recording equipment. Detailed rules on the amount of the levy and the share of different groups of right holders in the proceeds of the levy are to be laid down in administrative regulations.

Radio and television broadcasts and cable transmissions

3.4.11. As to home copying of radio and television broadcasts and cable transmissions, the legal position is broadly similar to that of audio-visual recordings though some differences also exist. One notable legal difference concerns the general admission in Ireland [14] and the United Kingdom [15] of home copying of broadcasts as such and, in the United Kingdom, of programmes transmitted by cable [16]. However, since the programmes being broadcast or transmitted frequently involve the use of protected works to which only the much more limited fair dealing exceptions apply [17], the practical significance of this legal distinction is much reduced. Of much greater significance in both law and fact is the exclusion of broadcasters from participation in the proceeds of the levy schemes in Germany, Spain, France and Portugal.

3.4.12. Nevertheless, whatever the detail of the differences, the essential result is that in one group of States private copying of audio-visual material being broadcast or transmitted by cable is interpreted as lawful, while in others it normally is not. Thus in Denmark [18], Germany [19], Spain [20], France [21] and Portugal [22] express provision is made authorizing private copying, while in the Netherlands broadcasts, cable transmissions and sound recordings are not protected by copyright or a neighbouring right at all, and private copying of broadcast works is expressly authorized [23].

On the other hand, in Belgium, Greece, Ireland, Italy, Luxembourg and the United Kingdom, private copying is not expressly authorized, except for broadcasts as such in Ireland and the United Kingdom and cable transmissions in the latter country. However, as has been seen, these exceptions are of limited significance given that programmes frequently involve the use of protected works. The status of cable transmissions may be uncertain in some countries, however, particularly if the programme being transmitted is not being broadcast over the air either simultaneously or at all. But for the purposes of the present discussion of private copying this complex question will not be further explored.

3.4.13. Before concluding this summary of the present legal position, however, it should be noted that relevant international agreements, namely, in addition to the Berne Convention for the protection of literary and artistic works[24], the Rome Convention for the protection of performers, producers of phonograms and broadcasting organizations [25] and the European Agreement on the protection of television broadcasts [26], all contain provisions which allow Member States to permit exceptions to be made for private copying.

Legislative trends in the Member States

3.4.14. Reference has already been made to the laws recently adopted in Germany, Spain, France and Portugal as a response to the problem of private copying. Consideration is also being given to legislative reforms in this respect in other Member States. It would appear that in those Member States which have introduced or which are contemplating the introduction of a levy on blank tapes the average level of such levy amounts to around 8-10% of the sales price of a blank audio tape.

3.4.15. In Belgium, a Private Members Bill [27] was introduced in the Senate in May 1986 permitting reproduction for private purposes of audio-visual works against compensation to right owners. The compensation was to be financed through a levy on recording equipment and blank tape. A second Bill has recently been introduced in the Senate [28], according to which the size of the levy is to be fixed at 8% of the sales price, the proceeds to be divided 50% to producers, authors and performers and 50% to promote cultural activities and train performers.

3.4.16. For Denmark, reference has already been made in paragraph 3.4.12. to the proposal of the Copyright Committee in respect of a blank tape levy. The proposal has not however made tangible progress towards becoming law.

3.4.17. In Italy, an amendment of the existing provision of the Copyright Law permitting reproduction "by hand" [29] has been considered for some time. Pending a final government position, a Private Members Bill was introduced to the Parliament in July 1986 [30] proposing to make home audio and video copying legitimate against a levy on recording equipment and blank tape. The proposal, which is expected to be re-introduced in the new Parliament, is sufficiently recent that relatively new equipment, such as twin-cassette deck tape recorders, has been taken into consideration and for those a high levy has been proposed.

3.4.18. In the Netherlands, a government memorandum favourable to the introduction of private copying royalties was issued in February 1987 and a bill has been approved by the Council of Ministers on 23 October 1987 and is now awaiting adoption by Parliament.

3.4.19. In the United Kingdom, the government has decided against the introduction of a blank tape levy in the Copyright Designs and Patents Bill published on 28 October 1987. The Minister of Trade and Industry indicated that it was felt that the levy proposals went beyond the principle of the Government providing legal protection to the intellectual property of a creative artist, and that any financial benefit to copyright owners and performers would be outweighed by the adverse effects the levy would have had on consumers, especially visually handicapped people.

3.5. Home copying in practice

3.5.1. The increasing facility with which home recordings can be made and their steadily improving quality has for some time caused understandable concern to the relevant right holders, who claim that the practice of home taping is not only harmful but also, according to their interpretation of national legislation and international conventions, unlawful.

3.5.2. Whether it is in fact lawful or not, however, the private copying of audio-visual recordings and programmes is clearly a common practice.

3.5.3. Much statistical information has been made available to the Commission from interested industries and organizations on the size and evolution of the market for audio-visual recordings, blank recording tape and recording equipment.

3.5.4. Many studies have also been submitted by the numerous interest groups involved in the home taping issue in support of their claims. To refer in detail to all these studies and submissions would undesirably extend the length of this document. The main arguments which they contain are, however, summarized in the sections which follow.

The market for recording equipment, blank tape and audio-visual recordings

3.5.5. Studies submitted to the Commission show that although sound recording equipment has been on the market for a long time, a high penetration did not take place before the marketing of the cassette recorder which is easy to use and cheap to acquire. In larger Member States like Germany, France and the United Kingdom, over 70% of private households possess at least one recorder [31]. Figures from smaller countries but with the same degree of industrialization point to the same level of penetration. Audio cassette recorders are indeed today within the reach of almost everyone, even those of modest means. Many manufacturers include portable and in-car recorders and players among their range of products.

3.5.6. These sound recording facilities are certainly used, as available figures on sales of blank tape clearly show. Sales of tape increased steadily year by year from 1977 through 1985, reaching particularly high levels in Germany and the United Kingdom and for the Community as a whole (286 million units in 1985) [32].

3.5.7. As to video recording, being a more recent phenomenon, it has yet to develop on the same scale as audio recording. In addition, the substantially higher price of video recording equipment is a constraining factor. Nevertheless, such figures as are available show expanding penetration of video recorders in households throughout the Community, particularly in Germany, France and the United Kingdom where approximately 40% of all households possess at least one VCR [33]. Likewise, available figures show that sales of blank video tape have increased steadily in recent years, again reaching particularly high levels in Germany and the United Kingdom [34]. The increasing miniaturization and portability of video equipment indicate that it may in time occupy a position similar to that of portable sound recording/playing equipment.

3.5.8. As to sales of sound and video recordings, the main trends appear to have been the following.

3.5.9. Sales of long playing vinyl discs in the Community have fallen steadily from their peak of 350 million units in 1978 to approximately 211 million units in 1985 [35]. A similar trend is apparent in the USA. Moreover, in spite of the general increase in costs and prices in recent years, the total world sales of all kinds of recording have remained constant from 1981 to 1985 at about 12 billion US dollars or 9.6 billion ECU. However, a closer examination of the available data reveals more positive features.

3.5.10. Initially, the decline in vinyl disc sales was not fully compensated by increases in sales of other forms of recording such as pre-recorded cassettes. However, beginning in 1983, and more obviously from 1985, sales of compact discs appear to be redressing the situation. Just as the compact cassette offered major advantages of portability and a copying facility over its predecessor, the vinyl disc, so the CD offers its own advantages of greatly enhanced sound quality and resistance to damage, thanks to the use of digital recording techniques and its laser "reading" technology. Some manufacturers were hesitant to embrace the new technology and penetration of the market by CD was initally slow. Investment costs in CD pressing plants were high but industry is now beginning to recoup some of that investment as sales of CDs have risen dramatically over the past two years. For 1986, it is estimated that CD sales world-wide amount to 140 million units, more than double the preceding year and, largely as a result of this increase, total world sales of all sound recordings amount to 12.75 billion dollars or 10.2 billion ECU [36].

3.5.11. The turnover in pre-recorded video cassettes shows a different trend. On the one hand, the penetration of the video cassette recorder is still lower than that of the record player or the cassette player and the degree of penetration is very different from one Member State to another. On the other hand, in the Member States with a high degree of penetration, primarily Germany and the United Kingdom, the sector shows a healthy development in the sense that in recent years the annual increase in turnover, comprising both sale and rental of video cassettes, has been estimated to be in the neighbourhood of 20% [37].

3.5.12. The evolution of new recording techniques has thus naturally produced changes in the market for recorded material. There is no sign of this tendency coming to an end or even slowing down as new recording media are under development that are likely to modify the situation further. These include digital tape recording; compact discs used for data storage (CD-ROM, that is, compact disc-read only memory); compact discs for video (CD-V) [38]; compact discs that permit the user to have an active role in relation to the recorded material (CD-I, that is, compact disc-interactive) and the forthcoming re-usable, optical disc.

3.5.13. Thus as the relationships between the different parts of the audio-visual recording market become closer and interfaces develop with other communication and information management systems, so it becomes increasingly important to find the appropriate means for protecting relevant copyrights while allowing these dynamic technologies to evolve in a way that is most beneficial to the producer and consumer alike.

The effect of home copying on the market for audio-visual recordings

3.5.14. The extent to which the decline in sales of the vinyl disc and the absence of growth in the world sound recording market from 1981 to 1985 can be attributed to home copying is far from clear. Many factors other than home copying were certainly present which could account for the results. Even if it is accepted that home sound and video recording is an increasingly common practice, as the figures on sales of recording equipment and blank tape confirm, questions remain as to whether the recordings made are of protected works and, if so, whether they have a negative impact on the normal exploitation of those works. Since home copying is by its nature a private act, a clear picture is difficult to draw.

3.5.15. As far as sound recordings are concerned, such survey evidence as is available suggests that while a proportion of home recording does not concern protected material, much of it does. European surveys indicate, for example, that in France 95% of all recordings concerned artistic works, and that 70% were made from sound recordings on disc or tape, a further 28% being made from radio and television [39]. Likewise a survey carried out in the United Kingdom showed that 84% of recordings were of music, made mainly from discs (70%), radio (21%) and pre-recorded tapes (6%) [40]. A more recent European study confirms that most home sound recordings are of music, the most common source being discs and the radio[41].

3.5.16. A survey carried out in the USA in 1982 indicated a substantially lower level of home copying of recorded music, which highlights how difficult it is to arrive at general conclusions about home copying practices. Even so, it indicated that such copying constituted almost half (48%) of the total use made of audio tapes in the relevant period [42].

3.5.17. As to video, available evidence indicates that in earlier years nearly all home recordings were made from television, with films and entertainment forming the major part of the subject matter. A French study indicated that 92% of private video recordings were made from television, with a further 4% to 5% being made from pre-recorded material [43]. Of the total number of recordings made, 65% were of films followed by 12% consisting of variety programmes. A more recent survey has confirmed that nearly all video recording is in fact made from television. Further it showed that in France 83% of respondents had recorded a film during the week preceding the survey; in Germany, 67% of respondents and in the United Kingdom, 56% of respondents. Entertainment programmes were also popular, recordings having been made in the preceding week by 22% of respondents in France, 34% in Germany and 52% in the United Kingdom [44].

3.5.18. The most recent survey, limited to Germany however, indicates a growing trend to use video cassette recorders for reproduction of pre-recorded material, in particular, feature films which often are exchanged with friends [45]. The film industry points out that though recording of television broadcasts for time-shift purposes is still predominant, the reproduction of pre-recorded material could soon be a matter of concern.

3.5.19. Nevertheless, present duplication techniques available to the home user do not allow the easy making of perfect copies of pre-recorded videos. Double-headed machines are not widely available so that two machines are needed. There is a considerable degeneration in quality from copy to copy, excluding in reality the making of generations of copies, and high speed copying facilities such as are available for audio are not yet on the consumer market. However, duplication equipment enabling one format of video to be transferred to another is already reported to be ready for launch. Digital television and video are being developed. When fully digitalized image systems become a reality, the problem of near perfect home copy making currently facing the audio recording industry will present itself to video producers. However, at the present time, available evidence suggests that home copying of pre-recorded video material is not extensive. Unauthorized copying of pre-recorded video material for gain does take place in the commercial sphere but this aspect is more appropriately dealt with in Chapter 2 on Piracy (see paragraphs 2.2.12. - 2.2.30).

Impact of copying on the exploitation of protected works

3.5.20. If it is clear that substantial amounts of protected audio-visual material are copied for use in the home, the question of whether such copying has a negative impact on the exploitation of those works remains to be answered. As far as recording off-air is concerned, the exposure of authors via radio and television broadcasts has been doubly beneficial to right holders. First, remuneration for the broadcasting of their works has been received. Second, the popularity of successful creators and producers of audio-visual works has been largely a factor of the promotion they have received from radio and television broadcasts. Therefore any alleged economic harm done to right holders' economic interests by off-air recording should be viewed against this background of greatly enhanced revenue from the broadcasting of their works. As far as recording of purchased pre-recorded original audio-visual material is concerned, available statistical information is far less helpful here for arriving at clear conclusions though it appears likely that a distinction should be drawn between sound and video recordings.

3.5.21. As regards sound recordings, the French study of 1983 indicated that the great majority of home sound recordings were to be retained for a considerable period of time and listened to frequently [46]. Of the recordings made on cassette, 81% were made on new tape; of those made on reels, 78%. An intention to keep the recording was indicated in 82% of the cases. As to frequency of use of cassettes, 49% had been listened to on average five times, 26% on average fifteen times; and 25% more than twenty times. Cassette recordings were kept for an average of ten to eleven months, those on reels being kept substantially longer, for a period of at least two years.

3.5.22. A British survey published in 1984 showed that respondents used the same blank tapes for sound recording on average somewhat less than twice [47]. The same survey also provided information concerning the likelihood that copying substituted for purchase of recordings. Of those copying from the radio, 8% said that they would very likely have bought the record; and 20% that they were quite likely to have done so. Of those who had copied long

playing discs or tapes, 16% said that they would definitely have bought the recording, 15% said they would very likely have done so and 20% that they were quite likely to have done so. 17% said they had already done so and were making a copy of their own recording.

3.5.23. A later study [48] provides less clear results since information is not available in the same detail on the periods of time for which recordings were kept, the frequency with which they were played or the possibility of respondents buying recordings if copying had not been possible. Nevertheless, permanent retention of the copies was indicated as the intention in over 15% of cases, with temporary retention, unquantified, also forming a substantial but unspecified proportion of the total. Editing or switching the support was given as the reason for copying in another 30% of the cases.

3.5.24. Information available on home taping of TV programmes and video cassettes taken as a whole, though limited, points to a significant difference : a much smaller proportion of such recording seems intended for long term retention and successive viewing on a significant number of occasions. The French study of 1983 [49] showed that only 36% of the home video recordings in the households surveyed had been made on new tape. An intention to keep recordings permanently was indicated in over 45% of cases but in reality recordings appeared to be kept permanently to a lesser degree. The average length of time recordings were kept was approximately two and a half months, while they were played on average only four times.

3.5.25. The later study confirms the findings of the earlier one in the sense that permanent retention was the objective in a relatively small proportion of the cases, between 5% and 10% [50].

3.6. New technical possibilities

3.6.1. Some of the new technical developments such as DAT to which reference has already been made will almost certainly further modify home copying practices. While forecasting the future is necessarily hazardous, an attempt must be made to understand and evaluate the most important implications of these developments since they may affect not only the scale and nature of the problem but also the possible means for dealing with it.

Digital recording techniques

3.6.2. Digital recording techniques, whether applied to sound, image or data, employ the same basic principles. In the case of sound, information about the sounds to be recorded is sampled and then converted into binary code in the same way as information is normally processed by a computer. The code can then be "re-translated" back again to produce the exact sound which was originally recorded. When sound is recorded by analogue means by conventional recorders, there is a loss of sound quality every time a copy is made. This puts a limit in practice on the number of generations of copy which can be made. Digital recording will have no such limits. Each copy will be perfect, at least as far as the ordinary listener is concerned, and can serve as a master from which many other generations of copy can be made. A very small number of purchased original recordings could serve to generate many thousands of perfect "clone" copies. The digital cassette recorder will undoubtedly open up new markets in the data storage and audio recording fields. Although compact disc and CD-Rom have advantages of speed of access and durability, the high cost and technical complexity of the disc pressing process is a limiting factor on the rate of entry onto the market of small new companies. Cheaper and simpler recording and

duplication facilities using digital tape will therefore widen the opportunities available for growth in the market for specialist products. The Commission welcomes the advent of DAT for this reason and is conscious of the fact that the possibilities of DAT as a recording medium may present considerable advantages to the popular music market. At the same time, digital tape will complement the existence of digital discs in the same way that analogue tape has co-existed with analogue vinyl discs, at least for such time as discs for the consumer market remain "play only".

3.6.3. The DAT recorder referred to in paragraph 3.6.1. above is intended for the recording of sound. Other types of dedicated digital recorders are being developed, for example, for the data storage market, with appropriate modifications to the electronic specifications.

Technical protection devices.

3.6.4. At the same time as these new forms of recording are appearing, attention is also being given to the development of technical devices that might be used to prevent or control copying of recorded material. A summary of these technical protection systems is contained in an Appendix to this chapter.

3.6.5. All technical protection devices raise issues as to their reliability in practice, as to their possible effects on use of the equipment for playing authorized material, and as to how their use would affect the balance of interests among right holders, equipment producers and consumers. Before examining these issues, however, it would seem useful to situate that analysis by reference to the views already expressed on the home copying debate as a whole by the main protagonists. These remarks reflect the arguments which have been put to the Commission and may be in part at least conjectural owing to the difficulty of obtaining reliable evidence as to activities in the private sphere.

3.7. The views of interested parties

Demands for greater protection

3.7.1. On the one side, the recording industry, frequently supported by organizations representing other right holders, argues in favour of measures to compensate them for home copying and, more recently, to limit possibilities for home recording through the mandatory application of technical anti-copying devices to DAT recorders.

3.7.2. They claim that private copying of audio and video material, whether lawful or not, is at present occurring on such a considerable scale and for such purposes that it conflicts with the normal exploitation of the works being copied and unreasonably prejudices the legitimate interests of the right holders. The relatively low level of sales of discs from 1979 to 1984 and survey evidence to which reference has already been made are cited as a measure of the negative effect of home copying. The sound recording industry in particular claims that unlimited private recording facilities jeopardize the profitability of the industry by reducing the revenue generated by more popular works, which it is claimed makes it more difficult to maintain a broad repertoire containing works of less popularity. New technical developments are said to exacerbate the problem. The high speed, double-headed recorder greatly facilitates the practice of copying. The digital audio recorder is already being marketed, which, without protection measures, could permit copies to be made of very high quality, comparable even to originals recorded on compact discs. Further developments can be expected which, it is claimed, will increase even more the facility, speed and technical quality of home copying. These developments in the "hardware" available to the public entail the risk of further serious damage to the "software" side of the recording industry.

3.7.3. Although in theory, right holders maintain that they would prefer increased sales and reduced private copying of their works, when recommending appropriate measures to deal with the problem, they have until recently underlined the difficulty of effectively controlling what takes place in the private sphere in the absence of any effective technical or legal means to prevent copying. For this reason, they have promoted legal provisions which recognized the practice as legitimate but ensured a reasonable return to right holders as the most solid basis for a solution.

3.7.4. According to this school of thought, private reproduction must be permitted against compensation based on a levy on recording equipment or blank tapes or both. The size of the levy should be such that it would give right holders and producers compensation more or less equivalent to the use made of protected material and to the losses caused by the practice. The levy could be collected through existing collecting societies and distributed to authors and producers on the basis used in a number of Member States for the collection and distribution of remuneration due to authors and producers for the sale and broadcast of records. Such mechanisms, based on a points system related to sales or air-play and on reports from relevant organizations, have been applied in other areas. Exceptions could be made for certain categories of user who have a particular need to make recordings, such as, for example, in the case of the blind.

3.7.5. The arrival of DAT and the new possibilities for technical protection have led to a modification of this approach, at least in so far as DAT is concerned. To protect works recorded on compact disc, some sections of the recording industry initially favoured the mandatory inclusion of the CBS Copycode System (see Appendix) in all DAT recorders to be marketed for private use, together with ancillary measures to make it illegal to circumvent or to make available devices for circumventing the system. Legislation to achieve this goal was promoted in the USA and in Europe by those who supported the recording industry view. The levy system is considered inadequate to deal with the allegedly greater economic harm which DAT could imply for right owners[51]. The recording and hardware industries now appear to favour other technical solutions based on digital recording technology itself. For example, alternatives based on draft

specifications drawn up by the International Electrotechnical Committee have been proposed. These alternatives called, for the sake of convenience, SOLOCOPY, address the specific characteristic of digital audio recording, namely the possibility of making "pyramids" of copies from one digital original. These proposals are described in the Appendix.

Opposition to demands for greater protection

3.7.6. The opposite school of thought, led by representatives of the blank tape industries, some sections of the hardware industry and supported by certain consumer organizations, has in the past rejected the claims of the recording industry and other right owners as to the harm done by the practice of home copying.

3.7.7. First, the prejudice alleged to be caused has been denied. As regards video material, since most copying is for the purposes of time shifting of television broadcasts, the negative effect on other forms of exploitation is said to be insubstantial and, if it exists, should be taken into account when right holders settle the terms on which material will be broadcast. As to sound recordings, it is argued that the relatively low levels of disc sales from 1979 to 1984 should be set against increasing sales of pre-recorded tapes, and more recently, compact discs. At present, the record market is believed to be showing clear signs of recovery. It is further claimed that much copying takes place from sources for which the consumer has already paid, either directly in the case of his own records or tapes, or indirectly, as in the case of recording off-air. It is therefore argued by these groups that transferring music already purchased on one form of carrier onto another form of carrier for personal use does not cause prejudice to right owners' interests.

3.7.8. For both video and sound, this school of thought further argues that the "software" and "hardware" sides of the recording industry are interdependent and that any analysis should go beyond identifying adverse economic effects, if any, of home recording on the "software" side. The beneficial effects should also be taken into consideration, and it is claimed that these effects are considerable. Home taping is said to stimulate consumers to purchase records and pre-recorded tapes, as portable recorders are said to increase the demand for portable music. Right holders are also said to receive additional benefits from video recorders creating a market for purchased or rented pre-recorded cassettes. The film industry is profiting from this outlet which has created an important market for older films and even films considered commercial failures in other contexts.

3.7.9. As regards levy schemes, the claim is made that such schemes would inevitably be overly broad and crude in their application. They would subsidize copyright owners at the expense of the public. No scheme could come into operation without all purchasers of recorders and blank tapes paying the royalty regardless of intended or actual use. Exceptions for particular groups of users are said to be impractical and in any case will not solve the problem of the ordinary user who may well buy tapes for purposes other than copying protected material and will be unfairly penalized when he does so. The problem of differentiating between leviable and non-leviable products will become all the more difficult as new types of recording support are developed, such as the programmable optical disc and digital audio tape, which may have many uses not involving the reproduction of copyright material or which may be used to copy material such as computer programs where a levy would be considered inadequate compensation for acts of unauthorized reproduction. Finally, levies would

involve a serious misallocation of revenue and would be highly unjust since compensation would be allocated primarily to popular authors and other successful right holders or, in other words, to those least in need of subsidies. Although a number of Member States have introduced legislation in favour of levies on blank tape and/or equipment, it is interesting to note that in the most recent instance of discussion on the subject, the United Kingdom has come down strongly against levies in the Copyright Designs and Patents Bill currently before Parliament (see paragraph 3.3.19).

3.7.10. Devices to prevent unauthorized copying were initially rejected by the majority of those who oppose levies as having negative consequences that outweigh their benefits to right holders. They were said to risk stultifying important technological developments and the potential markets for hardware and software associated with them. Doubt was expressed about the systems' efficacity and, in some cases, their possible negative effects on sound quality. The risk that audio-visual material would be "locked up" in an undesirable way was also stressed. In spite of these concerns, there is now every indication that the hardware and music recording industries might find a compromise technical solution acceptable to their respective interests. The solutions currently under discussion appear capable of avoiding the shortcomings indicated above, unlike earlier proposals for systems such as Copycode (see Appendix).

A "pay at source" approach to the home copying problem

3.7.11. It has been suggested in some circles that remuneration of right holders in return for acts of home copying could also be achieved by means of a charge applied at the moment of first sale, not to the carrier or support on which the copy is made, but to the material which is copied. This approach has already been adopted in varying forms in the fields of pay-television, data base operation and the marketing of computer software where a rate is charged for the goods or services commensurate with the use which the consumer can be expected to make of them. In time, telecommunications networks will also be widely used for the transmission of entertainment products such as sound and video recordings. When such integration occurs, the "pay at source" approach may well prove to be financially beneficial to right holders. This would be, in effect, direct enhancement of the royalty which right holders already receive for their works. Objections have been raised to this concept by the music recording industry which fears that the charge will be seen simply as a price increase to the first purchaser which would have a depressive effect on markets and could indeed exacerbate the home copying problem.

3.8. The main issues for the Community

3.8.1. The main issues for the Community concerning audio-visual home copying at the present time appear to be the following.

3.8.2. First, to what extent should it be concluded that home copying adversely affects the legitimate exploitation of certain audio-visual works and, if so, which ones? How do the latest technical developments appear likely to affect the position?

3.8.3. Second, if such adverse effects can be established, what legislative response at Community level, if any, seems preferable? In this connection, is there a role to be played by Community rules either on levies on recording media, on mandatory technical protection devices or a pay-at-source approach?

3.8.4. Third, if any of these solutions are retained, how far can they be applied consistently with the spirit of the Berne Convention (Article 9(2)) and in fairness to all interested parties?

3.9. The Commission's present orientations

3.9.1. The evidence available at present suggests that, as regards sound recordings, home copying does have negative but unquantifiable effects on the legitimate exploitation of recorded works. None of the studies referred to has been able to quantify with precision the extent to which home copying has substituted for sales of pre-recorded material due to the inherent difficulty in assessing consumer behaviour in twelve Member States. Estimates as to the volume of lost sales vary widely and are in many cases exaggerated. The only accurate starting point for assessing the substitution effect is the sale of blank tapes in the Community, estimated at 350 million units a year. But not all home copies substitute for legitimate sales, particularly where they are made by persons who have themselves purchased the recording in question, or where copies have been made off-air of works which are not for sale. According to the music industry's own calculations, if home copying were to be prevented, around 25% of those who now transfer music from one carrier to another would definitely purchase the same material in pre-recorded form. This calculation would indicate that the upper limit of the substitution effect, or the "loss" to authors in case home copying from all sources were totally prevented, would amount to approximately 1.5 billion ECU per year. Since a significant proportion of those who copy at home do so from sources they have already purchased, it seems reasonable to expect that sales of pre-recorded music would not necessarily increase dramatically, even if home copying of recorded sources were totally prevented. On the other hand, if technical measures can be introduced to prevent the copying of certain sources, and in particular, the production of second and third generations of copies, sales of pre-recorded material could be expected to rise, with increased revenue to right holders in consequence. This is especially the case for digital recordings, which allow the consumer to produce a copy which is in effect identical to a studio master tape, implying that home copying could in future substitute for purchases of originals to a much

greater extent than at present using analogue techniques. Given the increasing density and value of the material which can be recorded digitally on discs and tapes, and the fact that sound, image and data collections can be transferred cheaply, rapidly and perfectly from one support to another, the Commission believes that urgent action is called for to protect right holders against unauthorized reproduction of their works by digital means. In view of the fact that analogue products, especially vinyl discs, may be coming to the end of their life span, the Commission does not view the problem of home copying of analogue products with the same degree of urgency.

3.9.2. As to video recordings, the available evidence is inconclusive. Most recording is of television programmes, and for the purpose of time-shifting, that is, to enable television viewers to re-schedule their viewing to suit themselves. It would seem that the majority of programmes recorded off-air at home are not available for sale in video cassette form and recording does not therefore substitute for purchase of video. Even where the subject of a recording from television is a feature film, the prejudicial effect on other exploitations of the work is unlikely to be substantially greater than the effect of showing it on television in the first place. Home copying of pre-recorded video material is still a relatively limited phenomenon and the negative effect on the commercial exploitation of those works correspondingly small.

3.9.3. New technical developments may well exacerbate the home copying problem for video as well as for sound. Digital techniques, in particular, seem likely to stimulate home copying since they hold out the prospect of the easy making of perfect copies, in the not too distant future, of video recordings also. Therefore, since in time, all information management, communications and entertainment systems will be digitalized and inter-related, any solution which is retained must be appropriate to developments in the video and information management fields even if, in so doing, no totally adequate remedy can be found for the copying of the present generation of analogue products.

3.10. Possible legislative responses

Principles

3.10.1. In establishing whether legislative measures are needed at Community level and, if so, what their content should be, the Commission has sought to apply the following principles.

3.10.2. First, copyright laws should seek to ensure that right holders in audio-visual works can authorize, prevent or at least require remuneration, for any reproduction of their protected works which will adversely affect their ordinary sale to a substantial degree. In other words, it should not be possible, in principle, to copy a protected work instead of buying it. The creative and financial investment devoted to the making of the work is entitled to be protected against copying particularly where that copying enables consumers to produce unlimited quantities of perfect replicas of the original recording, and thus to reduce the market for legitimate sales of the product. Where a purchase has been made of a pre-recorded source, or payment made directly or indirectly to receive a broadcasting transmission, in both of which cases a royalty has been received by the right holder, it should be possible to reproduce that source or transmission for personal use. The Commission feels that such reproduction for personal use does not unduly prejudice the normal exploitation of the work.

3.10.3. At the same time, copyright protection for audio-visual works should not prejudice the functioning of a competitive market in such works nor the development of new audio-visual technologies. On the contrary, copyright should provide an important part of the legal environment which favours creativity, innovation and competition.

3.10.4. In addition, remedies should not be adopted for want of anything better if to do so would simply substitute one set of injustices for another. In matters of legislation, something is not necessarily better than nothing. Abstention is sometimes the best solution.

Solutions

Mandatory technical solutions

3.10.5. Applying these principles, the Commission has concluded that, with regard to DAT, Community measures to require a degree of technical protection would be desirable provided that they are technically feasible and properly balanced in respect of all the interests concerned.

3.10.6. A technical solution of a type similar to those outlined in the Appendix would have the following advantages : it would allow right holders to fix a limit on the number of copies which could be made of their works, and for the first time effectively to control which sources could be copied: it would permit hardware and tape manufacturers to enjoy approximately the same market for their products as at present whilst encouraging the development of new technologies to the full : it would allow the consumer the freedom to make copies of works for personal use within fairly generous limits. In effect, once digitalization is complete in the audio field, the consumer will have at his disposal approximately the same sources as at present, namely, radio, pre-recorded material and microphone. Such copying would be limited so that copies made on a DAT recorder could not serve as masters for subsequent generations of copy. At the same time, the specialist and handicapped user would be free to use DAT technology to meet particular needs.

3.10.7. No solution is without disadvantages, and it is clear that a technical solution, in addition to the risks of circumvention or malfunction inherent in such systems, will pose difficulties in respect of a differentiation between professional and domestic user products. Such a distinction must be made if DAT technology is to develop to the maximum, and if smaller recording studios and individual professional users are to have access to the benefits of digital audio recording techniques.

3.10.8. Similarly, a distinction must be maintained for the foreseeable future between machines for audio use and those for data storage. Solutions appropriate to the former cannot be applied to the latter. It is not proposed to place technical limitations on DAT machines for data storage use provided that they remain incapable of being used to record audio.

3.10.9. It is intended that the technical measures described should be applied to all DAT audio machines irrespective of their type. If manufacturers wished to put "professional" audio machines on the market, with specifications which differ from those required under the technical protection proposals, they would apply for a licence to put such equipment on the market in the same way as manufacturers of DAT contact printers [52] or design them in such a way that professional and home audio recorders are not interconnectable.

3.10.10. In this way, bona fide users of professional machines, such as recording studios, broadcasters, educational establishments and the like will not be deprived of the opportunity to use equipment designed for their specific needs. Such machines will not be allowed onto the general consumer market, and manufacturers and importers will have to take some responsibility for ensuring that the two markets are kept separate. Any other differentiation based on price or technical specifications is bound in the long term to be subject to circumvention. It is only by maintaining some measure of control over the distribution of "professional" equipment that the freedom for the consumer to copy to the extent proposed can be guaranteed.

3.10.11. The basic concept of a legal framework requiring digital tape recording equipment produced or marketed in the Community or imported from non-Member States to incorporate particular technical features designed to limit its use for unauthorized home copying appears therefore to be worthy of serious consideration. Such an approach could take the form of a legal instrument which would oblige the Member States to prohibit the production, commercialization or importation of such machines unless they conform to certain specified technical requirements. Ancillary measures prohibiting devices to frustrate the operation of such technical protection systems would also have to be included.

3.10.12. The Commission has concluded that the incorporation of technical protection systems into existing analogue machines, whatever its attractions in theory, would in practice prove unworkable in view of the re-design costs involved and the volume of existing products already on the market.

3.10.13. As to the different possible protection devices currently under development for DAT machines, the information at present available suggests that a number of such devices are technically feasible and would give some measure of protection to right owners against unauthorized reproduction of their works. It would be premature at this point to attempt a definitive evaluation of the technical merits of any particular system. It suffices to say that, in principle, an ideal system would present the following characteristics. First, it would encourage technological development and conform to the general trend towards fully digitalized systems in the audio-visual field. Second, it would accommodate future developments in telecommunications and information management systems. Third, it would permit the full potential for high quality, flexible, digital sound reproduction of both disc and tape to be developed in parallel. Fourth, it would offer right owners a measure of control over the unauthorized reproduction of their works. Fifth, it would allow the consumer to have access to, and to make fair use of the sound recordings and transmissions for which he has paid.

3.10.14. It is self-evident that no technical solution can ever be guaranteed against deliberate attempts at circumvention. However, if a reasonable degree of security can be achieved together with no deterioration in the quality of product offered to the consumer, and a reduction in the level of sales lost through home copying, then a technical protection system offers a solution which is worthy of consideration.

3.10.15. It is hoped that interested circles will themselves work constructively to provide a solution which can be rapidly implemented and effectively maintained in force. Preliminary evaluation of some systems has already taken place. Further detailed consultation with the industries concerned will be pursued if the principle of a technical protection system is accepted.

3.10.16. Accordingly, the Commission invites comments on the desirability of a technical solution which would permit DAT recorders to carry out certain limited copying functions, but which would at the same time impose restraints on the scope and nature of that copying. There may also be a need for particular provisions to be made for special categories of users of digital audio equipment.

Levies

3.10.17. As already indicated, in spite of any limitation of DAT recording as suggested above, copying from analogue sources by analogue recorders would continue to be possible. While the inevitable deterioration in quality will in practice limit the extent to which copies will themselves be reproduced by analogue means, nevertheless, as long as a high quality analogue source and analogue recorder are used, good quality copies will still be realizable. In time, digital sound recording equipment will replace most analogue systems. For the present, the question of whether right holders in analogue audio-visual recordings should be compensated for the reproduction for private use of their works by analogue means and, if so, whether this should be by means of a levy, remains to be answered.

3.10.18. In the case of sound recordings, the Commission has weighed most carefully the evidence presented in favour of and against levy schemes per se and in favour of and against measures to generalize levy schemes by way of harmonization at the level of the European Community.

3.10.19. As regards the advantages and disadvantages of levy schemes, it is not necessary or appropriate for the Commission to pronounce itself in favour of or against such schemes insofar as they have been introduced already in a number of Member States. The Commission is of the view that where such schemes have been introduced, it is the responsibility of right holders to ensure that the collection and distribution of revenues is satisfactory.

3.10.20. The Commission does not intend to propose that existing levy schemes covering analogue products should be removed where right holders are satisfied that they are working to their advantage on analogue products. This is a matter on which Member States are competent to decide for themselves. Levy schemes generate revenue for right holders and in those countries where they have been introduced, right holders appear to find them an acceptable solution.

3.10.21. Nevertheless, the Commission feels it would be inadvisable to view levy schemes as the most appropriate solution to the copying of works by digital means. The amount of revenue which can be generated in this way will never adequately compensate right holders for the losses incurred by unrestricted digital copying. Similarly, the increasing interchangeability of carriers and supports and the trend towards integrated digital networks and integrated products combining data, image and sound make the levy an inadequate tool with which to regulate the home copying practices of the future.

3.10.22. Nor does the Commission feel it appropriate to take steps at this late stage to harmonize existing levy schemes on analogue products. The reasons for this are as follows :

First, analogue products are becoming obsolete. Digital radio receivers are expected to be on the market within two years, digital audio is available now as compact disc and DAT. Digital video will follow within a few years. All leisure, telecommunications and information management technology is moving rapidly into the totally digital domain. Any Commission initiative now would require a commitment of time and resources which would risk being made obsolete itself by the march of progress within a decade.

Second, the Commission is not convinced that levies are entirely in the interests of right holders, more especially of creative artists, in that they sanction unlimited acts of home copying regardless of the value of the work copied.

Third, the possible distortion or deflection of trade between Member States which could result from differences between leviable and non-leviable products and differing rates of levies does not appear sufficiently important to justify a Community initiative at this stage. Existing levy schemes do not and, indeed, need not entail systematic controls at the borders as is currently the case with respect to fiscal measures. In addition, the schemes operate on the basis of direct reporting arrangements between the relatively limited number of producers and importers, on the one hand, and the designated collecting societies on the other hand. In this respect too, the collection of levies cannot be equated with the collection of value added taxes. The collection of levies will continue to operate in much the same way even after the abolition of internal frontiers after 1992. Equally, the value of the products themselves in the economy as a whole and the small divergencies in their price as a result of a failure to harmonize levies do not call for action on the part of the Commission of the same order as the proposals in other more important areas.

3.10.23. As to video recording, at present entirely analogue and likely to remain so for an uncertain period into the future, the evidence is, as has been seen, inconclusive. In these circumstances, a Community initiative to generalize the levy schemes already adopted in some Member States would not be justified. Any measures taken as regards technical protection of digital recordings might of course incidentally offer protection in practice to the new types of audio-visual work likely to be marketed in the future. Even if images are recorded analogically, they will be of limited interest if the sound and data to which they refer cannot be reproduced as well. In addition, existing systems of protection as described in paragraph 3.15.2. of the Appendix to this chapter already offer some measure of security to rights owners against unauthorized reproduction of pre-recorded video cassettes. National legislation and technical developments will be kept under review with a view to ensuring that appropriate action is taken if it becomes necessary.

The "pay at source" approach

3.10.24. This solution has certain advantages, namely that it adapts the present royalty system to remunerate right holders directly and proportionately in relation to sales or air-play of their works. Collection and distribution of the charge could be carried out by existing collecting societies, and a relatively modest price increase would generate substantial additional revenue to right holders. A "pay at source" approach could be most effectively applied in future, when the networking of sound, image and data by digital transmission systems becomes commonplace, if a technical solution is adopted now at an early stage. On the other hand the objections as to the rough justice of a system which imposes a charge on all who purchase a recording regardless of their intention to copy or not cannot be ignored, nor can the argument that payment by consumers in return for the right to copy may stimulate further acts of home copying. The Commission would welcome the views of interested parties on these issues.

3.11. Associated policies

3.11.1. The home copying issue, including the implications of new technical developments, should not be considered in isolation. Other policies considered in this document are relevant to different degrees and should not be lost from sight. The Commission has sought to reconcile a number of divergent interests in its proposals on copyright reform. On the one hand, through limitations on the activities of the home taper especially in relation to DAT, it has sought to protect the legitimate interests of the creative artist whilst at the same time recognizing the economic and cultural significance of consumer interest in audio-visual products. By measures to curb the uncontrolled development of rental of audio-visual recordings, it has sought to give a greater degree of protection to the investment of those who produce and market such recordings. The need to stimulate and invest in the development of new manufacturing industries and to foster the growth of new technologies has not been overlooked. The

measures proposed to combat piracy in Chapter 2 and to protect computer programs in Chapter 5 will help to ensure that the software products of the audio-visual and computer industries will be able to derive maximum advantage from the Community's internal market. Measures taken to secure better protection for these works in markets outside the Community, as suggested in Chapter 7, will also serve to safeguard the legitimate interests of the industries concerned. The proposals made by the Commission thus reflect the need to balance a broad range of interests in the proposed policies considered as a whole.

3.12. Summary

3.12.1. The Commission recognizes that the practice of home copying may cause losses to right holders to the extent that home copying may substitute for sales of pre-recorded material. It therefore proposes a series of related measures, which, in combination and as seen in the preceding paragraph, aim to reduce home copying practices (and thus indirectly to stimulate sales of pre-recorded sources) rather than to sanction the home copying phenomenon by means of harmonization at Community level. Thus the limitation of the copying by technical means of right holders' works, the introduction of a rental right for audiovisual works, the introduction of a series of anti-piracy measures and the freedom for Member States to maintain or introduce levies should all contribute to an enhancement of right holders' revenues.

3.12.2. The Commission accepts that home copying of digital sound recording by digital means could prejudice the interests of right holders if allowed to continue and to develop in an uncontrolled way. The Commission proposes to counter this risk by the introduction of technical measures to limit the scope of the copying facility of digital audio machines.

3.12.3. The Commission proposes that the levy solution should be retained where Member States feel that this is the best way to remunerate right holders.

3.12.4. The Commission does not feel that action is required at the present time to make mandatory the introduction of technical devices to protect video recordings, but intends to keep the situation under close review.

3.13. Conclusion

3.13.1. The Commission would welcome the views of interested parties on whether, as regards digital audio recordings :

(a) DAT recorders should be required to conform to technical specifications which prevent their use for unlimited acts of audio reproduction;
(b) the manufacture, importation or sale of machines which do not conform to the specification should be prohibited;
(c) the measures outlined in (a) and (b) should apply to all DAT machines for recording audio;
(d) the manufacture, importation or sale of devices intended to circumvent or render inoperable the measures outlined in (a) and (b) should be prohibited.
(e) possession of machines intended for professional or specialist use and not conforming to the specifications for home use outlined in (a) should be made dependent upon a licence to be delivered by a public authority and the maintenance of a register or registers in respect of licensed equipment;

3.13.2. The Commission would welcome the views of interested parties as to whether it is accepted that levies should remain in those Member States which have introduced them, and could be introduced if Member States so wish in those countries which have not yet introduced them, no Community action being required for their introduction or harmonization.

3.14. Timetable for submissions

3.14.1. Comments, at least statements of principle, on Chapter 3, considering the urgency of the DAT issues, should be submitted to the Commission no later than 31 July 1988. On the basis of comments received, the Commission will decide whether further advice - eventually by way of hearings - is called for.

APPENDIX

3.15. Technical protection

3.15.1. One system, widely publicized and demonstrated, is the "Copycode" developed by the Columbia Broadcasting System Records Technology Centre in the USA. This system works in the following way. Sound recordings are encoded by the inclusion of a notch, that is, by the removal of an extremely narrow sliver of sound energy taken from the upper middle of the audible sound spectrum at a frequency around 3840 Hz. This notch can be detected by a scanner device in the form of an integrated circuit incorporated in recording equipment in such a way that its removal, failure or bridging would in practice be impossible or at least extremely difficult. The detector in the recorder scans an incoming signal when the recorder is used to make a recording. If a notch is detected, the record function is interrupted making a copy useless. If the recording does not contain the notch code, then the scanner in the recorder permits copying to go ahead uninterrupted. It was claimed that the CBS system would work for both analogue and digital recordings. The CBS system has recently been evaluated by the National Bureau of Standards of the United States Department of Commerce in order to determine its applicability and effectiveness. The early enthusiasm for the system displayed by IFPI, representing the major record companies, seems now to have waned in the light of the National Bureau's findings (Evaluation of a Copy Prevention Method for Digital Audio Tape Systems, National Engineering Laboratory, February 1988)."

3.15.2. Devices are also under development to prevent the unauthorized recording of videos or television programmes. One system, Macrovision, seeks to rely on the existing design of video recorders. A signal is incorporated into the original video recording or programme which, while undetectable during normal playing or viewing, causes the videorecorder to produce a disturbance in the picture if a copy is made. Such a copy will therefore be unusable for replay purposes. This system has the advantage of not requiring special circuitry in the recorders. Tests are being carried out currently to establish the reliability of the system and whether the existence of the protection interferes with legitimate viewing of a video or television programme. Another system, being developed by CBS Fox, also works on the principle of a code signal in the video or transmission being detected by a device incorporated in an integrated circuit in the recorder.

3.15.3. The same technology which distinguishes digital audio recording from its predecessor, analogue recording, also offers specific possibilities of protection against unauthorized reproduction. Following a conference of the world electronic industry held in Tokyo in June 1986, a specification for the Rotary Head Version of Digital Audio Tape Recorder, R-DAT, using technology similar to that of the video recorder, was agreed to ensure that there would be only one format of digital audio recorder and digital audio tape commercialized for the home user market at present. This conference standard contains two elements which permit CDs to be protected against copying onto R-DAT tape. The first element is the different sampling frequency rates at which CD and DAT operate : 44.1 KHz for pre-recorded CDs and 48 KHz or 32 KHz for recording onto DAT machines. This means that a CD cannot be copied onto a DAT machine by digital means, but only via the analogue output of the CD, with a resulting small loss of sound quality. The second element is the existence of subcode areas in CDs and in DAT tape which permit the insertion of a copy prohibit code in digital signals. Where such codes are present in a digital in-put, the R-DAT specification is designed to ensure that digital recording of a digital source will not occur. Since the DAT machines currently on sale do not have the capacity to record a CD digitally, this copy prohibit code mechanism has not yet come into effect in reality.

3.15.4. The R-DAT specification formed the basis for guidelines issued by the Japanese Ministry for International Trade and Industry (MITI) early in 1987 to the Japanese electronics industry. It was indicated to the Commission that these guidelines also provide that where the copy prohibit code, mentioned in paragraph 3.15.3. above, has been included in a digital source, it must be passed on if that source is relayed and becomes a digital output.

3.15.5. An alternative form of protection system called SOLOCOPY using draft specifications outlined by the Technical Committee 84 of the International Electrotechnical Commission has been proposed by some sections of the hardware and recording industry.

3.15.6. Using the specifications, DAT recorders would be able to identify the source of an incoming digital signal by means of a flag added as a parallel signal on the space reserved for control information which would indicate to the receiving DAT recorder whether the signal could or could not be recorded. For example, if the source was a compact disc, the DAT machine would be able to record. In the case of a recording made on a DAT machine, it would not. Depending on how the system is implemented, digital radio broadcasts would be recordable, but copies of broadcasts made on a DAT recorder could not be used as masters to be copied again digitally, neither could digital recordings made of compact discs be used again to copy from one DAT recorder to another. Direct recording by digital microphone would be possible but not copying from DAT machine to DAT machine of such recordings.

3.15.7. The consumer would still be able to make a digital copy of a compact disc or broadcast or record with a microphone just as he can make analogue recordings today. Therefore a balance would be retained between the consumer demand for the freedom to make recordings off-air or from purchased originals, whilst at the same time the potentially harmful pyramid effect of DAT to DAT copying would be halted.

3.15.8. As an alternative to the SOLOCOPY proposal, a version named the SOLOCOPY PLUS has also been outlined. This would remove the analogue input and analogue to digital convertor from within the DAT recorder, thus preventing the first time copying of analogue sources. Digital copies would not serve as a master for further generations of digital copy, since DAT to DAT copying would be still impossible. The recording industry has claimed that in view of the risk that the continuing existence of analogue to digital convertors within the DAT machine would lead to circumvention of the protection system, the Solocopy Plus concept is more attractive to some right holders. The view has also been expressed to the Commission by a major hardware manufacturer that if a Solocopy Plus type system were to be made mandatory, it would have the effect of stimulating the market for digital products and drying up the demand for analogue ones. The fact that digital equipment would be put on the market which could not be interconnected to existing analogue equipment would accelerate the rate at which the change-over to totally digitalized entertainment and communications networks would occur.

3.15.9. Other forms of protection systems aimed at limiting the number of times a digital copy could be made of the same digital source are currently being discussed among interested circles.

[1] The Berne Convention for the Protection of Literary and Artistic Works.

[2] Under Section 6 of the United Kingdom's Copyright Act 1956 and Section 12 of the Irish Copyright Act 1963 no fair dealing with a literary, dramatic or musical work for purposes of research or private study shall constitute an infringement of the copyright in the work. Thus domestic reproduction of suh works is not per se permitted. The purpose of the making of the copy, study or research, will determine its legality.

[3] Article 68 of the Italian copyright law.

[4] These include dramatic, dramatico-musical, musical and cinematographic works. It should be recalled that producers of sound recordings and broadcasters in the Netherlands do not benefit from the protection of copyright or a neighbouring right, see chapter 2, paragraphs 2.6.10. - 2.6.18.

[5] Article 16(b).

[6] See Article 11 of the Danish copyright law, Article 53 of the German copyright law, Article 41 of the French copyright law and Article 81 of the Portuguese copyright law of 1985.

[7] Bundesgesetzblatt no. 33 of 27 June 1985, page 1137.

[8] See Article 87 paragraph 3.

[9] Law no. 85-860 of 3 July 1985, Official Journal of 4 July 1985 page 7498.

[10] Decision of 30 June 1986, Official Journal of 23 August 1986, page 10279.

[11] Report no. 944/1982. Båndafgifter, Sanktioner, Påtale.

[12] Code of Copyright and Related Rights (No. 45/85, 17 September 1985).

[20] Ley de propiedad intelectual No. 22/87 of 11 November 1987, Boletin Oficial del Estado no. 275 of 17 November 1987.

[14] Section 19(5) (a) and (b) of the Copyright Act 1956.

[15] Section 14 (4) (a) and (b) of the Copyright Act 1963.

[16] In Ireland, the status of programmes transmitted by cable is at present unclear.

[17] See paragraph 3.4.3. and note 2 above.

[18] Law on copyright, section 48(3).

[19] Article 87(3) of the Copyright Act 1965.

[20] Ley de propiedad intelectual No. 22/87 of 11 November 1987, Boletin

Oficial del Estado no. 275 of 17 November 1987.

[21] Article 29(2) of the Law No. 85-860 of 3 July 1985.

[22] Articles 81 and 189 of the copyright law.

[23] Article 16 b.

[24] Article 9(2).

[25] Article 15.

[26] Article 3.

[27] Bill introduced by Mr. DESMARETS and associates, Senate 282 (1985-1986), No. 1, R.A. 13596.

[28] Bill no. 615 (1986-1987) introduced by M. LALLEMAND and others.

[29] See paragraph 3.4.2. above.

[30] Proposal No. 3911 of 10 July 1986, Camera dei Deputati.

[31] See, for example, Audio and Video Cassette Equipment Study in West Germany, France and the United Kingdom, MARPLAN GmbH, October 1985.

[32] Source : European Tape Industry Council.

[33] See Audio- and Video Cassette Equipment Study in West Germany, France and the United Kingdom, op. cit.

[34] See Davies, The Private Copying of Sound and Audiovisual Recordings, 1983, Annex 15 and the United Kingdom government's green paper "The Recording and Rental of Audio and Video Copyright Material, 19 , Cmnd. 9445, para. 2.1

[35] Source : International Federation of Phonogram and Videogram Producers (IFPI).

[36] Source : IFPI.

[37] See, for example, for Germany, Mediumspiegel, April 1987, page 3.

[38] In its non-compact form, the video disc has had only limited success.

[39] Etude sur les enregistrements sonores effectués par le public pour son usage personnel, Sofres, May 1983.

[40] See the United Kingdom government's green paper, op. cit., para. 2.2

[41] See Audio and Video Cassette Equipment Study in West Germany, France and the United Kingdom, op. cit., pages 18 to 20.

[42] Why Americans Tape, Yankelovich, Skelly White Inc., September 1982.

[43] Les enregistrements vidéo effectués par le public pour son usage personnel, Sofres, December 1983, pages 7 and 22.

[44] See Audio and Video Cassette Equipment Study in West Germany, France and the United Kingdom, op. cit., page 33.

[45] V. Böttcher Marktforschung, Usage and Attitude Study Video, 1986.

[46] Etude sur les enregistrements sonores effectués par le public pour son usage personnel, op. cit., pages 11, 25 and 26.

[47] Copyright Infringement, British Market Research Bureau, September 1984.

[48] See Audio and Video Cassette Equipment Study in West Germany, France and the United Kingdom, op. cit., pages 18 to 20.

[49] Les enregistrements vidéo effectués par le public pour son usage personnel, op. cit., pages 7, 36 to 40.

[50] See Audio and Video Cassette Equipment Study in West Germany, France and the United Kingdom, op. cit., page 35.

[51] See IFPI, Digital Music and Copycode - The Future, 1987.

[52] See paragraphs 2.9.7. to 2.9.11. above.

CHAPTER 4 : DISTRIBUTION RIGHT, EXHAUSTION AND RENTAL RIGHT

4.1. Distribution right : the right to control commercial exploitation.

4.1.1. Copyright consists of a number of specific rights, some essentially economic in character, others protecting the author's artistic integrity and reputation. These rights are defined in different ways in different Member States. One major area of difference concerns the economic right of distribution. This right, where it exists, can be most simply described as the exclusive right to authorize that a work or copies thereof be made available to the public. What the distribution right is meant to add in addition to the other exclusive rights of the author is control over the commercial exploitation of his work within a given jurisdiction. It can be of particular importance if the manufacturing of copies of the work is not itself an "infringement" because it takes place, for example, in a country where the work is not protected or where protection has expired.

4.1.2. Some Member States provide expressly for the author to have the exclusive right to offer to the public or to place in circulation the original work or any copies thereof. This technique is applied in Denmark, Germany, Italy, the Netherlands and Portugal [1], and the new copyright law recently adopted in Spain contains a corresponding provision [2]. Others make no such express provision, though to some extent a distribution right may form part of the publication right granted by Irish and United Kingdom law [3]. Moreover, under Belgian, French and Luxembourg law, it seems possible to achieve results close to those of a distribution right by means of conditional exercise of the reproduction right. By clearly indicating conditions on published copies of the work, right holders may at least in some cases, be able to limit the use that third parties may make of them[4].

4.1.3. The question to be considered in this context is whether a distribution right should be introduced in all Member States and, if so, in respect of which works and which rights in those works. Examination of this question should include an assessment of the consequences appearing to flow at present from the absence of distribution rights or from their early exhaustion.

4.2. Exhaustion of distribution rights : national law.

4.2.1. "Exhaustion" should not be confused with "expiry" of the term of copyright protection. For an explanation of the meaning and application of exhaustion see paragraph 4.3.1. et seq. The doctrine of exhaustion is a familiar principle of intellectual property laws of different kinds. The rights in question are considered to be exhausted or consumed when the protected goods are first lawfully marketed, that is, by the right holder himself or with his consent. It has been applied in the patent and trade mark context as well as in the copyright field. The principle can be applied in more or less sweeping forms. In the copyright field, for example, it tends to be applied rigorously to the sale of copies of literary work, but in a more qualified form to the sale of copies of musical works. In the latter case, subsequent rental of the music may still be subject to the author's consent.

4.2.2. Those States that have expressly provided for a distribution right in their copyright laws have been obliged to confront at the same time the question of the appropriate limits of the right since permanent control for the duration of copyright protection over all forms of distribution of copies of a work seems clearly excessive. One obvious moment to put an end to the right of the holder is the time when the work or a copy of it is first lawfully placed on the market. This "exhaustion" or "consumption" principle is given explicit expression in this way in the copyright laws of Denmark, Germany and the Netherlands, whereas the same result is obtained in Italy by way of interpretation [5]. The new Spanish law also contains a provision on exhaustion of rights by first sale [6].

Portugal, however, has no provision in its copyright law on exhaustion despite the far-reaching distribution right laid down in Article 68(2). Finally, given that their laws do not make specific provision for a distribution right, Belgium, Greece, France, Ireland, Luxembourg and the United Kingdom make no express provision for exhaustion.

4.2.3. In the absence of clear provisions on the exhaustion of rights upon the first sale of a copy of the work, it may be uncertain to what extent the author by contractual or semicontractual means such as a notice of rights on the cover page of a book can impose restrictions in respect of the use of the copy on the buyer of a copy and on third parties.

4.3. Exhaustion of rights : Community law.

4.3.1. In its original form, the doctrine of exhaustion related only to the jurisdiction within which the rights in question had arisen. Goods lawfully marketed in other jurisdictions could still be kept out on the basis of rights arising in the first jurisdiction. However, the development of regional and international markets has led to the exhaustion concept being applied to favour cross-frontier trade. The doctrine has thus played a major role in the case law of the European Court of Justice, in relation to patents[7] and trade marks[8] as well as copyright[9]. The Court has held that in all these fields reliance on an exclusive right to exclude goods lawfully marketed in other Member States would be incompatible with the fundamental principles of the Community Treaty providing for the free circulation of goods since it would legitimize the isolation of national markets. While Article 36 EEC authorizes the Member States to maintain restrictions on imports justified on the grounds of the protection of industrial and commercial property, it does not permit a right holder to prevent the free circulation of goods once, with the right holder's consent, they have been placed on the market within the Community.

4.3.2. More particularly as regards copyright and neighbouring rights, the Court stated in Deutsche Grammophon v. Metro [10] that :

"If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market".

4.3.3. In Musik-Vertrieb v. GEMA [11], the Court similarly concluded that copyright did not permit right holders to claim the difference between the royalty payable in an importing Member State and that payable in an exporting State when sound recordings had been lawfully placed on the market in the latter. Such a claim was an improper restriction on the movement of goods in free circulation.

4.3.4. In subsequent cases, the Court has been given the opportunity to define further the proper limits of the doctrine of Community exhaustion in the copyright field.

4.3.5. First, the Court has made it clear that its doctrine of exhaustion is limited to the marketing through the sale of copies of the works in the form of physical objects like other merchandise[12]. In such cases, the legitimate interests of the copyright holder are satisfied by the payment of the royalty received on first sale irrespective of where within the Community it took place and even if the royalty paid is lower than it would have been if the first sale had taken place in another Member State. But where a work is marketed by being performed, as is the case with films, for example, then the right holder's legitimate interest in receipts from successive performances of the work will enable him to prevent performances in a given jurisidiction that would otherwise have been possible. Thus in Coditel v. Ciné-Vog[13] the Court held that the holder of performing rights for a film in Belgium could prevent the re-transmission by cable television in Belgium of a German broadcast of the same film. The producer's rights were not exhausted by the authorization to perform the film by televising it in Germany given his legitimate interest in calculating the royalty for cinema performance in Belgium on the actual or probable number of performances in that country. Re-transmission by cable television of the German broadcast would clearly upset that calculation.

4.3.6. More recently, the Court has had to address the question of the public performance of sound recordings. In G. Basset v. SACEM [14] a French discotheque had challenged the right of the author to claim a supplementary mechanical right royalty on top of the performance royalty when sound recordings imported from the United Kingdom were performed in public in France. In the United Kingdom, the mechanical right royalty is unchanged whether the phonogram is used for private purposes or used for public performance purposes. French copyright law, on the other hand, gives the author the discretion to increase his claim for remuneration for the reproduction when copies are used for public performances.

Before the French courts, the discotheque owner had unsuccessfully argued that the right of the author, according to the French law, to claim a supplementary mechanical right royalty for phonograms used for public performances was contrary to Community law because the first sale of the phonogram took place in the United Kingdom where a similar right did not exist. The Court did not endorse this claim, however, holding that the Treaty provisions posed no obstacle to the non-discriminatory application of a national law which permitted a collecting society to demand a royalty, known as a supplementary mechanical right royalty, by reason of the use in public of the recordings, even when such a supplementary right did not exist under the law of the State where the recordings were legitimately placed on the market. It should be noted that the situation in this case was significantly different from that in Musik-Vertrieb v. GEMA in that in the latter case the extra royalty was claimed on the simple grounds of importation from one Member State to another. In G. Basset v. SACEM, however, the royalty in question became due only on public performance of the recording within the importing State.

4.3.7. The limits of the doctrine of Community exhaustion in the field of rental of video cassettes will be addressed by the Court in the near future [15]. This matter is considered further in the context of the discussion of video rental rights in paragraphs 4.10.1. to 4.10.9. below.

4.3.8. Finally, in this context, it should be noted that the doctrine of exhaustion founded upon Articles 30 to 36 EEC concerns the free circulation of copies of copyright works after they have been lawfully placed on the market. Its effects should not be confused with the effects of competition law on agreements by which publishing rights are allocated on a territorial basis. Such agreements, which are of considerable interest to authors and publishing companies, are to be respected provided they do not run counter to the principles of competition policy in the Treaty, particularly the provisions of Article 85.

4.4. Distribution rights and exhaustion : outstanding issues

4.4.1. As regards the free circulation of copyright goods, the development of the exhaustion doctrine by the European Court on the basis of the Treaty's directly applicable provisions has already to a large degree ensured that national copyright laws will not have adverse or divergent effects on the functioning of the common market. However, some issues have not yet been specifically decided by the Court.

4.4.2. This applies, for example to the effect of the exhaustion doctrine on restrictive conditions indicated on copyright goods placed on the market and intended to limit or prevent the free circulation of those goods from one Member State to another. Such indications might state, for example, that the goods are "Not for sale in ..... " or "Not for export". Such conditions might in principle be permitted by a given national law. However, there seems little reason to doubt that the Court would rule also in the area of copyright, as it has done in other areas of intellectual and industrial property law, that such an exercise of the reproduction right does not form part of the essential function of copyright in goods placed lawfully on the market and accordingly cannot be used to oppose the import of goods from other Membert States. Such conditions run counter not only to the provisions of the EEC Treaty on the free flow of goods but also to competition rules. To this extent then, the "Europeanization of the exhaustion principle" [16] has already been largely achieved.

4.4.3. As regards performing rights in protected works, as has been explained, the exhaustion doctrine does not apply. These are likely to raise issues as regards the free provision of services rather than the free circulation of goods. In the broadcasting field, for example, the cross-frontier transmission of broadcasts, particularly television, by satellite and cable encounters legal obstacles deriving from copyright that require to be removed by appropriate Community secondary legislation. A proposal has already been submitted by the Commission to the Council [17].

4.4.4. The Commission has so far received no request for the introduction in all Member States of a distribution right of general application in the copyright field. Most problems that have been mentioned[18] seem to be capable of adequate solution at national level. It has been suggested, on the other hand, that the question of public lending or rental of books and the possible right of the author to receive remuneration for this use of his work is an issue requiring a solution at the Community level [19].

4.4.5. The desirability of allocating resources to this subject at Community level at this time seems far from evident, however.

4.4.6. First, in reality, only relatively small sums of money are at present involved. Commercial rental of books has practically disappeared. Public lending schemes, where they exist, generate only modest total revenues. In no Member State do they appear to exceed 10 million ECU per annum.

4.4.7. Second, the schemes operate only in a minority of Member States : Denmark, Germany, the Netherlands and the United Kingdom. Moreover, their introduction has on occasion generated considerable controversy. Establishing a political consensus in those circumstances, even at national level, has proved difficult and time-consuming. The chances of arriving at a Community consensus within a reasonable period of time are not great.

4.4.8. Third, of the four schemes in operation, those in force in Denmark, the Netherlands and the United Kingdom are not strictly speaking part of the copyright system at all, but a supplementary regime whereby authors receive sums from a fund largely financed from public sources. It may be doubted whether such forms of public financing are an appropriate subject matter for Community harmonization at this time.

4.4.9. Fourth, neither the absence nor presence of such schemes appears to cause significant problems for free circulation of books or to the development of book publishing in the Community. In particular, the lending or rental of books is far less closely linked to problems of private copying and piracy such as those that affect the audio-visual sector in the manner further explained below [20].

4.4.10. For all these reasons, the Commission is of the opinion that Community action in respect of approximation of laws in this area at the present time would not be justified.

4.4.11. On the other hand, in the audio-visual sector, important issues have arisen having both a cross-frontier dimension and important implications for the future development of the Community's sound and video recording industries. Authors and producers of such recordings have for some time been arguing strongly in favour of the introduction of a distribution right or at least for protection against unauthorized commercial rentals. The demand has been made in part in the context of the Community debate on audio-visual piracy[21] and some aspects of the problem have been considered in Chapter 2. But the demand also raises issues of substantive copyright law that merit further consideration here.

4.4.12. As regards the rental of computer programs, it is proposed in Chapter 5 (paragraph 5.8.2.(d)) that specific provisions be made for a rental right within the context of the proposed directive on the legal protection of computer programs. Rental of computer programs is therefore not dealt with in this present chapter.

4.5. The distribution of sound and video recordings

4.5.1. Sound and video recordings appear to lend themselves increasingly to commercial exploitation by way of rental.

4.5.2. As regards sound recordings, non-commercial libraries have been in existence for some time, especially in those countries where the public library system is well developed. But even where these systems have existed, the negative effects of lending or rental on right holders have appeared to be relatively limited. The principal reason is that the quality of traditional recordings on disc suffers proportionately to the number of times the record is borrowed, wear being inevitable and the risk of accidental damage high. Control of wear and tear on returned copies is at best burdensome and frequently impractical. Worn or damaged copies are unattractive whether for listening or private copying. The need to replace damaged copies of popular recordings operates as an automatic limit on the extent to which the purchase of one copy of a given work for lending or rental will substitute for the purchase of other copies and indeed on the entire scale of lending and rental operations. For all these reasons, profitable commercial exploitation of traditional sound recordings through rental seems to have been rendered insufficiently attractive for it to develop on a substantial scale.

4.5.3. The first technical development to change this state of affairs was the introduction of the tape cassette which is much less susceptible to damage. However, the relatively recent arrival of the laser read compact disc is likely to have much more profound effects since it appears to be virtually indestructible in normal use and repeated playing has little effect on the quality of the sound. Consequently the possibility of profitable commercial rental activity is much higher than before and in a number of countries, particularly outside the Community where the penetration of the compact disc player is particularly high, rental outlets have mushroomed. This is the case in Canada, Japan and the USA. Recently, following the increasing penetration of compact disc players in the United Kingdom, compact disc rental outlets have started to appear in large numbers. Similar developments can be expected elsewhere.

4.5.4. Furthermore, sound recordings on compact disc could until recently only be copied on to tape using ordinary analogue recording equipment, but the advent of the digital audio tape recorder means that the digital recording can be copied in digital form, unless protected against reproduction by technical means. When a repertoire is eventually available on pre-recorded digital tapes, the same problems will arise for this support as for the compact disc. The problem of home copying is treated in Chapter 3, but it is mentioned here since the negative impact of lending and rental undertakings on the income of right holders is clearly increased when high quality copies can be readily made by hirers at low cost.

4.5.5. Lending and rental of video recordings on cassette differ from the rental of sound recordings because the predominant method of distributing video recordings to the public is rental and not sale. The reasons why video recordings are rented and not sold include the saturation effect of repeated playing of most popular video products, in particular, feature films, and the relatively high price, though now decreasing, for their purchase by comparison with their rental. Some special types of recordings undoubtedly tend to be purchased, such as instructional and children's videos, for these are likely to be used repeatedly. But much material is produced on cassettes expressly for rental which accordingly then takes place with the full agreement of right holders.

4.5.6. At the same time, however, the video industry is concerned about the scale and nature of the unlicensed video rental activities that have developed in recent years. Such rental outlets, operating independently and without agreements with right holders in respect of the material rented, have increased substantially not only in Europe but also in the United States, Canada and Japan. Competition between outlets is often fierce and their financial situation precarious. Their activities have a negative effect on the revenue of right holders by diverting legitimate business from licensed distributors and, in addition, they tend to form the main outlet for pirate copies which produce a larger profit margin than rental of legitimate products.

4.6. The present position concerning the rental of sound recordings

4.6.1. The main features of the present legal position as regards the rental of sound recordings in the Member States can be summarized as follows according to the three categories of right holder concerned.

4.6.2. First, as regards authors' rights in respect of audio recordings, these will be exhausted by first sale in Italy [22] and the Netherlands [23]. Accordingly, authors are not entitled in those countries to authorize or to receive specific remuneration for subsequent rental of their recorded works.

4.6.3. In another group of States, the opposite situation prevails. Thus, in Denmark, the Copyright Act was amended by law no. 274 of 6 June 1985 to exclude exhaustion in respect of the right of the author to authorize the commercial rental of musical works including recordings thereof. In Germany, Article 27 of the copyright law explicity grants authors a right to remuneration when sound recordings are lent or rented but not a right to prohibit such use of their works. In Spain authors have, by virtue of Article 19 of the new Spanish copyright law, the right to control rental. This right is not exhausted by the first sale of a copy. Also in Portugal, Article 68(1) of the copyright law makes explicit provisions for the author's right to authorize rental copies of his work.

4.6.4. In yet a third group of the States, a degree of uncertainty prevails. In Ireland and the United Kingdom, where rental of published works is not a restricted act, it appears that authors have no right to control rental of copies of recordings marketed with their consent, except perhaps by contract; though serious doubts have been expressed about the efficacy of such practices[24]. In Belgium, Greece, France and Luxembourg, where no distribution right is recognized, conditional exercise of the reproduction right might in theory permit restrictions to be placed on subsequent rental by means of clear notification on the copies sold [25]. However, there appears to be no case law unequivocally sustaining the thesis that commercial rental can be controlled in this way and commercial practice in those countries frequently suggests the opposite.

4.6.5. As far as producers are concerned, laws at present in force do not generally give them the right to control the subsequent rental of recordings put into circulation by sale to the public. In France and Portugal, producers have however in 1985 been granted such a right [26]. In other countries, an effort has been made to achieve this end. Under the terms of the IFPI/BIEM Standard Contract[27], producers agree to print the following on record labels:

"All rights of the producer and of the owner of the work reproduced reserved. Unauthorised copying, hiring, lending and public performance of this tape prohibited".

Third parties are thereby put on notice that neither the producer nor the author of the work has given authorization for the hiring or lending of records. Moreover, the IFPI/BIEM Standard Contract also specifies that the producer is granted the right to put recordings into circulation solely with a view to their sale for private use. In Germany, recent case law[28] renders such restrictions ineffective. In the Netherlands, the authors' society is engaged in litigation in order to test whether the unauthorized commercial rental of records can be prevented on this basis[29].

4.6.6. As for performers, no Member State has enacted laws giving them the right to authorize the rental of their performances fixed on sound recordings.

4.7. The present position concerning the rental of video recordings.

4.7.1. The legal position in respect of rental of videograms is partially similar but not identical to the position in respect of rental of sound recordings.

4.7.2. One important difference is that a videogram is assimilated to a cinematographic work protected according to Article 2(1) of the Berne Convention. This implies that the producer of a videogram, irrespective of whether a given State operates with a specific film copyright in favour of the producer [30], is automatically considered an author, if not the sole author of the work and in that capacity, unlike producers of phonograms, enjoys authors' rights.

4.7.3. As to the rights of authors and producers to authorize or receive specific remuneration for the rental of videograms after their first sale, the legal results appear to be essentially the same as for sound recording though the legal technique used to realize those results may be different.

4.8. Recent legislative proposals concerning the rental of sound and video recordings

4.8.1. In Belgium, proposals for new legislation have recently been made which address the problem of lending and rental of sound and video recordings[31]. In the United Kingdom, an amendment to the Bill published on 28 October 1987 proposes the introduction of a rental right [32].

4.9. The Community dimension of the problem.

4.9.1. Given the differences in the legal situations in the Member States, difficulties may obviously arise if a video cassette is brought from a country where the author has no right to control rental into a country where this right exists. Such a situation has recently been the subject of litigation before the Court of Justice in case 158/66 Warner Brothers Inc. and Metronome Video Aps v. Erik Viuff Christiansen. In that case, the Danish defendant bought in the United Kingdom a video cassette of a feature film which was not available on video cassette in Denmark whether for rental or for sale. The plaintiff, Warner Brothers, later granted exclusive rights to the plaintiff Metronome Video Aps to exploit the work by way of rental in Denmark. The question which the Court had to decide was whether the right holder in Denmark, having the right to authorize rental in the territory of Denmark, could stop a person who purchased a video cassette in a Member State where rental is not a restricted act from exploiting the imported cassette for commercial rental purposes. By its ruling of 17 May 1988, the Court, in accordance with the Commission's suggestion, answered the question in the affirmative, motivated by the consideration that the exploitation of the film also by way of public performance or shows in cinemas could be severely compromised. The case is a vivid demonstration of the Community dimension of this type of problem from the point of view of the functioning of the internal market in sound and video recordings.

4.10. The future development of the Community's sound and video recording industries and the general introduction of a rental right.

4.10.1. Present trends in the distribution and marketing of sound and video recordings suggest that commercial rental will constitute an increasingly important means by which such recordings will be made available to the public. Furthermore, given the links between rental and the problems of piracy and private copying, this development implies significant economic consequences for those whose works and performances are recorded. In the absence of a firm legal basis for right holders to authorize the commercial exploitation of their works through rental, it seems likely that those responsible for creating recorded works will receive a much lower return for their efforts and investment than would otherwise be the case, while middlemen could profit disproportionately from the efforts of others. One likely consequence may well then be that recorded works will tend to be sold at relatively high prices since right holders will seek to achieve a return on first sale that will reflect, if only in part, the rental use that may subsequently be made of their works. However, this policy is unlikely to provide a satisfactory solution from the right holders' point of view since there are other limits on the prices that may be charged on first sale, while these higher prices will nevertheless prejudice those consumers who would prefer to buy rather than rent the recordings in question.

4.10.2. On the other hand, if right owners can sufficiently control the commercial exploitation of sound and video recordings through rental, they will be in a position to ensure that they receive an adequate return on their investment for rental exploitation of their works. Control of the exploitation by way of rental is also the necessary prerequisite for receiving remuneration for rental of a copy intended for public performance. The practice of entertaining different audiences such as patients in hospitals, military personnel in barracks, seamen aboard ships and inmates in penitentiary institutions can constitute a supplementary source of income to right holders. A rental right should provide the legal foundation for such income to be realized. At the same time, sufficient control over rental should favour the adoption of low pricing policies on sales which will encourage that form of demand and directly benefit the consumer. Finally, better control over the rental market should contribute to the repression of piracy since it will tend to ensure that rental outlets will not deal in infringing products.

4.10.3. In this connection, the need to provide adequate resources for the future activities of the Community's audio-visual industries should be borne in mind. As the Commission has already explained in other contexts [33], the European audio-visual programme industries must be able to call on new resources if they are to meet the challenge of supplying the new audio-visual media with the material that the latter will need. A rental market which ensures that right holders receive an adequate return on their investment has an important role to play in this regard.

4.10.4. Various remedies have been suggested to improve the situation including licensing of all rental outlets and the introduction of a broad distribution right for sound and video recordings. Such remedies are probably more than is necessary to solve the problem. However, a rental right would provide the solid legal foundation necessary for the future development of the Community's sound and video recording industries without underestimating the importance of other cultural policies designed to support authors and performers. It would also have the advantage that many practical matters could be settled by contractual arrangement rather than by the law itself including, for example, the uses to be made of rented copies, royalties and their distribution between different categories of right holder. Finally, the general introduction of a rental right in all Member States would ensure that artificial distortions do not arise as regards the marketing of sound and video recordings as a result of commercial rentals requiring authorization by right holders in some Member States and not in others.

4.10.5. The decisions of the European Court concerning exhaustion are in no sense incompatible with the introduction of a rental right whether at national or Community level. The situations so far held incompatible with the Treaty's free circulation provisions have all involved the sale and re-sale of goods lawfully placed on the market for that purpose, not the rental of recorded works subject to copyright. In addition, in the Coditel [34] case, the Court held that where copyright works are exploited through successive performances, the first performance did not exhaust the holder's rights. The exploitation of sound and video recordings through rental raises similar issues to exploitation through performance, not least the holder's legitimate interest in controlling successive commercial uses of the work.

4.10.6. In conclusion then, current developments in the distribution of sound and video recordings suggest that the introduction of a rental right in all Member States of the Community should be considered a priority matter. Such a right should be granted to authors of works embodied in sound and video recordings, to the producers of such recordings and to performers whose performances have been fixed thereon. Many details could probably best be settled at national level, preferably by contractual arrangements between the interests concerned. This would probably apply, for example, to the questions of how the royalty income from rental where authorized should be shared between the various right holders and what mechanisms may be needed to handle demands for licences authorizing rental. On the other hand, the scope of the right should be defined at Community level in order to avoid undue distortions.

4.10.7. A choice has to be made in this context between a right to authorize rental and a right to equitable remuneration as provided at present by German law. Each solution has different advantages and disadvantages, but at present the right to authorize rental appears to be the most appropriate. The trend in technical development is towards recording and copying facilities that readily and cheaply produce increasingly high quality copies and which permit the use of pre-recorded material by numerous users without deterioriation. This trend is likely to lead to rented products having an increasing market share. The ability of right holders to protect themselves by charging more for their products, particularly those intended to be made available for rental, is limited and, in any case, higher sales prices prejudice the consumer and tend to operate in themselves as an incentive to rental and to copying. A right to authorize rental would enable right holders to decide on the extent to which their products would be marketed by rental or sale on the basis of commercial considerations including the probable impact of one form of marketing on the other. A right to equitable remuneration would be far less satisfactory from this point of view and would inevitably involve the uncertainty and complexity of procedures designed to determine what is equitable remuneration in any given case.

4.10.8. It seems appropriate to suggest a duration of the rental right of 50 years to be calculated from the end of the year in which the recording was made in accordance with the legislative trend in Member States in respect of the reproduction of recordings.

4.10.9. Since the problems currently arising are a consequence of commercial lending, no need appears to arise to extend the scope of the right to including free lending, for example, by public libraries. By restricting Community action to commercial lending, Member States are also left the discretion to make appropriate arrangements in respect of other non-commercial lending of sound and video recordings, as for example lending to educational institutions.

4.11. Summary

4.11.1. The Commission considers that the increasing penetration of compact discs, which do not deteriorate by frequent use, entails the risk that the author, the performer and the phonogram producer may suffer economic damage by the unauthorized commercial rental of sound recordings.

This risk should be countered by the introduction in all Member States of a right for the author, the performer and the phonogram producer to authorize the commercial rental of sound recordings.

4.11.2. As far as video recordings are concerned, the economic interest of the producer of the cinematographic work so recorded makes it necessary to guarantee him the right to choose the time and place to exploit his work by performance in movie theatres and by commercial rental. The right to authorize the commercial rental of videograms, as laid down in the legislation of some Member States, should be generalized.

4.11.3. There appears at the present time to be no need for the introduction of a general right for authors to control other elements in the commercial distribution of copies of their works.

4.12. Conclusion

4.12.1. The Commission intends to submit to the Council a proposal for a directive, to be based on Article 100A EEC, to introduce a rental right for sound and video recordings in all Member States of the Community. Comments are invited on whether this right as suggested should consist of the right to authorize rental or should be restricted to the right to receive equitable remuneration.

4.12.2. Comment is also invited on the conclusion drawn in this chapter that the other issues of a broad distribution right and a harmonisation of exhaustion provisions do not appear to call for legislative initiatives at Community level at the present time.

4.13. Timetable for submissions

4.13.1. Comments on Chapter 4 should be submitted to the Commission no later than 1 December 1988.

[1] See **for Denmark**, section 2 of Law on Copyright no. 158 of 31 May 1961 with later amendments, **for Germany**, article 16 of the Copyright Law of 9 September 1965 with later amendments, **for Italy**, article 12 of the Copyright Law no. 633 of 22 April 1941 with later amendments, **for the Netherlands**, article 12 of the Copyright Law of 23 September 1912 with later amendments and **for Portugal**, section 67(1) of the Code 45/85 of Copyright and Related Rights of 17 September 1985.

[2] See article 17 of Ley de propiedad intelectual no. 22/87 of 11 November 1987
Boletin Oficial del Estado no. 275 of 17 November 1987.

[3] See A. Dietz, Copyright Law in the European Community, 1978, para. 233; and Copinger and Stone James, Copyright, twelfth edition, 1980, paragraph 495.

[4] See A. Dietz, op. cit. paragraphs 233-234; and Gotzen, Het bestemmingsrecht van de auteur, 1975, p. 17 et seq.

[5] A. Dietz, op. cit., para. 231.

[6] Article 19 loc. cit.

[7] Centrafarm et al. v. Sterling Drug, (1974) ECR 1147.

[8] Centrafarm v. Winthrop, (1974) ECR 1183.

[9] Deutsche Grammophon v. Metro - SB - Grossmärkte, (1971) ECR 487 and Musik-Vertrieb Membran v. GEMA, (1981) ECR 147.

[10] loc. cit.

[11] loc. cit.

[12] Coditel v. Ciné-Vog Films, (1980) ECR 881.

[13] loc. cit

[14] Case 407/85, G. Basset v. SACEM, not yet reported. A similar problem will be addressed by the Court in its judgement on the pending Case 270/86 M. Cholay, Société Bizon's Club v. SACEM.

[15] Case 158/86, Warner Brothers Inc. and Metronome Video Aps v. Erik Viuff Christiansen.

[16] A. Dietz, op. cit., para 236.

[17] Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities of 6 June 1986, O.J. No. C 179 of 17 July 1986, p. 4.

18 For example, see A. Dietz, loc. cit., paragraphs 227 and 250 et seq.

19 A. Dietz, loc. cit. paragraphs 250-258 and Community action in the cultural sector, Bulletin of the European Communities, Supplement 6/77 paragraph 26.

20 New technical development such as the development of the compact disc read only memory (CD-ROM) could alter this situation but it cannot be assumed that it will.

21 See for example G. Davies, Piracy of Phonograms, second edition 1984, Commission Document SG/Culture/52/84, pages 111 to 112. See also Report of the Group of Experts on the Rental of Phonograms and Videograms, UNESCO - WIPO, November 1984, UNESCO/WIPO/GE LPV.1/6.

22 A. Dietz, op. cit., paragraph 231.

23 See Article 12 of the Copyright Law of 23 September 1912 and A. Dietz, op. cit. paragraph 231.

24 See the Recording and Rental of Audio and Video Copyright Material, February 1985, Cmnd. 9445, page 11.

25 See Rental of Videograms and Phonograms prepared by the International Federation of Producers of Phonograms and Videograms (IFPI) for WIPO and UNESCO. Doc. UNESCO/WIPO/GE/LPV 1/2, Paris 30 August 1984, paragraph 44.

26 See for France Law no. 85-660 of 3 July 1985, Article 21 and for Portugal Law no. 45/85 of 17 September 1985, Article 184(1) and 176(8). The provisions in article 190 of the law which restricts application of the protection will not be discussed in this context.

27 Standard Contract drawn up by the International Federation of Producers of Phonograms and Videograms and the Bureau International de l'Edition Mecanique.

28 See decision of 6 March 1986 of the Bundesgerichtshof in case 1 ZR 208/83, GRUR 1986, page 736.

29 STEMRA v. Free Recordshop. The decision by the High Court reported in NJ 1986 Nr. 206 is at present before the Supreme Court (Hoge Raad).

30 For details on film copyright, see paragraphs 2.6.5. to 2.6.9. of Chapter 2 on Piracy.

31 Bill no. 282 of 29 May 1986 submitted to the Senate by Mr. Desmarets and others. See also Bill no. 615 of 18 July 1987 submitted to the Senate by Mr. Lallemand and others.

32 The Copyright, Designs and Patents Bill (H.L. 12).

33 See in particular the Community's broadcasting policy, Proposal for a

Council Directive concerning broadcasting activities, Bulletin of the European Communities, Supplement 5/86 point 16 and Action Programme for the European Audiovisual Media Products Industry, COM(86) 255 final of 12 May 1986.

34 loc. cit.

CHAPTER 5 : COMPUTER PROGRAMS

5.1. Subject matter

5.1.1. A computer program is a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions. While more complicated definitions have been attempted [1], this simple description will suffice for the purposes of the present discussion.

5.1.2. The program as such will frequently be accompanied by supporting documentation in a "package". In addition, its development will have involved the creation of the necessary preparatory design material. The program together with the supporting and preparatory design material constitute the "software". The legal protection of the supporting and preparatory design material may raise similar issues to those raised by the protection of the program itself as regards both the availability and scope of protection.

5.1.3. Computer programs are of different types and can be classified in different ways.

5.1.4. Operating systems control the internal functioning of the computer, while application programs direct it to perform particular functions for the user. If the application program is designed for a software developer, a professional user rather than the typical end user, it is often described as a "tool". Until recently application programs have normally required to be loaded into a computer prior to being used. However, it is becoming increasingly common for certain application programs to be incorporated in the computer hardware, for example, data base management programs. The distinction between operating systems and application programs is thus eroding and this trend seems likely to continue.

5.1.5. Programs in object or machine code are expressed in binary digits, while source code programs are expressed in some other form and are automatically translated into binary digits by a computer's compiler.

5.1.6. Finally, programs can be classified according to the different media on which they are fixed, including paper tape, punched cards, magnetic tape and discs, optical discs, as well as integrated circuits ("firmware").

5.1.7. Unless otherwise indicated, in this chapter, the word "program" signifies all computer programs however they may be classified.

5.2. The economic, industrial and technological context

5.2.1. The importance of computer software to the Community's economy and its industrial and technological future is quite apparent.

5.2.2. First, from a quantitative point of view, the world software industry is already large and will continue to expand. Information concerning this industry and its development is necessarily fragmentary. The following indications will serve, however, to give an impression of its main features.

5.2.3. Commercial software sales amounted in 1985 to between 30 and 39 billion dollars, the higher figure including an adjustment for distribution costs[2]. Since such sales figures do not include developments by users for their own purposes, the total annual output of the industry can be assumed to have a significantly higher value.

5.2.4. The largest software market is found in the United States which is about half the size of the world market and about 50% larger than the market in Western Europe. Since the United States imports relatively little software, while its industry exports on a considerable scale, with exports of package application programs expanding significantly in recent years, the US share of the world market amounts to at least 70%.

5.2.5. The Japanese software market is at present comparatively small at about 5 billion dollars. Japanese business attitudes and language difficulties are reflected in an almost exclusive demand for custom software and an industrial policy that aims for a mass market in software development systems. If this policy is successful, Japan could be a world player in software markets within a decade.

5.2.6. The Western European software market was valued in 1985 at 9.5 billion dollars of which 5.1 billion, or 54%, were derived from sales of package software. Package software sales are growing fast. They are led by packages for micro-computers which are at present growing at 30% per annum, having expanded by as much as 40% to 50% per annum in the recent past. Overall, software demand is currently stronger in Europe than in the USA which has motivated US firms to increase their sales and developments through subsidiaries and joint ventures in Western Europe.

5.2.7. Indeed, the dominant suppliers of software in Western Europe are of US origin. Taken together, US firms in 1985 supplied in the region of 65% to 85% of the Western European market for system software depending on the class and about 55% of the market for application software.

5.2.8. It is also striking that computer hardware manufacturers are the largest suppliers, even in the case of package software. Amongst the computer hardware firms, IBM leads the field with a 41.5% share of the package software market in Western Europe (1985). IBM's main contenders are Hewlett Packard, DEC, ICL and Bull with shares between 4.3% and 4%, followed by Siemens, Olivetti and Nixdorf with somewhat smaller shares of between 3.4% and 3.3%. The largest and most dynamic firms not involved in hardware production occupy positions much lower down the scale, ranking between tenth and twenty-fifth in relative importance : Computer Associates, Software AG, Cullinet, Microsoft, Ashton Tate, Cincom, Lotus and Scicon International.

5.2.9. As to developments in the future, some informed commentators[3] believe that the growth of package software will continue into the 1990's, at the expense of custom software and processing services. This opinion is not shared by all. In fact, a few software houses, notably in France, believe that they and their customers will be better off if they serve the growing demand for integrated solutions by supplying application programs that are more easily adaptable and portable than they were in the past. Such programs must also be produced more quickly and cheaply than in the past, by means of raising the number of re-usable program elements or modules. In their view, suppliers will have to assemble the necessary skills and offer a host of professional services including market research, business consultancy and user training in order to maximize value added. Developments in other Member States suggest that this view may well be correct.

5.2.10. Uncertainty also prevails as to the extent to which reliance on proprietary as opposed to freely accessible standards will affect the market position of software suppliers. At one level, free worldwide standards reduce investment risk. This is demonstrated, for instance, by POSIX - a standard set of interfaces between UNIX and similar operating systems and the application programs that run on these systems. Existence of POSIX now allows independent software producers to develop application software with the knowledge that this software will "fit" a range of installations irrespective of the version of the operating system being used. Conversely it is said that some computer makers aim to restrict the use of operating systems to their own products and to sell as much application software as possible. By withholding interface information for their products, they may delay or prevent competitive software from being developed. It was precisely such considerations which, in 1984, led the Commission to insist

that IBM undertook (ref. Bulletin of the European Communities 10-1984, page 96 et seq.) to identify the interface to be used by any competing product and give access to the relevant interface information. It has also been claimed that "proprietary standards" distort competition in the software markets, but the degree of distortion is difficult to measure because data about software activities are notoriously poor. The matter is clearly of sufficient cause for concern that it must be kept under close examination. Some important aspects of this problem are considered in paragraphs 5.5.8. to 5.5.12. below.

5.2.11. Whatever the outcome, it is nevertheless clear that, in the future, software will increasingly constitute the most important component of computer systems, with the hardware consisting increasingly of similar, standardized interoperable components. These systems will be of vital importance in all sectors of the economy. To retain its place in the forefront of technical advance, and indeed to maintain its competitiveness generally, the Community will accordingly have to ensure that it has a competitive, dynamic software industry.

5.2.12. At the present time, however, there is little room for complacency on this score since, though particular European firms may well be very successful in their particular niches, overall, the industry is characterized by the predominant position of US suppliers, in both the world and the Community markets, especially as regards operating systems. US computer manufacturers have a technological lead as regards much computer hardware. Operating systems are often supplied together with the hardware. This "bundling" of the software and hardware inevitably helps them to maintain their predominant position. As regards application programs, users have a much greater degree of freedom to choose their suppliers and, unsurprisingly, it is in this field that European firms have found it easier to invest in the development of competitive products and so increase their market share.

5.2.13. Given the late start of the Community's software industry compared to that of its principal competitors, it is particularly important to ensure that appropriate legal protection is available to computer programs and software generally, which will contribute to an environment favourable to investment and innovation by Community firms, thus permitting the Community industry to catch up with its competitors. Further, in debating the scope and term of protection, a correct balance should be found between the benefits protection gives to software producers and the "opportunity costs" it may impose on software users in the form of the range and price of software products available to them.

5.3. The legal response

5.3.1. Until recently, the development of computers and their associated programs, which has been under way for many years, had not produced widespread legislative change in intellectual property laws. Part of the explanation for this inactivity lies in the fact that, until a short time ago, access to programs was on the whole limited to more professional users in a direct relationship with program developers. This permitted many problems to be resolved satisfactorily on a contractual basis. At the same time, in the industrialized world, programs were not only protected contractually, but were widely considered to be eligible for protection under the existing provisions of copyright and, to a lesser degree, patent laws. The exact scope of this protection might well not be completely clear, but to the extent that case law was expected to clarify progressively the application of the law, there was a natural reluctance to embark on legislative initiatives which might prove to be unnecessary. In addition, if the protection of programs developed on the basis of existing instruments, national and international, it might be possible to avoid putting at issue valued principles which would run a greater risk of being questioned in the context of more comprehensive legislative reform.

5.3.2. Accordingly, until recently in the Member States, attention focused on the application and adaptation of existing laws to the particular characteristics of software rather than on the promotion of new legislative solutions.

5.3.3. As regards patent law, the common starting point has been the assimilation of computer programs "as such" to those forms of innovation, such as mathematical methods and presentations of information, that are not regarded as patentable inventions [4]. But this point of departure has not eliminated patent protection for programs to the extent that might appear at first sight. For where a program forms part of an invention that, taken as a whole, meets the criteria for patentability, patents have indeed been granted and upheld by the courts. The Paris Court of Appeal, for example, held in 1981 that an invention permitting the analysis and recording of the physical characteristics of the earth's strata, including its oil-bearing potential, should not be refused protection simply because certain steps of the procedure were directed by a computer program[5]. Similar approaches have been adopted in several Member States. In addition, the European Patent Office has re-examined its practice in this matter and adopted new examination guidelines in 1985 which, among other things, are designed to ensure that an invention which, taken as a whole, has a technical character and meets the normal criteria for patentability, may be patented even if the subject matter claimed includes a computer program[6]. Nevertheless, the restrictive criteria that must be met to obtain a patent monopoly are undoubtedly such that many programs representing a considerable investment are not patentable probably because the technical character of an invention is absent, no change being produced on matter or energy in the physical world. Even where a computer program does form part of an invention having this technical character, the required level of inventiveness may not be reached. In any event, to obtain patent protection, procedures have to be followed and charges paid. These can result in potential right holders failing to secure the legal protection of their work.

5.3.4. These limitations of patent law have emphasized the potential role of copyright in the broad sense, that is, authors' rights and neighbouring rights as the primary means for protecting computer programs both at the level of Community Member States and at the international level. The scepticism expressed by some in the sixties and seventies in respect of the extension of "copyright" protection to this new kind of work, gradually and in parallel with an increasing understanding of the similarity between a computer program and a literary and artistic work, has been replaced both at national and international level by a general acknowledgment of the advantages for creators, right holders, users and society as a whole of a "copyright" solution to the problem of ensuring adequate protection of programs against unauthorized reproduction.

5.3.5. Indeed, so strong had the preference for a copyright solution become, that the 1983 session of the World Intellectual Property Organization (WIPO) group of experts pursuing the work started in 1979 to consider the protection of computer programs at the international level, recommended that the conclusion of a special treaty giving sui generis protection to computer programs should not be pursued for the time being. Instead, it noted the suggestion that WIPO and UNESCO, the two bodies responsible for the main international copyright conventions, should further study the protection available for computer software under existing copyright laws and treaties and should convene a committee of governmental experts for this purpose[7].

5.3.6. On this basis, work on the protection of computer programs has been continued at the level of the competent international organizations. The session convened by WIPO and UNESCO in February 1985 may well be considered to have failed to achieve universal recognition of the existence of protection systems founded on the application of copyright laws. Neither did it obtain a general consensus on the desirability of the introduction of copyright protection where not already applicable. It did, however, demonstrate that copyright protection against unauthorized reproduction of computer programs already exists in most industrialized countries, and among those, nearly all Member States of the European Communities.

5.3.7. Indeed, the record demonstrated that in Member States, case law has increasingly recognized the application in principle of copyright to computer programs and the other forms of expression, such as supporting documentation, that together constitute the software family[8].

5.3.8. In recent years, legislation has also been proposed or adopted in many Member States, but essentially to confirm the trends in case law rather than to modify them substantially.

5.3.9. In Germany, the law of 24 June 1985[9] amends the copyright law so as to assimilate programs for data processing to literary works, including for the purposes of determining the term of protection. In France, the law of 3 July 1985[10] provides that computer programs shall figure among the works protected under copyright law, albeit subject to particular provisions including a limitation of the term to 25 years from creation. In the United Kingdom, the Copyright (Computer Software) Amendment Act 1985[11] was enacted in order to make it clear that computer programs attract copyright protection. Most recently Spain has provided for explicit copyright protection of computer programs by its comprehensive copyright law of 1987[12]. Similar legislative initiatives are being taken in Denmark[13], Italy[14], the Netherlands[15]. The governments of Belgium[16] and Luxembourg[17] have also announced that they will favour copyright as an appropriate vehicle for protecting computer programs. In Portugal, learned opinion[18] considers computer programs to be covered by the notion of "Intellectual creation" in Article 1 of the 1985 Code on Copyright and Related Rights[19], though they are not mentioned in the examples specified in Article 2. Only in Greece[20] do there appear still to be doubts about the desirability of protecting software in this way.

5.3.10. In brief then, the Member States have generally taken the view that the legal protection of computer software should reside primarily in the application of copyright laws in the broad sense with the patent system playing a more limited and ancillary role in the case of inventions involving computer programs. It is also generally recognized that the laws of contract, trade secrets and unfair competition have important roles to play, though legislative reform is not generally considered to be necessary in these areas in the immediate future. Copyright laws, on the other hand, are the subject of critical comment in their application to computer programs and the European debate is now focusing on the modifications that may be desirable to take account of the particular characteristics of computer programs and the needs of Community industry both within and outside the data processing sector. In order to broaden the activity base of the software industry, the Community and the governments of the Member States have committed themselves to ISO/OSI standards in data processing. The need to provide for more uniform protection in the Community has also become apparent if industry is to take full advantage of its large internal market.

5.3.11. In order to take advantage of this market, industry needs comparable operating conditions in the Member States. Commercial developments such as the advent of personal computers have underlined the need for specific legal provisions and interpretations of the laws. Small computers are being mass marketed like other consumer durables as is the software with which they operate. Programs in the form of tapes and discs are sold like books or records over the counter and the ability of the developer to protect himself contractually has been much reduced. The incomplete evolution of legal systems through case law and practice in some jurisdictions is increasingly seen as a handicap by comparison with clear legislative provisions adopted, for example, as regards copyright in computer programs, in the United States of America[21]. It should be noted however that recent American experience suggests that even if specific legislative provisions are enacted, difficult questions of interpretation will remain to be solved. One important example is discussed in paragraph 5.5.11. below.

5.3.12. Given the fact that these questions of interpretation will take time for the courts to resolve. Outstanding issues may be dealt with by agreement or by means of arbitration procedures. Such approaches may permit relatively detailed settlements to be reached quite quickly and in a way which takes largely into account the interests of those directly concerned, as has recently been demonstrated by the arbitration involving IBM and Fujitsu in the United States[22].

5.4. Community involvement to date

5.4.1. The Commission has monitored developments concerning the legal protection of software both within and outside the Community over a number of years. It has also participated in the meetings of the WIPO committee of experts and in discussions in other international fora. It has in addition consulted experts and organizations interested in the question including, representatives from major European Information Technology companies, UNICE, the European Computing Services Association (ECSA) and the Confederation of the European Computer Users Associations (CECUA). On the basis of this involvement, the Commission concluded that a directive on the legal protection of computer programs was a necessary step for the completion of the internal market. Consequently, in its White Paper "Completing the Internal Market"[23], it undertook the commitment to submit to Council before the end of 1987 a proposal for a directive on the legal protection in Community Member States of computer programs. Though delayed for technical reasons, the proposal will be submitted to Council as rapidly as possible.

5.5. Copyright : the focus for a Community initiative

5.5.1. It is suggested that the directive be based on the following principles.

5.5.2. No action appears to be called for at this time in relation either to patent law or to trade secrets and contract laws. As regards patent law, as previously mentioned, the European Patent Office in 1985 amended its guidelines on examination in the field of computer programs to make it clear that inventions having a technical character may be patentable even if they rely on computer programs to achieve their effects. Similar developments are occurring in the Member States. The Commission considers this kind of evolution to be desirable and hopes that all national patent administrations will adopt a similarly liberal approach. No formal Community initiative seems to be necessary at present. Likewise in relation to trade secrets and contract law, the situation in the Member States seems relatively satisfactory and legislative action at Community level is not at present needed.

5.5.3. Similarly, no legislative initiative appears necessary as regards contract law though its importance in this field is often underestimated. Guidelines for software suppliers and users might well prove useful, however, and commercial practices be developed which, once they become widespread, will acquire the character of rules which might be applied failing other arrangements. The Confederation of European Computer Users Associations and some national associations are examining the possibility of drawing up guidelines in this area.

5.5.4. From time to time, the possibility is raised of protecting computer programs by means of technical devices. Devices developed recently may prove more effective than they have in the past. At this stage, however, further experience is needed of their use in practice. No Community initiative is accordingly suggested at the present time.

5.5.5. As to copyright and neighbouring rights, the basic question whether their application to protect computer programs is in principle desirable, is generally being answered in the affirmative. Those who have argued that such protection is either inadequate or excessive have not been vindicated by events.

5.5.6. As to the suggestion that copyright is insufficient, some European voices have indeed suggested in the recent past that protection against copying is insufficient and that a true monopoly right, analogous to a patent, is needed. They have suggested that the limitations of copyright, in particular the principle that it protects the form in which ideas are expressed rather than the ideas themselves, render it a less than completely adequate solution. The application of the principle to computer software leads to the conclusion that while programs are protected, their underlying logic or algorithms are not. To the extent that the basic concepts can be expressed differently, programs can thus be developed to achieve the same results. This has led some to propose that a new form of protection be adopted, alongside copyright, to grant exclusive rights in new algorithms involving an inventive step. Such protection would in many ways be analogous to patent protection being dependent on registration and giving an effective monopoly for a fixed period in the region of 20 years as to the algorithms in question.[24]

5.5.7. However, this approach has not met with general approval. Many in the data processing industries indicated their doubts about the desirability of such protection, in particular, the risk that the development and use of programs might be stultified by the creation of monopolies in concepts having a mathematical or scientific character and as such unprotectable under any intellectual and industrial property protection system. This danger that the development and use of programs might be stultified is said to be greater since the number of useful algorithms appears in all probability to be limited. A broad consensus has emerged that competition would be severely impaired, if "independent invention" of programs having essentially the same functions of existing programs but developed without undue "inspiration" by existing programs and expressed in a different manner and "reverse engineering" were to be prevented. Interestingly, the same conclusion has been reached in the context of recent developments concerning the protection of semiconductor designs in the main producer countries.

5.5.8. As to the question of whether copyright protection can itself give an excessive degree of protection that is damaging to competition in the data processing industry and to the spread of computer technology, a definitive answer cannot be given at the present time but should soon emerge as more experience is gained both in the USA and in Europe.

5.5.9. For example, the problem of "access protocols" and interfaces has been raised. These must be used in the exact form in which they were first expressed if newly developed software or hardware is to operate compatibly with software or hardware already on the market. It has been argued that copyright could create an undesirable monopoly not only of the access protocol itself but of the entire segment of the systems market that depends on its use. The development of compatible programs, which is desirable from the point of view of both competition and industrial policy, would be impeded if competitors were prevented from integrating into their product range protocols or interfaces that are gaining wide support as likely international standards. The same would apply if protocols or interfaces were technically available, but only at a licence fee that only the largest of competitors can afford. Because of the severe consequences effective monopolies in such software would have for communications and industry at large, the specific exclusion of protocols and interfaces from copyright and similar protection is being debated in interested circles[25].

5.5.10. Similarly, the allegation is sometimes heard that copyright protection makes it so difficult to create compatible systems without at least the appearance of copying that, quite apart from the particular problem of access protocols and interfaces, the legitimate development of compatible systems will be impeded and desirable competition will be stifled. This applies particularly to the systems software and business applications markets.

5.5.11. At present, the extent to which the copyright laws of the Member States might permit program developers to prevent others using access protocols and interfaces or developing compatible programs is unclear. In any case, it might well be that in situations as described in the foregoing paragraph, where the exercise of copyright as to access protocols or interface specifications is likely to create and increase market dominance, such exercise would be accompanied by other factors so that an abuse of a dominant position may be established under the relevant competition laws.

3)

5.5.12. Much will probably depend on how successfully the courts manage in concrete cases to resolve the level of abstraction problem and so achieve a reasonable balance between the interests of right holders in existing programs and of persons who can show that they have independently developed programs to achieve similar results to existing ones. While copyright protection reaches beyond the form of the program, in object or source code, to include preparatory material such as the program description, there comes a point at which a claim for protection is a claim to an idea rather than the expression of that idea. For example, a mathematical formula to solve a particular problem can be implemented in a program in many different ways. Each implementation can provide the same result or output given identical values for the initial variables or input. But the performance of the different implementations will vary, perhaps considerably. Copyright should protect the manner of the implementation, and hence its particular advantages in terms of performance, and leave the formula to be implemented by anyone. As courts become more familiar with the subject matter, they should be able to develop case law on what constitutes copying in this field just as they have in more traditional fields. Copyright court cases have multiplied in the USA and so have the number of interpretations as to the scope of protection. At this stage, in the Community, there is not yet enough experience that would allow one to conclude that copyright laws need modification. If problems should arise, then methods could be found for dealing with them either within the relevant intellectual property laws themselves, through suitable non-voluntary licensing provisions or, in whole or in part, through the application of competition and standardization policy.

5.5.13. The Commission is of the opinion that from the point of view of fundamental economic policy, protection against copying of software by copyright or a neighbouring right seems correct and should be accorded by the Member States of the Community as a whole. After the Commission has taken a position on the question of principle, attention needs to be given to a consideration of what parameters may be needed to ensure sufficient convergence in the systems that will be applied in practice by the Member States.

5.6. Clarification and adaptation of existing copyright regimes

5.6.1. As regards clarification and adaptation of copyright regulation, the following matters have been said to merit consideration : the availability of copyright protection to computer programs, including requirements as to fixation; beneficiaries of protection; the scope of protection, that is, restricted and unrestricted acts, including possible provision for fair dealing or other exceptions from the exclusive right of the copyright owner; the term of protection; authorship, including the employee author and the self-employed author producing for remuneration; the protectability and authorship of computer generated programs; moral rights; and problems of proof.

Availability of protection

5.6.2. While judicial decisions in several Community jurisdictions have recognized that computer programs are protected by copyright[26], and learned opinion generally supports this conclusion, nevertheless a degree of uncertainty remains and will continue to do so until resolved by a series of authoritative decisions of final courts of appeal. This uncertainty should be removed by means of legislative clarification on the basis of a directive explicitly protecting computer programs under copyright law in the broad sense.

Originality and independent intellectual effort

5.6.3. Such a directive would not by itself necessarily ensure, however, that all computer programs are protected against reproduction on a uniform basis in all Member States. In every Member State, to be eligible for copyright protection strictu sensu a work must be "original" in the sense that it is the result of the creator's own intellectual efforts and not itself a copy. But in some jurisdictions, more may be required in certain cases, particularly where works have a utilitarian rather than an aesthetic function. Courts may then find that work lacks sufficient creative merit or is too modest in scope to attract full copyright protection though in some cases this "small change" (in German, "kleine Münze") may still be eligible for a lesser form of protection designed to protect the investment of time, manpower and money[27].

5.6.4. This tendency is more apparent elsewhere in Europe than in the United Kingdom and Ireland and, even where it exists, it manifests itself to different degrees as two recent decisions of final courts of appeal have shown in Germany and in France. In Germany, in the Inkasso Case[28], the Supreme Court held that programs must represent an individual, original, creative achievement and that this required that the form of the computer program resulting from the selection, collection, arrangement and division of the relevant information and statements exceeded the average skills displayed in the development of computer programs. On the other hand, in France, the Court of Cassation held in March 1986 in the Atari Case[29] that the Paris Court of Appeals had erred in excluding a program for a computer game on the ground inter alia that the program did not manifest the kind of originality of expression that would confer on it the aesthetic character necessary to attract the protection of the law on literary and artistic property. The program should be protected without any attempt being made to apply aesthetic criteria.

5.6.5. If the courts of different Member States apply standards of originality that are substantially divergent, action may be needed to eliminate the resulting distortions. However, at this stage, it would be premature to exaggerate the seriousness of the problem or the difficulty of finding a solution.

5.6.6. First, as to the seriousness of the problem, the divergence threatened by the Inkasso Case may turn out to be less significant than might at first sight appear. A complete reading of the judgment suggests that the Court was in large part concerned by the need to distinguish between, on the one hand, protectable programs and, on the other, those that consist of elements so commonplace that they are in a sense in the public domain. If the judgment, when applied in concrete cases, means no more than the exclusion of such commonplace elements from the protection of the copyright law, the divergence between the legal situation in Germany and that in many other Member States will not be very significant.

5.6.7. If nevertheless significant divergences persist a solution may already be to hand in the provision of the recently adopted directive on the legal protection of topographies of semiconductor products[30]. The text reads as follows (article 2(2)) :

> "The topography of a semiconductor product shall be protected insofar as it satisfies the conditions that it is the result of its creator's own intellectual effort and is not commonplace in the semiconductor industry. Where the topography of a semiconductor product consists of elements that are commonplace in the semiconductor industry, it shall be protected to the extent that the combination of such elements, taken as a whole, fulfils the above mentioned conditions".

A similar provision seems adequate also for the forthcoming directive on the protection of computer programs.

Fixation

5.6.8. Programs may well be expressed in conventional written form on paper but, as already indicated, they may also be stored on magnetic tape and magnetic or optical discs or even as a pattern of electrical charges on a micro-circuit or chip. Indeed these less accessible forms are becoming the normal medium for recording software. Copyright laws should therefore make clear that protection extends to programs fixed in any form[31].

Scope of protection : restricted acts

5.6.9. The particular nature of computer software and its typical use must be taken into account when assessing which forms of uses must be regarded as restricted acts for which the permission of the author is mandatory. The restricted acts applying to traditional works are not always perfectly adapted to software. Accordingly, consideration might well be given to the adoption of specific provisions clearly defining the content of the rights in question in the software context.

Restricted acts: reproduction, translation, adaptation and use

5.6.10. Of the traditional rights, those most obviously relevant to software appear to be copying the work in any material form from which it can be reproduced and making, reproducing, or publishing an adaptation of the work including translations of programs from one code to another. One particularity of the use of a computer program lies in the fact that, for technical reasons, its normal use necessarily involves operations of such kinds. In a typical case, a user receives the computer program on a machine-readable medium such as a floppy disc or magnetic tape. It is frequently recommended by the software supplier that the user makes a back-up copy of the software. The copy delivered by the software producer may well no longer be necessary thereafter. It is kept for security reasons in case of a defect in the computer. For the program to be used, it has to be transferred into the memory of the computer, which means it has to be copied. After this first and complete reproduction, the program is copied many times, although only in parts, whenever the program is run on the computer : when it is transferred from the program library into the main memory; when individual program instructions are transferred to the Central Processing Unit (CPU); or when units of information are made visible on the screen or printed on paper. The use of a computer program for the purpose it is intended to serve is not conceivable without constant reproduction, adaptation and possibly even translation, and hence the execution of restricted acts.

5.6.11. It is clear that authorized use of a program under a licence agreement implies authorization for reproduction, adaptation and translation of this kind, without which the program could not be used for its intended purpose.

5.6.12. On the other hand, by virtue of such comprehensive rights to authorize reproduction, adaptation and translation, the right holder is entitled under copyright law to restrict the use made of a program by reference to the purpose, time or place of such uses. For example, sophisticated software is often licensed only for use on a specified individual computer. Some manufacturers do provide "site" licences, which authorize the licensee to run the program on any and all machines which are located in the same room or on the same premises. Those restrictions appear justified, since they are intended to ensure that the licensor obtains a licence fee which corresponds to the extent of the use made by the licensee. Without it, large users in particular could profit unfairly from one licence fee, in view of the ease of reproduction and of multiple use.

5.6.13. These rights might be thought to be less appropriate, and indeed unlikely to be in practice enforceable, as far as mass-marketed packaged software is concerned. This kind of software is sold rather than licensed, although many suppliers try to maintain the character of a licence agreement. Typical restrictions on the user provide that he is only allowed to use the program on one computer at a time and that he is authorized to pass on the licensed material to a third party under the condition that he does not retain a copy of it and no longer makes use of the software. This reflects the need for the supplier to impede the simultaneous use by more than one user of a program for which only one fee has been paid. On the other hand, the authorization to transfer the software to other parties pays tribute to the sales-like character of the marketing of this type of software and to the public interest in its free circulation.

5.6.14. In brief, a broad use right, either formulated as such or resulting from rights to authorize reproduction, rental, adaptation and translation, seems appropriate given the way software is used in practice. It provides the legal foundation for relating the remuneration received by the right holder to the use being effectively made of the program. At the same time, authorization to use a program must necessarily imply authorization for all acts inherent in any such use.

Restricted acts : adaptation to improve performance

5.6.15. Attention must be given also to certain adaptations other than those necessarily inherent in the normal running of a program, namely those by authorized users for their own purposes. Much software is continually adapted by its users to improve its efficiency in the context of their particular activities. On the other hand, the right to authorize adaptations can be considered a normal feature of copyright. A balanced solution is required which takes proper account of the interests of both users and suppliers. The right holder's authorization should be necessary for adaptations which conflict with the normal exploitation of his rights, for example, where adaptation involves the translation of substantial parts of a program to enable them to be run on a machine other than that for which the program was licensed. Likewise commercial exploitation of an adaptation should be subject to consent. On the other hand, adaptation of a program to improve its efficiency when used within the scope of the basic licence provisions agreed between user and supplier should be considered as a legitimate and even necessary aspect of a user's right to use the program for the purposes for which it was acquired. The supplier's consent should not be needed or is rather to be conclusively presumed. It would, however, be appropriate for suppliers of software under commercial contracts to require that they be informed of any adaptations that are made so that they have the opportunity to check that these fall within the basic scope of the licence. Further suppliers' service and maintenance obligations and warranties may well be modified by a user's modification of the program.

Reproduction for private purposes

5.6.16. Member States of the Community have, in different ways and to varying degrees, made use of the discretion given to States by Article 9(2) of the Berne Convention, to allow reproduction of works without the right holder's authorization in special cases. Reliance has frequently been placed on this provision to permit reproduction for private purposes.

5.6.17. The recent German, French and Spanish legislation, however, does not apply the normal licence for reproduction for private purposes to computer programs. The reasoning behind the provisions is not so much the wish to ban genuine private copying which, in any case, cannot be policed, but to accord producers the necessary substantive rights to be able to proceed against "semi-private" reproduction, which can be described as the reproduction and exchange of programs within organizations and enterprises, between residents at universities, by members of computer clubs, and so on. In addition, the arguments used to justify private copying of audio-visual material, such as the consumer's need to change the support or to make extracts or compilations of material, have little application to computer programs. The real purpose of private copying of programs is in most cases simply to obtain a "free" copy of a program instead of purchasing a legitimate one.

5.6.18. This reasoning seems convincing. Accordingly, the directive should contain a provision excluding private copying of computer programs in general. At the same time, the production of a back-up copy or copies by a legitimate user would explicitly be made permissible. Such a copy or copies would need to be destroyed when the right to use the program expired.

The term of protection

5.6.19. If programs are simply protected as literary works, the length of the period of protection, according to the copyright laws of Member States, is at least 50 years after the death of the author. This appears to be the position in all Member States with the exception of France. According to Article 48 of the French law of 3 July 1985[32], computer programs are protected for 25 years only from their creation. This divergence will sooner or later create problems in relation to free circulation of programs. Indeed, since the French law does not contain any specific

provisions on the matter, programs created prior to the new law coming into force on 1 January 1986 may be subject to the shorter term. The issue may therefore begin to have practical consequences rather quickly as computer programs created in the sixties and seventies in France fall into the public domain.

5.6.20. The case for a term of protection shorter than 50 years frequently takes as its point of departure the character of computer programs, particularly operating systems, as functional devices of potentially strategic importance to the development of the industrial economy as a whole. In this connection, reference is made to the fact that many application programs have in practice a very short life and represent a limited investment for which a period of protection of 50 years is inappropriate. It stresses that given this functional character, the term of protection should not be longer than the minimum necessary to provide an appropriate investment incentive to program developers. Patent duration is in the region of 20 years and, given the functional, industrial character of software, a similar term of protection would be preferable.

5.6.21. The case for a 50 year term stresses that the fact that many programs have and will probably continue to have an exploitable life much shorter than this period is not in itself a compelling argument for proposing a shorter period of protection. The same can be said of many other items that are protected by copyright. In so far as programs do have a lengthy useful life, they should be entitled to protection and in so far as they do not, they will simply not be used. It certainly cannot be excluded that particular types of software, for example, operating systems, may have useful lives of considerable length. It is hoped that the reactions to this part of this paper will include information concerning experiences as to the useful life of programs, proprietary and otherwise, particularly those older than 25 years.

5.6.22. In addition to the issue of the length of the term, its calculation from the death of the author may one day pose practical problems since programs are frequently collective works though often all commercial rights will have been transferred to the enterprise for whom the authors have worked. It may be extremely difficult for a third party to know when the term comes to an end, since he will need to know the date of the death of the last surviving author. The practical relevance of this has of course been negligible as yet. Nevertheless, in the longer term, the issue may become important and consideration should be given to providing for calculating the term from the creation or first use or marketing of the program rather than the death of the author. Such a method of calculation might also be thought to reflect the technical, industrial or commercial character of much software.

5.6.23. It would clearly be desirable from the point of view of the functioning of the internal market in software, for all Member States to apply the same term of protection to a given program. A persuasive case has been made for calculating the term, whatever it is, from the program's creation. As to the length of the term, the choice between 50 years and a shorter term in the region of 20 or 25 years has to be resolved in the face of considerations pointing in opposite directions. It will be easier to resolve in favour of the longer term the extent that future developments establish that copyright protection will not lead to undesirable limitations on competition in the software market (see paragraphs 5.5.8. to 5.5.12. above).

Authorship

5.6.24. In the field of authorship, software produced by employees or on commission poses problems similar to those in other fields where collective works are common, such as advertising. But there is little doubt that the nature of the software industry is such that the legal situation as to authorship can be particularly complex. Standardization of the legal starting point throughout the Community would be the ideal solution but it cannot be said to be essential since, as regards economic rights, matters can be satisfactorily regulated by agreement and the absence of a uniform solution to this issue will not jeopardize the realization of an internal market for computer programs. Contractual solutions are, however, facilitated if there is at least a clear legal starting point in the jurisdiction in question. It would accordingly be desirable for all Member States to ensure that their law at least establishes clearly who is the right holder in the absence of any agreement to the contrary. A minimum provision of this kind, which still leaves the Member States considerable freedom as to the legal techniques that they use to resolve the problem, has been laid down in the Council Directive on the legal protection of semiconductor topographies[33]. The provision may serve as a model for a corresponding provision in the software context.

Computer-generated programs

5.6.25. Increasingly in the future, computer programs will be produced with the aid of a computer that is itself programmed to carry out certain programming functions. The question then arises as to who, if anyone, owns the copyright in the program that finally results from the process: those who used the computer, those who programmed it, the owner of the computer or conceivably all of these.

5.6.26. The basis of all copyright protection is the exercise of sufficient skill and labour for a work to be considered original. The Commission inclines to the view that it is those who use the programmed computer, which is essentially a tool, who should be regarded as entitled to protection. This solution has the important advantage of conferring the right on those who are most easily identified.

Moral rights

5.6.27. Moral rights, that is, the right of the author to claim paternity and to object to prejudicial modifications of his work, do not appear to have given rise so far to significant practical problems. Nevertheless, given their inalienable character, serious doubt exists as to the suitability of their application to works frequently produced collectively, having a technical, industrial or commercial character and subject to successive modifications. At least, consideration should in the long term be given to permitting the rights to be ceded by agreement though it should be noted that this would necessitate modification of the Berne Convention, should it be one day agreed that programs constitute literary works within the meaning of that instrument. It seems, however, unnecessary to include provisions on moral rights in a Community framework directive at the present time.

Beneficiaries of protection

5.6.28. To the extent that the Member States take the view that programs are protected by copyright within the meaning of the Berne or Universal Conventions, there is no strict need for a provision in a directive on protected persons. Each Member State will protect persons from other Member States in the same way as it protects its own citizens. On the other hand, it may be argued that neither of those instruments at present requires computer programs to be protected by copyright in the strict sense. A State taking such a view would probably consider that rights in programs under its law should be considered neighbouring rights falling outside the scope of any existing multilateral arrangement.

5.6.29. The directive need not seek to resolve the issue of whether computer programs are to be protected by copyright strictu sensu or by a neighbouring right[34]. But if it leaves the issue open, it must then address the question of protected persons since that issue will not be resolved by existing multilaterial arrangements. One model for so doing exists in Article 3 of the semiconductor directive: provisions for the protection of persons having specified links with the Community, combined with a mechanism for extensions of protection to others. A more radical alternative, which might avoid the need for relatively complex provisions and procedures, would be to provide, without prejudice to the question of whether the protection is to be classified as copyright or a neighbouring right, that Member States shall protect nationals and residents of members of the Berne and Universal Copyright Conventions. Provision might also be made for programs first published in those countries. Such an approach would have the advantage, besides that of relative simplicity, of avoiding potential disputes with such countries, though at the cost of perhaps granting protection in favour of some countries which do not extend reciprocal protection. The views of interested parties would also be welcome on the even simpler and more radical possibility of according national treatment to all natural and legal persons irrespective of origin or domicile.

Problems of proof

5.6.30. Problems of proof also seem to require consideration. Since copyright does not protect ideas but the form in which they are expressed, proof of copying requires a comparison of the works in question in their final form. Normally this poses no problem : if necessary, the works can be produced for examination by the competent tribunal which can judge for itself the degree of similarity. However, computer programs may exist in different versions and between some of these there may be little superficial resemblance. In addition, a right holder may not have access to the version of the infringing program which would enable him to show similarity; for example, his source program may have been translated by an unknown computer into an object code that looks to the human eye completely different from either the right holder's object code or the original program. This may be a particularly difficult problem prior to full discovery, for example, when seeking interlocutory relief.

5.6.31. A possible solution to the problem would be for the burden of proof to be shifted to the alleged infringer once the right holder makes available to the court the different versions of his own program to which he has access and establishes a prima facie case of copying. He might show, for example, that the allegedly infringing program achieves the same results with virtually the same method and that the alleged infringer has had access to the right holder's program.

5.7. Summary

5.7.1. As already mentioned in paragraph 5.4.1., the Commission has decided within the framework of the completion of the internal market, to examine as a matter of priority the issues relating to the legal protection of computer programs and subsequently to submit a proposal for a Council directive on the legal protection of computer programs. For this purpose, certain preliminary consultations have already been concluded, which have confirmed the desirability of an early initiative in this field. Further, all information received and experience gained from participation in the discussion at the international level on the appropriate protection system indicates that the Community approach should be within the framework of copyright and related rights.

5.8. Conclusion

5.8.1. The Commission intends to submit to the Council as a matter of urgency a proposal for a directive based on Article 100 A EC for the protection of computer programs.

5.8.2. As regards the contents of the directive, and especially in the light of Community standardization policy, the Commission would like to receive comments on whether:

a) the protection should apply to computer programs fixed in any form;
b) programs should be protected where they are original in the sense that they are the result of their creator's own intellectual effort and are not commonplace in the software industry;
c) access protocols, interfaces and methods essential for their realization should be specifically excluded from protection;
d) rights to authorize restricted acts should include a broad use right either formulated as such or as a consequence of rights to authorize reproduction, rental, adaptation and translation; for these latter rights, specific provision should be made in any event;

e) the adaptation of a program by a legitimate user exclusively for his own purposes and within the basic scope of a licence should be permitted;

f) the reproduction of a computer program for private purposes should not be permitted without authorization of the right holder whereas the production of back-up copies by a legitimate user should be permitted without authorization;

g) the term of protection should start with the creation of the program and last for an appropriate number of years to be fixed by the directive; a choice will have to be made between a period of 50 years and one in the region of 20 or 25 years;

h) the issue of authorship of computer programs, including authorship in respect of computer-generated programs, should be left largely to Member States but with national laws having to establish who, in the absence of contractual arrangements to the contrary, is to be considered the author;

i) protection would be available for creators who are nationals of States adhering to the Berne Convention or the Universal Copyright Convention or enterprises of such countries or possibly to all natural and legal persons irrespective of origin or domicile;

j) in infringement cases the onus of proof in respect of copying should be shifted to the alleged infringer once the plaintiff makes available to the Court the different versions of his program to which he has access and shows similarity and that the alleged infringer has had access to the right holder's program.

5.9. Timetable for submissions

5.9.1. Given the need to begin the legislative process as soon as possible, the Commission will be seeking the views of interested parties on these matters as a matter of urgency. Comments on the above mentioned suggestions should be submitted to the Commission not later than 1 September 1988.

[1] See, for example, the definition adopted for the purposes of the WIPO Model Provisions on the Protection of Computer Software, Geneva, 1978 : "(1) "computer program" means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result;". See also the Report of WIPO Working Group on Technical Questions Relating to the Legal Protection of Computer Software, Geneva, 30 April 1984 (LPCS/WGTQ/I/3).

[2] US Department of Commerce, A Competitive Assessment of the US Data Processing Services Industry, December 1984, pp. 23-24. US Office of Technology Assessments, Computer Software: Aspects of International Competition, November 1985, Exhibits V/VIII. OECD-ICCP(87)6, The Internationalisation of Software and Computer Services, distributed in March 1987, p. 5 & 27 ff.

[3] International Data Corporation, EUROCAST - Software and Services Marketplace, Western Europe, 1985-1991.

[4] See Article 52(2) of the European Patent Convention (1973) reflected in the laws of Belgium, Denmark, Germany, Spain, France, Italy, Luxembourg, and the United Kingdom.

[5] Propriété Intellectuelle Bulletin Documentaire (PIBD), 1981, III-175.

[6] Decision of the President of the European Patent Office of 6 March 1985.

[7] Report of the Committee of Experts on the Legal Protection of Computer Software, Geneva, June 1983, LPCS/11/6.

[8] Leading cases include : **for France,** Babolat-Maillot-With v. Pachot (Paris Court of Appeal, 2 November 1982); Apple Computer Inc. v. Segimex SARL (Paris "Tribunal de Grande Instance", 21 September 1983); Atari v. Sidam (Court of Cassation, 7 March 1986); **for Germany,** Visicorp v. Basis Software GmbH et al. (Munich District Court, 1983); Südwestdeutsche Inkasso KG v. Bappert and Burker Computer GmbH (Federal Supreme Court, 1985); **for Italy,** Atari Inc. and Bertolino v. Sidam Srl. (Tribunal of Turin, 14 July 1983), Unicomp Srl. v. Italcomputers and General Informatics (Tribunal of Pisa, 14 April 1984); **for the Netherlands,** The "Logboekprogram" Case (District Court of Hertogenbosch, 14 May 1982); **for the United Kingdom,** Sega Enterprises Ltd. v. Alca Electronics (Court of Appeal 1982).

[9] Law of 24 June 1985 on the Amendment of Legal Provisions in the Copyright Field (Official Journal (Bundesgesetzblatt) No. 33 of 27 June 1985).

[10] Law No. 85-660 of 3 July 1985 on the rights of authors, performers, record and videogram producers and communication enterprises (Official Journal of 4 July 1985, page 7495 et seq.).

[11] Copyright (Computer Software) Amendment Act 1985, c. 14 of 16 July 1985.

[12] See Articles 91-100 of Ley de Propiedad Intelectual no. 22/87 of 11

November 1987, Boletin Oficial del Estado, no. 275 of 17 November 1987.

[13] Bill No. L 153 of 14 January 1988 on the amendment of the Copyright Act.

[14] For example, draft law No. 1746 communicated to the President of the Senate, 25 March 1986.

[15] Declaration of the Dutch delegate at the meeting of the World Intellectual Property Organization's group of experts held in February 1985.

[16] Declaration of the Belgian delegate at the meeting of the World Intellectual Property Organization's group of experts held in February 1985.

[17] Answer of 26 November 1986 by the Minister of Economy and Trade (Ministre de l'Economie et des Classes moyennes) to Parliamentary questions no. 39 and 40. Parliament Report of 26 November 1986, pages 761-762.

[18] See Rebello in Revue Internationale du Droit d'Auteur, no. 129, July 1986, page 16.

[19] Law no. 45/85, Code of Copyright and Related Rights of 17 September 1985

[20] Declaration of the Greek delegate at the meeting of the World Intellectual Property Organization's group of experts held in February 1985.

[21] Pub. L. 96-517 (12 December 1980) 94 Stat. 3015.

[22] Arbitrator's Report. 15 September 1987. Announcement of Dispute Resolution by the American Arbitration Association Commercial Arbitration Tribunal in the matter of IBM-Fujitsu Ltd.

[23] Document COM(85) 310 final, point 149.

[24] See for example, "Vers une protection des logiciels informatiques : situation actuelle et propositions", 21 June 1984.
Report of a working group created within the framework of INPI (Institut National de la Propriété Intellectuelle).

[25] Japanese Copyright Amendment Act No. 62 of June 1985 specifies, in a paragraph added to Article 10 that algorithms, programming languages and rules are excluded from copyright protection; (also, Japan has not yet determined whether or not to require registration).

[26] See note 8 above.

[27] See, for example, Article 49 of the Danish Copyright Law (Law no. 158 of 31 May 1961 with later amendments). According to this provision "catalogues, tables and similar productions, in which a great number of items of information have been compiled, are protected against

unauthorized reproduction for a period of 10 years following production".

[28] See note 8 above.

[29] See note 8 above.

[30] Directive no. 87/54 EEC, O.J. nr. L 24 of 27 January 1987, page 36.

[31] It should be noted in this connection that according to Article 8 of the semiconductor directive, the legal protection of the topography of a semiconductor product does not extend to the information embodied in the topography other than the topography itself.

[32] Law n° 85-660 of 3 July 1985, Journal Officiel de la République française, 4 July 1985, page 7495 et seq.

[33] Loc. cit., article 3(1), 3(2) and 3(3).

[34] Neighbouring and related rights are those relatively modern creations which have been used on occasion to extend a type of protection similar to copyright to classes of work not covered by copyright itself. The policy decision whether to create a new neighbouring right or extend copyright to a new class of work depends on many factors and as a result can vary both with time and space. "A given work may enjoy a copyright in one country, but only a neighbouring right in another. This is the case with photographs, enjoying a copyright in France but only a neighbouring right or related right in another. Other rights, formerly granted a neighbouring right, may one day become beneficiary of a copyright" (Françon, International Protection of Neighbouring Rights, RIDA, 1964, Anniversary Number, p. 410). One obvious advantage of choosing the neighbouring right approach from the legislator's point of view is that he has a freer hand to adopt specific solutions that differ from those already adopted in the copyright context.

CHAPTER 6 : DATA BASES

6.1. Subject matter

6.1.1. The term "data base" is used in this chapter to mean a collection of information stored and accessed by electronic means. It may be a collection of full-text material, that is to say, existing copyright works, in which case an analogy might be made between the data base and a generalized or specialized library. It may be a compilation of extracts of works, similar to an anthology or a documentation centre, from which relevant parts of works may be obtained. It may be a collection of material which is in the public domain, such as lists of names and addresses, prices, reference numbers. There is here a similarity with catalogues, timetables, price lists and other such reference material in printed form. Lastly, it may consist of the electronic publishing of a single but voluminous work, such as an encyclopaedia.

6.1.2. The specific problems relating to electronic publishing and electronic libraries are not discussed in this chapter, although they frequently cause copyright problems similar to the ones related to the activities of data bases. Electronic publishing poses problems in relation to reprographic techniques, information management and transmission networks which fall outside the scope of the present chapter. Similarly, electronic libraries involve issues of public lending rights which, whilst they may occur in the context of the general discussion on rental contained in Chapter 4 or in relation to the piracy and home copying of audio-visual works discussed in Chapters 2 and 3 respectively are not considered in detail in this consultative document.

6.1.3. The most common mode of use of a data base is at present by on-line access using electronic communication media. The data base may thus be accessed by users situated at great distances from the source of information. The arrival on the consumer market of CD Rom discs similar to audio compact discs but having an immense data storage capacity permits the user to purchase his own copy of certain types of data base instead of accessing a central store of information by electronic means. The main target markets for such discs appear at present to be for works such as encyclopaedias or directories containing large numbers of names and addresses, but future generations of CD Interactive discs allowing the user to interact with the data base will contain sound and image in addition to data. Optical laser-read cards the size of a credit card and containing information equivalent to 20 volumes of printed text are being developed. Other types of re-usable discs known as WORMS (Write Once-Read Many Times) are being produced. Digital tape recorders are also being developed to serve as external data storage units.

6.1.4. The advantages of data bases over printed material stored in conventional ways are numerous. First, data bases are comprehensive in the sense that all available material of a given type can be located in a single data base. Second, data bases allow selectivity in that only relevant information on a given subject may be accessed easily from one source without having to search through non-relevant material. Third, they give accessibility of information which would be impossible in a conventional library, since constantly up-dated information can be given to the user at high speed and over great distances. It is the combination of this comprehensiveness, selectivity and accessibility which ensures the commercial success of the data base.

6.1.5. Since the most common applications of commercial data bases would appear to be in the scientific, industrial and business fields, it is frequently the raw data itself and the fact that it can be easily retrieved and readily updated, which is of value, rather than the way in which the work was originally written. This factor can have an impact on the selection of material to form a data base since in some scientific fields, very brief extracts from learned publications, such as formulae, may be sufficient to provide key information. This means that in the compilation of some types of data base, the form of expression of the information is of lesser importance than the substance of the information itself. Nevertheless, the arrangement of the compilation will have a bearing on the speed and ease with which the data can be accessed and hence its commercial success.

6.2. The creation of the common information market

6.2.1. The creation of a European information services market, currently divided by juridical and linguistic barriers, is of prime importance. Figures collected by the International Publishers Association and quoted in a recent Memorandum of UNESCO/WIPO[1] would seem to indicate that the market for data bases is evolving as follows : the number of data bases in existence for use by the public has grown from 400 in 1980 to 2,901 in 1986. The worldwide turnover of electronic publishing in 1985 amounted to 5 billion US dollars. Of this, the United States were responsible for more than 4/5 of the total turnover but the value of the total market produced by Germany, France and the United Kingdom represented 350 million dollars. Obstacles to the free flow of information between Member States must be removed if the Community is to develop a competitive role in the information services market. The Commission has established a specific policy and an action plan for the development of this market[2]. Legal issues affecting this market are being examined in cooperation with a Senior Officials Advisory Board (SOAG) and a Legal Advisory Board (LAB) for the Information Market, and in the context of Commission initiatives in specific sectors. The Legal Advisory Board is made up of legal experts of Member States who, acting in their individual capacity, advise the Commission services inter alia on legal problems in relation to transborder data flow.

6.2.2. Data of a personal nature may also be incorporated into computerized data bases, giving rise to questions of privacy of the individual and the protection of confidential information. These questions of data protection fall outside the scope of the present chapter which deals with copyright issues only. The same applies to problems associated with the liability of data base operators for the accuracy of the information contained in their systems.

6.3. Legal problems arising from the storage and retrieval of information using data bases

6.3.1. A broad discussion on the legal problems arising from the use of data bases is taking place within the framework of SOAG and LAB. It would thus be premature to indicate detailed findings at the present stage of these discussions but in order to give those interested circles which have not so far been consulted directly the possibility of expressing their view on the main copyright issues under consideration, some tentative general conclusions will be drawn. At a later stage, the Commission will submit its findings in respect of the possible necessity for adaptations in existing laws, if any.

6.3.2. The use of computerized information systems creates problems in three respects from a copyright point of view. First, the question arises as to whether incorporation into a data base of a protected work in its entirety or in part constitutes a restricted act from a copyright point of view. Second, the question arises whether the retrieval of stored information constitutes a restricted act under copyright law. Third, it has been suggested that the question of adequate protection of the compilation of data as such merits consideration.

6.3.3. A number of countries[3] have recently considered the protection of data bases within the context of revision or amendment of their copyright laws. The international organizations engaged in the establishment and administration of the intellectual property conventions have also for some time been engaged in a discussion on the intellectual property issues.

6.3.4. The main issue in relation to the operation of computerized information systems, namely the use of computers to access literary works, was discussed jointly by WIPO and UNESCO, that is, within the framework of the Berne and Universal Copyright Conventions. As a result, the Second Committee of Government Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, which met in 1982, was able to adopt a number of recommendations for solving at the level of relevant national legislations the copyright problems arising[4]. The experts also concluded that revision of the copyright conventions was not necessary since the solutions could be accommodated within the existing framework of principles as established by those conventions. A Committee of Governmental Experts on the Printed Word met in Geneva on December 7 to 11, 1987 and discussed a number of principles in relation to data bases. The Commission will take note of the discussion of these principles which, as regards their aims, appear broadly compatible with the tentative conclusions of this chapter.

Storage of information

6.3.5. As a result of this previous work undertaken by WIPO and UNESCO, it is recognized in all Member States of the Community that the use of a work protected by copyright in the broad sense in a computerized information system is relevant from a copyright point of view. The incorporation of the work in extenso will constitute a reproduction and presupposes the consent of the author or his successor in title unless the reproduction falls within a recognized exception to the restricted acts under the copyright laws of Member States. Given the fact that a computerized information system normally aims at giving extensive access to the information stored, the normal exemptions from restricted acts in the laws of Member States for certain uses, such as private use, or fair use, are of little practical relevance to the storage of copyright works in information systems.

6.3.6. It is equally clear that bibliographical information relating to published works and authors thereof, indexes, references and similar information can be compiled freely since the use of such information in no way implies that works are reproduced in full or in part.

6.3.7. The extent to which bibliographical information on existing copyright works can be supplemented by quotations, extracts, value-added abstracts, or summaries has in some jurisdictions caused litigation. Though this issue is one of general relevance, it is of course of specific interest to publishers, creators of data bases, information compilers and the operators of data bases. Some experts have expressed an interest in seeing the legal situation clarified to the maximum extent possible but have also expressed the view that the practical importance of the problem from an economic point of view should not be exaggerated. Nevertheless, data bases which are composed mainly or wholly of abstracts of learned and scientific publications do exist. Uncertainty as to whether such abstracts can be inserted in a data base without the consent of the author or his successor in title may have a negative impact on the development of this particular kind of data base. However, the practical difficulties of resolving issues like the appropriate scope of the right to quote or borrow from existing works should not be underestimated. It may be that these issues can only be settled by legislation in a very general way, leaving it to case law to determine the precise parameters in specific circumstances.

The retrieval of works stored in computerized data bases

6.3.8. Some jurisdictions treat all forms of retrieval of information from a data base involving direct recording (downloading) as a restricted act. However, retrieval may take place in different ways and in some jurisdictions a distinction is apparently made by learned opinion between the various ways in which a user may have access to the material stored, the main distinction being made between visual display and print-outs. Whereas print-outs are considered a copy everywhere, visual display is sometimes compared to the mere reading of a page of a book in a library or bookshop and consequently not considered a restricted act. Those differences in the legal position of Member States appear, however, to have relatively limited practical impact.

6.3.9. Insofar as the storage in a data base is a restricted act presupposing the authorization of the author, the latter will naturally, when solicited for authorization, fix the conditions for the various ways in which his work may be retrieved. The fact that those conditions more often than not are fixed by a collective agreement comprising all or a majority of authors in respect of a particular kind of work does not change the basic principle according to which storage and access to the work is in practice regulated by one act of agreement. It has consequently been suggested by some interested circles that initiatives aimed at the clarification and approximation of laws to arrive at a more uniform solution in respect of retrieval of information are not needed at the present time. Other sources have, however, indicated that it has proved difficult to negotiate agreements which take into account possible later extensive use of the information stored. Whereas authors and their successors in title in other areas can exercise a reasonable control, so that royalties are paid according to, for example, sale or rental of copies, public performances and the like, it is difficult to ascertain to what extent a given work stored in a data base is actually used. The views of users and operators of data bases would be welcome as to the necessity of Community action in this field.

6.4. Protection of the data base as such against copying

6.4.1. The protection accorded to data bases relates under existing national legislation and international conventions to the characteristics of the works stored therein, rather than to the data base itself as a collection of information. Thus, in the case of full-text data bases, where a single work such as an encyclopaedia is stored, the position is clear in relation to the author of the encyclopaedia, who enjoys the same copyright protection for his work regardless of whether publication is by conventional or electronic means. In the case of a data base where numerous works or extracts of works are stored, the provisions of Article 2(5) of the Berne Convention are of relevance :

> "Collections of literary or artistic works, such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections".

Thus a work which is protected by copyright in a Member State will continue to enjoy that protection when, in its entirety or in part, it is incorporated in a data base. Difficulties arise where the extracts from protected works are themselves not covered by copyright, by nature of their brevity, for example, or where the subject matter is not protected at all by copyright but is in the public domain.

6.4.2. The types of work which are normally considered to be in the public domain include official texts, legislative and administrative documents, records of public and legal proceedings. Works for which the period of copyright protection has expired are also considered to be in the public domain. All of these types of work may form the subject matter of data bases requiring a considerable degree of skill and investment in their compilation. In particular the compilation will have been designed to ensure ready access to the information and to create features attractive to particular groups of users.

6.4.3. In some cases the nature of the data base may be such that "selection" of material has not taken place in the sense that all available published material has been included in an exhaustive data base. Equally "arrangement" may be constrained by the technical necessity to order the information in the most readily accessed way, for example in alphabetical or chronological order.

6.4.4. Nevertheless, the compilation of such information may be subject to copyright in some jurisdictions dependent on the level of originality and creativity which the compilation represents and on the requirements in respect of originality and creativity laid down in the specific national legislation. The problem in this respect is similar to that discussed in the context of computer programs (Chapter 5, paragraphs 5.6.3. to 5.6.7.).

6.4.5. In some countries where a specific compilation may not attract genuine copyright protection because the work is considered insufficiently original, comprehensive or creative, another sort of short-lived protection against reproduction may nevertheless exist. This is for example the case in Denmark where, according to article 49 of the Copyright Act, catalogues, tables and similar works which compile information may not be reproduced without consent of the producer (compiler) for a period of 10 years from the date of publication. In other countries, works which are considered insufficiently creative to attract protection are in the public domain.

6.4.6. Similarly, a right in the published edition exists in some jurisdictions, over and above the author's right in the content of the published work. In both Ireland (Copyright Act 1963, section 20) and the United Kingdom (Copyright Act 1956, section 15), such a protection of the typographical arrangement of the published edition against unauthorized facsimile reproduction exists for a 25 year period from the year in which the edition was first published.

6.4.7. It has therefore been suggested to the Commission that the investment which a compilation of data may represent, and which may not attract copyright protection, necessitates some protection against unauthorized reproduction. "Information broking", that is, the buying and selling of data bases containing factual information is indeed a growth industry, which requires a clear legal framework within which to develop. The Commission is accordingly considering whether to propose the introduction of measures to give some limited protection to the data base itself, as a compilation.

6.4.8. It would have to be considered first, who should be the beneficiary for such a protection. Second, the scope of protection and the restricted acts would have to be carefully considered lest access to computerized information be unjustifiably restricted. Finally, the issue of down-loading for private purposes would have to be considered carefully before being made a restricted act in general.

6.4.9. Such a protection would not limit the access to information since the scope of application of copyright will not be enlarged beyond the protection already given to compilations under Article 2(5) of the Berne Convention in cases where the material contained in the data base was already protected by copyright. In cases where protection does not follow from the application of ordinary copyright law, by reason of the work's brevity or lack of creativity, or its nature, or because the term of protection has expired, it would still seem desirable that protection against copying of the mode of compilation should be available to the data base operator. It would give the producer a right similar to the right of the phonogram producer. The latter normally has a specific statutory right to protect his interest in the recording itself regardless of whether or not he is recording a protected work[5]. The producer of a data base may well not have such a right at present, even where the content of the data base is itself protected by copyright.

6.4.10. To combat data piracy, such a right may prove to be an important tool. The unauthorized reproduction of data will more often than not involve works of several authors. The individual author may not be in a position to establish that an infringement has taken place and even, in case of such knowledge, may consider the infringement of marginal importance only in respect of his economic exploitation of his work. To the data base operator, the infringement may nevertheless be of considerable importance. He is often better placed than the author to detect infringements and has, as mentioned above, more pressing incentives to react. Finally, a close contractual link between the operator of a data base and the numerous authors whose works form part of the data compiled does not necessarily exist. A contractual arrangement with a collective body, for example publishers or authors in respect of specific types of scientific literature, is a common solution.

6.4.11. Similar arguments have, in respect of phonogram producers, led to the conclusion that, in order to combat piracy, the general introduction of producers' rights in sound recordings would appear to be a desirable development. It is a logical step to introduce a corresponding right for data base operators to pursue unauthorized reproduction in their own right.

6.5. Data stored on discs and tapes

6.5.1. As the optical disc or card market and the market for data stored on digital tape expand so the protection of data stored on and accessible from such sources will become of increasing importance. Data bases may well be marketed along with other types of recorded audio and visual material. The legal principles outlined in paragraphs 6.3.1.-6.4.9. of this chapter will of course apply in theory to data bases marketed in any form. However, enforcement of rights in data bases sold on discs, tapes or cards will be more difficult in practice than where the user is in direct contractual relationship with the data base operator and accesses the data base within the context of a legally binding agreement as to conditions of use. At the present time, the impact of new technologies raises more immediate difficulties in relation to the private reproduction of sound recordings and the issues relating hereto have been discussed in chapter 3 on home copying. Since the recording of data on disc or tape in digital form relies on much the same technology whether that data represents a sound recording or a literary work, the solution which is eventually retained for the protection of digital sound recordings might equally well be applicable in principle to data bases commercialized in the form of discs or tapes.

6.6. Summary

6.6.1. The storage of copyright works in full or in part within computerized information systems creates a number of legal problems for which, at present the most appropriate solution would seem to be legal action to protect the compilation of works within a data base where those works are themselves the object of copyright protection. Specific legal action aiming at resolving existing difficulties seems to be at best premature.

6.6.2. The Commission is also considering whether the protection of the mode of compilation of the data base itself should extend to data bases composed of material which is not in itself protected by copyright. Such action would only be taken if it were felt that the considerable investment which the compilation of a data base represents could best be served by copyright protection rather than by other means.

6.7. Conclusion

6.7.1. The Commission would welcome comments from informed circles on the following matters.

a) whether the mode of compilation within a data base of works should be protected by copyright and,

b) whether that right to protect the mode of compilation, in addition to possible contractual arrangements to that effect, should be extended to data bases containing material not protected by copyright and whether this protection should be copyright or a right sui generis.

6.8. Timetable for submissions

6.8.1. Comments on above mentioned suggestions should be submitted to the Commission not later than 1 January 1989.

[1] UNESCO/WIPO/CGE/PW/3-II of 14 September 1987.

[2] The establishment at Community level of a policy and a plan of priority actions for the development of an information services market (document COM(87) 360 final).

[3] See Section 101 of Copyright Act 1976 of United States of America and Article 12bis of Law for Partial Amendments to the Copyright Law, May 23, 1986, Japan. See also Article 2(1)(xter) of the above.

[4] UNESCO/WIPO/CEGO/II/7, 13 August 1982.

[5] See Chapter 2, paragraphs 2.6.10. - 2.6.18.

CHAPTER 7 : THE ROLE OF THE COMMUNITY IN MULTILATERAL AND BILATERAL EXTERNAL RELATIONS

7.1. External relations : multilateral and bilateral

7.1.1. Not all Community action in the copyright field is concerned with legislative measures or with litigation in the Court of Justice. An important area in which the Community can take action is in the field of external relations. Both in bilateral and multilateral relations, the Community has a part to play in advancing the interests of copyright owners operating from within the common market, and this in two respects : the effective enforcement of existing intellectual property rights and the establishment of recognized minimum standards of protection. In this context, multilateral relations means relations within international or regional organizations and bilateral relations all others, whether between the Community and a single non-Member State or between the Community and a regional or other grouping of non-Member States. In some cases, of course, bilateral and multilateral relations are closely interlinked as will appear, for example, in relation to the protection of textile designs. Since intellectual property regimes have direct and intended effects on trade, the activities of the Community aiming at an elimination of impediments to and distortions of international trade must be seen in the light of Article 113 EEC establishing a common commercial policy.

7.2. Multilateral relations

7.2.1. Multilateral discussions and negotiations on copyright and allied matters take place in various international organizations. Of these, the most important are the United Nations and its specialized agencies, in particular, the World Intellectual Property Organization and the United Nations Educational, Scientific and Cultural Organization; the General Agreement on Tariffs and Trade; the Council of Europe; and the Organization for Economic Co-operation and Development (OECD). The nature of Community and Commission actions in each of these contexts varies according to the activities of the organization in question. References to some of the more important of these actions and activities have already been made at different places in the preceding chapters. The following paragraphs attempt to summarize the main features for each of the organizations concerned.

The World Intellectual Property Organization (WIPO)

7.2.2. In copyright matters, the principal forum for international negotiations and discussion is the World Intellectual Property Organization, a specialized agency of the United Nations established under the WIPO convention of 1967. WIPO performs the administrative tasks of the Berne Union and assumes or participates in the administration of other international agreements to promote the protection of copyright and neighbouring rights. The Commission has a working agreement with WIPO, under which there are exchanges of publications and reciprocal attendance at meetings organized by WIPO and the Commission respectively. The Commission is represented with the status of an observer at WIPO meetings on subjects related to activities being carried out at Community level.

7.2.3. WIPO is an international organization, of an economic character, within the meaning of Article 116 EEC; and therefore, in respect of all matters of particular interest to the common market, Member States are under a duty to proceed within the framework of WIPO only by common action. Until recently, the Community has limited its action on this basis to the industrial property field, particularly in relation to the current revision of the Paris Convention. It is only a matter of time, however, before issues arise concerning copyright and allied matters calling for a similar response. Moreover, with the adoption of the directive on the legal protection of semiconductor topographies to which reference has already been made, a new phase in the Community's relationship with WIPO has begun. For the first time, an activity of WIPO, namely, the preparation of a multilateral Treaty, will be undertaken in relation to issues already covered by Community legislation binding on all its Member States. For this reason, on 24 April 1987, the Council decided that the Community should participate as such in the preparatory work on the Treaty and that, in that context, the Commission would present the Community position on questions falling within the scope of the directive and the Commission has acted correspondingly. The question of Community participation in a future diplomatic conference for the adoption of a multilateral treaty on protection of integrated circuits and the possibility for the European Economic Community as such to become party to the future treaty have been raised in the Governing Bodies of WIPO, but no decision has yet been made by the competent bodies of WIPO. The further evolution of the Community's role within WIPO in general is a matter of considerable importance given the likelihood of further Community legislation on copyright and related rights and, indeed, on other forms of intellectual property.

United Nations Educational, Scientific and Cultural Organization (UNESCO)

7.2.4. In certain respects, the activities of UNESCO also concern copyright matters, either directly as, for example, by reason of the Organization's administrative responsibilities in relation to the Universal Copyright Convention, or by virtue of its more general interests in educational, scientific and cultural affairs. Thus, in recent years, meetings have been held jointly with WIPO concerning the use of computers for access to or creation of works [1], on copyright aspects of direct broadcasting by satellite [2] and on the rights of performers, phonogram producers and broadcasting organizations in respect of audiovisual works and phonograms [3]. During 1987, in co-operation with WIPO, attention has been given to the protection of dramatic and musical works, works of applied art and printed works, the latter in particular with a view to dealing with problems relating to the creation and operation of data bases. The Commission will continue to follow developments having Community implications and will participate in discussions to the extent that its resources permit. In addition, should matters arise that fall within Community competence or are of particular interest to the common market, it will make appropriate proposals to the Member States.

General Agreement on Tariffs and Trade (GATT)

7.2.5. Trade related aspects of intellectual property rights have been mentioned in the GATT on several occasions during the Tokyo Round of Multilateral Trade Negotiations. In this context, the European Community's and United States' proposal for an agreement on commercial conterfeiting of 1979 was of particular importance. Discussions on this subject matter among interested delegations, including the European Community, remained informal, however, and an agreement on a text for incorporation in the final results of the Tokyo Round was not reached. It was not before the Ministerial Declaration of the GATT Contracting Parties of 1982 that the GATT decided to examine the question of counterfeit goods with a view to determining the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting. Work on this issue did not lead to conclusive results.

7.2.6. In September 1986 Ministers of the GATT Contracting Parties, meeting in Punta del Este, Uruguay, decided to launch a new round of Multilateral Trade Negotiations and to include in them negotiations on "trade-related aspects of intellectual property rights, including trade in counterfeit goods". The relevant part of the Ministerial Declaration reads as follows:

> "In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines.
>
> Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT.
>
> These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organization and elsewhere to deal with these matters".

7.2.7. The Community and the Commission supported the inclusion of this chapter in the new round in pursuit of the following, complementary objectives :

(i) In order to avoid trade-related problems, steps should be taken to ensure that intellectual property rights are effectively implemented, irrespective of whether infringements are carried out through internationally traded goods or local production. Consequently, appropriate procedures should be provided for to ensure rapid and efficient enforcement at the border (regarding imports and exports) as well as internally.

(ii) The protection of intellectual property rights as recognized by existing national legislation should be improved through the application of certain general principles of the GATT. The application of "national treatment" and "most favoured nation treatment" would ensure that discrimination between national and foreign and among foreign right holders is avoided, both with regard to the substantive standards applied as well as the enforcement procedures and remedies available. Moreover, effective dispute settlement provisions allowing for appropriate sanctions would make sure that all parties to an agreement would respect their international obligations.

(iii) A wider adherence to and respect of international conventions on intellectual property should be achieved. This applies in particular, but not exclusively, to the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, which enjoy already rather widespread recognition.

(iv) The problems created by inadequate or sometimes excessive substantive standards should also be addressed through the transposition into the GATT legal system of those basic substantive rules that enjoy wide (although not necessarily universal) recognition, including but not limited to those which are provided for in existing international conventions.

(v) Where appropriate, internationally agreed rules for the protection of intellectual property, including those derived from new forms of creative activity (e.g. software, semiconductors), should be elaborated. All countries should be encouraged to participate actively in the revision of existing and the elaboration of new conventions within the competent international organizations.

Organization for Economic Co-operation and Development (OECD)

7.2.8. In the light of the Uruguay Round negotiations[4], the OECD Trade Committee has also engaged in an examination and discussion of the impact of intellectual property law on international trade, inter alia, with a view to providing OECD member countries with analyses of practices and legislation in OECD and developing countries. The OECD has also concerned itself with copyright issues, particularly in the context of its work on transborder data flows. In this context, the Organization has carried out an examination of copyright provisions of its Member States which may act as a barrier to the free flow of data. Copyright issues of Community interest may also arise in future in the context of work on international trade in audio-visual services. Further, the Committee for Information, Computer and Communications Policy has made preparations and drafted reports for a High-level Meeting in the fall of 1987 on transborder data flows under the theme "Improving International Rules of the Game", preparing an adaptation of the legal environment governing transborder data flows. The Commission is participating in the Organization's work and, in particular, the work related to international trade. It will, as appropriate, make proposals on issues arising in this context.

International Labour Office (ILO)

7.2.9. Although the Commission has not so far been directly involved in discussions held under the aegis of ILO in the copyright field, the ILO's contribution to such debates as those on satellite television and employee's rights is gratefully acknowledged.

Council of Europe

7.2.10. The Commission has welcomed the opportunity to participate in meetings with a direct bearing on certain aspects of copyright, particularly those of the Steering Committee on Mass Media and its expert sub-committees. The information gathered at these meetings has contributed greatly to its own work, for example in the field of television by cable and satellite. Other copyright issues of common concern have arisen, for example, as regards private copying of sound and audiovisual recordings and piracy of audiovisual works.

7.2.11. The Commission is of the opinion that work undertaken on copyright in the Council of Europe and initiatives at Community level are complementary. On the one hand, the Council of Europe seeks in the context of its larger membership to deal with common problems normally by way of recommendation and occasionally by means of international conventions. On the other hand, within the narrower context of States which are members of the Community, the Community seeks to create a genuine internal market for goods and services, including those protected by copyright, using the Treaty's directly applicable provisions and the legislative and other powers that the Treaty confers on its institutions. This may require an approximation of national laws prior to and going further than the work which can be achieved afterwards within the large grouping constituted by the Council of Europe. At the same time, where common approaches can be agreed on the Council's wider basis, it is desirable that appropriate instruments be adopted and that these instruments form a coherent whole together with any Community measures adopted in relation to the same subject matter.

7.2.12. Accordingly, the Commission intends to continue to work together with the Council of Europe on matters of common concern in the copyright field. It will participate in relevant meetings to the extent that its resources permit and will invite the Council's secretariat to be represented at similar meetings organized by its own departments, as it already has in the field of cross-frontier television and lately in the preparatory work on two Council recommendations on the subject of piracy and the private reproduction of sound and video recordings, which were adopted by the Committee of Ministers on 18 January 1988[5].

7.3. Bilateral relations : general

7.3.1. While multilateral organizations and conventions represent in principle the most adequate framework for addressing problems of intellectual property rights and their enforcement, it must be recognized that the existing international conventions relating to copyright have not yet achieved the objective of providing effective copyright protection on a large enough international scale, nor have have they succeeded yet in dealing adequately with new forms of in principle copyrightable matters such as semiconductor designs and software.

It is for these reasons that in addition to the work in the multilateral context problems existing with regard to individual countries or groups of countries need to be tackled bilaterally. These problems essentially relate to three areas:

- the absence of adequate substantive standards protecting intellectual property,
- the lack of effective enforcement where such standards exist, and
- the application of national treatment to Community right holders.

7.3.2. So far as bilateral relations in general are concerned the Community can act (and has acted) whenever specific problems concerning copyright and allied matters have arisen. In recent years, such problems have arisen with increasing frequency.

7.3.3. Thus, in 1984, when the United States Congress considered and then adopted legislation on the protection of semiconductor designs [6], representations were made on the basis of concerns expressed by Community interests likely to be affected. In addition, action was subsequently taken by the Community to secure protection on an interim basis for European semiconductor producers in the US market pending adoption of legislation at Community level in the form of a directive on the legal protection of topographies of semiconductor products [7].

7.3.4. The provisions of Article 3(7) of that directive concerning extensions of protection to persons from non-Member States should also be noted in this connection, which enable the Community to act as a whole. The procedure for which they provide has recently been set in motion for the first time[8]. In the field of semiconductor designs, relations with non-Member States will thus develop in future in large part on the basis of the specific provisions contained in the directive.

7.3.5. As regards Japan, reference may be made to the initiatives that were taken when it was learned in early 1984 that new legislation was being considered that could significantly limit the protection available to computer software in a number of ways. Again, representations were made to the Japanese authorities on behalf of the European interests that had expressed concern. The widely reported decision of the Japanese government not to pursue the creation of a specific form of legal protection for software but to modify its copyright law, which it realized in 1985 [9], has been a welcome development.

7.3.6. To complete the picture, reference can also be made to two other more recent examples involving contacts with non-Member countries.

7.3.7. In the summer of 1986, representations were made on behalf of the Commmunity and its Member States to the government of Nigeria concerning a range of intellectual property issues, including the need to strengthen legal provisions for the repression of piracy of copyright materials.

7.3.8. Early in 1987, the Commission was consulted by the authorities of Malaysia on a new bill for copyright protection in that country. The proposed limitation of copyright protection under the bill's provisions to Malaysian nationals and residents and to works first published in Malaysia is clearly a matter of great concern to Community right holders. The Malaysian authorities' attention has been drawn to the problem. Further Community action will be proposed, should it prove necessary.

7.3.9. Finally, as recently as the beginning of November 1987, following a commitment previously undertaken by the Republic of Korea to grant to Community nationals and enterprises rights in the area of intellectual and industrial property equivalent to the rights granted to US nationals by a US-Korea bilateral agreement, a Commission delegation carried out negotiations on a similar bilateral agreement including copyright protection with the government of the Republic of Korea on intellectual property protection. No results have as yet emerged from these negotiations. As a result of the refusal of the government of Korea to comply with its previously undertaken commitment, Community nationals are the subject of discriminatory treatment within the jurisdiction of the Republic of Korea. Consequently, on 18 December 1987, the Council agreed to a proposal by the Commission to suspend the generalized tariff preferences for products originating in the Republic of Korea[10]. The negotiations with Korea will be resumed as soon as further negotiations appear realistic.

7.3.10. In addition to specific problems of this kind, meetings on an ad hoc basis are also held between the Commission and particular countries or groups of countries with which the Community has significant trade and other relationships. On certain occasions in recent years, these meetings have been used to discuss problems arising in the intellectual property field, though to date attention has focussed primarily on fields other than copyright and no attempt has so far been made to develop this form of intervention in a systematic way.

7.3.11. In recent years problems of piracy and counterfeiting have become more serious and widespread. Clearly action within the Community or at the border cannot solve these problems effectively. They should be raised in the framework of the Community's bilateral relations in a more systematic way. Such action, which will require consistent co-operation from Community interests affected, should not only aim at ensuring respect for the rights of Community right holders, but could also address other matters of current concern, for example, the need for adequate legal protection of computer software[11] and semiconductor products.

7.4. Bilateral relations in the context of existing arrangements

7.4.1. The Community has woven a fabric of bilateral agreements with countries in Asia, Latin America, the Mediterranean, Africa, the Caribbean and the Pacific, thus creating a framework for diversified forms of co-operation. This framework is sufficiently broad to encompass, formally or otherwise, any topic of economic co-operation, including notably the protection of intellectual property.

7.4.2. Periodic meetings called under these agreements offer the occasion for discussing problems encountered by one Community industry or another. At times it has been useful to enter into negotiations and to conclude formal bilateral agreements. Although this approach has not been systematic, it should not be discarded, in particular for those countries which maintain formal contractual relations with the Community. Their interest in concluding one agreement with the Community, rather than a series of separate agreements with some or all Member States, is self-evident.

7.4.3. At times it has been necessary to deal in more informal manners with intellectual property issues, given their delicate character and the sensitivities of certain trading partners. Recently, for example, the Commission has agreed to review the national legislation of one of its trading partners to identify possible problems or lacunae. Training of officials and other forms of assistance have also been envisaged. Another forum for the discussion of these issues is constituted by the joint investment committees set up between European operators and their Asian counterparts in every capital of the ASEAN countries. These committees regularly attempt to identify and solve the difficulties which either side may encounter.

Design problems of the textile and clothing industry

7.4.4. In the textile and clothing sector, a start has already been made which may well indicate the direction which future developments should take.

7.4.5. By way of background, it should be noted that the Community's textile and clothing industries have a particularly pressing interest in securing better protection for their designs as well as their trade marks especially in developing countries. Since the seventies, the industry has been under severe pressure from low cost production in many newly industrializing and State-trading countries. This competition has generated growing quantities of low price imports which, combined with decreasing consumption, has led to substantial shrinkage and restructuring of the industries. As an important part of their response, Community industries have sought to stress, besides technological innovation, the marketing of higher quality products, protected by trade marks, offering innovative designs and models subject to change with increasing frequency. However, Community industries now find that this assertive strategy is being put at risk, and is even being turned against them, by unauthorized copying of their designs and trade marks, especially by firms exporting from developing countries. These illicit practices weaken Community performance not only on the world market but also within the Community itself since the firms which are copying are saving themselves the costs of developing their own brands, designs and models which frequently represent as much as 10% of total production costs.

7.4.6. Given the importance of the problem, as a first step, the Community sought and obtained the inclusion in the fourth extension protocol of the Multifibre Agreement of a provision recognizing the importance of the problem and underlining the need for its resolution [12]. Subsequently, in the context of the bilateral textile agreements concluded between the Community and individual trading partners, this recognition was explicitly confirmed.

7.4.7. As a next step, the general consultation clauses of the bilateral agreements will be utilized to raise the problem, in particular, on the basis of factual cases sufficiently proved. A pragmatic approach of this kind should prove helpful in finding mutually acceptable solutions to the problem which, it cannot be denied, presents a number of particular difficulties including, for example, the short life of many designs and the practical difficulties of detecting and proving infringements. The success of such an approach will, to a considerable extent, depend on the co-operation of Community industries and on the careful preparation of appropriate cases.

7.4.8. Finally, in this context, future concessions in the framework of bilateral textile agreements might well have to be conditioned by concrete evidence of improved co-operation by partner countries in the field of intellectual property rights including, in particular, both designs, models and trade marks.

7.5. The Lomé Conventions

7.5.1. Given its importance, actual and potential, the relationship between the Community and the African, Caribbean and Pacific (ACP) States merits mention in this context.

7.5.2. Although the Convention does not specifically provide for the protection of copyright, it does permit the Community to prohibit imports in order to protect industrial or commercial property (Article 132). Whereas this provides a certain protection against illegal imports into the Community, it does not deal with the problems associated with illegal reproduction.

7.5.3. The Convention does however provide a framework for information and consultation on such questions which can be invoked by any contracting party. This framework will permit the Community to deal with specific cases involving ACP countries if they arise.

7.5.4. There are specific problems which confront developing countries, particularly the least developed, in reconciling the legitimate concerns of owners of intellectual property rights with their own pressing development needs. In this context it is to be considered whether a higher profile should not be given to such problems in any successor Convention to Lomé III.

7.6. The new trade policy instrument

7.6.1. In order to combat illegal commercial practices, the Community now has an additional resource at its disposal: the new trade policy instrument[13]. One of the main considerations which led to its adoption was that of providing the Community with a procedure permitting it to respond more rapidly, more effectively and with a wider range of measures than in the past to illicit commercial practices of third countries with the aim of eliminating the resulting injury.

7.6.2. Illicit commercial practices are defined as being international trade practices which are attributable to third coutries and which are either incompatible with international law or with the "generally accepted rules". Thus, the instrument's use is not confined to cases in which countries do not respect their obligations under customary international law or international agreements to which they are parties. The new trade policy instrument, therefore, could be used against a State which disregards a multilateral treaty to which it is not a party, but to which a large number of other States are parties, when the treaty in question is not purely declaratory of customary international law. A State does not act in breach of international law if it acts in a way which is forbidden by a treaty which is not binding on it. Yet it could be said to have acted in breach of "generally accepted rules". Under the new instrument, it might not be necessary for the State complained of to have violated an obligation, legal or otherwise, applicable to it: the relevant provision in the new instrument is that action may be taken by the Community when there has been action "incompatible with international law or with generally accepted rules".

7.6.3. The concept of "generally accepted rules" is not defined in the new instrument but its context is clearly that of States engaging in international trade. There thus seems little doubt that, in the first place, it is intended to refer to the General Agreement on Tariffs and Trade, enabling the provisions of that agreement to be applied to the trade practices of countries which are not GATT members [14]. On this basis, other multilateral agreements can be evaluated to see whether the share of world trade for which their members are responsible is of the same order as that for which GATT members account. If this proves to be the case, the rules contained in such an agreement should probably be considered as "generally accepted" by the international trading community.

7.6.4. An examination of the States parties to the Berne Convention (77 States), the Universal Copyright Convention (81 States), the Paris Convention (96 States) and to the GATT (92 States) reveals the following picture.

Table I : The share of exports, imports and world trade for which the members of certain international agreements are responsible.

International Agreement	Exports as % of world total	Imports as % of world total	International trade as % of world trade
GATT	80	81	81
Berne	66	64	65
UCC	82	81	81
Paris	88	88	88

Source : IMF and UNO, 1985 figures.

7.6.5. Among these international instruments, the Berne Convention has the most modest participation which however, measured in relation to international trade, still accounts for approximately two-thirds of the total. The members of the Universal Copyright and Paris Conventions each account for a greater share of world trade than the members of the GATT itself.

7.6.6. Accordingly, the rules of the Berne, Universal Copyright and Paris Conventions appear to be "generally accepted" among countries engaged in international trade. Therefore, if the new instrument could be used against a State for failure to respect a treaty to which it was not a party, it could be used in the case of these three conventions.

7.6.7. An illicit commercial practice must also be attributable to third countries if it is to fall within the scope of the new instrument. Thus infringements, even repeated infringements, of intellectual or industrial property rights as recognized by the multilateral conventions will not by themselves be sufficient. The responsibility of a third country as opposed to a private individual must be engaged in one way or another. This might well occur, for example, when systematic infringements are carried out by entities for which the State is directly responsible since they form part of that State's administrative structure, for example, State trading organizations. Even in the absence of such a direct link, however, failure to respect generally accepted intellectual or industrial property rights might well be attributable to a particular country under certain conditions, for example, where the illicit practices are widespread and, despite repeated requests to act, nothing has been done to enact appropriate laws or, where they exist, to enforce them.

7.6.8. Where, in the opinion of an interested party, illicit commercial practices exist which cause injury to a Community industry, a complaint can be lodged with the Commission by any person or association acting on behalf of this Community industry or by a Member State. The injury must be sustained either within the Community or on export markets. The latter possibility is of considerable importance in the present context for in some sectors, such as book publishing, it is indeed on external markets that most of the damage occurs [15]. A complaint triggers an internal Community consultation procedure which, where there is sufficient evidence, can lead to an examination procedure on the basis of a formal notice of initiation published in the Community's Official Journal. This formal notice indicates the product and countries concerned and a summary of the information received. It also indicates the time limits within which interested parties may make their views known and may request to be heard orally.

7.6.9. Where it appears at the end of the examination procedure that action is necessary in the interests of the Community in order to respond to any illicit commercial practice with the aim of removing the injury caused by it, commercial policy measures may be taken. These measures may consist of the suspension or withdrawal of any concession resulting from commercial policy negotiations, the raising of existing customs duties or the introduction of any other charge on imports, or the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned. Such measures can be taken, however, only after the prior discharge of any international procedure for consultation or for the settlement of disputes which the Community has an international obligation to respect. Indeed, more generally, the procedures established by the new instrument are expressly subjected to compliance with all existing international obligations and procedures.

7.6.10. In the field of intellectual property, and copyright in particular, the new instrument could conceivably play a significant role in the future, particularly as regards countries which practise a policy of more or less active connivance in the pirating of goods and services developed elsewhere. Such a situation was at the basis of a first complaint, filed in March 1987, by the International Federation of Phonogram and Videogram Producers concerning Indonesia. It alleged that this country permitted the unauthorized reproduction of sound carriers on its territory, by reason of the lack of protection granted to Community works in Indonesia, thus causing serious injury to the Community industry[16]. Following consultations with the Indonesian authorities and the commitment undertaken by Indonesia to grant Community nationals national treatment on the basis of reciprocity as regards the protection of sound recordings, the procedure has been closed. The negotiation of a bilateral agreement between the Community and Indonesia would permit the consolidation of this result and its extension to the area of copyright in general. If in the future this instrument is to have practical effect, the industries concerned will not only have to be prepared to use it, but also to prepare possible complaints carefully and communicate relevant information to the Commission. The value of the instrument thus depends in large part directly on the response and full co-operation of those whose interests are being adversely affected.

7.7. Summary

7.7.1. As is the case for other topics as well, copyright cannot be seen only in a unilateral, bilateral or multilateral context. Copyright too is placed in a multi-faceted, plurilateral world. The success or failure of multilateral efforts, and the ongoing negotiations in the new GATT round in particular, cannot fail to have an effect on the Community's bilateral efforts. These, in turn, will affect and are affected by the use which interested parties may make of the autonomous new commercial policy instrument. It is this complementarity between the Community's multilateral, bilateral and autonomous efforts which lies at the basis of this chapter.

7.8. Conclusions

7.8.1. The Commission would accordingly welcome the views of interested parties on the following matters:

a) the priorities to be given to the different aspects of reinforcement of intellectual property protection in the international context;

b) the development by the GATT of new disciplines as regards the effective enforcement of intellectual property laws, in particular, copyright, as well as the adoption, as appropriate, of improved substantive standards;

c) the more systematic use of bilateral relations, to ensure better protection in non-Member States of the intellectual and industrial property of Community right holders, particularly in the copyright field.

7.9. Timetable for submissions

7.9.1. Comments on Chapter 7 should be submitted to the Commission no later than 1 December 1988.

[1] Report of the Committee of Governmental Experts of Copyright Problems Arising from the Use of Computers for Access to the Creation of Works. UNESCO/WIPO/CEGO/II/7, 13 August 1982.

[2] Report of Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite, UNESCO/WIPO/GE/DBS/I/4, 29 April 1985.

[3] Report of Group of Experts on audiovisual works and phonograms, UNESCO/WIPO/CGE/AWP/4. 30 June 1986.

[4] See paragraphs 7.2.5. - 7.2.8. above

[5] Recommendation no. R(88)1 of the Committee of Ministers to Member States on Sound and Audiovisual Private Copying and Recommendation no. R(88)2 of the Committee of Ministers to Member States on measures to combat Piracy in the Field of Copyright and Neighbouring Rights.

[6] The Semiconductor Chip Protection Act 1984.

[7] Council Directive 87/54/EEC of 16 December 1986, O.J. No. L 24 of 27 January 1987, page 36. See also the notice as to interim protection in the United States, O.J. No. C 284 of 7 November 1985.

[8] The Council has taken a Decision effective from 7 November 1987 on the extension of rights on the basis of reciprocity to natural and legal persons in the United States and the United Kingdom dependencies for whose external relations the United Kingdom is responsible, O.J. No. L 313 of 4 November 1987, page 22.

[9] Law Partially Amending the Copyright Law, Law No. 62 of 14 June 1985.

[10] Council Regulation (EEC) no. 3912/87 of 18 December 1987, O.J. no. L 369 of 29 December 1987, page 1.

[11] See Chapter 2 paragraph 2.2.31. and Chapter 5 paragraphs 5.3.5., 5.3.6.

[12] Protocol extending the arrangement regarding international trade in textiles, paragraph 27, July 1986.

[13] Council Regulation (EEC) no. 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, O.J. no. L 252/1 of 20 September 1984.

[14] See Bourgeois and Laurent : Le "Nouvel instrument de la politique commerciale" : un pas en avant vers l'élimination des obstacles aux échanges internationaux, Revue trimestrielle de droit européen, no. 1, January-March 1985, p. 52.

[15] See Chapter 2, paragraphs 2.2.2., 2.2.3.

[16] O.J. no. C 136 of 21 May 1987, page 3.