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Contents

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World Intellectual Property Organization

WIPO Copyright Course

(Beijing, May 10 to 21, 1982)

Note *

At the request of the National Publishing Administration of China, WIPO organized a two-week Copyright Course at the headquarters of the Publishers' Association of China in Beijing from May 10 to 21, 1982. The purpose of the Course was to provide the various firms publishing books or periodicals, authors' or publishers' associations, administrations, study and research centers and universities as well as the competent authorities of the Chinese People's Republic with a certain amount of information on copyright legislation, particularly with regard to books and periodicals and the relevant publishing agreements.

The Course was inaugurated by Dr. Arpad Bogsch, Director General of WIPO, and by Mr. Xu Liyi, Deputy Director of the National Publishing Administration of China and Vice-Chairman of the Publishers' Association of China.

Almost 150 Chinese officials, from Government administrations or publishing firms in Beijing, Shanghai, Tianjin, Shanxi, Shandong, Zhejiang, Sichuan, Guangdong, Hebei, Liaoning, Hunan, Jiangsu and a number of other provinces or cities of China, took part in the course. Mr. Wang Heng, Head of the Copyright Study Group of the Publishers' Association of China and a member of the National Publishing Administration of China, Mr. Song Muwen, Secretary General of the same Association, and several members of the Study Group mentioned were also present.

Fourteen lectures were given in English, their texts having been translated into Chinese and distributed in advance to the participants at the same time as the English versions. Each lecture was followed by numerous questions, to which each of the speakers concerned replied.

The lectures covered basic notions of copyright law, particularly as far as books and periodicals are concerned, the international protection of copyright, basic notions and related practice about publishing contracts between parties belonging to different countries, copyright problems arising from photocopying, illustrations in books and periodicals and the use of computers, the copyright law in force in the countries with which China entertains its most important relations in publishing matters, practices existing in international copyright relations and the structures and activities of authors' and publishers' organizations in the countries of Western Europe, in the United States of America, in the Socialist countries of Europe and the countries of Asia and the Pacific other than China. The Course had an exclusively informatory purpose, its aim being to provide participants with complete information on the situation outside China, either at the national or at the international level. The Course had been designed to interest all those whose profession or activities bring them into contact with various copyright problems, and to provide the competent Chinese authorities with all the material of a legal or practical nature that would be likely to assist them in the drafting of copyright legislation.

Lecturers invited by WIPO were: Mr. Ivor Davis (Comptroller-General of Patents, Designs and Trade Marks of the United Kingdom), Mr. Mihály Ficsor (Director General of the Hungarian Office for the Protection of Copyrights) and Mr. Alan Latman (Professor at New York University). Apart from the Director General of WIPO, the lecturers from the International Bureau of WIPO were: Mr. Claude Masouyé (Director of the Public Information and Copyright Department), Mr. Roger Harben (Director of the Public Information Division) and Mr. Gyorgy Boytha (Head of the Copyright Law Division).

After the holding of the Course in Beijing, the lecturers were received in Shanghai, at the Publishing Bureau of the Shanghai Publishing Association, where they had talks with Mr. Song Yuan-Fang, Director, and Mr. Liu Pei-Kang, Secretary General, on publishing activity in Shanghai.

* This Note has been prepared by the International Bureau of WIPO.

National Legislation

KENYA

The Copyright (Amendment) Act, 1982

(No. 5 of 1982) *

An Act of Parliament to amend the Copyright Act

Short title

1. This Act may be cited as the Copyright (Amendment) Act, 1982.

Amendment to section 2

2. Section 2(1) of the Copyright Act, [1] in this Act called the principal Act, is amended by inserting in appropriate alphabetical sequence the following new definition—

"infringing copy" means a copy whose manufacture constituted an infringement of copyright, or, in the case of a copy which is imported, would have constituted an infringement of copyright had the copy been manufactured in Kenya.

Amendment to section 11

3. Section 11(1) of the principal Act is amended by deleting the expression ", notwithstanding section 12(6) of this Act," from the proviso thereto.

Amendments to section 13

4. Section 13 of the principal Act is amended by—

(a) deleting subsections (1) and (2) and substituting the following—

(1) Copyright shall be infringed by a person who, without the licence of the owner of the copyright—

(a) does, or causes to be done, an act the doing of which is controlled by the copyright; or

(b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.

(2) Infringement of copyright shall be actionable at the suit of the owner of the copyright; and in any action for infringement the following relief shall be available to the plaintiff—

(a) the relief by way of damages, injunction, accounts or otherwise that is available in any corresponding proceedings in respect of infringement of other proprietary rights; and

(b) delivery up to the plaintiff of any article in the possession of the defendant which appears to the court to be an infringing copy, or any article used or intended to be used for making infringing copies.;

(b) renumbering subsection (6) as subsection (11);

(c) inserting, after subsection (5), the following new subsections—

(6) In an action under this section—

(a) copyright shall be presumed to subsist in the work or other subject matter to which the action relates, if the defendant does not put in issue the subsistence of copyright therein; and

(b) where the subsistence of copyright is proved, admitted, or presumed by paragraph *(a)*, the plaintiff shall be presumed to be the owner of the copyright if he makes a claim thereto and the defendant does not dispute that claim.

(7) Where, in an action under this section, a name purporting to be the name of the author or joint author appeared on copies of a literary or musical work as published or on an artistic work when it was made, any person whose name so appeared, if it was his true name or the name by which he was commonly known, shall be presumed, unless the contrary is proved—

(a) to be the author of the work; and

(b) to have made the work in circumstances not falling within the proviso to section 11(1).

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* Entry into force: May 28, 1982.

[1] For the Copyright Act and its previous amendments, see *Copyright*, 1966, pp. 127 *et seq.*, and 1975, pp. 224 *et seq.*

(8) Where, in an action under this section, subsection (7) does not apply but the literary, musical or artistic work to which that action relates was first published in Kenya, or any country to which the provisions of this Act in respect of works of the type in issue has been extended, twenty years before the year in which the action was brought and a name purporting to be that of the publisher appeared in a copy of the work when it was first published, then unless the contrary is proved, copyright shall be presumed to subsist in the work and that publisher shall be presumed to have been the owner of that copyright when the work was first published.

(9) Where, in the action under this section, the author of the literary, musical or artistic work to which the action relates is dead, it shall be presumed, unless the contrary is proved—

(a) that the work is eligible for copyright; and

(b) that any allegation by the plaintiff that the work is a first publication and was published in a specified country on a specified date, is true.

(10) *(a)* Where, in an action under this section, the sound recording to which the action relates is reproduced on a record, bearing a label or other mark, which has been issued to the public, any statement on that label to the effect that a person named thereon was the maker of the sound recording or the recording was first published in a specified year shall, unless the contrary is proved, be presumed to be true.

(b) In this subsection "record" means any disc, tape, perforated roll or other device in which sounds are embodied which are capable of reproduction therefrom with or without the aid of another instrument.

Amendments to section 13A

5. Section 13A of the principal Act is amended by deleting subsections (5) and (6) and substituting the following—

(5) A person guilty of an offence under subsection (1) or (2) shall be liable to a fine not exceeding ten thousand shillings or to imprisonment not exceeding twelve months, or to both.

(6) A person guilty of an offence under subsection (3) or (4) shall be liable to a fine not exceeding five thousand shillings or to imprisonment not exceeding six months, or to both.

UNITED STATES OF AMERICA

Public Law 97-180

(of May 24, 1982) *

Piracy and Counterfeiting Amendments Act of 1982

. . . . . .

Section 2. Section 506(a) [1] of title 17, United States Code, is amended to read as follows:

"(a) Criminal infringement

Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in section 2319 of title 18.".

Section 3. Section 2318 of title 18, United States Code, is amended—

(1) by respectively redesignating subsections (b) and (c) as subsections (d) and (e); and

(2) by striking out the section heading and subsection (a) and inserting in lieu thereof the following:

"§ 2318. Trafficking in counterfeit labels for pbonorecords, and copies of motion pictures and audiovisual works

(a) Whoever, in any of the circumstances described in subsection (c) of this section, knowingly

* Entry into force: May 24, 1982.

[1] See *Copyright*, 1977, p. 208.

traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or to a copy of a motion picture, or an audiovisual work, shall be fined not more than $250,000 or imprisoned for not more than five years, or both.

(b) As used in this section—

(1) the term 'counterfeit label' means an identifying label or container that appears to be genuine, but is not;

(2) the term 'traffic' means to transfer or otherwise dispose of, to another, as consideration for anything of value or obtain control of with intent to so transfer or dispose; and

(3) the terms 'copy', 'phonorecord', 'motion picture', and 'audiovisual work' have, respectively, the meanings given those terms in section 101 (relating to definitions) of title 17.

(c) The circumstances referred to in subsection (a) of this section are—

(1) the offense is committed within the special maritime and territorial jurisdiction of the United States or within the special aircraft jurisdiction of the United States (as defined in section 101 of the Federal Aviation Act of 1958);

(2) the mail or a facility of interstate or foreign commerce is used in the commission of the offense; or

(3) the counterfeit label is affixed to or encloses, or is designed to be affixed to or enclose, a copyrighted audiovisual work or motion picture, or a phonorecord of a copyrighted sound recording.".

Section 4. Title 18, United States Code, is amended by inserting after section 2318 the following new section:

"§ 2319. Criminal infringement of a copyright

(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section.

(b) Any person who commits an offense under subsection (a) of this section—

(1) shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings;

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least sixty-five copies infringing the copyright in one or more motion pictures or audiovisual works; or

(C) involves a sound recording, motion picture, or audiovisual work, and is a second or subsequent offense under this section;

(2) shall be fined not more than $250,000 or imprisoned for not more than two years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; or

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or audiovisual works; and

(3) shall be fined not more than $25,000 or imprisoned for not more than one year, or both, in any other case.

(c) As used in this section the terms 'sound recording', 'motion picture', 'audiovisual work', 'phonorecord', and 'copies' have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17.".

Section 5. The table of sections for chapter 113 of title 18 of the United States Code is amended by striking out the item relating to section 2318 and inserting in lieu thereof the following:

"2318. Trafficking in counterfeit labels for phonorecords and copies of motion pictures and audiovisual works.

2319. Criminal infringement of a copyright.".

Views of NGOs

Views of the International Non-Governmental Organizations on Private Copying

Introduction

At an informal meeting called by the Director General of the World Intellectual Property Organization (WIPO) in Geneva in December 1981, an exchange of views was held with the international non-governmental organizations essentially concerned with copyright and neighboring rights on current topics in this field. One such topic was that of private copying, that is to say the making of copies of phonograms and audiovisual tapes and the recording of radio and television broadcasts by private persons in their homes for their own use.

To reply to the concern expressed by the interested circles, the Director General of WIPO decided to devote a special issue of the WIPO reviews *Copyright* and *Le Droit d'auteur* to this matter and invited a number of international non-governmental organizations to present their points of view. These views are now reproduced in this issue.

European Broadcasting Union (EBU)

Private Recording of Radio and Television Broadcasts: The Broadcasters' Case

Werner RUMPHORST *

1. Purpose and scope of this article

In the February 1982 issue of this review, Patrick Masouyé, legal adviser of IFPI — one of the 12 non-governmental international organizations invited to contribute to this special issue of *Copyright* — gave an interesting account of his opinions on "Private Copying: A New Exploitation Mode for Works" (*Copyright*, 1982, pp. 81-90). For the present author, the merits of that article are twofold: first, it spares him the need to repeat what has already been said, and second, it illustrates the need to present the broadcasters' case.

P. Masouyé feels "that private copying represents a danger for authors and composers, performers and phonogram producers." Apparently, his ideal distribution key for sharing the equitable remuneration resulting from the levy advocated on recorders and blank cassettes would be one third each for authors, performers and phonograms producers. Broadcasters are not referred to in this context, nor mentioned anywhere else in P. Masouyé's article. This wise abstention of the author from dealing with questions that are outside the scope of his own professional domain and attachment is certainly commendable.

The purpose of the present article is to demonstrate the broadcasters' just claim to inclusion — *de lege ferenda* — among the beneficiaries of the levy on recorders or blank cassettes or both, or of any other remuneration a legislator may provide as generalized compensation for the possibility of making private off-air recordings. In limiting the purpose and

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scope of the present article in this way, it is hoped that other contributors to this special issue will deal with the factual background, the legal situation prevailing *de lege lata* and possible solutions *de lege ferenda*, in addition to what has already been said in P. Masouyé's article.

2. The broadcasters' case

2.1 Off-air recording means the recording of *broadcasts*, whether sound or television. The majority of sound broadcasts recorded certainly consist of music, either embodied in a commercial phonogram or a broadcaster's recording of a concert, or relayed direct (live) from a concert hall. In television, it appears that the majority of broadcasts recorded are programs which for some reason or other the viewer cannot watch at the time when they are broadcast, but which he would like to see at a later stage. Such programs may vary in nature and range from sports transmissions via variety shows, cinematograph films, police stories and nature films to virtually anything else. But whatever the program, and whoever may be the right holder(s) in the program, it is the *broadcaster's* specific contribution that renders off-air recording both possible and sufficiently attractive.

2.2 What is the value of this specific contribution? Taking the Federal Republic of Germany as just one example, broadcasters in that country spent a total of some 5 billion Deutschmarks in 1981 to provide the national audience with radio and television programs. It is thanks to this immense expenditure that the public in the Federal Republic had the opportunity of recording national radio and television programs off-air. For other European countries, the relevant figures — which are normally accessible to the public — are similarly impressive when seen in the particular national context.

2.3 The license to receive national radio and television broadcasts does not include an authorization to make recordings of them. In countries where no broadcast receiving license exists, there is likewise no question that the freedom to receive national broadcasts does not include an authorization to record them. Similarly, no express or implied authorization exists with regard to the recording of foreign broadcasts.

2.4 *Jure conventionis*, the broadcasters' right to authorize or prohibit the fixation of their broadcasts is recognized under Article 13*(b)* of the Rome Convention and, regarding television broadcasts, under Article 1, sub-paragraph 1*(d)*, of the European Agreement on the Protection of Television Broadcasts.

2.5 Article 15, sub-paragraph 1*(a)*, of the Rome Convention and Article 3, sub-paragraph 1*(c)*, of the European Agreement authorize Contracting States to provide for an exception to the right of fixation as regards private use. However, while no Contracting State is obliged to avail itself of this possibility, under constitutional law, at least of certain countries, there are two questions that arise:

(a) in view of the existing — and especially potential future — scope of private off-air recording, might not such an exception be tantamount to expropriation of right holders in general (including broadcasters)?

(b) if broadcasters are the only category of right-holders completely deprived of their right, while granting the others (in particular authors, performers and phonogram producers) some kind of generalized financial compensation, might this not constitute an arbitrary legislative act incompatible with the principle of equal treatment under the law?

On point *(a)*, it is arguable that the actual and potential volume of private off-air recording of both radio and television programs — which was certainly not envisaged at the 1961 Rome Conference — exceeds by a decisive margin the scope of the traditionally accepted "minor exceptions" from copyright which apparently also inspired the drafting of Article 15 of the Rome Convention.

On point *(b)*, there is of course the ancient argument — which is frequently repeated but apparently without reflecting on its present-day validity — that broadcasters do not suffer financial loss from off-air recording of their broadcasts. This is what underlies the view that there is a decisive distinction which justifies a treatment for broadcasters different from that of all other categories of right holders. Let us scrutinize this argument more closely:

2.6 Private off-air recording affects the financial interests of broadcasters in a number of ways, and in particular the following:

2.6.1 Private off-air recording constitutes unjust enrichment on the part of the private individuals carrying out such recording, with a corresponding financial loss on the part of the broadcasting organizations. It is an indisputable fact that without broadcasting numerous recordings would not be possible at all, and others only with greater or lesser difficulty and in most cases solely against payment. Home users therefore attribute an economic value to the possibility of making off-air recordings, and hence those who make private off-air recordings enrich themselves without cause at the broadcasters' expense.

There are those who nevertheless claim that the broadcasters' purpose is to broadcast, and that whatever use is made of the broadcasts after this purpose

has been accomplished cannot possibly result in a financial loss to broadcasters. The supporters of such a view are comparable to people who travel on trains without paying, occupy vacant seats and, when asked for their tickets, reply that the railroad company could not possibly suffer loss by their presence since the train would have done the journey without them and their seats were empty anyway. While granting that the parallel may not be complete, the decisive point appears sufficiently well illustrated.

2.6.2 To the extent that broadcasters hold exclusive — original and/or derived — rights in their programs, the marketing of the latter in the form of phonorecords, sound cassettes, videocassettes, videodiscs, etc., will be less and less profitable the more private individuals make their own recordings of programs that are of particular interest to them. A case in point is the 1978 World Football Championship, where a considerable sum of money had been paid for exclusive videocassette rights but, mainly due to private off-air recording by potential customers, hardly any demand existed on the market. (In addition, piracy contributed to rendering the marketing rights practically valueless.)

2.6.3 To the extent that broadcasters hold exclusive — original and/or derived — rights in their television programs, the opportunities for marketing the latter by way of pay-television, pay-cable and similar communication channels will diminish in so far as the programs in question have been privately recorded by potential customers during the earlier broadcast.

2.6.4 Even if a broadcasting organization has no exclusive rights in its own productions as far as exploitation for purposes other than broadcasting is concerned, the fact that it is the producer and the owner of the material will often enable it to obtain the right holders' agreement to marketing of the program in any or all of the above-mentioned ways. In sharing the overall revenue with the right holders, due regard will normally be paid to the broadcaster's immense investment, which will be reflected in an adequate share of the total amount of royalties available for distribution. Again, the chances of offsetting some of the production costs in this way would be lessened if the program has already been recorded at home by a large number of otherwise potential customers.

2.6.5 The problems mentioned above are aggravated by the fact that through off-air recording private individuals can constitute personal sound and video libraries of considerable size, which lend themselves not only to frequent repeated use during normal broadcast hours and thereby deprive broadcasters relying on advertising revenue of potential listeners or viewers of their current broadcasts, but which may also be lent to friends and acquaintances and thereby further increase the potential damage to broadcasters.

2.6.6 The negative effects mentioned are still essentially a national matter. However, where cable distribution of foreign broadcasts has already assumed major proportions (e.g. in Belgium and the Netherlands), the problem takes on an international dimension. With increasing cable penetration and especially with the advent of direct broadcasting satellites towards the second half of this decade (already definite for France, the Federal Republic of Germany and the United Kingdom), the negative effects described will be multiplied and become truly European-wide.

2.6.7 In summary, off-air recording affects the financial interests of broadcasters and causes them financial losses just as in the case of other right holders. This principle having been established, it remains to be decided what the broadcasters' equitable share in overall remuneration for right holders should be; and this decision can only be taken in full knowledge of the facts on a case by case basis.

2.7 Finally, it may be noted here that, speaking in more general terms, the report on the meeting of the WIPO/Unesco Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs (Geneva, February 21 to 25, 1977) likewise recognized that the dissemination of videograms and the ease of reproduction are "prejudicial both to performers and to producers of phonograms and *broadcasting organizations*" (emphasis added). The experts were therefore of the opinion that "considerations of equity justified the provision by national laws for participation by the owners of neighboring rights in the proceeds of the global compensation."

International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM)

International Confederation of Societies of Authors and Composers (CISAC)

Private Recording in the Home

1. In the last few years, of all the innovations with which technology has enriched the use of works of the mind, there is none which is more important or of greater consequence than that what is bashfully termed "private recording in the home."

Whilst, in general, the other means which have changed the conditions whereby works are disseminated (cable television, satellite transmission) only affect, in spite of the problems they pose, the exercise of authors' rights and the calculation of their remuneration, private recording, by its very nature and by the results which are inevitable from its development, tends to radically alter the exploitation of cultural goods as well as the fundamental links which make the existence of creators depend on this exploitation.

The theoretical and practical basis on which for more than a century and a half rests the system whereby society created copyright in order — as is said in the United States Constitution — to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" is the possibility given to the author to control the *access* by any third party to his work as well as the *utilization* which can be made by the latter. If this possibility were lost the entire system would collapse, including the benefits which one would have expected.

But what does "private recording in the home" imply? It implies firstly the uncontrolled and uncontrollable access to any work featuring in a television program by any person in possession of a video recorder (and one knows that these machines, whose cost is relatively reasonable, are sold by the million worldwide). It implies furthermore the impossibility of controlling the effective utilization of the recordings made, for private *recording* does not necessarily mean private *use*. If one generally begins by personal use, one then shows the recordings to one's friends on one's television and then one lends them; often friends reproduce them and, if some among them go so far as to sell them or to hire them out, it would be very difficult to discover the fact and prove it.

It is clear therefore that a new means of utilization is thus established and will develop increasingly or, to put it more correctly, a parallel means of utilization which seriously affects the normal exploitation of works, disturbs the market and causes considerable prejudice not only to creators but also to performers, to producers and even, to a certain extent, to broadcasting organizations although the latters' resources, whether they come from State taxes or advertising, are not directly linked to the contents of the programs.

Is it normal, equitable or quite simply conceivable that the exercise of all these professions be upset, that the benefits of some be diminished, that the economic and social conditions of others be compromised without any remedy, appeal and compensation?

With the exception of one single country which we will deal with later (and of another which, more recently, followed the example of the first although in a somewhat different way), this question is asked today in the whole world. Everywhere lawyers, experts and governmental circles themselves have understood belatedly — but one knows that law is always behind the facts — that a solution had to be found and with more or less haste and goodwill they are seeking to find it.

2. Quite naturally, here and there, specialists and officials have started by examining the problem in the framework of the laws in force nearly all of which — both nationally and internationally — contain provisions permitting the restraint of right of reproduction and the regulation of the conditions for its exercise.

However one had to recognize quickly that none of the restrictions foreseen (which one could apply for better or for worse — and often arbitrarily — to reprography or to so-called "educational" use) was able to encompass a phenomenon of such width and range as in the "private" recording of sounds and images.

Let us take, by way of example, three of the most frequently invoked texts: Article 9 of the Berne Convention, Article 41 of the French Law of March 11, 1957, and the "fair use" doctrine codified by Article 107 of the United States Law.

Article 9 of the Berne Convention, after establishing (paragraph (1)) the exclusive right which authors have to authorize the reproduction of their works in any manner or form, provides (paragraph (2)) that it shall be a matter for the 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."

A mere reading of this text shows that it can in no way concern private copying as it exists presently. These are "special cases," it is said. Can one talk of special cases in respect of a practice which has become current and is becoming more and more generalized? "Does not conflict with a normal exploitation of the work." The least degree of objectivity enables one to assert the contrary. "Does not *unreasonably* prejudice the legitimate interests of the author." We have taken the liberty of underlining the word concerned because, if it is impossible to contest the actual prejudice, some may wonder whether it is not really a matter of reasonable prejudice. But reasonable by what standard? For social reasons? For the interest which society might have for the free disposal of works? But this is a formal contradiction with copyright philosophy which was previously mentioned, as in the formula of the Constitution of the United States. The "reasonableness" would amount to denying this philosophy and thence to calling in question the very existence of copyright. Nobody, up until now at least, has dared to go so far.

Article 41 of the French Law is also open to discussion. It provides in fact (paragraph 2) that the author may not prohibit "copies or reproductions reserved strictly for the private use of the copyist and not intended for collective use." This raises several questions. Firstly, who is the "copyist"? In the event, it can only be the possessor of the copying machine. The usage he will make of his recording himself and in a private capacity is therefore free. But what exactly should be understood by "private use"? We have seen that in the area of audio and visual recording private use rarely remains personal. But the law explicitly prohibits any "collective use." That is to say that the fact of making or showing one's recordings even to one's friends — which is nearly always the case — is outside the law.

It follows that this provision, which was initially aimed at graphic copies made by hand or with the help of a typewriter, can in no way apply, even by stretching the wording, to the "audiovisual copy" of a film or a television broadcast.

A more complex matter is the thorough interpretation of *fair use*.

One is concerned here with American case law construction which has applied it for a long time with laxity when it wished to exempt a particular use from the copyright obligations. The notion has been introduced into the legislation as from 1976 and is to be considered in the light of four criteria: the purpose of the use (for educational or commercial ends), the nature of the work, the substantiality of the portion used, and the effect upon the potential market of the work or its value.

In a recent decision (October 19, 1981) the Ninth Circuit United States Court of Appeals, reversing a judgment previously given by the California District Court in the *Betamax* case, clearly affirmed, after a detailed analysis of the provisions of the law, that "the fair use doctrine does not sanction home video recording."

It would be superfluous to recall this analysis here. Let us simply remember that as regards the first factor (purpose of the use) the Court said: "The statute contrasts commercial and non-profit educational purposes, and there is no question that the copying of entertainment works for convenience does not fall within the latter category"; as regards the second (nature of the work): "Public interest can be concerned as regards the free circulation of informational type works but for works of entertainment the interest of authors must predominate"; as regards the third (substantiality of the portions used): "It cannot be invoked when it is a matter of reproducing whole works"; and as regards the fourth: "It is clear that the infringing activity tends to prejudice the potential sale of appellants' works."

What can one deduct from all this? That no actual law, whichever way one looks (other than the two exceptions mentioned earlier), contains what is required to enable an overall solution of the problem posed by the continuous and irreversible development of private recording in the home. One can discuss interminably the notions of special cases, of private usage by the copyist or fair use, but it will not facilitate the solution at all. One must therefore — and it is the direction in which almost all countries are heading — resort to new legislative provisions.

3. There is, as has been mentioned earlier, one country ahead of the rest of the world on this issue where the matter has been dealt with for the last fifteen years: the Federal Republic of Germany.

In 1965, at a time when private recording only involved sound reproductions by tape recorders or cassettes, the German Parliament, on the passing of the new law on copyright and neighboring rights, introduced into its legislation a completely new provision which is considered on both theoretical and practical grounds to be the only equitable and effective solution.

Hence the double provision in Article 53 of the Act dated September 9, 1965, whereby, on the one hand, "it shall be permissible to make single copies of a work for personal use" (paragraph 1) and, on the other hand, "the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions" (paragraph 5).

Originally, this provision was criticized in many countries. Lawyers, mostly reasoning *in abstracto*, talked of suspicion of motives (any purchaser of a

tape recorder is considered as a potential infringer), of a transfer of responsibility (from the person who acts in breach to the person who simply creates the possibility for it to be committed). In theory, all this can be supported but it remains the case that in fact the system instituted by the German legislator — even if he has shown himself to be more pragmatic than strictly legal — is the *only one* which permits a solution of the problem.

One can find proof in the fact that the majority of countries, having for a long while hesitated, reflected and searched in vain for other formulas, have gradually decided to come round to the same view.

One should mention Austria which, by the Law dated July 2, 1980, has adopted — unfortunately by means of a compulsory license — a system which imitates the German one.

The situation therefore seems to be in a state of evolution everywhere.

In France, Great Britain, the Scandinavian countries and Italy similar drafts are being prepared. Even in the United States, a country of radical solutions, even if it is true that, two days after the judgment of the Court of Appeals mentioned earlier and which held the manufacturers and importers of machines liable, two senators have proposed a draft law aimed purely and simply at exempting private copying from the application of copyright rules, other senators immediately proposed an amendment combining this exemption with the establishment of a royalty on the sale of machines and the recording material, a royalty which would also be in the form of a compulsory license.

4. However if one can observe a general tendency towards the adoption of the German system, there remain several points for consideration on which there do not appear to be unanimity: the nature of the royalty, its basis of calculation, its means of evaluation and its purpose.

Norway, for example, has recently passed a law putting a public law *tax* on the various recording machines which is destined to supply a fund for the benefit and aid to Norwegian authors and artists. It is clear that this can be of national benefit but it has strictly nothing to do with the compensation to be given to the copyright owners of works reproduced in exchange for the freedom to make such reproductions.

In logic and in equity this compensation should take the form not of a tax but a *royalty* due to owners of copyright (and neighboring rights) by virtue of a mechanism similar to the grant of an authorization. (In fact it is a matter of a grant for renouncing the right of authorization.)

What should this mechanism be? There are several possibilities.

In the first place we shall discard the statutory license, a simple and easy solution, reassuring in the opinion of some in that the rate is fixed once and for all, either by law or, as suggested by the proposed American amendment, by a State organization (in fact the Copyright Royalty Tribunal). Authors' organizations are in principle repelled by State interventions — which moreover, as the Copyright Office has found out, sometimes encounter difficulties.

In the Federal Republic of Germany, the royalty, whose rate is freely agreed between the parties, cannot exceed a given maximum which furthermore in practice is not reached. In the Nordic countries, there is a system as regards photocopying called "statutory license by negotiation" according to which the totality of the interested parties (organizations representing authors, publishers and the press on the one hand, and, on the other, libraries, training and education institutions, etc.) freely come to an overall agreement which is applied, by virtue of the law, to all the members of the professions involved without there being any possibility of individual claims.

In the final analysis, it is not impossible that an analogous system could be applied to home recording. The essence of the matter is that the beneficiaries can discuss absolutely freely and that they should have total control of the collection and distribution of royalties coming from the agreements.

The question remains of the basis on which such royalties will apply. The German Act only applies to the machines. In other countries it is thought preferable to consider the material (blank tapes and cassettes). Finally others consider — which appears logical — that the royalty should apply equally to both. The answer to this question requires flexibility.

5. What can we conclude?

We do not think that we can do better than sum up by enumerating the ideas which we have expressed and which we submit to the wise reflection of Governments:

(a) Private recording is for authors, and for all those who live by the exploitation of works, a threat jeopardizing the future of their professions.

(b) This threat, ultimately, imperils creation itself.

(c) Justice as well as caution require, given the impossibility of directly applying copyright rules, that there be established a system which enables them to be applied indirectly in a manner so as to deviate from them as little as possible.

(d) And it is important not to forget time, time which goes by quickly, and that legislations all too often lag behind it.

Let us hope that in the world as a whole one shall take care to act before it is too late.

International Copyright Society (INTERGU)

Reproduction Right of Authors of Literary and Artistic Works in Case of Reproductions for Personal Use

Erich SCHULZE *

I. Convention Right

Authors of literary and artistic works protected by the revised Berne Convention (Paris Act, 1971), according to Article 9, paragraph (1), possess the exclusive right to the reproduction of their works, and it makes no difference in what manner and in what form this is done. It can be done manually, it can be reprography as well as audio or video technique. Paragraph (3) of Article 9 states expressly that any sound or visual recording shall be considered a reproduction for the purposes of the Convention. In paragraph (2), however, it remains reserved to the countries of the Union to make exceptions to the exclusive right of reproduction, provided that this does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The ruling in the Universal Copyright Convention (as revised at Paris on July 24, 1971) is similar. Article I compels each Contracting State to protect the rights of the author adequately and effectively. Article IV^{bis}, paragraph 1, adds that the rights provided for in Article I are those which ensure the economic interests of the author and include, in particular, the exclusive right to authorize reproduction by any means. Paragraph 2 permits exceptions, provided they do not conflict with the spirit and provisions of the Convention. If a Contracting State applies the licit exception, it shall nevertheless assure that a reasonable and effective protection of the author remains, despite the exception.

Since technology has enabled the individual to make reproductions himself which are qualitatively equal to commercially reproduced copies of the work, it would be incompatible with the Convention right, if the countries members of the Berne Union or the Contracting States of the Universal Copyright Convention wished to assume that protection of the private sphere prevents remunerating the authors of literary and artistic works for such reproductions.

For it is evident that the normal exploitation of the work is adversely affected (Article 9(2), revised Berne Convention). Whenever a private individual buys gramophone records in a shop, for example, he pays for the remuneration to the authors of the works on the sound recording within the purchase price of the gramophone record. If instead of this he uses a tape recorder and re-records on a blank cassette works broadcast by radio or those recorded on a borrowed gramophone record, the authors must under no circumstances remain uncompensated.

Since until now the private sphere has been generally exempted from copyright claims, the Federal Court of the Federal Republic of Germany in Karlsruhe attracted considerable attention with its decision that claims could be filed for private tape recordings of works protected by copyright. The subsequent legislation in the Federal Republic of Germany finally placed the manufacturer and importer under the obligation of remuneration.

II. Legislation in the Federal Republic of Germany

1. If it can be expected from the nature of a work that, when broadcast, it will be recorded on video or sound recordings for personal use or that the same purpose is achieved by the recording from one video or sound recording to another, the law provides for such cases for the right to claim a remuneration from the manufacturer of the recording equipment. In the case of audio, one reckons particularly with musical works; in the case of video, works of music, literature, and cinema.

Since the remuneration has to be paid for all equipment marketed in the area covered by the law, including imports from abroad, the importer is jointly and severally liable along with the manufacturer.

Point of reference for the claim to remuneration is the equipment which is objectively suitable for such purposes. Its objective suitability causes the legal presumption that the equipment will really be used according to its applicability. Even the person who is not now interested in using the equipment for re-recording acquires, for the copyright royalty included in the purchase price, an equivalent in the form of such a potential use; this would benefit him in case he later wants to sell the equipment or change his intention regarding its use. It is unlikely that equipment suitable for private re-recording would never be used according to this suitability in its entire operational life. Consequently, the statutory remu-

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neration is due regardless of the extent of the equipment's private use.

As far as the amount of the remuneration claim is concerned, the law provides that the sum total of the claims to remuneration of all beneficiaries (copyright and neighboring rights) must not exceed 5 % of the sales proceeds.

Since the legislator wanted to avoid an infinite number of claims for small and trifling amounts, it reserved the presentation of the claims to remuneration solely to the collecting societies. To simplify the administration, the collecting societies responsible for this field of activity have jointly set up a civil law association under the name ZPÜ (*Zentralstelle für private Überspielungsrechte* — Central Office for Private Re-recording Rights), whose business is conducted by the GEMA (the German society for the administration of copyright). The fact that the legislator restricted the claim right to collecting societies does not mean that nonmembers are deprived of their rights. They cannot present their claims directly to the manufacturer or importer, but the collecting societies are liable to them. In order to receive the maximum amount of 5 %, these societies attend to relieving manufacturers and importers from the claims of third parties. Therefore, every nonmember is free to request a reasonable share of the remuneration from the collecting society which is relevant for him according to his area of activity. This question is only of theoretical importance, since practically all beneficiaries probably belong to the existing collecting societies.

2. Up to the present, the ZPÜ has had a total turnover of around 229.2 million DM from private use in the audio and video sector. This amounted to around 39.1 million DM in 1981, of which around 22.9 million DM came from the audio sector and around 16.2 million DM from the video sector.

The ratio of participation of the collecting societies is arranged so that, in addition to reimbursement for management costs, GEMA receives a share of 42 %. Distribution by GEMA is made in such a manner that 75 % of the reproduction rights are distributed yearly with the royalties collected from broadcasting and 25 % with the royalties collected from the gramophone record industry every year.

Despite the lack of material reciprocity, foreign countries participate in the same manner in the payments made by GEMA.

3. Doubt has arisen, however, whether the levy on equipment is the best solution. In the audio sector, namely, we have seen that equipment has become increasingly inexpensive, sales have decreased, but sales of blank cassettes have grown noticeably. In view of the expected rise in demand, the situation will be no different in the video sector. Increasing the levy on equipment could have a prohibitive effect. The idea therefore suggests itself that a remuneration should be introduced on every blank sound and video recording medium, in addition to the remuneration on each piece of equipment.

4. Unlike the situation in the Federal Republic of Germany, Austrian law subjects the blank tape cassettes to royalty. The remuneration which has to be paid by the person who first brings out the recording material commercially on the home market is not fixed in amount. As in Germany, claims can only be presented by collecting societies. In this regard, the Austrian legislator has provided that, when fixing the remuneration, particular attention must be paid to the playing time. If the collecting societies and business cannot agree, an Arbitration Board can be called upon, where the authors are unfortunately underrepresented. One doubts, therefore, that the Austrian provisions will lead to better economic results for the culturally creative (this author in "Österreichische Urheberrechtsnovelle ein Modell?" in *Film und Recht* 1981, No. 2).

5. In addition to the German and Austrian provisions, there is also the one designated by the Commission of the European Communities (EC Document R/2982 (AG 67) published as Annex 6/77 to the Bulletin of the European Communities). This alternative should be given preference. Within the framework of its activity in the cultural sector for the harmonization of copyright and neighboring rights, the Brussels Commission has suggested a percentage participation in the sales price of equipment (photocopying machines, tape recorders, video recorders) and sound recording material (copying paper, recording tapes). In the case of reproduction equipment employed in large numbers in libraries, universities, etc., the Commission is of the opinion that the remuneration to be paid with the purchase or rental price could be supplemented by a regular utilization fee. At the same time, reference is made to reprography.

It is a fact that self-service copying shops offer not only blank cassettes, but also all possible tools for unlimited photocopying practice. Writers in the Federal Republic estimate that 200 million "pirate copies" are made from their books each year.

Up until now a just statutory provision has been found in the Netherlands by introduction of the remuneration obligation. Libraries, universities and governmental offices pay ten cents per copy of a text page. For educational purposes in schools, the fee is reduced to 2.5 cents. In France, a solution has been found in connection with the tax legislation (Decree of June 8, 1976, No. 76 501, and Decree of June 11, 1976, No. 76 514). Manufacturers and importers of

photocopying machines are obligated to pay to the tax authorities not only the value-added tax but also a special levy of 3 % of the sales price. The revenue from this levy is provided to the *Centre national des lettres*, which in turn gives it to public libraries for the purchase of new books. The claims of the individual author come off badly, however, as regards the distribution. In Denmark, the tax office pays the Union of Authors 0.08 DKr for the schools for each text page. For the previous period up to July 31, 1980, 10 million DKr have been paid in remuneration.

6. The draft bill of the Federal Ministry of Justice of the Federal Republic of Germany, of September 8, 1980, is intended to take into account the considerably altered conditions since the Copyright Act of September 9, 1965, was passed. New techniques in the field of reprography have led to an extraordinary increase in reproductions of works protected by copyright. According to various studies, the number of reproductions of copyright works lies somewhere between two and five billion. Even the number of two billion would far exceed what the legislator wished to leave royalty-free. Photo-mechanical reproduction has reached such large proportions that one must speak of a new type of utilization of copyright works. The reproduction of sound and visual recordings, in particular the re-recording of radio broadcasts on blank cassettes, has developed to an extent that could not be foreseen at the time of the 1965 Act. In fact, a market survey shows that 60 % of all German homes own at least one cassette recorder. This explains the high sales-volume of blank cassettes: in 1979, around 100 million items. 95 % of them are estimated to be used for recording of radio broadcasts and the re-recording predominantly of gramophone records. Freedom of reproduction should therefore be further restricted in the future and the obligation for remuneration extended. This includes that the reproduction of printed musical works and the essentially complete reproduction of a book, a newspaper or a magazine is to be permitted only with the authorization of the beneficiary — unless rendered in handwriting. The draft bill also provides that the operator of a copying machine shall be obligated to pay the fee for photocopies of copyright works, made by him or authorized by him, to be made on his machine. The claim for remuneration can only be presented by a collecting society.

In the case of the reproduction by sound and visual recordings, the equipment levy will continue to apply, but in fixing the equipment levy, appropriate consideration will be given to the greatly increased recording volume caused by blank cassettes. This remuneration claim can also only be presented by a collecting society.

The draft bill under discussion has been prepared by the Federal Ministry of Justice of the Federal Republic of Germany. The final form of the governmental draft bill depends on whether the opinion held by this author prevails; i.e., that one should take into account the greatly increased volume of reproduction which has taken place since blank cassettes have come into existence. This can be done by the introduction of the remuneration obligation for blank cassettes in addition to the levy on equipment.

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In conclusion, it can be stressed that copyright must keep pace with technical development. Industry is certainly entitled to make a profit with its products. But who really wants to deprive a creative individual of the same right? Without the possibility of exploiting one's own intellectual property, technology is of no use.

International Federation of Associations of Film Distributors (FIAD)
International Federation of Film Producers Associations (FIAPF)

Problems Arising from the Private Copying of Audiovisual Works

Article 9(2) of the Berne Convention makes it a matter for legislation in the countries of the Union to permit the reproduction of literary and artistic works protected by the Convention 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.

The International Copyright Committees, meeting in Subcommittees, commented, after initial study by a working group, that these provisions had been drawn up at a time when private copying bore no similarity to the situation that had resulted from the fact that most homes were now more than adequately equipped with apparatus permitting both sound and audiovisual recording.

The basic difficulty resides in defining the area of private use and in the absolute necessity of deciding on the means of compensating the owners of the rights.

The Subcommittees were of the opinion that the introduction of a once-only, lump-sum levy on recording equipment and blank recording mediums would be capable of attenuating the losses suffered by the holders of rights without, however, meaning that they would be deprived of their normal exercise of such rights.

FIAPF and FIAD wish to emphasize the extreme seriousness of the damages resulting from the growing number of copies of cinematographic works for private use.

Private individuals are technically capable of copying not only cinematographic works published on videograms (videocassettes and videodiscs) hired or sold through the trade, but also the very large number of works put out by the broadcasting organizations and by the cable system operators.

It is to be assumed that, gradually, video recording and playing equipment will become the companion to the television set.

Already now, the manufacturers' advertising campaigns emphasize the possibility which viewers have with such equipment to adapt the showing times of works emitted by the broadcasting organizations by storing them and watching them at a later time.

Certain newspapers that give the television programs regularly publish labels bearing the titles of films that are being broadcast. The purpose of these labels is for them to be stuck on the private copies made on videorecorders.

This proves that private copying has indeed become an accepted fact, at least as regards those films which, by far, are copied most frequently by viewers.

It is symptomatic that the newspapers concerned do not publish labels for television films or any other broadcasts.

Video copying for private use of cinematographic works is going to have an increasingly serious effect on the distribution of films in three areas:

1. In that of exhibition at cinema theaters.

Although it is usual to wait for a film's career in the cinemas to have finished before assigning the distribution rights to a broadcasting organization, it is nevertheless not unusual for a popular film to have a renewed success in the cinemas some years after it has been shown on television.

The possibility of such "second showings" will be definitively lost when it is possible for the cinematographic work to be copied by a large number of viewers when first shown by a broadcasting organization.

2. In that of broadcasting itself.

Frequently, a broadcasting organization shows the same film a number of times over a certain period. For the reasons given in the preceding paragraph, this possibility is likely to disappear.

3. In that of videogram distribution.

It will be practically impossible to hire out or sell videocassettes or videodiscs of a film where this has been already copied on videogram by a large number of viewers when shown by a broadcasting organization. This situation is liable to compromise the amortization of the very considerable investments called for by cinematographic production and it is therefore the very continuation of cinematographic creation that is at stake.

The introduction of a compensatory levy on the copying equipment and the blank cassettes can only be considered a makeshift measure in the current state of the art.

In addition, this levy must not appear to be the counterpart of a right of reproduction for private use

afforded to private individuals but only as a practical solution permitting the damage caused by the existence of this situation, which is in fact no more than a tolerance, to be attenuated to some extent.

In this context, the Subcommittees very rightly emphasized that, "although this levy was intended to offset the consequences of private use, it should not be taken as meaning that the various persons concerned would be deprived of the normal exercise of rights which they might be recognized as having by international conventions and national laws and contracts, to the extent that such exercise was possible."

The Subcommittees referred to the provisions adopted in the Federal Republic of Germany as regards a levy on the recording equipment, but experience has shown that, although this solution is very interesting from the point of view of principle, it has turned out to lack effectiveness in its practical implementation.

In order to be effective, it would have to be combined with a levy on the blank cassettes also, as had in fact been recommended by the Subcommittees themselves.

In this context, it should be noted that the new Austrian copyright law introduces a levy on blank cassettes.

The recording equipment may be used to copy not only cinematographic works in which the rights belong to film production and distribution undertakings, but also television films where rights may belong to the broadcasting organizations or the retransmission of theatrical and musical works.

There will therefore be a problem of distribution of the proceeds of the levy between a number of professional groups.

It would therefore seem that collective management bodies will have to be set up by the members of each branch concerned.

These bodies could act together to carry out an initial distribution by branch of the proceeds of the levies.

It would then be for each collective administration body to carry out the second level distribution between the right owners represented by that body.

As regards the first stage in the distribution, that is to say the distribution between branches, market studies could probably enable the relative size of the various categories of works or of information copied by private individuals for their private use to be determined.

It is further indispensable that the lawmaker clearly define the limits of private use, thereby excluding both the sale and the exchange of works recorded on videogram by private individuals and, of course, their distribution outside the private circle.

In this context, reference to the concept of personal use would be highly desirable.

Finally, mention must be made here of a tendency, which has made an appearance in certain countries, towards the introduction not of a levy whose proceeds would be distributed amongst the holders of the rights in the copied works but of a fee flowing into a fund which may serve to finance activities under the cultural policy of the State with an aim to assist creation.

A solution of this type would not comply with the aim pursued, which is that this new mode of exploitation of works should, to some extent, compensate what Article 9(2) of the Berne Convention refers to as conflict with a normal exploitation of the work and unreasonable prejudice to the legitimate interests of the author.

Private copying has already taken on considerable dimensions and will expand much further yet in the forthcoming years. It is therefore important that copyright should be remunerated through this new form of exploitation of works.

(WIPO translation)

International Federation of Actors (FIA)
International Federation of Musicians (FIM)

The Problems of Private Copying — Seen from the Standpoint of the Performers

1. It is the particular characteristic of musical and dramatic works that they come to life when they are first performed. They can then, however, be recorded and reproduced without limitation in space or time. This means that not only the works themselves but also their interpretation and reproduction are available for unauthorized and uncontrolled use and for further copying. The private recording of discs or of excerpts of broadcast music are examples of such uses which have become uncontrollable. The same development is now becoming evident in the field of videograms; broadcast television and radio programs and recordings borrowed from friends, public libraries and clubs are the largest single source of home recordings. Therefore, the expression "private copying" is misleading. Market research has shown that in the industrialized countries, audio recorders and blank cassettes are to be found in two-thirds of households. In Japan, one in ten households already houses a video recorder also. These new technical means are increasingly taking over the function of conventional phonograms and this is likely to become true of audiovisual recordings. Use is made without payment of both music and audiovisual recordings and broadcasts; neither the copyright owners nor the performers concerned are paid for the utilization of their work, while producers of phonograms and videograms suffer loss. In this regard it makes no difference whether copying for private use is permitted or forbidden by law. The phenomenon is the same in all countries, irrespective of the relevant legal situation. Copying takes place in any case. Anyone can set up his own music library and now, with the appearance of video recorders, his own film library also. Few of those who are doing this are conscious of the fact that they are injuring others. Once people have become accustomed to something, it is regarded as normal. Perhaps in those cases where someone hides a recorder under his coat to make a recording in the concert-hall, there is some consciousness of unlawful behavior. On this point, most existing national laws are at one that such recording without consent is not permissible.

But in relation to such recordings made privately at home from discs or broadcasts, a number of legislatures have capitulated before the practical impossibility of control and have established exceptions to the right of authorization possessed by copyright owners. Such legislation, of course, dates from a time when the new technical means of copying were not yet on the horizon and copying for private use was not foreseen as a normal procedure for the use and enjoyment of artistic performances.

The fact is that private copying is today no longer a harmless affair. It inflicts enormous damage upon creators, performers and producers of phonograms and videograms. It has been estimated that the loss caused to the British phonogram industry in 1980 amounted to £ 200 million. Surveys made in Japan have shown that "hit" music is copied privately four or five times as frequently as the corresponding discs are bought. Statistics from the Federal Republic of Germany indicate that writers and composers alone are suffering an annual loss of royalties amounting to some DM 80 million.

For the performers there is even more at stake. For them it is not only a matter of a loss of residual payments or royalties which they would receive in respect of the sale of phonograms and videograms, but their profession itself is endangered. Products of the media and music industries are visibly supplanting the professions of performers. Their further personal performances are no longer required when their artistic productions are available more cheaply and more easily in "canned" form. Of equal importance, however, is the fact that the losses of the phonographic industry, due to the fact that private recording is primarily in the sector of the most successful popular records, results in their being less willing and less able to invest in productions which are from the start of limited market appeal but nonetheless may be more important from the cultural point of view. It is a known fact that it is thanks only to the profitable "hits" that the broad spectrum of records can be produced, of which many are unprofitable. Independently of the personal fate of artists who thus suffer under-employment or unemployment, this development is not without its effect upon their profession as a whole and on the cultural life of each country. Uniformity and impoverishment of culture are inevitable consequences, even though they may be less susceptible of measurement and quantification than are the material losses.

2. What are the solutions to the problems which home copying creates for copyright owners, performers and producers of phonograms and videograms? One thing seems certain: private copying cannot be prevented. But does this mean that those who are injured by this must simply resign themselves to this situation?

The most obvious solution is that payment be made to copyright owners, performers and producers for this new utilization of their work. Systems which were tried out in the Federal Republic of Germany and in the United Kingdom, under which private users were required to obtain licenses, were shown to be impracticable. The only practical solution so far proposed in the discussions on the international level is that of a levy on blank tapes and on the recording equipment ("hardware"). In 1977 a Working Group, established by Unesco and WIPO on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs, expressed the opinion that not only copyright owners but also performers, producers of phonograms and videograms and broadcasting organizations should receive compensation for home copying (Document UNESCO/WIPO/VWG/1/7). The same recommendation was made by the Intergovernmental Committee of the Rome Convention (1961) at its meeting in October 1979, following the recommendation of a Subcommittee (Document ILO/UNESCO/WIPO/ICR. 7/11). The 10th Ordinary Congress of the International Federation of Musicians, meeting in Geneva in May 1980, directed its Executive Committee to try by every means open to it to secure the establishment of a levy on blank cassettes and recording machinery. The same policy is followed by the International Federation of Actors. The organizations of copyright owners and of producers of phonograms and videograms are also making every effort to the same end.

The Federal Republic of Germany was the first to legislate on this matter and introduced, as early as 1965, a levy on the hardware, though not on blank tapes. A substantial reduction in the sale price for recorders led to an unexpected increase in the quantity of private copying, while at the same time income from the levy diminished. The object of the legislation was far from being achieved and efforts were begun to extend the levy to blank tapes also. In Austria a levy on blank tapes was introduced in 1980 and Hungary is now preparing similar legislation. What is common to the solutions in these three countries is that the levy on the hardware or on blank tapes has been imposed within the framework of copyright and neighboring rights legislation, thus making it possible for payment to be made to copyright owners, performers and producers of phonograms and videograms whose works and performances are utilized in this new way.

A different concept forms the basis of the solution chosen in Norway. In that country the State took powers in 1981 to introduce a tax on blank tapes and/or recorders. The income from this tax goes to the State, which is free to determine the uses to be made of it.

3. A variety of arguments has been advanced by a number of interested parties against the introduction of a levy on tapes or hardware. It has been said, *inter alia*, that such a levy would be socially unjust as it would affect mainly the young. Moreover, blank cassettes and recorders are used for purposes other than the copying of discs. The levy would lead to a disproportionate increase in prices and its effect would only be that the successful "stars" would become even richer while those copyright owners and performers who particularly needed the additional money would receive nothing. It is also claimed that the introduction of a levy and the distribution of the proceeds would require large-scale and expensive administrative machinery and, in accordance with international obligations, the greater part of the income — particularly in countries with little domestic production — would be transferred to foreign countries with no comparable amount of money coming in.

The following can be set against these arguments. It strikes one as odd that the criteria applied to artistic performances should differ from those applied to other commodities in respect of which there is no question but that the consumer should pay for them. This may be because the consumer, enticed into private copying by the equipment available on the market, fails to appreciate that, at bottom, he is making use of other people's works and performances. It should, however, be mentioned that in the case of video the number of "innocent" uses of recorders and tapes is probably greater than in the case of audio. With respect to the distinction between the use of cassettes and recording equipment for home recording and their use for educational purposes or as aids to the handicapped, ways could easily be found of exempting tapes and equipment from the imposition, whether by the authorization of special suppliers or by a retrospective refund of the levy. The assertion that the collection of the levy and its distribution to those entitled would require a disproportionately large administrative machinery, is unfounded. In every country, there already exist institutions for the administration of copyright and in many of them organizations for the administration of performers' rights and those of phonogram producers. These organizations are in a position, with little additional expense, to undertake the administration of a levy on blank tapes or hardware. The arguments which should not be underestimated on the political level is that the greater part of the money

would go to the "stars" who need it least, or that much of the compensatory funds would in any case have to be sent abroad.

4. The national examples given in paragraph 2 indicate that there are two possible legislative methods of introducing a levy on blank cassettes or hardware. The first corresponds to the Norwegian model, namely the imposition of a tax. Under this method, individual copyright owners, performers or producers are not entitled to payment. It is not a question of a payment for the utilization of protected works and performances but of a tax payable to the State. The money goes directly into the coffers of the State and it is the State which determines the use to be made of it. Under this approach, the money certainly remains in the country in question. But such an arrangement can in no way be approved if the income from the levy is diverted to meet general governmental expenditure or to replace State subsidies to the Arts. As has already been said, home copying causes substantial damage to the interests of copyright owners, performers and producers of phonograms and videograms. Accordingly, the levy must be used for the benefit of those so affected. It must be so used as to meet their special requirements.

The other possible system is based upon copyright and performing rights or, more accurately, on the reproduction right of copyright owners, performers and producers, according to which neither a phonogram nor a videogram may be copied without the consent of the right owners. As the enforcement of such a right is impracticable in the private sphere, levy is imposed in the first instance on the tapes or the hardware. In juridical terms, this represents payment for the potential utilization of protected works and performances. Moreover, in those countries in which performers and producers have no individual reproduction right, it is essential on grounds of equity that they be among the beneficiaries of the levy on blank cassettes and recorders as they suffer no less damage than do the copyright owners in consequence of private copying. This view was indeed stated by the Unesco/WIPO Working Group already referred to (Document UNESCO/WIPO/VWG/1/7).

5. The reluctance of some governments to legislate for the imposition of a levy may well be due to a preference for a solution achieved by contract between the parties concerned. We too would prefer a contractual solution if that were possible. Moreover, it seems to us highly likely that any solution so achieved would in practice be closely analogous to a levy system but with the additional advantage that contracts are more easily varied than is legislation and would so offer greater flexibility in relation to technical innovations or changes in the economic situation. There would be less reason to fear being overtaken by new circumstances as was the experience with the regulation in the Federal Republic of Germany. Changes could be met by new negotiations.

The contractual possibility is suggested by the considerations upon which was based a recent legal judgment in the USA. The basic principle underlying the judgment of the US Court of Appeals, Ninth Circuit, on October 19, 1981, in the case of Universal City Studios Inc. and others v. Sony Corporation of America and others was that it is unlawful, without the consent of the right holders, to copy, even domestically, recorded performances or broadcasts. Thus, whoever does this is accountable and liable to damages. The producers, importers and sellers of home-recording equipment were also held to be liable as they contribute to such unlawful acts by their provision of the necessary material, advertised and sold primarily for the purpose of home copying. The same reasoning applies to the manufacturers, importers and sellers of blank tapes, as is illustrated by the growing practice, particularly in Japan, of combining in a single transaction the sale of blank tape and the short-term rental of phonograms. As it is impracticable to bring before the Courts the individual persons undertaking private copying, the judgment means that the right holders would content themselves with proceeding or threatening to proceed against the "accomplices."

The US judgment, however, affirmed the rights only of copyright owners. An absolute prerequisite of a contractual solution, which would be just to all the parties in fact concerned, would be not only the legal recognition of the unlawfulness of domestic copying but also the possession by the performers of that right of control over uses of their recorded or broadcast work recommended by the 21st General Conference of Unesco in 1980. Without this, there would be no equality of bargaining power among the parties concerned — an equality which is essential if negotiations are to result in contracts equitable in relation to all the parties whose vital interests are affected. The same principle applies equally to producers where these have not yet obtained such a right.

Given these prerequisites, the manufacturers, importers and sellers of the hardware and the blank tapes would need to negotiate with the organizations of copyright owners, performers and producers over the quantum and manner of payment of damages (or license fees) to legitimize their trade. In the absence of agreement, the Courts would still be available. In the course of such negotiations it would in our view inevitably become clear that the problems of quantification, collection and payment would be solved only by a system involving a regular payment — i.e.

in effect a levy, reflected in the sale prices, on recording equipment and blank tapes.

6. In countries which in principle grant to writers and composers, performers and producers an exclusive right of authorizing reproduction, but have in effect removed this right in the case of private utilization, in accordance with Article 9, paragraph (2), of the Berne Convention or Article 15 of the Rome Convention, it is still possible to say that the producers and importers of recording equipment and blank cassettes could nonetheless be made liable for damages caused to authors and composers, performers and producers by home copying. For the thought behind the above-quoted provisions of the Conventions was that personal utilization (domestic use) is so insignificant that it could not seriously damage the protected interests of the right holders and that therefore there should be no unnecessary interference in the domestic sphere. When, however, private copying has increased to such an extent that such use of protected performances is no longer the exception but the general rule, it goes beyond the provisions of Article 15 of the Rome Convention and is, in consequence, unlawful.

7. The introduction by whatever method of a levy on blank tapes and recorders does not, however, answer all the problems. The question arises immediately how much should be received and by which categories of the beneficiaries. There could be endless arguments about the distribution. While the situation in relation to recordings of music is still relatively simple, one is faced with a whole series of claims in relation to video recordings. Copyright owners will stand upon their long-acknowledged rights. The performers will raise the objection that it is not always a work protected by copyright which is copied but that each private copy makes use of a performance. The producers of phonograms and videograms will assert that they bear the economic risks of production. Film producers and even broadcasters may advance arguable claims in respect of video recording. But what is the weight of each of these arguments?

All attempts to find a mathematically precise method of attribution of the compensation are bound to fail in present circumstances because there is no way of establishing what has been copied and how often. Such an approach is so bedevilled by variables and hypotheses that it is better abandoned. The least contentious and undoubtedly the fairest solution is to share the income from the levy in equal parts among the different categories of beneficiaries.

8. The same problems are met with at the next stage, when the question is the distribution of monies from the levy within a particular group of beneficiaries. Let us take the case of the performers. It has been suggested that the money should be divided in proportion to the sales of the relevant recording. This suggestion is based on the assumption that the number of sales of a record bears a direct relationship to the extent to which it is copied for private use. But such a distribution would have the result, undesirable from a socio-political standpoint, that the rich would become richer and the poor receive nothing. In the long run it would have damaging effects on the professions as a whole, ultimately affecting the leading players also. The levy on blank tapes or on the hardware should be used for the benefit of the profession as a whole. Hence the requirement that at least part of the income should be used for collective purposes. This postulate is all the more justified as there is no way of establishing whose performance has been privately copied or to what extent. Thus a personal claim by a performer for a defined share can in no way be established. The Austrian legislation has already taken this into account. It is there provided that the collecting society which administers the levy must devote the greater part of the income to social purposes. The Austrian collecting society administering performers' rights has gone beyond this minimum requirement and has decided to devote the entire share of the performers to collective uses.

The impossibility of determining what has been copied has in our opinion a further result, at least so far as the performers are concerned. This relates to the treatment of foreign performers. It has already been said that the income stays in the country of collection where the national legislation is based on the concept of a tax. But what is to be done where the individual solution is chosen and the levy based upon the laws protecting performers' rights? In countries adhering to the Rome Convention, would foreign performers not have to be paid their share of the income? In our opinion, the Rome Convention is not breached if it is decided that the income from blank cassettes or hardware shall remain in the country where it is collected and be devoted to collective use, as Article 7 of the Rome Convention guarantees no individual right to individual performers. Moreover, in the absence of identification and enumeration of what has been copied, no demand from a foreign collecting society or on the part of foreign individual performers could be quantified. Thus the fear that a great part of the income would be transferred to foreign countries is in fact without foundation.

Summary

Home copying of audio and audiovisual recordings causes substantial damage to copyright holders, performers and producers of phonograms and videograms. The International Federations of Musicians (FIM) and Actors and Variety Artists (FIA) are of the opinion that payment must be made for this type of utilization of musical and dramatic works, of artistic performances and of recordings of such performances. In the light of the variety of situations described above, it would be unrealistic to hope for a single solution of universal validity. Proposals for the provision of compensation to those damaged by private copying must be related to the circumstances of each individual country. It is conceivable that in countries which are still far from contemplating legislation establishing a levy on blank cassettes and hardware the considerations behind the above-quoted decision of the Appeals Court in San Francisco point the way to a practical solution. By whatever means such a solution may be found, the proceeds of the levy must in every case go to the categories suffering injury, be adequate in amount and be divided equitably among them.

International Federation of Producers of Phonograms and Videograms (IFPI)

Modern technological developments have led to situations never envisaged in existing copyright laws. One such development is simple, inexpensive and readily available magnetic tape reproduction equipment, coupled with inexpensive cassette tapes for use with such equipment. This has led to widespread private copying of phonograms.

1. The Nature and Scale of Private Copying

Since about 1973 IFPI National Groups and affiliates, and other interested organizations, have commissioned surveys to discover the scale and nature of the private copying problem and public attitudes on the subject. The picture that emerges is unambiguous. The scale of private copying is immense and the great majority of the material copied is protected by copyright or neighboring rights legislation.

The following tables contain information extracted from these surveys and other statistical material. The figures are given for a selection of six countries significant for their market size or legislative position.

TABLE 1 *Percentage of Households with Record Playing and Tape Recording Equipment*

Country	% of households with record players	% of households with at least one tape recorder	Date of information
Austria [1]	35 %	40 %	September 1974
France [2]	42 %	37 % (i)	March 1979
F.R.G. [3]	63 %	60 % (i)	April 1978
Japan [4]	N/A	87 %	August 1978
U.K. [5]	N/A	56 %	January 1980
U.S.A. [6]	N/A	48 % (ii)	June 1980

N/A = No information available
(i) = Restricted to cassette players only
(ii) = Percentage of population not households

[1] "Audio Cassettes" — Survey prepared by *Österreichisches Gallup-Institut* for Austro-Mechana, September 1974.

[2] "Works of the intellect protected by copyright — Sound reproduction by tape recorder for private use" — Survey prepared by SACEM, March 1979.

[3] "Recording of Music onto Blank Cassettes" — Survey prepared by *Gesellschaft für Marktforschung* for GVL and German Group of IFPI, April 1978.

[4] Survey on home taping conducted by the Electronic Association of Japan, July/August 1978.

[5] "Tape Recording — Report of a Quantitative Survey". Survey prepared by the British Market Research Bureau for BPI and MCPS, January 1980.

[6] "A Consumer Survey — Home Taping" — Survey prepared by Warner Communications Inc., March 1982.

Clearly the market penetration of the tape recorder is now very high. Table 1 reveals an average of at least 50 % of households have access to this technology and in Japan the figure reaches nearly 90 %. No other means of mass reproduction of protected works has ever achieved any level of availability approaching the figures indicated.

TABLE 2 *Ownership of Pre-recorded and Home Recorded Cassettes*

Country	Replies of those with cassette recorders		Date of information
	Average no. of pre-recorded cassettes owned	Average no. of home recorded cassettes owned	
Austria [1]	4.2	8.5	September 1974
France [7]	1.6	4.2	April 1976
F.R.G. [3]	9.3	14.6	April 1978
Japan [4]	10.0	12.0	August 1978
U.K.	N/A	N/A	—
U.S.A.	N/A	N/A	—

Although the figure for ownership of home recorded cassettes varies considerably from country to country, in all countries surveyed this figure exceeds that for ownership of pre-recorded cassettes, sometimes by a figure of more than twice. Moreover, blank cassettes are re-used so that the total amount of material recorded at home is even greater than these figures indicate. The IFPI surveys show that on average users record each blank tape between two and three times.

TABLE 3 *Nature of Privately Recorded Material*

Country	Nature of Recordings				Date of information
	Music	Spoken Word	Others	Don't Know	
Austria [1]	87 %	—	13 % (i)	—	September 1974
France [2]	85 %	3 %	12 %	—	March 1979
F.R.G. [3]	89 %	3 %	6 %	2 %	April 1978
Japan	N/A	N/A	N/A	N/A	—
U.K.	N/A	N/A	N/A	N/A	—
U.S.A. [6]	75 % (ii)	—	25 % (iii)	—	June 1980

(i) Includes both spoken word and other recordings
(ii) Includes music and other professional entertainment
(iii) Includes school or office work and personal or family recordings

The figures in Table 3 speak for themselves. The overwhelming majority of the material recorded onto blank cassettes is music. The surveys also reveal what proportion of this music consists of protected works. This proportion is represented by the percentage of all music recordings made either from records or tapes or from radio or television, which are: Austria [1] 95 %, France [7] 77 %, Germany (Federal Republic of) [3] 91 %, Japan [4] 78 %, United Kingdom [5] over 95 %, and United States of America [6] 95 %.

Finally, Table 4 gives estimates of blank tape sales per annum for the countries listed, according to the most up-to-date data available.

[7] "Recordings onto tapes and cassettes" — Survey prepared by SOFRES for SACEM/SDRM/SNEPA, April 1976.

TABLE 4 *Blank Tape Sales*

Country	Number of blank tapes sold (i)	Date of Information
Austria	30 million	1981
France	42 million	1981
F.R.G.	80-100 million	1981
Japan	N/A	—
U.K.	71 million	1980
U.S.A.	344 million	1980

(i) The expression "tapes" includes cassettes, 8-track cartridges and reel-to-reel tapes.

The extent of private copying was very well summarized in the conclusion drawn by NVPI, the Netherlands National Group of IFPI, from a survey conducted in the Netherlands in 1979. [8] In that year about 32 million LP records were sold in the Netherlands and the survey revealed that the equivalent of 74 million LP units had been copied onto blank tape in the same period. In other words, without even accounting for reutilization of blank tapes, every LP record sold was, on average, copied more than twice.

2. The Present Legal Position

Most national legislations deal with private copying in one of two ways. The first group gives a right to authorize or prohibit the reproduction either of works generally or of some classes of works. No exception is made for private copying which is therefore unlawful. The second group of countries make specific exceptions to the reproduction right for uses of a private nature, within certain stated bounds. In some cases the exception comes under the general head of "fair use."

There are two exceptions to this general pattern where equitable remuneration is provided for right owners in respect of private copying. In the *Federal Republic of Germany* Article 53(5) of the Copyright Act of 1965 provides for a royalty on audio and video hardware not exceeding 5 % of the ex-factory price to be payable to the owners of rights in works likely to be privately copied. In *Austria* the Copyright Amendment Law 1980 introduced a royalty payment for the benefit of the owners of the copyright in works likely to be privately copied which is payable on blank tapes and on tapes intended for use for private copying.

At the international level, the most important provision relating to private use is contained in Article 9(2) of the Berne Convention which states:

> 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.

It will be noted that, according to this Article, the two conditions under which legislation may make exceptions are cumulative, so both have to be satisfied before an exception can be made. In other words, if either the contemplated use does conflict with normal exploitation or unreasonably prejudices authors' legitimate interests, no exception ought to be made.

[8] "Investigation into the making of sound copies on tapes and cassettes by individuals in the Netherlands in 1979" — Survey prepared by the Institution for Economic Investigation of Amsterdam University, December 1980.

3. The Need for Remuneration for Right Owners

Although some countries do provide in their legislations for a reproduction right which covers private copying, this does not represent a desirable or practical way of dealing with the situation. Detection of private copying is difficult and also undesirable since it would involve an unacceptable invasion of privacy. Court action against private individuals for making copies in their own homes is similarly undesirable.

Yet the case for giving right owners effective remedies is overwhelming. Copyright law exists to balance the interests of right owners in being rewarded for the use of their works against the interest of the public in having access to works of the mind. It is quite plain from the figures given above that the availability to the public of recorded music has been greatly increased by the advent of recorder technology. The right owners' interests have been ignored and the imbalance should now be redressed.

There are two facets to this basic principle which correspond to the two conditions set out in Article 9(2) of the Berne Convention. First, private copying involves the use of the fundamental, primary right in works, the right of reproduction. The person who copies a phonogram acquires, so far as the rights embodied in the phonogram are concerned, the same thing as he would acquire by purchase of a commercial copy of a phonogram. The normal exploitation of those rights by their owners is by the sale of licensed copies. That norm is now being totally undermined.

Second, private copying causes widespread damage to right owners. Some of the surveys referred to above asked respondents to give reasons for taping. Wherever this question has been asked a substantial proportion of people give as a reason avoidance of the cost of purchase. For example, the June 1980 survey conducted in the United States of America [6] asked respondents to state reasons for taping. A reason given by 45 % of respondents was so they would not have to buy. Of a number of possible reasons, this was the one given most frequently by respondents to the survey.

The damage caused by private copying clearly prejudices the legitimate interests of right holders. It goes, however, much further. The financial resources necessary for the making of new recordings dries up and unemployment results both within the production and manufacturing industries and among authors and performers.

In IFPI's view, therefore, those who benefit from the ability to make private copies should pay a proper and effective remuneration to those whose rights are used. There are three categories of right owners who should benefit, producers, authors and performers.

4. Calculation and Payment of Remuneration

Because of the nature of private copying, the most logical basis for remuneration to right owners is by means of a royalty payment both on domestic recording equipment (hardware) and on blank tapes and tapes intended for private copying. A royalty on hardware is appropriate because modern tape recording equipment has been especially designed for private copying and actively encourages it. On the other hand, a royalty on blank tape is justified because it is on this material that works are copied and the number of tapes purchased by an individual is likely to represent the amount of copying he engages in.

The calculation of the level of royalty so far as blank tape is concerned may be based either on the price or on the playing time. In IFPI's view, playing time is the more appropriate basis. The extent of private copying and therefore the extent of the use of rights depends on the playing time of the tape not on its price.

As has already been said, so far as the use of rights is concerned, the home recorded cassette is the same as the pre-recorded copy. It is therefore appropriate that the remuneration recovered by each right owner should be an equitable percentage of the return that right owner would get from the sale of a pre-recorded copy, so that the royalty on blank tape would be a percentage of three elements:

(a) the average royalty paid by producers to authors,
(b) the average royalty paid by producers to performers,
(c) the average return received by the producer for the sale of a pre-recorded copy, including both the net return and the contribution the sale makes to fixed costs and overheads.

So far as the calculation of royalties on hardware is concerned, the only basis is the price. It is appropriate that the royalty should be a percentage of the manufacturer's or importer's price. No deduction should be permitted for non-recording parts of equipment as it is the juxtaposition of recording and non-recording parts that makes private copying so easy and widespread.

5. Collection and Distribution of Royalties

Two particular matters have to be considered under this head, first how royalties are to be divided among classes of beneficiary, and second what mechanism is to be used for collection and distribution.

In relation to the division of royalties, as a private copy involves the use of the reproduction right and is analogous to a record or pre-recorded tape, the royalty should, *prima facie*, be divided among the three categories of beneficiary in the same proportions as their respective returns from a sale of a pre-recorded copy bear to each other. The elements of these returns have already been set out. IFPI submits that wherever possible the beneficiaries should agree on such division at national level, but that legislation to provide for a royalty should also provide for decision on division of the royalty in the absence of agreement by an appropriate tribunal.

So far as collection and distribution of a royalty is concerned, collection could most conveniently be carried out by a single organization representing all right owners from manufacturers or importers. In many countries, organizations already exist for the collection and distribution of royalties and their experience indicates that, given adequate powers, this function can be effectively carried out. There is no need for any administration costs to be borne by public funds.

6. International Developments

In September 1978, Subcommittees of the International Union for the Protection of Literary and Artistic Works (Berne Union), the Intergovernmental Copyright Committee (Universal Copyright Convention) and the Intergovernmental Committee of the Rome Convention met under the auspices of the ILO, Unesco and WIPO to study the legal problems arising from the public and private use of videograms. The Subcommittees adopted a series of recommendations to governments on the subject of private copying, which it was hoped would assist governments in formulating legislation, and which were expressly stated to apply to both audiovisual and sound recordings. In October 1979, the main lines of these recommendations were endorsed by the Executive Committee of the Berne Union and the Intergovernmental Committees of the Universal Copyright Convention and the Rome Convention.

Among the conclusions of the Subcommittees appears the following:

> While recognizing that certain recordings could be made in good faith, at home, and that such activity was not to be compared with the offerings for sale of illicitly made copies, the Subcommittees considered that the owners of the rights did in every case suffer a loss which, if it could not be avoided, should at least be mitigated.

Referring to the "absolute necessity of determining ways of compensating the owners of the rights," the Subcommittees emphasized "that this charge was not to be considered as a tax or parafiscal levy, but as a compensation due to the owners of exclusive rights to offset their inability to exercise such rights" and the resultant prejudice to their interests . . . "the institution of a charge, both on recording equipment and the supports, would be likely to provide the best compensation for the prejudice caused."

Within the EEC, the question of providing remuneration to right owners for unauthorized private

copying has been the subject of discussion and the Commission's communication to the Council of November 22, 1977, on Community Action in the Cultural Sector included the following recommendation:

> As regards the reproduction of the written word, sounds and images, a sum ought to be included in the selling price of equipment (photocopiers, tape recorders, video recorders) and the material they use (photocopy paper, tapes) to guarantee the remuneration which authors, publishers and performers are entitled to expect (and must not be denied).[9]

7. Developments at National Level

Many national governments have been considering the problem of private copying and the possibility of legislating to provide remuneration to right owners. At the present time only Austria and the Federal Republic of Germany provide such remuneration. The following is a summary of developments at national level in a number of important countries.

(a) Austria

Section 42 of the Copyright Law as amended in 1980 gave right owners an entitlement to a reasonable fee in relation to the private use of their works. The remuneration is based on blank audio and video tapes or on audio and video tapes intended for private recording. This legislation came into force at the beginning of 1981 in relation to audio works, and under the legislation a total remuneration not exceeding 10 million Austrian Schillings was raised in that year. Agreement has been reached between the various groups of right holders for the division of the royalty amongst them.

(b) France

Authors, performers and producers of phonograms have, for a number of years, been lobbying for the introduction of a proper remuneration for private copying. In 1980 a working party was convened within the competent Ministries to study the problem and to draft provisions on private copying which it was hoped would be included in future legislation. At present it is uncertain whether such legislation will be presented to Parliament.

(c) Federal Republic of Germany

Section 53(5) of the Copyright Act of 1965 provided for a royalty on audio and video hardware not exceeding 5 % of the ex-factory price. Following representations from right owners that this royalty provides insufficient remuneration the Ministry of Justice convened a hearing in September 1981 for the discussion of working documents produced by the Ministry on the problem. These working documents accepted that the current royalty on hardware is too low. However, it did not suggest the introduction of a royalty on blank tape, as the right owners had sought, but rather an increase in the existing hardware royalty. Right owners have continued to lobby for a royalty on blank tapes and it is anticipated that the Ministry will produce further discussion documents in June 1982.

(d) Japan

In 1977 the representative organizations of producers of phonograms, authors and performers made a joint submission to the Government Agency for Cultural Affairs urging the introduction of a royalty system for private copying. The Copyright Advisory Council of the Agency set up a subcommittee in October 1975 to study the problem and a report was submitted in June 1981. No definite proposals were contained in this report although the effects of private copying on copyright and neighboring right owners were recognized. Recently the rapid increase of the rental of records in Japan, with the consequent increase in private copying, has highlighted the need for early legislation in this field.

(e) Sweden

For a number of years right owners have been lobbying the Government Copyright Committee to recommend measures dealing with private copying. However, in mid-1981 the Government of Sweden proposed a tax on blank audio and video tapes which would be 0.04 Swedish Kroner per minute for blank audio tape and 0.25 Swedish Kroner per minute for blank video tape, raising a total of 120 million Swedish Kroner per year. It is proposed that a small share, probably about 8 million Swedish Kroner, would be paid to right owners as a compensation for private copying. It is not at present known whether, despite opposition from right owners, these proposals will become law.

(f) United Kingdom

In the United Kingdom, and in other countries where similar legislation is in force, producers of phonograms have an absolute right to prevent copying even for private use. For reasons already explained, this right is ineffective in controlling the problem and right owners have for a number of years been pressing the Government for legislation to provide proper remuneration. In June 1981 the Government published a Green Paper which rejected proposals for a royalty either on hardware or blank tapes. The Green Paper called for further public discussion and right owners have continued to lobby for legislation. The Government has indicated that it will continue to receive representations until August 1982 but at present it is unknown what further steps will be taken after that date.

[9] Bulletin of the European Communities, Supplement 6/77, paragraph 24.

(g) United States

Following the decision of the United States Court of Appeals in the case of *Walt Disney* v. *Sony Corporation (Betamax Case)*, which decided that the off-air copying of cinematograph films was an infringement of copyright, bills were introduced into the US Senate and House that would legitimize home taping. The representative bodies of producers of motion pictures and sound recordings have secured the inclusion in legislative proposals of royalty provisions both for video and audio private copying. A coalition of interested parties has been formed to support the proposal for a royalty payment to authors, performers and producers of phonograms and hearings in the House and Senate continue on these proposals.

8. Conclusion

It has been the object of this paper to outline the legal, economic and moral reasons why right owners ought to be properly rewarded when their works are privately copied. It indicates also the strong support for this view that has been expressed at international level. But only national governments, by means of national legislation, can take the necessary practical steps. The experience of operation of the laws in Austria and the Federal Republic of Germany indicates that there are no great administrative difficulties in legislation of the type required.

It is therefore IFPI's hope that more governments will be persuaded of the justice of the case for right owners and will legislate in the near future along the lines that have been indicated above.

International Literary and Artistic Association (ALAI)

The International Literary and Artistic Association, whose mission it has been for more than one hundred years to defend the interests of authors, cannot remain unmoved by the development of advanced means of reproduction and the loss of earnings suffered by authors as a result of the use made of certain of those means. Much could, indeed, be said as regards the misdeeds of commercial piracy and of the abuse made of reprographic reproduction. Our concern here, however, is private copying, understood as the case of copies made of phonograms and audiovisual tapes or the recording of radio and television broadcasts, where these acts are carried out by private persons in the home and for their own use.

This matter has long been a concern of ALAI. At the Athens Congress in 1976 the accent had been placed more specially on the question of reprographic reproduction, whereas the 1978 Congress, commemorating the Centenary of the Association, dealt in a more extensive way with the "right of reproduction and technological progress." There would seem every justification for reiterating the words of the relevant resolution adopted by that Congress:

The International Literary and Artistic Association

Considers that the respect of the prerogatives afforded to authors, particularly the right of reproduction, is a necessary condition for safeguarding the independence of authors;

Notes that technological progress in the field of reproduction makes it increasingly difficult for authors to exercise their right of reproduction and that the very principle of this right is in jeopardy;

Considers it desirable that national legislations should avoid introducing restrictions on the right of reproduction whose compliance with the exceptions provided for by the international conventions could be debatable;

Therefore recommends:

(a) that all national or international regulations should take as their point of departure the recognition of the exclusive right of reproduction afforded to authors;

(b) that national legislations should include appropriate measures to facilitate the conclusion of collective agreements ensuring the effective exercise of this right of reproduction;

(c) that the States should envisage setting up, with the aid of scientific research, technical devices enabling reproduction to be effectively supervised and thus ensure the strict application of the relevant regulations;

(d) that the efforts to achieve uniform solutions at international level be continued.

Although ALAI has not had the occasion since then to again pronounce in a formal manner, it can be said that its attitude on these problems has not changed since 1978.

The Association remains convinced that the legal arrangements governing private copying cannot be based in a general way on free use and gratuity. All the countries bound by the international copyright conventions must indeed respect the narrow limits imposed upon exceptions to the right of reproduction

under those conventions. The 1971 Paris Act of the Berne Convention authorizes in Article 9(2) derogations to the right of reproduction only "in certain special cases" and solely on condition "that such reproduction does not conflict with a normal exploitation of the work" and "does not unreasonably prejudice the legitimate interests of the author." The Universal Copyright Convention, for its part, has stated quite clearly since 1971, in its Article IV^{bis}(2), that "any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article" (which include, of course, the right of reproduction). The text immediately adds, however, that "any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made."

However, in view of the current development enjoyed by private copying, it may fairly be claimed that, if it is allowed to escape copyright entirely, it will "conflict with a normal exploitation of the work," in the words of the Berne Convention, and also the right of reproduction will no longer be afforded "a reasonable degree of effective protection," as required by the Universal Copyright Convention, however.

The truth is that, in this context, it would not seem possible to apply in practice the accepted rule of prior authorization by the author to make reproduction of his work a lawful act. To impose this requirement would, in fact, amount to preventing the general public from enjoying the facilities and ease offered by advanced reproduction technology. This remark should not, however, lead to renunciation of literary property out of sheer desperation. It is possible to safeguard copyright to some extent while at the same time subjecting it to rules which a user acting in good faith can respect without suffering great inconvenience. This would be to include the amount of the royalty either in the selling price of the equipment with which private copies are made or in the selling price of the mediums on which the reproduction of the work is fixed (blank cassettes). The first system in fact exists under the arrangements set up by the Copyright Act of September 9, 1965, of the Federal Republic of Germany, and the second formula is contained in the Austrian Copyright Amendment Law of July 2, 1980. Both these systems would appear to be viable. It would even be possible to combine them. However that may be, ALAI considers that this type of solution should be the aim adopted by the other countries in order to regulate the irritating problem of private copying.

The above lines, however, have concerned exclusively the situation of authors. It is, nevertheless, equally true that private copying, contrary to reprographic reproduction, jeopardizes not only the interests of the authors but also those of the performers, the phonogram producers and the broadcasting organizations. There is no doubt, however, that these categories of persons are less well placed to protest against private copying under international law than are the authors. Whereas the authors, as we have seen, may find strong arguments in the Berne Convention and the Universal Copyright Convention to oppose national legislation under which private copying would be declared free and gratuitous, such is not the case for the performers, phonogram producers and broadcasting organizations. These categories find no such support in the Rome Convention since its Article 15(1) provides that "any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: (a) private use." Thus it would appear that a country bound by the Rome Convention would not infringe that Convention if it stipulated in its neighboring rights legislation that private copying was free and gratuitous.

ALAI's point of view on this matter is the following: although the royalty for private copying must certainly first go to the author since, without his creation, neither performer nor phonogram producer nor broadcasting organization could undertake their activities, it is nevertheless unquestionably equitable that those involved in the creation as auxiliaries, and certainly the performers, who set the seal of their personalities on the performance, should also obtain compensation for the prejudice which private copying is likely to cause them.

(WIPO translation)

Bibliography

List of Books and Articles

From January 1 to June 30, 1982, the WIPO Library has entered in its catalogue a number of works or other publications on copyright and neighboring rights, among which the following are mentioned which are most important or most relevant to recent developments.

Books

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Calendar

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1982

September 1 to 3 (Geneva) — Working Gronp on the Rights of Employed or Salaried Anthors (convened jointly with ILO and Unesco)

September 6 to 10 (Geneva) — International Patent Cooperation (PCT) Union — Committee for Administrative and Legal Matters

September 10 (Geneva) — International Patent Cooperation (PCT) Union — Assembly (Extraordinary Session)

September 20 to 23 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Gronp on Patent Information for Developing Countries

September 23 to October 1 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Planning

September 23 to October 1 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Special Questions

September 27 to 30 (Geneva) — Permanent Committee for Development Cooperation Related to Indnstrial Property

October 4 to 8 (Geneva) — Permanent Committee on Patent Information (PCPI) — Ad hoc Working Group on the Revision of the Guide to the IPC

October 4 to 30 (Geneva) — Revision of the Paris Convention — Diplomatic Conference

October 25 to 27 (Paris) — Berne Uuion — Working Group on Copyright Qnestions Connected with the Use of Works by Persons with Defective Hearing or Sight (convened jointly with Unesco)

November 8 to 12 (Geneva) — Working Group on Model Contracts for Licensing or Transferring Copyright (convened jointly with Unesco)

November 22 to 26 (Geneva) — Governing Bodies (WIPO Coordination Committee; Executive Committees of the Paris and Berne Unions)

November 29 to December 3 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

December 6 to 10 (Geneva) — International Patent Classification (IPC) — Committee of Experts

December 6 to 10 (Paris) — Berne Union and Universal Copyright Convention — Working Gronp on the Formulation of Guiding Principles Covering the Problems Posed by the Practical Implementation of the Licensing Procedures for Translation and Reprodnction nnder the Copyright Conventions (convened jointly with Unesco)

December 13 to 17 (Paris) — Berne Union, Universal Convention and Rome Convention — Subcommittees of the Executive Committee of the Berne Union, of the Intergovernmental Copyright Committee and of the Intergovernmental Committee of the Rome Convention, respectively, on Copyright and Neighboring Rights Problems in the Field of Cable Television (convened jointly with ILO and Unesco)

1983

January 25 to 29 (New Delhi) — Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights

January 31 to February 2 (New Delhi) — Regional Committee of Experts on the modalities of implementation in Asia of the model provisions for national laws on intellectual property aspects of the protection of expressions of folklore (convened jointly with Unesco)

UPOV Meetings

1982

Septemher 28 (Faversham) — Technical Working Party for Fruit Crops — Suhgronp
September 29 to October 1 (Faversham) — Technical Working Party for Fruit Crops
October 5 to 7 (Cambridge) — Technical Working Party for Ornamental Plants and Forest Trees
October 12 (Geneva) — Consultative Committee
Octoher 13 (Geneva) — Symposium (genetic engineering)
October 13 to 15 (Geneva) — Council
Novemher 15 (Geneva) — Information Meeting with International Non-Governmental Organizations
Novemher 16 and 17 (Geneva) — Administrative and Legal Committee
November 18 and 19 (Geneva) — Technical Committee

Other Meetings in the Field of Copyright and/or Neighboring Rights

Intergovernmental Organizations

1982

Council of Europe
Committee of Legal Experts in the Media Field — November 29 to December 3 (Strasbourg)

Non-Governmental Organizations

1982

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)
Assembly — September 20 and 21 (Geneva)

International Confederation of Societies of Authors and Composers (CISAC)
Congress — October 3 to 8 (Rome)

International Federation of Actors (FIA)
Congress — September 27 to October 1 (Paris)

International Federation of Library Associations and Institutions (IFLA)
General Conference — August 23 to 28 (Montreal)

1983

Council of the Professionnal Photographers of Europe (EUROPHOT)
Congress — October 6 to 13 (Munich)

International Confederation of Societies of Authors and Composers (CISAC)
Legal and Legislation Committee — May 1 to 4 (Washington)

International Federation of Musicians (FIM)
Executive Committee — June 27 to 30 (Amsterdam)
Congress — September 19 to 23 (Budapest)

International Literary and Artistic Association (ALAI)
Congress — April 13 to 20 (Athens)