ORGANISATION DES NATIONS UNIES
POUR L'EDUCATION, LA SCIENCE
ET LA CULTURE

UNESCO - PARIS

ORGANISATION MONDIALE
DE LA PROPRIETE
INTELLECTUELLE

OMPI - GENEVE

GROUPE D'EXPERTS SUR LE REPRODUCTION PRIVEE NON AUTORISEE D'ENREGISTREMENTS, D'EMISSIONS ET DE DOCUMENTS IMPRIMES

GENEVE, 4 - 8 JUIN 1984

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United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

C.L 649
- 451.1

The Secretariat of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the International Bureau of the World Intellectual Property Organization (WIPO) (hereinafter referred to as "the Secretariats"), present their compliments and have the honor to announce that, pursuant to the decisions taken by Unesco's General Conference at its twenty-second session and by the Governing Bodies of WIPO at the fourteenth series of their meetings in October 1983, a Group of Experts will be convened in Geneva, at the Headquarters of WIPO, from June 4 to 8, 1984, to consider questions of copyright law concerning the unauthorized private copying of recordings, broadcasts and printed matter.

The Secretariats have the honor to invite the Governments of States party to the Berne Convention for the Protection of Literary and Artistic Works or to the Universal Copyright Convention to follow the discussions of the said Group of Experts.

The Agenda (document UNESCO/WIPO/GE/COP.1/1) is
./. attached; the preparatory document will be transmitted in due course. The meeting will open at 10 a.m. on Monday, June 4, 1984.

The working languages will be English, French and Spanish, and simultaneous interpretation will be provided in these languages.

The Secretariats would very much appreciate it if the names of representatives designated by Governments could be communicated, in good time, to the Secretariat of Unesco (7, place de Fontenoy, 75700 Paris, France) or to the International Bureau of WIPO (34, chemin des Colombettes, 1211 Geneva 20, Switzerland), or to both, it being understood that, as is customary, their travel and subsistence expenses will be the responsibility of their Governments.

March 23, 1984

Enclosure: Document UNESCO/WIPO/GE/COP.1/1

United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

C.L 650
- 451.1

The Secretariat of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the International Bureau of the World Intellectual Property Organization (WIPO) (hereinafter referred to as "the Secretariats"), present their compliments and have the honor to announce that, pursuant to the decisions taken by Unesco's General Conference at its twenty-second session and by the Governing Bodies of WIPO at the fourteenth series of their meetings in October 1983, a Group of Experts will be convened in Geneva, at the Headquarters of WIPO, from June 4 to 8, 1984, to consider questions of copyright law concerning the unauthorized private copying of recordings, broadcasts and printed matter.

The Secretariats have the honor to invite your Organization to send observers to this meeting. The
./. Agenda (document UNESCO/WIPO/GE/COP.1/1) is attached; the preparatory document will be transmitted in due course. The meeting will open at 10 a.m. on Monday, June 4, 1984.

The working languages will be English, French and Spanish, and simultaneous interpretation will be provided in these languages.

The Secretariats would very much appreciate it if the names of observers designated by your Organization could be communicated, in good time, to the Secretariat of Unesco (7, place de Fontenoy, 75700 Paris, France) or to the International Bureau of WIPO (34, chemin des Colombettes, 1211 Geneva 20, Switzerland), or to both, it being understood that, as is customary, their travel and subsistence expenses will be the responsibility of your Organization.

March 23, 1984

Enclosure: Document UNESCO/WIPO/GE/COP.1/1

United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

C.L 651
451.1

The Secretariat of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the International Bureau of the World Intellectual Property Organization (WIPO) present their compliments and, referring to their Note of March 23, 1984, have
./. the honor to transmit herewith document UNESCO/WIPO/GE/COP.1/2 prepared for the Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, which will be held in Geneva, at the Headquarters of WIPO, from June 4 to 8, 1984.

April 16, 1984

Enclosure: Document UNESCO/WIPO/GE/COP.1/2

United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

C.L 659
451.1

The Secretariat of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the International Bureau of the World Intellectual Property Organization (WIPO) present their compliments and, referring to the meeting of the Group of Experts on Unauthorized Private Coying of Recordings, Broadcasts and Printed Matter, which was held in Geneva, at the Headquarters of WIPO, from June 4 to 8, 1984, have the honor to transmit herewith document UNESCO/WIPO/GE/COP.I/3, containing the report adopted by the said Group.

./.

June 18, 1984

Enclosure: Document UNESCO/WIPO/GE/COP.1/3

United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

UNESCO/WIPO/GE/COP.I/INF.1
ORIGINAL: English/French/Spanish
DATE: June 4, 1984

GROUP OF EXPERTS ON UNAUTHORIZED PRIVATE COPYING OF RECORDINGS, BROADCASTS AND PRINTED MATTER

Geneva, June 4 to 8, 1984

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LISTE PROVISOIRE DES PARTICIPANTS
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Mr. Stanley M. BESEN, Senior Economist, Rand Corporation, Washington D.C.

M. Hector DELLA COSTA, Professeur, Université de Buenos Aires, Buenos Aires

Mr. Walter DILLENZ, Director, Staatlich Genehmigte Gesellschaft der Autoren, Kompositen und Musikverleger (AKM), Vienna

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II. STATES PARTY TO THE MULTILATERAL COPYRIGHT CONVENTIONS INVITED TO FOLLOW THE DISCUSSIONS/ETATS PARTIES AUX CONVENTIONS MULTILATERALES SUR LE DROIT D'AUTEUR INVITES A SUIVRE LES DELIBERATIONS/ESTADOS PARTE EN LOS TRATADOS MULTILATERALES SOBRE DERECHO DE AUTOR INVITADOS A SEGUIR LAS DELIBERACIONES

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SWITZERLAND/SUISSE/SUIZA

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UNITED KINGDOM/ROYAUME-UNI/REINO UNIDO

Mr. John P. BRITTON, Principal Examiner, Industrial Property and Copyright Department, The Patent Office, London

UNITED STATES OF AMERICA/ETATS-UNIS D'AMERIQUE/ESTADOS UNIDOS DE AMERICA

Mr. David LADD, Register of Copyrights, Copyright Office, Washington D.C.

Mr. Harvey J. WINTER, Director, Office of Business Practices, Department of State, Washington D.C.

III. OBSERVERS/OBSERVATEURS/OBSERVADORES

(a) Intergovernmental Organizations/Organisations intergouvernementales/Organizaciones intergubernamentales

INTERNATIONAL LABOUR ORGANISATION (ILO)/ORGANISATION INTERNATIONALE DU TRAVAIL (OIT)/ORGANIZACION INTERNACIONAL DEL TRABAJO

Mme Rolande CUVILLIER, Chef du Service des employés et travailleurs intellectuels, Département des activités sectorielles, Genève

M. Valentin KLOTZ, Service des employés et travailleurs intellectuels, Département des activités sectorielles, Genève

(b) International Non-Governmental Organizations/ Organisations internationales non gouvernementales/ Organizaciones internacionales no gubernamentales

EUROPEAN BROADCASTING UNION (EBU)/UNION EUROPEENNE DE RADIODIFFUSION (UER)/ UNION EUROPEA DE RADIODIFUSION

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INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC)/
CONFEDERATION INTERNATIONALE DES SOCIETES D'AUTEURS ET COMPOSITEURS/
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FEDERACION INTERNACIONAL DE ASOCIACIONES DE DISTRIBUIDORES CINEMATOGRAFICOS

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FEDERATION INTERNATIONALE DES ASSOCIATIONS DE PRODUCTEURS DE FILMS/
FEDERACION INTERNACIONAL DE ASOCIACIONES DE PRODUCTORES CINEMATOGRAFICOS

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ORGANISATION DES NATIONS UNIES POUR L'EDUCATION, LA SCIENCE ET LA CULTURE/
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DE LA PROPRIETE INTELLECTUELLE (OMPI)/ORGANIZACION MUNDIAL DE LA PROPIEDAD
INTELECTUAL

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United Nations
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Unesco - Paris

World Intellectual
Property
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WIPO - Geneva

UNESCO/WIPO/GE/COP.1/INF.1 Rev.
ORIGINAL: English/French/Spanish
DATE: June 5, 1984

GROUP OF EXPERTS ON UNAUTHORIZED PRIVATE COPYING OF RECORDINGS, BROADCASTS AND PRINTED MATTER

Geneva, June 4 to 8, 1984

PROVISIONAL LIST OF PARTICIPANTS
LISTE PROVISOIRE DES PARTICIPANTS
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I. EXPERTS/EXPERTOS

Mr. Maniragaba BALIBUTSA, Directeur général de la Culture et des Arts, Ministère de l'Enseignement supérieur et de la Recherche scientifique, Kigali

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GERMANY (FEDERAL REPUBLIC OF)/ALLEMAGNE (REPUBLIQUE FEDERALE D')/ ALEMANIA(REPUBLICA FEDERAL DE)

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INTERNATIONAL BUREAU OF THE SOCIETIES ADMINISTERING THE RIGHTS OF MECHANICAL RECORDINGS AND REPRODUCTION (BIEM)/BUREAU INTERNATIONAL DES SOCIETES GERANT LES DROITS D'ENREGISTREMENT ET DE REPRODUCTION MECANIQUE/OFICINA INTERNACIONAL DE SOCIEDADES ADMINISTRADORAS DE LOS DERECHOS DE GRABACION Y DE REPRODUCCION MECANICA

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ORIGINAL: English/French
DATE: March 20, 1984

GROUP OF EXPERTS ON UNAUTHORIZED PRIVATE COPYING OF RECORDINGS, BROADCASTS AND PRINTED MATTER

Geneva, June 4 to 8, 1984

AGENDA

1. Opening of the Meeting
2. Election of the Chairman and of the Vice-Chairman
3. Consideration of questions of copyright law concerning the unauthorized private copying of recordings, broadcasts and printed matter (document UNESCO/WIPO/GE/COP.1/2)
4. Adoption of the Report
5. Closing of the Meeting

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GROUP OF EXPERTS
ON UNAUTHORIZED PRIVATE COPYING
OF RECORDINGS, BROADCASTS AND PRINTED MATTER

Geneva, June 4 to 8, 1984

UNAUTHORIZED REPRODUCTION FOR PRIVATE PURPOSES
OF SOUND AND AUDIOVISUAL RECORDINGS,
BROADCASTS AND THE PRINTED WORD

Prepared by the Secretariats of Unesco and WIPO

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UNAUTHORIZED REPRODUCTION FOR PRIVATE PURPOSES OF SOUND AND AUDIOVISUAL RECORDINGS, BROADCASTS AND THE PRINTED WORD

1. LEGAL AND FACTUAL BACKGROUND

1.1 Introduction

The institution of what are usually referred to as "authors' rights" or "copyright" under national and international law serves a number of purposes. Probably the most important one is the desire to stimulate intellectual creativity by granting authors certain exclusive rights in the utilization of the creations of their minds. The creators thus have inter alia the possibility of earning their livelihood through various forms of disposal of the rights, granted them by law, in their works. However, the stimulative effect of such rights is in the interest not only of the individual creator but also of society as a whole in that it promotes cultural, social and economic development. Furthermore an important effect of copyright law is that it encourages the disclosure and dissemination of works of the mind. Because of the rights that exist in what is thus made available to the public, the creator should not hesitate to disclose his work. In that respect the effects of copyright law are similar to those of patent law, which aims among other things to promote the dissemination and utilization of inventions by granting certain temporary rights to the inventor.

In connection with the above it should be noted that there is another important effect of copyright law, namely that it serves as a security for the investment made in the production of copies (books, records, videograms, etc.) or for instance radio or television broadcasts. If there were no exclusive rights for the protection of works used in this way there would certainly be fewer productions of the kind in existence. This "guarantee function" of copyright law has become very important in recent years with the advent of the new media technology, the development of which has called for substantial investment and will require even more in the future (computerized information systems, the "compact disc," etc.).

The same basic rationale forms the basis for what are usually referred to as "neighboring rights" under national and international law, that is, the rights granted to performing artists, producers of phonograms and broadcasting organizations. In this field too there is a need to stimulate certain activities by the grant of rights in their utilization. As regards neighboring rights, however, legal protection is somewhat different, at least in certain respects. For the protection of performers, elements of social and labor law also play an important role. For the two categories of producers, namely phonogram producers and broadcasters, the need to secure the investment made in the production process is of paramount importance in addition to the need to protect the particular skills and efforts that are necessary for their work.

It follows from the above that intellectual property rights in general and more specifically copyright and related rights play an important part in the overall legal structure of a nation. They provide a considerable impetus for creative and artistic activities and consequently also for the development process in general. Those beneficial effects are obviously the reason why so many countries--in fact the great majority of the nations of the world--have enacted legislation in this field. Most of them have also adhered to one or more of the relevant conventions. They also imply that the framing of the rights in this branch of national and international law and the application of those rights are of considerable importance and should be looked upon and considered with care.

1.2 The Basic Right of Reproduction

1.2.1 Authors

1.2.1.1 General

The law on authors' rights provides basically that writers, composers, painters and other creators of literary and artistic works are granted certain rights in the use made of their creations. Those rights are of two types. One is what could be called "economic rights" in the sense of rights that could be exploited in exchange for economic remuneration. Another is the so-called "moral rights" which basically consist of a right to claim authorship of the work and a right to object to distortion and similar acts affecting the work.

The "economic rights" are, generally speaking, rights that embody the possibility of authorizing or prohibiting certain acts. Those rights fall into various categories. One such right is the right to communicate the work to the public in a number of ways, such as broadcasting, cable transmission, public performance, public recitation, etc. Another such right, which has always been of prime importance, is the right to authorize or prohibit the reproduction of the work in any manner or form. This "reproduction right" is basically the right to control all kinds of copying of the work. The copies do not necessarily have to be direct (e.g. a photocopy of an article in a journal or an audio tape copy made from another such tape). Indirect copies are also included, such as when the sounds from a phonograph record or broadcast are recorded on tape, or when the contents of a literary work are transferred or stored in the form of digital signs in a computer memory.

The reproduction right is of paramount importance and indeed is one of the cornerstones of international as well as national copyright law.

It is well known that international copyright law is based on certain main principles. One is the principle of national treatment, the essence of which is that each Contracting State, in its national law, grants beneficiaries from other Contracting States the same rights as it grants its own citizens. Another main principle is that of minimum rights, whereby the protection granted to protected beneficiaries must not be below a certain level, for instance as regards term of protection, scope of rights, etc.

One of the minimum rights under the conventions is the right in respect of reproduction of protected works. That right is expressly granted in the 1971 Paris texts of both the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention.

1.2.1.2 The Berne Convention

The Berne Convention states the basic principle of the right of reproduction in its Article 9(1), under which:

> "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

A few things could be noted in connection with this provision, mainly the following.

The provision applies to "literary and artistic works," in other words to all categories of works protected under the Convention. According to Article 2(1), of the Convention, the expression "literary and artistic works" includes every production in the literary and artistic domain, whatever may be the mode or form of its expression. Consequently, the reproduction right applies to such important categories of works/productions as books and other writings, musical compositions, cinematographic works, works of art, photographic works, etc. As regards cinematographic works it should be noted that this category also includes "works expressed by a process analogous to cinematography." That implies that the term comprises not only films in the traditional sense of the word but also, for instance, televisual and other audiovisual works, such as telecast works, provided that the effect created is the same as that of a traditional cinematographic work (that is, roughly speaking, that the impression is one of "moving pictures"). The work does not necessarily have to be fixed. Thus improvised works can also be protected against reproduction by means of their fixation. The question whether fixation is needed in order to obtain protection is left to national law by the Convention (Article 2(2)).

Furthermore, Article 9 of the Berne Convention applies to works "protected under the Convention." This means, firstly, that the provision applies only to works eligible for protection under the Convention and the term of protection of which has not yet been expired; secondly, that the protection applies only in countries of the Berne Convention other than the country of origin (that country, according to Article 5(4), is basically the country of the Union in which publication occurs, or, in the case of unpublished works, of which the author is a national or where he has his habitual residence). The question of what country is the country of origin consequently has a certain influence on the right of reproduction, because the obligation to grant protection differs somewhat depending on whether the work to be copied is published or not. Books, newspapers, records and music cassettes and many works likely to be reproduced are usually published. In other cases, such as that of a broadcast of a work that is not previously published, the broadcast does not entail publication of the work. Under the Berne Convention, the expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work (Article 3(3)). Because the country of origin in this case is different from the country of origin of a published work, the obligation under the Convention could also be different. Furthermore, it could be said that the country of origin for unpublished cinematographic works was the country of the maker of the film (Article 5(4)(c)(i)).

The right is an exclusive right. This means basically that the right belongs only to the person or persons enjoying it. The right is a right to authorize, which is more than simply a right to prohibit certain acts, implying rather a right either to authorize or to prevent such acts.

The right refers to reproduction "in any manner or form." This fairly broad expression covers all means of fixing the work in a material form, whether existing now or in the future. Examples of such "manners or forms" are printing processes, photocopying and magnetic recordings on discs, audio or video cassettes, films, storage in a computer memory, etc. In order to avoid any misunderstanding of the meaning of "reproduction," Article 9(3) provides that:

> "Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

It follows from the above that the Berne Convention, as a starting point, grants authors a high degree of protection against unauthorized reproduction of their works. And yet surprisingly enough the right of reproduction was not formally introduced in the Convention until the Stockholm Diplomatic Conference in 1967.

1.2.1.3 The Universal Copyright Convention

The right of reproduction was also introduced at a fairly late stage in the Universal Copyright Convention, in this case at the Paris Diplomatic Conference in 1971.

The basic provision on authors' rights, which appears in Article I of the Convention in both its original version and the 1971 Paris text, reads thus:

> "Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture."

The notion of protected work under the Universal Copyright Convention is virtually the same as under the Berne Convention. As regards the criteria of eligibility for protection, the Universal Copyright Convention also distinguishes between published and unpublished works. In that context, however, it should be noted that, unlike the Berne Convention, it does not recognize reproduction in the form of sound recording as publication, the latter meaning, under the Universal Copyright Convention, reproduction and general distribution to the public of copies of a work from which it can be read or otherwise visually perceived (Article VI).

There was some discussion during the Diplomatic Conference on whether the Article should specify or guarantee the rights to be conferred on authors, such as the right of reproduction. The possibilities and dangers of such an enumeration of rights, either limitatively or by way of example, were also discussed. It was decided, however, that no such specification of the rights would be included in the Article (see the Report of the General Rapporteur, published inter alia in the Unesco Copyright Bulletin, Vol. V, No. 3-4, 1952, p. 47).

The Paris Diplomatic Conference in 1971 made certain amendments to the Convention and among other things included a new Article IVbis, the first paragraph of which reads as follows:

> "The rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. The provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original."

Basically it was not intended that the new Article IVbis should add anything new to the obligations already existing under Article I. This was made clear during the Conference: the Report of the General Rapporteur says the following in this connection (paragraph 44):

> "The Conference agreed that the general aim of the 1971 Convention should be that no State party to the Universal Copyright Convention of 1952, and that now respects the fundamental rights of authors, should be required to make any changes in its domestic law as a condition to adhering to the 1971 Convention."

As a consequence of the obligations arising from adherence to the international copyright conventions, countries which are party to those conventions have included the right of reproduction in their national laws on copyright, as a basic author's right. However, there are also, in many countries that are not at present party to any of the conventions, laws or other provisions that grant authors more or less far-reaching rights in relation to reproduction, or prohibit reproduction without consent, or try in other ways to prevent undesirable, unauthorized reproduction of intellectual creations from taking place.

1.2.2 Neighboring Rights

1.2.2.1 Performers

Performers are granted international protection under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). That Convention is based on principles similar to those of the copyright conventions, namely the principles of national treatment and of minimum rights. However, national treatment under the Rome Convention is subject not only to the minimum of rights but also to the limitations (including reservations) specifically provided for in it (Article 2(2)). Thus, for instance, according to Article 19, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, he may no longer, under the Convention, claim the right to prevent reproduction of that performance for different purposes, irrespective of whether the applicable national law grants such a right to national performers. As regards the minimum rights, one of them relates to the fixation of the performances of performers that are protected under the Convention, and to the reproduction of such fixations. The provisions on this issue are in Article 7 of the Convention, which reads as follows:

> "The protection provided for performers by this Convention shall include the possibility of preventing:
>
> ...
>
> (b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance;

(i) if the original fixation itself was made without their consent;

(ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

(iii) if the original fixation was made in accordance with provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions."

It should be noted in connection with this provision that a "possibility of preventing" is not the same as a transferable exclusive right to authorize or prohibit certain acts. The provision in the Rome Convention implies that the means by which a country implements its obligations under the Convention may vary. They can be exclusive rights but they can also consist of prohibitions under criminal law or provisions in labor or unfair competition law, etc.

1.2.2.2 Phonogram Producers

The producers of phonograms enjoy specific protection under two Conventions, namely the Rome Convention and the "Phonograms Convention" (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms).

The Rome Convention states in its Article 10, as a minimum right for phonogram producers, that:

"Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms."

The provision refers to "direct or indirect" reproduction. "Direct" is usually understood to mean reproduction made from a matrix, whereas "indirect" refers either to reproduction made from a record produced from the matrix or to the recording of the sounds of a phonogram when transmitted in a broadcast, for instance. Consequently the Rome Convention, like the Berne Convention but with a slightly different wording, grants protection against all forms of reproduction of the protected material.

The Phonograms Convention, in turn, uses a slightly different wording to describe the protection that it grants to phonogram producers. Article 2 of that Convention reads thus:

"Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public."

The Phonograms Convention was created in response to the rising tide of piracy affecting musical recordings, and it is aimed at preventing certain commercial acts. That is why the acts to which Article 2 refers have to be understood in the context of distribution to the public. Consequently, and because the Phonograms Convention does not require "national treatment," with regard to the act of reproduction as such the Convention is not applicable to copying for private purposes, whatever the relevant solutions under the laws of the Contracting States may be.

1.2.2.3 Broadcasting Organizations

Broadcasters can enjoy protection under copyright legislation--and consequently be beneficiaries of protection under the copyright conventions--in so far as they own original or derived copyright in their broadcast program or in the protected works it contains. They can also, however, enjoy protection as producers, namely for their sound radio or television broadcasts as such.

Protection of this kind can be granted under regional arrangements, such as the European Agreement on the Protection of Television Broadcasts. At a universal level such protection is available under the Rome Convention.

Broadcasters' rights in relation to the fixation of their broadcasts and reproduction of such fixations are described as follows in Article 13 of the Rome Convention:

"Broadcasting organizations shall enjoy the right to authorize or prohibit:

...

(b) the fixation of their broadcasts;

(c) the reproduction:

(i) of fixations, made without their consent, of their broadcasts;

(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

..."

As regards broadcasters' rights under the Rome Convention, it could be said that the protection is basically parallel to that granted to performers under Article 7 (although the nature of the right is different). The protection against unauthorized "fixation" refers to fixation of the broadcasts as such, that is, the sequence of sounds and/or images contained in the broadcast. The question whether still photographs of pictures appearing in a television broadcast are also covered by this expression is left to national laws.

1.3 Limitations on the Basic Right of Reproduction

1.3.1 General

The system of protection under the international copyright and neighboring rights conventions is based, generally speaking, on the philosophy of granting certain exclusive rights for the category of beneficiaries that the relevant convention covers and, in addition, of allowing national laws to make certain exceptions to the enjoyment of those rights, or to determine the conditions of their exercise. Such limitations are based on various considerations, primarily the need to satisfy certain particular interests, such as information, public discussion, education, etc. or the practical impossibility of controlling use. It is important to note, however, that in most cases these limitations offer the national legislator a <u>possibility</u> and do not <u>oblige</u> States to adopt them or to institute corresponding provisions.

The limitations under the conventions differ somewhat in nature. In the first place most of them relate only to one of the rights granted (the right of reproduction, the right of public performance, etc.). The only limitations that are of interest in the context of reproduction for private purposes are the limitations on the right of reproduction.

The limitations on the right of reproduction are somewhat differently framed in the copyright conventions as compared with the neighboring rights conventions. In the copyright conventions they are expressed in fairly broad terms, whereas the neighboring rights conventions are more specific and aim directly at certain uses.

1.3.2 The Berne Convention

The Berne Convention contains certain specific limitations (quotations, illustration for teaching, discussion on political or religious matters, reporting of current events) in its Articles 10 and 10<u>bis</u>. It also contains a more general limitation, however. Its Article 9(2) reads as follows:

"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 is generally agreed that this provision applies also to reproduction for private purposes, at least in principle. In fact the Programme for the Stockholm Diplomatic Conference in 1967 contained a proposal for a more specific limitation. The proposal aimed basically to make it possible for the national legislator to permit the reproduction of protected works in certain cases, namely (a) for private use; (b) for legal or administrative purposes, and (c) in certain particular cases, provided that (i) the reproduction was not contrary to the legitimate interests of the author, and (ii) that it did not conflict with a normal exploitation of the work.

During the Diplomatic Conference there were movements in favor of both extending and limiting the formula. In the end, however, an agreement was reached on a more general wording, corresponding to the present contents of Article 9(2). Certain drafting changes were also made, mainly the placing of the second condition before the first in order to facilitate the interpretation of the provision. The Report of Main Committee I (Records of the Stockholm Conference, 1967, p. 1145) contains the following well-known interpretative statement in relation to Article 9(2):

> "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying may be permitted without payment, particularly for individual or scientific use."

It appears from the wording of the provision in the Convention and the interpretative statements in the Report that the limitations permissible under Article 9(2) are subject to compliance with certain fairly strict criteria.

Firstly, the direct reference in the Programme to reproduction for private use does not appear in the final text of Article 9(2). During the Diplomatic Conference, the Delegation of the United Kingdom submitted a proposal with the aim of eliminating items (a) and (b) from the Programme proposal and instituting a different wording for condition (i) mentioned in the Programme (mainly replacing the expression "is not contrary to the legitimate interests of the author" by "does not unreasonably prejudice the legitimate interests of the author"). Consequently it could be concluded that there was a tendency at the Diplomatic Conference not to give national legislators specific instructions on the cases in which limitations were always possible. Instead more general criteria were introduced in the proposed provisions. The result was that the national legislator now has to apply these criteria and then determine whether reproduction for private purposes can be included in a national provision governed by the general criteria in the Convention.

Secondly, it has to be underlined that the criteria in the provision are basically of three kinds, namely the following.

> Limitations according to Article 9(2) may be instituted only in "certain special cases." No indication is given in the Report of what is meant by this expression. It could be noted, however, that, as just mentioned, the Programme specified three cases, namely, in addition to private use and judicial or administrative purposes, also "particular cases." In the final text all three categories were replaced by the term "certain special cases." Most probably the Diplomatic Conference intended to include the earlier categories (a) and (b), therefore including also private reproduction, in the "special cases" in which limitations were permitted. And yet it could be asked whether, and if so to what extent, reproduction for private purposes in its present-day form, does really fall within the category of "certain special cases." This matter is dealt with in greater detail below.

Even where a limitation has to be considered a "special case" the national legislator has to see to it that the limitation--and of course also its application in practice--does not conflict with the normal exploitation of the work. It could also be asked whether reproduction for private purposes, given its present form and prevalence, does not conflict with this provision, and if it does to what extent. This matter is also dealt with in greater detail below.

Furthermore, the limitations must not unreasonably prejudice the legitimate interests of the author. The term "unreasonably" seems to suggest some sort of balancing of the interests of the authors with other interests, probably interests of a general nature. The Report does not clarify what the nature of such interests is, or what standard should serve to determine what is unreasonable. The only indication given in the Report is that the unreasonable nature of the prejudice might be mitigated by a provision on remuneration.

Finally, it should be stressed that--as it appears from the Report--the provisions of Article 9(2) were drawn up basically with reprography in mind, which was at that time the main reproduction technique.

1.3.3 The Universal Copyright Convention

The Paris text of the Universal Copyright Convention, as mentioned earlier, provides for the basic right of reproduction in Articles I and IVbis. Provisions on exceptions to the right are contained in Article IVbis(2), applicable to other rights as well as the right of reproduction. It reads thus:

"However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and the provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. 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."

The Paris Diplomatic Conference adopted a number of interpretative statements concerning Article IVbis(2). Some of them relate to the special provisions for the benefit of developing countries but others refer more generally to the exceptions that would be possible under those provisions. The interpretative statements are to be found in paragraph 46 of the Report of the General Rapporteur of the Conference (INLA/UCC/44). All of them are of more general interest when it comes to determining the scope of the freedom that the Universal Copyright Convention allows its Contracting States when they introduce exceptions to the protection, and they are therefore reproduced here. They read as follows:

"1. The exceptions must not 'conflict with the spirit' of the 1971 Convention. It was considered that, in addition to the requirement for 'adequate and effective protection' in Article 1 the 'spirit of the Convention' also comprehended the convictions expressed in paragraphs 1 and 2 of the Universal Declaration of Human Rights: that everyone has a right 'freely to participate in the cultural life of the community' and that everyone equally has a right 'to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

"2. The 'a contrario principle.' Paragraph 83 of the Intergovernmental Copyright Committee Report accompanying the IGCC text (UCC/4, Annex IX, p. 9) stated the view of the Committee that 'the inclusion in the Convention of special provisions allowing developing countries to publish certain works and translations under compulsory licences, means a contrario that, except as provided in Article V, there could be no question of developed countries instituting a general system of compulsory licences for the publication of literary, scientific or artistic works.' The Conference adopted this principle, it being understood that a 'general system' referred either to a system applying to a specific type of work with respect to all forms of uses, or to a system applying to all types of works with respect to a particular form of use.

"3. The exceptions must not 'conflict with the provisions' of the 1971 Convention. As a corollary to the 'a contrario' principle, the Conference understood the reference to 'the provisions' of the revised Conventions as referring to Articles Vter and Vquater. This means that a State not qualifying as a developing country under Article Vbis would not be entitled to institute licensing systems similar to those provided in Articles Vter and Vquater.

"4. The State must accord 'a reasonable degree of effective protection' to each of the rights named. It was understood that, under the second sentence of paragraph 2 of Article IVbis no State would be entitled to withhold entirely all rights with respect to reproduction, public performance, or broadcasting, that where exceptions are made they must have a logical basis and must not be applied arbitrarily, and that the protection offered must be effectively enforced by the laws of the Contracting State."

What is particularly important to reproduction for private purposes in the statement is what is said in subparagraph 4 on the obligation to provide, despite the exceptions, a reasonable degree of effective protection.

1.3.4 The Neighboring Rights Conventions

The conventions and agreements in the field of neighboring rights have, as indicated above, adopted a different approach to the question of limitations on rights from that of the copyright conventions. The latter conventions establish a general framework for the possibility of providing for limitations and leave it to the national legislator to consider whether the limitations contemplated are covered by the criteria of the convention. The conventions in the field of neighboring rights, on the other hand, contain provisions that apply to specific cases in which the national legislation is free to introduce exceptions to rights or limitations on protection.

Article 15 of the Rome Convention provides that:

"Any Contracting State may, in its domestic law and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(a) private use;

...

Furthermore, paragraph 2 gives Contracting States the possibility of providing for the same kinds of limitations with regard to the protection of the beneficiaries under the Convention as they provide for the protection of copyright in literary and artistic works, with the proviso that compulsory licenses may be provided for only in so far as they are compatible with the Convention.

The Report of the Rapporteur-General of the Rome Diplomatic Conference contains a reference to the various proposals made during the Conference but does not contain any particular elements on the interpretation of the provision.

The Phonograms Convention also contains a provision on the possibility for States to make exceptions or limitations to the protection that is granted to producers of phonograms under the Convention, among other things against unauthorized reproduction of their phonograms. The provision is contained in Article 6 of the Convention, and it refers only to cases where protection under national law is granted by means of copyright or another specific right or by means of penal sanctions (in other cases, for instance if the protection is granted under the law of unfair competition, the question hardly arises). For the above cases the Article states that any Contracting State "may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works." It should be mentioned, however, that this provision hardly ever comes into play in connection with reproduction for private purposes, because under Article 2 the protection under the Convention, that is, against unauthorized reproduction, applies only if the reproduction is for the purpose of distribution to the public.

The Satellites Convention protects basically against unauthorized redistribution to the general public or any segment thereof of signals from certain categories of satellites. It does not contain any provision affording protection against fixation of the programme-carrying signals transmitted by satellite.

Finally, it could be mentioned that the European Agreement on the Protection of Television Broadcasts contains a provision allowing Contracting States to withhold protection against the fixation of protected broadcasts and the reproduction of such fixations, notably "where the fixation or reproduction of the fixation is made for private use."

1.4 Other International Standards (Model Laws)

Certain model laws have been drawn up under the aegis of Unesco, WIPO and, as regards performers' protection, the ILO. In the field of copyright the Tunis Model Law on Copyright for Developing Countries could be mentioned. Its Section 7, headed "Fair use," includes a provision which, in the case of works that have been lawfully published, allows "the reproduction, translation, adaptation, arrangement or other transformation of such work exclusively for the user's own personal and private use." In the accompanying commentary it is said that "the expression 'personal and private use' is interpreted with varying degrees of restrictiveness, but as a rule this concept is the reverse of collective use and presupposes that no profit-making purpose is pursued; a case in point is the student who copies a text, or causes it to be copied, in accomplishing his work of personal research or his studies." In addition to what is said in the commentary it could be stressed that the provision speaks of the user's own use, which seems to exclude use by others.

The Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted by the Intergovernmental Committee of the Rome Convention in 1974, also contains, in its Section 7, a provision parallel to the one in Article 15 of the Rome Convention on the admissibility of making reproductions for private use.

1.5 Intergovernmental Discussions

1.5.1 General

In more recent years the question of reproduction for private purposes has been dealt with in two separate intergovernmental contexts.

First there were the discussions on reprography, conducted essentially within the Subcommittees of the Executive Committee of the Berne Union and of the Intergovernmental Copyright Committee on Reprographic Reproduction of Works Protected by Copyright, which met in Washington D.C. in 1975.

The second occasion on which reproduction for private purposes was discussed was at the meeting of the Subcommittees established by the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee and also the Intergovernmental Committee of the Rome Convention to study legal problems in connection with videograms. These Subcommittees, which met in 1978 discussed a number of items related to videograms, including questions related to private use. They reported to their respective parent Committees, which discussed the results at their meetings in 1979.

1.5.2 Reprography

During the meeting of the Subcommittees in Washington various matters relating to reprography were discussed, such as a "surcharge on equipment" and some aspects of private use. No mention of the problem was made in the Resolutions of the Subcommittees, however. They merely stated that the problem of reprography did not arise in the same way for all countries and that after a thorough study of the various aspects it appeared that a uniform solution on the international level could not be found for the time being. It was left to each State to resolve the problem by appropriate measures. In States where the use of reprographic reproduction was widespread one could consider, among other measures, encouraging the establishment of collective systems to exercise and administer the right to remuneration.

The findings of the Subcommittees were discussed at the meetings of their parent Committees in 1975. Basically, the Committees decided to consider the issue exhausted for the present. It was furthermore considered preferable for the matter not to be reconsidered by the Governing Bodies of WIPO and Unesco, which statement was interpreted by some delegations as meaning "not in the near future" (see, for instance, paragraphs 36-38 of the Report of the First Extraordinary Session of the Intergovernmental Copyright Committee in December 1975).

Since the meetings of the Executive Committees in 1975 the reprography issue does not seem to have been discussed at a universal, international or intergovernmental level.

1.5.3 Videograms

The Subcommittees of the Copyright Conventions on this issue met in September 1978. In the general debate in the Subcommittees, the speakers stressed, among other things, the considerable harm already suffered by the various holders of rights whose interests were involved where their works and performances were used on cassette or audiovisual disc. The Subcommittees also pointed out that this harm was bound to grow worse since the equipment placed on the market at a constantly falling cost increased the number of users and consequently the number of recordings made. Those practices not only harmed the interests of the copyright holders but were liable to affect also the phonographic industry, the cinematographic industry and television organizations. Furthermore it was said that, by reducing the outlets for industries disseminating works of the mind, the endless multiplication of recording capacity might jeopardize the legitimate income of the creators of such works and consequently intellectual creation itself.

With regard to more specifically private use, it was recognized that certain recordings could be made in good faith at home, and that such use was not to be compared with the offering for sale of unlawfully made copies. The Subcommittees considered however that the owners of rights in any case suffered a loss which, if it could not be avoided, should at least be mitigated. Furthermore, it was pointed out that Article 9(2) of the Berne Convention was drawn up largely with reprography processes in mind and that the situation under review was markedly different, in that the equipment necessary to make reprographic reproduction was not as commonly found in homes as the equipment for making sound and visual recordings.

The Subcommittees noted that the conclusion of appropriate contracts made it possible to settle the problems relating to the making and use of audiovisual cassettes and discs outside the private sphere. It was then stressed that the main difficulty lay in determining the extent of the private sphere and in the absolute necessity of devising ways of compensating the owners of rights. The Report of the meeting of the Subcommittees furthermore emphasized the following:

> "The opinion was expressed that the International Conventions did not contain any provisions which expressly forbade private use as such, and that it could be deduced from this that such use was tolerated. However, owing to the fact that it was not possible to control such use at the same time respecting individual privacy and the inviolability of the home, it was considered that this tolerance was in any case prejudicial to the authors, and a fortiori when recordings made by an individual for his own use were circulated outside the family circle."

The Subcommittees then discussed the compensation system provided for in the Federal Republic of Germany (see below, under 1.6.2). The Subcommittees expressed the opinion that the imposition of a charge on both recording equipment and materials would be likely to provide the best compensation for the prejudice caused. Because of the fears expressed that such a charge might induce users to think that payment of a charge gave them the right to use the equipment and materials as they liked and to distribute copies, etc., the wish was expressed that the concept of private use be strictly defined and demarcated before a system to alleviate the harm suffered by copyright holders was introduced.

The conclusions of the Subcommittees, contained in paragraph 34 of the Report, read as follows:

"The Subcommittees reached the conclusion that, in view of the lack of technical means of preventing large numbers of uncontrolled recordings, the establishment of such a system [i.e. a levy] should be recommended, this system consisting of a lump-sum charge on the sales price of recording equipment and material supports and being intended to compensate all the professional groups whose interests were at stake. It was further specified 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 further added that such a system had the further advantage of respecting the freedom of the private user, for whom the financial burden would, according to some members of the Subcommittees, be minimal. A levy system would also be simple in that the amounts would be collected not from individuals but from manufacturers of equipment and materials. As far as collection was concerned it was hoped that it would be possible to concentrate operations within one single body.

As a sort of summary of their discussions, the Subcommittees established an Inventory of Problems which highlights all the specific problems and points out the issues that should particularly be taken into account by national legislators. As far as private use is concerned the Inventory says the following:

"D.1 It is considered necessary to delimit the concept of private use by drawing a distinction between bona fide recordings made at home and the marketing of copies which have been made unlawfully. It is also considered necessary to take into consideration the possibility of loans of videograms on a large scale free of charge.

"D.2 In the absence of techniques making possible the strict monitoring of reproductions and, hence, the actual exercise of exclusive rights, a compensatory system is recommended with a view to mitigating the prejudice caused to the owners of these rights by the utilization of videograms for private purposes.

"D.3 This compensation should consist in a charge on the sales price, either of the equipment used in the reproduction and projection of works or of the material supports on which the sequences of images and sounds are fixed, or on both of these, the latter solution being considered the most likely to provide the best compensation for the various categories concerned.

"D.4 The collection of these compensatory payments should be carried out as far as possible by a single body, public, private or mixed, acting on behalf of all the different categories, which would be responsible for distributing the proceeds among them.

"D.5 The institution of a compensatory system should not deprive the owners of rights of the normal exercise of their prerogatives as recognized by international conventions, national laws or contracts, where such exercise can be carried out, for example in the case of unlawfully made recordings being put on the market or violations of copyright on the pretext of private use."

The Subcommittee of the Intergovernmental Committee of the Rome Convention met immediately after the meetings of the Copyright Subcommittees.

As regards the problems relating to private use, this Subcommittee endorsed the conclusions reached by the Copyright Subcommittees. It stressed that the compensation for the prejudice caused to those concerned should be based on a levy both on the equipment used for making the reproductions and on the material used to fix the images and sounds. This Subcommittee also considered that payment should be collected globally and as far as possible by a single body, public, private or mixed, which would be responsible for distributing the proceeds among the different categories. In the course of

the discussions it was stressed by observers participating in the meeting that, whatever the form of the remuneration to be paid resulting from the use of videograms, it would be paid to all groups contributing to the making of a videogram.

The Reports of the Subcommittees were, as mentioned earlier, brought to the attention of the respective parent Committees at their sessions in 1979.

The Copyright Committees endorsed the main lines of the recommendations adopted by the Subcommittees. There was some discussion, however, concerning the compensatory levy, which in the Report of the joint meetings of the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee were summarized basically as follows (in paragraphs 49 and 50). Several delegations voiced reservations concerning the very principle of a compensatory charge, and also questioned the basis for the assessment of this charge on either recording equipment or materials or both. It was said that any levy affecting the sales price should be only made on one or other of the above-mentioned elements. Certain delegations also wondered what economic impact a charge might have on those countries that were importing such elements. It was stressed that the impact would be particularly heavy on developing countries. In any event the delegations from those countries expressed the wish that if such a compensatory charge were to be introduced it should be made only in the marketing countries.

The discussion in the Intergovernmental Committee of the Rome Convention on the Report submitted to it by its Subcommittee was not extensive. In connection with the compensation in the form of a levy on both equipment and materials a number of delegations indicated that alternative systems existed in their countries, so that for example a levy could be based either on the equipment or on the materials or on both. The Committee noted that in any event all contributors and copyright owners should be the beneficiaries of the envisaged levy.

The Copyright Committees expressed the wish that the Group of Independent Experts to be convened in 1980 for the examination of certain aspects of the impact of cable television in the area of copyright might also consider the problems raised by the economic repercussions of the utilization of audiovisual cassettes and discs, and particularly the possible impact of the introduction of compensatory charges. In the event, however, the work of the independent experts concentrated mainly on problems in relation to cable, and questions of private use, compensatory charges, etc. do not seem to have been discussed further at an intergovernmental level.

1.6 National Legislation

1.6.1 General

As mentioned previously, the international conventions in the field of copyright and neighboring rights give States the possibility--without any obligation, however--of setting limitations on protection, in order to permit, among other things, reproduction for private purposes. In some, but mainly the Rome Convention, there is a direct provision referring to the private use. Others, mainly the copyright conventions, make no direct mention of private use. Instead the national legislator has to determine whether the provisions of national law on such reproduction, and the application of those provisions, are consistent with the more generally-worded limitations in the conventions.

The legislation of some countries grants general exclusive rights to authorize or prohibit the reproduction of works, without making any exception applicable to reproduction for private purposes.

Most countries, however, have availed themselves of the possibilities of limiting protection so as to allow the making of copies for private purposes. Such limitations, broadly speaking, are of two kinds. In most cases the national law contains express provisions which make it legal, usually under certain conditions, to produce copies of protected works without authorization from the owner of rights and without payment. In other countries, especially those following the Anglo-American legal tradition, reproduction for such purposes may be governed by provisions on "fair use" or "fair dealing."

It is neither necessary nor even desirable to make a survey here of the various provisions in national laws on this particular issue. Firstly such information quickly becomes obsolete, because the laws change frequently. Secondly, a broad description of national laws could be of interest de lege lata, but it would not really serve to suggest appropriate measures to remedy the adverse effects of reproduction for private purposes. For that reason only some features of the national laws are mentioned below.

As regards the contents of the national laws two issues are particularly relevant. One concerns the scope of the provisions on private use, that is, the definition of what is reproduction for private purposes as opposed to reproduction for other purposes. The other important issue concerns the measures that are provided for in some laws in order to compensate the owners of rights for the widespread reproduction for private purposes that takes place.

The first is dealt with differently in various laws. The interpretation of the "private" concept may vary, and the applicability of general provisions, on "fair use" for instance, may differ. Moreover, national provisions specify more or less precisely the number of copies that may be made. National provisions also deal with such matters as who is allowed to make the copy, that is, whether the copy has to be made by the person who intends to use it himself or whether that person is allowed to entrust the production of the copy or copies to other persons. Moreover, special provisions may apply to particular kinds of work. Some categories of works, for instance architectural works, may be excluded from the application of the provisions on reproduction for private purposes. Some forms of material expression of certain categories of works, such as sheet music, may be considered so sensitive from a copyright point of view that private copying should be either forbidden or restricted in other ways. Reproduction for private purposes may alternatively be restricted to only parts of works, and not allowed in respect of whole books, for instance. In addition, national provisions may contain rules on the use of the copies made for private purposes, stating more or less explicitly, for instance, that such copies may not be used for other purposes.

In addition to statutory provisions there have also been court decisions in a number of countries dealing with the matter of reproduction for private purposes. Some of the cases are well known to interested circles; only two could be mentioned here. One was decided by the judgment handed down by the Federal Court of Justice of the Federal Republic of Germany on May 29, 1954, which stated that claims could be filed for compensation in connection with the private recording of protected works. The judgment was one of the reasons for the subsequent legislation in the Federal Republic of Germany on a compensatory levy on recording equipment (see below). Another well-known case, usually referred to as the "Betamax case" (Universal City Studios Inc. and Walt Disney Productions v. Sony Corporation and others), was first referred on appeal to the California Ninth Circuit Court of Appeal, which decided on October 19, 1981, that the off-air copying of cinematographic films was an infringement of copyright. However, the US Supreme Court ruled on January 16, 1984, by five votes to four, that the videotaping of television programs in the home for personal use was a "fair use" exempt from restrictions under copyright.

1.6.2 Legislation on Compensatory Measures

As regards the second issue, namely compensation for the owners of rights for private reproduction activities, a certain number of countries have legislated on it. Basically there are two approaches. One consists of a levy under copyright law, that is, an obligation under private law requiring certain persons, mainly manufacturers or importers of certain materials, to pay a levy to the owners of rights or their organizations. The second approach consists of a kind of tax on such material, that is, an obligation under public law to pay a charge which goes to the Government, whereupon the Government may decide to use the revenue from the tax wholly or partly as compensation for the owners of rights.

Provisions on a compensatory levy under copyright law currently exist in four countries, namely (in the chronological order of the time of adoption of the legislation), the Federal Republic of Germany, Austria, Hungary and the Congo.

By far the oldest legislation in this field is that contained in Article 53(5) of the Copyright Act of the Federal Republic of Germany. It provides as follows:

"If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, 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. Any person who for commercial purposes introduces or re-introduces such equipment within the jurisdiction of this Act shall be jointly responsible with the manufacturer. This right shall not exist if, from all of the circumstances, it appears probable that the equipment will not be used within the jurisdiction of this Act for the said purposes. This right may only be enforced through collecting societies. By way of remuneration, each copyright owner shall be entitled to an equitable participation in the proceeds realized by the manufacturer from the sale of such equipment; the total claims of all copyright owners, including those coming within Articles 84 and 85, paragraph (3), and Article 94, paragraph (4), shall not exceed five per cent of such proceeds."

These provisions also apply to the protection of performers (Article 84), producers of phonograms (Article 85(3)) and producers of cinematographic works (Article 94(4)).

To facilitate the administration of the remuneration, the collecting societies which are the responsible ones in this field have formed a joint association for this purpose, called ZPU (Zentralstelle für private Überspielungsrechte). The total amount of remuneration collected under the provision in 1981 was 39 million deutschmarks.

In Austria the Copyright Amendment Law of July 2, 1980, contains in its Article I, paragraph 5, provision for a copyright levy on blank tapes. The provision reads thus:

"If a work that has been broadcast by radio or fixed on a commercially-manufactured sound or visual recording medium is expected, by reason of its nature, to be copied by fixation on a sound or visual medium for personal use, the author shall have a right to equitable compensation when unrecorded sound or visual recording media that are suitable for such copying, or other sound or visual recording media intended for that purpose (recording material), are distributed within the country by way of trade for payment, except where the recording material is not used within the country or is not used for such copies for personal use; substantiated evidence of such circumstances shall be sufficient. Running time in particular shall be taken into consideration in the calculation of the compensation. The compensation shall be given by the person who first distributes the recording material within the country by way of trade for payment."

The Law further states that claims under paragraph (5) may only be made by collecting societies. It also contains a provision allowing a refund where someone purchases recording material at a price that includes the compensation, but does not actually use the material for the purposes concerned.

The new Article 42(5), introduced into the Austrian Copyright Act by the Amendment Law of 1980, adds new references to Articles 69(3) and 76(4) in order to give also performers and producers of phonograms a claim to equitable remuneration where, under a statutory license, tape recordings for personal use are made of their performances and phonograms, whether broadcast or fixed on commercially manufactured recordings, which claim may be asserted against persons who first market suitable recording material in Austria.

The royalty rates were raised on January 1, 1982, to 2.25 Austrian schillings per hour of playing time (somewhat less where the importer has a contract with Austro-Mechana). In 1981 the income from the levy was about six million Austrian schillings.

The next country to provide for a compensatory charge was Hungary. By Decree of the Minister of Culture of November 20, 1982, a new Article 14A was inserted into Decree No 9, 1969 (as amended by a Decreee of 1978). The new Article contains provisions on a levy on blank recording material, reading as follows:

"(1) With regard to reproduction for private use the authors of works broadcast by radio or television or published as visual or sound recordings shall also be entitled to special remuneration according to the rules laid down by the Bureau for the Protection of Authors' Rights and approved by the Minister for Culture. The performers and the producers of sound recordings shall also receive a share of the amounts thus paid.

"(2) The person who initially puts into circulation in the country blank mediums suitable for making sound or visual reproductions shall be required to remit eight per cent of the returns on sales--in the case of domestic products, the manufacturer on the basis of the cost price, in the case of foreign products, the domestic distributor according to the relevant price regulations on the basis of the wholesale price--to the Bureau for the Protection of Authors' Rights, in respect of the remuneration mentioned in paragraph (1). Transfer and accounts shall be due twice yearly, two months after the end of the calendar half-year.

"(3) Payment of such remuneration shall not be required in respect of

- distribution for export purposes, and

- blank mediums for sound or visual recordings fitting only devices (such as studio equipment, dictating machines) which, if utilized for their proper purpose, are not suitable for reproducing works for private use."

The Decree furthermore contains provisions on the distribution of the amounts. In the case of sound media 50% goes to the authors, 30% to the performers and 20% to the producers of phonograms. In the case of videograms and other visual media the proportion is 70% to the authors and 30% to the performers.

The Law on Copyright and Neighboring Rights of the Congo of July 7, 1982, contains in its Article 48 a provision on remuneration payable to authors for private sound and video recordings of their works. The provision reads as follows:

"Reproduction by means of the sound or, simply, visual recording on physical mediums of protected works within the meaning of this Law, intended for strict personal and private use in accordance with Article 33, shall entitle the author to remuneration whose amount shall be proportional to the revenue from the sales on the national territory of blank mediums. The remuneration shall be calculated as a percentage of the selling price, including all taxation, of such blank physical mediums, and shall be payable to the professional body of authors referred to in Article 69; their use shall be the subject of an assignment authorizing the reproduction of protected works under the conditions and within the limits set out by this Law; the amount of such remuneration shall be deducted from the price of such assignment."

What has been mentioned here is only the basic features of those national laws that have so far established a copyright law system for a compensatory levy on equipment or blank tapes, etc. On the whole the provisions in the various countries correspond, but there are some interesting differences. Because of both the differences and the similarities it has been considered appropriate to reproduce the relevant provisions here. It should be mentioned, however, that the details of both the laws themselves and the supplementary contractual framework have been left aside.

It has been mentioned in various international fora that other national legislators are at present actively considering the question of a levy and that, in the Federal Republic of Germany for instance, there are plans for amendment of the system established in 1965.

The other approach to the compensation problem is to grant such compensation from Government funds. It could of course be drawn from any kind of Government funds. However, in the countries where there is such compensation it seems always to come from funds generated by a tax on equipment or materials.

As an example of a tax system, the Norwegian Law concerning the Special Tax on Equipment for the Recording or Reproduction of Sounds or Pictures, of June 2, 1981, could be mentioned. Even before that date there had been a special tax on radio or television receivers and on recorders, the proceeds from which were used for the Norwegian Broadcasting Corporation. Under the new Law a tax was imposed on the import and the sale, renting or lending out of equipment (machines as well as tapes, etc.) for the recording or reproduction of sounds or pictures. The tax on the machinery was introduced as from January 1, 1982, and the amount was 17.5% of the highest price payable to the dealer. The tax on blank tapes came into effect on July 1, 1982, and the amount is currently three Norwegian Crowns (NCR; 1 NCR being equivalent to about 0.3 Swiss francs) on audio tapes and 15 NCR on video tapes. The proceeds from the tax go first to the Government Treasury. It is proposed that a certain sum (in 1983 about five million NCR) of the amounts collected be set aside and shared equally between four beneficiaries, namely authors, performers, producers and a fund for special projects.

Another example that could be mentioned is Sweden, which, also in 1981, introduced a similar tax on blank audio and video tapes. From the sums collected a certain amount goes to authors, artists/musicians and producers of phonograms. However, the Government Committee on the Revision of the Copyright Law has forwarded a proposal for a copyright levy on recording materials, which could replace the tax. This proposal is now under consideration.

1.7 The Factual Situation

It is of course of considerable importance in discussions on legal matters to know as much as possible about the underlying factual situation. As regards the problems surrounding reproduction for private purposes, it is therefore of interest to survey the extent and nature of such activities.

As regards reproduction for private purposes by means of reprography, no recent comprehensive international information seems to be available.

As regards "home taping" on the other hand, a number of surveys have been conducted and their findings released in various publications. Examples that could be mentioned are the information contained in "Copyright" July-August 1982, p. 226, and in "The Private Copying of Sound and Audio-visual Recordings," a study made by the International Federation of Phonogram and Videogram Producers (IFPI) at the request of the Council of Europe.

The next part of this document gives certain factual and statistical information that is mainly taken from those two sources. It has not been considered particularly meaningful, however, to go into too much detail. The situation changes rapidly, and what is true today is no longer relevant tomorrow. Furthermore, the information available is not truly worldwide but covers only certain countries. In addition, it often does not relate to the same year, making comparison difficult.

With the above reservations, some basic information on certain matters could nevertheless be of interest in this context. One such matter could be the penetration of audio and video recorders in certain countries. Such information is of interest because the figures give some indication of the volume of home taping, and reflect an evolutionary trend which may ultimately affect all countries.

As regards the penetration of sound recording equipment, the following could be mentioned.

In the issue of "Copyright" just mentioned, it is stated that the percentage of households with at least one tape recorder was:

in Austria, 1974:	40%	
in France, 1979:	37%	(only cassette players)
in the Federal Republic of Germany, 1978:	60%	(only cassette players)
in Japan, 1978:	87%	
in the United Kingdom, 1980:	56%	
in the United States, 1980:	48%	(of the population, not households)

In the study made for the Council of Europe additional and more recent figures appear, showing that the United Kingdom has the highest percentage of households with a tape recorder, namely 73%, with the "Nordic" countries in second place with about 70%. It also reveals that the number of homes with more than one recorder is increasing, so that, in the Federal Republic of Germany for instance, every household concerned has an average of two recorders.

As regards the penetration of video recorders, certain figures are given in the IFPI study made for the Council of Europe. According to this information the percentage of households possessing such a recorder in certain European countries was as follows in 1982:

United Kingdom:	15.0%
Sweden:	14.0%
Norway:	11.0%
Federal Republic of Germany:	10.0%
Netherlands:	9.7%
Denmark and Switzerland:	8.0% each

The above figures are just samples, and several countries are missing from the survey. Obviously video penetration develops differently in various markets, depending on a number of factors which would be difficult to explain in detail here, although the range and quality of the output of the television channels concerned is said to play a certain role. What seems obvious, however, is that video technology is here to stay and will penetrate further, although at a different rate in different countries.

Another type of information that would be of definite interest concerns the sale of blank tapes.

As regards audio tapes, some information is given in the issue of "Copyright" referred to above. That survey shows that the number of blank tapes sold was as follows:

Austria, 1981:	30 million
France, 1981:	42 million
Federal Republic of Germany:	80-100 million
United Kingdom, 1980:	71 million
United States, 1980:	344 million

The extent of private copying on audio tapes is not, however, determined only by sales figures. As mentioned for instance in the IFPI study for the Council of Europe (p. 19), blank tapes are on average used twice for recording, which means that they are recorded and then erased and then recorded again.

As regards video tapes, the study made for the Council of Europe shows some figures, which are quoted here just as examples. The sales of blank video cassettes in 1982 were as follows:

Federal Republic of Germany and United Kingdom:	15 million each
France:	9.1 million
Sweden:	3.5 million
Netherlands:	2.5 million

In addition to the figures the surveys also contain information about various other related matters. It is said that in the audio field the material mainly recorded is music (70-90%), the vast majority of which seems to be music protected by copyright, mainly pop or rock music of national or foreign origin. Most of the recording seems to be done from broadcasts or records. The reasons for private copying vary somewhat from counotry to country, but frequently the reason is that such a recording is cheaper than pre-recorded music. The possibility of making one's own selection and the fact that such recordings are more practical are also mentioned as reasons for such reproduction, however (study for the Council of Europe, p. 20).

As regards the nature and source of video recordings, page 28 of the study shows feature films to be the category most frequently recorded, the main source being the television broadcast. To an increasing extent, however, at least in some countries, copies are made from other cassettes. Video recorders are still used mainly for "time shifting" (recording of television programs for watching at a more convenient time). However, they are becoming more and more widely used for playing video cassettes that have been rented or purchased.

Finally, it would be interesting to determine the scale of the losses suffered through reproduction for private purposes. Such losses are of course difficult to quantify, and only few attempts have been made to estimate them. Some such attempts are referred to in the study made for the Council of Europe (p. 15). In the United Kingdom for instance, the music copied, if sold as long-playing records, would correspond to three times the turnover of the record industry in 1979. The British Phonographic Industry has estimated that 25% of the music copied would have been bought if the possibility to make private copies had not existed. The loss of sales, calculated from that assumption, would be 283 million, with an approximate loss to the owners of rights of 98 million (authors about 14 million, performers 28 million and producers 56 million).

No equivalent, more comprehensive estimation seems to be available concerning the losses suffered through private recording in the video field.

2. A GENERAL ASSESSMENT OF THE SITUATION AND OF POSSIBLE MEASURES

2.1 Introduction

The reproduction of protected works and contributions for private purposes has increased considerably in recent years. This is primarily due to the new media technology, which has a number of effects in this connection. One is a considerable increase in the output of works in forms suitable for private reproduction, for instance in broadcast or cablecast form or in the form of recordings. The other effect is that recording technology in both audio and video fields has made it possible to produce, inexpensively, high-quality copies of both sound and video recordings, and now also reprographic copies of literary works. The new technology has considerably increased both the quality of the copies produced and the possibility of making large numbers of such copies. In fact the new recording technology has made it possible for everyone to become his own producer.

The development of reproduction technology is likely to continue. Both in the video and the audio fields, innovations are still being made (small audio recorders, cheaper video equipment, etc.). The problem of reprographic reproduction for private purposes, in other words the private copying of the printed word, is also increasing rapidly, mainly as a consequence of two kinds of development. One is that home photocopying machines, hitherto rare, may become more common because technical innovations are making them technically better and economically more attractive. Also the growing cost of book production and other ordinary publishing activities may support the trend towards more home reprography. Another factor that may influence reprography and similar reproduction of both literary and other works is the advent of the so-called "electronic library," that is, the transmission of data, texts and pictures to private homes by way of telephone or other telecommunications links (view-data and similar systems). This development is likely to increase the reproduction for private purposes of some categories of works, in particular literary works.

One of the basic rights that authors, performers, producers of phonograms and broadcasters enjoy under both relevant international law and national laws, where such legislation actually exists, is the right to control the reproduction of their works or of recordings made of their contributions. This right of reproduction is in fact one of the cornerstones of the intellectual property system. Any erosion of this right therefore affects the very foundations of the law and has a detrimental effect not only on the position of the owners of rights but also on the more general interests that this branch of law has to serve. Countries introduce intellectual property laws in order to attain certain objectives. If the application of the legislation causes erosion of its effects, the objectives that the legislation should serve are no longer attained and adverse economic, social and cultural conditions would result.

Against this background certain basic questions arise regarding the development of the reproduction of protected works and contributions for private purposes.

The first question is whether the activities in this category are carried out in such a manner and to such an extent that action is desirable or even necessary at an international level. In order to clarify this, one has to determine fairly exactly what obligations there are under international law,

and establish whether the private reproduction activities, or rather the application of national provisions permitting that reproduction, are in conformity with the proper application of the international conventions. It could also be desirable to look into the more general question whether the private reproduction activities should be limited in the light of other considerations as well as those of international law.

If such an examination does reveal that reproduction for private purposes should be limited, the next question is that of deciding what measures are possible and/or desirable. In this respect two main issues arise. One concerns the desirability of a strict definition of what is actually to be considered reproduction for private purposes or of similar nature, in order that national legislation may permit such reproductions of protected productions. The other main issue concerns the possible compensatory or other measures to mitigate resulting adverse effects for the owners of rights.

2.2 Application of the Limitations Under the International Conventions

2.2.1 The Copyright Conventions

As mentioned above, the Berne Convention, in its Article 9(2), permits the countries of the Union to make exceptions to the exclusive right of reproduction, provided:

(a) that it is done "in certain special cases,"

(b) that the exception does not conflict with the normal exploitation of work, and

(c) that the exploitation does not unreasonably prejudice the legitimate interests of the author.

Reproduction for private purposes is not explicitly mentioned as being allowed under the provision, quoted above; photocopying, however, in "a small number of copies" and "particularly for individual or scientific use," is referred to in the report of Main Committee I of the Stockholm Conference as a case where reproduction is permissible without payment. When it comes to the relations between present-day reproduction for private purposes and the provisions of Article 9(2) of the Berne Convention, however, a number of observations can be made.

The first basic observation is that the provisions of Article 9(2) quite naturally use as their point of departure the technology available in the late 1960s. The comments made in the report refer to photocopying as the principal means of making copies of works. That situation was certainly not the same as the one prevailing today, where it is possible to make high-quality copies of recordings of works, performances and other productions rapidly and inexpensively. Even farther removed from the situation at the time of the Stockholm Conference is the situation where inexpensive photocopiers find their way into individual homes, and computerized data-bases provide material in the form of text and pictures and also music and feature films for direct home use.

Because reproduction technology and its use have developed to produce the present situation, the question inevitably arises whether private reproduction activities can still be considered in terms of a "limitation" or "exception" in relation to one of the basic privileges granted to the owners of rights. The cumulative effect of all individual copying acts may be such that one can no longer speak of the use of an exception but rather of some kind of specific use on its own, that is, a the use of the reproduction right itself. A well-known sentence from an United States judge (in the Williams and Wilkins case) says that "Babies are still born one at a time but the world is rapidly being overpopulated." This reasoning seems to be applicable both to reprography for private purposes and--above all--to home taping activities in various forms.

For the general public it is of course quite tempting to make recordings, in particular of music from the radio or, as often happens, from records borrowed from friends.

Television broadcasts are to a large extent recorded for watching at a more convenient time ("time-shifting"). Another practice that is becoming more and more current is the copying of videograms for private video libraries or for circulation among friends of the family. Each of these recording activities may seem harmless enough but collectively, as just mentioned, they could be highly detrimental to the owners of rights.

To a certain extent the same reasoning is applicable to reprographic reproduction. This technique is today used mostly for copying scientific or professional works, with the consequent adverse effect on the possibility of producing and disseminating such works.

In the light of the above, one should look into the question whether private reproduction as it occurs today, and may be expected to develop in the near future, is consistent with the criteria mentioned in Article 9(2) of the Berne Convention.

In the first instance one could question whether such reproduction can still be considered one of the "certain special uses" within the meaning of Article 9(2) of the Berne Convention because, even though it is a specific use, it is a widespread practice with a constantly increasing adverse effect on the value of exclusive rights as such.

Furthermore, reproduction for private purposes can have an effect on the normal exploitation of works. Normal exploitation of recordings, for instance of musical works, consists in the production of the recordings for the purpose of sale. At least to some extent, the royalties due to authors and other contributors are based on the sales or expected sales of the product. As for videograms, they are normally produced with a view to either sale or rental. Cinematographic works are usually produced on the assumption that they will be performed, broadcast, distributed by cable and reproduced and distributed in the form of videograms. Scientific or other professional books are published on the basis of certain assumptions regarding potential sales, etc., and they need that market for book publishing to survive.

At least as regards certain categories of works, such as the ones just mentioned, it may be assumed that normal exploitation is adversely affected by private reproduction activities and that that adverse effect is sometimes serious. It is of course very difficult to prove the degree of the negative effect statistically, because changes in market pattern are sometimes due to other factors, such as economic recession, changes in public taste, etc. However, such factors as the extensive penetration of recording equipment, together with the big sales of blank cassettes and the difficulties faced by certain sectors of the publishing industry, seem however to provide a solid basis for the assumption that current private reproduction activities in many countries do in fact conflict with the normal exploitation at least of some categories of works, in particular musical works, cinematographic works and certain kinds of literary work.

The criteria under Article 9(2) are cumulative in the sense that, in order to be lawful under the provision, the reproduction must neither conflict with the normal exploitation of the work nor unreasonably prejudice the author. If it can be stated that the reproduction conflicts with the normal exploitation of the work, it is consequently unnecessary to determine whether the same act causes an unreasonable prejudice to the author. If, however, action is taken, for instance in the form of compensatory measures, to ensure that there is no conflict with normal exploitation, the next test is to see whether the reproduction activities still do not cause an unreasonable prejudice to the author.

There is no particular indication, in the Stockholm Conference report, of the standard to be applied in the determination of what is actually reasonable or unreasonable in this context. Various suggestions have been put forward in international discussions on the subject. Loss of earnings for the author could perhaps be justified in certain cases, for instance when the user is not a commercial enterprise, but not in other cases. The theory of unjust enrichment has also been mentioned in this context: the private person producing the copy makes a profit--at least in certain cases--at the expense of the owners of rights, through not having to buy a copy.

The conclusion to be drawn from the above seems to be that, in a number of cases, current private, non-paying reproduction activities, even if they cannot be said to harm the normal exploitation of works within the meaning of the Convention, nevertheless cause an unreasonable prejudice to the authors of the works so reproduced.

From this it follows, broadly speaking, that private reproduction activities, as and to the extent engaged in today in many countries, run the risk of not being consistent with the obligations under Article 9(2) of the Berne Convention. That could be even more true if the technology develops further, making reproduction facilities still less expensive and more efficient, and covers even larger areas than today.

As mentioned earlier, Article IVbis(2) of the Paris text of the Universal Copyright Convention contains the possibility for any Contracting State, in its domestic law, to make exceptions to the protection that do not conflict with the spirit and the provisions of the Convention. Even if such exceptions are provided for, the State must nevertheless grant a reasonable degree of effective protection to each of the rights to which exception has been made.

The provisions on exceptions in the Universal Copyright Convention are thus more broadly worded than those in the Berne Convention. The question of the level of protection that the Universal Copyright Convention actually grants has been much discussed both as regards the scope of the reproduction right as such and the demarcation of the exceptions that the Contracting States are allowed to make. A number of experts believe however that, broadly speaking, the Convention grants the same level of protection as the Berne Convention. If one compares the general wording "reasonable degree of effective protection" with the criteria established in Article 9(2) of the Berne Convention, it would seem that the admissibility of exceptions was about the same in both Conventions. As regards the provision in the Universal Copyright Convention, it should be noted that the protection must not only be in "reasonable" degree but also "effective." This would seem to imply, among other things, that the protection provided for must be efficiently enforced, which could have implications for instance where provisions on private reproduction in national law are applied in such a way as to make protection ineffective.

The conclusion to be drawn from the foregoing seems to be that private reproduction activities, today and even more in the future, run the same risk in certain countries of being inconsistent with the provisions of the Universal Copyright Convention as they do with those of the Berne Convention.

2.2.2 The Rome Convention

As mentioned above, the Rome Convention contains, in its Article 15(1), a provision that expressly allows Contracting States to provide, in their domestic laws, for exceptions to protection, notably as regards "private use."

The concept of "private use" does not seem to be defined in the Convention or in the preparatory work. In the intellectual property context the concept is fairly well defined, however. In the "WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights" the concept is described in the following way:

> "Generally understood in relation to a published work as making a reproduction, translation, adaptation or other transformation of it, in one or several copies, not exclusively for individual use by a single person as in the case of so-called "personal use" but also for a common purpose by a specific circle of persons. Private use can also be arranged by a legal entity. Copies reproduced for private use must not be made available to the public."

As also with other relations governed by the international conventions, it is the national legislator who decides whether or not to avail himself of the possibilities that the conventions offer of making certain exceptions to protection. He is also entitled to define for national purposes the exact meaning of the concepts used in the conventions, without of course being able to deviate too far from the meaning that has been more or less commonly accepted.

The Rome Convention contains no further criteria on the concept of "private use" comparable to those contained in the Berne Convention and the Universal Copyright Convention. Consequently, the determining factor is the interpretation of the "private use" concept as such, without reference to any qualifying criteria such as interference with the normal exploitation of the productions concerned, or prejudice suffered by the owners of rights.

It therefore seems difficult to argue that national provisions allowing reproduction for private purposes, even if they interpreted the term broadly, would be contrary to the provisions of the Rome Convention. It is quite another matter when the national legislator, for constitutional reasons or in response to a wish to treat the different categories of owners of rights equally, has to apply the same standards to the beneficiaries of the Rome Convention as he does to authors.

As mentioned earlier, the Phonograms Convention and the Satellites Convention are not relevant in this context.

2.2.3 Summary

To summarize what has been said in the previous paragraphs, it seems doubtful whether current activities involving reproduction for private purposes are consistent, at least in some countries, with the international conventions in the field of copyright. As regards relations under the Rome Convention, it seems that legislation permitting reproduction for "private use" of the productions of the beneficiaries of the Convention would be consistent with the actual wording of the relevant provision of the Convention.

In addition to this point of view, a further element could be considered. Even if national legislation and its application were not to be considered contrary to obligations under international law, there could be a number of other factors that would induce a Government to take action against extensive private reproduction activities. Such considerations could for instance be based on the desire to ensure the dissemination of certain kinds of professional, scientific or educational material or to preserve the domestic entertainment industry's means of survival. The preservation of a healthy phonographic industry, for instance, could be considered very important from the point of view of cultural policy and also because it provides a large number of employment opportunities. The first aspect in particular has been referred to in relation to developing countries, in which it could be important to have domestic industries in the copyright field in general (not only phonographic industries but also, for instance, publishing industries).

In view of the above, it must be considered desirable to examine what action could be taken to mitigate the adverse effects of the current reproduction for private purposes.

The legislative action that could be taken is basically of two kinds.

One consists in efforts to determine strictly, by legislation, the criteria that govern reproduction for private purposes, in the form of either specific provisions or provisions of the "fair use" type. In the same context one could also consider more comprehensively the nature of private reproduction, and among other things whether it should still be governed by exceptions under the law or whether another proper legal solution should be found.

The other kind of action, presupposing acceptance of reproduction for private purposes in the forms it has today, would consist in devising means of mitigating its adverse effects.

2.3 Possible Legislative Measures Relating to Private Reproduction as Such

2.3.1 Demarcation of the Concept of "Reproduction for Private Purposes"

2.3.1.1 The Concept of "Private"

Under 2.2.2 there is a reference to the definition of the concept of "private use" in the WIPO Glossary. As can be seen from that definition, "private use" is a broader concept than "personal use": The latter, according to the Glossary, covers the case of material produced "exclusively for individual use by a single person." "Private use," on the other hand, covers not only personal use as just defined but also production "for a common purpose by a specific circle of persons" with the additional possibility of private use being arranged by a legal entity. The copies must not be made available to the public.

It should be mentioned that other terms are often used in relation to reproduction for private purposes, such as "home taping" which refers to the recording on an audio or video tape of the sounds and/or pictures either from another recording or from a broadcast. It is therefore a broader concept than "reproduction," which in common parlance usually refers to the transfer of sounds or images or sounds and images from a given recording to blank recording material, notwithstanding Article 9(3) of the Berne Convention, under which any sound or visual recording amounts to reproduction.

Generally speaking, to be for private purposes, the reproduction has to be undertaken for domestic use and without commercial aim. In normal cases the reproduction is undertaken by individuals for their own pleasure or for the pleasure of their families or friends.

It follows from this that the definition of what kinds of activity should be allowed as being reproduction for private purposes is very important. The following points are worth considering in this context:

the distinction between reproduction for private purposes and that covered by the "piracy" concept, which means unauthorized copying for commercial exploitation;

the distinction between reproduction for private purposes and reproduction, whether by reprography or by recording, for educational or institutional or other "semi-private" purposes;

the size of the circle that would be allowed to benefit from reproduction activity for private purposes; it could be:

(a) the copyist alone;

(b) the copyist plus his family and close friends;

(c) the persons under (b) plus other persons within a specific circle (colleagues in a team, members of private clubs and certain small organizations or associations of closed and personal character).

When discussing the scope of "private" use certain more specific problems are also important. In particular the following could be mentioned.

Should employed individuals be allowed to make reproductions (such as excerpts from books or journals) for their personal use in their employment activities, even if the employer indirectly benefits from it through the improvement in the quality of the employee's work, or should one require such copies to be made by the employer, under a contract with the owners of rights or their organizations?

Should reproduction for private purposes be allowed not only for individuals but also for legal entities as such?

What use of the copies made should be allowed?

A question that is frequently discussed is whether musicians (amateurs or professionals) are allowed to use photocopies of sheet music only for personal use at home, or also for rehearsals or even for the public performances.

In the educational field, the question frequently arises whether a teacher should be allowed to make "private" copies not only for his own personal use (for instance to improve his teaching abilities) but also for distribution to his pupils, or whether such reproduction should be governed by a contract like the one mentioned above. It has also been discussed whether recordings made for private use can be played for the pupils, for instance in a classroom.

Against this background and in view of the adverse consequences, it could be desirable for national legislators to consider the demarcation of the concept of "private use" in the context of reproduction activities.

2.3.1.2 The Nature of the Work or Other Production to be Reproduced

The provisions of the international conventions that deal with the admissibility of reproduction for private purposes do not make any distinction between various categories of works or other productions concerned in this context. The provisions of Article 9(2) of the Berne Convention and Article IV*bis*(2) of the Universal Copyright Convention apply to all kinds of work. The provision on private use in Article 15 of the Rome Convention applies equally to all kinds of performance, phonogram production and broadcast covered by the Convention.

This "universality" of the application of the relevant provisions in the conventions does not, however, prevent the national legislator from giving the national provisions a more qualified wording. In fact, as regards the Berne Convention for instance, the national legislator has to consider in quite considerable depth the questions of possible harm to normal exploitation and unreasonable prejudice. Taking these and other considerations into account, it could for instance be stressed that national provisions on reproduction for private purposes should not apply equally to all kinds of works or other productions. Various elements could be relevant in that case.

One element is that for certain categories of works it could be considered that reproduction for private purposes should not be allowed at all. The reason might be that it would be strange or unnatural or particularly dangerous to allow such reproduction. An obvious example of this is works of architecture, where it would be strange to allow individuals to reproduce such a work, for instance from the drawing to the building, under the provisions on reproduction for private purposes. This aspect could also be important for certain other categories of works. Examples might be certain works of art that should be considered unique, where it would be considered reasonable to prohibit all reproduction, even for private purposes. There is always a risk of such private copies coming on to the market, for instance after the owner's death.

As regards still other categories of works, it could be considered that the unrestricted possibility of making copies for private purposes would have particularly detrimental effects. This could notably be true of musical works--both as sheet music and as recordings--and cinematographic works. For political and practical reasons it would in most cases be impossible to prohibit reproduction for private purposes completely. There might nevertheless be room, however, for certain specific provisions in national law as regards such categories of works and perhaps others too.

One such provision might allow other persons to be commissioned to make private copies of the works concerned. This issue is dealt with further under the next heading. Another such provision might be designed to restrict the possibilities of private copying for certain particularly sensitive categories of productions, such as sheet music (which is expensive to produce and usually exploited under rental contracts, where private copying could have particularly disastrous effects).

There is a wide variety of national provisions on the issues mentioned here, and we do not need to go into details. Generally speaking there are good reasons, however, for national legislators to consider these aspects when they embark on the enactment of legislation in this field.

2.3.1.3 The Person Entitled to Make the Technical Reproduction

Basically, reproduction for private purposes means that copies are made for an individual's personal needs. The starting point is that he himself carries out the work of reproduction. A certain number of questions arise in this context, however.

One, which has to do with the interpretation of the concept "private," is dealt with under 2.3.1.1 above.

Another aspect has to do with whether the person for whose personal use the copy is intended does the actual reproduction work ("pushes the button") himself, or whether he is allowed to commission another person to do it.

The starting point here is again that the person for whom the copies are intended manufactures them himself. This was quite natural earlier, when copies were made by hand or with a typewriter. With the advent of modern reproduction technology and the ready availability of reproduction equipment, the answer to the question is not quite as clear as before. This is particularly true because in many countries, and especially in big cities, there are a number of copy centers, copy-shops or other enterprises that undertake copying work for customers, on the basis of either a master brought by the customer or a master made available by the enterprise itself.

Under most national legislation it is probably clear, either explicitly or by implication, that reproduction for private purposes may be carried out also by a person who has been commissioned to do so by another person, on whose behalf the copy is made. Usually the operation is carried out under the responsibility of the person who orders it, and the actual copyist is only giving technical assistance. The situation is in this respect somewhat similar to the relations between the cable operator (who decides what programs to carry) and the Post Office or other body that actually operates the network. There are grey areas, however, such as the extent of the responsibility of the machine operator where he assists in copying activities that are clearly outside the scope of private copying. In such situations a number of considerations are involved, for instance elements of labor law, which are outside the terms of reference of this study.

A third aspect concerns certain specific cases, such as when coin-operated photocopying machines are available to the public, for instance in railway stations and post offices, where people can make their own copies. Questions such as whether and to what extent the owner or possessor of the machine is responsible under copyright law for the copying done with it, whether or not he is obliged to affix notices about the contents of that law, etc., are the subject of much discussion and have been dealt with in various ways by national law.

A far more serious problem arises, however, where copying for private (and also other) purposes is carried out by commercial enterprises that sometimes possess sophisticated reproduction facilities and are specialized in reproduction activities (reprography centers, entrepreneurs who, upon request, provide copies of audio or video recordings, etc.). A number of questions arise in this context. One, which was referred to earlier, relates to responsibility under copyright law for the activities. This becomes particularly important where the copyist provides the master, for instance where a shop offers blank tapes for sale and also provides records for copying on the spot against a fee. In such a case it could be argued that the whole operation is outside the scope of reproduction for private purposes.

Another question concerning such professional operators of reproducing equipment is that they considerably facilitate large-scale copying of material that may be sensitive from a copyright point of view, and that they contribute to the harm done to the owners of rights by such copying. It could of course be argued that people who need to have personal copies made should not always be obliged to acquire reproduction equipment (particularly reprographic machinery), and that it is a good thing for professional people to provide such equipment. On the other hand the damage which may be done by such activities has induced certain governments to take steps to lessen it. An example worth mentioning is Finland, which recently introduced legislation under which it is prohibited to entrust to other persons the reproduction for private purposes of certain categories of works, namely musical and cinematographic works. Similar steps are under consideration in other countries.

2.3.1.4 Number of Copies

As regards the number of copies that may be made for private purposes, national laws vary from no indication at all to "single copies," or more or less specific figures. The number of copies to be allowed depends on various considerations, such as the nature of the work, its "sensitivity" from a copyright point of view, etc. From the point of view of international law it could be said that, the larger the number of copies, the greater the risk of incompatibility with the criteria established by the copyright conventions.

2.3.2 Possible New Concepts in Legislation

As has been mentioned repeatedly in previous paragraphs, reproduction for private purposes is today carried out under provisions which constitute an exception to one of the basic rights granted to the beneficiaries, namely the right of reproduction. Because of the extent and form of current private reproduction it could be asked whether such activities really should be governed by exceptions. Various ideas have been put forward for legislative measures to give the beneficiaries some control over such reproduction. Various approaches have been mentioned in international debate (including the ideas of P. Masouyé in "Copyright," 1982, p. 81, and the reference made by V. Hazan in "Copyright," 1982, p. 341, to the discussions in the Legal and Legislative Committee of CISAC in Madrid in May 1979). The following survey of some of the ideas expressed does not in any way claim to be exhaustive.

The basic idea of the first-mentioned author is that, while reproduction for private purposes is not necessarily lawful under Article 9(2) of the Berne Convention (for it to be permitted, it is necessary that the reproduction should not conflict with specified requirements), it can no longer be regarded simply as an exception to the reproduction right. Consequently, the exercise of the possibility of making copies for private use in general is also governed by the author's exclusive right. In that case the right cannot be enforced, however, because this would constitute a violation of privacy. Seen thus, reproduction for private purposes--which could then no longer be governed by the exception, or enforced as authors' exclusive rights are generally enforced--becomes a new mode of exploitation, and should be paid for by those using the copies.

One of the ideas put forward during the CISAC meeting started out from the basic assumption that there are only two occasions on which a protected work may be reproduced by means of a recorder (no account being taken here of the practice of "bootlegging"): one is when the author has already authorized the recording of his work, and the other when he has authorized its broadcasting. However, continuous recording of the published recordings of the work or of the broadcast of the work was not what the author had in mind when he authorized those uses of it. The increased possibilities that modern media technology has provided for access to the work in various forms should give the author parallel opportunities of increasing his income from his creative activities. This has not happened, however. Basically it is the phonographic industry and the broadcasters that have made reproduction for private purposes possible. Consequently the problem should, according to this idea, be tackled there. One could provide, for instance by legislation, that a levy of 0.5 to 1% should be imposed on the price of every record or other object incorporating a protected work, to be collected through either the manufacturers or the importers of such recorded material. As the manufacturers already have to pay royalties to the collecting societies, the payment of a levy would only increase those royalties slightly. As regards broadcasters, one could add the "potential recording levy" to the license fees or--in the case of broadcasters financed by advertising--to the payments that the advertisers have to pay to the broadcaster. To summarize, this idea would be to create a specific right to justify the levy, which right could be called the "potential recording right." Amendments to the international copyright conventions would be necessary, both to define the right and to establish an international obligation to apply it also to foreigners.

Another idea that was discussed at the CISAC conference was one put forward by Professor Ulmer. It would consist in creating a new right within copyright to cover "reproduction by means of tape and video." The basis for the idea is that the possession of a tape recorder not only makes it possible to produce a copy of the work but also provides a new means of performing that work. Consequently, one could consider the introduction of a new right, which, as mentioned during the CISAC meeting, would be an "additional right of potential reproduction." This solution to the problem would also call for national legislative measures and for amendment of the international conventions.

It could be said that the ideas mentioned here bear some relation to an idea that has been put forward in another context, namely in the Recommendations for Settlement of Copyright Problems Arising from the Use of Computer Systems for Access to or the Creation of Works, adopted by the Second Committee of Governmental Experts on the subject in 1982 (document UNESCO/WIPO/CEGO/II/7). In this area too there is a grave danger of erosion of authors' rights by new technology. To tackle these problems, it is mentioned in the Recommendation (paragraph 6) that: "in order to harmonize the approach of States in settling the problems relating to input and output and to provide the author with the real possibility of exercising control when their works are put into computer systems, States should consider the desirability of express recognition under their national laws of the exclusive right of the author to make his work available to the public by means of computer systems from which a perceivable version of his work may be obtained."

It should be noted, however, that there is an important difference between the proposed exclusive right to authorize making the work available to the public by means of a computer, on the one hand, and the concept of an unenforceable global right of potential reproduction, necessarily implying its compulsory exercise, on the other. The introduction of the last-mentioned type of right would mean that authors' rights were not only subject to limitation, but also possibly non-exclusive from the very outset.

In the last analysis, it seems appropriate to recognize the enjoyment of the basic exclusive right to authorize the reproduction of protected productions, whether or not that right is exercised publicly or for private purposes, and to try to determine the special cases where, and the particular conditions under which, the exercise of that right should be made subject to special regulations. Such regulations might provide for the free use of certain categories of productions in certain cases, or, in other cases and in respect of other kinds of productions, make any limitation of the right of authorization subject to various obligations of the user, thereby mitigating the adverse effect of reproduction for private purposes on the legitimate interests of the owners of the rights concerned.

As can be seen from the references to the discussions in international non-governmental fora, the main concern there has been private reproduction by means of tape recorders rather than reprography. However, this subject too has been dealt with on various occasions, and has furthermore been discussed in other international organizations.

There are two main reasons for the additional reference, in this intergovernmental context, to the discussions in certain international organizations. One is that any discussions at the intergovernmental level on the private reproduction of protected works and contributions should explore all possible ideas that could contribute towards solving the problem. Another has to do with the international character of the copyright system. Solutions based on the ideas just mentioned can of course be introduced in national laws without international consultations. However, owing to the international aspects, national solutions should if possible be in keeping with the international system for their impact to be truly effective. It would consequently be appropriate to discuss at the intergovernmental level the need for those or other legislative solutions and, if the conclusion is that there is such a need, to consider at the same level certain technical aspects, such as definitions, applicability to the reprography field and relations with existing international conventions.

2.4 Measures to Mitigate the Adverse Effects of Private Reproduction

2.4.1 General Observations

Under heading 2.3.1 various points have been discussed in connection with the definition and demarcation of the possibility of making copies of protected works and contributions for private purposes. Under heading 2.3.2 there is some discussion on the possibility of introducing new rights governing such reproduction.

The adoption of the measures mentioned under those headings would wholly or partly solve the problems that private reproduction causes for the owners of rights. It could be, however, that such measures prove impossible or difficult to introduce from legal, technical, practical or political standpoints. There is therefore a need to consider also other possible measures to offset the adverse effects of such reproduction. It should be stressed that the need to consider such measures could arise even in legal systems that offer the theoretically ideal solution, namely those where there is no exception allowing reproduction for private purposes without the authorization from the owner of the rights. In practice such systems do not, at least not always, place the owners of rights in a better position, because of the impossibility of enforcing such provisions without violating other important interests. In such cases too, therefore, there could be a need to consider compensatory measures.

Various ways of mitigating the adverse effects of reproduction for private purposes could be considered. One would consist in using various types of scrambler or spoiler systems in order to make it difficult or impossible to make reproductions in the form of recordings. For the moment, however, no truly satisfactory device for such purposes seems to exist, although even some systems are under development which could prove very useful in the future.

Most countries that have given any active consideration at all to the problem have found that a system of a charge on reproduction equipment and/or materials for such reproduction offers the best means of compensating the owners of rights for the prejudice caused them by the reproduction and/or extensive use made of their creations or contributions. This possibility has also been discussed in previous intergovernmental meetings (see under 1.5 above).

Against this background it could also be worth while to discuss the matter of a compensatory charge in the context of the present intergovernmental deliberations.

2.4.2 Various Legislative Methods

A charge could be introduced by two legislative methods.

One method, which has been chosen in some countries, is to impose a tax on the material. The money from the tax goes directly to the Government or the Treasury, and the State decides whether and to what extent that particular income should be used for the benefit of the categories that are harmed by extensive private reproduction. Usually the compensation goes only to national beneficiaries. Because the beneficiaries under such a system have no enforceable right under private law to share in the compensation, the State is in principle free to use the revenue from the tax for general government expenditure or to support cultural activities, or for whatever other purpose it may choose. This solution is basically a tax like all other taxes, and any share that the beneficiaries might obtain from the tax revenue could not be seen as a compensation for the use made of their creations or contributions, but merely as a kind of support based on cultural policy considerations. Consequently such a system has nothing to do with intellectual property rights.

The other system, which so far has been chosen by four States to offset the adverse effects of private reproduction by means of recordings, is the imposition of a charge under copyright law on recording equipment or materials (blank tapes) for the benefit of the owners of rights. There is a brief description under 1.6.2 of the legislation in those four States. Such systems are also under consideration in other countries.

The design and introduction of such systems under copyright law is basically a matter for national legislation. Because of the international aspects of copyright law, certain aspects of such compensation systems nevertheless merit consideration at the intergovernmental level also.

2.4.3 The Object on Which to Impose a Levy

A levy could be imposed either on reproduction equipment or on recording material, or on both.

An argument in favor of a levy on equipment is the fact that the equipment makes today's extensive private copying activities possible. Furthermore, at least tape recording equipment is today often designed specially to facilitate private copying, apart from which it could be said that, in those countries where such a levy (either under private law as in the Federal Republic of Germany or as a tax as in Norway) has been introduced, the system seems to have worked well and without any problems from a technical point of view.

On the other hand, a charge on equipment could have certain disadvantages. It could be difficult to calculate the proper amount of the levy if it has to be related to the price. The levy would in such a case be proportionally lower for cheap and probably low-quality equipment, but relatively high for high-quality, high-priced equipment, a fact that may to some extent distort competition on the market. Recording equipment is frequently combined with receiving equipment, which may lead to problems where the levy is imposed only on the recording part. In addition, it could be said that, at least in some countries, the market for recorders is saturated and that there is a risk of a levy on equipment producing less revenue than expected.

One argument in favor of a levy on materials is the fact that they are used for the actual copying. It could be assumed that, generally speaking at least, the number of blank tapes that a person purchases reflects the number of copies that he makes or intends to make. The level of sales of blank tapes, for instance, is fairly high, and one could consequently expect a substantial amount of revenue from a levy on tapes. The potential disadvantages of such a levy system concern more the administration of the system than its principles (difficulties in collecting the levy, risk of extensive illicit import of tapes without payment of the levy, etc.).

A levy on blank tapes could be related to various factors, but mainly either playing time or price. As can be seen under 1.6.2, various systems have been chosen in various countries. The ultimate choice by the legislator depends on national considerations relating to such factors as the desire to relate actual copying to playing time, the effect on market competition of relating the levy to the price, etc.

The above remarks on a levy on recording equipment and/or materials could, generally speaking, apply mutatis mutandis also in the field of reprography. That problem will not be further discussed here, however.

2.4.4 The Person Responsible for Payment of the Levy

The basic philosophy in the intellectual property field is that the person who utilizes a protected production is the one responsible for obtaining the necessary authorization and consequently also for paying for the use. This philosophy would, if applied to the levy, imply that the potential user of the equipment or materials is the one who should be charged the levy directly. Such a system might, however, cause considerable administrative problems. For that reason national legislators have frequently chosen a solution whereby the manufacturer or importer is made responsible for the payment of the levy. He may then, if he is not able to absorb the levy himself, charge it to the eventual purchaser of the material.

2.4.5 Collection of the Levy

Under the copyright law approach the claim to a share of the revenue from the levy belongs to each individual owner of rights in his personal capacity. It would be difficult, however, and might even make the system inoperative, if each beneficiary were entitled to put forward individual claims, directly against each user reproducing his work for private purposes. National legislators have therefore frequently chosen a solution involving a collective element, usually so that the claims may only be made through a collecting society.

2.4.6 Amount of the Levy

As regards the amount of the levy this is basically a matter to be decided at the national level, according to the conditions prevailing in each country. Sometimes the levy is determined on the basis of negotiations between the beneficiaries' organizations and the manufacturers/importers, and sometimes the amount or its upper limits are settled by legislation. What is important is to find a level that provides satisfactory compensation and at the same time avoids distortion of the market and does not encourage the illicit import of material without payment of the levy.

2.4.7 Distribution of the Levy

As regards the distribution of the levy, the first question is which categories of beneficiaries should be entitled to a share in the revenue.

Basically, the levy system is aimed at compensating the owners of rights for the utilization of the right of reproduction. Under the applicable international law such a right is granted to copyright owners, performers, producers of phonograms and broadcasting organizations. As mentioned earlier, each one of those categories could claim that it was adversely affected by private reproduction activities. In general terms, the opinion expressed in various international discussions is that at least the first three categories mentioned should be entitled to a share of the revenue from a levy. This solution has also been chosen in some national laws. It has also been argued, however, that broadcasters should receive a share not only where they are owners of copyright in their broadcasts but also where they have a sui generis right as producers of such broadcasts. This is of course a matter that is becoming increasingly important with the development of satellite technology and the corresponding enlargement of the areas in which it will be possible to receive the broadcasts. Ultimately, however, the allocation of a share also to the broadcasters is a matter for the national legislator.

The second question in relation to distribution is how to carry it out in practice. The first step would be to divide the revenue between the various categories of beneficiaries who are entitled to a share in it. In this respect there are, at the national level, various solutions. Some of them have been indicated in the survey under 1.6.2. In some cases the same proportion is used for division as is used in the sharing of the returns from a record or a pre-recorded cassette.

The next step is to distribute the shares to which the individual owners of rights are entitled. Various solutions are possible. In many cases the distribution at this stage is carried out according to what is decided within the collecting societies, and could be more or less individual depending on that decision.

One of the basic principles in international copyright and intellectual property law is the principle of national treatment. It implies an obligation for Contracting States to treat owners of rights from other such States in the same way as national owners of rights are treated in respect of protected works and other productions. This basic principle is valid for copyright as well as for neighboring rights. One of its consequences is that remuneration for any form of utilization of protected works or productions has to be given to foreigners as well as to nationals. It has been argued, however, that the principle of national treatment does not necessarily have to be applied to rights that are above the level provided for in the conventions, particularly if those rights are of a different nature from those laid down in the conventions. This question will not be discussed further here. A consequence of this reasoning, however, is that the more one regards the levy as compensation for a utilization of the reproduction right, the more the principle of national treatment applies (the Rome Convention explicitly requires national treatment also for performers, irrespective of whether they are granted rights or the "possibility" of preventing certain uses of their performances).

2.4.8 Marking of Cassettes

Certain countries have introduced systems under which blank cassettes may be put on the market only if they are marked in a certain way, usually with a stamp or tag which may be obtained by the manufacturer or importer against payment of a fee. Greece is one country in which there is legislation of this kind. Similar systems apply in certain other countries.

The advantages or disadvantages of such systems will not be discussed here. Marking systems could, however, have some effect also on the problem of control of or remuneration for private recording, for instance in the sense that the fee could also include remuneration for the owners of rights for the private copying that will be made of the tapes.

3. CERTAIN CONCLUSIONS

The reproduction for private purposes of material protected by copyright or neighboring rights has increased considerably in recent years, primarily on account of the new media technology. In certain areas this development causes considerable harm to the interests of authors and other beneficiaries of intellectual property, and there is an inherent risk that the current practice in this area might prove inconsistent with the obligations under the international copyright conventions.

In view of these and other circumstances which are briefly referred to in the present document, the problems relating to reproduction for private purposes should be discussed under the auspices of the intergovernmental organizations responsible for the administration of the relevant conventions, with the aim of:

making Governments aware of the situation and its implications, and

formulating, by way of conclusions or in another appropriate form, such as Model Provisions, Annotated Principles or Guidelines, guidance for the solution of the problems at the national level.

It seems appropriate, in particular, to consider the enjoyment of the right to authorize the reproduction of literary and artistic works, irrespective of whether that right is exercised publicly or for private use, and to try to determine (i) certain special uses in which the exercise of that right should be limited, and also (ii) corresponding special regulations under which the works concerned can be used in such cases. Moreover, the problem should be considered separately for each category of beneficiaries concerned.

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United Nations
Educational, Scientific
and Cultural Organization

Unesco - Paris

World Intellectual
Property
Organization

WIPO - Geneva

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GROUP OF EXPERTS ON UNAUTHORIZED PRIVATE COPYING OF RECORDINGS, BROADCASTS AND PRINTED MATTER

Geneva, June 4 to 8, 1984

DRAFT REPORT

prepared by the Secretariats

I. Introduction

1. Pursuant to the decisions taken by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) at its twenty-second session and by the Governing Bodies of the World Intellectual Property Organization (WIPO) at their fourteenth series of meetings in October 1983, the Secretariat of Unesco and the International Bureau of WIPO (hereinafter referred to as "the Secretariats") convened a Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter. The Group of Experts met at the headquarters of WIPO in Geneva from June 4 to 8, 1984.

2. The experts, who had been invited in their personal capacity by the Directors General of Unesco and WIPO, were nationals of the following seven States: Argentina, Austria, India, Rwanda, Soviet Union, Tunisia, United States of America.

3. The States party to the Berne Convention for the Protection of Literary and Artistic Works or to the Universal Copyright Convention had also been invited to follow the discussions of the Group of Experts. The following States were represented by delegations: Argentina, Australia, Austria, Brazil, Canada, Congo, Czechoslovakia, France, Germany (Federal Republic of), Ghana, Hungary, Israel, Japan, Kenya, Luxembourg, Madagascar, Mexico, Netherlands, Norway, Panama, Poland, Sweden, Switzerland, United Kingdom, United States of America.

4. Observers from one intergovernmental organization and 12 international non-governmental organizations also attended the meeting. The list of participants will be appended to the final report.

II. Opening of the Meeting

5. The meeting of the Group of Experts was opened by Dr. Arpad Bogsch, Director General of WIPO, and, on behalf of the Director General of Unesco, by Mr. Abderrahmane Amri, who welcomed the pariticipants.

III. Election of the Chairman and Vice-Chairman

6. On a proposal by Miss Kala Thairani (India), seconded by Mr. Maniragaba Balibutsa (Rwanda), the Group of Experts elected Mr. Walter Dillenz (Austria) and Mrs. Nebila Mezghani (Tunisia) Chairman and Vice-Chairman respectively.

IV. Documentation

7. The Group of Experts had before it a document drawn up by the Secretariats on the unauthorized reproduction for private purposes of sound and audiovisual recordings, broadcasts and the printed word (document (UNESCO/WIPO/GE/COP.1/2).

V. General Discussion

8. Before inviting participants to present considerations of a general nature on the subject, the Chairman asked Mr. A.H. Olsson (Sweden) to introduce document UNESCO/WIPO/GE/COP.1/2, which had been drawn up by the Secretariats with his assistance.

9. Following that presentation, the participants unanimously acknowledged the high quality of the work accomplished, and congratulated the Secretariats and Mr. Olsson for having drawn up the document, which would facilitate the work of the Group of Experts in its search for solutions to the problem raised by unauthorized reproduction for private purposes.

10. In the course of the discussions, the participants noted that according to the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention the author has an exclusive right of authorizing the reproduction of his work. The Berne Convention expressly states that this right relates also to any sound or visual recording of the work. The right of reproduction is not limited to reproduction for public or profitmaking use of the work and also covers protection as regards various forms of reproduction for private purposes.

11. It was recalled that, according to the 1971 Paris Act of the Berne Convention, national legislation may provide for limitations of the right of reproduction only 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 authors (Article 9(2)). Under the Universal Copyright Convention, the Contracting States have to provide for the adequate and effective protection of the rights of authors (Article I) and the States may make only such exceptions to those rights that do not conflict with the spirit and provisions of that Convention. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to the right to which exception has been made (Article IV*bis*(2) of the Convention, as revised in Paris, in 1971). The cumulative effect of reproduction for

private purposes of sound and audiovisual recordings and broadcasts as well as reprographic reproduction for private use of printed works is prejudicial to the author's legitimate interests and such kinds of reproduction may also conflict with a normal exploitation of the work reproduced; it also conflicts with the requirement of guaranteeing a reasonable degree of effective protection of the right of reproduction. Consequently, national legislations should not exempt such reproductions for private purposes from copyright liability. This also follows from the requirement of adequate and effective protection of authors' rights.

12. The participants also considered Article 15 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, according to which any Contracting State may provide for the exceptions to the protection guaranteed by that Convention as regards private use. They underlined, however, that according to Article 1 of the Rome Convention, no provision thereof may be interpreted as prejudicing the protection of copyright in literary and artistic works. Since Articles 24(2) and 28(4) of the said Convention provide that only such States may be party to it which are at the same time party to either the Berne Convention or the Universal Copyright Convention, limitation of any right of reproduction for private purposes under the Rome Convention would be, for practical reasons, permissible only under the same conditions as those applying to the reproduction of protected works.

13. The participants agreed that the use of modern technology for reproduction of works for private purposes should not be hindered and its adverse effects on authors' interests should be mitigated by appropriate means of protecting copyright and the so-called neighboring rights involved. Appropriate systems for the protection of authors' rights with regard to reproduction of works for private purposes may be collective administration of the exclusive right of reproduction or various forms of non-voluntary licensing.

14. Several participants underlined the importance to adapt the legislative regulation to peculiar features of distinct forms of reproducing works for private purposes. In particular, attention was drawn to the fact that whereas reproduction by means of the so-called home-taping is always uncontrollable, reprographic reproduction for private purposes is often made by using publicly accessible devices against payment. It was found that owing to technological development during the past decade the decision of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright

Convention, taken during their 1975 meeting on Reprographic Reproduction of Works Protected by Copyright, according to which the issue was considered exhausted, should be reconsidered and the problem further explored at the international level.

VI. Discussion of Possible Measures of Copyright Protection Relating to Reproduction for Private Purposes

15. The participants noted that the subject of the discussions is reproduction of works by means of reproducing equipment and traditional forms of copying for personal use remain outside the scope of their study.

16. Several participants stressed that the basic approach should be the recognition of the exclusive exercise of the right of reproduction and the reproduction of certain subject matters which are particularly sensitive from the point of view of copyright (e.g. works of architecture, sheet music, works of visual art of limited edition) should always be subject to authorization by the owner of the copyright therein.

17. A number of participants underlined that the exercise of the exclusive right of reproduction for private purposes should be effected by means of collective agreements between representative organizations of right-owners and users. Legislation should provide that relevant claims of the owners of rights concerned may only be asserted by their respective organizations and such organizations should be in a position to guarantee the users against claims from right owners outside the authorizing organization. Where the system of collective agreements cannot be introduced, the States may introduce proper non-voluntary license schemes for certain kinds of reproduction for private purposes, subject to the payment of proper remuneration.

18. Several participants stressed that the fees to be collected by the competent organization for the reproduction of protected works are royalties and should be paid, as regards reproduction equipment and/or blank material support of recorded productions, ultimately by the users of the devices enabling reproduction for private purposes. Such fees should be distributed to the owners of copyright in works presumed to be copied for private purposes in proportions corresponding to relevant data concerning the frequency of various forms of their public use (broadcasting, sales of records, performances etc.). The fees can be collected as an outright payment from the manufacturer or importer of the devices, who sells them to

the persons reproducing protected works by means of them and paying the royalty as a part of the selling price. The modalities of calculating the fees and the fixation thereof should be a matter of negotiation, as far as possible, between the interested representative organizations, even in case of non-voluntary licensing schemes and legislation or competent authorities should fix them only in the absence of such an agreement. Beneficiaries of the so-called neighboring rights involved should have a proper share of such fees, to be negotiated, as far as possible, by their respective organizations and fixed by a competent authority (which may also be a court or arbitration body) only in the absence of agreement between them.

19. Any fees fixed by legislation or competent authority should correspond, as far as possible, to amounts that might have been agreed upon by the interested parties by way of negotiation.

20. It was held that the rights of reproduction for private purposes and the collection and distribution of fees for such uses should be administered collectively by all categories of beneficiaries of rights concerned.

21. A great number of participants emphasized that the introduction of a fiscal tax (instead of copyright fees) on blank tapes and cassettes and/or equipment for reproduction of works for private purposes is contrary to the basic requirement under the law of copyright, according to which fees paid for the use of protected productions are due to the respective owners of the rights in such productions.

22. Several participants referred to the necessity of providing for a system of exempting from being subject to payment of copyright fee devices which are not intended or cannot be used for private reproduction of protected works.

23. In the course of the discussions special attention was paid to related interests prevailing in developing countries. The participants noted that the solution of the problem of reproduction for private purposes may be viewed differently in various developing countries. It was stressed, however, that the protection of copyright as regards reproduction of works by means of modern technology for private purposes also means supporting the development of national cultural industry which, again, is an important factor of furthering national creativity.

VII. Conclusion

24. In conclusion, the participants suggested that the Secretariat of Unesco and the International Bureau of WIPO continue to study the impact on copyright and the so-called neighboring rights of recording and reprographic reproduction for private purposes, of protected works and productions protected by neighboring rights and that they prepare annotated principles for the related protection of copyright and neighboring rights.

VIII. Adoption of the Report

25.

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11. It was recalled that, according to the 1971 Paris Act of the Berne Convention, national legislation may provide for limitations of the right of reproduction only 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 authors (Article 9(2)). Under the Universal Copyright Convention, the Contracting States have to provide for the adequate and effective protection of the rights of authors (Article I) and the States may make only such exceptions to those rights that do not conflict with the spirit and provisions of that Convention. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to the right to which exception has been made (Article IV*bis*(2) of the Convention, as revised in Paris, in 1971). The cumulative effect of reproduction for private purposes of sound and audiovisual recordings and broadcasts as well as reprographic reproduction for private use of printed works is prejudicial to the author's legitimate interests (in particular, to his claim to derive material benefit from the use of his work by others) and such kinds of reproduction may also conflict

with a normal exploitation of the work reproduced; it also conflicts with the requirement of guaranteeing a reasonable degree of effective protection of the right of reproduction. Consequently, national legislations should not exempt such reproductions for private purposes from copyright liability. This also follows from the requirement of adequate and effective protection of authors' rights. See, however, paragraph 15, below.

12. The participants also considered Article 15 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, according to which any Contracting State may provide for the exceptions to the protection guaranteed by that Convention as regards private use. They underlined, however, that according to Article 1 of the Rome Convention, no provision thereof may be interpreted as prejudicing the protection of copyright in literary and artistic works. Since Articles 24(2) and 28(4) of the said Convention provide that only such States may be party to it which are at the same time party to either the Berne Convention or the Universal Copyright Convention, limitation of any right of reproduction of holders of neighboring rights for private purposes under the Rome Convention would be, for practical reasons, permissible only under the same conditions as those applying to the reproduction of protected works.

13. The participants agreed that the use of modern technology for reproduction of works for private purposes should not be hindered and its adverse effects on the interests of authors and beneficiaries of neighboring rights should be mitigated by appropriate means of protection. Appropriate systems for protection with regard to reproduction for private purposes may be collective administration of the exclusive right of reproduction or various forms of non-voluntary licensing, such licensing implying the obligation to pay proper remuneration.

14. Several participants underlined the importance to adapt the legislative regulation to peculiar features of distinct forms of reproducing works for private purposes. In particular, attention was drawn to the fact that whereas reproduction by means of the so-called home-taping is always uncontrollable, reprographic reproduction for private purposes is often made by using publicly accessible devices against payment. It was found that owing to technological development during the past decade the decision of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal

Copyright Convention, taken during their 1975 meeting on Reprographic Reproduction of Works Protected by Copyright, according to which the issue was considered exhausted, should be reconsidered and the problem further explored at the international level.

VI. Discussion of Possible Measures of Copyright Protection Relating to Reproduction for Private Purposes

15. The participants noted that the subject of the discussions is reproduction of works by means of reproducing equipment and traditional forms of copying for personal use (for example, copying by hand) remain outside the scope of their study. The same is true, to the extent applicable and mutatis mutandis, when neighboring rights are involved.

16. Several participants stressed that the basic approach should be the recognition of the exclusive exercise of the right of reproduction and the reproduction of certain subject matters which are particularly sensitive from the point of view of copyright (e.g. works of architecture, sheet music, works of visual art of limited edition) should always be subject to authorization by the owner of the copyright therein.

17. A number of participants underlined that the exercise of the exclusive right of reproduction for private purposes should be effected by means of collective agreements between representative organizations of right-owners and users. Legislation should provide that relevant claims of the owners of rights concerned may only be asserted by their respective organizations and such organizations should be in a position to guarantee the users against claims from right owners outside the authorizing organization. Where the system of collective agreements cannot be introduced, the States may introduce proper non-voluntary license schemes for certain kinds of reproduction for private purposes, subject to the payment of proper remuneration.

18. Several participants stressed that the fees to be collected by the competent organization for the reproduction of protected works are royalties and should be paid, as regards reproduction equipment and/or blank material support of recorded productions, ultimately by the users of the devices enabling reproduction for private purposes. Such fees should be distributed to the owners of copyright in works presumed to be copied for private purposes in proportions corresponding to relevant data

concerning the frequency of various forms of their public use (broadcasting, sales of records, performances etc.). The fees can be collected as an outright payment from the manufacturer or importer of the devices, who sells them to the persons reproducing protected works by means of them and paying the royalty as a part of the selling price. The modalities of calculating the fees and the fixation thereof should be a matter of negotiation, as far as possible, between the interested representative organizations, even in case of non-voluntary licensing schemes and legislation or competent authorities should fix them only in the absence of such an agreement. Beneficiaries of the neighboring rights involved should enjoy a similar solution, to be negotiated, as far as possible, by their respective organizations and fixed by a competent authority (which may also be a court or arbitration body) only in the absence of agreement between them.

19. Any fees fixed by legislation or competent authority should correspond, as far as possible, to amounts that might have been agreed upon by the interested parties by way of negotiation.

20. It was held that the rights of reproduction for private purposes and the collection and distribution of fees for such uses should be administered collectively by all categories of beneficiaries of rights concerned.

21. A great number of participants emphasized that the introduction of a fiscal tax (instead of copyright fees) on blank tapes and cassettes and/or equipment for reproduction of works for private purposes is contrary to the basic principle under the law of copyright, according to which fees paid for the use of protected productions are due to the respective owners of the rights in such productions. Other participants felt that this was a question of implementation which could make a tax-type system compatible with principles of copyright provided the proceeds of the tax are used to remunerate the right-owners concerned.

22. Several participants referred to the necessity of providing for a system of exempting from being subject to payment of copyright fee devices which are not intended or cannot be used for private reproduction of protected works or which are exported.

23. In the course of the discussions special attention was paid to related interests prevailing in developing countries. The participants noted that the solution of the problem of reproduction for private purposes may be

viewed differently in various developing countries. It was stressed, however, that the protection of copyright and neighboring rights, as regards reproduction of works by means of modern technology for private purposes also means supporting the development of national cultural industry which, again, is an important factor of furthering national creativity.

VII. Conclusion

24. In conclusion, the participants suggested that the Secretariat of Unesco and the International Bureau of WIPO continue to study the impact, on copyright and the neighboring rights, of recording and reprographic reproduction for private purposes of protected works and productions protected by neighboring rights and that they prepare, on an urgent basis, annotated principles for the related protection of copyright and neighboring rights.

VIII. Adoption of the Report

25. This report was unanimously adopted.

IX. Closing of the Meeting

26. After the usual words of thanks, the Chairman declared the meeting closed.

[Annex follows]

UNESCO/WIPO/GE/COP.1/3

ANNEX/ANNEXE/ANEXO

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LISTE DES PARTICIPANTS
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