WIPO WORLDWIDE SYMPOSIUM ON THE FUTURE OF COPYRIGHT AND NEIGHBORING RIGHTS

Le Louvre, Paris, France – June 1 to 3, 1994

organized by
the World Intellectual Property Organization (WIPO)
in cooperation with
the Ministry of Culture and Francophonie of France

MINISTRY OF CULTURE
AND FRANCOPHONIE OF FRANCE

WORLD INTELLECTUAL
PROPERTY ORGANIZATION

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Geneva 1994

WIPO PUBLICATION
No. 731 (E)

ISBN: 92-805-0537-8

Cover: Le Louvre, Paris.
Photograph: Etablissement Public du Grand Louvre, S. de Luigi, architect I.M. Pei.

PREFACE

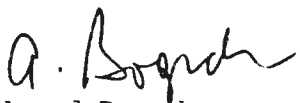
The World Intellectual Property Organization (WIPO) organized a Worldwide Symposium on the Future of Copyright and Neighboring Rights at the Louvre in Paris from June 1 to 3, 1994.

At the present, critical stage of extremely complex developments in the field of copyright and neighboring rights, the Symposium was an important forum for the international community interested in the appropriate and efficient protection of intellectual property rights. There is a need to outline new principles or confirm existing ones both in domestic and international relations. The task of the Symposium was just that. Emerging national solutions in various countries, efforts by interested private companies and intergovernmental and non-governmental organizations were presented and discussed. Areas where existing rights are likely to suffice and others where new rights could become necessary were explored, and the necessary improvements to administration methods were also considered.

The Symposium included presentations by renowned experts from the entertainment sector and the legal profession, both professors and practitioners. Government representatives also participated, notably as moderators. This volume contains the texts of the presentations.

The audience consisted of 550 persons from more than 65 countries, including government officials and representatives of intergovernmental and non-governmental organizations, business, the legal profession and journalists. A list of participants appears at the end of this volume.

WIPO is grateful to the Ministry of Culture and Francophonie of France and the Ecole du Louvre for hosting the meeting and contributing to the organization of the Symposium. It expresses its warm thanks also to the speakers and moderators.



Arpad Bogsch
Director General
World Intellectual Property Organization

October 1994

TABLE OF CONTENTS

PROGRAM

WEDNESDAY, JUNE 1, 1994

Opening Session

11:30 Opening Address

Arpad Bogsch, Director General, World Intellectual Property Organization (WIPO)

11:45 Welcoming Address

Jacques Toubon, Minister of Culture and Francophonie of France

First Working Session: Introduction

Moderator: Arpad Bogsch

12:00 The Adaptation of Copyright in the Face of New Technology

Pierre Sirinelli, Professor, University of Paris XI, Sceaux, France

13:00 Lunch break

Second Working Session: Basic Notions of Copyright and Neighboring Rights in the Face of New Technologies

Moderator: Paul Florenson,
Under-Director of Legal Affairs,
Department of General Administration,
Ministry of Culture and Francophonie,
Paris, France

15:00 Authorship and New Technologies from the Viewpoint of Civil Law Traditions

Thomas K. Dreier, Member, Research Staff, Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich, Germany

15:30 Authorship and New Technologies from the Viewpoint of Common Law Traditions

Peter Jaszi, Professor, Washington College of Law, The American University, Washington, D.C., United States of America

16:00 Coffee break

16:20 The Notions of Work, Originality and Neighboring Rights from the Viewpoint of Civil Law Traditions

Michel Vivant, Professor, University of Montpellier I; Doctor honoris causa, University of Heidelberg, Expert Adviser, European Commission, Montpellier, France

16:50 The Notions of Work, Originality and Neighboring Rights from the Viewpoint of Common Law Traditions

William R. Cornish, Professor, Magdalene College, Cambridge University, Cambridge, United Kingdom

17:20 Discussions

18:00 Reception given by Jacques Toubon, Minister of Culture and Francophonie of France

THURSDAY, JUNE 2, 1994

Third Working Session: New Challenges for Producers and Disseminators of Works

Moderator: Henry Olsson,
Special Government Adviser,
Ministry of Justice, Stockholm, Sweden

10:00 Audiovisual Industry: Economic and Legal Challenges

Pascal Rogard, Secretary General, Association of French Film Producers and Exporters, Paris, France

10:30 Recording Industry, the First Cultural Industry Fully Exposed to the Impact of Digital Technology

Nicholas Garnett, Director General and Chief Executive, International Federation of the Phonographic Industry (IFPI), London, United Kingdom

11:00 Coffee break

11:20 Computers, Digital Technology and Copyright

Zentaro Kitagawa, Professor, Kyoto University, Kyoto, Japan

11:50 Publishing in the Digital Age: Acquisition and Assignment of Electronic Rights

Hubert Tilliet, Legal Director, National Publishers Association, Paris, France

12:20 Discussion

13:00 Lunch break

Fourth Working Session: Protection and Administration of Copyright and Neighboring Rights

Moderator: Paul Vandoren,
Head of Unit DG XV, E4, European Commission,
Brussels, Belgium

15:00 The Implications of New Technology for the Protection and Collective Management of Authors' Rights

Jean-Loup Tournier, Chairman of the Board, Society of Authors, Composers and Music Publishers (SACEM), Paris, France

15:30 New Technologies and the Protection and Administration of the Rights of Performers

François Parrot, Managing Director, French Performers Association, Paris, France

16:00 Reprography, Electrocopying, Electronic Delivery and the Exercise of Copyright

Tarja Koskinen (Mrs.), Chairman, International Federation of Reproduction Rights Organizations (IFRRO), Helsinki, Finland

16:30 Coffee break

16:50 Using Computer Technology to Solve the Copyright Problems Raised by Computer Technology

Péter Gyertyánfy, Director General, Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), Budapest, Hungary

17:20 Protection of the Rights of the Creators of Audiovisual Works

João Correa, Secretary General, International Association of Audio-Visual Writers and Directors (AIDAA); Secretary General, European Federation of Audiovisual Filmmakers (FERA), Brussels, Belgium

17:50 Discussion

18:30 End of discussion

FRIDAY, JUNE 3, 1994

Fifth Working Session: Structural Changes in the International Copyright System

Moderator: Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Washington, D.C., United States of America

10:00 New Technologies and Copyright: Need for Change, Need for Continuity

Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

10:30 Surveying the Borders of Copyright

Jane C. Ginsburg (Mrs.), Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law, New York, United States of America

11:00 Coffee break

11:20 Copyright and Private International Law in the Face of the International Diffusion of Works

Georges Koumantos, Professor, University of Athens, Athens, Greece

11:50 Harmonization of Copyright in the European Union

Frank Gotzen, Principal, Catholic University of Brussels; Professor Extraordinary, Catholic University of Louvain; Director, Center for Intellectual Property Research, Brussels, Belgium

12:20 Discussion

13:00 Lunch break

Sixth Working Session: Conclusions

Moderator: Arpad Bogsch

15:00 Copyright and Author's Right in the Twenty-First Century

Paul Goldstein, Lillick Professor of Law, Stanford University, Stanford, California, United States of America

15:45 Summary of the Proceedings of the Symposium

André Lucas, Professor, Faculty of Law, University of Nantes, Nantes, France

17:00 Closing of the meeting

BIOGRAPHICAL INFORMATION ON THE SPEAKERS

William R. CORNISH

Professor William R. Cornish, a national of the United Kingdom, has held chairs of law at the London School of Economics and at Magdalene College, Cambridge University, and is taking up the newly founded Herchel Smith Chair of Intellectual Property Law at the latter University.

Professor Cornish is the author of a number of books on the subject and is an External Academic Member of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich.

Professor Cornish has been President of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP).

João CORREA

Mr. João Correa, a national of Belgium, has been the Secretary General of the European Federation of Audiovisual Filmmakers (FERA) since 1984 and of the International Association of Audio-Visual Writers and Directors (AIDAA) since its founding in 1985. Mr. Correa has been a member of the Audiovisual Council of the French Community of Belgium since 1989.

Mr. Correa was the President of the Belgian Association of Film and Television Authors (ABAFT) from 1985 to 1988. He is the author of several documentaries and fiction films (both short and feature films) and of several publications.

Thomas K. DREIER

Dr. Thomas K. Dreier, a national of Germany, is on the staff of the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich. He is also a legal expert on copyright questions for the European Commission and lectures on copyright at the Academy of Photographic Design in Munich.

Dr. Dreier has written and lectured extensively on topics related to copyright law, primarily computer programs and integrated circuits, cable and satellite programs, the harmonization of copyright laws in the European Communities and GATT law.

Dr. Dreier holds law degrees from the University of Munich, the University of Geneva and New York University. He is a member of the New York State Bar, the International Bar Association (IBA), the International Association for the Protection of Literary and Artistic Property (ALAI) and the German Computer Law Association (DRGI).

Mihály FICSOR

Dr. Mihály Ficsor, a national of Hungary, is an Assistant Director General of the World Intellectual Property Organization (WIPO), to which post he was promoted in October 1993. Previously, he was the Head of the Copyright Division (May 1985 to September 1985), Director of the Copyright Division (September 1985 to March 1992) and Director of the Copyright Department (March 1992 to October 1993) of WIPO.

Before joining WIPO, Dr. Ficsor was the Director General of the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS) from July 1971 to May 1985. He was a member (and between 1982 and 1985 the Vice Chairman) of the Executive Bureau of the International Confederation of Societies of Authors and Composers (CISAC).

Dr. Ficsor holds a doctor's degree in law and political science from Eötvös Loránd University, Budapest, where he was a lecturer on copyright from 1978 to 1985. He has published a number of books and articles on copyright including a study, entitled Collective Administration of Copyright and Neighboring Rights.

Nicholas GARNETT

Mr. Nicholas Garnett, a national of the United Kingdom, has been Director General and Chief Executive of the International Federation of the Phonographic Industry (IFPI) since March 1992.

Mr. Garnett began his legal career as a solicitor in the United Kingdom. He joined IFPI in 1983, was promoted to Regional Director for Asia and the Pacific in 1984, and in 1991 became the Director of International Operations and Legal Affairs.

Mr. Garnett received a law degree at Sydney Sussex College, Cambridge, and earned a further diploma in law from the University of Bordeaux.

Jane C. GINSBURG

Professor Jane C. Ginsburg, a national of the United States of America, is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University School of Law, New York.

Professor Ginsburg is a prolific writer and speaker on copyright-related subjects. She has taught United States contract and copyright law as well as French intellectual property law at the Universities of Nantes, Papeete, Leiden, Amsterdam and Paris.

Professor Ginsburg received her bachelor's and master's degrees from the University of Chicago, her law degree cum laude from Harvard Law School, and a further diploma (DEA) magna cum laude in private law and intellectual property law from the University of Paris II.

Paul GOLDSTEIN

Professor Paul Goldstein, a national of the United States of America, has been Professor of Law at Stanford University since 1975 and was appointed Lillick Professor of Law in 1985. He is widely recognized as one of the leading authorities on copyright law in his country and is the author of a three-volume treatise on the subject, as well as of a widely adopted law school text on intellectual property law, three other books and many articles.

Professor Goldstein is a member of the Bars of New York and California and, over the past 25 years, has actively consulted on a wide range of copyright cases. He is Of Counsel to the law firm of Morrison & Foerster where he works with the firm's Intellectual Property Group. Professor Goldstein has twice been awarded the John Bingham Hurlbut Award for Excellence in Teaching at the Law School.

Professor Goldstein frequently testifies before congressional subcommittees dealing with intellectual property issues and has been an invited expert at international governmental meetings on copyright issues. He has served as Chairman of the U.S. Office of Technology Assessment Advisory Panel on Intellectual Property Rights in an Age of Electronics and Information, and has been a Visiting Scholar at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law in Munich.

Frank GOTZEN

Professor Frank Gotzen, a national of Belgium, has been the Principal of the Catholic University of Brussels since 1992. He was recently appointed as an expert to the Belgian Parliament for the Copyright Bill. He has also been the Director of the Center for Intellectual Property Research, of the Catholic University of Louvain and of the Catholic University of Brussels since 1988, and Professor Extraordinary for Copyright and Industrial Property at the Law Faculty of Louvain since 1987. He is a member of the Belgian Council for Industrial Property.

Professor Gotzen is the author of numerous books and articles written or translated into Dutch, English, French, German and Japanese in the fields of industrial property, copyright and European law.

Professor Gotzen graduated from the Catholic University of Louvain and received a doctor's degree from the same University.

Péter GYERTYÁNFY

Dr. Péter Gyertyánfy, a national of Hungary, was appointed Director General of the Hungarian Bureau for the Protection of Authors' Rights (ARTISJUS), Budapest, in November 1992. Previously, he worked for ARTISJUS as Deputy Chief of the Legal Department, Chief of the same Department and as Legal Director.

Since 1983, Dr. Gyertyánfy has been a lecturer on international copyright law at the Law School of Eötvös Loránd University, Budapest, where he was appointed Titular Head in 1990.

Earlier in his career, Dr. Gyertyánfy held positions in the banking and financial sector, including counsellor to the International Financial Department of the Hungarian Ministry of Finance.

Dr. Gyertyánfy graduated from the Law School of Eötvös Loránd University in 1968 and received a doctor's degree from the same University in 1990.

Peter JASZI

Professor Peter Jaszi, a national of the United States of America, teaches copyright and international copyright at the Washington College of Law of The American University.

Professor Jaszi is the coauthor of a standard textbook on copyright law, published by Matthew Bender. He is the coeditor, with Martha Woodmansee, of a recent volume of essays about copyright and literary theory, entitled The Construction of Authorship: Textual Appropriation in Law and Literature, published by Duke University Press.

Professor Jaszi lectures frequently to professional and academic groups in the United States of America and abroad. Recently, he was a member of the Library of Congress' Advisory Committee on Copyright Registration and Deposit (ACCORD) and he serves as a Trustee of the Copyright Society of the United States of America.

Professor Jaszi is a graduate of Harvard College and Harvard Law School.

Zentaro KITAGAWA

Professor Zentaro Kitagawa, a national of Japan, is Professor of Law and former Dean of the Faculty of Law at Kyoto University, where he has taught since 1963. He is the founder and has been Chief Director of the Kyoto Comparative Law Center since 1981.

Professor Kitagawa is also a visiting professor at Harvard Law School, the University of Washington School of Law, Munich University and Marburg University. In addition, he is President of the Japan Association of Industrial Property Law.

Professor Kitagawa has published many books and articles on civil law, comparative law, consumer law, computer law, etc., including Rezeption des europäischen Zivilrechts in Japan (1970), Civil Law (five volumes [Japanese], 1993-94) and, as the general author, Doing Business in Japan (ten volumes, Matthew Bender, New York, 1980 to date).

Professor Kitagawa is a member of the WIPO Arbitration Council.

Professor Kitagawa obtained a PhD from Kyoto University and the degree of Doctor honoris causa from Marburg University, Germany.

Tarja KOSKINEN

Mrs. Tarja Koskinen, a national of Finland, has been working as Managing Director of the Joint Copyright Organization KOPIOSTO since 1987 and, in 1992, became Chairman of the International Federation of Reproduction Rights Organizations (IFRRO).

Mrs. Koskinen spent 15 years (from 1972 to 1986) in the Finnish Composers International Copyright Bureau (TEOSTO), where she was appointed Assistant Director in 1982.

Mrs. Koskinen graduated in economics in 1972 at Tampere University.

Georges KOUMANTOS

Professor Georges Koumantos, a national of Greece, has practiced law in Athens since 1955 and has pleaded at the Court of Cassation since 1960.

Professor Koumantos was successively professor of civil law (1960), lecturer (1965), full professor (1975) and emeritus professor (1993) at the Law Faculty of Athens University. During the dictatorship from 1967 to 1974, he was removed from his functions.

Professor Koumantos is particularly active in intellectual property and is President of the Intellectual Property Organization of Greece and of the International Literary and Artistic Association (ALAI). He is also a member of the Steering Committee for Legal Cooperation of the Council of Europe and an independent expert for the European Union.

Professor Koumantos has further published various works. He obtained the title of Doctor of Laws from the University of Athens.

André LUCAS

Professor André Lucas, a national of France, has been a professor at the Law Faculty of the University of Nantes since 1984. His speciality is computer law and intellectual property law.

Professor Lucas is the Director of "Juris-Classeur propriété littéraire et artistique" and a member of the Intellectual Property Expert Group of DG XV of the European Commission. He has published Le droit de l'informatique (P.U.F., Thémis, Paris, 1987) and, together with Henri-Jacques Lucas, the Traité de la propriété littéraire et artistique (Litec, Paris, 1994).

François PARROT

Mr. François Parrot, a national of France, has been Managing Director of the French Performers Association since 1983; he is Vice President of the International Federation of Actors (FIA).

Mr. Parrot is also a member of the Economic and Social Council, Managing Secretary General of GEIE-ARTIS, and, since 1988, Joint Manager of the Equitable Remuneration Collection Society (SPRE) and of the Musical Performing Rights Administration Society (ADAMI).

Mr. Parrot has been a performer since 1955 and was an impresario from 1976 to 1982.

Pascal ROGARD

Mr. Pascal Rogard, a national of France, occupies a number of important posts within the cinematographic field, notably as Secretary General of the Association of French Film Producers and Exporters, Delegate General of the Society of Authors, Filmmakers and Producers (ARP), and Secretary General of the Committee of the Cinematographic and Audiovisual Industries of the European Communities and of Extra-Community Europe (CICCE).

Mr. Rogard is a Knight of the National Order of Merit and an Officer of Arts and Letters.

Mr. Rogard holds a diploma in higher studies of public law and a diploma from the Institute of Political Studies in Paris.

Pierre SIRINELLI

Professor Pierre Sirinelli, a national of France, has been a professor at the University of Paris XI in Sceaux since 1991.

Professor Sirinelli is Director of DESS (Diploma of Specialized Higher Studies) in law, computers and new technologies and of the Center for Computer Law Study and Research (CERDI) of the University of Paris XI.

Professor Sirinelli is also a standing consultant to the Ministry of Culture and Francophonie on matters of copyright and new technologies and currently chairs the so-called Technology Watch Committee, set up by the Minister of Culture and Francophonie to assess the impact of new technologies in the cultural sector.

Professor Sirinelli is completing a work devoted to private computer law, that is to be published by Editions Dalloz.

Hubert TILLIET

Mr. Hubert Tilliet, a national of France, is the Legal Director of the National Publishers Association in Paris.

Jean-Loup TOURNIER

Mr. Jean-Loup Tournier, a national of France, was appointed Chairman of the Board of the Society of Authors, Composers and Music Publishers (SACEM) in 1992, and has been Founding-President of the European Grouping of Societies of Authors and Composers (GESAC) since 1991. He previously exercised the functions of Director General from 1961 onwards and Delegate General for North America from 1955 to 1960.

Mr. Tournier was President of the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) from 1986 to 1992. He was also Executive President of the International Confederation of Societies of Authors and Composers (CISAC) and participated on several occasions in the work of WIPO, particularly as a member of the French Delegation.

Mr. Tournier is an Officer of the Legion of Honor and of the National Order of Merit, and a Commander of Arts and Letters. He was elected Man of the Year 1992 by the musical industry. He has been President of the Jeunesses musicales de France since 1983.

Mr. Tournier has a doctor's degree in law and a Bachelor of Arts degree from the Faculties of Letters and of Law of Paris.

Michel VIVANT

Professor Michel Vivant, a national of France, is a professor at the University of Montpellier I, of which he was the Dean for three years.

Professor Vivant is a specialist in intellectual property law in general and the law of new technologies in particular, recognized both in Europe and outside Europe. He has published many works on the topics of patents, trademarks, authors' rights, computer law, communication, etc., in five languages and in more than ten countries. He practices in international arbitration and regularly acts as adviser to lawyers and enterprises.

Professor Vivant is also a Doctor honoris causa of the University of Heidelberg, an associate professor of Laval University in Quebec, a member of the French Industrial Property Council, a member of the Legal Advisory Board of DG XIII of the European Commission, and an expert with various international organizations and French public authorities.

OPENING SESSION

OPENING ADDRESS

by

Arpad Bogsch
Director General
World Intellectual
Property Organization

Mr. Minister of Culture and Francophonie,
Ladies and Gentlemen,

It is a great honor for me to welcome you to this WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights, organized by the World Intellectual Property Organization with the collaboration of the French Ministry of Culture and Francophonie.

I am very pleased to note the presence here of representatives of a great many invited governments and of other participants from more than 60 countries from all regions of the globe, and also by the strong attendance of interested groups. Moreover, the quality and standing of the lecturers and other participants in our discussions during the next three days are a measure of the interest shown in the subject that we have chosen and of the importance that WIPO attaches to this Symposium.

Our subject is indeed one of great importance: intellectual property has as its prime aim the recognition of the moral and economic value of intellectual creations to the cultural, social and economic development of nations. Intellectual property promotes creativeness by organizing the relations between the creators themselves on the one hand and between the creators of the works and those who disseminate and use them on the other. Being the reflection of the value of original creations, intellectual property --as Le Chapelier wrote in 1791--is the most sacred, the most legitimate and the most personal property.

That property is today faced with challenges arising, for the first time on such an enormous scale, from the progress of technology: digital technology has already started to revolutionize the ways in which works protected by copyright are created and distributed. This flow of technological innovation, particularly in the field of video and audio technology, cable television, satellite broadcasting, new reproduction technology and computer science, not to mention the combined use of innovations as in "information superhighways"--including the digital distribution and reception of works--raise fundamental questions regarding the international system for the protection of copyright and neighboring rights.

The Symposium opening today forms part of a program put in hand by WIPO several years ago already, its purpose to understand the implications and scope of the technological changes--not to mention the economic and commercial changes--facing us all. As the custodian of the Berne Convention, and indeed

of several other international treaties, WIPO works continually with its Member States in order to raise the standard of the international protection still further. Since the last revision of the Berne Convention, which took place in Paris in 1971, the International Bureau of WIPO has been endeavoring to understand and then to explain the consequences of technological progress. Furthermore, whenever it has seemed necessary, WIPO has not hesitated to propose new solutions, often before they become apparent at the national level.

Respect for established provisions has likewise been at the center of WIPO's concerns at all times. At the beginning of the 1980s, WIPO was one of the first to raise questions regarding the piracy affecting sound recordings and audiovisual and printed works. Thereupon the International Bureau of WIPO drafted revised and updated model provisions so that the draft legislation that it has proposed to a great many States, at their request, and the comments that WIPO has made on draft national or regional laws or regulatory systems, have always taken due account of internationally recognized practice.

It nevertheless transpired, towards the end of the 1980s, that recommendations and model provisions were not enough. New provisions were necessary to maintain some balance between the levels of protection available in the various countries. As we all know, the central pillar of the system of copyright protection at the international level--I am of course referring to the national treatment principle--has been strained in recent years by the tensions arising from considerable differences between the standards of protection accorded to authors, performers and producers of phonograms in the various countries.

It was for the purpose of correcting these inequalities that the Governing Bodies of WIPO requested the International Bureau to draw up a possible Protocol to the Berne Convention, then, two years ago, to add to it a possible instrument on the protection of the rights of performers and producers of phonograms.

Parallel to this, agreement was reached in the Uruguay Round of trade negotiations--an agreement that moreover refers to several of the treaties administered by WIPO--among other things with a view to making it possible to apply the dispute-settlement machinery of the future World Trade Organization in the field of intellectual property.

Time did not stop there, however. On the contrary, we are going through a period of acceleration in the progress of the technology for creating and disseminating works, the performances of performing artists and phonograms. Last year, at the WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, held at Harvard University, it became quite clear that the digital revolution far exceeded in scope all the progress of technology--considerable though it was--that had occurred between 1886, the date of the first edition of the Berne Convention, and 1971, the date of its most recent revision.

Digital technology is indeed the common denominator of all categories of works. Any work can be represented by binary chains of zeros and ones, and the works so represented can be combined and transformed to create new works. The user himself will therefore be able to reuse digitized works and add material of his own making to them, thereby metamorphosing, in a manner of

speaking, into a creator of new works. Access to works and also the means of disseminating works will also be transformed, as they will become interactive. Optic fiber networks and the creation of "information superhighways" will make it possible to individualize the dissemination of works, leaving the user of the system free to choose the day and time of use, and perhaps also the type of use, for instance with or without the option of making a "private" copy.

All that could call for the implementation of new standards, or the review of existing definitions and rights. It could happen, for instance, that hitherto secondary rights--like lending--take on primary importance. Apart from that, new methods of licensing and collectively managing rights may reasonably be expected to evolve, which in turn would create a need to define entirely new structures.

WIPO has also put work in hand with this in mind, notably the establishment of a voluntary numbering system for certain categories of works and phonograms, which in our opinion will make it possible to identify the material used, for instance by means of digital subcodes. In addition to this there is a project (already in progress) for the identification of digitized data carriers such as CD-ROM and other compact discs, and for the drafting of guidelines on the application of copyright and neighboring rights to the electronic storage, transmission and reproduction of works, recordings and radio and television broadcasts.

There are many more answers to be found, however, and no doubt also many questions that will still arise. That is why WIPO has organized this gathering. We wish to make progress in the study of those questions and answers. If our aim is to be achieved, our minds must be kept open to the exchange of ideas, to the confluence of civil law and common law traditions in a world that is now nothing more than a single great planetary market in a spate of exponential technological growth.

In the words of Victor Hugo may we, "ainsi qu'en une urne profonde, mêler races, langues, esprits, répandre Paris sur le monde, enfermer le monde en Paris!" [... as in a giant urn, mix races, languages and minds, spread Paris over the world, enclose the world in Paris]. It is indeed perfectly opportune and just that this Symposium should take place in Paris, in this majestic new Louvre, which does credit to France and beyond it to Europe as a whole.

Permit me to address warm thanks here to the French Government, and in particular to the Minister of Culture and Francophonie, for having made these prestigious premises available to us. For more than two centuries France has recognized the rights of authors in their works, and the level of the protection that it accords to copyright and neighboring rights is among the highest in the world, which in turn has greatly helped French culture to spread and flourish as it has.

The new Louvre is the symbol par excellence of this symbiosis between the traditional and the modern. Not only is it a shrine of history and culture, it is also a model of high-technology applications and innovative architecture. It was in other words a place asking to be chosen for a Symposium such as the one that I now have the pleasure to declare open.

Thank you.

WELCOMING ADDRESS

by

Jacques Toubon
Minister of Culture
and Francophonie
Ministry of Culture
and Francophonie
Paris
France

Mr. Director General,
Ladies and Gentlemen,

More than a pleasure, it is an honor for France to have been chosen by WIPO as the venue for its Worldwide Symposium on the Future of Copyright and Neighboring Rights, this intellectual property described in your program as "the most sacred property," and now confronted with the challenges of commerce and technology.

As Minister of Culture and Francophonie, I am very conscious of this honor, as is the whole Government and also the professionals and law specialists in France. I would like to thank you for having organized this Symposium here. To these thanks, I would add a secret thought of mine: I cannot help seeing in this choice a good omen for the convictions that I have always passionately defended and for everything I believe in here.

This extremely important Symposium has found its natural setting here, I think. Not simply in France, but in the amphitheater of the Grand Louvre. This prestigious museum, which represents the apex of our country's wealth and of all its long history, as well as that of all the countries of Europe and even beyond, has opened its portals to modernization, to new ways of visiting and getting to know works of art. It has combined with its traditions new methods of access, including more commercial activities, as you can see in the Carrousel wing. I would add that the Ecole du Louvre, where you are gathered together for a few days, teaches to its future curators the new technologies and how to handle them.

The aim of this Symposium is to find out how, in our States and in our professions, we can better protect works of the mind in the face of a double challenge: the challenge of commerce and that of new information technologies. The balance between the protection of the author and the necessary development of industry and commerce is an old issue. Its origins certainly go back to the invention of printing. And it was in fact Queen Anne, on the other side of the Channel, who at that time wished to encourage learning by granting rights to the authors of works. The Age of Enlightenment in France, and Beaumarchais in particular, contributed to this, as you will be aware, with study and innovation. In your historical résumé, Mr. Director General, you once again stated that works of the mind were the most sacred property. I would willingly say, with Le Chapelier, that they are also the most personal property.

This personalized concept of the creator's rights has always been a basis for our philosophy, for our principles on literary and artistic property, it has guided the most recent developments, and has also helped to anchor this part of private law firmly in the cultural domain. The methods of exploiting works are diversifying and multiplying, but for all that the creative act, on the contrary, remains at the origin of everything, it loses nothing of its initial strength, its dynamic vitality.

To my mind, this concept has been thoroughly tried and tested, and certainly since the end of the nineteenth century, on the emergence of new information and communication technologies. I am of course referring to photography and the cinema. Our legislation has altogether succeeded in adapting itself to suit these new media, these new vectors.

Today, as this story of uninterrupted adaptation continues, you will be reflecting on a new adaptation, a new adjustment of intellectual property rights to new technologies such as digitalization, data compression and interactivity. We know that digitalization, interactive digital networks, electronic superhighways could easily provoke a profound change in the basic concepts of copyright. What developments will there be in the information technology industry? How extensive and how swift will they be? What constraints will limit the development of the information technology industry, what investment will it demand? As for the public, the citizens of our States, what forms of culture, of cultural dissemination, of creativity can they expect, hope for, perhaps even fear?

These questions are essential for the transcendental value which we attach to culture and art. This is why, without delay, as soon as I was appointed to the Ministry of Culture, I decided to set up a committee to study this, entrusting the chairmanship to Professor Pierre Sirinelli. He will follow me on this rostrum. And I would here and now like to applaud the quality of the work accomplished.

The forthcoming explosion is of course rich, as always when technologies change, rich both with hope and anxiety, and the stakes are considerable. It is nothing less than the development of an "information" society which tends towards a certain universality--does that mean uniformity?--to an instancy which is more and more pronounced, eliminating any instant of reflection between the moment when the thing is done and the moment when it is seen or touched, and lastly to a protean character, one which must take account of cultural, economic and legal aspects, all at the same time.

As for the professionals, whatever borders or oceans separate them, they are increasingly aware of what is at stake.

These stakes are first of all those of the creators: whether in the circulation of their works, their access to these new creative technologies (will the cost of these technologies permit free access to all creators?), the increase in their exchanges, their apprenticeship in the multimedia trades, combining talent with scientific and technical learning.

Stakes too for multimedia economics, through the reconciliation of skills, the investment capacity, the incentive for new initiatives (the role of government or of the consumer or again that of private enterprise).

Stakes also of course for the lawyers. They require normative provisions which are appropriate to the problems arising, suitable provisions to anticipate or calm disputes. They must also have an open mind for considerations and practices developed in other specialist cultural sectors.

The final stake, the one which for us, a democratic government, is perhaps the main one: for the public, the public themselves. The question is that of the standardization of equipment, the democratization of access to learning and knowledge, the growth of exchanges in what will become the global village, or on the contrary the risk of isolating the individual alone in front of his screen.

We must never underestimate the complexity, the range, the risks or the advantages. It is necessary to think about this subject coolly and not under pressure from the economy, the consumer or the development of technology.

You gave an excellent summary, Mr. Director General, of WIPO's efforts to adapt the work of your prestigious body to its tasks and to anticipate developments, adding "time never stops, quite the contrary." You stated with good reason that the digital revolution is surpassing, in its magnitude, its possibilities and its potentialities, all previous technical advances, which were nevertheless considerable. It is true that works, henceforth represented by long binary sequences of zeros and ones, can be transformed and combined, even metamorphosed and, some would say, falsified. The user will have in addition a choice of use, of day, hour and place. That is to say that due to interactivity, multimedia products and new vectors, new relationships will be set up between the public and the work.

Literary and artistic property, beyond its economic and remunerative aspects, complies with the wishes of Beaumarchais: the author should be paid. It also regulates, in a fundamental manner, the relationship between the initial author and the public, the ultimate user. The enormous intermediate area between the initial author and the user having been disrupted by the new technologies, copyright must take this disruption into account. Copyright must not just stop at one aspect, the remuneration of the creator. It is important to know how the relationship is formed between the person who was inspired by the muses and the person who, in the end, will have the pleasure, the desire, the thoughts that are induced by any work of art and culture.

Faced with this development, two positions can be envisaged: either to trust blindly in technological evolution and postulate that market principles will provide the response. A policy of laissez-faire. The balance of power or contractual negotiations will eventually establish the necessary equilibrium between the parties involved. This position has a certain logic but I am not sure it is the best. In fact, I am convinced the opposite is true. Personally, I prefer another position. It rests on the adage that "prevention is better than cure" and that beyond a rather mechanical interplay of economic or technical developments, it is the law itself which should establish the necessary barriers and correctives. I think, moreover, that in these precincts this position is widely shared.

As Minister responsible for culture, I have two main preoccupations in this area. The first of these concerns cultural policy, more precisely the

risks of regression which can accompany any technical progress. Three main risks. The first possible risk is that of uniformity and standardization of works, for reasons which are, in a way, automatic, stemming from the economic and financial arbitrage carried out by investors and market operators. This is an issue we have already encountered in the cinema and audiovisual field. The second risk concerns the marginalization of independent creation, whatever its form of artistic expression, musical, literary or audiovisual. Finally, the third risk is the possible weakening of the position of the creators, authors and performers, compared with the holders of the new distribution and communication vectors. This is my first, and main, preoccupation: do the new technologies result in a regression in culture and cultural policies or can they be used to benefit these cultural policies so that, in terms of creation and distribution, they are more effective than today?

My second preoccupation concerns the future of the fundamental principles and concepts of copyright for which the Berne Convention is the internationally accepted charter. Naturally I am aware of the divergent ideas which can exist between States and between those who follow different legal philosophies. But at the same time I am convinced, and your work will be a powerful contribution to this, that a number of common problems, to which appropriate solutions must be found, can be highlighted and be the subject of convergent analyses even by those who have different views on the philosophy of law. Each person can use his own techniques to provide his solutions. Each person can follow his own particular lines, his specific ideas, but finally we will be reunited on the analysis and probably on the aims. In this respect, I ponder the following questions concerning literary and artistic property.

First question: who is the author of the work? This question arises due to the multiplicity of participants and their specific, respective contributions linked to interactivity which clearly poses the problem of the role and place of the user. Will recourse to computers or the intervention of a random generating machine mean that a creation which would not fit into any existing category will qualify as an independent work?

Second question: what influence will these new technologies exert on the very nature of the rights of performers or producers?

Another question: when works or performances are used, what will be the effects of the dematerialization of the media, which in fact blurs the borders between the medium on which the work is fixed and the vector which communicates it to the public?

Fourth question: what links are there between the constitution of multimedia products and the administration of rights? How can the right holders be identified and remunerated? Should new standard instruments be established, or will simple technical means suffice? How can we ensure that these multimedia products are not hampered in their development and, in allowing them to develop, not call into question the position of the right holders?

I would like to end with a final question: how can we reconcile the possibility of intervention in a work, either by professionals, or by the user by means of interactivity, with the moral rights to which we are attached? Are these real conflicts or rather, as might be hoped, can the various parties

involved not reach a suitable equilibrium, achieved in an interprofessional manner as can happen in France? To resolve these problems, must we enter conflicts where one wins and the other loses, or should we try to find solutions which show consideration for the positions and the interests of both sides?

In no way, Ladies and Gentlemen, do I underestimate the technical difficulty of the solutions that we must provide, together, to the legal problems that I have addressed. I think we must jointly seek--and find--solutions which will reconcile several approaches and aims: cultural and economic development, protection of intellectual rights, whatever, when all is said and done, our starting points or our original legal concepts. I am mindful of the potential for economic development, wealth, activity and employment which these new information technologies harbor for the communications industry. I would remind the audience that the White Paper published by the Commission last November pointed out that the communications industry would be one of the main growth areas in Europe, and throughout the world, over the next 15 years.

As for me, my profound conviction is that intellectual property finally remains one of the legal instruments which is most capable of adapting to the new technologies. It is with this fundamental recommendation that the French Government, in cooperation with its partners in the European Union, has undertaken measures to harmonize the national legal systems for a European market where products circulate freely and where the rights in works and performances must be in equilibrium. In the same way, we were involved in the TRIPS[1] Agreement in Marrakesh. Let me, however, make an observation. Although certain intellectual property rights do concern trade, the fruit of the creation of authors and the performances of actors or musicians cannot be assimilated to these acts of production or commerce. The European Union has been able to safeguard this balance. In the same spirit, I think that WIPO should maintain, should even consolidate its specific function in relation to the recently created World Trade Organization. WIPO's vocation is to stand at the legal, industrial and cultural crossroads, in collaboration with Unesco and with the ILO, that are also the guardians of international agreements in closely related fields. I know, Mr. Director General, that you have guarded this independence of WIPO throughout the mandates you have assumed with your own special qualities. As for France, it has done everything possible for this line to be safeguarded. You may rest assured, at a time when there are going to be changes in your Organization, that the French Government will endeavor to carry on with this balanced policy and will pursue it with all the means at its disposal. You are aware of the recent initiative taken by the French Government to ensure the continuity and the protection of WIPO's specific character and independence.

Ladies and Gentlemen, since the first Berne Convention, copyright has been able to adapt itself to the new technologies which, indeed, now abound. In a moment, Mr. Sirinelli will inform you in more depth about the thoughts of the working group of which I appointed him Chairman. He will mention in

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[1] Agreement on the Trade-Related Aspects of Intellectual Property Rights.

particular, I think, the problem of identifying the right holders and the possible establishment of a file of works. Doubtless, he will plead for a meeting between the worlds of creation and computers. Be that as it may, it seems to me that we have a fixed point to reassure us, a sort of star to guide us towards our essential common purpose: the legal arsenal must reconcile two indissociable elements, on the one hand, economic progress in a world which is now wide open and, on the other hand, the necessary protection of the identities of each of our cultural expressions. May God preserve us from these new technologies, digitalization and interactivity, one day breeding uniformity in works of the mind!

As regards this anxiety that I have expressed, it is enough for me to be here today with you, among you, to dismiss it and to rediscover the faith that I have in the future of intellectual property. Your participation is numerous, manifold and varied, qualities which are all fundamental tokens of our humanity itself: that is to say, its diversity.

I do not doubt for one moment that your contributions to this Worldwide Symposium opening today in Paris will play their part in the necessary convergence towards the common analysis and solutions that constitute the very basis of this prestigious body of dialogue and legislation, the World Intellectual Property Organization.

FIRST WORKING SESSION: INTRODUCTION

THE ADAPTATION OF COPYRIGHT IN THE FACE OF NEW TECHNOLOGY

by

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The adaptation of copyright to new technology--as the present Symposium testifies--is a universal question. It remains only to agree on the meaning of the question, which can be interpreted in one of two ways.

Is it necessary--this is the first interpretation--that the authorities in charge of copyright deliberately amend current legislation to take account of technological progress?

Is it even desirable?

In a way this is in line with the traditional debate on the adaptation of law to circumstances. The demand for it is strong, in any case, but is it always unbiased?

Should one on the contrary, and this is the second possible meaning, leave law to evolve naturally and adapt to progress on its own?

Is that even possible?

A choice between these two options can only be made in the light of technological progress.

Any attempt, even in the summary form of an introduction, to compile a catalog of new technology would be misleading. What after all is new technology? Should it take into consideration the technical novelty of the solution that it proposes, or should it be determined by the novelty of the legal analysis that it entails? Or again by the fact that the economic challenges inherent in it presuppose the rethinking of existing patterns? For instance, the question of reprography is not new. As technology, it is entirely familiar to us, as we have grown up with it, and to suggest that it is "young" would require no small measure of vanity. And yet a great many States are still looking for remedies to the economic questions that it raises.

The truth of the matter is that, today, our range of vision is limited. If we cast our eyes back towards the past, we would exhaust them in our effort to take everything in; turned towards the future, they would be liable to tip us into a dizzying swirl of modernity.

Do we really have to try and reform copyright in line with technology whose chances of success, whether material or commercial, we do not really know? The history of science is full of the tales of ingenious inventions

that have remained unknown or unexploited (for instance, the actual principle of the facsimile machine dates back to 1856). There are also other inventions whose effects have not made themselves felt until long after they were thought up. And then of course history is brimming over with examples of unexpected success.

We therefore can only afford a measured glance. Shortsightedness does of course have to be avoided and impending difficulties have to be anticipated, but a rational study cannot be made unless due account is taken of projects already in existence (and in progress) in laboratories. They will not have any real impact until they are economically viable and successful with the public.

Another thing that has to be borne in mind is that this technology includes some that can be considered perfectly "neutral" in copyright terms, in that it does not by any means question the reasoning that has long governed our subject, and which WIPO has taken upon itself to have adopted throughout the world.

One area of technology springs to mind that is not new as far as its principle is concerned but has a vast range of applications, namely digital technology.

Digital technology consists in the conversion of data into binary code. Data compression techniques enable it to multiply the possibilities for the creation, reproduction and performance of works. A good many of its effects are already noticeable; the first has to do with the increased potential of carriers in terms of quantity and also quality.

As far as quantity is concerned, the new carriers can incorporate more works and make it possible to mix creations from different genres. This accounts for the current proliferation of what are known as multimedia works.

As for quality, the work is given back without any loss of it, in the form of either published products or digital broadcasts. Quality also benefits from the fact that digitalization makes for greater interactivity.

While digital technology is fascinating, it can also be a cause of disquiet inasmuch as it makes it possible to produce absolutely identical copies, or leads to the "dematerialization" of the work, which in turn can cause the medium to lose its relative importance and the work its "sacred" status.

The economic or cultural consequences of such a phenomenon have been mentioned by the Minister of Culture. They are indeed considerable, but the legal consequences are by no means negligible either.

There is an underlying idea to this movement, namely the idea that our present copyright is unsuited to it. Some thought should be given to modernizing our body of legislative texts. Indeed this concern is arguably inherent in the current work of WIPO.

It is said that history is a perpetual new beginning. We know that copyright came into being when two conditions were met. The first had to do

with the material means whereby works could be disseminated (printing for instance). The second had to do with intellectual considerations: authors had to be perceived as useful people whom the political authorities wished to assure of an important place in society.

It could just be that the time has come for a "Renaissance" of literary and artistic property, as on the one hand new resources have come into being and on the other the international authorities are taking notice of the phenomenon and of its economic, social or cultural repercussions.

The foundation on which this new analysis should be based is therefore the idea that copyright as we know it evolved in an analog world, and that the transition to digital technology would make obsolete and unsuitable all the reasoning inherited from past experience.

The value of this Symposium is that it enables the soundness of the above statement to be tested. It is not a question of playing out once again the time-honored conflict between the old and the new, but rather to ascertain whether modern developments are bringing about a radical, substantive change of nature or merely a change of degree. The reply given will of course not be the same depending on the approach adopted.

What this means is that the debate is now open, and that in the course of these three days we are going to find the dividing line between fantasy and reality. We are going to try and distinguish real areas of tension or crisis areas from areas of discussion for its own sake.

In this first presentation, we can only make a very general approach which, in order that it may remain as neutral as possible, will be merely chronological. What we shall do is conduct a survey, monitoring the progress of works.

First and foremost, it is a question of measuring the impact of new technology in the creation phase (Part One), after which we shall have to assess the consequences at the stage where the works are actually used (Part Two). Whatever the problem under consideration, however, it will be a question more of asking a certain number of questions than of providing replies.

PART ONE
NEW TECHNOLOGY AND CREATION

This is where the demands of some of the main players become most emphatic.

On the whole, it is agreed that the present (and future) situation is too complex. There is a consensus in favor of working towards simplification, but we may just establish among ourselves that the matter at issue has less to do with the simple assertion of rights.

Two aspects may be considered, depending on whether creation, with digital aids, is "from scratch" (A) or on the basis of preexisting works (B).

A. NEW TECHNOLOGY AND CREATION WITHOUT BORROWING FROM PREEXISTING WORKS

These are hypothetical cases of computer-assisted creation. All areas of creation are or will be concerned. Theoretically the legal approach should not be new, but three points do deserve attention.

I. The Work Concept

Here the approach may be either global or piecemeal.

In the first case, one could wonder whether there is still a work where the material produced is the result of recourse to an appliance connected to a random generator, or where the user's involvement consists in no more than certain rudimentary acts.

The question is not a new one: the use of computer technology merely presents the same, age-old questions with greater acuteness. It seems that there is no creation unless the supposed creators, at the time of embarking on the task, have an idea, even a vague one, of the result they are aiming for, in other words a true project. Certain legal systems do exist that are less relucant to grant protection to "accidental" creations.

The debate is nevertheless somewhat academic as, over and above the stringency of the investigation, a question of proof indisputably arises. Seldom would an author freely admit that his involvement in an act of creation was minimal.

More simply put, one could be of two minds as to the status of photographs taken by satellites, or again as to the nature of reproductions of works made with the aid of a scanner.

A less global approach could lead one to ask whether, one day, it might not be possible to perceive the work concept from a new angle.

The possibilities that digital technology provides for the breaking down of works make it easier than it was to consider parts of works to be entities worthy of interest. Faced with a work protected as a whole one might, one day, be led to wonder what parts of it, in isolation, could have a legal existence in their own right (and be protected by copyright) and what others could be "chopped up" and become freely accessible. Such questions are not entirely new (traces of them are to be found in some infringement litigation), but recourse to digital technology puts them more blatantly inasmuch as the smallest data element forming part of the work may be perceived separately. The legal difficulties arising from the practice of "sampling" are already the result of such disassembly (see Part Two, below).

II. The Concept of Author

Here the debate is already under way: can the computer scientist who creates the system claim rights in the work produced after his program has been used? It depends entirely on the circumstances, but at the outset the reply is no: the rights accrue to the user-creator.

The interactivity that digital products offer by virtue of their nature nevertheless leads one to wonder what the exact position of users is in hypothetical cases of creations being spontaneously produced, notably in places open to the public.

Can the visitor who makes use of the system claim authorship even though he had no real cultural project at the outset, and has not fully mastered the system?

As a precaution, model contractual provisions should be proposed to prospective users, but their validity should be considered with care, as they cover questions that legislation considers to be matters of public policy, in other words out of reach of contractual freedom.

It should, however, be pointed out that certain designers of "open" systems consider that the borderline between creation and the interpretation of preexisting data is becoming more and more blurred, to such an extent that one could not be sure, in the event of a reservation having to be allowed on the product of the uses, whether the matter lay within the purview of copyright or that of neighboring rights.

III. The Status of "Plural" Works and the Location of Works--To Be Reconsidered in the Case of Remotely Produced Joint Works

Digital technology will make it possible to connect creators to each other by networking. A number of cases already exist, such as the Internet system, and others will appear, so that the process could become quite commonplace in the future. This "remote creation" increases the complexity of the questions already mentioned and calls for a rethinking of traditional conceptions.

For instance, it is a delicate matter to determine who is the author when the work produced is the result of the participation of thousands of contributors, each with an intervention capability of a few pixels only. How is one to treat such a work, which evolves constantly in response to such interventions? Can it be described as a work of joint authorship, even though the participants have no joint project and are not really working together? Can it be seen as a collective work, even though the coordination of the work is rudimentary, to say the least, and the person purporting to be the promoter can hardly impose anything (it is true that this concept is being made ever broader by the courts, to the point of becoming the accepted legal treatment for plural works)?

There is, however, another difficulty, that of location, which is even more delicate.

In certain cases, as we know, there are national laws (such as Article L. 111-4 of the French Intellectual Property Code) and international conventions (Berne Convention, Geneva Convention) that decide on the regime governing a given creation according to the place of the work's first publication or its country of origin. But how is that place to be determined when creation and dissemination take place simultaneously, in network form?

B. NEW TECHNOLOGY AND CREATION WITH BORROWINGS FROM PREEXISTING WORKS

Here, in a general way, we are dealing with the question of derived or composite works. Among all the questions that arise, special attention must be given to those that concern what are known as multimedia products, which are one of the economic and cultural challenges of the twenty-first century.

The discussion should on the face of it be quite easy to conduct, but the digitization of works does multiply the options and hence the sources of conflict. It should be made clear at the outset that the difficulties encountered in this area are identical to those associated with data bases. The solution should be as well, as the Brussels Commission clearly considers that the data base statute that it is now working on is destined to apply to multimedia products. Leaving aside this assimilation for a moment, the analysis of present solutions can be simply summarized and presented in the form of questions:

-- How does one freely put together a multimedia product? (I)

-- Is copyright a nuisance outside the areas of freedom it allows? (II)

-- What does a multimedia product qualify as? (III)

-- Who is the author of a multimedia product? (IV)

I. How Does One Freely Put Together a Multimedia Product?

Here copyright is generally presented as an obstacle to the making of multimedia products.

In essence, the creator of a multimedia product may make use of freely accessible elements free of charge, either because they have never qualified for protection (unspecific data, unoriginal contributions, creations specifically excluded by law from the purview of copyright, and so on) or because they have fallen into the public domain (on the lapse of exclusive rights, generally 50 years--soon to be 70 years--after the author's death).

In the event of the source documents being still protected by exclusive rights, recourse would still be possible to the exceptions to copyright, notably those that have to do with the freedom to make certain partial borrowings. Here digital technology may just complicate things.

For instance, certain laws recognize freedom of quotation when the borrowings are characterized by their shortness. This provision is generally focused on the work quoted, but also takes account of the quoting work. The matter becomes particularly delicate where it has to be judged on the basis of the digital medium, precisely because the works, depending on their nature, do not occupy the same place in the memory. The binary unit or bit affords only an unsatisfactory representation. It will no doubt be necessary to rely on the spirit and intention of the law and on a mathematical calculation.

The problem presented by sampling is more a practical than a theoretical one. It is the problem of providing proof of borrowings because, by

definition, digital technology affords an infinite capacity for manipulating digitized data.

Here perhaps digital technology could come to the aid of the law, if ever systems for the coding or marking of works or carriers are eventually developed that are effective enough to track down unauthorized borrowings.

II. Are Copyright and Neighboring Rights a Nuisance Outside Freedom Areas?

The makers of multimedia products rightly point out that, as soon as they are made to acquire rights in preexisting works, they come up against such difficulties that they are often obliged to abandon a project. The observation is indeed a valid one, but care should be exercised in the search for the true causes and the solutions to be provided. Here, even more than elsewhere, it is less a question of reforming copyright than facilitating its implementation.

1. The basic comment is the following: the making of a multimedia product centered on the borrowing of preexisting works becomes a veritable obstacle course, liable to provide full employment for three persons working full time for a period of three months. That slows down the project and costs a vast amount of money.

Various solutions are advocated in the profession to remedy the situation. Some want multimedia products to benefit from independent rights; those rights could be either outside the field of copyright or alternatively an adaptation of copyright, as in the case of software. The creation of a specific new right would not be wise at all, as it would add the absence of international recognition to the difficulties that we are going to mention.

The creation within copyright of a special protection title specific to multimedia products would no doubt be a mistake today.

A specific right (either within or outside copyright), built up from evolving technical data and fleeting or insignificant economic observations would be a legal construct destined to become rapidly unsound and obsolete, apart from which it would also come up against substantial difficulties.

-- First, how is a multimedia product to be defined? The definition is a fundamental question in itself, as it determines the scope of any exceptions. That said, attempts made hitherto have been somewhat disappointing or contradictory, and perhaps do not take into account the reality of tomorrow's world. Apart from that there would arise the question of the borderlines with categories that already exist; it is by no means sure that the individual areas of concern are completely hermetic (see below).

-- One could also wonder what exactly the regime eventually adopted would be. It would be unthinkable to confine oneself to specifying the powers and rights of producers: what about those of users, when tomorrow the products are going to be networked as well as published?

-- The psychological effect would moreover be disastrous. The new concept would give the creators of the initial (classical?) works the impression that they have a great deal to lose in such an exercise. It would induce protagonists from other cultural sectors to make or repeat claims that they consider equally legitimate (why act here and not there?).

-- Finally, copyright would become a law of segments and categories, and one in which ultimately no one would find his exact place. The ill-fated experiment already conducted with "computer creations" is instructive in this connection.

Far from being a simplifying solution, the creation of a new right at the present stage in the proceedings is a simplistic one and a source of tension. Recourse to this kind of response is all the less welcome since there are other courses of action available that would be less destructive and would no doubt win acceptance from the various protagonists without our system having to be redesigned at all or even its spirit changed (in response to the appeal of common law copyright systems).

2. To take the legitimate demands of the producers of multimedia products one by one, three difficulties can be mentioned in particular:

-- How is one to identify the owners of the rights in the works to be incorporated in the multimedia product?

-- How is their consent to be obtained?

-- How is one to avoid paying them royalties in such an amount as to put the entire economics of the operation at risk? The last two questions can be dealt with together.

The difficulty of identifying owners of rights is the most important problem. New technology can provide a certain number of replies for future use.

-- The "watermarking" of works stored in a digital medium, with a place reserved for the relevant information (identification of the works, of the holders of rights, of authorized forms of use, and so on), is an approach to be encouraged; technically speaking, the operation does not appear to be either complex or costly.

It is a cumbersome and incomplete solution, however. Marking of this kind can be forged by persons with a certain amount of equipment at their disposal, and is not very adaptable, apart from which it can only be used with digitized works.

-- Computer technology on the other hand affords the possibility of the creation of a vast file. If one were to take an optimistic view, that would amount to making a sort of guide available to users or producers which would contain an inventory of all works still covered by protection and identify the owners of the rights in those works. This central file would be entirely adaptable in response to the emergence of new works or the licensing of works already incorporated. What this amounts to is the establishment of a kind of "land register" for copyright. If one were to adopt a modest approach, such a

register would at first concern only newly created works. It would then be a question of gradually working back in time to cover those creations that present the most problems or are the most likely to be incorporated in a multimedia product. Such files do seem to exist already in certain countries, at least in a rudimentary form and for certain categories of works. It is noteworthy that this procedure, seen in the context of the various forms of intellectual property, comes close to those already existing in the industrial property field.

It remains only to procure the means of pursuing such a policy.

The truth of the matter is that the problem would not be a technical one but above all a "political" one for societies (affecting the confidentiality of repertoires) or even for authors, who would be subjected to mandatory administration (but backed up by what sanctions?).

It is moreover undeniable that absolute security is going to be difficult to achieve. How far back should one go along the line of successive licenses? One intermediate solution that could be tried would be the introduction of a system that merely registered availability and directed interested parties towards the relevant societies of authors or other owners of rights.

Without making the system mandatory, one could nevertheless devise incentives, such as that which consists in making the binding character of certain legal operations subject to their being publicized, in other words registered.

-- This solution having been proposed, the question that arises is whether one should make the transition from a "collective administration" solution to a "collective management" solution. General adoption of the second solution might just obviate recourse to the first, even though such a radical step is neither desirable nor in line with history.

To some, it is a leap that appears to answer not only the questions concerning the agreement in principle that has to be sought from the owners of rights but also those connected with the calculation of the amount of remuneration payable, two points on which negotiations tend to stall nowadays.

A number of solutions would appear to be possible.

The most binding would have all owners of rights under the obligation to join a society. The various societies could themselves set up a federal body responsible for actually managing the rights. Thus would be created a sort of "single booking office," a time-saving as well as a money-saving factor. In fact all permutations are possible here, but due account should be taken of the fact that the system would not be really of any interest unless based on a certain generality of coverage, meaning all categories of works, regardless of the intended use. If that were not the case, there would be discrimination between types of exploitation (why would the compiler of an encyclopedia on a digital medium be given the benefit of simplified procedures and reduced prices and not be offered the same facilities for a paper-copy version?) and the machinery would be ruined by the gaps that would be left (interminable

searches or negotiations for a given category of works, unfair exclusion of a given category of owners of rights, and so on).

Without expressing an opinion on one course of action or another, we should clarify the available options by checking the relevance of the arguments put forward by the "reformers," which emphasize the present risks of blockage.

Those that have to do with the arbitrary exercise of moral rights seem unsound. In France, for instance, the chosen home of moral rights, their exercise is under the control of the courts, which do not hesitate to punish abuses.

Thus the purely financial considerations remain. There is no disputing that the negotiations have been going on for a long time, and they are failing on account of the excessive demands made by the creators of the original works. This obstacle could usefully be put in the right perspective, however: it may be only a temporary one; the excessive demands made by creators are easy to explain: the various authors come from different environments; books, pictures (animated or otherwise), music and computer technology are rather different activities, and each creator has to adapt to the ideas of the others. Not all of them have yet understood the ins and outs of multimedia economics. What is visible today is the conflict and the dithering, but some equilibrium should be found in the normal course of events.

If disagreement were to persist, a solution might be to publish indicative scales (and standard contracts) drawn up in consultation with the various interested groups; it might even be possible, as a last resort, to provide for the appointment of a mediator or moderator.

III. What Does a Multimedia Product Qualify As?

This question is important, as it determines the legal regime applicable to the product. Indeed it is the one that has led a number of people to advocate, on the grounds of what they claim to be uncertainties, the adoption of a specific regime.

One thing is sure: the fact of multimedia products being on a digital medium should not on any account be a reason for the application of the special provisions on software. Even though it may be an important element of the product, the software involved must not be allowed to obscure the nature of the other elements. Here once again we come up against the traditional debate which also surrounded certain complex computer creations like expert systems or video games, and which seems moreover to have been clearly settled in both legal literature and case law: special provisions are applicable to the program part, and ordinary copyright provisions to the rest.

Reference to more classical concepts, even if one seeks to avoid practicing "nominalism," does seem to suggest that existing products should be classifiable, as the case may be, in one of the two major categories already available, namely collective works on the one hand and audiovisual works on the other. Everything depends on the circumstances.

It is even highly probable that multimedia products will be made to qualify as something else, namely data bases, which has been proposed by Article 1 of the proposed European Directive on the legal protection of data bases. The consequences of such an event would precipitate the acceptance of two things:

(1) multimedia products would certainly be subject to doubly special provisions (adapted copyright and sui generis provisions, both derived from the proposed Directive);

(2) in certain cases one and the same multimedia product would be eligible for the double status of data base and audiovisual work! (the latter being the one most readily attributed to it by the various protagonists). What that means is that it could be made subject to the combined effect of two sets of separate special provisions (data base law and the law of audiovisual works), which of course are not necessarily compatible.

The latter observations further highlight the dangers of continually enacting special legislation, above all when a text rightly applicable to factual or informational bases in fact also applies to an assemblage of works.

IV. Who Is the Author of a Multimedia Product?

The complexity of the process whereby the product is developed and the large number of contributors may make analysis difficult.

In practice, lesser difficulties arise for categories of contributors that are already known to the world of analog creation, but the multimedia sector is also characterized by the appearance of new categories of persons whose authorship may just be more problematic.

Nevertheless, the producer of a multimedia product who finds himself in one of the two situations mentioned earlier (collective work or audiovisual work) will have the benefit of the presumptions established by the texts in force, and the management of the rights in the new product as a whole will thus be facilitated.

In conclusion, no important substantive reform is really called for. The present tensions are perhaps due only to the economic climate, resulting no doubt from the advent of new "players," and from the failure of circles which hitherto have operated in virtually complete isolation to recognize each other's practices. A program of teaching, guidance and assistance would certainly be welcome.

This intermediate solution has the additional advantage of allowing time to observe developments.

Is the same true of the second phase, namely that of the use of the works?

PART TWO
NEW TECHNOLOGY AND USE OF WORKS FOR PURPOSES OTHER THAN THE CREATION OF DERIVED WORKS

"Use" should be understood here as being any instance of exploitation of creations, but also the simple act of "consuming" works.

The choice of words may come as a surprise, but it should be pointed out that legislation has tended recently to adopt the term on account of what it evokes. It is indeed encountered more and more frequently in computer or audiovisual contexts.

The difficulties are even more numerous in this part of our study than in the one on the creation phase. It does not seem possible, therfore, within the confines of a report such as this, to deal with all of them or even to deal fully with those that we do consider.

Briefly, it is a question of studying some of the consequences of recourse to new technology at the stage of the use of works (A), before considering any contributions that the technology could make towards the better monitoring of specific uses (B).

A. CONSEQUENCES OF RECOURSE TO NEW TECHNOLOGY AT THE STAGE OF THE USE OF WORKS

These consequences are quite numerous.

One could, for instance, wonder what intermediate digital storage qualifies as.

Is it in fact a "neutral" operation, or should it not be looked upon as an initial act of reproduction for dissemination purposes, in other words for eventual public use? The answers given such questions may be important to certain research-related projects or to centers for the creation of computer graphics.

One could also attempt to assess the legal consequences of certain kinds of dissemination.

What of the digital radio experiments, for instance? Whether over the airwaves by digital audio broadcasting (DAB) or by cable, digital broadcasting is liable to change a certain number of habits, and we have to expect an increase in more or less private, high-quality copies and also the marketing of pirate editions.

It seems moreover that the question of remuneration amounts has some relevance here. It is a question that should be considered in detail, as the aim would be to strike a careful balance between two concerns, namely the desire not to arrest the development of new technology, for instance cable technology, as a provider of vehicles for the dissemination of culture, and the desire not to jeopardize the music industry, and the culture industry as a whole in its present form.

And what of the downloading of certain works?

Are the solutions adopted for cable or satellite technology still in line with the state of the art?

As it is impossible to cover everything, we shall concentrate our questions on three particular difficulties.

I. Consequences for the Distinction Between the Right of Reproduction and the Right of Performance

While it might seem trite to say that digitization affords works an extraordinary opportunity in that their range of distribution will be enormously enlarged, whether in the form of published paper copies or in network form, this explosive development could give rise to some difficulties in traditional legal analysis. As Professor André Lucas says in his Traité de la propriété littéraire et artistique (Litec, 1994, No. 235), the dematerialization associated with new communication technology blurs the boundary between the vehicle carrying the work (suggesting the exercise of the right of performance) and the medium in which it is incorporated (suggesting the exercise of the right of reproduction).

The fixing of a work on a digital medium is unquestionably an act of reproduction. But is that all?

The use of software and the consultation of a data base or multimedia product are perfect examples of borderline cases in which legal writers are divided on some points. Is the right of performance involved in the hypothetical cases mentioned? Some writers maintain that the display of the data on the computer screen when a client consults the work constitutes a "performance." Perhaps the search for a solution involves making a distinction according to the nature of the works involved and the way in which they are distributed.

The real danger is elsewhere, however, and is more of a threat to the concepts. For if, as is also said, display on a screen (computer, monitor or network terminal) can also be regarded as a material fixing of the work, in other words a reproduction, it is not impossible to regard everything that carries a work (airwaves, electric current, etc.) as a medium, albeit an ephemeral one, so that the right of reproduction would always be involved, and no longer merely the right of performance.

Is cumulative application acceptable? Should one allow the one to be disregarded in favor of the other? Should these underlying concepts of our field of law be revised, or at least redefined? It is of course too early to answer these questions, as not all the technical data have been fully perceived in their true guise, while the economic implications of any approaches that might be adopted have not for the moment been properly assessed. It is not too early to think about them, however, as the debate is not a purely theoretical one; it is not merely a question of the cohesiveness of copyright. In practical terms, depending on whether one approach or the other is adopted, the amount or the number of royalties may vary, while the holders of rights may well not be the same people.

II. Consideration of Individual Practices

Here we come back to the question of copying.

How are we to appreciate the difficulty when digital technology is capable of making reproduction perfect and discouraging purchase?

(a) Fears of the spread of unauthorized copying, or even fraud on an organized scale, seem to call for a response of an essentially technical character, such as the incorporation of codes, either in the digital media themselves or in the recording apparatus, to prevent or at least limit copying. The introduction of such technical devices presupposes close cooperation between industrialists and the representatives of the holders of rights.

(b) This question of the risk of increased unlawful copying should be distinguished from the question of private copying.

While the right of private copying is bound to remain, the real question that will arise has to do with the organization of payment for such copying.

In many countries in which the practice exists, it is closely tied up with the concept of the medium, but it does have to be borne in mind that there is more "dematerialization" with digital technology.

What is more, existing methods of calculation now seem unsuitable.

For instance, the present French system for the collection and distribution of royalties relies on a calculation of the term of copyright that is inappropriate in the case of digital media, and also on distinctions between audio and audiovisual material and between phonogram and videogram that lose their relevance in the case of creations that mix the two genres.

What criteria should be applied to replace the present methods of calculation?

III. What Are the Consequences of the Shrinking Role of the Medium?

This question goes hand in hand with that of the distinction between the two concepts of reproduction and performance (see above) and that of the monitoring difficulties that could be overcome by technical action (see above also).

In the context of economic rights, it should be pointed out that the concept underlying some of the remuneration existing at present for the benefit of owners of rights is determined by the concept of the medium. Instances of this are remuneration for the private copying of audio and audiovisual material and the right of mechanical reproduction.

Other, more surprising consequences are possible in the field of moral rights.

"Dematerialization," far from focusing attention solely on the work, undoubtedly tends to divest it of its "sacred" quality.

How is one to ensure respect for moral rights precisely when the possibilities offered by digitization lend attractiveness to the different ways of manipulating works? Interactivity is itself unquestionably perceived as an offer of public involvement.

This phenomenon may be all the more disquieting for being combined with others, like the progressive recognition of a "right of the public," meaning users or at least the consumer. Manipulations, enhancements and the like are looked upon as so many odes to progress and invitations to become involved.

Oddly enough, attempts to tie digital works to a more or less tangible medium do not improve this way of looking at things. What ensues is a mental drift towards acceptance of the digital medium and the (albeit wrong) application to it of software provisions, which give short shrift to moral rights. This kind of reasoning by analogy is inaccurate, and it would be a good thing if it were clearly denounced as such.

B. CONTRIBUTION OF NEW TECHNOLOGY TO THE BETTER CONTROL (MONITORING) OF WORKS AT THE STAGE OF THEIR USE

Some (but by no means all) of the answers to the difficulties mentioned could be technical ones.

Without going into detail on actual techniques, it should be pointed out that the various systems either in operation or under test have different functions, ranging from the protection of data against unauthorized uses (for instance, the SCMS system against multiple copying) to a function that consists merely in the identification of owners of rights (ISRC, ITTS, etc.) or in management (as with the APP code) with, in between, the tracking down of infringements or unlawful uses (ABTEST), or even sometimes a combination of a number of approaches (the CITED project has the twofold purpose of ensuring respect for rights and the management of uses).

The implications of such arrangements have yet to be assessed.

First because, while it is clear to see that all these systems are definitely useful in connection with the assertion of rights, most of them have the shortcoming of not being inviolable, above all where organized fraud is involved, and they have to be adaptable if one is to keep track of the rights that may be owned in a work. The solution of the introduction of a file system to back up these marking procedures should not therefore be ruled out.

Secondly, technical considerations obviously should not be substituted for legal reasoning. The material proof of borrowing (by the finding of a marker) does not automatically point to infringement, because it can happen that the portion borrowed is in fact not protected (for want of originality). Technology merely simplifies the search for substantive evidence on the basis of which a judge can freely form an opinion.

Ultimately the viability and effectiveness of the various systems presuppose cooperation between the professionals responsible for the management or defense of the interests of owners of rights and the industrialists who

are in a position to introduce the systems on a large scale. One thing that is clear is that, with the internationalization of the circulation of works, which is liable to increase with new technology, whatever technical solutions are worked out will have to be considered with international standardization in mind.

The fact remains that computer technology can at least be a useful tool for the making of files or "guides" to facilitate the management or exercise of rights.

CONCLUSION

In conclusion, the digitization of works should not be regarded only as a curse by the owners of rights. It is true that the opportunities that it affords to the users of works are at the same time risk factors (one thinks of piracy and manipulation, among other things), but it should be pointed out that digital technology does after all offer certain advantages. For one thing, it allows control to be exercised over the uses of works (identifiers, counters, etc.), even though such procedures are not totally reliable. For another thing, it can be used as a basis for teaching aids or aids to the management of rights, and finally, by providing new media, it offers new scope for exploitation and also interesting methods of creation.

Copyright is not as ill suited to the digital technology phenomenon as is often suggested. In fact, this new technological development has not brought about a radical change of approach, even if some adjustments have been necessary here and there. Indeed we are up against the same, time-honored questions which have merely been brought up to date.

You will notice that my conclusion has not replied to the question before us: should something be done? The reason for this is simple: the reply has to emerge from the presentations or discussions that will follow. Then, at the end, it will be time to decide whether digital technology calls for a substantive transformation or just a change of degree.

I want mine to be a simple conclusion, in the form of a call for caution.

There are two last factors that should still be taken into consideration in our investigation, both of them time-related.

First, it should be borne in mind that the movement is still going on.

The background is falling into place. If action has to be taken at all, surely it is still too early as long as we can see only the first stirrings of the movement? Technology is evolving, markets are only just forming. Any tension felt at present is for the most part only conjunctural, and tied much more to human than to technical factors.

Secondly, we must not ignore the lessons of the past.

History shows us after all that copyright has managed without difficulty to adapt such technical breakthroughs as the phonograph, motion pictures and

satellites, or even to respond to the advent of inventions as revolutionary at their time as photography.

Truthfulness obliges us, however, to say that the adjustment has sometimes had more to do with construction than with natural evolution, to such an extent that adaptation has sometimes been a painful process. Software is sufficient testimony to this. Adaptation sometimes causes unnatural alteration.

All things considered, arbitrary action in isolated areas would be the worst thing of all. It would undoubtedly create confusion or risks. So, if anything at all is to be done, it is essential to go back to the roots of copyright in order to ensure that our subject retains some semblance of unity or cohesiveness.

SECOND WORKING SESSION: BASIC NOTIONS OF COPYRIGHT AND NEIGHBORING RIGHTS IN THE FACE OF NEW TECHNOLOGIES

AUTHORSHIP AND NEW TECHNOLOGIES
FROM THE VIEWPOINT OF CIVIL LAW TRADITIONS

by

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"Les modes de circulation, de valorisation, d'attribution, d'appropriation des discours varient avec chaque culture et se modifient à l'intérieur de chacune."

Michel Foucault

I. AUTHOR, WORK, ORIGINALITY AND IMMATERIAL RIGHTS

Speaking about intellectual property, "civil law tradition" means author's right, droit d'auteur, as opposed to copyright. Although for some time, modern droit d'auteur has also encompassed creative productions neighboring on true creations, the author--l'auteur, der Urheber, il autore, or el autor--still occupies the focal position of droit d'auteur, of Urheberrecht, diritto di autore and derecho de autor. Droit d'auteur: its starting point differs from the "right to make copies." But this is all common knowledge.

Who, then, is the author? All droit d'auteur laws agree that it is the person to whom the rights granted are attributed. This, of course, does not help much for the purpose of describing authorship from the viewpoint of civil law traditions, since the same definition holds true for copyright. However, the fact that the rights granted are both moral and economic in nature, that they protect both the author's material and immaterial interests, already points to what appears to be the essential characteristic of any droit d'auteur system.

In defining the concept of the author, some of the droit d'auteur laws, such as, e.g., the German and the Spanish laws, are more specific. The "author," it is programmatically stated, is the creator of the work. The following question then remains: What is a work? The answer, that a work is an "original creation," in turn leads to the question: What is original? The answer to this question, namely that original is what shows the individuality, the creative personality of the author, not surprisingly leads us back to the concept of the author. We thus are presented with several concepts--author,

work, originality, immaterial as well as material rights--which are closely interwoven and dependent upon one another. None of them can be correctly defined without the other. However, even if the work is the actual object of protection--since droit d'auteur does not protect the author as such, but only with regard to his or her works--it is the personality of the author which is protected in the work. It is this which may be determined as the essential characteristic of droit d'auteur.

Consequently, it follows that by definition the author can only be a natural person. Only in exceptional cases does droit d'auteur legislation provide otherwise, such as, e.g., in Articles L. 113-2, third paragraph, and L. 113-5 of the French Intellectual Property Code (Code de la propriété intellectuelle (CPI)), according to which a legal person can be the author of a so-called collective work, i.e., where it is not possible to distinguish the single participant's creative contributions in a work which has been published and disseminated under the name of that legal, editing person. It should be noted, however, that as an exception to the general rule, the provision on collective works, and thus on authorship by a legal person, is narrowly construed by the French courts. Most important, under a droit d'auteur approach, and other than under a copyright approach,[1] the principle that first ownership vests in the human creator of a work is also maintained for works created in an employment relationship and for such complex team creations as cinematographic works. Rather than granting an exemption to the principle so fundamental to droit d'auteur, the economic interests of the employer and of the producer are, as a rule, accommodated by way of legal techniques such as cessio legis, legal presumptions of transfer of rights, or legal rules which, in cases of doubt, ensure an employer or producer-friendly interpretation of contractual stipulations.[2] The results thus obtained may in many instances be astonishingly similiar to those achieved in a copyright environment; however, because it is precisely economic interests that are being accommodated, droit d'auteur leaves the author, even in the cases just mentioned, with his or her moral rights. Hence the ruling, e.g., in the French John Huston case.[3] Of course, other droit d'auteur countries, such as Germany, are not as strict, in that they take the producer's economic exploitation interests into account when determining the exact scope of authors' moral rights.[4]

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[1] For detail, see the recent comparison of the two systems by Strowel, Droit d'auteur et copyright, Brussels/Paris, 1993, pp. 323 et seq.

[2] However, in France Article L. 132-23 CPI, introduced by the 1985 amendment, adopted the collective works rule also for audiovisual works.

[3] Cour de cassation of May 28, 1991, JCP 1991, II-21731. See, however, Articles L. 121-5 and L. 121-6 CPI, introduced by the 1985 amendment, which, on the one hand limit the moral rights of film authors vis-à-vis the producer while, on the other hand, strengthening the authors' position with regard to the moral rights prerogatives with which they are left.

[4] See Article 93 of the German Copyright Law, which, in the case of cinematographic works, limits the author's right of integrity to a mere right against "gross distortions or other gross injuries."

Of course, in simplifying this complex issue, this brief introduction cannot elaborate upon the more or less subtle differences which exist in the respective national droit d'auteur concepts. Likewise, what follows can, of course, only be a more than rough sketch of, first, the theoretical ramifications of authorship in Continental European history and philosophy, and, second, the impact which new technologies such as digitization and networking will have on "authorship" from the viewpoint of civil law traditions.

II. AUTHORSHIP IN HISTORY AND PHILOSOPHY

Historically speaking, authorship as we understand it presupposes the creator's awarenes of his own creative act, a perception of the resulting work, if not as his, then at least as having been made by him (fecit). Although in western art history, the first individual names were handed down in connection with Gothic cathedral construction, to my knowledge it is still unclear whether at that time it was already intended to impart the stonemason's individual name to posterity so that he remained linked with the building forever or whether the carving of the name just served some technical or other purpose. Apart from ancient authorities, such as the Greek philosophers, the writers of the Bible and the church fathers--who, however, rather than as persons, had been named for the authority conferred by or upon their scriptures--and with only a few exceptions mainly in literature and in music, before the Renaissance it was not possible for the name of an individual author to be affixed to his work. This brief remark should suffice as evidence for the assumption cited at the outset, according to which the circulation, evaluation, attribution and appropriation of works varies over time.

Where, then, do the roots of authorship as understood by droit d'auteur lie? Technically, the advent of reproduction techniques such as engraving and, primarily, book printing formed the starting point for the privileges. Admittedly, these first exclusive exploitation rights were initially granted to publishers and printers rather than to the authors, and for some time thereafter, discussion centered around the rights of the author vis-à-vis the publisher. More important for the development of authorship under droit d'auteur, however, is the fact that in Germany philosophers such as Pütter (1774), Kant (1785)[5] and especially Fichte (1793) postulated a natural property right of the author in order to give a foundation to the postulated right of the author against the illegal reprinting of books, which, due to the great number of small individual German States, was an "international" problem from the outset. Unlike in France, where the revolutionary laws on intellectual property of 1791 and 1793--rather pragmatically concerned about the material survival of the authors--decreed economic exploitation rights, the problem could not be solved by just one legislative act, but needed a

[5] It should be noted that Kant's "personal right" designates the subjective right of the publisher out of the publishing contract, rather than a personality right of the author.

strong philosophical foundation.[6] However, in both countries it was only later that scholarship and jurisprudence developed the personality right of the author (droit moral; Urheberpersönlichkeitsrecht), mainly under the influence of 19th century idealistic philosophy. Without retracing mutual influences in detail, in Germany, this meant a shift from the property approach to a theory of the personality right (monism); in France, although the droit moral was understood as a right separate from the exploitation rights (dualism), the famous codification of 1957 nevertheless placed moral rights above exploitation rights, thus stressing the prime importance of the link between the author and his or her work.[7]

In fact, to exaggerate slightly, it could be said that, at least in France, droit moral ultimately became the very raison d'être of both moral and economic rights. In a similar vein, droit moral has consequently become the essential factor in defining the concept of "authorship," at least in theory. In practice, however, the early "romantic" picture of the author has long since faded and been outgrown. If today droit d'auteur speaks of the author, what is meant is nothing more than the natural person who has created protectable subject matter, under modern creative conditions and with modern creative tools.

In view of the fact that in the beginning the legal notion of "authorship" was shaped to such an extent by philosophical discourse, it is then interesting to see what modern philosophy has to say about this idealistic concept of authorship. It comes by no means as a surprise that, like many other philosophical concepts, the "author" came under the attack of postmodern deconstructivism, especially by such "authors" as Foucault, Barthes and Derrida.[8] In essence,[9] it is claimed that far from speaking with his or her individual inner voice, which expresses in a form proper to the author the eternal truth of the Weltgeist, the discourse of the author emanates from several contexts which historically, socially and philosophically determine the author's personality. Consequently, the author ceases to be a creator in the conventional meaning of the word; instead, he or she becomes an initiator

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[6] For detail, see especially Strömholm, Le droit moral de l'auteur, Vol. 1, Stockholm, 1967; more recently, from a deconstructivist point of view, e.g., Saunders, Authorship and Copyright, London/New York, 1992.

[7] If, nevertheless, it seems justified today to speak of a single droit d'auteur concept of authorship, this is due to the common emphasis placed on the link between the author and his or her work, a link which is expressed by the concept of originality, work and primarily by the attribution of moral rights' prerogatives. Furthermore, in the light of the contrast between droit d'auteur and copyright, differences and nuances between the individual droit d'auteur laws become less important.

[8] Foucault, "Qu'est-ce qu'un auteur ?," Bulletin de la Société française de philosophie, 1969, pp. 73 et seq.; Barthes, "The Death of the Author," Image, Music, Text, New York, 1977, pp. 142 et seq.; Derrida, Limited Inc. abc ..., Glyph 2, 1977, pp. 162 et seq.

[9] For a detailed account of the differences in approach, see, Saunders, op. cit., pp. 227 et seq.

of discursivity, an "instaurateur de discursivité," someone who in turn exercises an influence on, and contributes to, his or her successors' discourse. Thus, the person whom we call an "author" exercises an authorial function rather than being an author. Of course, under a more radical approach such as Derrida's, the subject of the author seems to vanish altogether.

The question is now, is today's legal concept of "authorship" under civil law affected by this frontal attack on what used to constitute its philosophical basis? It is submitted that for a minimum of two reasons it is not, at least not yet.

First, deconstructivist analysis applies to traditional modes of creation, and these traditional modes of creation have been considered to be adequately encompassed by the dichotomy of form and contents which in current author's right effects the distinction between the protectable and the unprotectable.[10] Although legal doctrine attributes the rights in the protected work to its natural creator, it by no means denies that a creator draws on preexisting material. Indeed, the very rationale why ideas and unprotected elements must remain free is that their monopolization would otherwise hinder further creation.

Second, legal discourse demonstrates a certain independence as compared with philosophical discourse, and they both do not necessarily follow the same rules. Neither discourse takes preference over the other, although the philosophical can be said to have the character of a meta-discourse. This leaves room for adhering to the traditional, droit d'auteur concept of the author for other than merely philosophical reasons, namely for socio-economic reasons such as the interest in adequately compensating the author for his or her creative work, or under a human rights perspective as laid down in Article 27 of the 1948 United Nations Universal Declaration of Human Rights[11] and in Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights.[12] At any rate, once codified, "black letter law" of civil law systems shows great resistance to influences emanating from the Zeitgeist, a characteristic which, depending on the problem at issue and the critic's standpoint, has either been condemned or acclaimed.

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[10] It should be noted that, in practice, this distinction is applied in a far more subtle way than the dichotomy of the two notions might itself suggest.

[11] "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"; see also Dietz, Revue internationale du droit d'auteur (RIDA) 155, January 1993, 2, pp. 43 et seq.

[12] Under Article 15(c), the Contracting States recognize that everyone has the right to enjoy protection of the intellectual and material interests resulting from authorship of works of science, literature or art.

III. THE IMPACT OF DIGITIZATION AND NETWORKING ON THE CONCEPT OF AUTHORSHIP

However, the deconstructivist description of the authorial function just outlined seems to have been evoked by a sensitive awareness of social and technological circumstances under which modern or, to follow historical and philosophical chronological order, postmodern creation takes place. Indeed, substantial differences can be spotted between, on the one hand, the bohemian image of the lonely artist genius--misunderstood by the general public--who, with chattering teeth and half-starved, sitting in the freezing cold under his leaking roof, tried to give form to his inner truths, and, on the other hand, today's creative process, which mostly takes place within an employment relationship or upon commission, is often team-oriented, uses computerized design tools and thus quite frequently resembles an industrial activity rather than the creativity of a literary or artistic nature.

Of course, most of these changes already began to take place several decades ago and they only have become increasingly intensified over the past years. Nevertheless, droit d'auteur has shown enough flexibility in embracing these changes. Newly created neighboring rights may have been created and their practical importance may have increased; droit d'auteur may have been viewed within the larger framework of labor law, social law and/or information law. The concept of the author, however, has largely remained intact.

However, this time, where digitization and networking are concerned, more fundamental changes are expected. In what ways will these new technologies affect the concept of droit d'auteur "authorship?" In my opinion, changes can be divided into, at least, two categories.

First, the more technical the resulting digital work is in character and the more a machine is used in the creation of the work, the less will the final outcome reflect or even prolong the creator's personality.

Thus, to cite just one example, it may hardly be said that the form given to the source code of a computer program shows the individuality of the programmer in the same way as, let us say, a painting reflects the painter's individual perception of the object depicted. Faced with authorship in computer programs, the French courts have indeed reacted to this problem by redefining the criterion of originality. Rather than a work having to bear the "personal imprint" (l'empreinte personnelle) of its author, all that is required is the latter's "personal contribution" (l'apport personnel)[13]; however, this formulation does not express clearly whether the contribution has to be judged according to the result it produced or the input that was made. It might be noted that the German courts had far less difficulties in this respect, since the main test in order to determine the individuality required to establish originality has always been whether or not a sufficient number of creative choices has been available, and whether or not these choices have in fact been selected in a creative way. Furthermore, German doctrine has always applied the criterion of originality and hence the concept

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[13] Cour de cassation of March 7, 1986, JCP 1986, II-20631 (Pachot case).

of authorship and ultimately the scope of protection, according to the manner of variable geometry.[14]

The absence of the author's personality in a work is further heightened when a computer is used in the process of the creation of the work. Whenever the computer is employed not only as a tool to execute a form already preconceived by the author, but rather as an instrument to help conceive the work itself and partly design its form--i.e., when the resulting work appears to be a computer-"produced" rather than a computer-"aided" work[15]--the only meaningful question to ask in order to decide whether a work is protectable or not then seems to be whether the output of the machine can in any meaningful way be attributed to any one of the numerous input activities involved. Without going into further detail, it can be said that in this respect, copyright systems would give up the search for a human author much earlier, and grant protection to the producer responsible for the investment made, much faster than any of the droit d'auteur systems.

Moreover, the less the personality of the author is--subjectively or objectively--manifested within the work in question, the more the rationale for granting protection shifts from the personality of the author to the investment made, provided the object in question is not excluded from protection altogether. This could already be observed under the German doctrine which protects the so-called small change, i.e., works of little originality and it likewise is the solution which has been retained for functional works, technical drawings and the like. Similarly, as a European compromise between droit d'auteur and copyright, a very low level of originality has been prescribed by the EC Directive on computer program protection,[16] which has been taken up by the EC Directive on the duration of protection with regard to photographic works,[17] and by the proposed EC Directive on the legal protection of data bases.[18] It remains to be seen to what extent this convergence between droit d'auteur originality and copyright originality ultimately leads to the convergence of the other legal concepts as well.

Apart from affecting the concept of originality, the shift in the rationale for granting protection from the personality of the author to the investment made is likewise responsible for the trend towards the introduction

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14 For this perception of originality à géométrie variable, which designates nothing more than the impossibility of defining precisely the exact meaning of originality in droit d'auteur, see most recently A. Lucas/H.-L. Lucas, Traité de la propriété littéraire et artistique, Paris, 1994, pp. 104 et seq., para. 94.

15 It should be noted that only when the form of the output has been designed totally by the computer does it seem appropriate to speak of a computer-"generated" work.

16 91/250/EEC, Article 1.3.

17 93/98/EEC, Article 6.

18 Official Journal of the European Communities (OJEC) No. C 308, November 15, 1993, p. 1, Article 2.3.

of an ever growing number of neighboring or sui generis rights. Other than under copyright, under droit d'auteur this approach is chosen in a situation where, depending on the subject matter in question, the protection is to benefit the producer rather than the natural creator. Furthermore, this approach seems to be preferable whenever negative influences are to be feared for the scheme of protection so far provided for works of traditional authors. Again, we are faced with a trend towards a system of variable geometry, but this time outside the system of author's rights in the proper sense.[19]

Second, the activity of creating new works, and thus the status of the author, mutates in yet another way: the greater the number of protected works created in digital form--or already digitized--and stored in accessible data bases, the more often new creations in a digital and networked context will draw upon this preexisting material. Indeed, why should a creator in a digital environment not draw from all material already stored in sources throughout the world? Why travel to the Caribbean and take a picture of the sunset, when hundreds of such pictures are at the disposition of a mouse click? In other words, the independent creation of new works on the sole basis of unprotected ideas and principles becomes increasingly unlikely. While this does not necessarily affect these new works' originality, to an increasing extent digital and networking technology will, however, replace traditional authors with what may be termed mere "contributors."[20]

Admittedly, in addition to single authorship, droit d'auteur does recognize forms of coauthorship. However, coauthorship both with regard to collaborative works (oeuvre de collaboration) and composite works (oeuvre composite) presupposes that the respective authors have jointly decided either on collaboration in the creation of a new work or on the composition of two or more preexisting works. Although this may still be the case in the creation of several of the on-line and off-line digital media, such as traditional on-line data bases and CD-ROMs, it no longer is the case in the scenario just described. Rather, what we are faced with here is an adaptation of preexisting material. It follows that--apart possibly from acts done in private--all such acts require the consent of all the right holders in the preexisting material used. Although in line with traditional droit d'auteur and copyright understanding, such a result might be looked upon by many as both impractical and unenforceable. Consequently, it comes by no means as a surprise that the possibility of facilitating the acquisition of rights in preexisting material, such as central or collective licensing, are being widely discussed today. In addition, the question of how to deal with outsiders who only own rights in a small portion of a much larger adaptive work has been answered in some cases.

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[19] See, once more, A. Lucas/H.-L. Lucas, supra footnote 14, loc. cit.

[20] However, I pointed out at an earlier WIPO symposium that in view of the dissolution of the work into smaller and smaller parts in a digital context, there is yet another trend working in favor of the contributors' status as authors; see Dreier, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, Harvard University, Cambridge, Massachusetts, United States of America, March 31 to April 2, 1993, WIPO Publication No. 723(E), Geneva, 1993, p. 192.

Finally, it should be noted that, apart from technological changes, at least one further development seems to have an erosive effect on the basis of the traditional concept of the author as understood by droit d'auteur. This is the growing tendency, fostered by the awareness of the economic importance of what are now called the copyright industries, to regard material protected not only by neighboring rights, but also by authors' rights, as "products," as "merchandise" and "commodities." Thus, as could already be discerned within the context of the recent GATT negotiations, ultimately not only computer programs and data bases, but also novels, musical compositions and pictorial creations will be treated like copper, soy beans and livestock. As a footnote, which, however, today is only of merely philological interest, it might be added that it was Marxist theory in which the creator of a work was referred to as its "producer," in another sense, of course.

IV. THE FUTURE

How will these phenomena develop in the future and what conclusions are to be drawn?

Quite recently, the traditional function of the author as the creator of an artwork, the uniqueness of the artwork and the individuality of the creator's expression have also been questioned in the form of copy art and especially the so-called appropriationist art. In essence, the artistic means used to this effect consisted of reproducing, in part or--more subversively--in whole a well-known work, or of at least imitating the style of a well-known artist, whilst removing the accepted and attaching a newly invented, historical reference to the work. After all, this artistic strategy successfully managed to transgress the field of artistic discourse since, in view of the blatant reproduction technique, the courts called upon by the intellectual property right holders could not rule otherwise but to prohibit reproduction and public communication of some of the works in question. Of course, most likely, appropriationist art will put in nothing more than a brief appearance in avant-garde art, since once the artistic point is made by its proper means, artistic expression can move on to attack the next problem.

However, it is not at all easy to predict the scope of the changes which digital technology and networking will have, or perhaps have already had, on the mentality of the users of material so far protected by droit d'auteur. It may well be that the enthusiasm over the fabulous access and transformation possibilities offered by digital technology and networking will overcome all attempts to strengthen the position of the author and right holders in general both by legal and technical means. But this is not necessarily what is going to happen. Rather, it may well be that the attempts to strengthen the legal position of the author and the right holders will ultimately prevail, despite the admittedly increasing criticism that the old notion of the "author" and all the connotations attached to it are old fashioned, outdated and unsuitable within the digital and networking context.

There are in fact two developments, on the one hand, the technical freedom to appropriate and manipulate someone else's protected material and, on the other hand, the legal and technical attempts to safeguard the author's interests in view of the threatening appropriation and manipulation of material freely available. Indeed, they both concur in shaping our future understanding of, as Foucault put it, the "evaluation, attribution and appropriation of discourses," and therefore our droit d'auteur understanding of authorship in the face of the new technologies.

AUTHORSHIP AND NEW TECHNOLOGIES
FROM THE VIEWPOINT OF COMMON LAW TRADITIONS

by

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Back in 1980, a group of English computer enthusiasts launched the first MUD (or "multi-user dungeon") on the Internet. At the last count, the network was supporting almost 200 of these specialized virtual communities, each with dozens--even hundreds or thousands--of subscribers who interact anonymously through their elaborately imagined and realized electronic personae, and who (in one writer's description) "use words and programming languages to improvise melodramas, build worlds and all the objects in them, solve puzzles, invent amusements and tools, compete for prestige and power, gain wisdom, seek revenge, indulge greed and lust and violent impulses."[1] If I were setting an examination question, I might ask: "What are the various rights and liabilities under the law of copyright, vis-à-vis one another and vis-à-vis third parties, of participants in a MUD? Be sure to address the question of who can own rights in an electronic environment characterized by the dissolution of traditional boundaries of identity." But if I did, I suspect my students' answers would be highly unsatisfactory--precisely because the familiar concepts of copyright law, rooted in notions of "authorship," offer only a poor fit for this--and many other--aspects of what could be called the emerging "culture of cyberspace."

The goal of my paper today is to call attention to some of these problems of fit, and to suggest that in the next decade we have a unique opportunity to reimagine "authorship" in a variety of fruitful ways. Although I will be drawing my examples mainly from the history and jurisprudence of Anglo-American copyright, I will insist that the "crisis of 'authorship'" is not a uniquely American, or even a specifically "common law," phenomenon. In centuries past, the idea of "authorship" has played a central role in shaping the intellectual property laws of common law and civil law countries. And in the last decade of the twentieth century, that idea is showing the same signs of strain everywhere.

Twenty-five years ago, in the context of cultural critique, Michel Foucault posed a question which has growing significance for law today: "Qu'est-ce qu'un auteur?" or "What is an author?" Foucault's purpose was to call into question the inevitability of a particular way of thinking about

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[1] Howard Rheingold, The Virtual Community: Homesteading on the Electronic Frontier, Addison-Wesley Publishing Co., 1993, p. 145.

cultural production--the Romantic conception of the "author" as sole creator of unique, inspired works of art, marked in their expression by the singular personalities of their makers--bearing on their faces, as it were, the basis for authorial claims of imaginative ownership. Not so incidentally, these are works the "originality" of which also warrants their protection under laws of intellectual property known as "copyright" or "authors' rights."

What makes Foucault's question particularly poignant for law today is the challenge posed to received ideas of "authorship" by contemporary developments in the ways in which information is created and disseminated--in particular, the rise of the various so-called digital media. Historically, changes in the ways we think about the legal regulation of the production and distribution of information have been driven by changes in technology. Indeed, the first copyright and authors' rights regimes conventionally have been understood as responses--albeit delayed ones--to the so-called rise of print in sixteenth- and seventeenth-century Europe, and to the ways in which that technology affected the social, political and cultural order. I will return to the part that the idea of "authorship" played in bringing about a development in which, to quote Elizabeth Eisenstein, the "literary 'common' became subject to 'enclosure movements' and possessive individualism began to characterize the attitude of writers towards their work."[2] First, however, I want to suggest that the rise of digital media is, in its way, an event in the history of information technology as significant as the rise of print.

Pamela Samuelson has identified the various characteristics of digital information technology which make it, in its way, as different from print as print was from manuscript copying--including ease of replication, ease of transmission and multiple use, plasticity, and the equivalence of works in digital form.[3] Obviously, some of these characteristics pose special risks to traditional notions of proprietorship in information, by eliminating the familiar non-legal constraints on unauthorized copying--expense and delay. Indeed, the ease with which digitized information can be transmitted, received, and copied has already begun to disrupt established market relationships. The economic structure of the information industries is changing, and the very survival of the kinds of business entities that have dominated information distribution since early modern times--book publishers, journals, and so forth--is in question.

Beyond this, however, the inherent fluidity and openness of digitized information challenge some of our most basic assumptions: our notion of a "work" as a stable, fixed entity--and the individualistic tradition of cultural agency encapsulated in the idea of "authorship." Digitization will require us to rethink relationships between writers and readers, if not the categories themselves. As it invites--or even demands--multiple participation in the making of meaning, the new information technology reminds us of an older truth which was obscured by the terms of the individualistic modern

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[2] Elizabeth L. Eisenstein, The Printing Revolution in Early Modern Europe, Oxford University Press, 1983, p. 84.

[3] See generally, Pamela Samuelson, "Digital Media and the Changing Face of the Law," 16 Rutgers Law and Technology Law Journal, 1990, p. 323.

discourse of cultural production organized around the idea of "authorship": that writing is a fundamentally collective and collaborative activity. Ultimately, digitization will call into question the paramount value we have placed on individual authorial control over the release, dissemination, and reuse of cultural productions.

Indeed, the questioning already is under way, as copyright and authors' rights regimes around the world struggle to assimilate one of the new potential subject matters of protection to which digital technology has given rise: that is, computer software. The imperatives favoring some sort of protection for this valuable new class of works are obvious enough, but efforts to analogize software engineers to bards and programs to poems have been somewhat unpersuasive, given the essentially functional nature and essentially style-less quality of these new works. Despite this, advocates of strong protection have insisted, by and large, that copyright and authors' rights were the most appropriate legal regimes to apply--an insistence that has led to somewhat paradoxical results.

Nowhere has a national software industry been more committed to achieving full copyright protection for computer programs as works of literary "authorship" than in the United States of America. And at the outset, our courts were remarkably receptive: decisions like Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.,[4] from 1986, signalled their apparent willingness to afford remarkably broad and intense protection to program works under copyright. But as you are aware, the tide in our decisional law has turned--a turning marked by the influential 1992 decision in Computer Associates Int'l, Inc. v. Altai, Inc.,[5] which excludes a wide variety of technologically-constrained features of software works from protection, and by Sega Enterprises, Ltd. v. Accolade, Inc.,[6] a 1993 decision which recognizes an "decompilation" privilege of broad--although still uncertain--contours under the doctrine of "fair use." It appears that the result of 15 years of intensive litigation and legislation around the issue of software copyright in the United States has been the erection of what is, in effect, a dual approach, under which software works are strongly protected against piratical takings but receive relatively little protection against borrowings of their functionality and the characteristic ways in which that functionality is implemented; indeed, the protection they do receive may not go very far beyond the "code only" limitation which some of the severest critics of software copyright have urged. Programs may be "works of authorship" but ordinary authorial privileges, including plenary control over adaptation and duplication, do not apply to them with anything like full force. Indeed, the software programmer emerges from the American case law as something of an "author manqué."

Meanwhile, real questions remain about whether the protection flowing from the implementation of the European Union's Software Directive will approximate, in scope or depth, traditional authors' rights guarantees. If

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[4] 797 F.2d 1222 (3rd Cir. 1986), cert. denied, 479 U.S. 877 (1987).

[5] 982 F.2d 693 (2d Cir. 1992).

[6] 977 F.2d 1510 (9th Cir. 1993).

the international commitment to protect computer programs as "literary works," embodied in Article 10 of the new GATT TRIPS agreement, ultimately turns out to be a relatively hollow victory for proponents of strong software protection, it will be--in large part--because the traditional idea of originary "authorship" simply did not prove flexible enough to take into full account the realities of software engineering. As Pamela Samuelson, Randall Davis, Mitchell Kapor and Jerome Reichman point out in an important paper appearing in next December's Columbia Law Review, copyright law may provide too much protection for the least valuable features of program works and too little for the non-expressive, incremental innovations which represent the programmer's "value-added."

If the case of computer programs has tested the adaptability of the concept of "authorship," and found it wanting, the outer limits of its flexibility have been become even more dramatically apparent where another kind of work characteristic of the digital environment--the comprehensive data base or data bank--is concerned. Professor Cornish will speak at greater length about the problem of rights in data under copyright. Here, I will merely note that, in the United States, our dedication to "authorship" has produced the ironic result that the more extensive a data compilation, the less likely it is to receive meaningful copyright protection. Despite the obvious expense involved in compiling--and maintaining--such information resources, and despite their equally obvious consumer value, the United States Supreme Court, in its 1991 decision in Feist Publications, Inc. v. Rural Telephone Service Company, Inc.,[7] conclusively rejected them as copyrightable subject matter in themselves, on the grounds that they lack the qualities of "creativity" and "originality" which we associate with true works of "authorship." Meanwhile--and for much the same reason--projects to provide protection for electronic (and other) data bases in the European Union are emphasizing sources of protection other than the laws of authors' rights.

I want to stress, however, the challenge to received notions of "authorship" posed by digital media is not just--or even primarily--a matter of new subject matter. In fact, the greatest difficulties in applying the old paradigm to new circumstances arise in connection with the circulation, in digital form, of works of what might be described as "conventional" kinds. These days, in the United States, we are in the somewhat paradoxical position of expending tons of paper on documents in the debate over the future of the so-called National Information Infrastructure (NII)--our designation for the still loosely conceptualized phenomenon of convergence in the means by which digitized information is communicated and received. Briefly, the acronymous NII is envisaged as an integration of (among other things) cable television, telecommunications, and the Internet, over which a high volume of digital data, representing movies, video games, newspapers, musical compositions, legal information, so-called multimedia works, scholarly communications, personal correspondence, and much more would move. At least in theory, each entity connected to the NII could be both a receiver and an originator of digital data flows--and therein (and in the inherent characteristics of digital media themselves) lies the regulatory rub!

One of the biggest disputes in the discussions of the regulation of the NII is over how much control the firm or individual which introduces a work

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[7] 499 U.S. 340 (1991).

into this "super-network" or "giant hypertext" ought to enjoy over the ways in which it is used and reused--and about how that control, in whatever degree is deemed appropriate, should be enforced. Roughly speaking, there are two major parties to this debate, neither advocating the radical position that some or all of the vast "cyberspace" defined by the new network of networks ought to be a "proprietor-free zone." Worthy of discussion as the values which underlie that position may be, the real argument--at least for now--appears to be between advocates of the extension of traditional intellectual property regimes into this new domain, endowing proprietors with all the traditional attributes of "authors," including the absolute right to veto proposed electronic uses of their works, and proponents of a modified approach which would emphasize forms of comprehensive collective and/or compulsory licensing to assure that the NII would function as a kind of "modified informational commons."

As a matter of practical implementation, either approach probably would be possible; the same technology which permits broad, rapid dissemination of data in digital form also provides the means by which transactions in that data can be monitored. The choice, when it is made, will be culturally rather than technologically driven. And perhaps the most important factor influencing that choice will be the attitudes of policy-makers towards received notions of "authorship," shaped in the course of a long conversation between legal and literary culture.

"Authorship" first entered the domain of law in 1710, with the English Statute of Anne--the first copyright statute--enacted as a response to the demands of book publishers for the reinvigoration of their historic monopoly in the face of unprecedented competition from domestic and foreign "pirates." The decision to make "authors" the initial owners of new portable rights in literary property seems to have been a purely opportunistic choice, exploiting the positive associations of a pre-Romantic idea of "authorship" which derived, in turn, from the increasing emphasis on individual agency in early modern social thought. Beginning later in the eighteenth century, the centrality of "authorship" in legal discourse would be reinforced as a result of the Romantic reconceptualization of the creative process. Effectively, "authorship" had been introduced into English law as a blind for the booksellers' interests, and it continued to perform that function throughout the eighteenth century--and beyond. Rhetorically, it took on more and more of a life of its own, as individualistic theories of literary creativity which emphasized "originality" and "inspiration" as attributes of the autonomous "author" were poured into it.

In the early nineteenth century, the content of English copyright, and of the concept of the "author" it entails, were profoundly influenced by the vision of creative genius articulated by William Wordsworth and his contemporaries, the Romantic poets who portrayed the "author" as a solitary secular prophet with privileged access to experience of the numinous and a unique ability to translate that experience for the masses of less gifted consumers. Significantly, Wordsworth was not only a campaigner for an expanded appreciation of "authorship" in the abstract. His exalted understanding of the author's calling--and his own self-interest--made him a tireless campaigner for the expansion of authors' rights in copyright. The legislation that resulted, in part, from these efforts may have been too little and too late to please Wordsworth, but his intervention nonetheless helped to fix the attributes of the idea of "authorship" in copyright, and to cement an association between that idea and the Romantic conception of the

literary genius which persists down to the present. Even today, proposed changes in American laws relating to literary property tend to be rationalized in terms of the interests of the endangered species of "author"-geniuses whose natural habitat is a landscape of freezing garrets, ruined towers, secluded cottages, and cork-lined studies.

Similar stories can be told about the elaboration of the idea of "authorship" in European literary and legal culture. Thus, my collaborator Martha Woodmansee has demonstrated how the new class of professional writers in eighteenth-century Germany, seeking to justify legal protection for their labors, "set about redefining the nature of writing," and thus helped to "give the concept of authorship its modern form." The outcome was a reconceptualization of writing which rationalized "vesting exclusive rights to a text in its author insofar as he is an Urheber (creator, originator)."[8] Obviously, too, this conception of "authorship" would eventually become a foundational element in the culture of the Berne Union.

In short, the Romantic conception of "authorship" is not a universal truth--instead, it is a cultural construct with a specific genealogy, particular sources, and identifiable consequences. As to the last, one might summarize by saying that this idea of "authorship" has been the engine which, over the last two centuries, has propelled the development of notions of copyright and authors' rights in Anglo-American and continental jurisprudence alike. One aspect of this trend is apparent in such phenomena as the progressive augmentation of terms of protection, and the movement to reject formalities as preconditions for protection. In particular, we owe our expansive contemporary vision of the exclusive rights of owners of literary property--including rights of adaptation and moral rights--to the influence of the "authorship" construct, as mediated by another doctrinal structure which was, so to speak, spun off from it. While much of the last century of development in copyright doctrine is traceable directly to a broadening of the concept of the "work" to comprehend not only the literal text but also a variety of potential variations upon it, this expansion of the "work" concept has been justified, in turn, by reference to the genius of the "author."

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[8] Individual contributors to collaborative projects often find it difficult, after the fact, to recollect exactly where their contributions left off and others' began. More generally, the question of attribution simply makes no sense in the context of genuine collaborative work. Thus, Professor Woodmansee deserves as much credit as myself for anything of value in this talk. But I should note that her work on copyright and the English Romantics, and on the rise of the "author" in eighteenth-century Germany, predates the beginning of our work together. See generally, Martha Woodmansee, The Author, Art, and the Market: Rereading the History of Aesthetics, Columbia University Press, 1993, especially the chapter entitled "The Genius and the Copyright: Economic and Legal Conditions for the Emergence of the Author," reprinted from 17 Eighteenth-Century Studies, 1984, pp. 425-28.

For a summary of the larger project on which Professor Woodmansee and I are engaged, see the "Introduction" to our jointly edited volume, The Construction of Authorship: Textual Appropriation in Law and Literature, published by Duke University Press in 1994.

But the trend in the law of literary property driven by the idea of "authorship" has had another aspect as well. If the channel carved out by the momentum of "authorship" and allied concepts is a deep one, it is also narrow. As a result, new categories of works sometimes have proved at least temporarily difficult for copyright and authors' rights to assimilate. To begin with, the law balked at photography, because these new images seemed more like the productions of machines than works of individual authorial genius. When photography had been assimilated to traditional notions of "authorship" through decisions which stressed the essentially personal and artistic nature of the photographer's choices, motion pictures presented a new difficulty: how could a category of works so inherently collaborative, in which so many individuals contributed to the end product, be classified in terms of "authorship?" The solutions arrived at under different national laws, and in international agreements, were--and are--more or less uncomfortable ones. (One of the most peculiar of these, the Anglo-American "work for hire" doctrine, will be among the topics of Professor Cornish's presentation to this meeting.) The question of how to categorize the amount and kind of "authorship" going into works of the next major new category, that of sound recordings, continues to divide the international community. Even the United States, which has accepted phonograms as copyrightable subject matter, has stopped short of giving them certain protections--against unauthorized adaptive imitation or public performance--which "works of authorship" ordinarily would enjoy, in much the same way that we have stinted on protection for computer programs, another group of works which the "authorship" paradigm can accommodate only with difficulty.

But if we have been able to broaden our idea of "authorship" sufficiently to take in at least some <u>new</u> categories of works, we have consistently failed to reach back, so to speak, to embrace certain <u>old</u> forms of cultural production. As we know, many expressions of traditional cultures, including folkloric works in various media, are denied meaningful protection under domestic and international law. This is not, by any means, a reflection of their lack of value; in fact, traditional music and design are significant, involuntary and uncompensated "exports" of many developing countries. Rather, this absence of protection is the consequence of the exclusive tendencies of the "authorship" construct itself, with its emphasis on identifiable, non-incremental "originality," traceable to a particular creative individual or individuals, as the mark of the protectable work.

Here, perhaps, it may be useful to remember the understanding of cultural production which prevailed generally before the rise of the Romantic vision of "authorship"--and which, to a significant extent, that vision has displaced in both the domain of aesthetic theory and the domain of law. Formerly, words and texts circulated more freely than they do today, and reuse of another's words carried with it no legal penalty--or social stigma. This is not because surveillance was lax, but because more corporate and collaborative writing practices were the norm. Moreover, despite the rise of the Romantic vision of "authorship" these practices have persisted, not only in traditional societies, and in everyday professional, technical and academic writing the world over, but among the very writers and artists who contributed to the Romantic reconceptualization of creativity--and among their contemporary successors.

I could multiply examples of the ways in which actual practice in literature and the arts fails to measure up to the standards of Romantic

"authorship." Instead, however, I want to return to my point of departure--the ongoing debate over the regulation of the new digital information environment. At least in some of its aspects, the emerging global network has the potential to facilitate exchanges and uses of information which correspond far better to a collective model of cultural production than to an individualistic one. By their very nature, digital networks--large and small--are spaces in which polyvocal and collaborational creative practices can flourish, if they are permitted to do so. Indeed, the history of the Internet to date suggests that the impulse to collaborate may be strong enough to support a considerable level of continuing creativity in "cyberspace" even in the absence of any effective regime of intellectual property.

Nonetheless, as I suggested earlier, some form of comprehensive legal regulation of the new digital environment seems inevitable; the real question is what form that regulation will take. Likewise, in his seminal essay, Foucault suggests that an "author-function" is a cultural necessity, as a "principle of thrift in the proliferation of meaning." Foucault invited students of culture to reconsider what sort of "author-function" would best serve their needs and purposes. For us in law, the ascendence of digital media provides us with a similar occasion. If we choose, we can build a scheme of proprietary rights in the digital environment around a modified and revised version of Romantic "authorship," or around some altogether different metaphor for the process by which meaning is constructed out of the natural and man-made environment. In some respects, such a reconceptualization of proprietary rights is likely to be less "protectionist"--more respectful, that is, of a wider range of common "use-rights" in information--than are traditional schemes of copyright and authors' rights. But if we accept the challenge, we may discover that our laws of intellectual property also can and should be revised in other ways, to provide <u>higher</u> levels of protection for certain works. If one result of the struggle to legislate for the digital information environment is to loosen somewhat the imaginative bonds of the conceptual straightjacket of "authorship," we may yet find ways to give greater recognition to the range of cultural interests which a law of intellectual property focused on a narrow vision of individual genius has operated to exclude or marginalize, including the full range of traditional and folkloric works. Ironically, our efforts to face up to the implications of the newest information technologies may liberate us to acknowledge more fully some of the very oldest forms of human culture.

THE NOTIONS OF WORK, ORIGINALITY AND NEIGHBORING RIGHTS FROM THE VIEWPOINT OF CIVIL LAW TRADITIONS

by

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France

1. Is it correct to speak of traditions? Or should we speak of tradition? The fact is that although the "civil law" countries, i.e., in the present context those countries that recognize authors' rights (diritto di autore, derecho de autor, Urheberrecht), have a number of principles in common, and mainly that of making the author the focal point of their concerns, they do not form a unified whole--happily for those who believe in the individual genius of nations. Nor do they necessarily have the same traditions. Therefore, the plural "traditions" in the title of this paper is not out of place.

It is likewise not inappropriate to reduce those countries' major options to just a few broad brushstrokes. Paradoxically, the question is not so much whether one or several traditions exist as whether the tradition or traditions are in fact those they are said to be.

Some form of "deconstructivist" philosophy may well say that the author is dead, but he is still celebrated in the writings of many jurists ("civil law" ones), and everything, at least in those writings, seems to be based on him. Is it absolutely certain, however, that this is the "tradition" in our countries? It is true that a tradition springs up at a particular time and that tradition--as in the Churches, for example--is not always identical with time-honored practice.

2. So what is the issue? Why is it that we want to avoid lapsing into a presentation which is both too simple and too naive? We might be inclined to give as a subtitle to our discussion the words "from the cultural discovery of a natural right to the natural rediscovery of an economic right."

Let me explain.

2.1 When they came into existence in the eighteenth century, authors' rights were not merely natural rights as has been suggested.

Certainly, Kant and Fichte in Germany theorized about the concept of authors' rights as natural rights. In France, Le Chapelier proclaimed in 1791 that "the work, which is the fruit of a writer's thought," is "the most sacred, the most legitimate and the most inviolable of property," a dictum that the French have always quoted. It is a profession of faith to be found

in the very title of this Symposium. We shall not discuss here the significance of Le Chapelier's pronouncement (which Boufflers had already made, in so many words, in 1790 with regard to patents), but merely note that the same Le Chapelier also said, without any particular emphasis, that "it is only fair that men who cultivate the field of thought should derive some benefits from their labor." That is a modest statement, reminiscent of the simple, legitimate concern expressed by Beaumarchais (which was not that of a certain Voltaire some years earlier) that authors should be able to live by their writing.

2.2 Only later, during the nineteenth century, was the "romantic" aspect of authors' rights discovered. It appeared fairly early in France (although the first decisions cited are not entirely convincing), and much later in Germany. It can be summarized in Flaubert's famous saying, "Madame Bovary, c'est moi." The author is the work, the work is identified with the author and if, as Hegel said, a thing is "that which by definition is only exteriority," this thing, the work, can only be singular.

3. Originality--and, as we shall see, a certain originality--is consubstantial with the work. The notions of author, work and originality interact in a close dialectical relationship (Part I). Outside that relationship there is no place for authors' rights and the best we can do is recognize what are indeed known as neighboring rights (Part II).

Those are the two avenues we intend to explore here, even if we later discover that, in the presence of new technology, new creations and perhaps also new cultures, they do not necessarily lead us in the direction we might have imagined.

I. THE AUTHOR AND THE WORK

4. The main feature in the "tradition" of the countries that recognize authors' rights in the strict sense is that in fact questions about the notions of author, work and originality are all part of the same problem. The relevant German law (of 1965), which is very much characterized by a monistic, or personalistic, conception of authors' rights, is a good example of that fact. Article 11 states that "Copyright shall protect the author with respect to his intellectual and personal relations to his work, and also with respect to the utilization of the work." In Article 7, the author is defined as "the person who creates the work," while Article 2 tells us that "Works ... include only personal intellectual creations." However, even if the legal option were dualistic as it is in France (in the 1957 Law and in the 1992 Intellectual Property Code, copyright is formally declared to be composed of moral and economic rights), doctrine and case law are such that the problem does not present itself differently. The author "exists" because he creates a work and the work is recognized because it is the author.

A. In Search of Originality: the Author Is the Person Who Imprints His Personality on a Creation of the Mind

5. We do not intend to repeat here what has been so competently expounded in previous presentations. The author is certainly no longer the person he was or may have been in the past. The conditions of the art market (for we are bound after all to speak of a market) and those prevailing in the publishing

market (which is dominated by work done to order) have "fashioned" a new type of creation and therefore a new type of creator. The emergence of new technology has provided wonderful tools for creative work but has at the same time profoundly changed the conditions under which it is done, particularly when the creator, being dependent on his particular tool, is less and less able to be alone.

The Classical Conception

6. The only comment we shall make, within the context of our topic, is that in the authors' rights tradition or traditions the author is not recognized as such unless he has imprinted his personality on a creation. A person who, for example, has done no more than provide an idea is not regarded as an author.

It is this stamp of the author's personality that gives us the classical definition of the notion of originality. Although the law does not say so, it has been the traditional definition in France since Desbois, also holding good in Belgium, Greece, Italy, Portugal and Spain among other countries. Earlier we mentioned the German definition of a work, which speaks of personal intellectual creation. In Turkey, it is an "intellectual creation revealing the personality of its author." Originality is thus an essentially subjective notion calling for--calling only for--the assessment of a link (or "umbilical cord," as it has been called) between the author and the work: the originality of a Chagall is that it is just that, a Chagall. And if merit does not normally have anything to do with protection, a mediocre work will be protected insofar as it is the reflection of its author (who is himself perhaps nothing more than mediocre).

There remains the fact that what creation there is must be such as to bear this stamp of its creator.

The Reality of the Rule

7. Long before the appearance of the "new technology," however, the protection requested--and granted--for such things as directories and train timetables was already upsetting established principles. It could no doubt be argued that such a solution is a specific one, that it is not significant, but the argument does seem rather glib.

If we study case law carefully, we find ourselves obliged to depart from the received wisdom.

In a country such as France, which allows cumulative protection under both copyright and design law, the notions of originality and novelty are frequently confused (novelty being required by the latter law), and a design is deemed original and/or new because it has not been anticipated. It will be retorted that such an eventuality is remote, as indeed it is.

However, a study of decisions involving copyright alone reveals that the courts are not as lacking in flexibility as one might have imagined from reading theoretical works. First, where creation belongs to the traditional field of the Arts--literary creation in the widest sense or musical creation--the question of originality often does not really arise, being as it were taken for granted, which is very convenient from the probative viewpoint,

but shows little consideration for an aspect that should really be given more specific treatment. Secondly, it does seem that, when more ambiguous situations lead to debate, the proceedings are certainly not conducted in such a manner as would indicate that the relevant courts are concerning themselves with whatever continuity might exist between author and work. The non-existence of prior rights will sometimes be pointed to, or particularly with regard to photographs, the nature of the technical choices made. This could pass for the application of principles, but is rather a comparison of one work with another. So ultimately, however carefully the judgment may be worded, protection is granted to creations--which therefore have to be considered original--that cannot easily be claimed capable of meeting traditional criteria. The French Court of Cassation pays particular attention, and already did so in one decision dating back more than a century, to the intelligence of choices, and substantive decisions by judges have taken account of the intellectual work or the sheer amount of work that creation has required. It is not unusual for German decisions to speak of intellectual effort, while a certain decision of a Lisbon court mentions the "creative effort of intelligence."

Panamanian law perhaps best expresses the complexity of the phenomenon in question when it declares the protection of "every production which is the result of personal work or effort of intelligence, imagination or art."

Questioning the Principle

8. Insistence on strictness of meaning does have the virtue of allowing fine distinctions to be made. However, rigid adherence to a view that is too dogmatic can have unfortunate consequences. The Germans realized this in the 1985 Inkassoprogram case relating to computer software, which no doubt preserved the purity of copyright, but did put Germany in a difficult international position.

At the same time the French made a quite different choice in the Pachot case of 1986: they discovered originality in the evidence of the author's intellectual contribution. Some commentators have criticized this development, claiming it to have been a novelty that dared not speak its name. This is certainly true, in our view at any rate; but we would add that we see no reason to be shocked. We have long maintained that originality, all things considered, is no more than novelty in the world of form. But, returning to creation without technological adornment, what of the "ready made" movement or better still, Las Meninas as reinterpreted by Picasso? It is still Las Meninas, but seen through different eyes. Since that time, it has to be admitted, the French Court of Cassation has placed particular emphasis on evidence of the author's personal contribution.

What we have to face, however, at the risk of being accused of reversing what should be the logical approach, is that choosing or agreeing to allow certain creations the benefit of copyright means almost inevitably agreeing to change the essence of the notion of originality. European directives on the protection of computer programs and its duration, as well as the proposed directive on data bases, have provided a uniform defini ion of originality for the purposes of programs, data bases and photographs, according to which they are regarded as intellectual creations specific to their authors. It can

always be maintained that this is a matter of copyright in the strict common law sense and not of authors' rights, but the obvious relationship of the European definition and the definition adopted in France in the Pachot case is bound to be pointed out.

9. It could still be argued that this is not originality as traditionally defined. But while traditio is the handing on of an established concept, one is bound to admit that these successive transfers lead to the situation we have just described.

The fact also remains that in the (intellectual) tug-of-war between author, originality and work, the notion of work is itself likely to be shaken up.

B. In Search of the Work: the Work Is the Creation of the Mind Imprinted With the Personality of Its Author

10. In the traditional approach, the work is indeed the creation of the mind imprinted with the personality of its author. The most rigorous treatises make a clear distinction between "intellectual work" and "protectable intellectual work." It may be said that the intellectual work per se is a creation of form, that it must be perceptible to the senses. However, it is quite clear that in most cases the distinction is academic, and that in the opinion of many specialists only the protectable work truly deserves to be called a work.

(1) Work

11. It has to be recognized that the primary requirements mentioned in this presentation have more to do with practical constraints than with the conceptual requirement. A work does not properly exist unless it comes into contact with other people, and such contact can be achieved only through a form that is accessible to other people, albeit at the risk of involving jurists in long, erudite discussions on the nature of that form.

On this point and on many others, however, computer software manages to upset the consistency of the argument since, although it is true that behind the machine for which the software is designed there is a human being, it is nevertheless for the machine that it is designed, and in this it reveals its strikingly unusual feature, which we have emphasized elsewhere, namely that it is an "operational" form.

Let us, however, leave aside the question of software, which after all is not part of the tradition, even though the intention of the European Community directive on programs wants us to treat it as a literary work, which a jurist will regard as a fiction and a literary person as surreal.

(2) Protectable Work

12. In the context of tradition, if questions are to be asked, they are going to be much more, as we have mentioned, on what constitutes a protectable work.

In that case we can go back a few steps and say that an original work is a protectable work: the problems involved are the same and the viewpoint we adopted earlier could well be used again.

The Classical Conception

12.1 According to one classical conception, the protectable work is--as we have said--that which is potentially the embodiment of its author's personality.

So, while a work will not necessarily fall within the field of fine art, that will be its "natural" environment. The title of a law can suggest this, as does France's 1957 Law on "Literary and Artistic Property" (this title has since become the title Part I of the Intellectual Property Code), or alternatively a provision may refer to the author of a "literary or artistic work," as in Belgium. The lists of protectable works given in many laws suggest the same interpretation. In Italy, for instance, the term serves as a visa or certificate for creations in the fields of literature, music, three-dimensional art and cinematography. On the other hand, lists of example works in the French or German manner, which state that protected works include this or that category of works, are less reliable guides (particularly when, as in the German text, reference is made to illustrations of a scientific nature, which we do not know whether to regard as graphic works or scientific works).

The fact remains that there are, in this approach, creations of the mind that clearly do not conform to the description of the intellectual work eligible for protection.

The Reality of the Rule

12.2 The rule, however, is not and has probably never been that. Even in the field of authors' rights, a work according to literary and artistic property law is only tenuously connected with an actual literary or artistic work.

The legal concept is independent of the artistic one, and may produce quite different results. It would be interesting to judge the urinal in Duchamp's Fountain or Malevich's White Square on White Ground according to the traditional criterion of originality outlined above. There is every reason to suppose that they would be hard put to pass the test.

Conversely, the legal concept is particularly accommodating in respect of works that would probably not be recognized as such in the world of the arts. Indeed the Portuguese Code refers expressly to intellectual creations in the literary, scientific and artistic fields, which does not mean that literary property might be leaning in the direction of some form of industrial property, but does emphasize the difficulty of assigning a natural field to it. That said, since the literary work referred to in many laws may be understood simply as a work of language, and since the practice is to consider neither its merit nor its purpose, "the person writing," as Barthes puts it, and the writer are both called to the colors of copyright. And what is true in the field of writing is obviously also true in other fields of creation.

It was according to this reasoning that, as long ago as 1830, a synoptic table summarizing the State budget was protected in France, as were, later on, with (or despite) the advent of the civil law doctrine of authors' rights discussed earlier, all types of compilation, the text of a patent or, in another domain, a salad shaker.

Photographs, however, which are the product of an old new technology, seem to be an interesting exception when we note that certain countries (authors' rights countries) distinguish between photographs eligible for authors' rights and ordinary photographs that benefit from a related but lesser protection. This is a response to a reluctance to compromise the notion of work and a desire to acknowledge that there may be something else which is not quite a work but nevertheless worthy of protection.

Contemporary Rethinking

12.3 The observation that there may be "something else" to protect explains a certain contemporary "drifting" of the work concept wherever the law concerned does not include a third possibility somewhere between protection by authors' rights and non-protection.

Ever since their fate has been a matter of interest, compilations have been a prime example of these ill-defined situations. The data base controversy has reactivated the debate. The Dominican Republic has expressly declared data bases protectable by copyright, but the need felt by the European Union authorities to propose, for their protection, a *sui generis* right based on authors' rights provisions is an excellent illustration of the fact that copyright cannot easily resolve everything. However, the "low" definition of originality given in the proposed directive on data bases makes this right particularly accommodating (indeed too much so, according to some).

That is in fact the most noteworthy point in the current situation: if the protectable work is the original work but with originality tending to be, as we saw earlier, nothing more than the author's intellectual creation, the status of work is likely to be very widely, even very casually accorded. Photographs, which in some States have up to now been denied copyright protection, will in future have to be accommodated, at least where the States concerned are members of the European Union. Moreover in France it is already less a question of when software may be protected than when it is liable not to be protected.

13. We would add that, whatever may sometimes be said, we do not believe that digitization has been instrumental in bringing about the changes that have occurred. They are probably due to the fact that, oddly enough in societies that call themselves liberal, the main players are seeking to increase the number of fortresses in which they will (or think they will) be able to protect themselves. And this phenomenon has nothing to do with either authors' rights or copyrights.

There are, however, two questions that deserve to be asked in the light of these developments. The first, of a general nature, is whether the cost of offering facilities for the protection of "new works" will not eventually be a weakening of protection. The second, which is peculiar to authors' rights

countries, is whether this phenomenon, which can be very easily summarized as a "distancing," either imposed or desired, of the author from the work and vice versa, is not liable in the end to cause a radical rethinking of authors' rights: it is one thing that the connection between the author and the work should no longer be the same, but another that the author should actually disappear from the scene, whereupon the issue would no longer have anything to do with copyright traditions!

II. FURTHER AFIELD: NEIGHBORING RIGHTS

14. Authors' rights and their traditions still have their part to play when neighboring rights come on the scene. Let us once again consider the work, the be-all and end-all of authors' rights. It is the work that engenders the rights, so where there is no work, there are no authors' rights.

We do, however, have to look at the contribution made by accepted ideas and the unequal influence of pressure groups. There can indeed be different kinds of neighbor.

A. A Right That Is (Only) Neighboring Because Creation Does Not Take Place

15. We are dealing here with rights accorded on the one hand to producers of phonograms and videograms, and on the other to broadcasting organizations.

16. To be frank, it is difficult enough to speak of authors' rights traditions at all, let alone of one authors' rights tradition. On June 1, 1994, neighboring rights were still unknown in Belgium and seemingly also in Switzerland. It was not until 1985 that France concerned itself with them, and, while Greece has had a law on them since 1980, the implementing decrees governing its operation have not been introduced, and so it was not until the reform of the copyright legislation in 1993 that neighboring rights actually became part of the Greek system.

Even though some legal systems today agree to confer neighboring rights on the beneficiaries that concern us here, the available options are still different when it comes to defining just who those beneficiaries are (there is more than one definition of a broadcasting organization, for example) and to determining what prerogatives they are to be offered and what limitations there should be on those prerogatives.

Although it is true that in a number of countries the courts already afforded producers of phonograms and broadcasting organizations some degree of protection through the use of means available under ordinary legal provisions (penalties for unfair competition, the observance of "proper trade practice"), and that rights have thus not come into being spontaneously in the last decade or so, the fact remains that this detour through ordinary legal provisions and the ever present differences between national laws clearly show that there cannot really be a "picture" of neighboring rights, as there can of authors' rights, on which authors' rights countries could agree.

17. Paradoxically, however, it is this very negative fact that is clearly characteristic of an option marked by the logic of authors' rights.

There is no question, as in the copyright countries, of granting such partners in creation the same rights as are granted to authors. Fixing a work or disseminating a work are two activities of great importance, but they are not activities involving creation, not activities that bring about the emergence of the work, in either the strict or another sense of the word. Pressing a record, for example, is a technical activity; it is certainly related to musical creation, but clearly not to be identified with it.

However, inasmuch as we deem such activities worthy of protection, and wish to give rights to those who engage in them, it remains for us to grant a neighboring right, "another right of intellectual property," as Spanish law puts it, another right which cannot but be "other."

B. A Right That Is (Only) Neighboring Because Creation Is Not Recognized

18. It is by no means certain that we can say the same about the rights granted here and there to performers.

19. One thing that remains true, however, is that it is very difficult to speak here of tradition, as we did in the previous case. Case law has come to the aid of performers in a number of countries, but the rights, written down in the form of a law, are generally still young and differ from State to State.

However, although there are still legal systems that ignore them, the interests of performers (or performing artists, depending on terminology) tend to be more willingly accommodated than those of "promoters" of creation, discussed earlier. The explanation is probably that they are closer to the creative act. They are not always uniformly defined, however, and we see France, for instance, placing so-called supporting artists in a separate category. Furthermore, such rights as they do enjoy are said to be in their "interpretation" or "performance" (the term "work" is not used).

While in most cases performers are owners of economic rights in the form of exclusive rights--in the sense of the right to prohibit--but sometimes also a simple entitlement to remuneration, as in Italy under certain circumstances, they normally take second place to copyright owners, whose preeminence is often spelt out in national legislation.

It is significant moreover that in Colombian law, which states that performers enjoy the same moral rights as authors, they are usually granted such moral rights as authors are granted, but--unlike authors--moral rights that carry less weight. For instance, the respect that their performance commands can be gauged solely by the harm that could be done to their prestige or reputation, as in Germany or in Italy, or their moral prerogatives will be more limited in time.

20. The situation would seem to be that, while their status as "creation auxiliaries" requires that they be accorded a dignity similar to that of the author and rights similar to authors' rights, they cannot, by any stretch of the imagination, be regarded as anything other than auxiliaries, cannot, to put it bluntly, be considered creators.

And yet there are a thousand and one ways of saying, for instance, "The little cat is dead." And if I may refer to a personal experience, I would

mention very vivid memories of two productions of Brecht's The Life of Galileo, which were so differently directed and acted that I cannot possibly think of them as anything other than two separate works--two works by virtue of the interpretation by the performers. But it may be retorted that, as in the case of Malevich's white squares, art and law--even artistic property law--each have their own separate "keys," and that what is a work for one is not necessarily a work for another, and vice versa.

We should, however, point out that, in terms of law, scholarly works of theory have put forward the argument that the performer should be recognized as a fully fledged creator. In terms of pure copyright logic, does he not imprint his personality, often very strongly, on the play or the composition that he is performing? Which brings us back to our discussion of what constitutes a work.

21. In reality, the rather timid approach adopted by authors' rights countries with regard to performers is itself instructive in a manner that goes beyond their particular case. Their particular dogmatic conception of the work means that copyright protection is strictly reserved not only for "works" (with all the uncertainty inherent in the word), but also for what is perceived as a true work (with all the imaginary element that such an expression evokes). Curiously enough, this may open the way towards a fragmentation of literary and artistic property: when subject matter that is not easily identifiable with the "ideal" work is denied copyright protection in the strict sense, recourse will be had to a neighboring right, indeed even to a new such right if necessary. Although the sui generis rights in data bases proposed by the European Union authorities are not actually neighboring rights, they are acceptable to the authors' rights countries only insofar as they are neighboring on authors' rights; the proposal that there should be neighboring rights covering satellite pictures is at the outset a response to the desire to keep such pictures outside the purview of copyright.

BY WAY OF CONCLUSION

22. By way of conclusion? Are we able to conclude at all? We have spoken of tradition, of (various) traditions, of tradition sometimes misused, sometimes reconsidered. There is something religious in the pure tradition of authors' rights, or at least in that tradition as it is generally understood. What this means is that the received image of authors' rights is a cultural image, evoking an element of imagination, that of Hugo, "the holy dreamer" of "enlightened mind." However, neither CAD (Computer-Assisted Design) nor design for its own sake leads a priori to mysticism. Via new technology and new creations, but also via new conditions for creation (which may or may not be linked to new technology) economic demands are forcing themselves on us whether we like it or not, the received wisdom is losing its relevance. The notions of work, originality and even author are being reworked, with neighboring rights waiting on the sidelines. Does this signal the emergence of a sort of civil law copyright? Is it a revised conception of authors' rights or is it a return to forgotten sources? Certainly a little of each.

We should like it to be remembered, at least, that in our view tradition is not as rigid as has been suggested and that therefore, without being untrue to themselves, authors' rights are much more accommodating than they are said to be.

Are they in the case of Malevich's White Squares? But is common law copyright more so? Are they more accommodating to Levine's White Square, which is supposedly based on Malevich and entitled After Malevich? We would not swear to it. Be that as it may, now that the concepts of work and authors' rights have been revisited, it remains part of the authors' rights tradition, part of the strong tradition of authors' rights, that they are rights of creators (although we must not overlook performers). Any reassessment of the concepts of work, originality and neighboring rights that failed to take account of that fact would itself be no longer true to the tradition of authors' rights.

THE NOTIONS OF WORK, ORIGINALITY AND NEIGHBORING RIGHTS FROM THE VIEWPOINT OF COMMON LAW TRADITIONS

by

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I. "TRADITIONS"

I have been invited to speak about "work," "originality" and "neighboring rights" in the common law traditions. The real sophistication of this title lies in the use of "traditions" in the plural. There are at least two quite distinct traditions within the common law net of copyright laws. That fact alone is enough to question our axiomatic division of the world into authors' rights countries and copyright countries. That is, in my view, a rather crass dichotomy, and we would do well to start using it in inverted commas.

For today's purposes, where my attention is directed to the "common law side," I must distinguish between what I shall label the "British" system and the "American" system. Within the "British" group of countries I include all those territories which participated in the Imperial copyright scheme of 1911: not only those 51 territories which have become States within today's British Commonwealth,[1] (plus 16 British colonies and dependencies), but States such as Ireland, Israel and South Africa. The Imperial copyright system of 1911 provided a common set of copyright laws throughout the British Empire and may fairly be regarded as the most extensive system of unified copyright law, arching over a variety of jurisdictions, that the world has so far known. With growing independence since World War II, this homogeneity now is less marked, but there remains much basic similarity in concepts and attitudes. We cite each other's case law in court without discomfort.

My purpose in referring to the passing phenomenon of Imperial copyright in my opening remarks is this. Today we face a digital revolution: who can tell how far it will be carried? It appears that there will be huge agglomerations of sources, which appeal to the senses of sight and hearing and which may heighten both the rational and the emotional responses of those who use them in a measure which is quite beyond our current reckoning; and which will be open not only to passive extraction and further distribution, but to myriad forms of recombination and other manipulation. Exploitation will respect national boundaries far less than in the past. That in itself

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[1] Gratifyingly, this number once more includes South Africa.

suggests how important it will be to seek common approaches to basic conceptions.

There are numerous factors which in part explain why British and American copyright, for all their common eighteenth century rootstock, have grown so significantly apart. One, plainly, is that the United Kingdom was a founding State of the Berne Convention and so absorbed much of its ethos for a century before the United States of America joined it; equally, on the neighboring rights front, the United Kingdom helped found the Rome Convention in 1961, while the US still remains outside it. But more basic still is the fact that the power of the US Congress to enact copyright laws is limited: it may "promote the progress of science and the useful arts, by securing for limited times to authors...the exclusive right to their...writings." If it wishes to step beyond this confine, it must justify its action under some other power, such as the Commerce Clause. The UK, by contrast, has a sovereign Parliament whose powers are conditioned only by the authority which it has conceded under the European treaties; and in Commonwealth States with written constitutions, the central government will have a general power to make intellectual property laws.

Some of the consequences of these differences will become apparent as I turn to the three concepts which are my brief for today.

II. "WORK"

In the considerable variety of ways in which copyright systems give conceptual shape to the protection which they offer, there seems to be one constant: productions which are protected as "works" have an author; normally therefore (though not inevitably, as we shall see) they must satisfy some notion of originality or creativity (though what this must consist of will differ between systems). Other protected subject matter, not defined as a work, tends to bypass the originality issue, the entitlement being defined by reference to an activity such as performing, recording, filming, broadcasting or publishing, without direct reference to the intellectual qualities which direct that activity.

Legal systems accumulate detailed rules and assumptions about the definition of "works" and authorship related to them which become part of their basic copyright thinking, but are in large measure rules of convenience, so far as their precise scope is concerned. Where they differ, as they are likely to do in the absence of any common inheritance, they can lead easily to mutual incomprehension. Unfortunately some of these differences occur at just that level of thought where it is difficult to accept change, and much sterile argument may occur over the comparative virtues of different national approaches. From an international perspective, the result is a complicating irritant.

I cannot pursue this theme far today. But looking no further than a comparison between American and British systems, one finds, for instance, different attitudes over the degree to which the works protected by statute must fall within the categories of statute law--the British tending to a strictly positive requirement of statutory authority, the Americans allowing a certain scope for judicial extension. One also finds in the British a high

degree of atomization--a view that a work is either literary, or artistic, or musical, but not more than one. Songs, for instance, always have separate copyrights with differing terms, in words and music. Whereas US theory allows a more holistic approach, so that a song may be a joint work. Carry this distinction over into something truly agglomerative, such as a film, or today a multimedia construct, and one is liable to find thinking that operates on very different premises.

III. "ORIGINALITY"

The rights given to authors, in the common law as much as the civilian systems, begin from an image of high aesthetic creation, of individual intellectual activity of a unique and treasurable quality. (I myself am of that cautious faith which believes that these finest embodiments of our culture are going to remain distinct, valued entities even in the digital stewpots of infinitely extendable zeros and ones.) The question then becomes how far the protection offered to such splendid acts should be diluted so as to encompass the everyday, the uninspired, the mundane. Because the difficulty of arriving at criteria for distinguishing comparative levels of creativity, let alone applying those criteria to particular works, systems of protection in all countries have been obliged to cover everything above a minimum qualifying level; and that qualifying level has been defined in terms of "originality."

Until the arrival of electronic data banks with their extraordinary storage capacity, the precise mode of defining "originality" was not of prime importance in comparisons between systems of copyright protection. On both the American and British fronts there was for a long period considerable readiness to accord literary copyright for what Americans piquantly characterize as "sweat of the brow." The British put this more sedately by calling for an exercise of "labor, skill and judgment" which carries what is done beyond the mere copying of an existing source or sources. In particular, it would be enough, if the work which resulted from this effort was expressed in words, numerals or other symbols, that the main labor consisted in commercial calculation and effort--for example, in selecting the products for inclusion in a trade catalog, or in deciding what types of bet to include on a football pool form.

"Sweat of the brow" protection was accorded to street directories, telephone listings, broadcasting schedules, railway timetables and in British systems today this continues. The copyright which is given is "thin," i.e., the protection is against copying the whole or the great bulk of the compilation.

As is now well known, some difference in approach has recently arisen between the British and American systems, in consequence of the US Supreme Court's decision in Feist v. Rural Telephone.[2] On the basis of the Constitutional restriction on the powers of Congress, the Court ruled that a licensed telephone company's White Pages directory of its subscribers could

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[2] 111 S.C. 1282 (1991).

not be protected as an original work of authorship. There is as much a "fact/expression" dichotomy in US copyright law as there is an "idea/expression" dichotomy. At the same time, the court recognizes that copyright can exist in compilations, provided that they contain some slight amount of creative spark. This may exist purely in features of original selection or arrangement. Just how much difference really exists between current British and American approaches is hard to predict: a data base of all English poetry (such as is currently being produced in Cambridge, England) will probably be protectable at home, though not in Cambridge, Massachusetts (at least so far as copyright is concerned). On the other hand, a selection of romantic poetry, or vernacular poetry, or whatever, is probably covered on both sides of the Atlantic.

In respect of electronic data bases, the "British" of the British Isles are being driven to accept even severer Continental ideas of personal intellectual creation: for this will be a requisite criterion when the EC's Directive on data bases[3] becomes law. At the same time, that Directive will provide a form of unfair extraction right against the commercial exploitation of uncopyrightable data bases. It will be more limited than copyright protection, being restricted in term (probably to 15 years) and being open to compulsory licensing in certain circumstances. The apartheid which it will import will probably not be of much importance so far as concerns the difference in duration of the right: for any data base worth its salt will be renewed often enough to enjoy what is in effect indeterminate protection.

But where there is no copyright in the data base, but only an unfair extraction right, the right will be subject to fair and non-discriminatory licensing whenever the contents of the data base come from public bodies or firms with publicly conferred monopoly status. It will thus address what was obviously the underlying concern of the Supreme Court in Feist, itself, a concern which could not be dealt with in a legal frame of rights which had either to be regarded as exclusive or as non-existent. It is just these cases which are most likely to be the source of conflict in the future; one may predict that courts will be tempted by them to push the level of creativity needed for copyright in compilations ever higher. Another means of reaching broadly the same result is to impose antitrust or competition law controls on the exercise of copyright itself. That can be a more complex route to the same end; even now, in the Magill case, the EC Court of Justice is poised to decide whether, and if so how far, it is a permissible approach in the Communities.[4] Whatever a country's inheritance in these matters, until it adopts one or other method of tackling the monopoly sourcing of information, it is unlikely to be able to resolve in any satisfactory way the tensions which surround the "fact/expression" dichotomy. In the end, rights will be needed for sweat of the brow fact assimilation, but they will have to be qualified at least in some decidedly significant cases.

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[3] For the Revised Draft, see Official Journal of the European Communities (OJEC) No. C 308/1, November 15, 1993.

[4] The Advocate-General's recent opinion in the case favors a less interventionist approach than that taken by the Court of First Instance.

IV. "NEIGHBORING RIGHTS"

Neighboring rights are not easily classified as a single phenomenon. They are rights related to the rights of authors, stricto sensu, which have emerged in response to the novel techniques of cultural production, and even more the techniques of accurate and cheap copying, which have been breaking upon us, wave upon wave, for the last 100 years. They acquired international standing--and at the same time a standing which was distinct from authors' rights--with the signing of the Rome Convention in 1961.

The EC's proposal for an extraction right in unoriginal data bases will be the latest in a considerable line, but doubtless not the last.[5] It shows the typical characteristics of the genre: lacking the need for originality, it lasts for a shorter term, akin to industrial property rights and thus shows that its direct object is the protection of investment, rather than the recognition of creativity. The right protects certain forms of economic activity, and not personality as expressed in any work. There is not the same insistence that the right must be exclusive in all save the most marginal circumstances, as is shown by the way in which monopoly sourcing may be open to control.

In essence, the American and the British systems have reacted to the phenomenon of neighboring rights very differently. The British have been active creators, though most recently they have sought to disguise the differences from authors' rights; the Americans, with one eye always on the Constitution, have been avoiders.

To start with the active, British side: in 1911, the UK was among those precocious countries which gave producers of phonograms a distinct "copyright," deeming it to have the same scope and effects as copyright in a musical work and so conferring both a right against reproduction and against performance. This was part of Imperial copyright and so was spread throughout the Empire.

In the wake of the Brussels Act of the Berne Convention, the UK legislation was substantially recast in 1956 (though this time the new law was taken over in the various dominions of the Commonwealth only when they chose individually, and then only to the extent that they wished: Imperial copyright belonged to a former age). In the British Act of 1956, the neighboring rights concept found distinct expression. Although the practice continued of labelling all the rights "copyright," the neighboring rights were placed in a separate part of the new Act: they became the so-called "Part II rights"--(as before) in sound recordings, (notoriously) in cine films, in broadcasts (and then by amendment in cable-casts); and (as a first response to reprography) in the format of a published edition. These rights were not defined by reference to "works," nor did they have authors; only performers

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[5] Other examples occur in the EC Directive on term (93/98/EEC, OJEC No. L 290/9, November 29, 1993): the requirement to provide a publisher's right in works not published during the author's copyright term (Article 4); and the permission to provide a publisher's right in critical and scientific publications of works in the public domain (Article 5).

were given shorter shrift, with criminal penalties for unauthorized use of their performances. They have had to wait until 1988 for civil rights of action.[6] The terms of these neighboring rights were relatively short, and did not depend on the death of any natural person. Instead the "subject matter" of each right was given to a person denominated as its owner.

After its 1956 legislation, the UK was thus able to be a leading proponent of the Rome Convention, though it had to ensure that the rights being conferred on performers were limited in ways that allowed for the British "partial solution" in their favor. It was alone among the "British" countries in this endeavor.

The UK now has further legislation, introduced in 1988. In it, performers and those who have exclusive contracts for their work are given civil rights akin to copyright but separate and to some extent distinct from it. Otherwise, the neighboring rights continue much as before. However, they have now been packaged in a manner which integrates them closely with the rights of authors in the classical sense. From an international perspective, I regard this as a step as unnecessary as it was unfortunate: it is inherently likely to produce confusion and misunderstanding. To explain: the neighboring rights are now given in "works" (sound recordings, films, broadcasts, etc.) and works must have authors: but the authors of the neighboring rights are only those who are deemed to be so; and they turn out to be the former production organizations--the recording companies, film producers, broadcasting organizations, etc.--who enjoyed rights under the 1956 Act. Their rights are given without reference to any aesthetic contribution or intellectual activity to their product. No test of originality is prescribed for them, as it is for literacy and similar works. In these essentials, they remain distinct from true authors' rights and this is marked in the 50-year term which is accorded to most of them (a term about to be standardized throughout the EC[7]).

In the US there has been a different set of responses, striking their own balance between powerful sections of the entertainment industries. The US Copyright Act exists to protect authors, and, as the Feist decision has underscored, authors must in some minimal sense engage in original creation. So there seems to be a conceptual bar to the very concept of a neighboring right within the copyright legislation given in respect of investment rather than creation. The claims which technological advance has pressed on all industrial nations have had therefore to be met in other ways. Under the US statute of 1909, motion pictures were listed as works, and by amendment in 1971, sound recordings were added. In both cases the authors were, prima facie, those persons whose creative decisions brought the works into existence. The interests of investors were then met under the general operation of the work-for-hire doctrine. In relation to all categories of work, this doctrine treats an employer, and even by contract a commissioner,

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[6] Just before the legislature intervened in 1988, the courts found a way of conferring on performers (though not on recording producers) a civil right of action, derived from the criminal legislation.

[7] Directive on term (above, footnote 5), Article 3.

as the author, thus displacing the person who actually made it by intellectual effort. The copyright then lasts for 100 years from creation, or (if earlier) 75 years from publication. By this legislative legerdemain, the US at present grants rights very largely to recording companies and audiovisual producers for a term broadly equivalent to the copyright of real authors. At the same time it avoids the inherent difficulty that these investing "authors" will in all likelihood be immortal corporations. The actual creators--the directors, performers, cameramen and score writers in films, the performers and recording engineers of sound recordings--are displaced from the moment of creation.

It would be a satisfactory state of affairs if all substantial copyright countries could approach the arrival of digitization with a common attitude towards authors' rights and neighboring rights. Authors' rights, with their lengthy, indeed (for better, for worse) lengthening period, could be reserved for "products" of the mind, the best of which attain a high, unquestioned level of cultural value. This would justify the personal right of inheritance, and would at least define and for the most part limit the categories of claimants to moral rights. Neighboring rights could then give more limited rights directly to investors for purely economic protection, and, where appropriate, could be confined to rights to equitable remuneration.

The degree to which the two categories of right could be subject to collective administration (a necessary consequence of digitization) could then be differentiated. A strategy could be worked out which, with a good deal of electronic monitoring, would enable the licensing of the whole heap of rights which underlie any multimedia package of modern material. Solutions along these broad lines are beginning to form in the EC, with such measures as the Directive on rental and neighboring rights and the Directive on duration. The common law countries of that Union have had no difficulty in joining in these first steps. One hopes that with their considerable pragmatism and experience they will contribute much to future developments. After all they have industries which are in the forefront of the wondrous electronic world ahead. The stumbling block in the way of a Utopia so structured would seem to lie in the development of US copyright law. However, now that there is the hope that the US will introduce rights for the protection of performers, there seems a chance that a common approach can emerge on the issue as a whole. That is a goal very much to be sought.

THIRD WORKING SESSION: NEW CHALLENGES FOR PRODUCERS AND DISSEMINATORS OF WORKS

AUDIOVISUAL INDUSTRY: ECONOMIC AND LEGAL CHALLENGES

by

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Thank you, Mr. Chairman, for giving me the floor now. I do not know whether it is due to the storm over Paris, but after yesterday's discussions I am going to try to come down to earth and leave the stratospheric paths along which we have been proceeding.

We speak of copyright, but we must realize that behind copyright there are enormous economic challenges. The audiovisual industry is one of those industries in which, until and even beyond the year 2000, the most important developments will probably occur. There will be jobs and income, there will be challenges that are commercial as well as cultural, and behind the copyright discussions lie fundamental economic challenges, as we saw recently at the GATT talks. At the end of last December the President of the European Commission, Jacques Delors, published a white paper on competitiveness, growth and employment which endeavors to map out the paths for Europe's future, and in that document he lays particular stress on the importance of the audiovisual sector. I should like to talk to you about the figures involved. It is estimated that by the end of the century the demand for audiovisual products in Europe will have doubled, with expenditure on audiovisual hardware and software having risen from 23 to 45 billion ecus. As for the number of television channels, it is estimated, but quite realistically estimated, that it will have risen from 117 to 500 by the year 2000, with television broadcasting hours rising from 650,000 to 3,250,000 during the same period. Furthermore, it is estimated that encrypted program hours will increase by a factor of 30, which indicates fundamentally different and greater income flows. With regard to employment, it is a fact that in films--and audiovisual programs in general--labor costs represent 47% of the budget. The audiovisual sector, the program sector, is a sector that creates jobs requiring highly qualified personnel. These jobs are less likely to be at risk of relocation than those in other sectors. Lastly, the estimated job-creation potential of the European audiovisual sector between now and the end of the century is approximately two million. We are therefore talking about very substantial figures and challenges. Of course, it is by no means certain that those jobs will actually be created because, as the audiovisual industry develops, so does the imbalance between a genuine industry like the American industry and a "cottage industry" such as Europe's. Let me quote a few more figures. Sales of American programs in Europe rose from 330 million dollars in 1984 to 3.6 billion dollars in 1992--which weakens somewhat the accusations of protectionism that have been levelled against us--and 77% of American exports of audiovisual programs have been absorbed by Europe, including nearly 60% by the European Union. So the development of audiovisual systems and audiovisual

works does not necessarily benefit everyone, and it is important to see how we can ensure harmonious and balanced development all over the planet.

As far as cinema in particular is concerned, while I do maintain that it is the spearhead of the audiovisual sector, the most advanced industry and the one most often mentioned in connection with the development of new networks and new technology, it is nevertheless an industry of prototypes, and neither Americans nor Europeans have found the philosopher's stone that makes a film into a success. It is estimated that in the United States of America only one film in five earns enough to cover its production and editing costs, the latter often being as high as the former; it is the same in Europe. To give you a rough idea of film budgets, in the United States the average budget for a film produced by Hollywood's major companies is 28 million dollars, whereas in France it is just over 20 million francs. These are very substantial, very high-risk investments, and these days they are no longer protected by ownership of the medium and the hardware. When films were distributed only in cinemas, the holders of rights enjoyed full copyright protection because they owned the 35mm or 70mm copies of their films. It was very difficult for an individual, whether natural person or company, to obtain copies. Today, however, we have to face up to a society and technological progress that have caused data carriers to "dematerialize," and so the only protection for the very substantial investment in the cinema and audiovisual sector is intellectual property law. Whenever intellectual property rights are infringed, whether copyright in the United States and the United Kingdom or continental civil law rights, investment and therefore employment are adversely affected, and jobs disappear. One thing that I wish to emphasize is that the new technology speaks a great deal about the circulation of images, but before images can circulate they have to be created, and, for them to be created, the investments made by those who create them have to be offset by earnings. People are laboring under a misapprehension, because it is quite obvious that the creation of new channels--there is talk of increasing the number of satellite channels from 10 to 100--will not be matched by an equal supply of programs. Many of the new channels will simply duplicate existing ones. Instead of watching a channel such as France's TF1 live, you will be able to watch a deferred transmission. There will be dozens of channels showing films in pay-per-view systems, but you will always see the same films as you can now obtain in cassette form or on television. There is a very simple reason for this, especially in the case of cinema: production cannot be stepped up because of the congestion caused by the showing of films in cinemas. Five or six years ago, the Americans greatly increased their volume of film production and, as a substantial amount of that output could not be screened in cinemas, it was marketed direct in the form of videocassettes or sold to pay-TV stations because of the bottleneck at the cinemas.

On the subject of new technology, I should like to divide my presentation into two parts. First of all, I shall talk about technology that is new but is already in use today, and then I shall venture a few predictions about what is going to happpen, but once again I shall be cautious. I do not believe that the law should anticipate the development of services too much, as it is not just because technology exists that it is going to be used. For technology to be implemented there has to be a market, with consumers prepared to pay; that is the basic point.

Many of the new problems facing producers in the field of copyright management stem from the conflict between individual and collective management

of rights. Clearly it is in the interest of creators who are private individuals to join together and secure remuneration through collective management organizations. The opinion of producers is by no means the same, however. They prefer individual management of rights, which alone permits the chronology of the work's exploitation to be controlled and exclusive rights to be preserved, although they have of course made provision for collective management where it has been dictated by technical needs. Such technical needs first made themselves felt in the area of cable retransmission.

It took us 15 years of litigation to secure the exercise of our right to authorize or prohibit, since our opponents had long invoked against us the principle of free circulation. This twice brought us before the European Court of Justice, where we eventually obtained a judgment that has since become famous, namely the Coditel ruling. But the cable distributors told us, quite rightly, that they wanted to deal with us but were unable to make individual management work. How could they request prior permission for retransmission from each owner of rights in each film shown on each channel? It was then that the producers realized that they had to overcome their reticence and establish a collective management organization. They did so in a rather original way, however: instead of creating national organizations with reciprocity agreements on the lines of the classical authors' societies, they straight away established a multinational copyright body known as AGICOA (Association for the International Collective Management of Audiovisual Works), which covers the world repertoire of film producers. AGICOA deals with all cable distributors on European and Canadian and one day, I hope, also on American territory, from which we European producers unfortunately earn no money as yet. AGICOA is therefore a multinational society created on that basis, as producers believe that collective management, being a makeshift, must at least be profitable, and that management costs must therefore be kept low. Since the same television stations are all broadcasting from one country to another, with many programs being shared, there are clearly very substantial savings to be made by centralizing computer facilities and not having to sort through the programs of each country's channels for the apportionment of remuneration. That, broadly speaking, is the first experience of collective management that producers ever had.

The second experience was that of a number of countries, and had to do with payment for private copying, where again there was no alternative to collective management. One cannot imagine a producer individually authorizing a private person to copy or not to copy a film, apart from which we can expect the future to bring technical devices to block the operation of video recorders, access being afforded by a card copiable against payment. While it is said that technology will make the application of classical copyright impossible, it can on the contrary strengthen copyright principles by making individual consumption systems and coding systems available. For the time being, however, it is clear that the principle of remuneration for private copying obliges owners of rights to abandon their right to authorize or prohibit reproduction in exchange for payment. I personally cannot understand why payment for private copying is not more extensive. This has to be a policy decision, since it is obvious that video recorder manufacturers and the manufacturers of blank cassettes are selling the recorders and cassettes only because they make it possible to copy works. If there were no works to copy, there would be no market for video or audio recorders or for blank tapes. The principle of remuneration for private copying should therefore be established at world level and in all countries, as there is no reason for one group--the

hardware manufacturers--to be the winners and another group--the creation chain as a whole--to be the losers. Fortunately action was taken in France, on the initiative of Jack Lang, in 1985, and we have developed a system that works very well, so well in fact that we have introduced, for producers in particular, a distribution method that enables us to determine, work by work, the copying rate for each film and each audiovisual program, and to give each work copied by private individuals its fair share of remuneration according to the number of copies made. This system, which was introduced last year, demonstrates that technical progress also makes it possible to develop distribution methods and to avoid systems that take too much account of the relative strengths of specific categories, and too little of the actual exploitation of works.

By way of conclusion on the subject of collective management, I would say that it is important that it should not be too remote from those whom it is supposed to defend or represent, namely creative artists and producers. That means that the organizations should be open to scrutiny, and also that the added value of the rights of both parties should be properly assessed. In particular, we must replace what is at present a purely political approach in many countries with an economic approach to the value of the rights of producers, authors and possibly performers. We have to find a way of ascertaining the contribution of all parties to the creative process. Finally the problem of collective management lies in the need to keep the cost of services rendered at a low level. It is quite clear that it is preferable, for users, to deal with one collective management organization rather than with several. That makes it easier to use the film repertoire, and it is a service which can afford to be improved; on the other hand, it is not very healthy to have a monopoly. What the collective management system actually is in most countries is a cartel system: each organization has a repertoire and monopoly control over it. A monopoly does, however, lead to management practices liable to make one forget the interests of those whom one is supposed to be defending. In my view, systems should be invented, not that it will be easy to do so, that maintain the service rendered to the owners of rights and at the same time introduce some degree of competition, not over rights, since we clearly do not want the kind of competition that weakens rights, but, rather the kind that will give collective management organizations some incentive to improve their management structures. I do not believe that a situation where the incentive of competition does not exist can ever be a healthy one.

Moving on now to the new technology currently in use--after which I shall speak of the technology of the future--the main problem experienced by producers in recent years is that of satellite broadcasting. Obviously satellite broadcasting, compared with broadcasting by the classical method of electromagnetic waves, does not alter the nature of the rights involved. All it does is change the territoriality of the rights, because as a matter of principle, except where the program is encrypted, the satellite disseminates very widely, whereas broadcasting over the airwaves, being limited by the power of the transmitters, does not go very far beyond the borders of the country in which the broadcasting organization emitting the signal is located. I should now like to mention, as a very bad example for copyright principles, the Directive on satellite broadcasting adopted by the European Commission. Why? Because two principles were, as ever, at odds within the European Union: the principle of freedom of circulation and the principle of

copyright. It should be mentioned here that, in the name of the principle of free circulation, an attempt had been made in 1986 to introduce, and spread right across Europe, a system of legal licenses for retransmission by cable; the campaign against it carried on by the holders of rights drove the Council and the Commission into retreat, but it should be borne in mind that the aim of the European Commission at the outset was to make the principle of free circulation prevail over the copyright principle, which consists not only in authorization but also, let us not forget, in prohibition. An author, as an owner of rights, has the right to prohibit a performance, whether one likes it or not. With regard to satellite technology, the aim of the Commission was clearly to promote the growth of transnational channels, and to do so it adopted a relatively simple principle which involved saying that, as the satellite operators were going to be hard put to gather together the rights for the whole of Europe, satellite communication occurred only in the country of emission. What that means very clearly is that, if I am the holder of the rights for Luxembourg, for instance--and I have chosen that country quite at random--and I broadcast by satellite to Europe as a whole, the actual communication to the public takes place only in Luxembourg. That means that the signal goes up to the stratosphere and never comes down, and that the viewers who see the film in France, Portugal, Spain and Belgium, in strictly legal terms, will have seen nothing at all; the film has not been broadcast to those countries, and only Luxembourgers are deemed to have seen it. There is moreover another anomaly when the signal is encrypted; one can quite well imagine the encrypted signal being emitted from country A, for instance Luxembourg once again, and destined for country B, say France, and decoders being sold in France only; if once again we apply the Directive, there will in Luxembourg, where no one will have seen the film for want of a decoder, have been communication to the public; in France, where the film will have been received because decoders are sold there, and if so of course will have potentially violated the exclusive preserve of the holders of rights, there will not have been communication to the public. To me this text seems to be a complete aberration, and I think that the procedures put in hand within the European Union for the revision of this and other texts will make it possible to deal with such anomalies. Apart from this, new legal standards are created that complicate copyright unnecessarily. In France we are fortunate to have a relatively clear, relatively readable law which any normally constituted individual can more or less understand. I defy anyone who did not take part in the Brussels discussions to understand anything of the directives on satellite broadcasting, the directives on lending rights and, soon, the directives being prepared for us on data banks. When you know that a set of already incomprehensible texts will have to be written into each national statute book by legislators who have not necessarily understood the law involved, you can imagine the chaos that will result: instead of promoting the harmonization of copyright, the directives will promote confusion, to the delight of the lawyers, of course, but not that of producers and creators.

I should now like to tackle the problem of new technology. We hear a great deal about it, but for the time being we cannot see it, and, I say it again, I do not think we should rush into the enactment of regulatory provisions until the market has reacted to the supply of services that may be forthcoming. I can see two types of problem, and in my opinion Professor Sirinelli gave a quite remarkable presentation on the subject yesterday. There are no answers to all these problems, but at least the questions have been perfectly put. There are problems associated with the

work and the nature of the work, and a second type of problem that relates to services. As far as the work is concerned, it is clear that a certain number of new works known as multimedia works are going to make it difficult to apply the classical rules that in France are known as the principle of the oeuvre de collaboration or work of joint authorship, where the authors are clearly identified, and that other new forms of work may yet come on the scene where in fact it is the producer, that is, the person overseeing the making of the work, who will be the owner of the whole set of rights from the start. This is an application of the principle of the collective work, which moreover already exists in French law. The second problem is that of the use, by someone compiling a multimedia work, of extracts from other works. In that case, we always hear the same refrain: it is a very complex business to secure the rights in all the works, so legal license systems should be used, while the holders of rights should be approached and prevailed upon to hand over, in exchange for obviously modest remuneration, extracts from films and extracts from works to the new industrialists who are going to create the multimedia works. It is no more awkward to put together a multimedia work--even though it may take time--than it is to make a film. Those involved have to take the time to go and see the holders of rights, one by one, which in fact has become that much easier over the last 10 years or so with the tendency for catalogs to be grouped, both within Europe and throughout the world. Gone are the days when audiovisual works were scattered over hundreds and hundreds of holders of rights. In the United States of America the main holders of rights, the main holders of catalogs, are relatively few. In Europe there are now about 20 societies that must hold the rights in 80% of all cinema products and 50 to 60% of all audiovisual products.

As far as the new services are concerned, we are witnessing the rapid appearance of two types. The first, which is called the pay-per-view system, does not present any copyright problem; there are, I know, legal quibbles over whether it is a rental right or a right of communication to the public, but that is of little interest. What I can say is that such systems have the advantage of allowing the proceeds to reach the holder of the rights directly, and that they will improve the remuneration of authors and producers; that therefore represents progress for the copyright principle, with the added advantage of the systems being encrypted, so that consumption can be accurately monitored.

The second step forward that is due to take place, but perhaps later than expected because there have been complications with the installation of the host computers, is what is known as video on demand, that is, the possibility available to an individual of having, not just a programmed film as in the pay-per-view system, but any film, selected from a catalog, communicated to his home. There, clearly, we are in a system comparable to the video rental system, where one simply goes into a shop and takes a cassette. The only difference is that the film is conveyed by cable. What I did hear, however, is that there was a plan to grant the person who compiled such catalogs of films a sort of copyright or neighboring right. It is true that there is at present a tendency to create new neighboring rights at will; copyright is somewhat neglected, while neighboring rights multiply. Video on demand is nothing more than a compilation, and the protection that should be given to those who create data banks requires at some stage that the fundamental criterion, namely that of originality, be observed. What would you say if tomorrow the manager of a corner shop called The Video Club were granted

copyright? You would all laugh. The situation would be exactly the same if copyright were granted to the person who puts together a catalog of films for a video-on-demand service.

Finally, what disturbs me most about the technical inroads being made by digital technology, because in that case I do not have an answer ready, is not so much dissemination as reproduction. Digital technology is going to make it possible, by means of much more sophisticated video recorders, to engage in mass reproduction at home. Now private copying, copying for home use, involves the making of a single copy. As soon as there are two or more copies it is piracy, and the only protection that one has in that case is not legal protection in the form of remuneration systems, or legal protection by means of authorization or prohibition, but rather protection that has to be provided in the form of a world standard that allows the limiting of reproduction to a single copy. Tomorrow, the making of more than one copy has to become impossible. This would happen in the same way as, in future, one can quite well imagine the video recorder and the television signal being so designed that it is not possible to copy films distributed by pay-per-view or pay-TV services, private copying being feasible only when the works are disseminated by general distribution services. So much for that concise description of some of the problems presented by the advent of digital technology and by the new reproduction methods that are to be made available. And yet the real question is whether--when the three worlds now in the process of organizing themselves, namely the world of telecommunications, the audiovisual world and the computer world, will become one and that the transmission of image sequences will be achieved as easily as voice transmission by telephone, or data transmission by computer networks--the concept of communication to the public will still have any meaning. That is my great worry, and not just a worry for the next two or three years but for much further ahead: what will happen when individuals can transmit audiovisual works person to person, just as they would conduct a private conversation? There would no longer be any communication to the public. Will it then still be possible to monitor image flows and secure remuneration for them?

I should like to close with a mention of problems which I shall call problems of genetic engineering. With all this new technology, there is a possibility of manipulating works, and that is precisely where moral rights recover some of their significance. I am well aware that discussions are going on between the two sides of the Atlantic, and that some countries have ratified the Berne Convention without applying the provisions on moral rights, which in my opinion is going to cause them some problems in the future. Moral rights are indeed protection of the same kind as has been introduced to guard against biological manipulation. At this very moment a new area of law, bioethics, is in the process of being created, while moral rights protect works against manipulation, and I think that, if we reflect on the future, it is in the interest of producers and authors as a whole to retain, by means of this system of moral rights, protection against the transformations and manipulations to which works may be subjected, in order that their integrity may be preserved. My final wish is that, in the coming months or years, those countries that have ratified the Berne Convention without applying all its provisions will bring their actions into line with what is implicit in their signatures.

RECORDING INDUSTRY, THE FIRST CULTURAL INDUSTRY FULLY EXPOSED TO THE IMPACT OF DIGITAL TECHNOLOGY

Encounters With Digital Technology: The Music Industry

by

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Copyright and droit d'auteur provide somewhat different answers to the same questions about human creativity, entrepreneurship and technology. For the last century they have been seeking to draw the balance between creative individuals--working alone, in corporate undertakings or other voluntary associations with others--and the owners of the technology. Technological considerations underlie many of the most interesting, vexing and important questions in the field. What is creative intellectual expression as opposed to an industrial process or a technique? Who is an "author?" Where are lines of functionality that mark the theoretical end of authors' rights? How can lines be drawn, if at all, between the products of intellect and those of technology, particularly when contemporary works often result from the creative use of technology? Technology continues to change, the questions remain.

Digital technology--really, the techniques, equipment and languages of information science--are new elements in these long-standing questions. The speed of commercial development gives "digital" copyright issues edge and urgency. They affect all right holders in the intellectual property universe and whether or how we adjust the interests of any right holder can have radical implications for the entire cultural and informational marketplace. The task of the policy maker is to test the rules of copyright and neighboring rights against the demands of changing circumstance, in order to assure that the principles of copyright and related rights remain valid. It is not always easy.

Hyperbole comes naturally to copyright discussions. Even more so when talking about the potential impact of digital technology upon our lives. In the intellectual property field, there has always been a tendency to speak about "confrontations" between art and industry or to make each technological advance a cause for alarm. Of course, this attitude usually ignores the reality that much art would not exist, or would remain obscure, without an industrial base. And technology has generally expanded rather than eroded the power of creative authorship, its audiences and profitability.

Still, has there ever been a technology that was not, at least at first glance, an overwhelming challenge to copyright and authors' rights?

Photocopying and reprographic reproduction was the crisis of at least two generations of publishers and librarians. Much doom-saying accompanied the emergence of broadcasting and later, cable television and communications satellites. The bad dream of uncontrolled photocopying became the nightmare of unrestrained information storage and retrieval systems. Yet so long as we kept the author, producer, performer and broadcasters in the center of our thinking and recognized their interdependence, we seem to have survived most of those dangers.

Of course, all of these technologies created new unauthorized uses of protected works and they continue to pose commercial problems for affected industries. In the inevitable encounter with technology, copyright and authors' rights have found ways to maintain the social objectives upon which they rest--by judicial expansion of the law, new contractual arrangements, legislative and regulatory changes at the national level and enhancement of international law. Copyright and related rights seek to give right holders control over activities and utilizations of their creations which form the core of their economic--and for authors, moral--interests. When the core from which potential economic rewards are obtainable shifts, usually through technological advance, we must consider whether rights must shift as well.

In theory, all technologies can thwart the historic purposes of intellectual property protection. In theory, the dangers always loom largest because affected interests are invariably alert to destabilizing effects. It is, however, in the actual, day-to-day encounter with new technology that full appreciation of the challenge to fundamental values becomes apparent. It is in the marketplace that we are now learning the opportunities and pitfalls of digital technology. The phonographic industry has been grappling with the profits and perils of digital technology for over a decade, with spectacular results and a few spectacular frustrations.

At the outset, we should make certain general sentiments clear. First, the phonographic industry's encounter with digital technology has persuaded many of us that it will "change everything." Yet few can explain how it will do so. The phrase "digital changes everything" reflects a vivid sense of new, untested, possibilities; a range of new products and services and ways of delivering them that are both great and different from the way many companies now do business.

However, uncertainty about the future is not important to copyright law. It is not necessary to have a sharply focused snapshot of what the digital marketplace of the future will look like. What is enduring and important about authors' rights and copyright is how it empowers right holders with the legal rights to protect their property against incursions from <u>any</u> technology. It is not the function of copyright and authors' rights to regulate one particular technology or another. The best copyright laws set down fundamental rights through which creators and the commercial entities which realize their creations can respond to any change in technology. Rights may relate to given technologies, but the values underlying the grant of copyright and authors' rights are not limited to particular technologies of the moment.

So, while we sense that digital technology will "change everything," that does not impair the fundamental rationale of legal protection of authors, producers/publishers and performers. Digital technology will require

adjustments to national and international copyright law. What is important is to maintain the essential controls of individual and corporate creators over commercially significant uses of their works.

The title of this paper is a bit misleading. The phonographic industry is not the first industry to feel the full impact of digital technology. No one has yet felt the "full" impact of digital technology if only because the infrastructure essential to support a digital marketplace is itself not yet fully developed. Still, computer software creators and distributors have had more than a little passing experience in the problems associated with creating, marketing and protecting creative works in digital utilizations. So, too, have segments of the traditional publishing industry, particularly those serving scientific and technical communities.

What is unique about the music industry is how quickly digital technology has been accepted throughout the entire complex process of composing, performing, recording and selling one of the basic human forms of expression: music. Information technology has revolutionized creation and manufacturing in large copyright industries--films, phonograms and publishing; but it still awaits development of mass consumer capacity to enjoy works in digital forms. In the recording industry, however, digital technology has created new instruments for making music, conquered the recording studio and reshaped a global business around digital carriers, the compact disc and digital compact cassettes.

Put simply, digital technology has seen the development of the compact disc as a consumer format and in many ways it has revolutionized the appreciation of music. Sound recordings, old and new, available on compact discs, have reawakened the public's interest in music generally and forced a reevaluation of the role of music in society. The response of the public to digitization of music has been consistently positive for two reasons.

First, the digitization of an existing recording offers the possibility of dramatically improving the original sound of the source material. Digital recording technology has put powerful creative tools at the disposal of the record producer. These tools enhance the ability of the producer to define the aural content and perceived characteristics of performances, expanding the range for judgment, selection and arrangements of sonic elements into a phonogram. It also permits the revitalization of older analog recordings so it is now possible to hear Caruso or Armstrong as never before. Second, the quality of sound reproduction possible by compact disc delivers musical performances with a precision and clarity which in most cases--and even with a modest outlay on equipment--surpasses that of a live performance in the finest concert hall.

In the 10 years since the compact disc was introduced, we have seen a major stimulation of interest in all forms of musical expression, past and present. And this interest is creating new opportunities not only for phonogram producers, but for telecommunicators, composers and performers.

The public has found the compact disc to be a nearly perfect medium for recorded sound; apart from the quality of sound, it is a convenient, virtually indestructible carrier. The digital recording process reduces the sounds reproduced to a series of binary codes which plot the amplitudes of the recorded sound. The recording is therefore fixed in absolute values. By

contrast, in analog recording these amplitudes are measured electronically and fixed either in a physical medium in a disc or in electromagnetic fields on a tape. The recorded sound is thereby subjected to a range of variables which impair sound quality, particularly through successive generations of copies.

Once sounds have been reduced to binary notations, interesting possibilities for the manipulation of aural material arise. Two can be mentioned here. First, provided the recordings remain in the digital domain and are not subject to compression, they can be stored and transmitted an infinite number of times without any loss of quality. Secondly, it is possible to work with the binary notations in a way which can alter the sound reproduced from the recording; this is how--to take the simplest example--it is possible to dramatically improve the sound of old recordings or to correct a performance which has gone out of tune momentarily. The potential to rework or refashion sound is enormous.

Digital technology has the potential to liberate both the creation and communication of music from the restraints of traditional composition, performance and dissemination processes. This is already occurring to a certain extent with the compact disc; it is on the point of leaping forward dramatically as the "dematerialization" of recorded music proceeds.

The music industry is entering phase two of the digital era; a phase which is already characterized by confusion and complexities. The picture is remarkably unclear because the systems for storage and transmission of data are still evolving both technically and commercially. There are, however, a number of products and services already available in the market which have raised questions that are relevant to a more mature and complete digital marketplace.

The first question is, how will consumers receive and enjoy recorded music itself? Music is often a long-term investment by consumers, in the sense that the demand for ownership of copies of recordings is a function of the need to hear music repeatedly over a considerable period of time. What will digital technology do to this very simple calculus--which happens to underlie the economic and commercial structure of the entire music industry? Will the demand for copies grow and shift towards digital delivery of copies to consumers? Will the demand for copies decrease, because multichannel digital music services make broadcasting a viable alternative to ownership of copies as a way of experiencing music? Will material copies in any major sense fade from commercial significance in the face of huge data bases of recorded sounds from which consumers can do their own programming at any time, and ultimately, at virtually any place?

Second and more difficult, how may a piece of recorded music be consumed together with other information? In short, what is the place of music in growing multimedia markets? Not only how will music be licensed and packaged for multimedia products, but what happens to music in the hands of the multimedia consumer?

The first question has already received extensive examination and deals essentially with the delivery of music through digital transmission systems. Although still in relative infancy, digital music transmission services pose

questions about how licenses shall be granted, on what basis royalties should be charged and remuneration administered. Most of all, companies are only now beginning to think about how licensing arrangements will need to be adjusted as digital transmission services proliferate and the multiplicity of channels, as well as subscriber demand, permit the creative tiering of the distribution of recorded sounds.

At present, digital music deliverers are approaching recording companies with licensing requests; the recording industry has not brought to digital cable technology its own concepts of how different services at different prices can be developed, shaping the digital marketplace. But the time for experimentation in licensing and packaging music transmission services may be shorter than we had expected. It is necessary to underline the rapid expansion of cable networks around the world and the imminent launch of wireless digital broadcasting systems.

One of the most critical experiences which will be gained over the next several years of licensing digital transmission services is an assessment of the impact of these systems and their characteristics in relation to their regulation. The key to the expansion of cable is the enormous development in its carrying capacity. Digitization, compression and the use of fiber optic cable make this possible. Digital audio broadcasting provides, without any physical link, flawless reception of CD quality broadcast sound.

The investment in cable is already considerable and the last few years have witnessed an extraordinary chapter of corporate alliances, bringing together major elements of the entertainment, telecommunications, consumer elecronics and computer industries. One international bank recently calculated that the market value of all the corporations currently involved in the cable industry amounts to 8.3% of the total value of the world's stock markets--a massive US$680 billion. These corporate alliances are becoming ever more complex, not only in respect of distribution networks, but also in respect of software and key peripheral technologies.

Much of the thinking in the recording industry about digital transmission systems relates to how particular modes of diffusion impact on the basic, existing, market structure of the recording industry. Since the first reaction to new technological applications in the market looks at how present markets may be damaged, rather than new ones built up, the focus has often been defensive, seeking to mitigate potential disruptions to the manufacture and sale of digital recordings at retail.

The result is often an attempt to sort out digital transmission systems into those which are not perceived as leading to high quality, massive copying, which displaces authorized sales, and transmission services which do so in a direct enough fashion to be properly thought of as "distribution" rather than "public performance."

Every effort must be made to resist premature conclusions concerning the impact of these systems in the creation and dissemination of the software.

There is a dangerous and shortsighted tendency to treat interactivity as the distinguishing feature between existing cable diffusion networks and the electronic delivery systems of the future. Interactivity is then defined as

the ability of consumers to access a data bank containing the world's stock of sound recordings and select a particular item or a user-determined sequence of items. That is unlikely to exist for many years: the celestial jukebox notion is drifting out of orbit.

Interactivity is always a matter of degree. Limiting expansion, for example, of performance rights to circumstances where consumers are programmers ignores the nearly identical commercial impact of highly targeted, non-interactive, transmission services. It ignores the possibility and desirability of empowering right holders with the ability to create many different sorts of services utilizing electronic transmission and information storage and retrieval technology. Degrees of interactivity will doubtlessly provide the nuances of licensing arrangements and royalties. What "interactivity" must not do is determine the scope of intellectual property rights. Indeed, "interactivity" must be understood in terms of consequences and must therefore be understood to begin with selecting between multiple channels of predetermined music programs as is currently available in many parts of the United States of America, Europe and Japan.

Likewise, Digital Audio Broadcasting is not just an improved form of radio: it is a revolution in radio. To the music industry it could present the ultimate replacement for the second format market which has existed since the introduction of the music cassette in the mid-1960s. Portable DAB receivers with channels of uninterrupted CD quality music are more than likely to become the Walkmen of the future.

This underlines the urgency of establishing the correct regulatory principles. It is private investment which will drive the digital revolution and as the market analysts are consistently insisting, ownership of the software is the key to this investment. What they fail to point out, of course, is that the dimensions of that ownership are a function of laws, particularly copyright law and that these laws may not provide the necessary foundation as presently formulated.

The complexities which the relevant laws have to address are further highlighted by the multimedia applications of digital technology. Many observers believe that the greatest opportunity for multimedia, of which music will form an integral part of the entertainment package, may lie with domestic workstations such as personal computers and home entertainment systems such as CD-I and 3DO. The personal computer market constitutes an enormous installed base of machines which may now be used largely for games, word processing and personal finance but which could gently ease millions of consumers into the new world of multimedia.

Multimedia products have already been introduced to the consumer market. Philips, with cooperation from Matsushita and Sony, has developed a workstation which combines the facilities of CD systems with the interactive capabilities of computers. This is CD-I, which was launched in Europe in 1992. The system is designed to accommodate graphics, photographic images, animation and audio.

CD-ROM is, perhaps, even more developed because it was immediately embraced by the publishing and information-oriented industries, due to its ability to store vast amounts of data, be it visual, audio or text. Until

recently, much of the music included in CD-ROM software has been incidental, but music-based titles have begun to appear. The most well-known to date is Peter Gabriel's "XPLORA" CD-ROM which, with its interactive capability, features videos, biographical data and the possibility of remixing a track or of coordinating a jam session.

A complicating factor common to both multimedia products and digital transmission systems is the virtually total absence of standardization. Compression is an essential element of all digital transmission systems--cable or wireless--and there is a variety of compression modes currently in use or projected. The set top box which decodes the material fed into the home can accommodate a single compression system, thus placing limitations on the services which can be accessed. Similarly, the variety and incompatibility of multimedia platforms force the consumer to limit his explorations within the field. It appears that the hardware and network developers are about to repeat the mistakes of the past which set Betamax against VHS, NTSC against PAL and the Digital Compact Cassette against the Mini Disc. The consumer should enjoy the system which provides the highest efficiency for the least outlay--and not the system which is pushed through a battle of competing formats by the highest marketing spend.

To conclude this outline of the digital revolution, it is important to emphasize that much is already in place which indicates the direction of future developments and that the process of regulation must urgently advance on an open basis. Regulations must relate to existing concepts and structures but will not necessarily be governed thereby. Digital technology is not merely a replacement or an improvement on analog technology nor even a new language: it provides a new way of organizing and assimilating information and will therefore impact on all but the most basic functions of human existence. Even within its existing applications it can be seen that its impact is as profound as the changes brought about by the discovery of antibiotics or the invention of air conditioning.

The development of digital media is steadily transforming the ways in which all segments of the music industry do business. They have already transformed one of the most fundamental problems of the industry--piracy--into a true monster. A clear lesson emerging from the recording industry's encounter with digital technology is that while analog piracy has caused incalculable harm to authors, performers and producers and continues to do so in many parts of the world, digital piracy is immensely more dangerous. The quality of a pirate CD will be as good as its source material, often another CD. The technology of piracy is small, highly portable and relatively inexpensive. The prospect of recordable and erasable CD decks for the consumer market puts the wherewithal of CD piracy on the shelves of ordinary department stores.

The difficulties and expense in tracking down CD pirates, the complexities of determining whether a CD is a pirate copy, or whether a CD for playback equipment has mutated into a CD-ROM for use in PC's, all point up that the realm of digital piracy is infinitely more complicated and convoluted than its analog ancestors.

The digital pirate's commercial base transcends music and includes a wide variety of non-musical CD-ROM publications. Today's CD pirates will become

thieves of zeros and ones, bits and bytes--the building blocks of creative expression for many authors, interpretive artists, producers, publishers and broadcasters. The first lesson of digital technology is unfortunately pathological: copyright industries that have fought piracy on an industry specific basis must now collaborate with other industries to control a technology fundamental to all copyright industries. Governments must examine carefully the existing fabric of criminal copyright infringement and refine it to meet the unique threats of digital piracy.

Another lesson drawn from the experience of fighting digital piracy is of greater long-term importance, because it has implications for the conduct and orderliness of legitimate copyright enterprise. We have come to realize that solutions to piracy entail digital technology itself. Information on digital carriers--in analog form such as the industry's SID Code or in digital form such as the ISRC--point to possibilities for impeding piracy that are integral parts of software.

Drawing on analogous experience with technical systems to mitigate private copying, such as SCMS and systems used in the audiovisual industry, it is clear that the next major legal step to be taken relates to technical standards in hardware and software to thwart piracy. The enhanced importance of this area of standardization comes from the fact that a similar process must take place respecting technical means for the administration and enforcement of licensing programs for digital transmission and delivery systems.

Underlying the development of national law in the digital domain is the network of copyright and neighboring rights treaties. The principles of private property rights centered in individual (for authors and performers) and corporate creativity (as is the case with motion pictures and sound recordings), broadly drawn to assure control over significant commercial uses of works for an ample period of time, are for the moment secure. But in the case of phonogram producers, the system has been woefully inadequate for a woefully long time.

The international system for protection of producers of phonograms was created in the early 1960s, when analog broadcasting was deemed only a "secondary use" of phonograms, supporting a market consisting entirely of direct retail sales of copies of phonograms to consumers. No amendments to or revisions of key treaties have occurred since then. Yet, throughout the 1980s, telecommunication of phonograms has become less promotional to the distribution of recorded sounds and more a legitimate market in its own right. With the advent of digital technology, telecommunication services are poised to become the principal means by which consumer demand for music will be served in the twenty-first century. Digital telecommunication of recorded sounds is not therefore a mere technical enhancement of existing broadcast services. It will impact on the traditional means of manufacture and distribution of copies of sound recordings in several ways:

-- by providing a means for the electronic, licensed delivery of copies of recorded sounds;

-- by offering highly targeted, multichannel programming that enable consumers to select programs designed to appeal to their strongest musical tastes. Ultimately, digital transmissions will provide on-demand interactive

programming services, linking consumers to data bases of recorded sounds, where each consumer becomes his or her own programmer;

-- by providing consumers with personal copying opportunities far superior to present analog broadcasting. The diversity and quantity of different digital transmission services, with different economic bases heightens the need for technical controls and standards relating to private copying of recorded sounds. Not only will consumers be able to make professional-quality copies of recorded sounds using digital recording equipment, they will be more readily able to identify desired programming through multichannel distribution services catering to specific market niches. Exclusive rights in respect of the digital transmission of recorded sounds are an essential element for entrepreneurship in the digital telecommunications environment; however, it is incomplete without complementary technical systems and standards permitting controls over private copying, applicable to hardware, recording media, telecommunications service providers and the recording industry.

This is not a list of problems and dangers. It is a catalog of opportunities. These are new service opportunities that will constitute the marketplace in which authors, performers and producers must derive remuneration that rewards and promotes creativity, that sustains investment in the creation and distribution of works and phonograms. The objectives of intellectual property protection will not be served by the application of today's legal regime to this global digital telecommunications marketplace.

Countries that protect sound recordings under copyright or neighboring rights disagree on many matters of form and substance of protection. But we submit and agree on certain objectives of protection:

-- to encourage the greatest possible economic opportunities for the creation of new works and a commercial environment that sustains their widest possible dissemination;

-- to strengthen the ability of the party in the best position to defend the economic interests of all right holders in sound recordings in the marketplace--the producer--against unauthorized commercial users as well as outright pirates;

-- to provide strong incentives for the investment of sufficient resources in the production and distribution of original works;

-- to reward and promote creativity. With the passage of time and the advance of recording technology, it has become more apparent that the work of producers of sound recordings in selecting, shaping, coordinating and arranging the sounds of a performance requires artistry of the highest order.

Absent legal rights and supporting technical standards, the introduction of intellectual properties into digital transmission systems exposes those materials to unauthorized reproduction, performance or display on a demand-basis downloading, transformation of the original material and piracy.

Future public access to recorded sounds will be obtained from a variety of competing sources including free, over-the-air digital broadcasting, cable diffusion, multichannel access services and remote access to high density

storage data bases of recorded sounds for interactive programming and/or delivery. The objectives of intellectual property protection will not be secured if commercially important uses of protected materials cannot be effectively managed by right holders. In too many countries producers are unable to control the public telecommunication of their phonograms and can secure only an equitable remuneration.

The new telecommunications markets created by digital technology are so qualitatively different from broadcasting today that no equitable remuneration can be devised to account for all significant commercial uses. A right to equitable remuneration will take out of the hands of the right holders their ability to create different products and services, priced differently so as to come within the reach of the largest possible audience.

Further, if society continues to have an interest in promoting musical creativity, seeing it widely disseminated at attractive prices and in convenient formats, an enormous investment will be required by the phonographic industry. Those investments will only come if industry can continue to exercise reasonable controls over all commercially significant uses of their phonograms. Expansion and development of the industry requires the intellectual property tools for creative entrepreneurship.

Unless States are prepared to contribute immense, direct subsidies to these undertakings, authors, performers and producers will require exclusive property rights that allow them to control and profit from their work's dissemination in the marketplace. Over a substantial period of time, the industry must devise new licensing arrangements, new ways of tiering public distribution of recorded sounds, and appropriate technical systems for the exercise and enforcement of their property rights. At the same time, adaptation of the intellectual property system to achieve these ends must begin now and steadily evolve over succeeding decades to meet these challenges. The first step, limited but fundamental to all future progress, should be taken now. The key right to be established is essentially the extension of exclusive rights of public performance, long enjoyed by producers of audiovisual works, to right holders in sound recordings.

Over the last several years, the international community has been examining proposals for new international treaties relating to copyright and neighboring rights, in particular the WIPO program examining a possible "protocol" to the Berne Convention and a "new instrument" for the protection of phonogram producers and performers. This work is now at a crossroads and government, industry and international organizations will, over the next several months, be taking decisions of long-term importance.

The recording industry is completely convinced of the necessity and the feasibility of creating new, limited, treaties aimed principally at those elements of digital technology that require clarification of the existing regimes or enhancement of the rights of authors, performers and producers. This is not only a necessity for the producers, but for all right holders; no less for authors than for performers and no less for publishers than for broadcasters.

The work of WIPO includes extensive documentation prepared by the International Bureau and the results of discussions of two committees of

governmental experts meeting over the last year and a half. It represents a substantial body of international intellectual property thinking on the implications of digital technology for authors, producers and performers. However provocative the analyses may have been to existing interests, the International Bureau succeeded in establishing an intellectual framework for assessing the strengths and weaknesses of industrial age copyright and neighboring rights in regard to the fast-approaching digital future. Those debates--that framework--is basic to international understanding of the legal regime required by intellectual property right holders in new digitalized, telecommunications environments.

The WIPO work on a new instrument and Berne protocol has recently been delayed at the request of the Assembly of the Berne Union. The process will resume in December 1994, and the delay appears on the surface to be no more than a brief stocktaking in a process for which the Assembly, to one degree or another, reaffirmed its support. The purpose of the delay seems to be to permit consultations among States, although we see a difference of views on what those consultations should be about. Certainly, the documentation prepared by WIPO needs very careful study and discussion at the national level and particularly among the right holders. Yet, we at IFPI are deeply concerned.

We believe the delay is prompted by very serious uncertainty in governments over what needs to be done at the international level to adapt copyright and neighboring rights to digital technology. Much of the official reaction to the WIPO documents during the Committees' sessions fell into the category of "premature," or "not yet persuaded" or "unclear." The delay also reflects the failure of the concerned right holders to embrace a consensus proposal against which governments could test the overall public interest. Governments were not alone in their divisions; parts of the work program were greeted by resistance and uncertainties within the camp of the non-governmental organizations.

The need for more time also reflects uncertainty over how the unfinished business of the Uruguay Round should shape the further work of WIPO. It reflects uncertainty about the timing and cumulative impact of new digital communications services in the market. It is also, in a sense, a price of the phenomenon of convergence: digital technology and intellectual property issues cannot so easily be addressed on a sector-by-industrial-sector basis. Much of the planning for the E-way, the "New Information Infrastructure," the electronic superhighway, is at an early stage. All of these uncertainties, superimposed upon the undeniable complexity of many of the legal issues raised by WIPO, led to this delay.

The problem now is how to reinvigorate the international dialogue on copyright and digital technology, to lead towards urgently needed reform without compromising the much larger assessment of the public interest called for by the imminence of the new electronic "superhighways."

IFPI believes that the existing proposals for new international agreements affecting authors, producers and performers have proven to be too comprehensive. Much of what WIPO has proposed represents needed improvements to the overall copyright and neighboring rights system. But the list of critically needed changes varies from constituency to constituency and embraces long-standing issues in the analog or industrial domain.

The very best of WIPO's very good work is focused on the interstices of protection that emerge out of digital technology. The first task is to concentrate effort on what is unique and challenging about digital technology. From that refined focus we must determine the essential first steps to preserve the social objectives of copyright and neighboring rights protection against erosion.

The WIPO program for a Berne protocol and a new instrument for producers and performers was shaped in large part by the ongoing negotiations in GATT. The limited agenda of issues for the Berne protocol, in particular, had to take account of what was on the table in TRIPS, what was settled and what was determined to be unnegotiable at that time. The conclusion of TRIPS makes it possible to reexamine the contents of a possible protocol to the Berne Convention. While the temptation to use the WIPO process to complete the unfinished business of the TRIPS negotiation is great, we should remember that seven years of hard work failed not only to secure an agreement on many of these issues, but fell short of creating a conceptual framework for a later agreement.

To revive the full agenda left undone in TRIPS is to court another protracted negotiation. The international recording industry does not believe we can afford the luxury of another protracted negotiation. The digital communications revolution will not be built in a factory and imposed on the world in a single stroke. The "E-ways" are growing, being patched together in an almost organic fashion--sometimes with the help of governments and the private sector, sometimes despite their preferences for a bit more planning time. Governments and companies that are trying to plan and hope to regulate or determine fully the development of the information infrastructure and its services are attempting to build a skyscraper in the midst of an earthquake. It is important therefore to concentrate legal development on threshold issues; to affirm or establish basic principles rather than seek to regulate in great detail.

Underscoring the urgency for a new treaty is the conviction that digital technology does transform the entire environment for the creation, distribution and public consumption of recorded music in ways that echo some of the problems in the electronic publishing community, the film industry in respect of satellite transmissions, data base proprietors and the computer software industry.

For IFPI, digital technology means the breakdown of the traditional unit of marketing of recorded sounds, the long-playing record, into an unbundled set of individual works that may be assembled by consumers into any configuration, length or diversity of content desired. It changes the single point upon which producers and performers have depended for recoupment of their time, effort and investments--retail sales. It changes it into a mix of compensable utilizations: retail sales, high targeted broadcasts, multichannel cable or satellite diffusion services and interactive systems for consumer programmable performances or actual delivery of copies.

A new treaty for the protection of phonograms producers is needed because:

(1) present treaties do not provide assurance of harmonized proprietary exclusivity required for full and secure exploitation of emerging regional and global digital telecommunications systems;

(2) present treaties, including the TRIPS Agreement, do not address the need for global application of certain technical standards important to the fight against piracy and the administration of rights in phonograms (e.g., SID Code, ISRC, SCMS, protection against disabling or encryption systems used in audio-program carrying transmissions);

(3) where producers lose control over their markets, damage is felt throughout all the constituencies of the music industry. The economic interests of performers and authors who now enjoy revenue streams from the manufacture and sale of copies of phonograms and complementary public performance royalties will be compromised;

(4) it is increasingly important to rationalize the development of national and international private copying systems, drawn up in response to analog technology, with the challenges of digital telecommunications markets. In particular, a new treaty should affirm the power of right holders to exercise and enjoy their exclusive right of reproduction and distribution of copies of phonograms in respect of private copying.

While the discussions over the WIPO program for a Berne protocol and a new instrument for producers and performers have cleared away a great deal of brush and helped us to sort out immediate needs, what is reasonable to anticipate from what is premature, it badly needs a new direction that supports the work of the International Bureau in the service of the entire world copyright and related rights community. That direction, IFPI is convinced, must and can only come from the affected interests themselves, from the right holders seeking a consensus proposal. We must risk throwing away our prepared positions and begin to talk about fundamental interests in the digital domain and how they can be secured without damaging other parts of the creative community.

The right holders themselves are divided by different ways of thinking about authors' rights and neighboring rights. These differences go beyond mere matters of form. There are the underlying agreements on the purposes, the objectives of intellectual property rights for authors, producers, performers and broadcasters mentioned earlier.

If those objectives are kept in mind, the international community should be able to consider a treaty that establishes direct, relatively simply, minimum standards of protection essential for right holders to maintain control over when, how and on what terms phonograms may be used in digital transmission systems. Seeking limited but basic objections, the treaty should lead naturally to a more comprehensive future agreement, embracing in a more comprehensive fashion the full rights and remedies right holders require. Once a new consensus over the contents and essential limitations of a new treaty is accepted by key countries, greater negotiating freedom than is presently enjoyed may be found.

A new treaty must be based upon an achievable set of minimum standards, avoiding unnecessary conflicts and laying a foundation for the broader acceptance of the rule of national treatment in respect of all rights and benefits accorded right holders in works and in phonograms. It is neither necessary nor desirable to embark on a comprehensive effort to harmonize copyright and neighboring rights systems. That is a task for the future and itself will only succeed if it is based on a full understanding by negotiators

of the very real and deeply felt legal, economic and social roots of these systems. That understanding can produce in time a considered negotiation to refine and stabilize the contours of copyright and neighboring rights, leading to predictability and a greater confidence in national treatment. But it is the work of another day.

Today we need a treaty that, for the phonographic industry, should address the following areas:

(1) the exclusive right to authorize or prohibit public performance, communication to the public and broadcasting of phonograms by digital transmissions. Compulsory licensing of the right should not be permitted and right holders should be free to exercise their rights by voluntary collective or individual licensing arrangements;

(2) the obligation to protect technical controls utilized by right holders respecting unauthorized copying and piracy, including the unauthorized interception and utilization of digital transmissions and to mandate the uses of such technologies in accordance with publicly determined standards;

(3) define the concept of reproduction right in terms broad enough to embrace all forms of unauthorized digital adaptation of protected phonograms;

(4) establish the rule that electronic, digital, transmission of recorded sounds does not exhaust the right to distribute such transmissions on a territorial basis, nor to control the unauthorized importation of copies made from such transmissions in a territory not licensed for authorized copying (subject to an appropriate exception for customs unions);

(5) the treaty should provide that exclusive rights are subject to specific, narrowly drafted, legislative limitations that do not conflict with a normal exploitation of the phonogram nor otherwise prejudice the legitimate interests of right holders.

The treaty should establish a full and unqualified exclusive right to authorize or prohibit the communication to the public by means of digital transmissions of phonograms. It should extend to retransmissions of a covered transmission. Compulsory licensing is incompatible with the overriding interest in permitting diverse and flexible licensing arrangements to be reached between right holders and the many different program suppliers that will emerge in digital and multimedia environments. Right holders may, in many cases, need to resort to collective administration of rights to simplify the granting and administration of licenses in transnational telecommunications involving many different commercial users and, in the case of personal and private reproduction, ultimate consumers. But collective administration should not, in general, be mandated.

It would be highly desirable for the treaty to lay down specific obligations respecting the imposition and operation of systems of remuneration to mitigate the consequences of private copying, particularly levies on hardware and software. Discussions over the new instrument and Berne protocol in WIPO suggest, however, that this may be premature. Whether the subject is dealt with as a minimum obligation in a new treaty for the protection of phonogram producers depends in the first instance upon whether independent and

equal benefits are established for authors within the framework of the Berne Convention.

A new treaty should, however, deal with one of the most important aspects of private copying in digital contexts: assuring that States imposing such levies do so without prejudice to the exercise and enforcement of the exclusive right of reproduction by electronic delivery systems. In the context of the Berne Convention, where digital technology makes possible the exercise of the exclusive right of reproduction through practical technical controls, the limitation of rights to an equitable remuneration appears to contravene the limits established by Article 9(2) of the Convention. At the very least, this ought to be affirmed in respect of all right holders.

The treaty should create specific obligations respecting technical means to combat piracy, administer and enforce rights. This is an important element of its character as a digital technology agreement and involves systems of identification of digital recordings, the origin of their manufacture and administration of public communication of rights. It is not necessary to recapitulate the enforcement provisions of TRIPS.

The ability of consumers and commercial users of digital systems to utilize recording and information processing technology to create new commercial products using protected sound recordings will often infringe the reproduction right enjoyed by phonogram producers. The scope of this right must be clarified so that producers can both protect their recordings and, where appropriate, enjoy the commercial market which digital technology has created by increasing the power of consumers to appropriate and utilize preexisting materials in their own creations. In information highways it is critical to avoid sanctioning regimes which, as conditions of entry onto the distribution system, require the surrender of exclusive rights respecting reproduction or adaptation.

Additionally, to the extent that the reconfiguration of preexisting analog sounds into a new digital edition involves the creative selection, coordination and arrangement of those sounds digitally, incentives for substantial and continuing investment in such activity will only be protected by a broadly recognized reproduction, or specially drafted adaptation right.

The treaty would not address the full complement of proprietary rights which producers and other right holders require in an intellectual property regime and would not address the concerns of other right holders outside the use of phonograms in digital contexts. That does not mean, however, that it should be a treaty securing rights only for phonogram producers. The benefits of the treaty should extend to other right holders as well, particularly performers. What is contemplated is an agreement that is much narrower in scope, more sharply focused on the phonogram in digital contexts. But it must not exclude relevant right holders within that narrower focus.

The work on the new instrument and Berne protocol appears frankly becalmed. No concrete program that commands broad support appears to have emerged from governments. Perhaps that is natural since no concrete proposals have emerged from the affected interests. The recently agreed delay in the work of the governmental committees considering the protocol and the new

instrument may result in a consensus proposal from governments later this ear. We are, however, pessimistic. It is not that the governments lack goodwill or wisdom; it is simply that the real parties in interest that governments serve--right holders and consumers--are themselves in disarray and disagreement over what must be done to meet the future. And the problems put on the table by WIPO are a long and daunting agenda.

IFPI believes that an initiative to revitalize the modernization of authors' rights, copyright and neighboring rights must come from the private sector, creative communities. We must use this hiatus between now and the end of the year to convene new private sector groups to make proposals based on an appreciation of our interdependence, our symbiosis. We must begin to talk about fundamental interests, how they can be secured without damage to any part of the creative community and seek a set of balanced intellectual property rights that permits us to serve the public fully and fairly.

COMPUTERS, DIGITAL TECHNOLOGY AND COPYRIGHT

by

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1. PROBLEM

Information culture in the coming era will be characterized by digital technology. The age of digital information and electronic distribution of digital works has already begun. We are constantly hearing the word "multimedia" which sounds like a magical word to generate something special and innovative.[1]

A transformation of some of the fundamentals and concepts of the copyright regime is now occurring. For example, the distinction between telecommunication and broadcasting is in some instances disappearing. The same applies to a more fundamental distinction between work and information. Copyrighted works in a tangible medium (book, phonogram, video, etc.) are converted into a quantity of digitized data.

The main concern in this paper is how to secure the enforceability of copyright, particularly with regard to mass copying and multimedia licensing. Mass copying is perceived as one of the most serious copyright problems caused by modern high technology, and aggravated by the digital technology which easily enables anybody to make a copy of exactly the same quality as the original. Difficulties in obtaining copyright license for multimedia products frustrate a variety of multimedia businesses throughout the world.[2]

As an attempt to overcome these unprecedentedly difficult situations there are two basic approaches: one is based on a legislative model and the other on a contractual model. My interest is to develop a contractual system which makes copyright enforceable as a private right and protects copyrighted

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[1] The term "multimedia" is widely used, but its meaning needs further articulation, particularly in order to determine its legal implications. A critical comment is made, for example, in Information Infrastructure Task Force, Green Paper on Intellectual Property and the National Information Infrastructure--A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, July 1994, p. 24, which points out that the terms "multimedia" and "mixed media" are, in fact, misnomers, because it is the types or categories of works included that are "multiple" or "mixed," not the media. The Green Paper further says that "the very premise of a so-called 'multimedia' work is that it combines several different elements of types of works into a single medium."

[2] As digital technology spreads, concern about mass copying and multimedia licenses has increased.

works against unauthorized mass copying in the age of digital technology. The contractual system discussed here makes the copyright regime compatible with business and technology, by making full use of modern high technology. For that purpose I have proposed two contractual models.[3] Let me start with these two proposals.

2. COPYMART: 1993 PROPOSAL

The following is a summary of my 1993 proposal presented at the WIPO Symposium at Harvard Law School in 1993 (see Fig. 1).

2.1 Copymart (CM)

Copymart is a contract-based transaction model for copyright, which is a registry of copyright as well as a market for copyright transactions. It consists of two kinds of data bases, namely the copyright market (CRM) and the copy market (COM). Copymart may operate as a global network, making no distinction between domestic and foreign copyrights. There can exist multiple numbers of such copymarts, which form a competitive copyright market made up of copyright businesses.[4]

2.2 Copyright Market (CRM)

The copyright market (CRM), one part of copymart (CM), is a data base in which individual right holders, organizations or agents that are authorized to do business in copyright matters can file their copyright information, including identification of the name of the author and right holder, categories of copyright and neighboring rights, kinds of works, a brief description of works, duration of copyright, licensing conditions and terms relating to the copyright and neighboring rights, prices in accordance with the scope and type of use of copyright, etc.

The copyright market (CRM) makes it possible for its customers to find works suited to their purposes and to obtain licenses for their uses. Licensing conditions and terms may be changed by right holders by using a password. The change may be made either on any item registered or on certain items specified by the value-added-network (VAN) system. Works may be described by writing outlines with several key words or sentences, or by demonstrating a small portion of a musical work or picture.

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[3] The 1989 model was Z. Kitagawa, "Copyright Clearance or Copy Sale?--A Thought on the Problem of 'Mass Right'," in AIPPI Journal, International Edition (Japan), 1989, pp. 207-215, and Archiv für Urheber-, Film-, Funk- und Theaterrecht (UFITA), No. 117, 1991, pp. 57-69. The 1993 model was Z. Kitagawa, "Copymart: A New Concept--An Application of Digital Technology to the Collective Management of Copyright," WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, Harvard University, Cambridge, Massachusetts, United States of America, March 31 to April 2, 1993, WIPO Publication No. 723(E), Geneva, 1993, pp. 139-147.

[4] See Kitagawa, "Copymart: A New Concept..." (footnote 3), pp. 142-143.

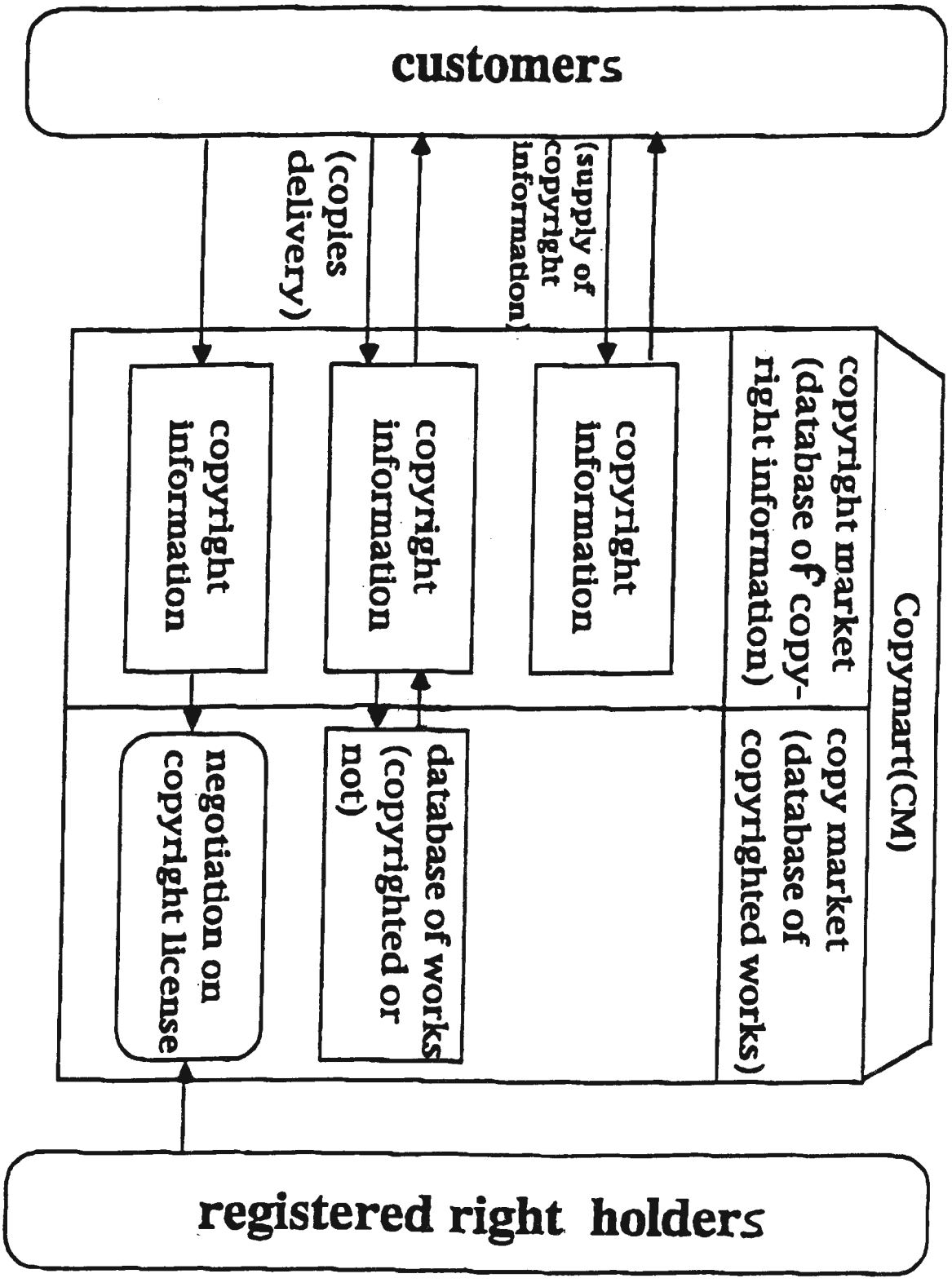

Fig. 1 - Outline of Copymart

Information available in the copyright market (CRM) may also include that relating to unprotected works. The copymart owner can determine to what extent such data should be included, taking the purport of each copymart (CM) into consideration. This extended copyright market, which includes information on unprotected works, will enhance its value, because it can be used by the copymart customer, according to his or her purposes, to access as many works as possible, whether they are copyrighted or not.[5]

2.3 Copy Market (COM)

The copy market (COM), the other part of copymart (CM), is a data base from which, upon request and in exchange for payment, copies of works are distributed to copymart customers. Copies of works of various kinds (literary works, musical works, artistic works, architectural works, graphic works, cinematographic works, phonographic works, computer programs, etc.) can be distributed to customers in accordance with the licensing conditions and terms stipulated by right holders in the copyright market (CRM). Even unprotected works which are registered by the copymart owner in the copyright market (CRM) and are stored in the copy market (COM), may be distributed to customers upon request, in exchange for payment.[6]

2.4 Copymart Contracts

At least three different types of contracts are involved in copymart (CM):

(1) A contract for filing copyright information is concluded between the copymart owner and the right holders who intend to file their copyright and neighboring rights. Filing fees may be imposed upon the right holder.

(2) Another copymart contract is for use of the copymart (CM). This contract is concluded between copymart customers and the copymart owner when customers access the copymart (CM). The access fee will vary depending on the type of use, i.e. single use or multiple use of works.

(3) The third copymart contract is for distribution of copies of works. In the case of distribution of copies of protected works, it is concluded between copymart customers and the right holder. In the case of distribution of copies of unprotected works, the distribution contract is concluded between the copymart customer and the copymart owner.

(4) The copymart (CM) may also facilitate opportunities for further direct negotiations between customers and right holders or multiple right holders.[7]

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[5] See Kitagawa, "Copymart: A New Concept..." (footnote 3), p. 143. The distribution of freeware and shareware in telecommunication networks presents an interesting example in this regard (see infra in 3.2).

[6] Ibid., p. 143. As to the payment for the distribution of unprotected copies in copymart, see the discussion in 2.4 and 2.6.

[7] Ibid., p. 144.

2.5 Copymart (CM) as a VAN System

The copymart (CM) is a contract-based system which integrates the operation of these two types of markets as a VAN system. It is a market where copyright information is offered and copies of works, copyrighted or not, may be obtained in accordance with the licensing conditions and terms.

The copymart (CM) may become competitive if multiple copymarts are able to distribute a variety of works. As they grow and effectively function, there emerges a coexisting social system of copyright, technology and business.[8]

2.6 Payment System

The VAN system underlying the copymart (CM) regulates the payment system.

The filing fee would be paid to the copymart owner by right holders at the time of filing the copyright information. An access fee would be collected from copymart customers who use the copyright market, and would likely be lower for a single use of one category of works, whether copyrighted or not, compared with the multiple use of various categories of works.

Payments for copies of copyrighted works distributed to copymart customers are made by customers through the copymart (CM) to the right holder, either through the VAN system or by using a particular device to gain access to the copymart (CM). Integrated circuit cards (IC cards), prepayment cards or vouchers could be used as such devices. Payments for copies of unprotected works are made by copymart customers to the copymart owner through the copymart.

Special service fees may be charged for facilitating direct negotiations between customers and right holders in the copymart (CM).[9]

2.7 Copymart (CM) as a Collective Management System

The copymart (CM) assumes that right holders themselves take the initiative to file their copyright information with the copyright market, including the licensing conditions and terms. Copymart customers access copyright information filed in the copyright market (CRM) and obtain copies of works of various kinds from the copy market (COM) in exchange for payment, automatically made in accordance with the payment terms set forth in the copymart (CM). Consequently, this transactional process functions as a kind of collective management system of copyright.[10]

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[8] Ibid., p. 144.

[9] Ibid., pp. 144-145.

[10] Ibid., p. 145.

2.8 Copymart (CM) as a System Contract

Our society has to deal with problems which have been caused by digital technology. These are, for example, the handling of legal matters relating to mass rights in contracts, such as multiple claims in credit card transactions, ticket reservations in the travel agency business, collective settlement of debits and credits in electronic funds transfer (EFT). Collective administration of copyright is also a typical example of such problems.

Common to these problems is the use of a computerized information network system which combines data processing and telecommunication. We may characterize these transactions as "system contracts."[11] It goes without saying that the proposed copymart (CM) is a typical example of such system contracts.[12]

2.9 A Predecessor: Copy-sale Model 1989

2.9.1 Copy-sale for Traditional Works

The predecessor of copymart (CM) is the 1989 copy-sale model for printed materials.[13] The copy-sale model presupposes that publishers sell a part of a copyrighted work. It is also based on contracts for sales of a part of books or journals.[14]

Under the copy-sale model, a copying record is electronically stored in copy machines equipped with a data processing function, and payments for copies made are transferred to the account of each right holder through a VAN system. The copy-sale model is designed for traditional works such as books or journals. Its basic features are as follows[15]:

(a) books or journals are sold by copy at bookshops or other facilities;

(b) "identification data," including the author, publisher, title, page and per-copy price are printed invisibly on each page of the book or journal, by using a bar code system[16] or OCR (optical character recognition);

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[11] See Kitagawa, "Der Systemvertrag--Ein neuer Vertragstyp in der Informationsgesellschaft," Festschrift für M. Ferid, 1986, pp. 219-238.

[12] See Kitagawa, "Copymart: A New Concept..." (footnote 3), p. 145.

[13] See supra in footnote 3.

[14] This type of business has already been introduced by "CLARCS: Copyright Licensing Agency's Rapid Clearance Service" of CLA, the UK's reproduction rights organization.

[15] See Kitagawa, "Copyright Clearance or Copy Sale?..." (footnote 3), UFITA, pp. 64-66.

[16] A new digitized bar code system is now available, which makes it possible to print on each page identification data of a negligibly small size in digital format.

(c) the copy machine is equipped with a data processing function to read, store and process the invisibly printed identification data of a copyrighted work;

(d) copying is permitted only by using a particular access device such as integrated circuit cards, prepayment cards or vouchers;

(e) such an access device electronically connects an act of reproduction with the right holder's identification data;

(f) payments for copies made are collected from each user and then distributed to each right holder based on the copying record in the copy machine.

Digital technology is utilized especially in (c), (d), (e) and (f). The value-added-network (VAN) system which underlies this model provides the technology to integrate the printed identification data described above, the data processing of the copy machine and the user's data as a computer-assisted information system. It follows that payments for copies made are automatically sent to the account of copyright holders. It is clear that under the copy-sale model copyright is fully enforced as a private right.

2.9.2 Copy-sale in Non-print Electronic Publishing

It is to be noted that the copy-sale model is already operating in the new business of non-print electronic publishing. Compared with traditional publishing, the copy-sale scheme in electronic publishing is, technologically speaking, an advanced one, because the copyrighted works are all digitized.

Most on-line information services offer their customers access to data bases provided by a variety of publishers.[17] The services negotiate contracts with the owners of the data bases for the right to distribute them, and pay royalties based primarily on how much the data base is used. Copies of digital works in a data base are distributed by agreement, with payment to be made in accordance with the length of time spent using the data base.

The copy-sale model is operative in the field of electronic publishing. With the extended use of digital technology, however, it may be utilized as a collective management system of copyright in almost all kinds of copyrighted works. The copymart (CM) I have already summarized is an improved version of the copy-sale model.

3. RECENT PROPOSALS

3.1 Proposed Models

"Xanadu," proposed by Ted Nelson, is a global paradigm which may contribute to solving the problem of mass copying. The licensed network of digital storage delivery centers, which is Xanadu's core system, functions as

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[17] See some examples infra in 3.2.

a data base and copyright clearing house. While a further study of this paradigm is necessary to articulate its legal implications, it seems to be quite similar to my copymart model.[18]

Another new concept and architecture is "Superdistribution," which was proposed by Ryoichi Mori in 1983. This is a technological model for a software distribution system in which software is made available freely and without restriction, but is protected from modification and modes of usage not authorized by its vendor. The patented technology of copy protection in Superdistribution eliminates the need for software vendors to protect their products against piracy. The Superdistribution architecture provides three functions: administrative arrangements for collecting accounting information and fees for software usage; an accounting process that records and accumulates usage charges, payments and the allocation of usage charges among different software vendors; and a defense mechanism, utilizing digitally protected modules, that protects the system against interference with its proper operation.[19]

Though its legal implications need to be further clarified, the system of Superdistribution may be utilized in the future as one technological solution for my copymart model concerning computer programs, if the entire system is based on contract.

One of the most exciting projects currently underway is the International Identification System, developed by the Agency for the Protection of Programs (APP) at the request of WIPO.[20] This is a deposit system for software and digital works, under which a codified identification number is put on each work. The identification number indicates the country of deposit, the organization holding the work, the deposit number, the date of deposit, the type of the work (primary, compilation, adaptation, etc.), and also licensing conditions. This system may identify subsequent transfers of copyrighted works and provide prospective users with necessary information regarding licensing. The International Identification System aims at establishing a worldwide deposit interconnection linked to a reliable identification system.

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[18] He himself mentioned this similarity when he heard my special lecture at a symposium. I had a brief but exciting talk with him after my presentation. My lecture, "Recent Developments in Intellectual Property Rights," is published in the Computer World '89 International Symposium on Artificial Intelligence--Multimedia and Human Interface, pp. 25-34.

[19] Ryoichi Mori and Masaji Kawahara, "Superdistribution: the Concept and the Architecture," The Transactions of the IEICE, Vol. E73, July 1990, pp. 1133-1146.

[20] See Laurence Guédon, "International Identification of Computer Programs and Information Technology Products," WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights (footnote 3), pp. 171-185.

Two more proposals come from Japan. One is the Centralized Organization for Copyright Information.[21] The other is the Digital Information Center.[22] Both proposals are to set up an organization to provide a more workable legal environment for the multimedia age. The Copyright Council will take some more time before making a final report on its proposal. It tentatively recommends the establishment of a system for appropriate and effective clearance of rights in preexisting works which are used as source material for multimedia software.

The above-mentioned Centralized Organization for Copyright Information is proposed as a system which centralizes the right-information of various copyrighted works administered by the respective organizations representing the right holders, and which offers this information to users through a single channel. The proposed centralized organization will take charge of the management and operation of such a system. The proposal furthermore suggests consolidating existing collective administrative organizations in respective fields and improving their license systems (e.g., the introduction of a blanket licensing fee for a series of uses of works). Such a single system as a registry for right-information would be established, either by legislation or by agreement in order to consolidate all the relevant organizations, associations and societies. If this system were to prohibit any other contract-based systems from operating in the market as registries, its exclusivity would not be compatible with the underlying policy of copymart (CM).

The Digital Information Center is proposed as a collective administration center where copyright information is readily accessible and copyright clearance can be efficiently realized. It presumes that right holders voluntarily register their copyrights and neighboring rights and set their licensing conditions at the Center. Through the Center, copyright holders will license their rights to others for multimedia use. The Center collects royalties from users on behalf of the right holders and reimburses them to them. The Center also offers relevant information as to registered works, including a description of the work, the name and address of the right holder, royalty fees and licensing conditions. The Digital Information Center is a contract-based approach, similar to my proposed copymart. Its operation is focused more particularly on the copyright clearance system for multimedia works.[23]

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21 The November 1993 proposal by the Preliminary Report of the Multimedia Subcommittee of Copyright Council of Japan's Agency for Cultural Affairs (Japanese).

22 "Exposure 94," the February 1994 proposal of the new rule on intellectual property for multimedia by the Multimedia Committee of the Institute of Intellectual Property (MITI) (Japanese - English).

23 It is not clear whether the proposed Digital Information Center is intended to be exclusive. If it is, it may not be compatible with the concept of competition. It is recommended that multiple numbers of such institutions come into existence in order to accelerate a better dissemination of copyrighted works for the use of multimedia products with reasonable remuneration.

3.2 Digital Information Products in the Market

As digital technology becomes more and more advanced, we often see new information products or new ventures in which digital data and information are disseminated to users in such a way that copyright may be simultaneously cleared. This is a contract-based approach to copyright clearance, an application of the copymart (CM) concept. Photos, art or books stored in a digitalized form are put on the market with such a copyright clearing function.

There are at least two kinds of copymarts practically operating in the market.[24] One is the system which provides copies of works, copyrighted or not, and collects fees through telecommunication systems. The other is the package-type copymart such as a CD-ROM. Here the data stored on electronic devices like CD-ROMs can be used standing alone, but fees are collected through the VAN system built by network providers, since the use records are electronically registered.

Two examples of package-type copymart from the software distribution system: the "Software Envelope System" [25] and the "CD Showcase."[26] The Software Envelope System offers to users software in encrypted form. In accessing the envelope users are provided with copyright information and further obtain licensing conditions stipulated by the licensor, such as restriction on reproduction, modification or downloading. In cases where users want to use particular software, the software is decrypted, on entering an identification number, by running a certain program which also documents every transaction regarding the software and provides accounting.

The CD Showcase similarly enables software publishers and resellers to take advantage of low costs and highly customized services and customers to make informed decisions--"try and buy" and in-house shopping. The above-cited CD-ROM distribution system is a contract-based one, which combines a copyright registry and a delivery system with regard to software. The encryption and decryption of software is a technological mechanism making the distribution contract operative as a copyright clearance system.[27]

I would now like to briefly mention the copymart utilizing a telecommunication network. Let me present the example of NIFTY-SERVE in Japan, which distributes computer programs through such a network.[28]

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[24] The following examples are just to show what the copymart looks like in actual business.

[25] The product of Infologic Software, Inc.

[26] The product of IBM.

[27] See, as to further technological aspects of controlling access to protected works, Information Infrastructure Task Force, Green Paper (footnote 1), pp. 108-116. See also R. Mori and M. Kawahara (footnote 19).

[28] This service corresponds to "CompuServe."

Firstly, a member user of NIFTY-SERVE provides, as a vendor, software to SOFTEC (on-line software distribution). In other words, a vendor and prospective purchasers first conclude a licensing agreement via NIFTY-SERVE, then NIFTY-SERVE collects licensing fees on downloading of software and sends them to the vendor, after subtracting a handling charge imposed by NIFTY-SERVE. Currently, due to the capacity of the telecommunication systems, software with approximately one megabyte memory is mainly distributed through SOFTEC. Other services NIFTY-SERVE provides are to distribute freeware and shareware. The relationship between this type of service and the on-line software sales service is inevitably connected with the issue of copyright.[29]

NIFTY-SERVE also distributes information on newspapers for 30 to 200 yen per minute, and information on companies for 400 yen per minute. This is not only an information distribution service, but also the distribution of copies of works. The above services still have to be refined to fulfill a function as a copyright market, because fees for searching for copyright information and fees for distributing information on copyrighted works are put together into one category without making a distinction between the two.[30]

4. FACTORS AFFECTING THE FUTURE OF THE COPYRIGHT REGIME

4.1 Analysis of Issues

According to the prevailing view, digitized data is subject to copyright protection, though some experts do not agree or have doubts. As digital technology is more and more pervasively utilized in a wide range of copyrighted works, the existing copyright regime may partly lose its substance or eligibility as a legal tool, because digital technology inevitably puts copyrighted works fixed in certain media into a constant process of transformation and metamorphosis. This process forces us to consider quite new issues, such as the copyrightability of digitized works, which no longer need to be fixed, the necessity of adding new neighboring rights, and the enforceability and efficiency of the copyright regime itself.

It is questionable whether digitized works may still be eligible for coyright protection. Digitized works in a data base, particularly when they are subject to daily modification as a result of interaction, are a quantity of information. For such quantitative information one may argue that there is no expressive form which is essential for copyrightability. Therefore, digitized data cannot be protected under the copyright regime. The generally accepted view asserts that such data is still protectible thereunder.

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[29] The influx of software in the public domain into the copymart contributes, in my view, to a better understanding of the copyright regime and a better system of dissemination of information, particularly in the age of multimedia.

[30] It will take more time for us to see whether these two businesses, namely the information distribution service, on the one hand, and the distribution of copies of works, on the other, are going to merge into one type of business.

However, in order to assert this view, which is acceptable to me, the existing copyright law needs some new additional theory, because the zeros-and-ones data in a digital format may be regarded as having no "expression" or no "expressive form" as a work under the copyright regime. In this regard, I believe that the controllability of the digitized information would be a key word for maintaining its eligibility for copyright protection.[31]

Furthermore, broadcasting and telecommunication are going to merge in some business areas. It is also suggested that digital technology creates new copyright issues, such as multimedia copyright as a new category of copyright, authorship of a multimedia work, right to digitalization as a neighboring right.[32]

As for the enforceability and efficiency of the copyright regime as regards digitized works, which is the main concern in this paper, digital data is easily copied with equivalent quality, easily transmitted, and easily modified. Consequently, right holders are losing the capability to control their own works. On the other hand, it would be difficult for producers of multimedia titles to find the information about relevant copyrighted works and obtain license for their utilization from copyright holders.[33]

Protection of moral rights in multimedia products needs special attention.[34]

4.2 Key Factors for Building New Law Models

Is the relationship of copyright law and technology an intensified ambivalent one or can a system of coexistence of the two be produced? The following are key factors which we will have to take into consideration for finding a better legal system or systems for copyright dissemination and clearance in the age of digital technology.

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[31] The controllability will be denied, for example, if a set of zeros and ones is just an information flow resulting from interactive joint authors in the information network. A data base usually satisfies the condition of controllability, but the concept itself will need articulation.

[32] Information Infrastructure Task Force, Green Paper (footnote 1), pp. 120-125, tentatively recommends creating the distribution right, modifying the meaning by adding publication "by transmission," etc.

[33] These difficulties alone hardly justify the introduction of a mandatory license system. See the discussions infra in 4.2.4.

[34] "Exposure 94" (footnote 22) tentatively suggests that there exists a need to either permit the specific waiver of the right of integrity or to limit its application to digitized works. Information Infrastructure Task Force, Green Paper (footnote 1), p. 95, points out that moral rights, because of their non-transferability, may create difficulties for the commercialization of works in the NII environment and the Task Force does not make any concrete proposal, mentioning the Exposure's suggestions. The copymart will reduce these difficulties, because registering right holders are able to set special conditions and terms for moral rights in advance.

4.2.1 Legislative and Contractual Approach Compared

As pointed out above in the beginning of this article, in order to overcome the copyright crisis in an age of mass copying, there are two approaches under consideration: one is the legislative approach and the other is the contract-based approach. Some might say that the contract-based approach is self-evident and therefore needs no particular attention. This is true insofar as an individual licensing agreement which is concluded for an individual copyright clearance is concerned. The situation is, however, entirely different when a contract system is considered as a system for the collective management of copyright clearance using computer technology. It is in this sense that the contract-based approach deserves attention as a legal tool to overcome the copyright crisis.

As to the relationship between the two, it goes almost without saying that the two approaches must supplement each other in the coming age of digital technology.[35]

4.2.2 Single Centralized System vs. Multiple Systems

Assuming that a coexisting system of legislative and contractual approaches is going to be introduced, the next factor to be considered is whether the legislative approach or the contractual approach should adopt a single, centralized system or multiple systems. As for the contractual system, a single contractual system for collectively managing copyright information and works is excluded from further consideration, because it would be impossible to set it up. From a legal standpoint, a gigantic monopolistic system necessarily conflicts with the laws of fair competition. The contractual system is thus by nature suited to multiple systems, which may operate competitively.

The situation with the legislative approach is somewhat difficult. It is simple to assert that a single management system be set up by law, but this would not be feasible either, because copyright organizations regarding different categories of works are hardly unified as a single organization. A consolidation of these copyright organizations with the function of coordinating various interests may, at most, be conceived.

4.2.3 Governmental Organization vs. Private Organizations

It is generally not recommended that governments intervene in the area of copyright dissemination and clearance, because copyright is a private right with an international character. Establishing a uniform system of copyright registration may under some circumstances need governmental support. However, governmental or government-assisted systems of collective management of copyright clearance, when they differ greatly from country to country, would

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35 It is appropriate and also necessary that the copyright authority, domestic and international, recognizes the important role such coexistence may play in the digital world.

cause legal and technical complications for users of copyrighted works, as digital technology globally spreads.[36]

4.2.4 Licensing Scheme

As multimedia reveals to us unprecedented difficulties in obtaining licenses for various copyrighted works used in creating multimedia products, many consider the statutory introduction of a mandatory license scheme necessary. This view first appears to be irresistible, but it is questionable how multimedia can by itself justify the introduction of a compulsory license scheme. Therefore, it is necessary to find specific reasons which would justify the introduction of a mandatory license for multimedia products.

Licensing agreements concerning multimedia will have to deal with a combined type of license: single licenses, multiple licenses and/or packaged licenses, etc. This is a kind of business which can best be developed in private hands in a systematized computer network.

4.2.5 Copyright as Subject Matter of Transaction

The current copyright regime, in my view, will survive and revive if it is appropriately supplemented by a contractual system for collective copyright transactions. The validity of a contractual system has been neglected until now in attempts at solving the mass copying problem. Competition in the market is not foreign at all to copyright and its transactions. Considering that we have enough technology for creating new contractual models, the importance of the contractual system cannot be underestimated in the age of digital technology.

4.3 System Assessment Council (SAC): A Proposal

Many fields of intellectual property law have been protected since the 19th century under international treaties. This is due to the universal nature of intellectual property rights. It is true that national laws show us undeniable differences from country to country, which are detrimental to the development of technology and business. Nevertheless, current attempts at harmonization of these differences are justified by the assumption that intellectual property rights are universal in nature.

The problem of mass copying presents a fundamental challenge to the current copyright regime. At present, there does not exist an appropriate and workable solution. At the same time, it is currently an inevitable trend in many countries to introduce some kind of multimedia and digital technology-oriented law reforms. It is premature to think of the harmonization

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[36] Additionally, special attention should be paid to the fact that administrative jurisdictions are now crossing over areas of telecommunication, broadcasting or "narrowcasting," information network, multimedia, etc. If these jurisdictions are not reasonably coordinated, domestic administrative systems might be detrimental to the development of copyright transactions in the digital world.

of such attempts. But it is not premature to start studying standards for evaluating these ongoing attempts at an international organization such as WIPO.[37] This kind of study group, which may be called "System Assessment Council (SAC)," should engage in the analysis of standards with regard to each proposed law model. The standards which should be assessed are those relating, among others, to evaluation of users' interests, providers' interests, distributors' interests; standards for evaluating business interests, consumer interests, public interests, social interests, domestic and foreign interests, etc. The SAC is a research group which aims at maintaining independency and objectivity.

5. COPYMART REVIEWED

The remaining task in this paper is to review the copymart (CM) proposal in the light of the preceding discussion.

The copymart (CM) is a contractual system which establishes both a copyright-registry and copy-dissemination-data base. It also offers to the public a marketplace where direct contracts are concluded between right holders and users. In other words, in this system right holders provide copyright information and deliver through copymart (CM) copies of their copyrighted works under the licensing conditions and terms set forth by themselves, and users obtain copyright information regarding various kinds of works and get their copies in exchange for payment. The copymart (CM) also offers the registration of unprotected or freely available works and delivery of copies to their users. It further operates also as a marketplace for direct negotiation between right holders and users concerning licensing conditions and terms.

This concept requires further consideration on the following issues: its compatibility with legislative approaches (for example, the copymart will not be compatible with a legislative introduction of a monopolized compulsory license scheme for facilitating the creation of multimedia works, but is compatible with a copyright codification and registration system functioning as a supporting tool for the copymart); the multiplicity of copymart (CM) (thus, not compatible with the introduction of a single monopolized system of distribution); copymart (CM) as a market for direct transactions between right holders and users; the inclusion of single licenses, multiple licenses, or packaged licenses (copymart is not restricted to multimedia); the articulation of the re-use and interactive use issue; the relationship with the existing collective clearance systems (as a rule, no cumulative relation)[38]; the moral rights issue, etc.

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[37] A joint undertaking of WIPO and other competent organizations may be suitable for such a study.

[38] This means that a user who paid in the copymart may not obtain a right to reimbursement from collective clearance systems, and vice versa. There are apparently no legally meaningful interrelationships between the copymart and existing collective clearance systems which do not leave individually identified records of reproduction of copyrighted works.

6. CONCLUSIONS

In this paper, I have discussed and analyzed several copyright issues which have arisen unprecedentedly and will continue to arise as digitized data penetrates into the copyright regime. The future of copyright law, without doubt, depends on how we reconsider the current system and successfully respond to such trends. With this in mind, I have proposed to set up a System Assessment Council (SAC), in order to evaluate feasibility and efficiency of any proposals and reforms introduced in this regard.

After summarizing the copymart concept which I proposed in 1993 at the WIPO Worldwide Symposium at Harvard University, I have mentioned some recent proposals and have introduced some business operations implementing the copymart model. As the copymart (CM) may apply to various types of business activities (e.g., creation of multimedia titles, access to and acquisition of information for educational or research purpose, "electro-school," "electro-library," "electro-theater," distribution of software and layout-designs, etc.), its increased use in business seems to be inevitable. The concept of copymart needs, of course, further refinement before it can be practically operable. It should also be kept in mind that the copymart model, even if implemented, can offer only a partial solution to the problem of unauthorized reproduction of copyrighted works. However, if successfully introduced and accepted, its practical benefits and cultural implications are not negligible. The proposed copymart (CM) may contribute to substantially solving the problem of unauthorized mass copying and, to a much greater degree than now, to facilitating and disseminating copyrighted works of various kinds with an assured system of royalty payment. This will certainly enable the present copyright regime to survive and copyright to be revived as a private right in the era of digital technology and information culture.

The author wishes to thank Mr. Takahiko Kinoshita and Mrs. Michelle Tan, Research Staff of the Kyoto Comparative Law Center, for their assistance in checking his manuscript.

PUBLISHING IN THE DIGITAL AGE: ACQUISITION AND ASSIGNMENT OF ELECTRONIC RIGHTS

by

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INTRODUCTION

The development of electronic media gives rise to a certain number of questions from publishers. The questions are legitimate ones, since this type of exploitation introduces elements that are new in relation to customary editorial practice, notably the following:

-- an increase in information storage capacity;

-- the appearance of new means for the dissemination, especially the remote dissemination, of works;

-- the possibilities available to publishers and users of the media for reprocessing and modifying works.

The question before us today is that of the modes of acquisition and assignment of electronic rights, and the first thing that we have to do is define those rights.

They are in fact all rights pertaining to the fixing, to the partial or complete reproduction and to the representation of an intellectual work on or from an electronic medium.

Fixing devotes the legal implications of storing a work on an electronic medium according to certain technical processes, backed up by an organization determined by the desired means of consultation.

Reproduction denotes the legal implications of transferring all or part of the contents to another medium, whether electronic or not. In this connection, reproduction on paper from an electronic medium must be considered with particular care and treated in contracts as forming an integral part of the electronic rights. Those rights therefore relate not only to the possible uses of the media, but equally to all uses that it is possible to make with the media as a starting point, such as paper sub-editions.

Representation denotes the legal implications of having direct access to the work by calling it up on a screen, which may take the form of transmission over a network.

Acquiring and exploiting literary property is all in a day's work for publishers. There is a body of customary usage and practice, expressed in

long-established standard contracts, the structure of which should serve as a starting point for the acquisition of electronic rights. For instance, when a publisher encounters the opportunity of recording a book on CD-ROM, the rules of the author's contract have to be applied, subject to some adaptation. The logic is not fundamentally different, however, from that of adaptation to paperback or book club format.

Certain new features do nevertheless appear, which makes for an element of discontinuity in the contractual practices of publishers. This happens in the more and more frequent event of the direct creation of multimedia products which, being by nature composed of works governed by different kinds of legal and economic logic, lead to important innovations, both in the contractual practice that ties authors to publishers and in the relations between publishers and industrial partners in multimedia creation.

The assignment of rights likewise embodies an element of uncertainty in that the dematerialization of creative works affords the user hitherto unknown possibilities for the use of works. The publisher will no longer be in the classic position of selling a medium, namely books, the "derived" uses of which are somewhat limited, being essentially confined today to reprography and lending. The publisher will therefore have to set up a contractual system with users, taking care to define very precisely the use of works in relation to the specific circumstances of each party: legal entity, professional user, natural person.

In the first part of my presentation, which is devoted to the acquisition of rights, I shall deal with:

-- the application of classical contractual practice to electronic rights, and the interaction with authors that it is likely to cause;

-- new conditions for the acquisition of rights in the context of multimedia works.

In the second part, devoted to assignment of rights, I shall deal with:

-- the method of management (collective or individual) of electronic rights;

-- the licenses granted to persons entrusted with public service responsibilities;

-- licenses granted to private individuals.

I. ACQUISITION OF ELECTRONIC RIGHTS

A. FROM THE PUBLISHING CONTRACT TO ELECTRONIC RIGHTS

1. Application of Publishing Contract Rules

We shall use an observation based on positive law as our starting point. It is generally recognized in most legal systems, on one basis or another, that any rights that the creator of a work has not expressly assigned to the publisher remain with him.

The aim of this rule is to allow the author or the holder of rights:

-- not to dispose of the work at a time when the prospects of its exploitation are not yet thoroughly known;

-- to negotiate royalties (percentage, advance) at a time when a particular form of exploitation has become possible;

-- to select those responsible for exploiting the different kinds of right himself.

This rule for the interpretation of contracts, which is applied strictly by the courts, notably in France, will certainly be made stricter still, precisely on account of the balance that a given court will wish to maintain between the growing number of exploitation possibilities on the one hand and the difficulty for authors to monitor the uses made of their works on the other.

It is interesting to see how the institution of the publishing contract established itself in France in response to the latent challenge to the publisher represented by the limited, partial assignment of the rights of authors.

The standard contract provides for the following:

-- assignment for the entire term of the literary property rights, in all languages and for all countries, which makes the publisher the true representative of the author, having among other things the right to bring legal action to ensure respect for the rights in the works;

-- assignment on a very broad scale, covering all forms of exploitation of the work, either by reproduction or by representation or performance; as far as reproduction is concerned, all forms of incorporation in a paper medium are precisely specified, while for representation or performance provision is made for all the adaptations that direct performance of the work to the public is likely to entail; an exception to this is the case of audiovisual adaptation of the work, which is subject to a separate contract in French law.

An assignment of such importance is bound to involve proportionate compensation.

The publisher is under the obligation to exploit the work, failing which the author can have his rights back. A distinction should however be made between the obligation to exploit the main edition, which is an obligation to produce results (publication of the book, followed by permanent and uninterrupted exploitation) and derived exploitation, the latter being no more than an obligation regarding the medium, under which the publisher must, within the limits of professional practice, put in hand such action as will permit the production of a foreign language edition, a paperback edition or an audiovisual adaptation.

Each of the rights assigned must be accompanied by an indication of the remuneration payable to the author in the event of exploitation, failing which the assignment is null and void.

The arguments in favor of these contractual arrangements are the following:

-- The publisher takes the risk of publishing the work, so it is normal that he should be able, if the opportunity arises, to offset the initial investment with other forms of exploitation, made possible by the existence of that initial risk.

-- Unitary administration is essential for all the rights in one and the same work: the publisher is the best placed to investigate all possible forms of exploitation on the basis of a given work, and also has the necessary contacts for the purpose.

These arrangements are perfectly suitable in the case of the fixing of a book on an electronic medium, as it is actually a continuation of the exploitation of the book, indeed even a mark of its success.

In accordance with the above principles there should be provision for all the media on which the work is liable to be fixed, and also all the modes of consultation that involve no fixation but simply transmission.

The listing of known media at the time of the conclusion of the contract is not really a problem. It will be advisable to try, as far as possible, to adapt the legal conditions of the assignment with riders, at the same time avoiding as far as possible such sweeping generalizations as "the author consents to fixing on all electronic media, both present and future." Not that such a formula is devoid of meaning, but it does leave the door open to possible legal dispute.

There should also be a detailed enumeration of the forms that the representation of works can take, with a distinction being made between consultation on the internal networks of private companies or public institutions, such as groups of associated libraries, either in one country or across borders. Due account should also be taken of the possible consultation of products on networks intended for the public at large. The express agreement of the author is indispensable for such consultation.

In the case of electronic exploitation, however, the following specific characteristics should be taken into consideration.

New Means of Consulting Works

The precise mention of the type of medium concerned and the intended form of consultation is not sufficient, however: the fixing of a book on an electronic medium is bound to cause changes in the presentation of the work to the public and in the manner of its consultation. Fixing on an electronic medium allows the public to browse through the work according to a non-linear logic, and to move from one part of the work to another across links specially created for the purpose. The resulting change may be no more than just technical, but it is liable also to threaten the integrity of the work, or even result in the creation of a second work. This is why the publisher has an interest in specifying clearly in the contract what aims are being pursued and the consequences that those aims might have on the contents of the work, and in assuring himself of the author's agreement to all possible adaptations, and hence to the validity of the assignment.

Respect for Moral Rights

Particular care has to be taken over respect for moral rights, particularly with pictures, in which the sheer range of possibilities for the reprocessing of works is bound to present problems (see below in connection with multimedia works).

Remuneration of Authors

Finally, the remuneration base will have to be adapted to electronic exploitation. Very often, as the book is sold at a fixed price, that price serves as the basis for royalties. The absence of a similar system applicable to electronic media will make it necessary to calculate remuneration on the basis of the publisher's turnover, all the more so since the exploitation of the work will not necessarily take the form of the sale of a material medium (which applies to everything displayed on a screen).

2. The Debate With Authors

The proposed logic, which consists in applying publishing contract principles to electronic rights, is sure to come up against obstacles at the political level. Authors, or at least the societies representing them, have already been expressing reservations regarding the wording of contracts that provide for the assignment of electronic rights. The authors rightly point out that the expression "electronic rights" covers a large number of rights, each of them capable of giving rise to an extremely profitable form of exploitation. With this in mind, the British authors' society has adopted the following recommendations for the purposes of authors:

-- all electronic rights should be reserved, like all other types of exploitation not specified in the contract;

-- the electronic rights assigned should be specified, each of the uses having to be consented to by the author on agreed terms.

In the event of such an arrangement being impossible to negotiate, the following applies:

-- the author may assign the electronic rights to the original publisher if the latter carries out exploitation in that form, in which case the remuneration, the advance, the electronic format and the period of exploitation will have to be agreed upon before production;

-- if the original publisher of the printed work does not do the electronic publication himself but has it done by a third party, the author has to approve the exploitation modes and be paid 80% of the remuneration;

-- the author has to be consulted on any offer of electronic exploitation made to the publisher;

-- the electronic rights have to revert to the author if the publisher does not exploit them within a certain period;

-- authors have to ensure that their works are not altered;

-- if the book is no longer exploited, the electronic rights, even if they themselves are still being exploited, have to be returned to the author.

These recommendations call for a number of comments:

-- Some are inspired by a desire to apply the law on intellectual property, such as the specifying of assignments and the respect for moral rights. Here publishers will have to be careful to draw up clear contracts that will establish, in the event of dispute, that the exploitation mode adopted by the publisher actually conformed to the will expressed by the parties.

-- Others are inspired by considerations of even-handedness in negotiation. An instance of this is the suggested 80-20 sharing of remuneration in favor of the author.

It need not be emphasized that the latter suggestion is hardly in keeping with contractual practice, at least in the French context.

In the case of electronic adaptation by a third party from a printed work, it is the existence of the work that permits the making of the electronic product. This is a typical instance of derived exploitation, comparable to what happens in the cinematographic field, or with the making of a paperback from a hard-bound edition. The need to reward the publisher for his initial investment, which after all is the source of the subsequent exploitations, leads one to recommend instead a 50/50 share.

-- Still other recommendations, finally, are totally unacceptable. The idea that the end of the exploitation of the printed work should cause the electronic rights to revert to the author, while they are themselves still being exploited, seems quite outrageous. It would in effect deprive the exploitation of a work in electronic form of its potential for "taking over" from exploitation in printed form, which is tantamount to denying the very raison d'être of electronic exploitation.

These recommendations show clearly that the discussion with authors is going to be difficult, as indeed it has sometimes been in the field of books.

B. THE FIXING OF WORKS IN MULTIMEDIA PRODUCTS

In spite of having some common features, the acquisition of electronic rights in multimedia works is a question that presents itself in quite different terms.

What do we mean by "multimedia work?"

The definition that I shall use here is the one that we adopted in the White Paper of the National Publishers Association that dealt with legal questions relating to multimedia works.

> "[The multimedia work is] a work incorporating in one and the same medium one or more of the following elements: text, sound, still pictures, animated pictures and computer programs, the structure of which

and access to which are determined by software that permits interactive use."

1. Acquisition of Rights From Authors

The specific characteristics of the multimedia work as compared with a book embodied in an electronic medium have to do with the following:

-- the multiplicity of sources (text, pictures, sound, software and so on): these various sources are not always subject to the same kinds of practice; the scope of the authorizations and the manner of remuneration are different, obliging the publisher to adopt a more intrusive form of management than is prevalent in the world of books;

-- the manner of creation: in the case of books, the natural person is often the primary source of the work; that will not be the commonest situation in the multimedia field: the scale of the investment required and the need for coordination among a multiplicity of contributors who do not pursue the same trade give the publisher a management role in creation that is bound to have consequences for the assignment of rights;

-- the potential for the modification of works: clearly the fixation as such of a preexisting work or of a work specially created for the multimedia product will not always conform to the objective of the publisher; he will therefore have to make alterations and reprocess the various components of the work, which creates a moral rights problem.

Multiplicity of Works

The multimedia work will at the outset be made up of preexisting works. This is particularly true of musical sequences, photographs and three-dimensional works, and also the work of performers and audiovisual works. The reproduction licenses that are issued through the various collective administration systems now in existence will therefore be:

-- non-exclusive, as each owner of rights will be trying to avoid obstructing the exploitation of a work for the sake of just one product;

-- limited to specific uses, as they are today with the reproduction of photographs in books.

To give an example of the wide diversity of authorizations, requests have to be submitted to the following:

-- independent photographers, photographic agencies and management bodies responsible for the field of three-dimensional art (SPADEM and ADAGP) for the reproduction of still pictures;

-- SACEM and SDRM for the reproduction and playing of sound sequences;

-- ADAMI and SPEDIDAM for the performances of performers;

-- audiovisual producers, SDRM or PROCIREP, as the case may be, for sequences of animated pictures.

The Mode of Creation of Multimedia Works and the Acquisition of Rights

A multimedia work will more often than not be created on the initiative of the publisher, who will decide on its content and purpose. That will give him a contractual "right of inspection" in relation to the contributions of which it is made up. This right of inspection of contributions will have to be defined so that it cannot be considered arbitrary and therefore potentially contentious.

The advisable method is to provide for an order that goes from the publisher to the author, whereupon the latter submits his draft contribution to the former, if necessary in a number of instalments; the publisher then requests the necessary alterations according to criteria laid down in the contract. As long as the order has not given rise to acceptance, the assignment of rights has not taken place, and so the publisher is under no obligation to exploit the work.

This method of creation in several stages, combined with the publisher's involvement in the work of an outside or in-house, salaried team, means that the publisher can be considered the original owner of the rights in the work as a whole, either as a collective work or as the creation of a salaried employee, with author's rights reverting to the employer.

However, this original ownership of the rights in the multimedia work as a whole is certainly not sufficient, and it is essential to provide in the contract between the authors and the publisher for an enumeration of the rights assigned in each of the contributions. In particular the publisher will have to ensure that the following rights are assigned to him:

-- the right of reproduction: the right to reproduce the author's contribution or to have it reproduced on CD-ROM, CD-I or any other present or future electronic medium, and to have any originals, duplicates or copies of it made in any format, by any method and in any language; that right will bring with it the right to produce, publish and distribute to the public copies of the work, and also the right to have it translated; the assignment will likewise include the right to exploit the work in another form, either by fixation on another electronic medium or by reproduction on a printed medium;

-- the right of representation: the right to represent the work or have it represented by all processes associated with that method of exploitation, including the public performance of the whole work or extracts thereof, notably for demonstration or promotional purposes; that right will also have to cover any distribution of the product that may be made over the internal networks of companies or groups of companies, libraries or groups of libraries or educational establishments at all levels, and also any other legal entity under public or private law; this authorization will further cover the distribution of the goods for the benefit of a wider public than those on the "télétel" network.

The Alteration of Works and Moral Rights

The structure of a multimedia work may require the publisher to adapt or reprocess the works incorporated in it. In a certain number of cases the author could invoke his moral rights to object to any manipulation of his

creation. It is essential to provide for this eventuality, all the more so since, as moral rights are in principle unassignable, they could give the author the possibility of blocking the exploitation of his economic rights, thereby making the assignment inoperative.

A further distinction should be made here between works predating the multimedia product and works that are created specially for incorporation in it.

In the former case, the publisher's freedom will be limited.

In French law, the courts exercise strict control over the integrity of works. We should remember that the following have been judged breaches of moral rights:

-- the addition of a preface to a book without the author's consent;

-- the publication of a book with extensive cuts;

-- the removal of the background to the subjects in a photograph.

That means that the court ensures not only that the work is in no way altered, but also that the context in which it is reproduced will not have the effect of altering its nature.

For the acquisition of rights not to be merely theoretical, the publisher will therefore have to inform his various sources of all the alterations that are liable to be made to the works, but also of the general plan of the new creation with all its component elements and the essential features of its presentation. The author will have to give his agreement to those various aspects.

In the latter case, the publisher's freedom will be greater. Moral rights cannot predate the creation of the work. The publisher will thus be able, in the commission contract, to specify the exact rules that the author will have to observe when making his contribution. If the contribution does not conform to the rules, the publisher will be able to demand its alteration, or where appropriate to refuse to incorporate it in the overall work. That is all the more true if the work comes under the legal heading of a collective work, which allows the publisher to exercise his editorial powers fully. Case law has been consistent in France in allowing the publisher of a collective work to make such alterations to contributions as are justified by the need to give consistency to the whole work.

We cannot therefore overstress the need for precision in contracts on the moral rights arrangements, which is just as important as on the scope of the assignment of economic rights.

2. Acquisition of Rights and the Publisher's Industrial Partners

The production of a multimedia work may lead the publisher to cooperate with an "industrial" partner, who has the technical and financial means and also the knowledge of the market that will ensure the best possible exploitation of the work.

The collaboration contract between the publisher and his partner will reflect the sharing of responsibilities, which does not present any particular problem. By way of example, one would expect the industrial partner to take responsibility for the following:

-- the physical manufacture of a product, such as the pressing of the compact disc;

-- the design of the packaging of the product;

-- involvement in the definition of functional aspects, and supervision of the preparation of the data supplied by the publisher;

-- in some cases, definition of the general architecture, design of graphic elements and sound tracks and even an outline for the interactive use of the various media (video, audio, text and so on).

This type of collaboration can create uncertainty as to the ownership of the rights in the whole work. The difficulty here stems from the fact that the contribution of the provider of services is to some extent mixed, being split between the rendering of a service and a creative activity eligible for copyright protection. It is essential to find the clearest possible solution to the question of the ownership of rights, by specifying that they are to be assigned to the publisher responsible for carrying out the exploitation of the work. It is therefore advisable, provided of course that relative strengths permit, to specify the creative contribution of the provider of services and to transfer the ownership of that contribution to the publisher. The clause could be worded as follows:

> "The publisher acknowledges that the following contributions [which are specified] by the provider of services are works protected by intellectual property law.
>
> "The provider of services assigns to the publisher the reproduction and representation rights arising in respect of those works for the entire duration of the literary property rights.
>
> "This assignment shall be valid in all languages and for all countries.
>
> "In exchange for the aforesaid assignment, the publisher shall pay by way of remuneration a single lump sum of ...
>
> "The provider of services hereby assures the publisher that the latter holds all the rights on the former's contribution, and likewise guarantees him against disturbance or dispossession of any kind."

If this assignment clause is not to be a dead letter, it could be useful to impose a non-competition clause on the provider of services, who in certain cases may retain rights in elements that would permit the product to be used, being themselves, by nature, incapable of exclusive assignment. This could apply to software, if the provider has taken care of its development or adaptation from a standard software. In such a case the publisher will have only a right of use of the software that is limited to its application to the product.

The non-competition clause could be worded as follows:

"The provider of services undertakes not to produce [CD-ROM, CD-I, etc.] liable to compete with the work that is the subject of this contract, with respect to either the contents thereof or the selection and arrangement of the protected or unprotected component parts thereof. This undertaking shall remain valid throughout the term of the contract and for x years after the termination thereof for whatever reason."

II. ASSIGNMENT OF ELECTRONIC RIGHTS

I should like to lay stress on the precautions that publishers have to take when they license electronic products. Owing to the technical facilities available for the reproduction and dissemination of works, there is a serious risk of the various licensees making unrestricted use of the contents, simply because the technology allows it.

It would moreover seem appropriate to speak of licensing rather than of the actual assignment of rights: assignment of rights suggests that the person acquiring the rights will be exploiting the electronic product commercially, which in fact will not be the case much of the time, as it is the publisher who will retain monopoly control of exploitation.

The licenses we are concerned with here are authorizations of use granted by publishers to their public or private customers, the purpose being to define the use that can be made of electronic works, and the method resembling that used by the publishers of software.

This state of affairs is somewhat new for publishers. Traditionally, the sale of books did not involve contracts with purchasers. Any derived uses of the books (by reprography or lending) came under collective management, either provided for in the law or administered by societies specially set up for the purpose. This prompts a first question: will a publisher of electronic products have recourse to collective or alternatively to individual management of his rights?

A distinction should also be made between the publisher negotiating with public users and with private users, whether legal entities or natural persons, who cannot put forward such arguments as will block or weaken the application of intellectual property rights.

A. COLLECTIVE OR INDIVIDUAL ADMINISTRATION?

This question is an important one, because collective administration by definition leaves the owners of rights less freedom than individual administration with regard to tariffs and the scope of the reproduction and representation licenses granted. One of the objectives of collective administration is indeed to impart some uniformity to the conditions in which works are used. If the scope of the licenses and the remuneration demanded in exchange were to vary according to the individual works in the repertoire of a collective administration organization, that kind of management of rights would be of less interest to users.

However, the exercise of the electronic rights in a work is for the publisher a real market which he can either exploit himself or have exploited by another person or again entrust directly to the eventual user. That means that he will want to retain full control of licenses so that he can adapt their scope to the development of technology.

Using the example of photocopying, collective administration is justified by the following four factors:

-- because the reproduction of works occurs not on the publisher's initiative but on that of the user, it can only be observed after the event, by means of surveys, which by their nature can only be global;

-- the reproductions that are made are widely dispersed, which makes it practically impossible for a publisher to negotiate contracts directly with the legal entities and natural persons making the copies, apart from which the cost would be exorbitant in relation to the aim to be achieved;

-- there is no real market in the field of photocopying, as photocopying is not necessarily intended to be substituted for the purchase of a book, apart from which there is no clear commercial purpose to the use of photocopies, in the sense that those who make them do not derive any direct profit; that is notably the case of all copying done in educational establishments;

-- finally, copying is often done in an environment which, rightly or wrongly, is regarded as affording grounds for claiming public service associations (dissemination of culture, educational programs, etc.) such as will diminish the application of the principles of intellectual property law. This is true of educational establishments and libraries and the institution responsible in each country for legal deposit arrangements. It is therefore a good thing for the owners of rights to gather together and make States apply the principles of literary property that they after all have enacted.

What is the position of electronic rights, and their various components, in relation to these four underlying arguments for collective administration?

Lack of Publisher Initiative

It is clear that in a great many cases the reproduction of a work embodied in an electronic medium will escape the publisher completely. The purchase of a medium containing texts will always give a teacher the means of making paper copy reproductions for use in his teaching. It is hard to see how this kind of photocopying could escape collective administration.

Dispersed Uses of Works

One can on the other hand imagine hypothetical situations in which a publisher may exercise control in anticipation of the distribution of works, for instance over a network. Provided that the server or host computer can, by technical means (such as counting software), monitor the various subscribers and their consumption patterns, the publisher will not necessarily be obliged to resort to collective administration, as he will be talking to only one person. Apart from that, the introduction of such a network is bound to form part of his commercial strategy.

Non-Existent Market

This is one of the fundamental differences between photocopying and electronic exploitation. The latter will be a primary medium for the exploitation of works which will give rise to immediate negotiations between a publisher and the user. Unlike photocopying, which at the outset is not considered a "normal" use of books, the distribution of works by remote means or within the framework of a legal entity may be written into the sale contract as a nominal consultation mode. Similarly, it will often be on the initiative of publishers that a market for the supply of documents on electronic media evolves, as the return on investment is calculated from the start for this type of exploitation.

Public Environment

This is a factor that will certainly continue to be important, militating strongly in favor of collective administration or at least the collective working out of the conditions for the licensing of electronic rights. There is indeed little likelihood that the exceptions invoked by the authorities will disappear as the dissemination of works increases.

Depending on the mode of reproduction and representation concerned, the administration of electronic rights will thus be liable to take one of three forms:

-- collective administration pure and simple for everything resembling photocopying, notably reproduction from an electronic medium to another electronic or a paper medium;

-- collective administration where it is desirable that the logistics of licensing should be collective, whereas the actual contents of the licenses and the remuneration would be worked out by each publisher;

-- individual administration where the publisher has the means of monitoring the use of works electronically. That could happen in the case of the operation of a network for the dissemination of works or for the sale of media to private-law entities for professional purposes.

B. LICENSES GRANTED TO PUBLIC BODIES

Public bodies are in a fairly strong position vis-à-vis publishers, in that they have the option of invoking their public service responsibilities as a means of lessening the application to them of the law on intellectual property.

This can be illustrated by two French examples.

1. Statutory Deposit

Article 1 of the Law of June 20, 1992, on Statutory Deposit provides that:

> "Printed, graphic, photographic, sound, audiovisual and multimedia documents, whatever the technical process used for their production,

publication or dissemination, shall be subject to a compulsory deposit, known as statutory deposit, once they are made available to the public."

The draft law provided originally that one of the aims of statutory deposit was "the furnishing of deposited documents to the public for consultation purposes."

The National Publishers Association, and also other representatives of the owners of rights, drew the attention of the Ministry of Culture to the risks inherent in this wording.

The consultation of such products does indeed make a certain number of operations possible that publishers have to be in a position to keep under their strict control. In theory those operations are the following:

-- display of the contents of the medium on a screen at the location of the depositary library and at French or foreign associated libraries;

-- partial or complete reproduction of the contents of the electronic medium on another electronic medium;

-- reproduction of the contents of the electronic medium on a paper medium for personal or group use (which could become commonplace for teaching staff preparing the background literature for their courses);

-- creation of a new, derived product made up of extracts readily accessible in various documents available on electronic media. The product thus created is capable of being fixed on a paper medium, and could easily result in the publication of a new book.

Now all these operations call for prior authorization by authors and publishers.

A certain number of protective devices have therefore been written into the Law. The purpose of deposit, dealing with the matter of consultation, is now specified in Article 2, under 3, in the following terms:

"Statutory deposit is established in order to consult documents, subject to secrets protected by law, under conditions that comply with the law on intellectual property and compatible with their conservation."

In a letter to the President of the National Publishers Association, on May 13, 1992, the Minister of Culture wrote the following:

> "This possibility of consultation is traditional and, as you know, is the generally accepted practice of the National Library. The situation will be no different. The principle remains the same: researchers identified by the depositaries according to access criteria may consult the files by way of the statutory deposit."

Consultation is thus restricted to a certain public (researchers) and subject to guarantees. Article 6 of the Law of June 20, 1992, provides that the Statutory Deposit Scientific Council participates in defining the conditions for exercising consultation of the deposited documents, which has to be done in a manner that reconciles respect for intellectual property and

the researcher's right of access. The right of access is itself clearly specified.

It is limited to individual access, within the context of the research being conducted, and on the premises of the depositary authority. It has to be negotiated for in a contract with the owners of rights, as the Senate rapporteur of the draft law makes clear:

> "The diversification of the methods of communicating documents to the public, and the possibilities for remote consultation offered by computer technology and remote data processing are however liable to alter somewhat the nature of the problem. This is why the authors of the draft law have preferred to rely on contractual negotiation to reconcile as well as possible, for each new method of communication, the prerogatives necessary for the operation of the public service and the legitimate rights of authors and the owners of neighboring rights."

The publishers of multimedia products have to be extremely careful when negotiating such arrangements, as it was sometimes suggested during the debate in the legislature that intellectual property law was too stringent for these new media.

For instance, the National Assembly rapporteur on the draft legislation said the following:

> "There remains the question of prior authorization. Two conflicting interests are involved. Keeping this authorization would be contrary to the objective of the draft legislation, which is to make the deposited documents available to the public. Authors and publishers however, for their part, advocate retention of the Law of March 11, 1957, which allows them to object to the representation or performance and reproduction of works in which they hold rights, even if the works have been deposited.
>
> "This intransigent position stems from their fear of the setting of a precedent and of the risk of derived exploitations of works being allowed that go beyond the objectives of the statutory deposit.
>
> "Nevertheless, the consensus prevailing within the National Library in favor of settling this contradiction indicates that it is possible to develop the statutory deposit without putting the rights of authors and publishers at risk. Apart from this the United Kingdom has been successful with the 'fair use' principle, which allows audiovisual documents to be lent, without any special authorization, for the purposes of research work, especially at university level."

The concept of fair use is alien to French law and would open a breach in the protection system, which is why its spirit as well as its substance should be kept out of any conventions.

From the point of view of the public user, what are the principles that will govern the arrangements made with owners of rights?

In the letter quoted earlier from the Minister of Culture to the President of the National Publishers Association, the principle advocated is

that of retaining the system currently in use at the National Library for the consultation of documents on file.

Retention of the National Library System for Consultation of Documents on File

On this point, the contracts to be concluded between publishers and the National Library will provide for:

-- the forms of preservation chosen by the depositary body: transfer to new storage media or preservation of the works themselves;

-- the principle of consultation of documents on file by researchers according to access criteria.

Authorizations will have to be global, and will relate only to consultation in situ. They will in particular relate to consultation covered by the right of representation, that is, the use of deposited multimedia products by researchers.

The Ministry of Culture mentions in this connection that "there will be no distinction in the agreements according to the type of document in the case of mere on-the-spot consultation." This wording is ambiguous.

A distinction can indeed be made between consultation on a paper medium on the one hand and the accessing of multimedia products on the other.

The first is free at present, because there is no lending right or right of communication in French law, and the rights of reproduction and representation are not involved.

On the other hand, the consultation of multimedia products necessarily involves calling them up on a screen, and therefore brings the right of representation into play. Article L. 222 of the Intellectual Property Code provides that the author may not prohibit "free, private performances effected exclusively in the family circle."

This exception does not cover representations or performances in a library, which is a public place that cannot be assimilated to the family circle. Owners of rights in a multimedia product thus have the possibility of monitoring access to deposited documents, even if such access takes the form of mere on-the-spot consultation. Due account will of course have to be taken of the public service mission of the depositary body, but the agreements will still have to define accurately the limits of the right of representation of multimedia products, and any remuneration that might be payable.

Use Other Than Mere On-the-Spot Consultation Made by Researchers and Requiring the Prior Authorization and Remuneration of Owners of Rights

This relates especially to the following:

-- reproduction not reserved for the private use of the copier, or intended for collective use;

-- network transmission of works, entailing reproduction after the event of sequences from those works.

As far as this kind of use is concerned, publishers will obviously have the option of:

-- prohibiting them because they themselves wish to exploit the works in that form;

-- authorizing them subject to collective administration of the collection and distribution of royalties, which might be the case with paper reproduction;

-- authorizing them subject to the scope of the authorization and the manner of remuneration being negotiated within the framework of individual administration; a publisher may under such circumstances wish to work together with a group of libraries to distribute certain products;

-- granting individual authorizations in certain specific cases that do not involve the assignment of any rights in the products.

2. The Convention With the National Library on the Digitization of Books

The National Library, a public body, has devised a plan for the digitization of works for the purpose of preserving them and making them accessible to researchers either on screen or by reproduction on other media.

The National Publishers Association has entered into a Convention with the National Library to ensure that the conditions under which digitized works are disseminated do not harm the interests of authors and publishers.

The underlying principle is the following:

> "Prior authorization by publishers shall be necessary at the stage of the digitization of works with a view to their consultation on screen, their network distribution and any reproduction that may be made of them in that connection."

The National Publishers Association has worked out a standard contract with the National Library for this experimental phase. The reproduction or screen display of works may, where appropriate, give rise to remuneration that is shared between authors and publishers according to the contract between them.

The counting of the access to digitized works will take place at the screen display stage. The basis for any remuneration will be worked out in the course of the experimental stage.

The National Publishers Association also wished to make a reservation for circumstances in which publishers wish to assemble multimedia products from their own stocks. It is therefore provided that:

> "The National Library shall not manufacture editorial products liable to represent competition for publishers or to afford a publisher access

to protected data belonging to another publisher. A publisher wishing to compile and distribute a product requiring the digitization of text or pictures may obtain authorization from the National Library after having applied to it within a reasonable time."

This provision is written into the standard contract between the National Library and publishers whose works are affected by digitization. It expressly rules out any publishing activity that the National Library might wish to engage in or arrange for on the basis of digitized works. It is however acknowledged that a publisher may wish to assign the reproduction rights more widely, or to produce joint editions of certain works with the Library.

C. LICENSES GRANTED TO PRIVATE INDIVIDUALS

The commonest instance of this will be the sale of a medium containing information or data of a professional nature, or corporate subscriptions to on-line data bases. According to the logic that should prevail in contracts between publishers and users, licenses should be strictly limited to the types of use necessary for the activity of the business.

The proposed European Directive on data bases has been amended in relation to the original wording, referring for the most part to contracts to establish those acts that can be lawfully performed by acquirers of the data base.

This new wording is a substantial step forward compared with the earlier version, which provided that acts covered by the producer's monopoly could be performed by the acquirer or legitimate user of a data base provided that they were a necessary part of his consultation. That wording removed something of the value of the contracts between producers and users. In the new version, the contract becomes once again the main reference for the assessment of the scope of licenses.

Three things have to be very carefully considered:

-- the term of contracts;

-- the persons concerned by the licenses;

-- the scope of the licenses.

Term of Contracts

In the case of a subscription, for instance in the case of a product available on line, authorization has to be given for a short period, thereby allowing the publisher sufficient latitude to alter the nature of the contract according to the development of the product and the technical options for its use.

Similarly, in the case of the sale of a medium, authorizations have to be limited in time so that the publisher may allow for technological advances and the repercussions that they might have on the exploitation of products.

Persons Concerned by Authorizations

The multimedia product, among other things because it will frequently be used for professional purposes, will allow use by several natural persons within a legal entity.

The authorization will have to cover all the natural persons likely to have access to the product, and the corresponding remuneration should take that into account.

The contract should also provide for identification of the natural persons who will be called upon to use the product, as in certain societies whose role is to provide information. This identification can take the form of an access code.

Extent of Authorizations

The rights granted to the user amount to no more than permission to or a right of use.

It should be mentioned in the contracts that the rights of reproduction and representation remain the property of the publisher.

The notion of use of the product should be precisely defined. This is important because in matters that involve the European Directive, the authorization will become the criterion by which those acts are determined that the lawful acquirer of a data base can perform without special permission if nothing is specified in the contract.

Use must be expressly reserved for the private purposes of the person making it, whether or not it presupposes reproduction of all or part of the work.

In the case of a legal entity, the situation is rather more complex in that the use will be by definition collective. Thus use will nevertheless have to be strictly limited to the corporate aim of the user and be possible only for internal purposes. It will be in the interest of publishers, in certain cases, to introduce "on-site licenses," whereby the use of the works may be identified in qualitative and quantitative terms, as is already done in the field of software.

Any use that goes beyond the internal environment or the corporate aim will have to be specified at the time of the signature of the contract, including for instance:

-- use by persons from outside the legal entity;

-- authorization to disseminate, publish or sell information obtained by means of the data base;

-- authorization to make partial or complete copies of the product, even if only for the purposes of preservation;

-- authorization to use the product on a free or paid-for network;

-- commercial exploitation of the information and works contained in the product;

-- rental or other disposal.

When such rights are granted, the appropriate remuneration will have to be agreed by negotiation.

CONCLUSION

It seems clear to me that publishers are far from helpless against the growth of the electronic exploitation of works. The existing contractual apparatus is a sound starting point for providing them with legal security that is equal to all the new methods of dissemination.

This nevertheless requires the publishers to be prepared to convince their opposite numbers of the legitimacy of their interests:

-- in dealings with authors, the publisher has to come across as the best placed partner for the exploitation of all the electronic rights in a work;

-- in dealings with users, he has to adopt a contractual practice that ensures the protection of his rights, and teach them respect for copyright, which is too often lacking nowadays;

-- in dealings with the authorities, he has to do some lobbying in order to avoid a situation where technological progress becomes an additional pretext for making exceptions to intellectual property, which are too often demanded in campaigns conducted in the general interest.

FOURTH WORKING SESSION: PROTECTION AND ADMINISTRATION OF COPYRIGHT AND NEIGHBORING RIGHTS

THE IMPLICATIONS OF NEW TECHNOLOGY FOR THE PROTECTION AND COLLECTIVE MANAGEMENT OF AUTHORS' RIGHTS

by

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INTRODUCTION

For France--and for the world--1994 marks the centenary of the invention of the cinematograph by the Lumière brothers. It was a formidable innovation in 1894, destined, as we now know it was, for worldwide success, and it represented for copyright--which also came into being in France in its present-day form--the first new technology to be contended with.

This is another way of saying that "the most sacred property" is also celebrating this year its first century of confrontation with the new technology that has punctuated the progress of the twentieth century: cinema, radio, records, television and so on.

The result of this confrontation, to the extent that one can report on it today, is quite encouraging on the whole. Copyright has shown itself to be capable of evolving without going against its original underlying principles, and has produced practical management procedures that have proved themselves over and over again. Who indeed would claim that copyright has had an inhibiting effect on the development of those major sectors mentioned a moment ago?

At present we are witnessing another burst of technological innovation and, as usual, minds naturally inclined to pessimism are making the gloomiest prognostications on copyright's ability to take up these new challenges.

It has to be said calmly and categorically: copyright is able to face this situation, to provide practical solutions to any difficulties that may arise and to draw from the actual environment created by the new technology the new means of simplifying its own administration. All that is required is a cool head and common sense.

We shall not therefore give in to this fashionable trend whereby alarmist arguments are used as an excuse for mixing up creative genres, and trying to weaken the exclusive rights that belong to authors on the pretext that they are an obstacle from bygone era.

This exposé will be in three interconnected parts.

In the first part we shall attempt to describe the main characteristics of the new technology. Then we shall put the question whether that new technology justifies making changes to the nature of copyright. Finally we shall see whether the new technology does not suggest that the holders of rights should change the way in which they exercise those rights.

I. THE NEW TECHNOLOGY

The profusion of new technology is such that it is both difficult to draw the frontiers of innovation, and certainly presumptuous, above all on the part of a non-technical person, to attempt an exhaustive list. So, rather than draw up a tedious and perforce incomplete list of this new technology, it seems preferable that we should select digital technology as the nexus common to all the innovations that we have been witnessing. It is indeed this process of basic translation into binary code that is the vehicle of the present technological upheaval, and we propose to make use of a few essential key words to describe the basic elements that characterize digital technology.

The key words are compression, volume, interactivity, interconnection, quality and permanence: in them are crystallized a large number of the questions that will then have to be dealt with in terms of copyright and the exercise of copyright by those who hold it.

(1) Digital data compression is certainly the breakthrough without which the applications of digital technology itself would not have been as extensive as those that are being contemplated today. It is a phenomenon that illustrates the convergence of the data processing, telecommunication and programming industries. On the basis of standards worked out according to the nature of the signals to be handled and classified by program type (such as JPEG for still pictures, MPEG for audiovisual works and MUSICAM for sound works), data compression permits, thanks to sophisticated software, the coding on transmission and decoding on reception of messages that are conveyed in condensed form on telecommunication networks or recorded as such on ad hoc media; this process makes it possible to escape most of the limitations on output imposed by the carriers of signals.

(2) Volume is a direct product of the possibilities made available by data compression. The vastly greater amounts of data that compression and decompression algorithms are capable of processing in real time transforms processing capabilities both on physical media and in terms of transmission:

-- as far as physical media are concerned, a 12cm CD-ROM is known to have a capacity of up to 650 megabytes of data, equivalent to 250,000 A4 pages of text, 7,000 photographs, 72 minutes of animated pictures or two and a half hours of recorded stereophonic sound (or a combination of two or more of these); this capacity, in terms of both volume and permutations, opens wide the potential for multimedia products, in other words the possibility of accommodating on one and the same medium data from the worlds of sound, images and text, and in unimagined quantities; the IBM company has just announced the development of a process that enables this already considerable potential to be increased tenfold;

-- as for actual broadcasting, data compression makes it possible to multiply the potential for sending signals; by way of example, we could say that a satellite transponder which until now was dedicated to a single signal will be able to handle simultaneously up to eight different signals in real time. The same applies to cable transmissions. Data compression is undoubtedly pointing the way to the 500-channel world which is the subject of so much speculation in the United States of America.

(3) Interactivity likewise stems directly from data compression, providing for the feedback which will elevate the user from his present passive state and make him into the real head of programming, in charge of looking after his own requirements. Interactivity will benefit both the sector of actual programs (as with video on demand) and also a whole range of services (teleshopping, news, etc.), not to mention the chosen field of interactivity, namely games.

(4) Combined with the interconnection of the networks and data bases available at the national and international levels, interactivity will make it possible for the user to "navigate" in the most extensive areas of knowledge and to consult and download on to his own personal computer those data that he needs.

(5) The quality achieved by digital technology in the recording, transmission and reproduction of sound and visual works opens up a new environment. Broadcasting and recording systems are reaching the ultimate levels of sophistication. By way of example, the digital audio quality of recordings made by producers can be transmitted without loss by DAB (Digital Audio Broadcasting) or DMX processes all the way to the listener who, with blank digital cassettes, is able to make a perfect private recording of a quality equivalent to that of the source recording.

(6) Finally, optical readers of digital media ensure, barring accidents, the durability of the data that the media contain.

These "horizontal" characteristics having been emphasized, we can make a summary distinction between three "vertical" families of products or applications that derive from digital technology:

1. Content media: these are the chosen area of multimedia publishers who, by means of fixed media of CD-ROM or CD-I type connected to personal computers, offer interactive programs. For the public at large, knowledge programs (such as encyclopedias, museum collections) or service programs, and also game programs (with the use of a dedicated terminal where appropriate) are the ones most frequently offered by publishers.

2. Blank media: after the limited success with the public of digital audio tape or DAT, there are now two types of medium competing to become the reference in the sound recording field: the digital compact cassette or DCC by Philips and the Sony minidisc. However, the traditional computer diskette or the main memories or hard disks of personal computers are also able to record digitized programs or works.

3. The techniques for the transmission of compressed digital signals, when used for television or radio, permit the quality and quantity leaps mentioned

earlier. These phenomena, combined with interactivity and the additional data flow that will result for broad-band networks (notably cable) explain the interest shown in the United States by telephone companies (the seven "baby bells" created by the break-up of AT&T in 1984) in cable networks, which in future will have to accommodate a considerable amount of extra business in view of the sheer number of programs or services that will be offered to subscribers.

II. POSSIBLE IMPLICATIONS OF NEW TECHNOLOGY FOR THE NATURE OF COPYRIGHT

None of the above characteristics is without copyright implications, and there is one remark that has to be made when one considers the quantity and quality leap made possible by digital technology in the management of works: on the face of it, the creative world is bound to welcome technology that allows the means of exploiting works, and hence the means of securing remuneration for the owners of rights, to be multiplied, all the more so since the quality of the works thus reproduced for the public is superior to anything that the public has been accustomed to previously.

Care should first be taken, however, to quash two assertions that have been made time and time again throughout the life of copyright, and which are gaining new strength with the emergence of new technology.

1. The first of the assertions is that copyright is supposedly quite unsuitable for responding to the development of the new technology. According to the supporters of this argument, there is thus a legal loophole to be filled after radical solutions have been found that would obviously be completely contrary to the very principles of copyright. This is an old refrain well-known to authors, and it stems from a twofold misconception:

-- copyright has already provided abundant evidence, from its history in France, of its extraordinary adaptability: two decree-laws of 1791 and 1793 made it possible for a consistent body of case law to evolve until 1957 and for the advent of cinema, records, radio and to a certain extent television to be provided for;

-- the new digital technology, promising though it may be, carries within itself a powerful coefficient of uncertainty and insecurity with respect to its evolution; even now the prognosticators, while blithely painting an idyllic picture of the interactive hypermedia society of tomorrow, are nonetheless incapable of saying whether the industries involved will be making 10, 20 or...340 billion dollars in this area 10 years from now, apart from which the behavior and the real needs of consumers are unknown (see for instance the experiments under way in Orlando and Castro Valley in the United States, the findings of which will not be available for another year at least).

It will be noted that investors in the United States are always in search of the "killer application" that will enable the multimedia sector really to take off (as spreadsheets and word processing were the killer applications that caused the personal computer market to explode), and indeed the multimedia industry is often described across the Atlantic as "the biggest zero-billion-dollar industry." It is interesting in this connection to observe that commercial success is most likely to come from the games and

teleshopping sectors. It would probably be unwise, therefore, to try and establish today, once and for all, a set of provisions applicable to a sector that is still very much in a state of flux. Even in the United States the "information superhighways" are for the time being carrying little more than a mere word, and doing so moreover in a regulatory environment that has yet to be specified.

2. A second assertion that has already been forcefully made on other occasions likes to accuse copyright of having a braking effect on the development of new technology (especially in the multimedia sector), in that program publishers find themselves up against practically insurmountable problems with the administration of rights. Here cause and effect are being confused. It is true that the volume of business made possible by digital technology substantially increases the quantity of authorizations that have to be negotiated for and procured from the owners of copyright; they do not however alter the basic nature of the authorization process, neither do they present a fundamentally new problem. What we suggest is the adoption of a pragmatic approach: it is possible that, in certain cases, new technology may make it desirable to devise new rights. This development should be the result of experience, however, not its precursor.

Three aspects among others deserve special attention when new technology is discussed. They derive from the characteristics that we have just described.

The perfect recording and reproduction quality achievable with digital technology makes for a completely new approach to the phenomenon of private copying. The direction of evolution, if not towards the gradual dematerialization of media, is at least towards the substitution of privately owned blank media for prerecorded media. The protection of contents, in order to ensure the profitability of investments made by publishers as well as to guarantee remuneration for the owners of rights, calls for both the strengthening and the broadening, at the international level, of legislation on private copying.

Data compression makes use of predictive mathematical models that simplify the contents of the messages transmitted by removing what is not visible or audible to the human senses. Here there is the potential for the "genetic manipulation" of works, to which attention should be given if the nature of the works is not to be altered. This is why an international normative effort is important, and why it is unnecessary to involve the representatives of creators in the work done. It is moreover in the field of music that the first uses of this kind occurred, on account of the more and more widespread practice of sampling.

Interactivity is liable to rekindle the controversy on the authorship of the work, and there are some who would like to make the user of an interactive program into a coauthor. It would probably be wise to be very careful on this point so as not to dilute the concept of the rights of the creator-designer who, regardless of the degree of interactivity built into his program, nevertheless remains the one who originally devised the set of processes offered to the user.

Over and above these specific aspects, there are two more general trends worth mentioning which we think should be resisted and which, if

they were to win favor, would unquestionably have the effect of weakening copyright:

-- the first seeks to remove the differences existing between copyright and neighboring rights, on the albeit unproven pretext that new technology would in effect erase the present dividing line between these two types of right;

-- a second trend, which has appeared in the multimedia sector, is something of a paraphrase of the first in that it seeks to recognize the authorship of the publisher-producer.

The owners of neighboring rights, whether producers or performers, have the benefit of a legal regime that is clear and defined by international treaties and national legislation, and which seems to us to be for the most part quite capable of meeting the challenges of new technology, although some adaptation of the Rome Convention might just be called for.

III. IMPLICATIONS OF NEW TECHNOLOGY FOR THE EXERCISE OF COPYRIGHT

It is fashionable to play Cassandra and foretell the apocalypse of copyright in a digital universe in which everything is copied and pirated, and where no limit can be set on the long litany of zeros and ones that will be the language of tomorrow.

This overlooks the fact that the same digital technology, which can indeed throw up some complex problems, is equally capable of proposing solutions to the very difficulties that it creates.

Several examples show that digitization is likely to clarify, even to simplify the management of rights:

-- digital audio broadcasting or DAB can without difficulty be combined with the emission of a subtrack--inaudible to the listener--of internationally standardized identification codes (like the ISRC for phonographic recordings); the automated processing of the codes would then make it possible to administer the rights involved efficiently and remunerate the owners of rights correctly;

-- digital marking processes like Cyphertech, by giving each program element a "fingerprint" capable of being read and decoded in real time, may allow automated processing of the contents of broadcasts according to the different groups of owners of rights, and thereby contribute to solving a difficulty that has long existed within collective administration organizations;

-- the work carried on under the European ESPRIT program in connection with Copyright In Transmitted Electronic Documents or CITED make it possible to provide a technical solution for the monitoring of the ways in which digitized tools or media are used, and may eventually produce practical models for the protection of the owners of rights.

A number of conditions do however have to be met to organize the solution by digital technology itself of any difficulties that it may have created:

(1) a determined attitude will be required of the authorities in each country and in international organizations with a view to pressing ahead with standardization and devising the technical specifications to be taken into account by digital technology in order to permit, if not facilitate the administration of rights. This determined attitude will then have to be accompanied by some definition of the regulatory frameworks defining the obligations to be imposed on the users of digital technology.

(2) Strengthening the collective administration of rights is the only way to make copyright and neighboring rights problems manageable for investors. Collective administration has been established for a long time in the music field, and at the international level: management societies, like SACEM in France, have long been dealing with an assortment of large-scale uses of the works in their repertoires, and have developed efficient negotiating practices and computer aids.

The same is not true of other areas of copyright, in which the traditions of collective administration are not or not well established. The fields of audiovisual works, works of graphic and three-dimensional art and still pictures will have to act very quickly to define management structures and work out new know-how (which moreover probably cannot be done by purely and simply transposing the methods long applied in the music sector). This move towards collective administration is made all the more necessary by the fact that multimedia technology (CD-ROM or CD-I) involves combining in one and the same medium the worlds of sound, image and text, the management practices of which have hitherto tended to be completely different.

Collective administration also has to involve a common approach to the technical difficulties that have presented themselves to the holders of rights; the approach should not be confined to authors' societies alone, but rather be opened up to neighboring rights societies. Private copying has revealed the soundness of such a plan in France: this development must be reinforced when what is involved is the definition of standards of treatment for the various groups of owners of rights.

It is important, however, that this move towards the reinforcement of collective administration within societies which by force of circumstances are in a dominant position should not be systematically hampered by the more and more forcible intervention of the competition authorities, as that might adversely affect the prerogatives afforded by copyright and neighboring rights unless the specific characteristics of works and artistic performances are given serious consideration (cf. Article 128 of the Maastricht Treaty).

CONCLUSION

One of the key words of modern technological evolution is convergence; it is the expression commonly used, when speaking of the development of digital technology and in particular the prospects offered by data compression, for the meeting point of three industrial forces, namely telecommunications, computer science and programming. The reconciliation of

these industrial factors is one of the prerequisites of success in multimedia systems and interactivity, while convergence of this kind, although regularly mentioned by specialists, is not the only one required.

A second form of convergence, of a professional, technical and regulatory nature between the owners of rights themselves and then between them and the investors and public agencies that devise and determine the regulations and standards necessary at the international level, is equally indispensable if the vast projects that foreshadow the interactive society of tomorrow, and respect for the rights of each person involved, are both to be successfully achieved.

This document has been written with the assistance of Mr. Claude Gaillard, Director of the General Documentation and Distribution Department, SACEM.

NEW TECHNOLOGIES AND THE PROTECTION AND ADMINISTRATION OF THE RIGHTS OF PERFORMERS

by

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INTRODUCTION

For many centuries, the remuneration of performers was based on their physical performance alone, be it on stage, in the circus ring or on the street. At the close of the nineteenth century, with the development of social rights, salaried work, and union organization, it was labor law which took over and prevailed, particularly in the twentieth century.

No one could predict, when the gramophone and the cinematograph were invented, what vast upheavals would take place in the performer's trade.

Today, no one can seriously predict what the practical consequences or the impact of the new technologies will be for these performers. What is certain is that the modes of musical and audiovisual "consumption" will substantially change the way in which performers will be remunerated, but at a rate which is difficult to evaluate.

Already now, developing technologies such as CD-ROM and CD-I use the recorded performances of large numbers of performers in a manner which, legally, technically and even artistically, is highly questionable.

For example, it is already possible to make a perfect copy of a digital cable broadcast by using a digital audio cassette. As for digital broadcasting, it will develop swiftly once the price of domestic receiving equipment has come down to a reasonable level, with a leap forward in quality equivalent to that from the microgroove to the compact disc.

The relatively slow start made by audiovisual diffusion will soon be compensated by means such as digital compression and data bases will enable the immense inventory of images built up over recent decades to be accessed rapidly. A vast storehouse of wealth will become available to everyone and we can but rejoice, as long-standing advocates of the maximum possible circulation of works, to see the work of performers accessible to its greatest possible audience.

We therefore approach this technological leap forward not with fear or apprehension, but with confidence in the fantastic capabilities it will provide, both in quantity and quality.

However, there is a danger that these fabulous means could initially turn on those who participate in creating works and, at a later stage, on the users themselves as the broad creative source, which today flows so generously, begins to dry up. Vigilance must be exercised at all times so as not to strive, for mere economic reasons, towards maximum digital compression, which would result in a poorer quality of artistic performance, particularly at the time of diffusion.

The chain of creation, diffusion and remuneration of right holders must be set up at all levels. The fragmentation of performers' remuneration over all these new mediums requires that they be associated in all stages of management of the works in which they have participated.

The unions have successfully safeguarded against the unauthorized use of recorded performances in the sound and audiovisual sectors by means of collective agreements. The general terms of performers' engagements regulate the recording and the modes of using their recorded work.

The unions are strongly attached to this long-standing practice which enables them to use their members' support to obtain a general framework in which to exploit the works in which they have participated. This basis is and will remain vital for the defense of their essential rights.

Performers are very attached to labor law and would never accept new rights that called into question their professional status that they achieved, with the support of the International Labour Organization, after years of struggle.

Worldwide distribution of their recorded performances has inevitably led to significant changes in the administration of their rights. As a result, the viability of the present legal framework needs strengthening in order to cope with the new modes of diffusion and communication to the public, such as the dematerialization of carriers and multimedia (I), and the collective administration structures need adapting to the technological processes and operating methods of the new markets (II).

PART ONE
STRENGTHENING THE LEGAL FRAMEWORK

Rather than talk of a legal vacuum, it would, to me, seem more useful to look at the existing legal framework to find the means to strengthen it by affording an exclusive right to performers to authorize the use of their work and to adapt it to the new features of the market.

A. AFFORDING AN EXCLUSIVE RIGHT TO THE PERFORMERS

1. Professional Environment

1.1 It is claimed that the arrival of digital compression, which allows new interactive techniques to be evolved and multimedia to be developed, will

place users and right holders in a critical and complex situation which will prevent the first-mentioned from communicating musical and audiovisual works and their performances to the public easily and flexibly and the latter from properly supervising the use made of their recorded work and from receiving remuneration for each mode of exploitation.

1.2 The markets are offering new features, with massive, diversified consumption of services, all concentrated on a single receiver. This new technical factor has caused a complete upheaval in the contractual relationships between those involved in the professional chain, i.e. from creation to "consumption" of the work performed.

Due to its flexibility, digital processing enables a very large number of services to be developed, of which some are new, such as the purchase, rental or consultation of performed works or products via data banks, and some already operated on analog systems, such as tolls, pay per view, pay per listen, teleshopping or interactivity.

2. Legal Environment

2.1 However, national laws and international conventions on the protection of intellectual property rights are not based on the technical means used. It is solely the mode of exploitation of the work recorded by the performer which justifies the remuneration to which the performer is directly entitled.

2.2 In the case of performers, it may be observed that most of the new modes of exploitation do not fall under the scope of the non-voluntary licenses provided for in most national texts and the international conventions, and therefore do not give rise to payment of equitable remuneration under Article 12 of the Rome Convention.

None of the texts, whether it be Article L. 214-1 of the French Intellectual Property Code, Article 8 of the European Directive 92/100, of November 19, 1992, on rental right and lending right and on certain rights related to copyright, Article 6 of the European Directive 93/83, of September 27, 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, or again the draft for a new international instrument on the rights of performers, at present being studied by a WIPO expert committee, provide the necessary conditions for payment of equitable remuneration to performers and phonogram producers for communication to the public of dematerialized music.

2.3 These facts call for the implementation of new means, or for considerable improvements to existing means, through international instruments recognizing the exclusive right of performers in all their recorded performances as a vital necessity at both European Union and WIPO levels.

2.4 As far as French and European intellectual property law is concerned, the so-called non-voluntary licenses, which are also sometimes known as "rights to remuneration," are exceptions to the general principle laid down by the texts and, as such, must be interpreted stricto sensu.

Thus, any new situation not covered by these exceptions must fall under the fundamental principle: the right to authorize, which is an individual economic right afforded its holders where their recorded performance is used (see Articles 6, 7, 8 and 9 of the European Directive 92/100, of November 19, 1992, on rental right and lending right and on certain rights related to copyright, which, subject to exceptions for certain sectors, expressly stipulates the right of performers to authorize the fixation, reproduction, broadcasting, communication to the public and distribution of their work).

It is this orientation which should be adopted, in our opinion, in the new instrument for the protection of performers' rights which is currently being elaborated by WIPO.

2.5 These European and international instruments should enable the entire field of activity, be it sound or audiovisual, to be taken into account and to be adapted easily and swiftly to any new technology without the need for new diplomatic conferences each time, since these are slow to get started and their debates are necessarily long, which means that the result is increasingly likely to be out of step with the accelerated development of new technologies.

Adaptation of the continental copyright system will demand a degree of flexibility in the exercise of this right and the strengthening of the part played by the collecting societies.

B. EXERCISE OF THE RIGHT TO AUTHORIZE

1. Two Different Legal Systems

1.1 Some, rather than make legal demonstrations, put forward practical and economic arguments (and that they do regularly) to prove that the common law copyright system alone provides a satisfactory response to the demands on complexity, speed and flexibility set by the contractual relationships in this new market.

These arguments generally carry weight with the buyers and sellers of programs since the demonstration is easily made.

The main argument advanced, without further qualification, is that all the exploitation rights can be concentrated in the hands of the producer who, as owner of the product under common law copyright, is therefore alone entitled to a copyright in such product.

In comparison, the exclusive right to authorize afforded by the continental system to creators and performers, is referred to as complex and it is explained that the user is altogether incapable of asking each right holder to give his authorization every time he wishes to exploit a recorded performance, since that would bring to a halt the circulation of works and artistic performances and thereby jeopardize the whole musical and audiovisual market.

1.2 However, we may simply point out that the right to authorize, which is the basic principle of civil law copyright, has demonstrated exactly the

contrary since 1837, when the first society of authors and composers was formed, since it is on a contractual basis that authors obtained remuneration in exchange for the authorization they gave for use of their performances.

It is therefore on the basis of general or collective agreements, and in no event under statutory or non-voluntary licenses, that the Society of Authors, Composers and Music Publishers (SACEM) in France collects and individually distributes remuneration to the authors it represents. I need not explain that these agreements vary in their conditions and amounts, since they take into account the specific nature of each sector liable to payment.

No one can claim today that continental copyright, practised for over a century, has endangered the consumption of music.

1.3 As regards holders of neighboring rights, droits voisins or derechos conexos, their situation may be taken to be identical with that of authors, without, however, prejudicing the latter's rights under Article L. 211-1 of the French Intellectual Property Code, Article 14 of the Directive on rental right, Article 5 of the Directive on satellite broadcasting and cable retransmission or Article 1 of the Rome Convention.

This inevitably means a strengthening of the role of the collecting societies.

2. Strengthening the Role of the Collecting Societies

2.1 The societies that have been administering the rights of performers and producers of phonograms in France since 1985 are chiefly known for their role in collecting equitable remuneration and the royalties for private copying.

Many people are still not aware of the faculty afforded these societies under Article L. 321-10 of the French Intellectual Property Code to conclude general contracts of joint interest with the various users, within the limits of their members' instructions or shares in the society, thereby collectively exercising the right to authorize, held by each of the right holders they represent.

The "Multiradio" operation, developed in France by Skyrock over the cable network, offers to the general public, on condition that they possess specific access equipment, a digital service covering five thematic music channels. Multiradio representatives applied to the various societies administering performing rights and concluded a general agreement enabling Multiradio to use the various repertoires of performed works.

2.2 However, it is not through a few isolated experiments that the use of the various repertoires or recordings or the collection of remuneration for the right holders can be regularly and efficiently monitored.

The role of these societies must therefore be extended from collecting and distributing remuneration to a more general task of administration, comprising exercise of the right to authorize, conclusion of collective agreements, and collection and individual distribution of remuneration to the right holders they represent.

Under the European directives and the international texts, these societies must negotiate worldwide, or at least European, contracts for all categories of right holders.

These contracts would lay down the amounts of remuneration, harmonized according to:

(1) mode of exploitation:

-- sale of music, whether on a medium or not,

-- rental, whether on a medium or not,

-- consultation, with or without the right to copy,

-- cable distribution for which the rights must be administered by a collecting society (cf. Article 9.1 of the Directive on satellite broadcasting and cable retransmission);

(2) price per service paid by the consumer;

(3) percentage of remuneration allocated to each category of right holder.

It is therefore necessary to strengthen the role played by the societies by means of national, European and international legislation, which would lead to closer ties or mergers between them, enabling them to encompass the needs of today's market, since the designers of new multimedia products obviously cannot undertake a marathon to contact all the right holders or the societies that represent them in order to sign contracts.

PART II
ADAPTATION OF ADMINISTRATIVE STRUCTURES

A. COLLECTION OF REMUNERATION

While it is to be feared that systematic negotiation of collective agreements, and the increase in categories of right holders, will lead to a fall in the rate of remuneration, it must nevertheless be remembered that the market itself will grow as a result of telediffusion over the air and by wire utilizing the interactive communication networks (cable, French Numéris system, and so on).

As regards the collection of remuneration, it must be explicitly recognized that the administration of performers' rights is not a commercial undertaking, and that customary rules in this area cannot be considered contrary to the laws on competition because they are limited to a single national territory.

This is not a chauvinistic nationalist concept, but simply a statement of fact: every country has thousands of performers in activity, not to mention retired performers and their heirs.

If it is considered that performers are in vital need of remuneration for these new uses, which are gradually replacing the other methods of remuneration, and if it is wished therefore that those whose recorded performances are used should also be those who are remunerated and, lastly, if swift, efficient and reasonably priced administration, appropriate to the sums collected, is required, then we must accept as plain common sense that the administration should be carried out as close as possible to the performers' workplace.

Instead of launching into over-scaled computerized administration, which is cumbersome to operate and excessively expensive to run, we must opt for a decentralized structure, close to those involved in creation.

This implies two obligations:

-- the rules for collection and the levels of remuneration must be as close to each other as possible for the various categories of right holder, the conditions for individual payments clearly defined and the percentage allocated to activities in the general interest clearly stated;

-- the identification systems must be fully compatible and enable reciprocal agreements to be concluded between one collecting society and another, to ensure transparency and supervision by the performers themselves.

However, this supposes that the agreements enable individually distributed remuneration to be sent from one country to another (type A reciprocal agreements), since any other type of agreement would result in a denial of individual remuneration of right holders and thus to violation of the very spirit of intellectual property rights.

There is no question of isolationist solutions reserved for performers. Examples of cooperation between two or three categories of right holders, mostly in the collection of fees in the audio sector, already exist today. It is high time that these relationships were developed and extended to the audiovisual sector.

It is difficult to break with old habits, and consumers of multimedia products will not wait around until the various categories of right holders have finished arguing about who is tops or who gets the biggest slice of the cake.

All that is ridiculous when we consider what is at stake.

Putting aside any utopian ideas, it is urgent that a minimum of decisions be taken, otherwise we can be sure that the pirates will have a field day, since the data bases that are being prepared and the CD-ROMs already in circulation will not make it easy to collect royalties.

All collecting societies, representing the various categories of right holder, must therefore develop a new approach to these problems and modify their operating rules in order to set up joint collecting agencies.

Data stored and exploited on computer mediums and transmitted by cable or telecommunication networks now allow consumers to mix or superimpose repertoires of differing types (photos, films, music, painting, and so on).

The current division into sectors, by discipline and category of right holder, is no longer justified, and the establishment, as part of coordination and harmonization between societies, of joint collecting agencies is the only possible answer to the massive diffusion of dematerialized music.

B. DISTRIBUTION OF REMUNERATION

Even with the progress accomplished in data processing, it is indeed inconceivable that all the information necessary for the individual distribution of performers' royalties could be entered into a single, worldwide data base.

How, in practice, can we attest to tax and welfare returns, calculate entitlements without having detailed knowledge of the situation of each right holder?

How can each right holder be identified within a work in which he participated to varying degrees, or in pro rata of time which varies from one title to another?

As for individual distribution, this will become even more difficult, and might even threaten in time the very principles on which it is based.

Thus simple, efficient systems must be set up, allowing information to be decentralized, by using complete accounting that permits automatic data processing that alone can ensure the accuracy of individual distribution at a price which would be reasonable as compared to the sums being paid to right holders.

While the sound sector has developed a code, known as the ISRC (International Standard Recording Code), which has become an ISO standard, the same cannot be said for the audiovisual sector.

For the moment, each of these sectors works only in its own specific field, despite the fact that all the time images, music and words are to cohabit on the same medium or are being distributed in dematerialized form. It will be possible to use the same medium as a music video on television or as a phonogram on radio.

There is no time left to barricade ourselves in the fortresses of each category of work or of each type of right holder. Competition between the various identification systems will lead straight to evasion of payments and to all sorts of unlawful uses, for want of controls.

Digitization makes it possible, by sampling, to use the sounds from an instrument in ways which were not anticipated nor authorized by the creator.

Not only does this lead to less work for musicians, with no financial compensation, but it will also be possible to recreate a work in which a performer's own sounds and colors are used without his authorization, and without him even having participated, while at the same time he is under exclusive contract to a recording company.

It will be possible to transform the digitized images of an actor, and to use his voice speaking a part he has never played, thus calling his moral rights, his rights in his own likeness, into question.

The only way to prevent such manipulation is to keep track of all possible uses, whether sound or audiovisual, by a universal system of tracing. Thus, only collective administration will be capable of monitoring the unlawful images of a performance which have not been authorized by the performer and avoiding a situation even worse than today's bootlegging.

Already today, it is possible to determine the hard core or threshold of information needed to detect and identify works, using electronic bridges to link them to the various systems required by each category of right holders for its own individual distribution.

But if we are to avoid the earthquake that will follow the foreseeable anarchy, it is essential that the work accomplished by WIPO and the International Standardization Organization (ISO) be harmonized so as to achieve a unified, modifiable and evolving standard.

No one has an interest in a suicidal battle between incompatible systems.

It must be stated clearly that the performers are those least able to impose their own standards, since they have neither the economic power of the recording or audiovisual industries, nor the protection afforded by the Berne Convention as do authors.

The latter have led the way by introducing the notion of collective administration, which we still do not enjoy to the full. We do not demand the right to merge with them. But, just like the performers, they too are likely to suffer a loss of power from the new means of distributing and communicating works. This is a further reason for combining our efforts, while maintaining respect for each other's independence.

Finally, at the risk of offending some, the issue of a recommended or compulsory system must be addressed without ambiguity or hypocrisy. When the damage caused by private copying as a result of analog broadcasting and by organized piracy of compact discs is observed, it is easy to imagine what will happen when everything is digitized.

If the incontrovertible identification of works is not possible, including the shortest sequences, be they a photo or an entire work, the entire collective structure will crumble, at the very time when fractionalization of broadcasting, its splitting up into cable, satellite, multimedia products, will make it indispensable.

Therefore all those participating in creation have an absolute need of a constraining, compulsory legal instrument. For lack of economic means, the entire wealth and diversity of creation will be affected. Only those for whom programs are merely promotional tools for selling, receiving and recording appliances will survive.

We must therefore be brave enough to face reality, and not shelter behind principles which, however noble they may seem, will merely serve to break up two centuries of patient construction of systems which have permitted the most fantastic development of culture in our history.

REPROGRAPHY, ELECTROCOPYING, ELECTRONIC DELIVERY AND THE EXERCISE OF COPYRIGHT

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TABLE OF CONTENTS

1. SOME BACKGROUND

The birth of copyright law was a response to the political, economic and social changes brought about by the advent of the printing press in the European monarchies of the fifteenth and sixteenth centuries. Well-trusted and identifiable printers were given exclusive printing monopolies. The Stationers Company in England was, in 1557, given the exclusive power to supervise and control printing. That was a way to prevent the printing of seditious material or other material that would place the Crown in a bad light.

The growth of capitalism and democracy in the early eighteenth century led to a market and antimonopoly situation. Queen Anne issued in 1710 a Statute that broke the monopoly of the Stationers Company and recognized, for the first time, the rights of authors to grant permission to publish their unpublished works, for a limited period of time.

The effects of this century's technologies, reprography and digital technology on copyright legislation and especially on the exercise and administration of rights are dealt with in this paper. This paper deals mainly with rights in literary works, or rather in "the printed word."[1]

Collective administration of authors' rights started with dramatic and literary rights. Already in 1777, the predecessor of SACD (Society of Authors and Composers of Dramatic Works) was founded in France. SGDL (Society of Literary Authors) was established also in France in 1837 in the field of literature.

However, a fully developed collective administration started only in 1850, when a collecting agency for non-dramatic musical rights was founded in France. This agency was soon replaced by SACEM (Society of Authors, Composers and Music Publishers). At the end of the last century and during the first decades of this century similar organizations--so-called performing rights societies--were founded in nearly all European countries.

Later, when technological developments led to new ways of using protected works, new types of collective administration organizations were founded.

The first part of this paper is dedicated to questions relating to reprography (photocopying). Reprographic reproduction rights form an area where collective administration is the only feasible solution. Collecting societies in this field are called reproduction rights organizations (RROs).

Electrocopying and electronic delivery affect mostly the same right owners as photocopying. For the time being authors, publishers and their organizations are looking for different solutions to deal with these new modes of exploitation.

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[1] "The printed word" refers to "any written works, that is, any writings included in books, newspapers, magazines or...in computer memories, electronic libraries, etc., irrespective of whether their content is belles-lettres, scientific, educational or other." (Preparatory Document for, and Report of, the WIPO/Unesco Committee of Governmental Experts on the Printed Word, 1987.)

It is a delicate task to maintain a policy of promoting the dissemination of knowledge and the development of learning and at the same time to safeguard the rights of authors and publishers.

2. REPROGRAPHIC REPRODUCTION

2.1 Challenge of the Photocopying Machine

Reprography was invented in the 1940s in the United States of America. Unlike traditional methods of photography and film development, which were slow and expensive, reprography offered users a quick and easy method to get "dry copies." The technology offered a cheap way to obtain copies of printed material without purchasing it.

From the beginning of the 1970s the widespread use of photocopying machines has been a challenge to the legislators and right owners. Uncontrolled photocopying threatens the interests of authors and publishers and undermines the publishing industry.

2.2 Berne Convention and National Laws

According to Article 9 of the Berne Convention, the author of a literary and artistic work has the exclusive right of authorizing the reproduction of these works "in any manner or form." It may be question of traditional photocopying, electrocopying or other form.

As regards the possibility of imposing limitations on this exclusive right, Article 9(2) provides that "it shall be a matter for legislations 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 the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

Reprographic reproduction rights cannot in practice be exercised on an individual basis. Collective administration is the only workable solution. This collective administration should be based on voluntary licensing whenever possible. It lies in the very nature of the exclusive rights.

Non-voluntary licensing systems can be stipulated in national laws when permitted by the international conventions. In that case the consent of right owners is not needed, but they have a right to remuneration. Collective administration is needed to collect and distribute the remuneration.

In free use situations, works can be used without the right owners' consent and without remuneration. The fair use and fair dealing concepts in the Anglo-American legislations are examples of free uses.

Reproduction for private and personal use is a special case. Normal licensing systems would be unworkable. However, reproduction for private use can be compensated indirectly. An equitable remuneration through a levy on reprographic equipment is one solution.

2.3 Legal Techniques to Support Collective Administration

It is in the interest of users that the license given by the organization provides full cover. "Blanket licensing" concepts offered by the organizations meet with this demand. In this case the whole of the protected world repertoire is at their disposal, within the limits of the agreements.

Collective administration organizations base their activities on mandates given by the right owners. The rights of foreign right owners are acquired by reciprocal representation agreements. However, no organization represents all right owners. For that purpose there are different legal techniques to support collective administration and make it possible for the organization to grant covering licenses.

These legal techniques are:

-- contracts with indemnity clauses,

-- extended collective license,

-- legal presumption.

Contracts with Indemnity Clauses

The organization assumes in the contract with the user the liability for payment of remuneration to non-represented right owners. This does not, however, make the use as such permissible, but only eliminates financial liability under civil law. Since an agreement cannot transfer liability under criminal law, the user remains responsible for any infringement he has committed.

Extended Collective License

Voluntary licensing based on free negotiations among the parties and a possibility to authorize or not to authorize are important elements in collective administration. However, no organization represents all national and international right owners. The answer to the problem of non-represented right owners (outsiders) has, in the Nordic countries, been the so-called extended collective license.

The characteristics are:

-- the organization and the user conclude an agreement on the basis of free negotiations;

-- the organization has to be nationally representative;

-- the agreement is made binding by law on non-represented right owners;

-- the user may legally use all materials, without needing to meet individual claims by outsiders and criminal sanctions;

-- non-represented right owners have a right to individual remuneration;

-- non-represented right owners have in most cases a right to prohibit the use of their works.

The extended collective license does not give the organization any right to represent the non-represented right owner.

Legal Presumption

The law contains provisions by which the organization is given a general authorization to represent the right owners or it is presumed that the organization has such a right.

The practical effects hardly differ from those of the extended collective license. However, legal presumption gives the organization a general right to represent the right owners.

2.4 Owners of Rights

All authors whose works can be copied should participate in collective administration. It is of great importance to convince all right owners that joint ventures, whatever the legal forms are, lead to best results in the long run.

Right owners can be listed as follows:

-- non-fiction authors including authors of teaching material,
-- fiction and drama writers,
-- journalists, editors, critics,
-- translators,
-- visual artists,
-- photographers,
-- composers and lyric writers,
-- publishers of books, newspapers, magazines, periodicals and sheet music.

Special conditions apply in most countries to the copying of sheet music, if permitted at all.

The author-publisher relation is important. Regardless of whether or not the reprographic reproduction right itself is transferred to the publisher according to the legal system or the contractual practice in a given country, authors and publishers should participate in the administration.

2.5 User Categories

Licensing is foremost dependant on the legislation and its interpretation in the country concerned. Most of the European RROs have first licensed educational sectors.

User categories can be listed as follows:

-- education at all levels,
-- government, regional and local public administration,

-- publicly funded bodies,
-- church administration,
-- trade and industry,
-- professions,
-- public and research libraries,
-- cultural institutions,
-- research bodies,
-- copy shops and other places with photocopying machines open to the public.

As to photocopying in private homes, normal licensing schemes are out of question. In some countries an equipment levy is paid by the manufacturer or importer. Germany and Spain are examples of countries with a levy system.

2.6 Extent of Copied Materials

"Some 500,000 pages are photocopied every minute throughout the world, and this phenomenon is growing every day thanks to the possibilities offered by new reproduction technology...that is 260 billion pages per year." The quotation is from the European Report of the European Commission, March 1991.

As regards the extensive copying which takes place in educational establishments, government authorities, public and private organizations, there is hardly any justification for free uses. As a minimum there has to be an equitable remuneration in all cases of mass use.

In order to get an idea of the quantities, an example of the Nordic countries is given. In Denmark, Finland, Norway and Sweden, with some 23 million inhabitants, altogether some 2,400 million copies are made yearly in education.

Denmark	Finland	Norway	Sweden
5.1 m. inh.	4.9 m. inh.	4.2 m. inh.	8.6 m. inh.
500 m. pages	740 m. pages	540 m. pages	650 m. pages
schools	schools, universities	schools, universities	schools

The share of protected material in the educational sector in these countries is the following:

Denmark	Finland	Norway	Sweden
38%	31%	35%	20%

The share of protected material is usually highest in universities. According to an investigation made in Germany, 49% of all copies made in universities and libraries were of material protected by copyright.

The share of protected material varies naturally a great deal in different sectors. But in all the sectors the total amounts of copied protected material by far exceed what could be described as a "few copies harmless to the right owners."

In Finland, statistical investigations have been made in all the licensing areas, that is education, State administration, municipal administration, church administration and private corporations. The following table shows some of the results:

Education	State Administration	Municipal Administration	Church Administration	Private Corporations
31%	10%	7.5%	11.9%	5 - 15%

2.7 Distribution of Remuneration

One of the basic notions of collective administration is that remuneration is to be distributed individually to the right owners according to the actual use of their works. This general principle applies to fees collected from reprographic reproduction too.

An adequate system of gathering information from the users forms a basis for correct distribution. It is therefore of great importance to the RROs that cooperation with the users exist. Copyright legislation should assist in the monitoring and distribution work of RROs by stipulating certain obligations to the users.

The following alternative distribution ways are used:

-- individual distribution on the basis of full reporting,

-- individual distribution on the basis of sampling,

-- individual distribution on the basis of objective availability,

-- distribution to collective purposes of right owners.

Distribution on the basis of full reporting is impossible in most cases of mass uses. However, some licensing schemes for trade and industry provide actual reports of the copied materials.

Quite often individual distribution is based on sampling. A certain number of users report at agreed intervals the actual use. In Denmark, for instance, 5% of all schools report their copying to the local RRO.

All the material existing on the market can be copied, and at certain stages probably will be copied. The principle of availability on the market forms the basis of individual distribution, amongst others in Germany. Authors and publishers report their publications to the local RRO and get their share of the distribution accordingly.

In Sweden, Finland and Norway collected fees are distributed for the collective purposes of right owners. This is a solution which the right

owners themselves have chosen. The solution applies only to the right owners represented by the organization. According to the extended collective license in the Nordic countries the non-represented right owners have, on the basis of the law, always a right to remuneration on an individual basis.

Technological development created photocopying. Further technological development as regards photocopying machines may help to solve the problem of fair and accurate distribution of remuneration to the right owners at a reasonable price.

Different techniques are tested in a number of countries. Capturing of the ISBN number of the copied material with a laser pen is one alternative. Devices capturing the image of the copied material is another technique.

Foreign Right Owners

License fees for foreign right owners are channeled through the RRO in the receiving country (A-type of reciprocal agreement). The reciprocal representation agreements between the societies are based on the principle of national treatment.

Some RROs have at the initial stages preferred to conclude reciprocal representation agreements where no transfer of remuneration between the countries is effected (B-type of reciprocal agreements).

Author-Publisher Shares

The participation of authors and publishers in the collective administration of reprography is fundamental. In most cases both authors and publishers are represented in the RRO. In some countries the division of remuneration between authors and publishers is regulated in the statutes of the society. In those cases a 50/50 division is the most common.

The sharing of the remuneration between authors and publishers can differ as to different types of materials. The German example illustrates the situation:

	Authors	Publishers
Fiction	70%	30%
Non-fiction	50%	50%

2.8 IFRRO

The International Federation of Reproduction Rights Organizations (IFRRO) links together all national RROs (members) as well as national and international associations of right owners (associate members). IFRRO has for the time being RRO-members in 19 countries, and more are foreseen in the near future.

IFRRO has three primary purposes:

-- to foster the creation of RROs worldwide;

-- to facilitate formal and informal agreements and relationships between and on behalf of its members;

-- to increase public and institutional awareness of copyright and the role of RROs.

3. ELECTROCOPYING

3.1 Impact of Digital Technology

The advent of digital technology is perhaps the most important element in today's information technology. Digital technology means the storage, reproduction and transmission of material in the form of digits; in binary code consisting of zeros and ones. In numeric form, digital information is generally only machine-readable and must be converted by the machine into some other form before it can be understood by a human being.

In digital form:

-- boundaries between different types of works break down, allowing texts, pictures, audiovisual and musical works to be viewed and heard through the same medium, i.e. a computer screen,

-- works can, combined with telecommunication systems, be transmitted anywhere,

-- enormous volumes of material can be stored in a relatively small space, allowing increased portability,

-- information is, together with proper software, easily indexed and accessible according to the various needs of users,

-- any kind of manipulation of information is possible; authenticity and integrity of information are critical issues,

-- there is a totally new re-use capacity of works; the "original" can be copied over time without any loss in quality.

Authors and publishers know today that unauthorized electronic uses represent even substantially greater risks to right owners than the already present and known damage from unauthorized photocopying. A facsimile paper copy of protected material has a limited life cycle. The copy is distributed to the end user or new copies are taken from the "first" copy. There are clear limits on the re-use possibilities of photocopies.

Authors and publishers are looking for different solutions to deal with the administration of copyright in the digital environment. The somewhat slow awareness of the threats of photocopying and the great damages caused by it have certainly taught a lesson.

3.2 Some Definitions

The term electrocopying is used in this paper meaning the storage and further uses of protected material, be these printed or machine-readable, by electronic means.

Over time different terms have been used to refer to the process of using computer technology to make copies of protected works. One of the earliest and probably most widespread is electrocopying. It has been used because of its analogies to photocopying among others by IFRRO and by the International Publishers Association (IPA) during the latter part of the 1980s.

In the past few years, the term electronic copying has gained some preference in the discussions. It has been stated that the term electrocopying only refers to the storage and reuse of printed material, whereas electronic copying also encompasses the use of digital or digitized, non-print material.

On one hand, both terms, electro and electronic, fail to anticipate future developments in the technology, i.e. photonic technology as opposed to electronic technology. On the other hand, the term copying normally includes certain "non copy" uses, such as dissemination and public performance. Perhaps in the future the term digital copying will be used when reproduction acts are concerned. This is proposed in a study paper entitled "Digital Copying," issued by the Finnish Copyright Institute and written by Richard Cohen.

In 1989, IFRRO issued the Report of the Working Group on Electrocopying. It adopted a broad view of the term electrocopying. According to the Report, "electrocopying is the term currently used to cover one or more of the following acts:

-- storage both of preexisting print-based works and of works made avalaible only or alternatively in machine-readable form,

-- display of such works,

-- manipulation (including searching) of such works,

-- dissemination e.g. by downloading or networking of such works,

-- reproduction of such works."

The following eight steps were described which can occur either alone or in a sequence within the context of electrocopying:

1. from paper format through keyboard to computer,
2. from paper format through optical scanning to computer,
3. from computer on-line to computer(s) (networks),
4. from computer by print-out to paper format,
5. from computer through electronic information carrier to computer,
6. from information carrier to computer,
7. from paper format on-line (fax) to computer, and
8. from computer through broad-/narrowcast to computer ("datacasting").

Thus, electrocopying qualified a situation in which a digital, machine-readable copy was

-- the basis for,

-- the intermediate step of, or

-- the result of the copying process.

3.3 Electrocopying and Copyright

Right of reproduction

There is general agreement that input activities into the computer and output activities from the computer constitute an act of reproduction, and are subject to the right owners' consent. There is some debate concerning certain temporary processes within a computer. However, if the temporary storage is permanent enough to allow uses, such as display or print-outs, the right of reproduction comes into question.

Different ways of inputting are:

-- keying, i.e. inputting data into a computer by means of a keyboard,

-- scanning by different processes, and

-- downloading, i.e. transferring already digitized material from one memory device to another.

The latter can take form of an off-line transfer (from a CD-ROM or a diskette) or an on-line transfer (from on-line data bases).

As for outputs, we deal with:

-- paper print-outs, and

-- digital storage mediums, such as diskettes.

Where a tangible copy is not the result of a downloading, we have an interesting question. If the user calls up the information to his computer screen in order to temporarily "view" the information, does that constitute a reproduction?

The so-called reproduction theory of a display is under discussion for the time being. WIPO proposed, already in 1987, in the Preparatory Document for, and Report of, the WIPO/Unesco Committee of Governmental Experts on the Printed Word, the following explanation: "When writings and graphic works are displayed on a screen they are fixed...for the time which is necessary for reading the text and studying the work concerned. What appears on the screen is actually a copy of the work, usually in page format. If it is true--and it seems to be true--that the display on a screen is reproduction and the presentation of the work a copy, such a display is necessarily covered by the right of reproduction."

Public Display

There is rather general agreement that displaying or viewing of protected material on a screen ought to be subject to copyright. The protection can be constituted, as described above, by considering a display to be a copy and the act consequently subject to the right of reproduction.

An alternative would be a right of public display with a broad definition of what is "public." Users viewing materials retrieved from data bases normally do this viewing at different places and different times in their private homes. Non-simultaneous viewing in non-public places should in that case be considered as "public."

Limitations on Rights

The reproduction right is important in the context of electronic copying. Legislations of most countries contain certain limitations on the exclusive right. Private and personal use is the most common. Moreover, copies made for use in teaching and in libraries are subject to exemptions. That might be justified in cases of traditional photocopying. A different assessment has to be made when digital copies are in question. The application of existing exemptions may not be in line with the provisions of Article 9(2) of the Berne Convention.

Protection of Data Base Producers

This paper does not deal with the protection of data base producers or providers in more detail. Article 2(5) of the Berne Convention protects collections of protected material. From the right owners' point of view, collections consisting of mere data or information pose a problem, if sufficient protection is not guaranteed. The proposed EC Directive on the legal protection of data bases is of interest in this connection.

3.4 Chain of Interested Parties

The chain of parties in the digital environment can include authors, publishers, information providers/intermediaries and end users.

Authors of Protected Works

For unpublished works, the author of the work authorizes the first storage. The licensee may be the publisher, the data base provider or even the end user. The author can keep the information always on an up-to-date level and authorize use when demand occurs (so-called publishing on demand).

For published works, the question arises whether the existing publishing agreements include also storage on computer and further digital uses. In most countries there are model agreements between authors and publishers. National rules concerning the interpretation of existing contracts will also play a

role. In the Nordic countries for instance, agreements would, in case of uncertainty, be interpreted in a restrictive manner.

Traditional contracts are being renegotiated by authors for the purposes of dealing with digital uses. Two separate issues can emerge. First, who is permitted to authorize further uses vis-à-vis information providers or users. Secondly, how the licensing remuneration is to be divided between authors and their publishers.

Researchers, i.e. authors of scientific, technical and medical material (so-called STM material) have traditionally transferred all their exploitation rights to established publishing houses. Whether new approaches and ways of delivering information arise in the digital environment remains to be seen.

Publishers

From the publishers' point of view, electronic storage is considered to be part of the primary publishing process, and needs permission from the right owners.

To acquire rights broadly and license them narrowly has been a common view among the publishers. The development of licensing mechanisms suitable for the great variety of uses is a challenge.

Individual licensing of electronic storage is the first option in cases where this is effective, for instance when licensing commercial data base providers. The case may be different in case of scanning of works into in-house data bases for archival and information purposes, for instance in enterprises.

Non-commercial and Commercial Information Providers

Libraries are examples of non-commercial information providers or intermediaries. In 1992, ELP (Working Group of European Librarians and Publishers) stated in its resolution on electronic storage that "they support:

-- the general copyright principle that the storing of copyright works into electronic systems is an act which requires the authorization of the right holders of these works, and

-- equally the general need of users to have easy and fast access to copyright works, in whatever formats, on reasonable terms."

The biggest concern to the libraries seems to be that the necessary permissions can be obtained easily.

Commercial data base providers are a diverse group. The contractual arrangements between data base providers and end users are developing. Different pricing and licensing stuctures in an on-line information network are possible, such as:

-- connect-time charge,

-- connect-time together with guaranteed minimum and prepayments,

-- charges for the amount of information retrieved,

-- "flat-feel" pricing structures, and

-- "site" licenses (i.e. for an entire enterprise or a department of it).

Users

One of the major concerns to all parties is of course the user's compliance with whatever conditions are imposed on him. For instance, how to prevent the end user from copying the material and re-utilizing it. Technological solutions help, but do not solve the problem.

3.5 Exercise and Administration of Rights

In September 1992, IFRRO and the International Group of Scientific, Technical and Medical Publishers (STM) issued a Joint Statement on Electronic Storage of STM material. The general principles state clearly the hierarchy of rights as well as two-fold options for the right owners.

Electronic storage of STM material belongs to the primary publishing process. According to the statement "some STM publishers may wish to exercise individual control over licensing in some or all instances, while other STM publishers may wish voluntarily to authorize RROs in some or all instances to license users on their behalf under such terms as publishers agree to."

In the latter case, RROs do the licensing, but publishers set individually their terms of licensing. With STM material it is question of a special, concentrated and easily identifiable market.

In markets where there is a multiplicity of users asking for permission from a large number of right owners, the situation may be different. IFRRO is currently having discussions with other groups of right owners, including the coalitions of authors, on licensing issues in the electronic environment.

From the user's point of view, the decisive factor is the effectiveness and ease of getting the licenses rather than the price. If right owners together with their collective administration organizations can offer voluntary clearing centers, the demands of the users can be reasonably met.

If the users encounter practical impossibilities in getting the licenses, the right owners run a clear risk that non-voluntary licensing schemes in the legislation will be asked for. This has to be avoided in the digital environment.

Blanket licensing models used in the licensing of photocopying are not the only solution. RROs can function as clearing houses or permission clearance centers (one-stop shops), where users can obtain permission against individually set prices and conditions.

The Copyright Clearance Center (CCC) in the United States has had a number of pilot licensing projects in the digital environment. In February

this year, CCC began collective licensing of digital uses of full texts in networked environments. The first aim is to secure the participation of those publishers whose material has been mostly photocopied by corporate users.

Of course RROs meet in licensing with the same representativity problem as in the case of photocopying. Plans to introduce extended collective licenses also in the field of electrocopying have been considered in Norway, where the Copyright Committee Report on Electronic Copying tackled this option already in 1989.

A rather natural role for RROs is to license scanning of material into in house data bases for archival and information purposes (document management systems). The right owners have normally no possibility to gain knowledge of this kind of use, which takes place in a closed environment. The know-how of RROs in licensing photocopying in this field is already considerable.

Authors, publishers and information providers are increasingly demanding technological answers to their concern for controlling and auditing the access, use, copying and dissemination of digitized information. This area is outside the scope of this paper, and the focus of a separate paper in the Symposium.

3.6 Home Electrocopying

Electrocopying for private and personal use forms a specific area. Home uses are impossible to control, and normal licensing measures are out of question. There exist basically two different approaches to this question: either to prohibit the private use of material in digital form or to introduce some indirect ways to obtain compensation for that use.

Recent statistics from Norway show, rather suprisingly, that 25% of households have a personal computer, and the penetration is steadily increasing.

Equipment levy systems are possible alternatives, especially in countries where such levies exist already in photocopying machines. A recent decision in Germany stated that the levy has to be paid also for reader-printers and fax machines. The next step is to test the case of scanners. Recent legislation in Greece introduced a 6% levy for audio and video recording equipment and at the same time a 2% levy on personal computers.

An analogy could be taken from blank tape levy systems in the field of audio and video recordings. This would lead to levies on diskettes or other storage mediums. This issue is being discussed for instance in Norway.

WIPO proposed in 1992, in the Memorandum prepared for the discussions on a Possible Protocol to the Berne Convention, that, in relation to the storage of works in computer systems, no exemption for private use should exist. Otherwise there would be a clear conflict with the normal exploitation of the works concerned.

The Danish Minister for Culture submitted, on February 9, 1994, a bill to the Parliament for a revised Copyright Act. The representatives of right owners, the Danish Writers Union and the Danish Journalists Union, had argued that there should not exist any exemption for private use, where copies in

digital form are concerned. In the bill, the protection of computer programs was extended to all copies of works in digital or digitized form. No private use exemption would exist. In the explanatory part it is stated that the new digital technology represents such considerable possibilities for rapid reproduction in first-class quality, also of types of works other than computer programs, that good grounds exist to expand the protection to all categories of works when they exist in digital format. The proposal is pending in the Parliament.

4. ELECTRONIC DELIVERY

4.1 Market and Technology

The publishers of scientific, technical and medical material (STM publishers) were among the first to experience the impact of digital technology in their business.

STM journal publishing has grown over the years. There has been an increasing amount of material offered by the researchers, and the number of publications has expanded. At the same time librarians have had decreasing resources to acquire the material available on the market. The result was a fall in subscriptions, an increase in journal prices and an increase in interlibrary loans, etc. The use of photocopying and fax machines increased substantially. The combination of tight budgets and an improved technical infrastructure have created the need and opportunity to replace subscriptions by the acquisition of articles on demand (document delivery).

The basis for electronic communication is the Internet. It is a connection of about 30,000 networks linked to more than two million hosts and used by more than 10 million people. Internet operates internationally. Electronic mail (e-mail) and File Transfer Protocol (ftp) are examples of connection exchange and operating software programs.

Today the CD-ROM is probably the cheapest way of storing large quantities of data. More and more CD-ROM titles are finding their way into libraries. Searching in data bases may be expensive, and the information on disc is equally accessible. Even traditional data base suppliers are publishing on CD-ROM, and it has been concluded that the medium is rapidly nearing maturity.

4.2 Electronic Versions of Printed Journals[2]

Publishers are increasingly offering their printed journals in electronic form, mainly on CD-ROM. The first of this kind of offline service was started in 1987 by a Consortium of STM publishers called Adonis, "following the custom in European documentation projects of adopting names of Greek and Roman gods."

The goals of the service were:

-- to enhance awareness of the value of copies made from printed, copyrighted material,

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[2] On the basis of an article by Professor Dr. Götze, Springer-Verlag, May 1994.

-- to enable publishers to set a copyright fee and charge it for copied articles, and

-- to provide a system for producing copies of articles cheaper and faster than conventional photocopying.

Today, the Adonis system provides about 560 journals from about 40 publishers covering biomedical/pharmaceutical subjects. About 80 CD-ROMs are supplied annually. The CD-ROMs are delivered to subscribers, i.e. to the pharmaceutical/chemical industry libraries and academic libraries as well as to the British Library Document Supply Centre (BLDSC). Articles can be retrieved according to different criteria, viewed on screen and printed out. Each print-out is recorded and a fee set by the publisher is charged.

Increasingly, Document Delivery Services (DocDel) are offering copies of articles online via fax or networks. In most cases the articles are scanned and stored in facsimile mode. For instance, BLDSC obtains the permission needed for scanning and storing from the Copyright Licensing Agency (CLA) in the UK.

There are experiments on network versions of electronic journals, such as TULIP (The University Licensing Program, by Elsevier) and Red Sage (by Springer-Verlag).

4.3 Document Suppliers

According to the International Federation of Library Associations (IFLA) there were, in 1990, national libraries having document supply facilities in 116 countries.

Information on BLDSC states that 3,450,967 requests from UK and overseas were received in 1992/93. Science and technology is the subject of the request in 73% of the cases. The main part of activities is based on "old technologies," photocopies by post and fax.

BLDSC participated in the Adonis project. According to Phil Barden, who is in charge of advanced technology at BLDSC, "a major problem arises in implementing a new technology application within a large-scale manual system in so far as special steps have to be taken to ensure that the new technology option is exercised. A way had to be devised to identify and divert request forms for Adonis material away from the mainstream manual processing cycle and towards the Adonis workstation. This, of course, had associated processing overheads in double handling...The Adonis trial was, for the most part, a success. The major objective of the trial, establishing a workable system for the storage and retrieval of full-text articles from CD-ROM, has been achieved." Moreover Barden states that "it is also worth pointing out that the Adonis trial proved that co-operation on new technology developments across national frontiers is feasible and valuable."

4.4 Licensing Issues

Some basic decisions that a publisher has to make when dealing with electronic document delivery are, according to Karen Hunter, Vice President

and Assistant to the Chairman, Elsevier Science Publishers BV, the following:

-- what physical format will be permitted (paper copies, electronic storage to produce paper copies or electronic copies),

-- to whom the authorization will be given (corporations for internal electronic storage, universities for classroom use or on-campus network access, etc.),

-- decide the royalty rates,

-- decide how you collect the money,

-- decide what else is wanted besides the royalty (what information from the market).

On the latter issue, Karen Hunter states: "There is a need to be realistic about what data can be affordably gathered and how it will be used. It makes no sense to insist on data which will not be used, where use probably includes computer analysis. It may be desirable for publishers, document suppliers, customers and RROs to have a joint discussion on this topic and see if working standards can be developed."

International document delivery poses special questions. Which countries' legislation, conditions of agreements and royalty rates shall be applied in a fully international environment where the article is published in country A, the digital master copy of the article is made in country B, the international electronic article delivery system operates from country C, and a not-for-profit library/for-profit corporate user receives a copy in country D.

Publishers in the United States have agreed with BLDSC that the royalty rates for articles sent by BLDSC to the States shall be paid to CLA in the UK according to the terms set by the US right owners.

5. FUTURE PERSPECTIVES

We are living in the "Information Age." The European Union and many national governments have current plans for developing their national information systems, building "digital superhighways."

In the agenda for action of the National Information Infrastucture (NII) of the United States, the phrase "Information infrastructure" has an expansive meaning. "The NII includes more than just the physical facilities used to transmit, store, process, and display voice, data, and images. It encompasses: a wide range and ever-expanding range of equipment including cameras, scanners, keyboards, telephones, fax-machines, computers, switches, compact disks, video and audio tape, cable, wire, satellites, optical fiber transmission lines, microwave nets, switches, televisions, monitors, printers, and much more".

May this quotation show the challenge of the information age in which we live, and where we will define and settle the questions of rights, their exercise and enforcement.

USING COMPUTER TECHNOLOGY TO SOLVE THE COPYRIGHT PROBLEMS RAISED BY COMPUTER TECHNOLOGY

by

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I. INTRODUCTION

1. The impact of technology on copyright results in many positive consequences--like the opening up of new dimensions of creation. However, it may have manifold negative effects as well. Generally speaking, one of the main controversial consequences of this impact is that works, performances, recordings and broadcasts can be accessed overly easily by using widespread copying technologies and telecommunication networks but without paying for hard copies or tickets to any performance. Works distributed in digital form are copied like "cloning" for private purposes in mass quantities. This tendency of the mass "private" character of today's use of works is foreign to the traditional market mechanism of copyright. Further, the difference between the exploitation of the works in material form and in immaterial form is fading; the importance of the use of works in immaterial form is growing. All this may necessitate a change of paradigm of copyright.

2. If we go into more detail, it becomes evident that the scope of the problems raised by computer technology is extremely wide. Technological innovations challenge the basic concepts of copyright, from authorship through the subject matter of protection to the concept of copyright use. They concern also the present statutory limitations on rights, the possibilities of exercise of rights and the concept of infringement. Some of these problems may probably be solved by interpretation or amendment of copyright laws. Some questions will remain unanswered for a time. However, there is a third group of problems where the solution can be expected from technology itself. We shall deal with that "direct way" of protecting copyright interests in this article. The series of symposia organized for some years by WIPO on copyright issues connected with computer technology already allows such an interim summarizing.

3. The direct way to protect the legitimate privileges of the owners of copyright by the use of new technology means, on the one hand, putting certain restrictions on the use of technology otherwise available to the public or, on the other, prescribing the use of certain technologies for industry and trade obligatorily. This may again have certain implications of a copyright or even constitutional nature. The study of these specific questions is, however, not the direct subject matter of this presentation. The possible threats to the personal privacy of the application of a technology controlling the individual use will remain outside the scope of this presentation in the same way as we shall not treat the industrial agreements and statutory regulations often indispensable for the implementation of one or other technical solution either.

II. "SAMPLING"--UNAUTHORIZED ADAPTATION

4. We encounter a number of difficulties raised by new technology even in the first life period of works, in the phase of creation. One of them is caused by musical "sampling." Small but recognizable audio elements are extracted from recorded musical works and--after certain alteration--incorporated within a new work, a new recording. In many cases, this concerns a qualitatively substantial part of the original music/words/recording and it constitutes, therefore, a copyright infringement. In many cases, it may qualify as a derogatory treatment which never would be consented to by the author. Anyway, this use would very often presuppose previous authorization from right owners. It is, however, extremely difficult to prove "sampling," as a recording can always be sufficiently tampered with to disguise its origins. The judgment of these practices also seems to be difficult from the purely legal point of view since it requires an answer to the tricky question: what is the smallest identifiable part of a work which is still an original expression of thought but not yet the underlying idea?

5. The results of the digital sampling of musical works (derivative works?) constitute a hardly surmountable problem also for the distribution of royalties in collective administration. Royalties have to flow to the very source of creation, but sampled material still cannot be distinguished from the new works, or very little. If we could succeed in this endeavor, the royalties in a given work should be shared according to the agreement of the parties concerned exclusively, as a pro rata temporis solution would not reflect the often decisive character of the "sample" for the "new" work.

6. Digital technology can be used for unauthorized manipulation and modification of works even more generally. Digitized versions of different works of the most differing work categories can be stored, combined and interchanged by way of computer programs in the same work carrier. Such unauthorized practices, when made in the course of a commercial exploitation or of a communication of the work, qualify for copyright infringement. This is probably not the case with private manipulations made by users, as this--unlike home taping--does not influence the normal exploitation of the original work.

7. One possible technological answer of the right owners to these challenges is the encryption of protective software in works made public in digital form and the enforcement of the obligatory application of some spoiler devices at the users' end. A more realistic approach would be the development of detective techniques: the comparison of digitally stored musical--and other--recordings within the computers of the organizations of the collective administration of copyright.

III. DIGITAL WORKS--DIFFICULTIES IN IDENTIFICATION

8. The digital form is an essential form of manifestation of certain works, like computer programs. The human perception requires a conversion from digital to analogue form, as human eyes, ears and skin behave like analogue sensors. This element of indispensable reconversion is not absolutely new in copyright since the appearance of film and sound recording and does not exclude copyrightability. Computer programs, however, are often used without tangible embodiments, they may exist in several electronic circuitries at the

same time. This threatens the right holder with the inability to control usage of his work and the user with the inability to ascertain who is the genuine owner of those rights that are to be transferred to him. Computer programs are often composite works produced by different right owners and the prospective use may need a specific "module" only. Digital works (computer software) and digitized works stored in computers and transferred--with increasing circulation speed--over electronic networks are prone to piracy.

9. In a rather dramatic way, we could say that the digitization of works may result in cultural catastrophe as it makes the individual traits of the work less and less identifiable and, therefore, protectable. The decrease in the enforcement of exclusive individual rights diminishes the incentives to create individually and originally as well as to invest in intellectual property.

10. All that calls for a new, evidently digital, identification and voluntary registration of certain works like computer programs, multimedia works, other works expressed in digital form as a practical means of control. This has nothing to do with copyright eligibility or with formal requirements.

11. In the case of computer programs, the elements of such an international identification--numbering--system have already been developed by the French Agency for the Protection of Programs (APP). The central element of the system is the allocation of identification numbers, to be inserted electronically into the program. In case of complex works, the identifiable, substantial, individual elements will also have identification numbers. The system may be internationalized by the establishment of a central authority (organization) allocating blocks of numbers to local registration authorities, similarly to the working of the ISBN numbering in the book sector. The obligatory core of the information content of the number must contain a reference to the right owner (country, registering organism, deposit number), to the release number, to the type of deposit, and to the type of work (primary, composite, adaptation). Further information may also be included by further codes for operating system, minimum hardware configuration, available rights and licensing conditions.

12. The voluntary deposit of a copy of a work seems to be a necessary element in this international numbering system as the user may need a guarantee of access to the source code. Further, a unique authentication document setting forth claims of authorship rights would facilitate the proof of ownership in legal disputes. Certain national laws might even give a rebuttable presumption of entitlement in favor of the registered person.

13. The special value of this numbering system lies in the possibility of including the number not only in the material support, as in the case of other existing systems such as ISBN and ISSN (books, periodicals), ISRC (sound recordings), "bar codes" (different products), ISMN (sheet music), but also in the body of the work. The programs and its distinct parts (modules) as immaterial productions would carry their codes through practically every conversion, transfer and modification.

14. For certain work categories, the codes internally generated and inseparably attached to the work by the producer suffice for identification, without external, international allocation or assignment of coding numbers. This seems to be the view of the United States film producing industry which is experimenting with a "digital fingerprinting" system. "Cyphertech Systems"

creates a continuous digital fingerprint in the master copies of audiovisual works. The code identifies not only the work but also a precise segment, even each frame, of the work. The codes can be monitored and reported by monitoring stations. It is unerasable and so carried from copy to copy. However, this "internal" code system could work together with the "external" codes just mentioned.

15. Coming back to the externally assigned code numbers, we have also to refer to the tempting idea of having a unique worldwide system covering all work categories. Such international "earmarking," especially if it could be fixed in the immaterial work itself, would be useful for "analogue" works distributed in digital form as well in the age of mass distribution and use in general. However, the extent to which new methods can be applied and devices installed to identify and control works depends greatly on the kind of work used and the actual use made. A unified, detailed international system for all work categories is hardly conceivable.

16. On the contrary, an international register of national and international work-registering organizations together with their scope of activity and the information content of their codes seems to be necessary. This would be, in the case of rights in musical and literary works administered collectively, an international register of licensing sources as well. Even an all-embracing unified international code number under the auspices of WIPO seems also to be feasible if the code is short and simple. This could serve as an "overall system" of references to different "sub-systems." Its codes should be restricted to an indication as to what kind of thing is being numbered, who has allocated the number and to a part unique to the specific item.

IV. MATERIAL CARRIERS OF AUDIO AND VIDEO WORKS IN DIGITAL FORM--WIDESPREAD PIRACY

17. The next copyright problem generated by technology and to be discussed here is situated within the right of reproduction. Different sound and video carriers have appeared or are about to appear on the market which carry the sound and image frequency information in the form of a digital signal which can be laser-read (CD, DAT, DCC, CD-Video, CD-Photo, CD-I, etc.). The last mentioned is an interactive video compact disc, a so-called multimedia product, where the user can intervene at any moment in the development of the program. These carriers permit an infinite number of duplications of perfect copies which are qualitatively equal to the original. The availability of blank digital media and recording equipment signals the next phase of this rapid development. Storing capacities of carriers are expanding: a CD-ROM disc is capable of storing as much information as approximately 1,000 floppy computer discs or roughly 50 text books. The density of digital storage is also increasing: smaller and smaller media store greater and greater amounts of works.

18. The consequences of this development for the copyright owners are already commonplace. Firstly, the mass electronic reproduction of audio and audiovisual works from broadcasts and commercial copies for private purposes prejudices the legitimate interests of the right owners of musical works, sound recordings and films, especially since digital carriers have conquered the market. Secondly, the widespread practice of reproducing commercial

compact disc copies for distribution purposes, in conflict with the normal exploitation of these works and products, is an act of piracy. Technology may help to curb this second-mentioned dangerous side effect of the technological developments.

19. Digital technology has also developed the methods to encrypt or to lock down the digital information and prevent any unauthorized activity or use. For example, an anti-copying device can be inserted into the digital software and hardware with the effect of inhibiting the copying of encoded recordings or the copying of the copies. This Serial Copy Management System (SCMS) has been made obligatory for the industry in the United States of America by copyright legislation. The rationale of the SCMS is to hinder the pirate copying activity which produces for the black market, but does not address the problem of mass private copying. On the contrary, as it allows first-generation copying, the system acknowledges the legitimate interests of the public in making one copy and leaves it to the "home-taping royalty scheme" to provide material compensation for the right owners.

V. NEW WAYS OF IMMATERIAL DISTRIBUTION--A USE WITHOUT COPYRIGHT CONTROL?

20. We are witnesses to a technological leap in computer storage, telecommunication, cable distribution and broadcasting. The most spectacular elements of this "new distribution technology" are the following.

21. Several cable television and audio services are already operating in the world. The coaxial broadband cable networks have 250,000 times the capacity of a normal telephone wire. Imminent introduction of two technological innovations, that of the fiber optic cable and of digital compression will further enhance the quality of transmission and the channel capacity of the systems leading to the transmission of 100 to 150 different programs to each of the connected households.

22. Data input and storage technology is changing. The increase in the storage capacity of computers leads to the expansion of the usual scope of the storing application of computers. Not only thousands of audio and video works, but--due to improved graphics scanning technology--even the full text of literary and scientific works can be held in data bases. Such computer data bases connected into networks can make any work in digital form available in a few moments on faraway desktop computers due to the above-mentioned high performance of transmission technology. This technology, distributing data on demand to a multitude of users at the same time, is already operational.

23. Digital technology also has an expanding role in broadcasting. Digital Audio Broadcasting (DAB) allows parallel broadcasting from the same emitting station and within the frequency block of 1.5 MHz of several (six to 10) programs. The recipient of the signal will have the ability to make any number of distortion-free copies of the programs received over the air. This would allow--from the mid-1990s on--the quality of sound (stereo) and the number of programs to be raised and would lead to the proliferation of thematic musical radio stations. This technology has more advantages on the national than on the local scale. Digital Satellite Radio (DSR) is already operational in Europe, while digital satellite television still awaits its introduction. The digital broadcast can be fed into cable networks.

24. The entertainment industry will soon fully exploit the possibility of connecting the above-mentioned technologies. Huge data bases will contain thousands of musical works and films. Digital compression provides enormous channel capacity, particularly for the far lower requirements of audio data transmission. This will allow two-way communication: cable and data-base operators will offer audio and video but also, as we have seen, even scientific literature cable service on demand. Such interactive entertainment cable systems are in the test phase in the United States of America and the United Kingdom. They will permit consumers to separately access, and to download if they so choose, film or recorded music without regard to outside broadcasting decisions and scheduling. It is just a question of time before these digitized record, film and scientific literature libraries are connected by fiber optic cables and also by digital broadcasting and offer even transcontinental services to consumers.

25. What are the negative effects of the just discussed technology for copyright which, hopefully, can be fended off by technology? As an introduction, we have to observe, without qualifying the facts, that the immaterial form of exploitation is, step by step, replacing the traditional "material" forms such as publishing, selling and rental of copies. The quasi totality of the repertoire of the most varied categories of work becomes available to the public at any moment. The networks link the private sphere of the author or publisher, producer, cable operator to the private sphere of an abundance of users. A primary use may take place in controllable data bases and interactive cable studios (input, storing, offering supply of works for a subscription fee) but the actual use--secondary, compared with the other--depends on the decision of the user (and not, for example, on the schedules of a broadcaster) and occurs inside his home (perception and reproduction by his private devices). Reception on demand (the downloading of works by private telephone lines into the private computer as an act of choice effected by the private recipient) is active behavior and cannot be identified with the traditional passive reception of broadcasts over the air. All this makes the present copyright concept of broadcasting, distribution and private use ripe for reconsideration.

26. The ever increasing possibility of on-line access to works in digital form leads to the dematerialization of all kinds of printed matter and, especially, of sound recordings. Traditional publishing and selling of copies of sound recordings may become unnecessary, unprofitable, thus emptying the reproduction rights of authors, publishers and producers of sound recordings of their substance. A certain amount of reproduction would still occur in the future, but it would take place in the private sphere, not controllable or manageable by individual licensing.

27. It is quite clear that the future of whole cultural industries, the maintenance of the material incentives of original creation depends on how identification, control, licensing and royalty distribution would cover each and every use of each individual works in the age of mass "immaterial use." In this system today, even if the initial distribution--possibly of copies--is lawful, it is virtually impossible to control redistribution. New, big users--distributors--appear on the scene changing their roles like, for example, the libraries, moving from an archival to an access/intermediary role.

28. Finally, not only right owners but users as well are in distress in this new situation. Law-abiding prospective users seeking authorization for an

adaptation of software or a musical work can only find the licensing source or authority through a costly and time-consuming process.

29. Let us see what kind of remedies technology can offer for these illnesses. We have already described the technological possibilities of the identification of works in paragraphs 8 to 16. Here we shall concentrate on the field of control, licensing and distribution of royalties.

30. Digital technology is already used for licensing purposes by the various collective administration organizations which maintain large data bases on their respective repertoires as, for example, the reprographic right organizations (Copyright Clearance Center (CCC) in the United States and Copyright Licensing Agency (CLA) in the United Kingdom). The instant retrieval of bibliographic data and licensing conditions stored for each of several hundred periodical articles allows direct dealing with users, and quick permission clearance. The application of new technical devices, known as "smart cards" included in or associated with data bases which--like credit cards--contain information about the user's identity will result, in the near future, in better control, easier licensing. They should allow, for example, the making of a certain number of copies only.

31. A more specific application of the digital technology in licensing is the encrypting of broadcasts, which is already a practice in the analogue field and can be introduced in digital broadcasting as well (broadcast receivable by special decoders, pay-TV, pay-per-view). Physically, this means the limitation of public access to the program, in other words the extension of the control of the right owner/authorized distributor to the final phase of the "communication to the public" of works and protected productions. Legally, it is questionable whether this final phase of communication, that is to say, reception, can be termed a restricted act under copyright. Namely, the qualification of the use of illegal decoders as copyright infringement depends on the answer to this question.

32. The royalty distribution systems of the organizations for the collective administration of musical rights are based already today, in the age of analogue works and of work distribution, on computer technology. Each organization has to match hundreds of thousands of program data with hundreds of thousands of work data (and data of right owners) yearly. This rendez-vous of data--and the corresponding distribution of the collected royalty funds--is only possible with the digital encoding and processing of the above data. CISAC (International Confederation of Societies of Authors and Composers), the non-governmental organization for these organizations, has developed international data bases on CD-ROM ("CAE List," "World List of Works") in order to facilitate the international flow of data and royalties. For the time being, the data supply on uses from users (for example, from broadcasters) to the organization is usually in paper form, as the digital codes--used by the organizations for collective administration--are not universal and are not embodied in the work itself. The supply of electronic data carriers having the titles of used works is of no great help as the smallest typing differences make identification impossible. The printouts of these lists serve as a basis for further identification work.

33. Fair royalty distribution in the world of the now beginning mass and multipresent digital use of works cannot be achieved except by universal digital identification and tracking of works. "Universal identification of

works" means, as we have described, the harmonized, linked existence of different code subsystems. Each group of right owners needs its own externally allocated or internally generated numbering with differing information content. The musical authors' rights organizations, for example, need the inclusion of the authors and publishers in the work code as well, since the sub-versions could not be distinguished otherwise. Performing artists need the numbering of specific scenes to be able to track the various uses in feature films, multimedia works, commercials, etc.

34. Automatic "tracking of works and uses" presupposes the embodiment of codes into the works and fixed performances and the application of monitoring devices connected to the royalty distribution computers. The monitoring devices may be fixed in the technical means of use (like the case of "smart card copying") or be at the royalty collecting organization (like the case of a digital broadcast or cable transmission which includes the inaudible digital international identification number of the work). The main feature is that these devices, based on the use of coded works, provide an account of which works (part of the represented repertoire) have been used (extracted, copied, broadcast) by the user.

PROTECTION OF THE RIGHTS OF THE CREATORS OF AUDIOVISUAL WORKS

by

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Europe is the only place in the world where men have been able to combine economic progress with social and cultural progress.

From the very foundation of European civilization, the author and his work have had a special place and a specific set of rules, society having perceived the special nature of the work and its circulation.

Justinian, one of the first Roman jurists, made a statement in his Institutes that expresses the fundamental idea underlying our conception of the creator and his work in social intercourse, which is the conception prevailing in European audiovisual circles today. He expressed that idea in connection with a painting on a plank, saying:

> "It is indeed ridiculous to dismiss a work by Apelles or Parrhasius as the accessory of a mere wooden plank."

Today, nearly 2,000 years later, it is equally ridiculous to claim that the creator of Citizen Kane was RKO, Inc. in 1943, and the Turner Corporation in 1994. Who can ever forget the splendid credits of this masterpiece of world cinema, and the rich voice proclaiming that "This film was written and directed by me. My name is Orson Welles."

On September 9, 1886, the heads of 10 States adopted the "Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works."

The preamble to the Convention affirms that the heads of States were "equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."

Such an attitude on the part of governments, whereby authors are granted rights so that they may derive material benefit from the use of their works by others, may be explained by the sense of justice which constitutes the foundation of democratic governments. Without the rule of law and the safeguarding of justice, no democracy can survive.

Furthermore, the recognition of the rights of authors and the protection of those rights promote creativeness, which manifests itself in literary and artistic works that express and testify to the development of life itself.

Over the years the Berne Convention has become the legal instrument serving the interests of authors and the public, and also a "Union Charter" of a group of States, administered by an international secretariat known as the International Bureau of the World Intellectual Property Organization (WIPO), established in 1967 at the Stockholm Intellectual Property Conference.

Seeking the fundamental principles relating to intellectual property, copyright and the rights of the auxiliaries of literary and artistic creation calls for some investigation of the raison d'être of such rights.

The raison d'être of intellectual property is to reward creators as a means of promoting both the making of intellectual creations and access to such creations. Article 27 of the Universal Declaration of Human Rights (adopted by the United Nations General Assembly on October 10, 1948) affirms the primacy of that objective and its necessary consequences:

> "1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Copyright is engraved upon the very facade of the edifice of our civilization.

The place of the creator and of the artist in society and in his complex relations with his environment, owing to the definition of his rights and obligations, is essential to the achievement of balance with the other social forces, the public and the economic sector.

This is not due to sentimentality, romanticism or an idealistic vision of society but rather to pragmatism, because society cannot be reduced to mere exchanges of goods and services: it carries with it a culture which forms the web of its social fabric.

By defending, protecting and exploiting that culture we permit the development within society of a sense of cohesion, of belonging to a group, to a nation and to Europe, and it is this that underpins initiatives and economic advancement.

Copyright, in its classical conception, is adapting to and participating in the comprehensive development of our societies. It is changing and taking into account technological developments and the changes in the relations between those involved in creation and those involved in production.

When we speak of the economic expansion and development of the audiovisual sector, and examine the question of the best system for protecting that expansion, we often compare authors' rights with copyright.

Historically, copyright is a legal privilege granted in the public interest. From the outset, copyright has made no distinction between work and object, indeed the term "copyright"--implying rights in the copy--contains the seeds of this contradiction. By its very nature, the work--the subject matter of copyright--is regarded as a thing.

The term "authors' rights" (or Urheberrecht), which was officially used for the first time in the Prussian law applicable to Bavaria in 1865, replacing the term "literary property," refers to the notion of a natural person's personality being expressed by means of a work.

A number of audiovisual experts have succeeded in explaining the success of American films on the world market in terms of the copyright protection system as applied in the United States of America. This system is presented as the system best guaranteeing the complete control of distribution rights, which permit the free circulation of audiovisual works and the definition of a film marketing strategy.

If that were true, however, British cinema (Britain being the birthplace of the copyright system) would be flourishing, whereas it has in fact virtually disappeared, while in all those European countries with a strong system of authors' rights the cinema is thriving when judged by European cultural and industrial criteria.

As is often the case, "miracle" systems do not exist and American copyright is actually a very complex system which provides both American and foreign producers and authors with very costly and sometimes ineffective protection. There are historical and structural reasons for the success of the American cinema and American programs that have nothing to do with the system for the protection of rights.

The development of copyright in the United States has been strange, although it does protect "motion pictures and other audiovisual works" as well as any other work of the mind. The strange development, which has had consequences above all at the technical level, notably in relation to the term of copyright, the holders of rights and exceptions, has been characterized by three main periods, 1909 to 1978, 1978 to 1989 and 1989 to date.

Technically, the new law of 1988 may have brought American legislation into line with the Berne Convention, but in fact it has all the attributes of an "accommodation"; in practice it is still the same law, full of pitfalls.

The American law that entered into force on January 1, 1978 (Copyright Act of 1976) began to heed the norms applicable within the Berne Union as far as the term of copyright was concerned.

Under the previous system (the Copyright Act of 1909), the provisions relating to term of copyright were very quaint, having been drawn from the first copyright legislation, which was the English law known as the "Statute of Anne" of 1710.

The current law's transitional provisions are still complex, and it is often difficult to calculate the term of copyright in the case of works created before January 1, 1978. We therefore have to distinguish between works created after that date, works created before it and works created after 1989.

Accordingly, when the NAFTA Agreement (North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America) was signed, the United States Government was forced to acknowledge that its system of

copyright protection had made it possible for thousands of films to be legally exploited (having fallen into the public domain) without the rights of their legitimate owners (producers, authors and other holders of rights) benefiting from any protection as required by the Berne Convention.

The United States was obliged to grant Canadians and Mexicans the possibility of indemnification for prejudice caused in this way.

It is noteworthy that, as Europe and the rest of the world are unable to invoke it, the relevant clause of the NAFTA Agreement could be considered a discriminatory measure under GATT provisions.

Apart from the fact that it disavows the very foundation on which it was built up, namely creation, copyright considerably strengthens the rights of producers as opposed to authors, but otherwise grants the same prerogatives to the producer as authors' rights do to users.

Continental authors' rights (by means of their automatic system, or presumption, of contractual assignment of rights) enable the producer of audiovisual works to control whatever rights he needs to ensure the free circulation of works.

The intellectual property protection system prevailing in continental Europe has made it possible, without any particular problems, to compile important catalogs of European films, such as the Bertelsmann, Kirsch, Gaumont, Pathé and Filminvest catalogs, and has prevented the long and violent strikes in the audiovisual industry that the copyright countries have experienced.

The ultimate economic usefulness of copyright is identical to that of authors' rights. Quite simply, authors' rights are predicated on the notion of respect for reality--the reality of creation--and regulate the relations involved by means of legal institutions, whereas copyright--which is a legal fiction--believes it necessary to impose the denial of creation, by making the producer or the production company the sole author, in order to exist.

One could then wonder how the fact of legally denying the natural bond between the director and the screenwriter on the one hand and their film on the other, which moreover means that a film is known by the name of the director or screenwriter and not that of the producer or the distributor, actually favors the economic development of the sector whereas copyright does not. Furthermore, while the ownership of an audiovisual work may change frequently, its authors remain the same.

This basic conceptual difference in relation to our European traditions should never be forgotten.

Copyright is justifiable only in relation to a particular environment, by the choices of a society that are relevant only to that society.

Continental authors' rights have never prohibited or limited the freedom of film production or marketing.

From whatever angle the problems of authors' rights are considered, it is abundantly clear that a system of protective rights contributes to the enrichment of our societies.

The existence of adequate economic or patrimonial rights makes it possible for the fruits of everyone's labor in the complex chain extending from the author to the public to be fairly distributed.

Moral rights, for their part, contribute to the safeguarding of the cultural heritage. The author, as the trustee of the public interest, ensures that the very nature of the wealth created by him is respected in the economic system. The protection of the audiovisual heritage is directly attributable to the perception of the characteristic feature of the film as a material medium incorporating a tangible work.

Economic considerations aside, the preservation and restoration of films are these days based on the notions of respect for the original work and of screening that assures the viewer of a correct perception of the work.

How many films from the silent and even from the talking era have been lost through negligence and ignorance of rights, or because the production companies or studios have gone bankrupt?

And today, when too many production companies are disappearing, who is there to ensure the maintenance and survival of works? More often than not it is the authors themselves, who, in their desire to protect their personality as embodied in their films, also serve the general interest in conserving our memories.

The Americans have themselves acknowledged the link between heritage protection and the rights of creators in the enactment of a specific law, the 1988 National Film Preservation Act, under which 25 films more than 10 years old may be selected every year which cannot be distributed in an altered form unless prior notice is given that the altered version has not received the authors' approval. Nothing, incidentally, prevents a foreign film from being selected. However, the Act has an extremely limited scope, which moreover is not based on moral rights; moral rights permit a general defense of our heritage, without limitation as to number or category.

Current film advertising in the United States uses the wording "A film directed by ...," followed by the name of the director and sometimes that of the screenwriter. This trade practice relies on the professional standing of the director or the screenwriter, which is a guarantee and an incentive for the public to see the film. It is in itself a moral-right contribution to the exploitation of films.

Moral rights are non-pecuniary personal rights, including the right to respect for the names of the authors (director and screenwriter) and for their authorship of the work (as director or screenwriter), and a guarantee of the integrity of the producer and the distributor vis-à-vis the public.

Moral rights also include the right to determine the process and conditions of disclosure of the work. This right is governed by regulatory provisions in Europe's audiovisual sector, the effect of which is that it does not come into effect until the final version has been established by mutual agreement between the director and the producer.

The final version is the result of that agreement, and the audiovisual work cannot be subsequently modified without the further mutual agreement of the two parties.

Continental European authors' rights are the heritage of our civilization, democracy's guarantee of the free exercise of the right to freedom of expression and to respect from the public.

Having set forth these few fundamental ideas on the general subject of continental authors' rights as one of the pillars of European history and its future development, I should like to give you a more down-to-earth account of my experience and expectations regarding the exercise of those rights.

Authors' rights are sometimes naively contrasted with the rights of producers, the explanation being that their exercise could complicate the production and proper distribution of works.

On the other hand, the management of rights may prove difficult in the complex new world engendered by innovations in communication technology and the growing number of distribution processes.

In this situation, we must allow a place for balanced collective management, which offers stability and predictability, the foundations of sound business economics, to all concerned, thereby promoting the European production of works and their dissemination.

It is often argued that individual management can place the author in a good bargaining position because of the contractual freedom involved.

In practice, however, authors' difficulties first in negotiating satisfactory terms and subsequently in ensuring the proper fulfillment of their contracts make it difficult to implement properly what can only ever be wishful thinking.

To directors and screenwriters, collective management means the certainty of being remunerated at an acceptable level, and by more obviously solvent end users.

Where there is abundant and widespread use of works, neither the author nor the producer can monitor the individual uses of the film or audiovisual program on his own.

By joining together, authors and producers give themselves a bargaining power that enables the remuneration payable for authorization to be set at a reasonable level.

Collective management offers the producer numerous advantages, both at the production stage, by easing his task and lessening his costs, and at the stage of exploitation of his films by cable, private copying and other forms of distribution yet to be devised.

At a rather more mundane level, it also frees him from one time-consuming chore during the preparation of a production, that of negotiating rights individually, author by author.

By making the end user responsible for the main remuneration, collective management releases funds and makes them available for production, particularly all the money paid for the pre-purchase of films by users.

It does not prevent the producer from working out a marketing strategy according to the media hierarchy he wishes to establish by means of contracts, exclusive rights and access to the material.

Relations between the author and the producer remain as they are, which allows both yesterday's and tomorrow's European audiovisual heritage to be protected, also with an eye to the improved use of material via multimedia installations and information superhighways.

Moreover, by simplifying the grant of authorizations, collective management offers users administrative security and simplicity, thus promoting respect for authors' rights. Such simplification is also essential for the effective implementation of authors' rights in future digital developments: the smoothness and speed of the network transmission of works entail centralized management in order to analyze flow, identify works and propose flexible, comprehensive contractual solutions to ensure a rise in earnings from the new distribution channels.

If collective management is to play its regulatory role, it must respect certain conditions and be exercised according to rules that have been laid down and defined in advance.

With regard to the exercise of economic rights, the difficulty arising from the sheer number of authorizations to be sought for a multimedia work looks like a new one.

In fact, however, it has long existed for certain types of work which, because of their nature, or for certain types of exploitation which, because of the widespread use of works that they entailed, presented the problems of identification, of granting authorizations and of monitoring exploitation.

In the case of musical works, for example, it soon became apparent that because of their volatile and ephemeral nature they were destined to be performed everywhere, at all times and on a large scale that was difficult to keep under review.

In the light of this situation, individual authors were obliged to establish a satisfactory system of organization to keep a check on the use of their works and to insist on authorization being requested before each performance.

The establishment of the appropriate societies met the need to defend authors' rights, and from then on collective management was organized and defined by the authors themselves.

The advent of television and the increasing numbers of devices for the mass distribution of works gave prominence to another argument for collective management, no longer in the interest of authors alone but also in that of users, namely a secure and rapid legal procedure.

Since he has to deal with one party only, the user can obtain from one source the authorizations for the hundreds of works that he distributes.

This demand for simplicity and security in the grant of authorizations is now being made by multimedia producers today; it no longer comes from the

authors themselves, who have opted for the collective management of their works, but from users.

They in turn wish to define the type of collective management that would suit their desire to carry out their activities in the best possible framework, namely one that is less costly, rapid and unlikely to give rise to claims.

It is true to say that the advent of digital technology has, for the first time in the history of authors' rights, caused the data carrier to disappear and the communication to take place in an absolutely non-material form.

Until the arrival of cable and satellite technology, authors' rights had always been determined by the data carrier for the exercise of the rights of reproduction and representation.

Broadcasting on the airwaves, by satellite or by cable is also relatively well controlled, subject to the legal difficulties associated with the international nature of broadcasting, since technical installations require heavy equipment, the corresponding investment and the publicizing of the act of broadcasting. Copyright owners have thus been given the technical means of identifying the individual or individuals responsible for a particular broadcast.

Digital technology, data compression and network diffusion bring with them the problem of precisely identifying those responsible for communication, since there is a direct relation between the work and the public, and between the public and private domains: intermediaries are no more.

However, the new technology also offers owners of rights the technical possibility of completely controlling the circulation of the work, provided that the control is integrated from the outset into the programming of the initial data carrier.

Control takes place at two levels, covering the identification of works and the management of the uses of works.

Digital data carriers permit mass identical copying, without any loss of quality, by extremely simple means.

However, this technology also makes large-scale piracy possible. We already have the example of pirated audio CDs, which today represent up to 90% of the market in some countries. The fight against data carrier piracy presupposes the ability to identify accurately the origin of works.

But the digital signal will also be transmitted by digital broadcasting through existing channels, whether satellite or cable, and in the future across telecommunication networks.

How can we actually manage the vast numbers of acts of dissemination, most of which will take place between two private persons?

First of all, we need to be informed about what is really being disseminated. Since the signal is in binary code, we have to be able to

analyze the data flow so as to identify the works before intervening, by whatever means, to determine their presence.

The systems used in the past for the verification of owners of rights are now obsolete. They were based on control over the data carrier, and on checks from the publicity surrounding the broadcast and available in paper form (programs of television stations, catalogs, internal lists and so forth). Once there are a multitude of channels and the private consumption of works by means of networks becomes widespread, it is no longer possible to apply traditional methods.

It is therefore necessary to detect the presence of works in the data flow and to introduce an external control system.

This means that space must systematically be allowed, in the standards now being defined, for the marking of works. But the information provided in that space must also refer to a number or a classification by means of which the owners of rights can be traced.

With that in mind, the working out of a satisfactory framework requires first of all the setting of minimum rules to standardize the definition of the rights themselves, especially against the background of the intellectual property harmonization work going on within the Commission of the European Communities (CEC), the Council of Europe and WIPO.

It is essential at this point to take into account the imbalances in the apportionment of rights among the various owners; authors must be assured of access to such rights as will be laid down in the directives of the CEC.

Systematic provision must also be made, by means of appropriate transitional machinery, for collective management to take precedence over previously concluded individual contracts. This is an essential point, and one of the pivotal features of both the model director's contract proposed by FERA and the model screenwriter's contract in the process of being completed by AIDAA. Without transitional provisions, the benefits of the implementation of collective management would be felt too late.

It is naive and illusory to believe that the mere contractual interaction between authors and producers will alone ensure an equitable division of authors' rights by the latter in favor of the former.

Each category of holders of rights must therefore be represented within its area by its own management organization which directly grants authorization to the end users of works, guaranteeing legal security and ease of administration, and offering each category the certainty that its rights will be exercised, and exercised effectively.

This also makes it easier to lend more transparency to the exercise of authors' rights.

Solutions can thus be found without dogmatism, but with due respect for the basic tenets of continental authors' rights, in such a way that each individual may carry on his activity in peace, all owners of rights are assured of direct control over the use of their works and freedom of marketing, and the public are assured of seeing a film in the form in which it was conceived and made by its creators.

FIFTH WORKING SESSION: STRUCTURAL CHANGES IN THE INTERNATIONAL COPYRIGHT SYSTEM

NEW TECHNOLOGIES AND COPYRIGHT: NEED FOR CHANGE, NEED FOR CONTINUITY

by

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I.

The relationship of copyright and neighboring rights to technology is complex. Even if we often speak today about "the problems raised by new technologies," we should not forget that after all both copyright and neighboring rights came into being to respond to the challenges of certain new technologies, and that new technologies, with all the problems they create, also offer new possibilities for creation and new possibilities for the distribution and use of works and other productions protected by copyright and neighboring rights.

Nevertheless, it has become a kind of tradition that technological changes time and again serve as bases for attempts to go beyond the truly justified adaptation and modification of certain aspects of the system of protection of copyright and neighboring rights, for attempts to question the reasons for granting certain rights or granting them in a certain way (of course, in general, what is questioned is the exclusive nature of the rights), or even the reasons for the very existence of the system.

This tradition is age-old, as old as the international system of protection of copyright itself. At the very birth of the Berne Convention, such an attempt was already made, and with temporary success: a new method of reproduction, the mechanical reproduction of musical works, was excluded from the scope of application of the--then implicitly recognized--basic right, the right of reproduction. This exception to the right of reproduction was removed at the 1908 Berlin revision conference; at the same time, however, non-voluntary licenses were allowed for the same kind of reproduction.

Similar problems emerged later on, with the appearance of radio, cinema and television. Solutions were finally found, once again through compromise, which allowed the recognition of authors' rights for the new forms of expression and for the new uses involved, but not without certain restrictions.

Those changes, however, were not yet so fundamental as those which have taken place recently. At the beginning of the 1980s, technological changes accelerated, took new directions, and created quite difficult and complex problems for copyright and neighboring rights.

The first group of problems arose when certain new categories of creations appeared (computer programs, data bases, computer-generated works), the copyright status of which was not clear, and the characteristics of which

differed from the characteristics of the more "traditional" works in many important aspects. There was much hesitation as to whether it would be wise to accept those strange new clients. They were looked upon as potential elephants in the china shop of copyright; they themselves might not feel good, and they might not leave anything in the shop intact.

The second group of problems related to the advent of new uses of works (such as reprography, home taping, computer storage and retrieval, cable retransmission, satellite broadcasting, and rental). These problems had two aspects, the first being that it was not clear which provisions, if any, of the Berne Convention and the Rome Convention covered them, and the second being that these new uses were, in general, of a massive, secondary nature for which the exercise of rights, even if recognized, would have been difficult on an individual basis. In harmony with the above-mentioned two aspects of the new uses, those who wished to get access to works and to other productions as easily and inexpensively as possible led their offensive against copyright and neighboring rights on the basis of two kinds of arguments: first, they tried to prove that the obligations under the conventions and national laws did not cover the new uses, and, second, they started (or rather continued) a general attack against the exclusive nature of the rights that were to be recognized, either on the basis of existing provisions or as "new rights," citing the difficulties in getting access to the works and to other productions for the said massive "secondary" uses.

The third group of problems related to rapidly spreading piracy of the various categories of works, facilitated by the ever more perfect, ever more efficient, and ever more easily available reproduction equipment and material.

The international community interested in the appropriate protection of copyright and neighboring rights, after the mixed results of the 1967-1971 twin revision conferences of the Berne Convention, did not show great enthusiasm for the idea of revising the Berne Convention again. Thus, in the 1980s, rather the strategy of "guided development"[1] of copyright and neighboring rights was followed. At a series of meetings of committees of governmental experts, groups of consultants and working groups convened by WIPO--some of them jointly with Unesco--all the important questions arising with the advent of various new categories of works and new uses were discussed in detail, and, in the form of recommendations, guiding principles and model provisions, guidance was offered to national legislators and governments.

As a result of the documents prepared for, and the discussions in, those meetings, the legal status of the new types of creations was clarified (for example, it was made clear that computer programs and data bases should be protected by copyright, pointing out that an obligation to grant such

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[1] This expression was used by Sam Ricketson to describe this period in his well-known book The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, Centre for Commercial Law Studies, Queen Mary College, London, 1986, p. 919. He said that, "[i]n essence, 'guided development' appears to be the present policy of WIPO, whose activities in promoting study and discussions on problem areas have been of fundamental importance to international copyright protection in recent years."

protection already existed under the Berne Convention). Similar clarifications were made concerning new uses. In general, it was found that the Berne Convention itself--on the basis of a more or less generous interpretation--offered appropriate protection for the rights and interests of authors and other owners of copyright. In certain respects, however, it was felt that the Berne Convention was not sufficient to solve the problems.

For neighboring rights, which were mainly discussed at the regular sessions of the Intergovernmental Committee of the Rome Convention, it was much more frequently found that the existing conventions, particularly the Rome Convention, were not suitable to respond to the challenges of new technologies.

In addition to the desirable international level of protection of copyright and neighboring rights, growing attention was devoted to the administration and enforcement of rights. At various meetings and in an in-depth analysis carried out by the International Bureau of WIPO, the collective administration of rights was studied in detail. It was presented as an ever more important form of exercising rights and as the answer to the attempts to introduce non-voluntary licenses "for the sake of guaranteeing sufficiently easy access" to the works and other productions required. Moreover, guiding principles were offered for the establishment and operation of an appropriate system of collective administration. For the enforcement of rights, draft model provisions were worked out for the various means (provisional measures, civil remedies, criminal sanctions, etc.) of fighting piracy.

Although this period of "guided development" had brought positive results, at the end of the 1980s it became clear that mere guidelines, recommendations and principles no longer offered sufficient guarantees for a harmonious development of copyright in the long term. In the absence of binding international norms, there was increasing danger that national legislators would choose differing solutions to new problems, that this would lead to increasingly divergent trends in the international system of copyright and neighboring rights, and that this, as a result, would also undermine the delicate balance between the minimum level of protection determined by the Berne, Rome and Phonograms Conventions, on the one hand, and the principle of national treatment, on the other.

The preparation of new binding international norms for the protection of copyright and neighboring rights started at the end of the 1980s in two forums: the preparation of an Agreement on the Trade-Related Aspects of Intellectual Property Rights in the Uruguay Round of the GATT negotiations, and the preparation of a protocol to the Berne Convention and a new instrument for the protection of the rights of performers and producers of phonograms by two WIPO committees of experts.

There was a certain relationship between the two projects. The preparation of the Berne protocol and the "new instrument" was slowed down to await the outcome of the TRIPS negotiations and to avoid disturbing the preparatory work being done in parallel.

The TRIPS Agreement has been adopted and signed and is now waiting to be implemented. It is clear that that Agreement offers substantially new elements

in the international system of protection of copyright and neighboring rights in respect of enforcement of rights and settlement of disputes. As far as the questions raised by the new technologies are concerned, the Agreement only settles a relatively small number of questions--more or less along the lines of the solutions worked out during the period of "guided development" described above--and leaves many such questions unanswered.

It seems, therefore, that the preparatory work on the protocol to the Berne Convention and on the "new instrument" should continue in the two WIPO committees of experts and now at a reasonable speed. This also seemed to be the view of the Assembly of the Berne Union, expressed at its extraordinary session held in Geneva on April 28 and 29, 1994.

The Assembly decided that the memoranda prepared by the International Bureau of WIPO for the fourth session of the committee on the Berne protocol and for the third session of the committee on the "new instrument" should be distributed to the member States and to the European Commission for comments, to be sent to WIPO by September 1, 1994. The comments will then be published by the International Bureau, and the Assembly of the Berne Union will decide at its next extraordinary session to be held in Geneva from September 26 to October 4, 1994, whether the provisional documents should be modified in the light of these comments, or whether the comments should simply be annexed to the documents which in that case would become final, without change. The Assembly at that session, of course, may also modify the terms of reference for these projects, particularly the terms of reference for the protocol to the Berne Convention which now seem too restricted. According to the decision of the Assembly, the new documents will be distributed by November 1, 1994, and the next sessions of the two committees of experts will take place during two consecutive weeks, from December 5 to 16, 1994.

II.

Now that the discussions (and, according to the new style, the negotiations) on the new norms for copyright and neighboring rights continue, the international community is faced with a set of qualitatively new problems emerging with the advent and rapidly spreading application of digital technology.

The General Information document prepared for this Symposium states as follows:

> "With the advent of interactive digital networks, digital 'superhighways,' digital delivery and the other new developments brought about by digital technology, not only some new provisions and new licensing techniques, but also the need for a completely new structure for the protection, exercise and enforcement of rights, may become necessary."

WIPO's early response to the challenges of digital technology was the organization of the WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights at Harvard University, from March 31 to April 2, 1993. More than 300 participants from all over the world took part in this important event, including most of the leading copyright

experts. All aspects of this broad topic were examined or touched upon, and the need for action in a number of areas became evident.

The International Bureau then proposed concrete solutions to the member States. At their series of meetings held in Geneva in September 1993, the Governing Bodies of WIPO approved for the program for the 1994-95 biennium an item on the preparation of an international system of identifying numbers for works and phonograms to be used in digital systems. The purpose of this program item is, first, to take stock of existing numbering systems for various categories of literary and artistic works and for phonograms. WIPO will then consider whether a numbering system is necessary or useful for certain other categories of literary and artistic works, and, in the affirmative, what the form and the mode of operation of such a system should be. It will also be discussed whether there is a need for harmonizing the various systems and their operation.

Numbering and, in a more general way, identifying works and phonograms seem to be required, first, for the administration of rights in an interactive environment. A system to identify such works and phonograms would be useful, if not necessary, for right holders for the (collective) administration of rights (i.e., to identify works and phonograms used) and to allow users to identify right holders from whom they may obtain authorization.

Identification would seem to be useful also to fight piracy. Identifiers for works, phonograms (including each carrier) as well as manufacturers would greatly facilitate provisional measures (such as injunctions) and help identify legitimate and pirated copies and the origin of copies.

To discuss these aspects, WIPO held a consultation meeting with the representatives of interested non-governmental organizations in Geneva on February 14 and 15, 1994. The reaction of those organizations was positive; they urged WIPO to give this project a "fast-track" treatment. We are ready to do so. We have already convened the four working groups established as a follow-up to the meeting, on musical works and phonograms; computer programs; printed works; and audiovisual works, respectively. We hope that, by autumn of this year, concrete and detailed proposals will be ready whether it is justified and timely to establish and operate such an international system, and if yes, in which way.

Another item in the WIPO program for the 1994-95 biennium is the preparation of guiding principles on how existing norms on the protection of copyright and neighboring rights should be applied and what new international standards should be followed in response to the challenges of digital technology. The first meeting on these guiding principles will probably be convened early next year.

It is obvious, however, that digital technology has such a strong impact on the creation, dissemination and use of works and in the exercise, administration and enforcement of copyright and neighboring rights that we must inevitably take a fresh look at the relevant binding international norms. Certain aspects of the impact of digital technology were already discussed in the documents prepared for, and during the sessions of, the committees dealing with the Berne protocol and the "new instrument," and, now that this work continues, we should devote even greater attention to this qualitatively new technology.

III.

The General Information document already quoted above outlines the possible impact of digital technology on copyright and neighboring rights as follows:

> "The categorization of works may have to change, the role of some rights may become less important, other heretofore 'secondary' rights may gain primary importance, and certain new rights may have to be recognized. Furthermore, collective administration of rights will probably have to replace individual exercise of rights in further fields, and technical means, such as copy-protection and copy-management systems, smart cards, digital sub-codes, identification numbers and the like, may be more frequently applied. It seems that this--in harmony with the globalization of the digital uses of works and other productions--will call for appropriate international norms."

All this may happen in that way and may require corresponding norms, as indicated.

We should stop here, however, for a moment. As the French say, il faut calmer le jeu. We have spoken about digital technology at different forums very much, perhaps too much, recently. The danger may emerge that we might become blind to anything but those series of zeros and ones.

Recently, the scientific world has applauded a sensational discovery: it seems that the last missing tiny building elements of atoms and, thus, the entire world, the famous top quarks, have finally been discovered in a huge particle accelerator in the United States of America. This may draw our attention to the fact that everything in the world is composed of those tiny particles. But even if this is true in a certain sense, do we think of the Arc de Triomphe, the trees and flowers of the Bois de Boulogne, the Mona Lisa or the people walking along the Champs-Elysées as mere combinations of protons, neutrons or top and bottom quarks? Of course, it would be absurd to think of them only or mainly like that.

Now, it would be equally absurd to think of works, fixed performances and phonograms in digital format as mere series of zeros and ones. Works transformed into, or originally created in, digital format do not change their basic nature as works just because they are in digital rather than analog format. An audiovisual work still remains an audiovisual work, a musical work still remains a musical work, and the relationship of these works with their authors does not change. And we can say the same about the intellectual property status of performances and phonograms (please note, I do not speak here about the quality of the productions, but about their basic legal nature).

This does not mean that digital technology will not have a significant impact on copyright and neighboring rights. It probably will. But it would not be appropriate--actually it would be a brutal attack against the basic rules of logic--to hastily and blindly upset everything in the field of copyright and neighboring rights just because of this change of format. All the justified changes should be made at the level of international norms and national laws, but the principle of continuity should be respected, the system of copyright and neighboring rights should continue to serve its basic purposes and objectives, it should grant an efficient protection for authors,

performers, publishers, producers, broadcasters--also maintaining an appropriate balance among the various groups of rights owners--and, at the same time, should ensure the availability of the cultural treasures of mankind, as well as the newly created works, to the general public.

Let us take the above-quoted part of the General Information document and look at the various statements included in it with these considerations in mind.

"The categorization of works may have to change"

Of course, here reference is made mainly to the famous phenomenon of multimedia.

Many of you certainly will agree with me if I say that, for the time being, the situation around multimedia could hardly be characterized better than by the saying: "If you are sure you understand everything that is going on, you are hopelessly confused."[2]

To start with: the expression "multimedia" itself is far from being precise. This only partly follows from the not quite clear and not quite uniform meaning of "media"; with the other part of this composite word --"multi"--there is some difficulty as well. It seems that, if we speak at all about media, it would be more appropriate to speak about unimedium (or, more precisely, about a multi-genre unimedium) than about multimedia. This is so because the essence of multimedia as generally understood is that all kinds of works and contributions (writings, graphic works, photographic works, cinematographic works, musical works either as sheet music or in the form of performances recorded in phonograms, etc.) are included in one uniform "medium," in digital format. In addition to the digital format, great emphasis is placed on the typical inclusion of all those kinds of works and other contributions (as well as possibly also mere non-protected data) at the same time (since certain typical combinations of some of those kinds of works and contributions existed also before the advent of multimedia, such as the combination of writings, graphic works and photographs in illustrated books, particularly in encyclopedias, or the combination of moving images and recorded sounds, particularly the performances of musical works in cinematographic works). It seems that the possibility of interactive use, especially the "searchability" of multimedia productions and the possibility to establish specific order and connections among the various works and contributions included in such productions are also decisive elements of the concept of multimedia.

Now, let us look at this phenomenon. Is there a need to modify the Berne Convention to bring multimedia under its protective umbrella? Hardly. Article 2, paragraphs (1) and (5) of the Convention will certainly take care of the copyright protection of all works and/or contributions of an original

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[2] Having something to do with copyright, I tried to identify the author of this saying, but on the basis of the information available this is not clear. According to some sources, however, Walter Mondale said this once (but not about multimedia).

nature included in multimedia productions, and also the productions as such as specific collections, compilations of works, contributions, and possibly of mere data insofar as they are (and it is quite sure, they are) original in respect of the selection and arrangement of their contents.

This does not mean, however, that all questions of the protection of copyright and neighboring rights in respect of multimedia may be considered to be settled at the level of international norms. Time is not sufficient here to discuss all the details, but it is clear that the genre-specific provisions of the Berne Convention might create problems.

Particular analysis is needed concerning the relationship between the status of cinematographic works and multimedia productions. The question might emerge whether, in the case of a multimedia production containing moving images, it would be appropriate to apply the specific provisions on cinematographic works for the entire production. The answer probably should be negative (at least in general; I do no speak here on mere "interactive video"). In the regulation of the status of cinematographic works, there are positive and negative elements from the viewpoint of the various rights owners. While some of them might be happy with the application of certain positive elements, the same rights owners or some others might be quite unhappy with the application of what they would probably see as negative elements in the regulation. For example, authors would not applaud if cessio legis or certain presumptions of authorization applicable in the case of cinematographic works would become applicable for all kinds of works and contributions included in multimedia. Not to mention the foreseeable reaction of performers to the idea of extending the scope of application of Article 19 of the Rome Convention beyond the audiovisual fixations of their performances included in multimedia productions, to the fixations of their performances in phonograms included in such productions.

It is also clear, however, that it will be difficult to exercise different rights in the very great number of works and contributions which will be typical in the case of multimedia. Also, the interactive nature of multimedia should be considered. Therefore, it seems probable that some attempts will be made to work out some tailor-made legal regulation at the national level or perhaps also at the international level for this specific category of collaborative works. Tailor-made regulation in the sense that it may not necessarily follow the solutions adopted in the case of the existing types of collaborative works (such as cinematographic works and collective works, the way the latter exist, for example, in the French legislation). If this happens, the regulation should, of course, correspond to the purposes, objectives and basic principles of copyright and neighboring rights. It may help in obtaining and exercising rights, but it should not lead to any unreasonable limitation to the rights of contributors or to upset the desirable balance among the rights and interests of the various categories of rights owners involved.

"The role of some rights may become less important, other heretofore 'secondary' rights may gain primary importance, and certain new rights may have to be recognized"

These possible changes in the structure of rights mainly relate to the operation of the digital "superhighways," that is, to the interactive digital networks whose extremely big capacity--combined with the technique of data

compression--will make on-demand use of works and other productions possible. The possibility of making digital copies without any deterioration whatsoever and the plasticity of the works and other productions in digital format (that is, the possibility of their easy transformation) may also require some changes in the system of copyright and neighboring rights.

The on-demand availability of works and other productions in perfect quality at any moment freely chosen by subscribers of the interactive digital networks, may undermine the basis for the copy-related rights (the right of reproduction, the right of distribution, the right of rental, the right of importation). If such a subscriber may listen to a given piece of music in the performance of a given performing artist recorded on a given phonogram at a given moment of his free choice, he or she may consider it unnecessary to keep a copy, even a home-made copy.

In the case of copyright, the alternative rights--the right of broadcasting and the right of other communication to the public--exist, in general. Nevertheless, as far as broadcasting is concerned, in respect of digital programs which may undermine the value of copy-related rights, it seems particularly obvious that non-voluntary licenses allowed by Article $11^{bis}(2)$ of the Berne Convention are quite out-of-date. Furthermore, the unifying effect of digital technology with the possibility of quick transmission of nearly all types of works and other productions (perhaps with the exception of three-dimensional works, an exception which, however--according to certain indications--might soon be eliminated) has drawn attention to the unjustified gaps in the provisions of the Berne Convention on the right of communication to the public, gaps following from the limited genre-specific nature of the relevant provisions (Articles 11(1)(ii), $11^{ter}(1)(ii)$, 14(1)(ii) and $14^{bis}(1)$ of the Berne Convention).

As far as the rights of performers and producers of phonograms are concerned, the same alternative rights do not exist at the level of international norms, at least not in the form of strict minimum rights in respect of which no reservations could be made. The reservations to the so-called Article 12 rights of performers and producers of phonograms (for broadcasting and other communication to the public) under the Rome Convention may go so far as the complete denial of the application of those rights. The difficulties to grant more generous rights to performers and producers for such uses are well-known. Both authors and broadcasters have understandable fears of what they consider a danger for upsetting the--from their viewpoint--well-established balance of the rights of authors and neighboring rights owners. Nevertheless, there seems to be growing agreement at the international level that, in cases where broadcasting and communication to the public by wire may undermine the value of the copy-related rights of performers and producers and, thus, unreasonably prejudice their legitimate interests (this is considered to be the case in respect of digital broadcast programs), at least, a right to remuneration is necessary, and that, in cases where such qualified acts also conflict with the normal exploitation of recorded performances and phonograms (this is considered to be the case in respect of interactive, on-line "delivery" through digital networks), the recognition of an exclusive right of authorization itself seems justified.

The decrease in the role of copy-related rights, however, may only be a long-term trend and may only fully prevail when the digital "superhighways" are more or less completed.

Until this happens, or in certain fields perhaps even after this has happened, certain copy-related rights may also have to be recognized in some respects where they do not exist yet or where they are not sufficiently clarified.

Digital domestic reproduction of phonograms and audiovisual works is an obvious example. Even in the case of widespread analog home-taping, there was already growing agreement that a right to remuneration was justified, in keeping with Article 9(2) of the Berne Convention, to reduce, at least to a reasonable level, the prejudice suffered by the owners of rights. With the advent of digital copying of digital recordings, the need for at least a right to remuneration became obvious and it was also found that, in respect of serial digital reproduction, even such a right would not be sufficient; it should be preferably combined with some technical means to exclude such serial reproduction.

The other example for the need for some specific copy-related rights to respond to certain challenges of digital technology is the question of the right of rental. For the time being, there seems to be agreement that this right should extend to computer programs, phonograms, and, with certain conditions, to audiovisual works. Recently, however, the rental of digital data bases in CD-ROM format and multimedia productions has also started to become a spreading practice, and it can hardly be denied that, due to their high value and their relatively easy home reproduction, it would be justified to grant a rental right also for such productions.

It is a further result of the application of digital technology that the borderlines among the right of reproduction, the right of distribution, and the right of communication to the public are getting ever more blurred. This is particularly the case in respect of what is generally referred to as "digital delivery." Digital delivery is considered by some experts as a kind of distribution. In reality, however, various possible qualified acts may be involved in the case of digital delivery; the legal qualification depends on whether the work or other productions transmitted are made available with or without the possibility of reproduction (and whether they are actually reproduced). Some clarification and/or new norms may be necessary in respect of those uses (for example, because of the above-mentioned gaps in the right of communication to the public in the Berne Convention, or because of the specific aspects of the question of exhaustion of rights in case of digital on-line "distribution").

Parallel to the blurring of the borders among the above-mentioned rights, and, in a way, as part of this process, the role and the relationship of "public" and "private" uses are also changing. For the sake of preserving the efficacity of copyright and neighboring rights in serving their purposes and objectives and of maintaining an appropriate balance between the interests of owners of rights and users, either the concepts of "public" and "private" should be adopted, or the operation of certain rights should simply be extended to some uses that so far have been, and may continue to be, considered private.

It is also due to the ever more widespread case of digital technology for the manipulation of recorded performances that the demand for some kind of moral rights (not necessarily in the same manner and at the same level as in

the case of authors' moral rights) has emerged with a greater emphasis and is getting now broadening support at the international level. The idea to recognize a right of adaptation has not been received in a similarly favorable manner.

"Collective administration of rights will probably have to replace individual exercise of rights in further fields"

This may be particularly true in the case of certain "small rights" situations, where, due to the great number of works or other productions and uses involved, individual exercise is impossible or at least impractical. This may be the case in respect of certain categories of works and other productions as far as the works and productions included in multimedia are concerned. However, the freedom of owners of rights to decide what way of exercise of rights they choose and the exclusive nature of the rights involved should be fully respected to the greatest possible extent.

It should be noted that the great capacity of digital networks may also allow the application of new methods of exercising rights. Beside the present blanket licensing technique applied by collective administration organizations, another form of "one-stop" licensing techniques may become possible: namely what is frequently referred to as "permission clearance service." In the case of such computer-supported--and ever more typically on-line--services, the licensing conditions and fees may be differentiated within the same category of works or other productions and in respect of the same rights, and some works or other productions may even be excluded from such a service and may be referred to fully individual licensing.

"Technical means, such as copy-protection and copy-management systems, smart cards, digital sub-codes, identification numbers and the like, may be more frequently applied"

Some aspects of the application of technical means were discussed above in the framework of the brief summary of the relevant WIPO projects.

What should still be emphasized here--in the spirit of the principle that all the necessary modifications in the system of copyright and neighboring rights should be made, but the purposes, objectives and basic principles of this system should be kept in mind and respected--is the following:

It is more appropriate to leave the introduction and application of these technical means to the interested rights owners. For the time being, there seem to be only two aspects where some norms may have to be set at the national level and possibly also at the international level. The first such field is the protection for the appropriate operation of such technical means. For example, efficient sanctions may have to be prescribed against those who manufacture, import or distribute unauthorized decoders for the reception of encrypted programs or equipment whose only or main purpose is to circumvent copy-protection or copy-management systems. The second such field is the possible overprotection as a result of the application of technical means. Regulation in this field (the working out of which does not seem to be an easy task) would have to prevent the extension of the application of

technical means in such a manner that they exclude or unduly limit the access to works and other productions in the public domain or certain uses that under the relevant conventions and national laws are justified and authorized as free uses.

This was only a brief review of the foreseeable impact of digital technology on copyright and neighboring rights. If one considers the very large and quite urgent agenda for norm-setting at the national, regional and international levels, one thing seems quite clear: the lives of those who are responsible for the appropriate development of the system of the protection and enforcement of copyright and neighboring rights will not be boring in the rest of this century--and at the beginning of the next one--in making all the necessary changes, and in opposing certain changes that should not be made.

SURVEYING THE BORDERS OF COPYRIGHT

by

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INTRODUCTION

The copyright course I teach at Columbia Law School begins with a survey of what copyright is not: it is not a patent, a trademark, or an object of physical property. Nor, as the course examines a little later on, does copyright protect every object of economic value whose worth might be further enhanced were it to be shielded from unauthorized copying. However, the frontiers between copyright and mere commercial value have never been well defined. Not only may the same item be simultaneously the object of copyright and of other legal rights, but copyright increasingly covers--or is invoked to extend to--products far from the beaux-arts, but that present strong economic claims to security from copying. Digital technology does not initiate this phenomenon, but it accentuates the longstanding pressure on the copyright system to encompass a broad variety of information products.

Ironically, at the same time as new entrants (as well as some old suitors in newfangled, binary garb) are pushing at the borders of the subject matter of copyright, a variety of extra-copyright devices are emerging to ensure the protection of works of authorship. This survey of the placement of copyright's boundaries therefore requires examination also of the frontier between protection granted under the copyright law, and under other laws invoked to prevent unauthorized copying or public performance.

In this presentation, I propose first to outline ways in which the borders of copyright may be drawn...or overrun (I). I will consider the boundaries both of subject matter (A), and of rights (B). I will then examine the international consequences of locating the borders in the various ways suggested (II). While many of my examples will feature digital media, much of the analysis that follows would apply to analog media as well.

I. BORDERS: POSITION AND PERMEABILITY

A. Placing Limits on the Subject Matter of Copyright

There are a variety of responses to the problem of the perceived ill-definition of the boundaries of the copyright domain. One reaction would retrench and reinforce the walls between copyright and other kinds of creativity or fruits of labor and investment (1).

A less xenophobic approach would decline to expel as illegal aliens those newer forms of creativity seeking shelter on the copyright shore. Rather,

this approach contends that the copyright system, having in fact allowed a variety of immigrants to enter, should seek, to the extent possible, to naturalize them, taking account of adaptations needed to adjust the newcomer to copyright society (2).

Alternatively, having acknowledged that the borders of copyright--long ago and frequently since permeated--will remain porous, a final approach recognizes that those borders now accommodate a variety of permanent residents. These are creations or fruits of labor and investment that share some characteristics with copyright subject matter, but that cannot avail themselves of full copyright citizenship because in other respects they either fail to meet even expansive copyright criteria, or copyright fails to meet their economic needs. These works may claim some of the benefits of copyright protection, but they will be subject to parallel non copyright regulation as well (3).

1. Reinforcing the Borders

This approach would secure the purity of copyright by expelling works of low (or no) authorship from the copyright domain. "Quasi creation,"[1] and the fruits of labor and investment may merit protection from unauthorized copying, but that protection should be autonomous. Under this approach, copyright would close its borders to unworthy intruders, leaving them to more appropriate, possibly sui generis, protection. Those to be excluded include: computer software, data bases and compilations of information, some photographs, sound recordings, and some applied art.

2. Bringing New Entrants Within the Boundaries

Under this approach, copyright would welcome a variety of marginal claimants to protection, so long as they manifested the minimal creativity sufficient to meet a generous standard of originality. But, admission of these works to copyright status does not require uniformity of organization of their copyright regime. Adjustments to the traditional copyright provisions may be made with respect to ownership of copyright, and the scope of rights protected (or scope of exceptions to protection).

A leading example of this approach is the 1991 European Community Software Directive.[2] This text confirms the copyrightability of computer programs, but derogates from traditional copyright protection in a variety of ways. The standard of originality is arguably lower than that required in some EC countries for more traditional works.[3] The Directive provides for

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[1] See Mireille Buydens, La protection de la quasi-création, 1993.

[2] Directive 91/250, Official Journal of the European Communities (OJEC) No. L 122/42, May 17, 1991 [hereafter, "Software Directive"].

[3] The Directive defines an original work as the author's "personal intellectual creation," Article 1.3. This standard may be more permissive than the "personal imprint of the author" ("l'empreinte personnelle de l'auteur") standard that predominates in most continental copyright systems.

employer copyright ownership of employee-created software, even though in many member countries employers are not the direct owners of works of salaried creators.[4] The Directive also sets forth several exceptions derogating from the reproduction and derivative works rights, in favor of the interests of users or competitors.[5] Thus, the Directive does set forth a copyright regime, but the system it creates, while easily recognizable to Anglo-Americans, significantly departs from some continental copyright precepts.

3. Cohabiting With Copyright

This approach concerns works for which copyright provides partial, but inadequate, coverage. Copyright fails to afford sufficient security for the economic interests at stake because copyright protects original authorship, and the work's economic value may reside, at least in part, in unoriginal features. Adequate protection therefore requires either a broadening of copyright beyond the borders of originality, or combining copyright protection with an additional source of protection, such as that afforded by unfair competition law. An important example of the latter technique is the proposed European Community Draft Directive on the protection of data bases.[6]

The Draft Directive acknowledges the copyrightability of data bases, but only insofar as they manifest originality in their selection or arrangement of data.[7] Unoriginal compilations are not entitled to copyright protection. Similarly, the scope of copyright protection is limited to the substantial copying of original aspects of the data base; it is not copyright infringement to extract data independently of its treatment (selection and organization) in the data base.[8] However, the Draft Directive further establishes a right to prevent "unauthorized extraction" of data. The extraction right applies to data of any kind, original or not. Thus, unauthorized appropriation of data from a data base may violate the rights set forth in the Draft Directive, whether or not the data base is copyrightable, and whether or not the extracted data meets originality standards.[9] Here, unfair competition law supplements copyright law, with respect to the same work.

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[4] Software Directive, Article 2.3.

[5] Id., Articles 5, 6, 9.

[6] COM(93) 464 final--SYN 393, OJEC No. C 308/1, November 15, 1993 (as modified by the Commission following the examination by the European Parliament of June 23, 1993).

[7] Id., Article 2.3.

[8] Id., Article 6.

[9] Id., Chapter III, Articles 10 to 13.

B. Overrunning the Frontier: Using Contract or an Extra-Copyright Regime to Achieve Copyright-Like Results

The focus of this survey of the borders of copyright now shifts from the subject matter that may or may not be covered by copyright, to the scope of protection afforded to works of authorship. To an increasing extent, copyright law is not the only law to secure protection against reproduction and public performance of copyrighted works. Both private parties and States have in a variety of circumstances provided for parallel or substitute protection, by means of extra-copyright doctrine or legislation. Extra-copyright means to achieve copyright ends include contracts (1) and a variety of narrowly focused laws, addressing for example private copying, that mirror copyright coverage, but that purport to fall outside copyright (2).

1. Contracts as Copyright

Traditionally, only a property right, enforceable against third parties, could ensure effective protection for authors (or exploiters), because the author could not control copying once the work was released to the public. But today, computers have to some extent furnished the means to restore control over third-party exploitation of a work. If a work is available only "on line," the information provider can know who has access to the work, and can impose by contract the conditions of use. Some of this kind of control may also be imposed on free-standing digital media, such as CD-ROM and diskette, through subscription agreements, encoding, and even insertion of viruses.

If it is true that the author/information provider can effectively control the access and exploitation of the work, then the provider may seek to substitute contractual protection for copyright coverage. By contract, the provider may ensure a broader scope of protection than copyright would afford, for example, by overriding exceptions set forth in the copyright law, such as the right (available in many countries) to make private copies. Moreover, by contract, the information provider may secure protection for material that may not be copyrightable.

From the provider's point of view, contract may therefore prove a more attractive means of obtaining the same, or more, protection than that available under copyright. By outstripping copyright protection, a vigorous contract regime may afford the information provider the incentive to seek, develop, and commercialize information that, under a copyright regime, might not have been worth pursuing. However, from the user's point of view, a contract regime, if it eludes user-rights available under copyright, drives a one-sided bargain for access to information, to the detriment of the balancing of rights set forth under copyright.[10]

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[10] On the potential substitution of contract for copyright protection, see, e.g., Zentaro Kitagawa, "Computers, Digital Technology and Copyright," paper presented at the WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights, Paris, June 2, 1994 (proposing a contract-based "copymart" system for the distribution and protection of works in digital media); Jane Ginsburg, "Copyright Without Walls? Speculations on Literary Property in the 'Library of the Future'," 42 Representations, 1993, p. 53.

2. Copyright Equivalents

Coupling other laws to copyright is not a new development. For example, trademarks law in the United States of America, and unfair competition law in many continental European countries, have long afforded additional protection against some kinds of unauthorized copying. The problems spawned by private copying, however, have prompted additional legislative techniques in a variety of countries. For example, the 1992 U.S. Audio Home Recording Act[11] creates a special regime to compensate creators for private copying of works distributed or transmitted in digital format (as well as to combat certain forms of private copying). While this law addresses unauthorized reproduction, the U.S. Congress distinguished it from the general copyright law, by codifying the Act in a separate chapter of Title 17 (as Congress had previously done in the 1984 Semiconductor Chip Protection Act[12]), and by providing that the new Act's compensatory measures and other sanctions replaced copyright infringement actions.[13]

If member countries of the Berne Convention adopt (as the EC has for software) any of these approaches to defining, or reshaping, the boundaries of copyright, what are the consequences for the structure of the international copyright system?

II. PLACEMENT OF COPYRIGHT BORDERS WITHIN THE BERNE UNION: THE INTERNATIONALIZATION OF COMPETING DEFINITIONS OF THE COPYRIGHT DOMAIN

Each of the approaches reviewed above carries different international consequences.

A. Subject Matter of Copyright

1. Copyright Purified

The Berne Convention protects "literary and artistic works," but it does not instruct member countries how to define these categories. Article 2(1) lists illustrations of literary and artistic works, but the text does not reveal--beyond stating that the list is not exclusive--how to evaluate a non-listed endeavor. It would therefore be possible for a member country to determine not only that particular kinds of works should be excluded from domestic copyright protection, but that these kinds of works, if not listed in the treaty, do not come within the Berne minima of protection. However, Article 10.1 of the recently concluded GATT TRIPS Agreement[14] limits Berne

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11 17 U.S.C., sections 1001 to 1010.

12 17 U.S.C., Chapter 9.

13 17 U.S.C., sections 1008, 1009.

14 Annex 1C of the Agreement on Trade-Related Aspects of Intellectual Property Rights. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negociations, Marrakesh, April 15, 1994.

and other GATT members' freedom to define the subject matter of copyright, by obliging them to protect computer software as literary works within the meaning of the Berne Convention, and Article 10.2 requires member countries to protect data bases as intellectual creations.

On the other hand, the Berne Convention does not define the requisite level of originality. Thus, a member country might also exclude many members of a class of works, on the ground that even if the Berne Convention does provide for protection for this kind of work as a whole, such protection for particular examples of the work would be incompatible with the member country's determination of the requisite quantum of authorship.[15]

For example, suppose a Berne member, having adopted the first approach outlined above,[16] determined that compilations of data are not literary works. The current text of the Berne Convention does not oblige the member country to include compilations of data (as opposed to compilations of "literary or artistic works"[17]) among the classes of protected works. As a result, under the rule of national treatment, neither local nor foreign Berne Union compilations would receive any copyright protection in that forum. Similarly, foreign and domestic compilations that did not meet the forum's (perhaps unusually high) standard of originality would not be covered.[18]

2. Copyright Expanded

Under this approach, the Berne member, rather than retracting the borders of copyright, will have expanded them to take in works not included in Article 2(1)'s illustrative list, or to give a generous interpretation of the categories set forth elsewhere in that Article. This technique is fully consistent with the Berne Convention: the minima that text provides by no means prohibit a member country from granting more protection than the

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[15] See, e.g., German Federal Republic, Bundesgerichtshof (BGH), decision of May 9, 1985, Inkassoprogram, in Gewerblichen Rechtsschutz und Urheberrecht (GRUR), 1985, p. 1041 (requiring a higher level of originality for computer programs; Article 1.3 of the 1991 European Community Software Directive effectively "overrules" this decision by requiring EC member countries to apply the "personal intellectual creation" standard of originality).

[16] See Part I, A.1, supra.

[17] See Berne Convention, Article 2(5).

[18] If adopted, the Database Directive would impose a "personal intellectual creation" standard of originality, see Article 2.3. The Directive would thus limit member countries' ability to exclude data bases from copyright by raising the requisite level of originality. However, the Directive only applies to electronic compilations, see Article 1.1.

Article 10.2 of the GATT TRIPS Agreement applies an "intellectual creation" standard to compilations, without regard to the format of the compilation.

treaty demands.[19] Thus, once a member country includes a category of works within copyright, it will protect Unionist works of that kind under copyright as well.

But, what if the scope or terms of copyright granted these works differ from the traditional copyright regime? The analysis will depend on whether the departures from traditional copyright nonetheless remain consistent with Berne minima.

(a) Berne-Compatible Divergences

The Berne Convention sets forth not only what kinds of works must be protected, but also what rights must be secured, as well as the kinds of permissible exceptions to protection.[20] The treaty does not, on the whole, define who shall be the copyright owner.[21] Thus, the treaty sets forth minimum rights to be protected, but does not impose standards as to who shall be the owner of those rights.

The EC Software Directive affords an example of a modified copyright regime that remains consistent with Berne standards. The Directive's limitations on the exclusive rights of reproduction and adaptation can be said to fit within Article 9(2)'s authorization to member countries to adopt exceptions that do not conflict with the "normal exploitation" of the work. Alternatively, the Directive's limitations can be justified as means to avoid monopolization of ideas and processes by the software copyright holder. Since the Berne Convention does not protect ideas, limitations of the kind set forth in the Directive would be compatible.

The Directive also modifies the regime of copyright ownership by derogating from the general copyright law of many EC countries that vests copyright ownership in the physical creator of a work, whatever his employment status. This feature of the Directive is nonetheless consistent with the treaty, because the treaty does not impose a general requirement that the human creator of a work be the copyright owner.[22]

(b) Divergences Falling Below Berne Minima

If a Berne member accords copyrighted works fewer rights than those whose protection the treaty requires, one might conclude that that member country

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[19] See Article 19.

[20] See Articles 6bis and 8 to 14.

[21] But see, Article 14bis, regarding cinematographic works.

[22] But see, e.g., Sam Ricketson, "People or Machines?," 16 Columbia-VLA Journal of Law and the Arts, 1991 (contending that the Berne Convention implicitly designates the human author as copyright owner).

has not fulfilled its treaty obligations. However, one might also argue that if the member country has included within the scope of copyright works whose coverage the treaty does not mandate, then that country may tailor copyright protection without regard to minimum rights. Under this analysis, the most the Berne Convention may require is that the member country accord such works from Union countries the same treatment as the member affords local works of the kind.

Sound recordings present a leading example of this kind of work. The Berne Convention does not cover sound recordings, and most Berne members do not include them within the subject matter of copyright. However, some countries, for example the United States, do provide for copyright protection of sound recordings.[23] On the other hand, the United States does not afford sound recordings the full scope of copyright protection: there is no public performance right in a sound recording.[24] By contrast, the Berne Convention sets forth the public performance right as a minimum right.[25] But if the member country was not obliged in the first place to protect sound recordings, and if therefore the scope of protection granted sound recordings is equally independent of Berne Convention constraints, then that country has not acted inconsistently with its treaty obligations.

(c) Summary

Thus, the international consequences of broadening copyright boundaries to include works not traditionally within the subject matter of copyright would be as follows:

-- If the member country determines that the work, albeit non traditional, falls within Article 2 criteria, then the Berne member must accord that work the minimum scope of rights set forth in the Convention.

However, nothing in the Convention prohibits that country from according the work a different scope of protection than that granted other kinds of copyrighted works, so long as the specific protection remains consistent with Berne standards.

Moreover, the Convention permits a member country to organize the copyright ownership of the work differently from the traditional ownership regime.

-- If the member country determines that the work does not fall within Article 2 criteria, then the country may accord a foreign work of the same kind the domestic scope of protection, even if that scope falls below Berne minima.

One should note, however, that the last element of this analysis may lend itself to abuse: because the Berne Convention leaves to member countries the

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23 See 17 U.S.C., section 102(a)(7).

24 See 17 U.S.C., section 106(4).

25 See Berne Convention, Articles 11, 11bis, 11ter.

interpretation and implementation of Article 2, one may fear that a member country might seek to escape the application of Berne minimum rights by asserting its autonomy in interpreting the scope of Article 2. There are two means to avoid this result. First, one might contend that Article 2 incorporates an international consensus as to the meaning of its terms (or at least, some of the terms--as Dr. Ficsor has argued with respect to computer programs[26]). Member countries therefore would not be completely free to interpret the terms in any way they desire. Second, one might argue that once a member country undertakes as a matter of domestic law to include a work within the subject matter of copyright, then it must accord the same works from Berne countries Berne-level protection (even if it does not afford the same level of rights to local works).

3. Copyright Plus

For subject matter that the member country protects in part by copyright, and in part by another legal regime, the Berne Convention would require compatibility with national treatment and minimum standards of protection, with respect to the copyright component. However, to the extent that the local regime of protection covers non copyright subject matter (and local law has not engaged in an abusively restrictive definition of copyright subject matter), the treaty would not govern the non copyright features. Thus, the Berne member would not be obliged to grant national treatment with respect either to subject matter that does not qualify for copyright, or to rights that are more extensive than those available under copyright.

For example, the EC Draft Database Directive would be subject to Berne standards in its regulation of copyrightable data bases; it would not be in its creation and regulation of the copyright-independent "unauthorized extraction" right. EC nations, albeit Berne members, would therefore be free to condition extra-EC extension of the extraction right on demonstration of reciprocal protection by non EC nations.[27]

B. Copyright-Equivalent Rights: International Consequences of Imposing Protection Under Other Legal Regimes

When a Berne member nation affords copyright-equivalent protection to works that come (at least in part) within the subject matter of copyright, but make this protection available under a legal rubric other than copyright, what are the consequences for foreign works? The answer may depend on whether the protection results from contract law (1), or from an extra-copyright regime (2).

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[26] See Mihály Ficsor, "New Technologies and Copyright: Need for Change, Need for Continuity," paper presented at the WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights, Paris, June 3, 1994.

[27] See Draft Database Directive, Article 13.

1. Substituting Contract for Copyright

Once one departs from copyright territory to consider the international consequences of parallel contract protection, the Berne Convention is no longer at issue. Rather, in the absence of a specific treaty, this question falls within the domain of the international private law of contracts. The general subject of conflicts of law is beyond the scope of this discussion; I will therefore confine this discussion to two observations.

First, in most instances, one may anticipate that the information provider will have imposed a choice of law governing the agreement in its contract with the users. Since the general contracts conflicts of law rule respects the choice of the parties, that may be the end of the issue. However, it is possible to imagine that if the substantive terms of the contract depart drastically from copyright norms (particularly with respect to user rights), those terms may violate the public policy either of the country whose law has been chosen to regulate the contract, or of the forum.

Second, if the parties have not chosen an applicable law, the contract would be "localized" in light of a variety of factors including: the parties' residence (place of business), or nationality; the place of origin of the information; the place of receipt of the information. Each forum is likely to make its own determination of what weight to give these factors. Finally, it remains possible that even after finding the national law applicable to the contract, the forum may find that (foreign) law to violate local public policy, if that law would uphold contractual provisions that are deeply inconsistent with local copyright norms.[28]

2. Extra-Copyright Protection of Copyright Subject Matter

Having earlier considered the international impact of sui generis protection of productions falling outside the boundaries of copyrightable subject matter,[29] one should also address the international consequences of provisions, such as the U.S. 1992 Audio Home Recording Act, that concern works coming within the subject matter of copyright, but that purport to create a distinct, extra-copyright, regime of protection.

Providing copyright-like protection by extra-copyright means is not new to the Berne system. A notable and venerable example is the United Kingdom's recourse to a variety of tort doctrines, particularly defamation, to secure a level of protection of moral rights compatible with the Berne standard

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[28] For example, in the U.S., several judicial decisions and academic commentary suggest that anticompetitive contractual conditions on access to or exploitation of copyrighted works may be invalidated as "copyright misuse." See, e.g., Lasercomb America, Inc. v. Reynolds, 911 F.2d 970 (4th Cir,. 1990); Phillip Abromats, "Copyright Misuse and Anticompetitive Software Licensing Restrictions," 52 University of Pittsburgh Law Review, 1991, p. 629; David A. Rice, "Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Provisions Against Reverse Engineering," 53 University of Pittsburg Law Review, 1992, p. 543.

[29] See II, A.3, supra.

introduced in the 1928 revision.[30] The U.S. adopted the same course when it adhered to the Berne Convention in 1989. While the U.S. and the U.K. have been criticized for insufficient solicitude for authors' non economic interests, the critique has addressed the substance of moral rights protection, not the technique of supplying that protection by extra-copyright means.[31]

From this example, one may conclude that what counts for Berne compatibility is not the form or the label, but the substance of the protection at issue. Let us now invert the proposition. Suppose a Berne Union member elects to afford protection against unauthorized copying or public performance, but purports to do so under a rubric other than copyright. Recourse to a parallel source of legislation should not itself excuse the member country from extending the benefits of that protection to foreign authors and copyright owners. If the objects of special protection are works of authorship within the meaning of Article 2, and if the rights protected are within the scope of the Berne minima, then the principle of national treatment should apply, whatever formal classification the domestic legislation employs.

For example, the U.S. Audio Home Recording Act of 1992 purports, in response to the anticipated private copying of digitally recorded works, to install an extra-copyright regime of technical anti-copying standards and royalties derived from levies on recording material. The subject matter the law addresses, predominantly musical compositions, are copyrightable works (as are, in the U.S. scheme, the sound recordings). The law establishes compensatory remedies for copying. Despite its sui generis pretentions, the law, I would contend, essentially accords a form of copyright protection. The law's benefits should therefore extend to other Berne Union members. In fact, the 1992 law's rather complicated provisions do appear to apply to Berne members (as well as to other foreign authors and copyright holders entitled to protection in the U.S.).[32] Thus, the law is Berne-compatible.

By contrast, national private copying legislation in some other Berne Union countries restricts to local authors, and/or local social-cultural institutions, the distribution of some or all of the sums levied. These measures have been justified as non-copyright "taxes," on the ground that the proceeds do not go entirely, or directly, to authors.[33] To the extent the

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[30] See, e.g., Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Property: 1886-1996, 1987, 8.98.

[31] See, e.g., Adolf Dietz, "The United States and Moral Rights: Idiosyncracy or Approximation--Observations on a problematical relationship underlying U.S. adherence to the Berne Convention," Revue internationale du droit d'auteur (RIDA), No. 142, October 1989, p. 222.

[32] See 17 U.S.C., sections 1001(7) and 1006.

[33] See generally Gillian Davies and Michèle E. Hung, Music and Video Private Copying: An International Survey of the Problem and the Law, 1983, pp. 218 to 221.

sums are distributed to authors, I believe we are back in the realm of copyright, whatever the name of the regime, and that the principle of national treatment therefore applies. To the extent the proceeds replenish general social-cultural coffers, the kinship to copyright is attenuated. Nonetheless, authors remain the indirect beneficiaries of this kind of scheme. Moreover, exempting this kind of scheme from national treatment would seem to invite disingenuous recharacterization of the royalties as mere domestic social welfare legislation. (The characterization would be more convincing if the basis for the levy were limited to local works.)

CONCLUSION

The borders of copyright are being at once stretched, and compressed. On the one hand, new entrants, including works expressed in digital media, seek to be counted among the citizens of the copyright world. On the other hand, both private parties through contract, and States, through extra-copyright legislation, seek to complement, or even substitute, extra-copyright means to protect copyrightable works. The international consequences of these border actions vary. The analysis here proposed suggests that Berne members may still enjoy some autonomy in the decision whether or not to include certain kinds of works in the copyright domain, although the GATT TRIPS Agreement imposes considerable limitations on that freedom, with respect to computer software and data bases. However, once the work's copyright status is settled, its protection against unauthorized copying and public performance should be the same for local and for foreign works, whatever the local legislative label attached to that protection.

COPYRIGHT AND PRIVATE INTERNATIONAL LAW IN THE FACE OF THE INTERNATIONAL DIFFUSION OF WORKS

by

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I. INTRODUCTORY REMARKS

The international diffusion of the works of the mind is not a new fact arising from technical developments. There has always been copies (for instance of a book or of a record) exported or manufactured in countries other than the country considered as the country of origin of the work. And there has always been public performances (including radio or television broadcasts) in countries other than the country of origin. However, in all these cases, there had to be either export of the material goods incorporating the work or a new act of exploitation, edition or broadcast on the spot, in the foreign country.

What is new, is the fact that international diffusion is now possible without export of the material object and without a new exploitation act or, at most, with a new act that only relays the initial exploitation act. This international diffusion of a new type is effected by transmission systems which widen the scope of the initial exploitation act: television broadcasts can reach distant audiences, in numerous countries, foreign in relation to the country of the broadcast, by means of cable and satellites.

Already in the previous phase when it presupposed export or a new exploitation act, the international diffusion of works of the mind raised several problems. The solution to these problems was sought by a key concept that seemed to meet the needs of both substantive law and private international law. This key concept, set up as as all-purpose principle, was the concept of territoriality.

For substantive law, the principle of territoriality was to mean that each country granted its own protection to the works it wished to protect--and there were therefore as many (subjective) copyrights as there were States protecting the works. This territorial multiplicity of copyrights could have several corollaries in private international law. Several conceptions of territoriality are possible, ranging from refusal of protection for foreign works or refusal of protection against infringements abroad to application of the lex fori or, sometimes, of the lex loci protectionis.

This multiplicity of interpretations rendered the territoriality concept either unusable or arbitrary. In trying to be a passkey able to open several doors, it finally opened only the one that each performer wanted to have it

open. It also was arbitrary from another point of view: it was lacking--and is still lacking--a legal basis. There exists no legal text, whether national or international, that establishes and defines the territoriality concept as such, although there are several texts imposing one or other of the possible interpretations.

Territoriality sought its legitimation in tradition and in opportuneness. The tradition came from a time when copyright was granted by the State as a "privilege," an administrative act similar to patents and trademarks, and it was normal that the administrative act should be recognized on the territory of the State that promulgated it. However, this has no longer been the case for about 200 years: like most of the other subjective rights, copyright is acquired automatically when the conditions of its existence are met.

Among the reasons of opportuneness, often invoked to justify the principle of territoriality, only one might have a certain weight: territoriality enables the author to exploit his works separately in each country, by concluding separate contracts and by obtaining separate remuneration. However, to achieve this perfectly legitimate goal, the construction of territoriality is not at all necessary. As the example clearly shows, it is by the play of contractual stipulations that this result of separate use in each country can be achieved.

II. PROBLEMS RELATING TO CABLE

1. Private International Law

Logically, the examination of the private international law problems has to precede the examination of the problems arising from substantive law. To seek solutions in substantive law, one must first know according to which law these solutions will be sought, i.e. what is the applicable law. However, this logical priority loses its importance in this case since the solution does not have to be sought according to one or the other substantive law: it arises directly from the Berne Convention to which almost all countries are party and which is therefore truly universal.

2. Substantive Law

Does television program distribution by cable pose a genuine problem of copyright? Before answering, let us first try to clear the ground of a number of problems that I would call "small" since they are relatively easy to solve:

-- Distinction between common antenna serving a building or a block of houses and genuine distribution by cable on a large scale: certainly, there is a demarcation problem that can only be defined quantitatively, which allows doubtful cases to subsist but which, in fact, does not affect the great majority of cases, which are sufficiently clear to enter one or the other category.

-- Distribution by cable in the area of reception over the air (or service area): although it is true that it does not address a new public, it is equally true that it provides a better reception and therefore, by

definition, different to an audience already supplied over electromagnetic waves. Otherwise, such distribution by cable would neither exist nor be sold because it would be completely superfluous.

-- Distribution by cable carried out by the organization that makes the radio broadcast: an extremely rare case in which the lawfulness of distribution by cable would depend on the contractual agreements between the owner of the copyright and the broadcasting organization; these agreements, duly interpreted, would make it possible to decide whether the broadcasting organization had the right to proceed with cable distribution.

There remains the usual and normal case, in which an organization other than the broadcasting organization functions as a relay and, after having received the broadcast over the air, distributes it by cable to a new audience. The case is directly and explicitly regulated by the Paris Act of the Berne Convention which, in its Article 11bis, provides that: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing ...(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one."

That is so clear that one cannot speak of a problem. In fact, there is no problem created by cable distribution of works of the mind. What is claimed to be a problem is only a difficulty of practical implementation of the rules, because the cable operators often do not have the necessary time to conduct negotiations and to obtain authorization from the owners of copyright, after having been informed of the contents of the programs to be broadcast. At the strictly legal level, the answer could be categorical: if they do not obtain authorization, all they have to do is not broadcast. However, we must be ready to provide for and facilitate the conclusion of collective and blanket contracts between the copyright administration societies and the cable operators in order to cope with this difficulty, while safeguarding the principle of the absolute and exclusive right of the authors as afforded by national laws and the Berne Convention. It is the path taken by the recent Directive of the European Union and a happy one.

III. PROBLEMS RELATING TO SATELLITES

1. Private International Law

In the field of satellites, the Berne Convention would not seem to provide a rule sufficiently explicit to immediately set aside any private international law problems. Therefore, these latter rules keep here their primacy and their importance. Nevertheless, before examining the problem of conflict of laws, it is as well to give a definition and to avoid a trap. The definition, in fact, seems to go without saying given the technological developments: I refer exclusively to direct broadcasting satellites, which are more and more widespread, and not to point-to-point satellites, which are generally used for telecommunications.

Now, let us come to the trap: a very cunning theory has been evolved to conclude that authors are not entitled to claim rights when their works are contained in a satellite broadcast. The satellite broadcast includes two

legs: the upward leg from the Earth to the satellite and the downward leg from the satellite to the Earth. It has been claimed that the upward leg is not a broadcast since it is not intended for reception by the public. As for the downward leg, which is a broadcast, this comes from an object located in space and therefore, by definition, it is beyond any jurisdiction, in a legal "no man's land." However, the trick is all too obvious: the satellite broadcast constitutes a single act taking place on the Earth and returning there, after having used the satellite as a distant antenna.

Nonetheless, this single process of satellite broadcasting presents a particularity: while its starting point is a determined point on the terrestrial surface, its return is not towards a single point, but towards a much greater expanse, covering in theory one third of the surface of the Earth and, in any event, usually covering several States. The fact of the matter is that the downward beam cannot be shaped to correspond to the borders of a State of European size. Hence, several problems are created, particularly in respect of private international law.

Here again, we must try first of all to eliminate several confusions. The issues of private international law (determining the law applicable in a situation of conflict of laws) cannot be solved other than on the basis of a given legal order. There is no theoretical, in abstracto international law; there are provisions of private international law for each country whose courts are required to hear a case, unless such country is required to observe the rules of private international law contained in an international convention (in our case, it may be the Berne Convention). Therefore, the answers given will be national answers; they may vary from one country to another and they must be based on statutory instruments.

A second point that needs to be clarified concerns the multiplicity of aspects that a case brought before the courts may involve. This point may be summarized by the phrase: law applicable to what?

Actually, a satellite broadcast, which becomes the subject of litigation involves three aspects for which different rules of conflict may apply.

First, there is the copyright aspect that comprises a number of questions, for instance, concerning the work eligible for protection, the status of the author, the transferability of the right, the limitations, and the duration. The prevailing opinion maintains that these questions have to be resolved according to the law of the country where protection is sought and that this rule arises from the Berne Convention, constituting one of the possible variants of the principle of territoriality. But, as already mentioned, from one country to another solutions may vary; and to cite the example of a very recent national law, the new Greek law explicitly provides for the application of the law of the country of origin, which is the law of the country of first publication or, if the work has not been published, the national law of the author.

Second aspect: the satellite broadcast of a work will normally be carried out on the basis of a license contract. Questions concerning this contract, and in particular questions of validity and interpretation of the contract, will be judged according to the law applicable to the contract (lex contractus) which, certainly, may differ from the law applicable to copyright. The points of attachment adopted by the national rules on

conflicts can be the place of the conclusion of the contract, the place of its execution, the law to which the parties have submitted themselves or even, according to a more flexible formula adopted, for instance, by Greek law, the law which is appropriate to the contract considering all relevant special circumstances.

Third aspect: if the satellite broadcast is not authorized under contract, it will normally be an unlawful act and possibly a tort. In such case, it is the provision of private international law on torts that will determine the substantive law applicable to the issues relating to the tortious nature of the broadcast, namely fault, liability, indemnity, compensation for moral damages, etc. The more or less generally admitted rule is application of the law of the place where the wrong was committed (lex loci delicti commissi). However, in the case of a satellite broadcast, this rule is not adequate if the following question remains unanswered: where has the wrong been committed? In the country from which the upwards beam has been emitted or in all countries in which the broadcast can be received? Various divergent theories have seen the light since the problem has arisen, quite apart from satellite broadcasts, in relatively simpler and rarer situations, as with a defamatory letter written in one country and sent to another or a bullet shot from the one side of the border and killing or wounding a person on the other side.

There would seem reason to prefer the theories resulting in the application of the law of the countries where the broadcast can be received: otherwise, the organization that broadcasts by satellite would be careful to emit the upwards beam from the country that gives the weakest protection to copyright or even from a place beyond any jurisdiction, for instance the high seas. However, it must be emphasized that often, in this field, the real problem is dissimulated behind a problem of private international law; and this problem is the geographical extent of the required consent, that is a problem of substantive law.

2. Substantive Law

The essential question is as follows: for which countries does the consent of the copyright owner have to be obtained? Does it suffice for consent to be granted for the countries from which the upwards beam is emitted or must it be granted for the countries for which the satellite broadcast is intended or for all the countries where the satellite broadcast is capable of reception?

The answer may depend, of course, on the applicable law but, particularly where that law is silent, it will depend on the contract that grants the authorization, duly interpreted according to the law that governs it. To originate a satellite broadcast that can be received in a country for which there is no authorization from the copyright owner constitutes an offense. It is this rule that is reflected in the recent Greek law by a provision that, limited to broadcasts receivable in Greece, reads as follows: "The broadcast of a work by satellite, when it can be received in Greece or in a substantial part of the country, shall be lawful only if the television organization which emits the upwards beam has acquired an authorization or obtained a license for the television broadcast in Greece."

It would be difficult to imagine that a contract granting the right holder's authorization would specify geographical areas that were impossible to respect. How could one authorize a satellite broadcast for France and Germany without being aware that it is practically impossible to exclude reception in Switzerland or in Belgium? Anyone who granted such authorization would have to suffer the consequences of his negligence or ignorance. However, situations are not always that simple. Let us suppose that the right in a television broadcast was assigned by the author to different persons for each of the countries concerned, for instance to the various coproducers of a cinematographic work. In such case, the lawfulness of the satellite broadcast would depend on the authorization of all owners for all the countries "serviced" by the satellite.

An objection is sometimes raised to these solutions on the basis of law and reason: if the broadcasting organization that emits via satellite has to obtain the authorization of the owner or owners for all the countries where its broadcast is capable of being received, the cost of the operation is likely to become exorbitant, that is to say prohibitive. No great attention should be paid to this. Firstly, because of all the expense necessary to effect a satellite broadcast, the share devoted to remuneration for the author is rather modest. But more than that, because the argument can be easily reversed: if, in certain countries, the work is exploited without the consent of the author and without his being paid remuneration, his legitimate interests suffer an unjustified loss to the profit of the exploiter.

IV. BY WAY OF CONCLUSION

Need to obtain the consent of the author for the cable distribution of programs, even if deadlines make this consent difficult, need to obtain the consent of the author for all the countries "serviced" by the satellite, even if the broadcast is intended only for some of those countries--these are solutions that could awaken old criticisms of copyright, to the effect that this right constitutes an obstacle to the dissemination of culture. Let us not stoop to the observation that the television programs distributed by cable or transmitted by satellite do not constitute the quintessence of the culture, and let us simply note that the dissemination of culture presupposes cultural creation and that effective protection for authors is a decisive factor in promoting human creativity.

And what about the future? In the light of the doubts that could subsist, in particular with regard to satellite broadcasts, it would certainly be useful to supplement the Berne Convention with an additional protocol. However, here the problem becomes political: if a protocol is to achieve but modest results or ambiguous solutions or the introduction of new provisions unfavorable to authors, it would be better to leave the texts as they are, and to place our trust in those who will be called upon to interpret and implement them.

HARMONIZATION OF COPYRIGHT IN THE EUROPEAN UNION

by

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I. COMMUNITY HARMONIZATION AND THE INTERNATIONAL SYSTEM OF COPYRIGHT PROTECTION

1. Anyone observing the international copyright stage is necessarily struck by the ever growing part played by a new actor known as the European Community. It has displayed a new forceful personality both in the negotiations that led to the TRIPS Agreement[1] within GATT as also in discussions at WIPO on the drafting of a protocol to the Berne Convention and a new instrument to protect the rights of performers and phonogram producers. It did so with all the more authority for the fact that it had succeeded, within its own territory, in obliging the national lawmakers to step out along the path of harmonization of their own intellectual property systems.

2. Such had not been the case at the beginnings of European construction. In the time before Maastricht, the Community had indeed acted over a lengthy period as the exclusively mercantile entity that was suggested by its initial name of European Economic Community. That Community appeared only to concern itself with copyright for the purpose of applying to it the rules on free movement of goods and competition. In view of the eminently cultural aspect of literary and artistic property, one could question whether the Community indeed possessed any competence in that field.[2] However, the Court of Justice and the Court of First Instance held, thus agreeing with the Commission, that the Treaty was altogether applicable to copyright. Without completely denying the non-economic aspects of copyright, they placed the

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[1] "Agreement on the Trade-Related Aspects of Intellectual Property Rights."

[2] For more detail, see F. Gotzen, Het bestemmingsrecht van de auteur/Le droit de destination de l'auteur, Brussels, 1975.

accent above all on the possibilities of commercial exploitation.[3] This is not the place here to comment on those decisions.[4] Let us make just one comment. The Maastricht Treaty on the European Union of February 7, 1992,[5] which entered into force on November 1, 1993,[6] deleted the adjective "Economic" from the title of the Treaty of Rome establishing a European Community. This change demonstrates the will not only to extend the Community's field of action to new sectors, but also its concern to exercise existing competences on a broader scale. This should enable it to take into account the non-economic aspects. The introduction of a new Title IX in the Treaty of Rome, headed "Culture," is a good illustration.[7] The new formulation of Article 128 in that Title includes for the first time the explicit principle of Community action in the cultural field. Although the wording is still rather vague and does not in itself afford material competence to the Community in the copyright field, attention should nevertheless be drawn to its paragraph 4 that is capable of modifying the interpretation of other provisions in the Treaty. Indeed, according to the new text, "the Community will take into account the cultural aspects of its action and other provisions of this Treaty." That means that, in our field, the interpretation of Articles 30 to 36 and of Articles 85 and 86 of the

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[3] Decisions of the Court of March 18, 1980, 62/79, Coditel/Ciné Vog-I, Rec. 1980, 881; January 20, 1981, 55/80 and 57/80, Membran/GEMA, Rec. 1981, 147; January 22, 1981, 58/80, Dansk Supermarked/Imerco, Rec. 1981, 181; September 14, 1982, 148/81, Keurkoop/Nancy Kean Gifts, Rec. 1982, 2853; October 6, 1982, 262/81, Coditel-II, Rec. 1982, 3381, April 9, 1987, 402/85, Basset/SACEM, Revue internationale du droit d'auteur (RIDA), 1987, 133, p. 168; May 17, 1988, 158/86, Warner/Christiansen, RIDA 1988, 137, p. 88; January 24, 1989, 341/87, EMI/Patricia, RIDA 1989, 141, p. 235; October 20, 1993, C 92/92 and 326/92, Phil Collins/Imtrat, RIDA 1994, 159, p. 304.

Decisions of the Court of First Instance of the European Community of July 10, 1991, in three linked cases concerning the "Magill TV Guide," T-69/89, RTE/Commission, T-70/89, BBC/Commission, T-76/89, ITP/Commission, RIDA 1992, 151, p. 216, note TH. Desurmont.

[4] R. Joliet - P. Delsaux, "Le droit d'auteur dans la jurisprudence de la Cour de justice des Communautés européennes," Cah. Dr. Eur. 1985, pp. 381-401; R. Joliet, "Geistiges Eigentum und freier Warenverkehr," Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (GRUR Int.), 1989, pp. 177-185; F. Gotzen, "La libre circulation des produits couverts par un droit de propriété intellectuelle dans la jurisprudence de la Cour de justice," R.T.D.C. 1985, pp. 467-481; L. Defalque, "Copyright--Free Movement of Goods and Territoriality: Recent Developments," European Intellectual Property Review (EIPR), 1989, pp. 435-439; C. Doutrelepont, "Missbräuchliche Ausübung von Urheberrechten?," GRUR Int. 1994, pp. 302-308.

[5] OJ No. C 191 of July 29, 1992.

[6] OJ No. L 293 of November 27, 1993.

[7] See also the modification made by the Maastricht Treaty to Article 92(3) with respect to "aid intended to promote culture."

Treaty could be "modalized" to take account also of the non-economic values inseparably linked to the monetary aspects of copyright.

3. It was not until 1991 that the effects of a further activity of the Community in the copyright field began to make themselves felt. These were in fact the first results of a vast effort to approximate the national laws, initiated some years earlier, that bore witness in many respects to a true will to protect the interests of the holders of copyright and neighboring rights at Community level. Indeed, the tardy nature of such an action, whose principle has never been criticized, could surprise us. The Community's competence to act in such a constructive manner can indeed be based on a number of provisions in the Treaty, whereby Articles 100 and 100A spring naturally to mind. When necessary, these can be supplemented by recourse to Articles 57, 66, 117 and 118, or even Article 235.[8]

It is quite obvious that the vast effort to harmonize national legislation taking place before us does not only mean that the operation of the Community's internal market has been improved. From an external point of view, it simultaneously constitutes an element of competence for the Community, which is thus enabled to put its whole weight into negotiations that are becoming ever more international.

II. THE LONG MARCH TOWARDS COPYRIGHT HARMONIZATION IN THE COMMUNITY

4. The harmonization of copyright laws has taken some time to get going. It was not until May 13, 1974[9] that a resolution adopted by the European Parliament finally invited the Community executive "to propose measures to be adopted by the Council to approximate the national laws...on author's rights and the so-called neighboring rights."

The Commission presented its initial concrete ideas on harmonization of the national laws concerning copyright and neighboring rights in the form of communications addressed first to the Council and then also to the European Parliament. The first of those communications was dated November 22, 1977, and was entitled "Community Action in the Cultural Sector."[10] It was followed by two similar communications published in 1982 and in 1987.[11] The Commission stresses in those communications that the Treaty is fully applicable

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[8] For further information, see F. Gotzen, "L'harmonisation du droit d'auteur et des droits voisins," in La protection de la propriété intellectuelle. Aspects juridiques européens et internationaux, Institut universitaire international, Luxembourg, July 1989 session, Vol. 16, Luxembourg, 1990, pp. 224 and 225.

[9] OJ No. C 62 of May 30, 1974.

[10] EC Bulletin, Supplement 6/77.

[11] Communication of October 12, 1982, on "Reinforcing Community Action in the Cultural Sector," ibid., Supplement 6/82, and communication of December 1987 on "A New Impetus for Cultural Action in the European Community," ibid., Supplement 4/87.

to the cultural sector, but that specific problems are raised. Authors and artists must be considered "cultural workers" enjoying all the provisions of the Treaty. The main problem that arises with regard to such persons is that the national laws affording rights lag considerably behind technical developments. They run the risk, therefore, of an overall impoverishment which can only be avoided by dynamic harmonization, in the direction of progress, of the national laws protecting them. Harmonization should enable the level of protection for authors and the holders of neighboring rights to be increased and at the same time to combat piracy and discrimination based on nationality.

5. Subsequently, on three occasions, the Commission submitted more detailed drafts on the approximation of laws with regard to copyright and neighboring rights in the form of a Green Paper. These constitute, in each case, a preparatory document which, prior to formulating concrete proposals, sets out various solutions in detail in order to provoke a broad-ranging discussion and to prepare for consultations with the concerned circles.

Thus, on June 14, 1984, the Commission published a first Green Paper entitled "Television Without Frontiers."[12] The aim of that Green Paper was to establish a common market in the field of broadcasting, particularly with respect to cable and satellite television. It was necessary, to do so, to prepare for the elimination of a large number of discriminations affecting broadcasts originating in other Member States and also to reduce the most flagrant disparities in the national laws. One of those concerned copyright in respect of cable television. The view of the Commission was that a remedy had to be found to the situation arising from the decision of the Court of Justice in the Coditel case.[13] That decision had acknowledged the author's exclusive right to authorize the transmission by cable of television broadcasts that contained protected works even when they originated from other Community countries. The Commission therefore considered the institution of a statutory license for all the Community countries. That part of the Commission's proposals, as you will be aware, met with numerous objections.[14] This explains why the proposed Directive on Television Without Frontiers that emerged from the Green Paper already tended towards a rather less restrictive solution of arbitration.[15] The final wording of the Directive adopted by the Council in fact no longer contained any provisions on copyright.[16]

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[12] COM (84) 300.

[13] Decisions of March 18, 1980, and October 6, 1982, cited in footnote 3.

[14] For more detail, see F. Gotzen, op. cit. in footnote 8.

[15] Compare the amended proposal of April 6, 1988, OJ No. C 110 of April 27, 1988, with the initial wording of the proposal of April 30, 1986, OJ No. C 179 of July 17, 1986.

[16] Directive of October 3, 1989, OJ No. L 298 of October 17, 1989.

Despite this, the subject was not abandoned since, as we shall see later, it will in the end be covered by a new directive specifically devoted to the question of copyright in relation to satellites and cable.[17]

6. In June 1988, the Commission published a second Green Paper, with the title "Copyright and the Technological Challenge."[18] This time, it was a document exclusively focused on copyright questions.

One of the advantages of this Green Paper was certainly to have drawn the attention of all parties to the problem of piracy that demanded action both within the Community and in its external relations. The Commission took the opportunity of stressing the urgency of strengthening copyright protection. At the same time, it very clearly reaffirmed the need to recognize neighboring rights throughout the Community.

However, despite its impressive size, the Green Paper contained only rather limited proposals. For example, on the matter of the private copying of protected works, the Commission ignored the problem of reprographic reproduction and dealt solely with the case of audiovisual fixations. Instead of proposing the legal solution of a levy on blank cassettes or on the reproduction appliances, the Commission went no further than putting forward the idea of a technical system which, although it restricted somewhat the facilities for digital recording of sound, in no way concerned either videograms or analogue recordings. On the other hand, in a further chapter, the Commission favored the introduction for the benefit of both authors and producers and performers of an exclusive right in the commercial hire of sound recordings and videograms. However, the Commission also stated that it did not wish to deal with a similar problem arising with regard to books in the matter of public lending. Finally, the Commission also touched on the computer field and announced its intention of submitting to the Council "as soon as possible" a proposed directive on computer programs. On the other hand, after examining the case of data bases, the Commission concluded that they did not appear to require immediate intervention.

The Green Paper on "Copyright and the Challenge of Technology" was criticized on the grounds of its active approach to the problems to be dealt with and on account of its exclusively mercantile spirit.[19] After having carried out broad-based consultations and public hearings, the Commission

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[17] Directive of September 27, 1993, commented below in item 11.

[18] COM (88) 172. With regard to this document, see A. Françon, "Réflections sur le livre vert," RIDA 1989, 139, pp. 129-157.

[19] See in particular the contributions by M. Möller, F. Gotzen, J. Corbet, G. Dworkin and A. Françon in Droit d'auteur et Communauté européenne. Le livre vert sur le droit d'auteur et le défi technologique, Intellectual Property Research Center (CIR) Collection No. 1, Kluwer Story-Scientia, Bruxelles, 1989. Comp. H. Cohen Jehoram, "Harmonising Intellectual Property Law within the European Community," IIC-International Review of Industrial Property and Copyright Law, 1992, p. 627; D. Franzone, "Droit d'auteur et droits voisins : bilan et perspectives de l'action communautaire," Revue du marché unique européen, 1993, pp. 143-146.

rapidly ammended its approach by publishing two new communications. The first, dated August 3, 1989, is entitled "Books and Reading: Europe's Cultural Stakes."[20] It was important not only because it announced further harmonization in the field of the term of copyright and also in the field of reprographic reproduction, but also due to a change of approach compared with the very industrial spirit of the Green Paper on the technological challenge. The new communication placed the whole field of copyright again in a cultural and social perspective, as had been the case of the initial communications on Community action in the cultural sector, referred to above.[21] Subsequently, on January 17, 1991, a second communication was published with the title "Follow-up to the Green Paper."[22] With its vast program of work with regard to copyright and neighboring rights, which we shall look at subsequently under Chapter III, this document attempted to reply to the criticism of the highly selective nature of the proposals made in the second Green Paper.

7. Before dealing with the initial results of the harmonization within the Community, we should first mention a further Commission working document, also presented in the form of a Green Paper, published in June 1991, concerning "The Legal Protection of Industrial Designs."[23] After having heard the reactions of the concerned circles, the Commission presented a proposed regulation establishing a Community design, together with a proposed directive on the approximation of national laws in that field.[24] These proposals put forward the idea of Community protection under a single deposit, instituted by means of a regulation. The term of protection would be of five years and would be renewable up to a total of 25 years. However, one may also note the alternative of a non-registered Community design enjoying short-term protection, that is to say three years. During the first 12 months of its existence it may be transformed, however, into a registered right enjoying a longer term. The national laws on design protection may coexist with the Community system, subject to a degree of harmonization by directive. Cumulative protection under copyright should be permissible, subject to the, non-harmonized, conditions laid down in national laws.

III. THE INITIAL RESULTS OF HARMONIZATION

8. The true signal for the harmonization of copyright and neighboring rights was given on January 17, 1991, with the publication by the Commission of its

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[20] COM (89) 258.

[21] Supra, item 4 in this study.

[22] COM (90) 584.

[23] III/F/5131/91. A discussion of the various proposals is to be found in F. Gotzen (ed.), Le livre vert sur la protection des dessins et modèles industriels, CIR Collection No. 5, Kluwer Story-Scientia, Brussels, 1992.

[24] OJ No. C 345 of December 23, 1993, and OJ No. C 29 of January 31, 1994. Regarding these proposals, see P. Brownlow, "The European Commission's Proposed Design Directive and Regulation," Copyright World, May 1994, pp. 29-32.

communication on "The Follow-up to the Green Paper." This was the Commission's program of work with respect to copyright and neighboring rights."[25] This document comprised a program of action to be undertaken by December 31, 1992, the date on which the internal market was to have been established.

In that document, the Commission began by proclaiming the need to have a "base" common to all Member States and on which it would be subsequently possible to more readily construct individual solutions.[26] This minimum common base for harmonization was to be found, quite naturally, according to the Commission, in the most recent versions of the major international conventions on copyright and neighboring rights. This meant that all the Member States should have ratified by December 31, 1991, both the 1971 Paris Act of the Berne Convention and the Rome Convention of October 26, 1961, or have acceded to them. Thus, as of December 11, 1990, already, the Commission submitted to the Council a proposed decision,[27] which was amended slightly on February 14, 1992, to take into account the observations made by the European Parliament and by the Economic and Social Committee.[28] Following opposition by some Member States that wished to avoid the Community extending its competence to such international conventions, the Council restricted itself to adopting a simple resolution on May 14, 1992,[29] in which it took note of the undertaking of States to become party, before January 1, 1995, to the Paris Act of the Berne Convention and to the Rome Convention. Compared with the initial proposal, therefore, a two-fold retreat may be noted. Firstly, the final date for execution has been postponed for three years and, secondly, the act has been adopted not as a formal decision, but simply as a non-compulsory resolution that leaves the initiative with the States. As far as this latter aspect is concerned, it has to be added, however, that reference is made to a further international instrument constituted by the Agreement on the European Economic Area signed on May 2, 1992, in Porto with the EFTA (European Free Trade Association) countries and which entered into force on January 1, 1994.[30] This Agreement comprises Protocol No. 28 concerning intellectual property. In that Protocol, its Article 5 requires the Contracting States to become party, before January 1, 1995, to the latest versions of the major international conventions dealing with that subject. Those of course include the Berne and Rome Conventions.

9. As we have already seen, the Green Paper intended to initiate "as soon as possible" the legislative procedure towards a Directive on computer

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25 COM (90) 584.

26 Paragraph 1.10.

27 COM (90) 582, OJ No. C 24 of January 31, 1991.

28 COM (92) 10.

29 Resolution of May 14, 1992, concerning the strengthening of protection for copyright and neighboring rights, OJ No. C 138 of May 28, 1992.

30 OJ No. L 1 of January 3, 1994.

programs.[31] The program of work of January 17, 1991, moved in the same direction.[32] Thus, a proposed directive was already submitted on January 5, 1989.[33] Despite the fact that an involved debate had grown up in the meantime on the protection of interfaces and on decompilation, the text nevertheless progressed and resulted, after publication by the Commission of a modified proposal,[34] in the Council Directive of May 14, 1991.[35] This Directive should have been transposed into the domestic law of all the Member States since January 1, 1993.

The Directive clearly opts for software protection under copyright. It is noteworthy that the text mentions the Berne Convention on a number of occasions. Thus, in its very first Article, the Member States are required to protect computer programs "under copyright as literary works within the meaning of the Berne Convention."[36] The main reason that incited the drafters of the text to choose that option was precisely the will to enter into an international system of protection that already existed and that required no formality. That was its major advantage compared with all the other arrangements which, through a sui generis system of protection that would perhaps be better adapted to the specific nature of this particular matter, would have demanded the drafting of a new international instrument, as had been the case in the field of integrated circuits.[37]

As to substance, it will be noted that, effectively, the Directive contains elements based on the traditional concepts of copyright. This is demonstrated, for example, in the limitation of protection to the form of expression, excluding ideas and principles (Article 1.2). The same may be

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[31] Supra, item 6 in this study. For more details, see F. Gotzen, "Programmes d'ordinateur et banques de données," in Droit d'auteur et Communauté européenne," op. cit. in footnote 19, pp. 23 et seq.

[32] Paragraph 5.2.2.

[33] Proposed directive on the legal protection of computer programs, OJ No. C 91 of April 12, 1989.

[34] Modified proposal of October 18, 1990, following the amendments made by the European Parliament, OJ No. C 320 of December 20, 1990.

[35] OJ No. L 122 of May 17, 1991. With regard to this Directive, see B. Czarnota - R. Hart, Legal Protection of Computer Programs in Europe, London, 1991; F. Brison - J.P. Triaille, "La directive C.E.E. du 14 mai 1991 et la protection juridique des programmes d'ordinateur en droit belge," Journal des tribunaux, 1991, pp. 782-791; T.C. Vinje, "Die EG-Richtlinie zum Schutz von Computerprogrammen und die Frage der Interoperabilität," GRUR Int. 1992, pp. 250-259.

[36] See also Article 6.3.

[37] The Washington Treaty on Intellectual Property in Respect of Integrated Circuits of May 26, 1989. See in this respect, F. Gotzen (ed.), Chip Protection/La protection des circuits intégrés, CIR Collection No. 2, Kluwer Story-Scientia, Bruxelles, 1990.

said of the definition of originality as "the author's own intellectual creation" without qualitative or aesthetic requirements (Article 1.3). And even the term of protection proves to be very conventional since, after having followed the Berne Convention with a 50 years post mortem rule, it is now to follow the 70 years post mortem tendency imposed by the Directive on the term of protection.[38]

However, from other points of view, the Directive departs from accepted concepts of copyright. Thus, it is clearly the spirit of industrial property that emerges in the provision under Article 2.3 which, unless otherwise agreed, empowers the employer to exercise all economic rights in software created by his employee in the execution of his duties or following instructions.

It will also be noted that this Directive introduces a number of special exceptions that are specifically intended for the software field. Thus, under Article 5.1, and unless otherwise agreed, the lawful acquirer of a program may carry out the normal acts of reproduction and adaptation where they are technically necessary for normal use. For example, the loading and running of a program, even if such operations require certain forms of reproduction in the computer, or the correction of errors. Likewise, and despite any contractual provision to the contrary, it will be permissible for any lawful user to make a back-up copy (Article 5.2). Finally, reproduction and adaptation of another person's software are permitted within the limits of Article 6 if the aim is to make it compatible with an independently created program. This so-called decompilation cannot serve, however, as a pretext for counterfeiting the original software.

10. Immediately after publication of the program of work, there appeared a very important proposal for a Directive on rental and lending rights and on certain neighboring rights, presented by the Commission on December 13, 1990.[39] Under the cooperation procedure, the Parliament made a number of amendments which led the Commission to present a modified proposal,[40] and the Council finally adopted Directive 92/100 on November 19, 1992.[41]

This Directive has to be translated into national provisions by July 1, 1994. As set out in its title, it in fact covers two different subjects. A first chapter institutes an exclusive right of commercial rental

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[38] Article 11 of the Directive of October 29, 1993, on harmonization of the term of protection, which repeals Article 8 of the Directive on computer programs.

[39] OJ No. C 53 of February 28, 1991. In respect of this proposal, see S. von Lewinski, "Vermieten, Verleihen und verwandte Schutzrechte. Der zweite Richtlinienvorschlag der EG-Kommission," GRUR Int. 1991, pp. 104-111.

[40] OJ No. C 128 of May 20, 1992. The words "in the field of intellectual property" were added to the title.

[41] OJ No. L 346 of November 27, 1992. See J. Reinbothe - S. von Lewinski, The EC Directive on Rental and Lending Rights and on Piracy, London, 1993.

afforded to authors of all types of works, except for works of architecture or of applied art. Computer programs are also excluded for the simple reason that the relevant Directive of May 14, 1991, already afforded such a right. The same exclusive right of rental is also afforded to performers with respect to fixations of their performances, to phonogram producers and to producers of the first fixation of a film. Where an author or a performer has transferred or assigned his rental right in respect of a phonogram or a film to a phonogram or film producer, he in all cases maintains his unwaivable right to equitable remuneration. An assignment of the rental right, together with the obligation to pay the corresponding remuneration, is deemed to have occurred with respect to performers in a film by the simple fact of a production contract having been individually or collectively concluded. In principle, the right holders referred to above also enjoy an exclusive public lending right. However, the States have been given the faculty of derogating from the exclusive nature of such right. However, such derogations may not be such as to deprive Community authors of the right to remuneration, but the States may exempt certain categories of establishments from the payment of that remuneration.

A second chapter contains a set of rules on neighboring rights that follows the model of the Rome Convention and, in some respects, even goes beyond that model. For instance, an exclusive right of fixation is afforded to performers with regard to their performances and to the broadcasting organizations with regard to their broadcasts. In addition, exclusive reproduction and distribution rights are instituted for performers, phonogram producers and for the first fixations of films, as also for the broadcasting organizations. Finally, an exclusive right with regard to broadcasting and communication to the public is afforded for live performances. The same applies in relation to broadcasts where they are rebroadcast or are communicated in a place accessible to the public against payment of an entrance fee. In addition, a right to equitable remuneration is afforded both performers and producers where a commercially available phonogram is broadcast or communicated to the public. Although similar, this latter solution goes much further than the solution contained in Article 12 of the Rome Convention, since not only does it admit of no reservation within the Community, but also makes it no longer possible to exclude performers from the remuneration.

I should also point out that, as a result of an amendment introduced by the Parliament, a rather unexpected provision has been included in the Directive. That provision indeed states that at least the principal director of a cinematographic or audiovisual work is to be considered as one of the authors of such work.

11. As far as broadcasting is concerned, you will remember the vicissitudes affecting the drafting of the Directive on Television Without Frontiers that led to the chapter on copyright, originally foreseen by the relevant Green Paper, not being included in the eventual texts.[42] However, that matter has not in fact been abandoned. In its 1991 program of work, the Commission referred back to its own communication of February 21, 1990, "on an audiovisual policy," which had pointed out clearly that the legal framework set up by the Directive on Television Without Frontiers still had to be

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[42] Supra, item 5 in this study.

supplemented with regard to copyright.[43] For the detail of its new ideas in this field, the program of work referred to a more voluminous "discussion paper" entitled "Broadcasting and Copyright in the Internal Market," published in November 1990.[44] This document provided a basis for consultation with the trade circles and led to the proposed directive presented on July 22, 1991,[45] and amended on December 2, 1992.[46] This led finally to Council Directive 93/83 of September 27, 1993, on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission.[47]

As far as satellites are concerned, the Directive starts from the principle that the authorization to broadcast has simply to be requested once only in the country of origin of the broadcast, defined as the Member State in which, under the control and responsibility of the broadcasting organization, the signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. This avoids the cumulative application of several national laws to one and the same act of satellite broadcasting.[48] However, this should not stop the level of remuneration taking into account the real or potential audience that will mostly cover a number of countries. To avoid the application of this principle leading to the broadcasters all setting up in the Community country that has the lowest level of protection, the Directive also stipulates a minimum level of protection for authors and right holders. Thus, with regard to authors, communication to the public by satellite generates a right of authorization throughout the Community and thus excludes any statutory license. Likewise, with regard to neighboring rights, all the Member States must afford them, for the purposes of communication to the public by satellite, those rights that had already been afforded to them under Directive 92/100 referred to above.[49]

As far as cable is concerned, the new Directive relies on freely negotiated agreements and carefully avoids any idea of statutory licensing which had scuttled the copyright aspect of the Directive on Television Without Frontiers. However, action by the collective management societies representing

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[43] COM (90) 78.

[44] III/F/5263/90. On this text, see T. Dreier, "Rundfunk und Urheberrechte im Binnenmarkt," GRUR Int. 1991, pp. 13-19.

[45] OJ No. C 255 of October 1, 1991.

[46] OJ No. C 25 of January 28, 1993.

[47] OJ No. L 248 of October 6, 1993.

[48] W. Rumphorst, "Erwerb des Satellitensenderrechts für ein bestimmtes Territorium?" GRUR Int. 1993, pp. 934 and 935.

[49] Articles 6, 7, 8 and 10 of the Directive of November 19, 1992, on rental right and lending right and on certain rights related to copyright. Where this Directive speaks of broadcasting, that expression is understood as also covering communication by satellite.

the various categories of right holders becomes compulsory. In order to facilitate the course of negotiations with the cable operators, each party must nevertheless have the possibility of calling upon mediators whose impartiality is beyond reasonable doubt. Additionally, the principle is laid down that no party shall prevent negotiations without valid justification.

The Member States are required to take the necessary measures to transpose the Directive before January 1, 1995.

12. The currently most recent Directive is that harmonizing the term of protection of copyright and certain related rights. Presented as a proposal by the Commission on March 23, 1992,[50] amended on January 7, 1993,[51] it was adopted by the Council on October 29, 1993.[52]

This Directive will basically, in most of our countries, mean lengthening the term of protection since it requires that the author's economic rights be protected up to 70 years after his death and that the term of all neighboring rights be extended to 50 years after publication, communication or broadcast of the performance in question. This effect has to be achieved by July 1, 1995. However, in the case of the moral rights afforded the author, the initial proposal by the Commission to maintain those rights at least up to expiry of the economic rights was not maintained in the final text. Its Article 9 declares that "this Directive shall be without prejudice to the provisions of the Member States regulating moral rights."

I should also point out that the second paragraph of Article 10 is likely to produce peculiar results on occasion, since it requires that the terms of protection laid down in the Directive be applied to all works and performances that are still protected on July 1, 1995, by domestic law in at least one Member State or that meet the criteria for protection under Directive 92/100. To take the example of a German work that has fallen into the public domain in Belgium as a result of the 50 years post mortem rule, but is still protected in Germany on July 1, 1995, due to the German term of 70 years post mortem. At such time, subject to rights acquired by other parties, we shall witness in Belgium, as in other Community countries, a real rebirth of an author's right that we might have thought had expired.

IV. PROSPECTS FOR FUTURE HARMONIZATION

13. What are the other fields in which we might expect harmonization of laws? A first reference must be made to the field of data bases. Despite the earlier statement in the 1988 Green Paper that there was a lack of urgency in

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[50] OJ No. C 92 of April 11, 1992.

[51] OJ No. C 27 of January 30, 1993.

[52] Directive 93/98, OJ No. L 290 of November 24, 1993. On this text, see P. Wienand, "Copyright Term Harmonisation in the European Union," Copyright World, 1994, pp. 24-28.

that area,[53] the Commission held in its 1991 work program that a uniform and stable legal framework had to be set up without delay.[54]

Indeed, a proposed directive on the legal protection of data bases was submitted on April 15, 1992.[55] This proposal has since been modified on October 4, 1993.[56] This text sets out the principle of data base protection provided by copyright. In various of its provisions, it reproduces almost word for word the contents of the Directive on computer programs. However, one element that is altogether new in comparison with the software Directive is the generalization at Community level of the "catalogue rule" known in Scandinavian law.[57] The interesting feature of this rule is the possibility of protecting against commercial pillaging a collection of data that has been painstakingly put together and which, although not necessarily original in the copyright meaning, has nevertheless acquired an intrinsic value that a competitor may wish to enjoy without expense. That is why the proposed directive contains a sui generis right referred to, in a not particularly elegant manner, as the right to prevent unauthorized extraction of the contents of a data base.[58] This would enable the creator of a data base comprising data that is not in itself protected by copyright, such as facts or figures, to enjoy for a period limited to 15 years the right to prohibit extraction or reutilization for commercial purposes of the whole or a substantial part of those data. This right would apply irrespective of any longer term protection of the data base under copyright.

The wording of this proposal is currently under discussion at the Council where the question has been asked, inter alia, whether its scope should not be extended to collections of data that are not in an electronic form.

14. In the audio and audiovisual field, the Commission's work program announced that "the Commission is considering submitting to the Council a proposal for a directive on private copying."[59] It therefore seemed that the waiting position that was still obvious in the Green Paper on Copyright and the Challenge of Technology[60] had now been abandoned. It may indeed be noted in this respect that the Directive on rental right and lending right and on certain rights related to copyright, commented on in item 10 above, contains

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53 See above, in item 6 of this study.

54 "Follow-up to the Green Paper," COM (90) 584, para 6.3.1.

55 OJ No. C 156 of June 23, 1992.

56 OJ No. C 308 of November 15, 1993.

57 See G. Karnell, "The Nordic Catalogue Rule," in E.J. Dommering - P.B. Hugenholtz (ed.), Protecting Works of Fact, Deventer, 1991, pp. 67-72.

58 Article 1.2, Article 2.5, Article 8, and Article 9.3 and 9.4.

59 "Follow-up to the Green Paper," COM (90) 584, paragraph 3.4.2.

60 Supra, item 6 of this study.

an Article 10 on the limitations that may be applied to the neighboring rights that it institutes. One of those concerns private use, with respect to which it is explicitly stated that it "shall be without prejudice to any existing or future legislation on remuneration for reproduction for private use." The statement of grounds of the initial proposal explained in this respect that the provision drew attention to the great importance of this type of reproduction and that an effort would have to be made to institute a right to remuneration for right holders in view of the intensity of such private reproduction.[61]

However, in view of the reticence of some States in the Council, the Commission is progressing in this matter more prudently than would have been thought. Before deciding to submit a formal proposal to the Council, it held a series of consultations with concerned parties, particularly on the basis of a discussion paper on private copying distributed by DG XV in October 1993. At present we are still at the stage of discussions. These particularly concern the effects of the subsidiarity principle and the scope of the national treatment rule in this field.

15. In the "Follow-up to the Green Paper," the Commission announced that, apart from the actions of a legislative nature that it intended to undertake, it was also going to proceed with the analysis of certain other issues.[62] This latter qualification indeed showed that, from the onset, the Commission appeared to consider those matters to be less urgent.

A first topic to be submitted to such an analysis is very close to that dealt with in the preceding item, since it concerns private copying on paper or reprographic reproduction. You will remember that the Green Paper had left aside that topic, but the communication on books and reading had placed it back on the Commission's agenda.[63] After having entrusted a study to an expert,[64] the Commission consulted the concerned circles at a hearing in June 1991. A proposal for a directive on this subject would not seem imminent.

Other matters are still under study, but have not yet reached maturity. The first of those is the highly controversial question of resale royalty rate which was already the subject of a hearing of the concerned circles in November 1991. The very delicate matters of moral rights, on which there was a hearing in November 1992,[65] and that of collecting societies are also still at the stage of preparatory study. It was further noted that, as far as the other matter was concerned, neither Article 13 nor Recital 34 in the

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61 COM (90) 586, 8.2, p.70.

62 COM (90) 584, Annex.

63 Supra, item 6 in this study.

64 J.P. Trialle, La reprographie dans les Etats membres de la C.E.E., Doc. III/5135/91.

65 The hearing of professional circles, held in Brussels on November 30 and December 1, 1992, showed up a fairly wide divergence of opinion as to the opportuneness of harmonizing moral rights at Community level.

Directive on satellites and cable[66] attempt to prejudge any eventual harmonization in the field of collecting societies, leaving it to the Member States to regulate the activities of societies.

V. HAS HARMONIZATION ALREADY ESTABLISHED A BASIS FOR A COMMUNITY COPYRIGHT SYSTEM?

16. The harmonization of copyright laws in the European Union would indeed seem to be following a path midway between two extremes. The first of those would have been that of minimum intervention. With the publication of the Green Paper on Copyright and the Challenge of Technology, one may have thought for the moment that such was to be the Commission's approach since it was still said in that document that, instead of yielding to the temptation to reform for the sake of reform, it was more advisable to deal simply with a number of matters which were of obvious economic interest in that field, such as piracy or computer programs.[67]

The other extreme would have been a vast attempt at harmonization, or even unification, of Community copyright, at one fell blow and altogether, rather in the way in which it happened in the field of patents and of trademarks or as is proposed for industrial designs.[68] In the past, the Commission has refrained from setting out on such a path. It will also not be very encouraged to do so in the future since the Maastricht Conference has included the principle of subsidiarity in the European texts.[69] The Commission will doubtlessly continue to take the middle path, which is both modest and ambitious. Modest because it does no more than propose partial harmonization on individual points, ambitious in the number of measures proposed and adopted in this way and which is in fact becoming quite considerable.

17. In view of the multiplication of harmonization initiatives, we may nevertheless wonder whether we are not in fact simply witnessing the birth of a new Community copyright? This question would appear all the more pertinent by the fact that the directives adopted up to now, despite their diversity, nevertheless demonstrate a number of common features. Let us take a brief look at them to determine whether they already constitute an actual set of general principles.

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66 Directive 93/83 of September 27, 1993.

67 COM (88) 172, Nos 1.4.9 and 1.4.10. Comp. B. Posner, "Purposes and Scope of the Green Paper on Copyright and the Challenge of Technology," in Droit d'auteur et Communauté européenne, cited in footnote 19 herein.

68 See A. Dietz, "Harmonisierung des Urheberrechts in der Europäischen Gemeinschaft," Film und Recht, 1984, pp. 353-357 and 360-361, "A common European Copyright--Is it an illusion?" EIPR 1985, p. 215.

69 Article B of the Treaty on the European Union of February 7, 1992; new Article 3B of the Treaty establishing the European Community. Comp. D. Franzone, "Droit d'auteur et droits voisins : bilan et perspectives de l'action communautaire," Revue du marché unique européen, 1993, pp. 147-148.

To begin with, there are a number of definitions that reoccur. It is particularly noticeable that, both in the rental/lending Directive[70] and in those on satellites and cable[71] and on the term of protection,[72] States are required to consider the principal director of a cinematographic or audiovisual work as its author or one of its authors. Remaining in the audiovisual field, these same Directives speak on several occasions of the rights of "producers of the first fixation of a film," whereby the latter word refers to "a cinematographic or audiovisual work or moving images, whether or not accompanied by sound."[73] Thus, the Community texts have judiciously avoided affording a direct neighboring right to any videogram producer. Although these definitions would appear well established at Community level, they nevertheless only regulate too fragmentary aspects of copyright for them to directly constitute true general principles.

If we look for broader based principles, we shall discover at least two. Firstly, there is the confirmation of the principle of exhaustion of the right of distribution afforded to the author of a computer program as also to the holders of neighboring rights. This implies loss of the right to control circulation of copies of a work or of a performance after the first sale in the Community by the right holder or with his consent.[74] However, this principle is qualified by the continued subsistence of the right to control subsequent rental or lending.[75] Then, there is the repeated statement that protection of neighboring rights afforded under the European Directives does not affect the protection of copyright.[76] On reflection, however, we are bound to note that, despite their fundamental nature, these two principles add practically nothing that is new. What the Directives refer to as "exhaustion" aims above all at confirming the established case law of the Court of Justice on the freedom of competition and movement of goods.[77] As

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[70] Article 2.2 of Directive 92/100 of November 19, 1992.

[71] Article 1.5 of Directive 93/83 of September 27, 1993.

[72] Article 2.1 of Directive 93/98 of October 29, 1993.

[73] Article 2.1, Articles 7, 9 and 10 of Directive 92/100 of November 19, 1992; Article 3.3 of Directive 93/98 of October 29, 1993.

[74] Article 4(c) of Directive 91/250 of May 14, 1991, on computer programs; Article 9.2 of Directive 92/100 of November 19, 1992, on rental, lending and neighboring rights. Comp. Article 5(d) of the amended proposal for a directive on data bases.

[75] Article 4(c) of Directive 91/250 of May 14, 1991, on computer programs; Article 1.4 of Directive 92/100 of November 19, 1992, on rental, lending and neighboring rights. Comp. Article 5(d) of the modified proposal for a directive on data bases.

[76] Article 14 of Directive 92/100 of November 19, 1992, on rental, lending and neighboring rights; Article 5 of Directive 93/83 of September 27, 1993, on satellites and cable.

[77] See F. Gotzen, "The Right of Destination in Europe," Copyright, 1989, pp. 229-232.

for the relationship between copyright and neighboring rights, there is also nothing particularly new since, in fact, these texts simply echo what was already anchored in the 1961 Rome Convention on neighboring rights.[78] But there is more. The Community texts also contain stances that are truly new on the basic problems of copyright. Thus, the concept of originality is defined for programs, photographs and data bases with an identical formulation. That formulation talks of "the author's own intellectual creation" and adds that "no other criteria shall be applied to determine their eligibility for protection."[79] Both the eighth recital in the Directive on programs and the 15th recital in the proposal on data bases explain to us that there should be no assessment of the quality or aesthetic value. The 17th recital in the Directive on the term of protection adds "whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account." A further basic stance that recurs both in the Directive on programs and in the proposal on data bases concerns employed authors. Where a computer program or a data base have been created by an employee in the execution of his duties or on the instructions of his employer, the employer alone is empowered to exercise the various economic rights subsisting in the program or the data base that has been created, unless otherwise laid down by contract.[80]

What should we hold of these stances? May we conclude that the Community has definitively forged its own concepts on the level of originality and on ownership of rights? To claim that would be premature. We are obliged to note that the sectors in respect of which the solutions have been formulated concern only rather specific fields of literary and artistic creation (programs, photographs, data bases). There is no certainty that these same solutions will prevail in the more conventional sectors of copyright. Indeed, their generalization would give rise to serious controversy. Perhaps that would be less the case for the definition of the level of originality, since the formulation chosen remains sufficiently broad to cover the most usual national concepts in this field. However, it is certain that, outside the cases of software and data bases, it would be altogether unacceptable to

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[78] Article 1 of the 1961 Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations: "Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection." On the scope of this text, see F. Gotzen, Le droit des interprètes et exécutants dans la Communauté économique européenne, study for the Commission, Brussels, XII/52/78, pp. 24-25.

[79] Article 1.3 of Directive 91/250 of May 14, 1991, on computer programs; Article 6 of Directive 93/98 of October 29, 1993, on the term of protection; Article 2.3 of the modified proposal for a directive on data bases.

[80] Article 2.3 of the Directive on computer programs; Article 3.4 of the modified proposal for a directive on data bases.

assume transfer of all rights in any work to the employer. This solution is likely to conflict with the personalized concept that pervades copyright in most of the Community countries and which normally reserves enjoyment of this right for the creator of the work as a natural person.[81]

It would therefore seem, as the texts currently stand, that anyone wishing to draw from them general principles for Community copyright will still have to exercise a measure of prudence.

VI. CONCLUSION

18. Even if the Community has not yet been able to put together a set of complete and coherent rules throughout the field of copyright, it has certainly to be admitted that considerable work has been accomplished over recent years. It would indeed seem that we have now today entered definitively into a period of Europeanization of copyright and of neighboring rights. As with all changes, this process raises quite real problems of adaptation. These problems will be all the more rapidly overcome if the Community continues to draw on collaboration of all circles, taking into account not only the economic interests involved, but also the social and cultural considerations that are a specific feature of this issue. It would indeed seem that such is its wish. This is witnessed by the recitals in the most recent directives. They present the harmonization that has been undertaken as an endeavor with multiple aims. Obviously, it is wished to avoid the negative effect on the operation of the common market of the risk of obstacles to trade or distortions of competition.[82] Obviously, the aim is also to protect economic investments from counterfeiting and piracy.[83] However, it is also wished to promote "the cultural development of the Community,"[84] as also the "harmonious development of literary and artistic creation in the Community."[85] In order to do so, the "creative and artistic work of authors and performers necessitates an adequate income as a basis for

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[81] Comp. A. Françon, Le droit d'auteur : aspects internationaux et comparatifs, Quebec, 1992, p. 149.

[82] Recital 4 in the Directive of May 14, 1991, on computer programs; Recitals 1 and 3 in the Directive of November 19, 1992, on rental, lending and neighboring rights; Recitals 2 and 5 in the Directive of September 27, 1993, on satellites and cable; Recital 2 in the Directive of October 29, 1993, on the term of protection.

[83] Recitals 2 and 3 in the Directive of May 14, 1991, on computer programs; Recitals 4 and 7 in the Directive of November 19, 1992, on rental, lending and neighboring rights.

[84] Recital 5 in the Directive of November 19, 1992, on rental, lending and neighboring rights.

[85] Recital 11 in the Directive of October 29, 1993, on the term of protection.

further creative and artistic work"[86] by means of "a high level of protection."[87]

Thus, in its work on harmonization, the Community intends to take into account all the interests that are involved. This new approach can but reinforce the position of the European Community in the discussions on the structural changes to the international system of protection for copyright.

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[86] Recital 7 in the Directive of November 19, 1992, on rental, lending and neighboring rights; Recital 10 in the Directive of October 29, 1993, on the term of protection.

[87] Recital 24 in the Directive of September 27, 1993, on satellites and cable; Recital 11 in the Directive of October 29, 1993, on the term of protection.

SIXTH WORKING SESSION: CONCLUSIONS

COPYRIGHT AND AUTHOR'S RIGHT IN THE TWENTY-FIRST CENTURY

by

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My remarks today will address two questions: What direction should copyright and author's right take across the span of the next century? What direction will they take? These questions confront changes that are far off in the future. But they do not lack a polar star. The paths that copyright and author's right have taken over the past three centuries will guide the paths that these legal systems will--and should--follow into their fourth century.

In addressing these two questions, I do not take as my text the seemingly congenial literary theories of post-Modernism raised on the first day of this Symposium. Instead--and to the extent that I rely on theory--I take welfare economics as my text. Whatever its imperfections, economic theory does a far better job than any other in explaining the behavior of those who produce and consume literary and artistic works; and it is human behavior, above all, that can best guide us in thinking sensibly about copyright and author's right in the next century.

Some of the Symposium's speakers have romanticized the artist starving in his garret, invoking the romantic images of La Bohème. I would just observe that I know of no artist who starves in his garret because he desires to do so. Every serious creator wants to communicate his work to as large an audience as his vision can command. Copyright and author's right create the shelter of privacy that authors need, and give publishers and other risk-taking intermediaries the economic protection they need, to make this hoped-for communication between author and audience a reality.

This perspective should put into sharp relief two relevant, inescapable phenomena that cannot help but persist into the next century. First, humankind has from the beginning been drawn to the authorial voice, to the whole authorial vision that pervades and defines an author's work, be the work truly creative or merely mediocre, be it the paintings on the walls of the Lascaux caves, Medea, Les Misérables, Schindler's List or Charlie's Angels. It is, ultimately, the author's cohering vision that commands our attention and our memories, and not fragmented digits of zeros and ones.

The second persisting phenomenon of human behavior--one that will seriously complicate author's right and copyright--is that the human day is short, and the human attention span shorter still. Authors and publishers will in the next century find themselves competing for an increasingly scarce resource: time, the limited attention that an individual can give to their

works. As we enter the age of the much vaunted information superhighway, with its overflowing abundance of creative offerings, the competition for this scarce resource of human time will become increasingly intense. The digital revolution promises not only to accelerate this competition, but also to alter the creation, distribution and enjoyment of literary and artistic works.

What will the digital future look like? Imagine a celestial jukebox: a technology-packed satellite connected on the one side to a vast digital storehouse of literary and artistic works and data bases, and connected on the other side, through satellite dishes and fiber optic networks, to consumers throughout the world. Twenty-four hours a day, circling thousands of miles above earth, this celestial jukebox will await a subscriber's order for any one of the millions of works or billions of data stored in its digital warehouse and will instantaneously, and on command, communicate this entertainment or information to a home or office receiver that combines the power of today's television, radio, CD player, VCR, telephone, fax and personal computer.

The infrastructure of the celestial jukebox--much of which will doubtless be earthbound--is far from complete. But the forces of market demand, and the pace of technology to meet this demand, are certain to secure a central place for the celestial jukebox, however it is configured, sometime early in the next century.

What new strains will the celestial jukebox place on the legal systems of copyright and author's right? Four strains seem likely to emerge in the next century. First are the strains that will result when new digital subject matter lays claim to protection under copyright and author's right. Second are the new technological uses that will test the law's ability to keep creative works and products, new and old, within the author's control. Third--on the international front--is the challenge posed by perennially shifting balances of intellectual trade. Finally are possible changes in the very conditions of authorship itself.

I. NEW SUBJECT MATTER

Digital technologies promise to yield new forms of intellectual products. On their surface, many of these products will look as if copyright or author's right is their natural home, most particularly in common law countries that take a relatively wide-open, catholic approach to the definition of copyrightable works. Computer programs and computer data bases are two contemporary examples of digital products laying claim to protection under copyright and author's right. Products of artificial intelligence--the more sophisticated successors to today's computer-generated weather maps--lie somewhere in the intermediate future.

What standards should the legal systems of author's right and copyright impose as these new products arrive at their threshold? I well recall the occasion--another WIPO gathering, in Stanford, California--when Dr. Bogsch asked of artificial intelligence products: "Who is the <u>author</u> of what <u>work</u>?" Three years later, this provocative question has reverberated throughout this Symposium.

To the observations already made in the course of this Symposium, I would only add that the presence of an author and of a work is required to open the

gates not only of author's right, but also of copyright. For example, the United States Constitution speaks expressly of protecting the "works" of "authors." To be sure, the United States Copyright Act may deem a corporate entity to be an author under the so-called work for hire doctrine. But this doctrine has nothing to do with authorship, for every American work for hire bears the imprint of some author's personality--sometimes the personalities of several authors. The United States work for hire doctrine has more to do with ownership than with authorship. It is simply a pragmatic solution to the problem of collaborative effort, and is not a philosophic declaration on the insignificance of human authorship.

Should lawmakers continue to insist on true authorship in the coming digital age? I believe that they should, and for two reasons. First, it is an important raison d'être, not only of author's right, but of copyright, that the law protect the sphere of privacy that creative authors need to pursue their art. If there are no true authors, there is no need for privacy, and the raison d'être disappears.

Second, when real authors disappear from the equation, the economics of both copyright and author's right can become wildly distorted. The products of artificial intelligence present a convenient example of how copyright may overprotect new digital products that are entirely devoid of human authorship. True authorship is by definition a labor-intensive activity, the sustained concentration of creative spark and tedious effort. Copyright and author's right provide the incentive that authors and publishers need if they are to invest their human and financial capital in such creative effort. When, however, a product is created by a computer--virtually at no more than the marginal cost of the electricity it takes to run the machine--what need will there be for copyright's and authors' rights' high level of incentive and protection?

The recent history of copyright protection for computer programs illustrates the problem of underprotection for digital subject matter. To take just one example, the present wave of American copyright decisions on software consistently extends protection only to a computer program's expressive--but relatively least valuable--elements and withholds protection from its most valuable, but non-expressive, elements--its functional utilities. But advances in functional utility are just what consumers typically desire when they purchase new software products. To entrust such advances to copyright, which systematically rejects protection for functionality, would seriously disserve consumer welfare.

Will lawmakers be able to resist the expected industry demands to extend copyright and author's right to new digital products whose surface fails to reveal the impress of an author's personality or whose predominant value lies in its functionality? I believe that they will. In countries that follows the author's right tradition, the doctrines of neighboring rights provide a ready safety valve to accommodate these claims. But a continued focus on human authorship, and on creativity rather than invention, seems likely even in countries that lack a neighboring rights tradition. One example is the United States Supreme Court's 1991 decision in Feist v. Rural Telephone that alphabetized telephone directory white pages lack the creativity that the U.S. Constitution requires of copyrighted works. By poetic coincidence, Feist came down on the last day of the WIPO Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence at Stanford that I mentioned earlier. I well recall a comment from Thomas Dreier, who participated in that

Symposium. After reading the decision he declared, "This is a very German opinion!"

Looking beyond currently recognizable digital subject matter--software, data bases, artificial intelligence--it is impossible to predict with any confidence the new technologies that will arrive at the door of author's right or copyright. But if it is impossible to predict the contours of the new technologies, it is possible--and also critically important--to predict the emerging needs to which technology must respond if the welfare of authors and consumers is to flourish into the next century.

One technological need will be paramount. In the world of the celestial jukebox, this overflowing cornucopia of entertainment and information, literally millions of works will simultaneously compete for an increasingly shrinking commodity: the attention of consumers. The great human need in this new environment will be for a technology--a screening mechanism--that can separate out, from all the rest, those works in which the consumer is truly interested, in which he will be willing to invest the scarce resource of his time. I doubt that copyright, or even neighboring rights, can support investment in the needed screening technology. Industrial property law seems a more likely and appropriate source of protection for these essentially utilitarian mechanisms.

II. NEW USES

The new digital environment will place a second strain on the systems of copyright and author's right. Following the trend towards private uses that began in the mid-1960s with photocopying, and later home audiotaping and videotaping, the economically most valuable uses over the celestial jukebox will increasingly occur in the privacy of the subscriber's home, in performances and displays rather than in copies, and through private one-to-one communications rather than through the traditional public media such as theaters and over-the-air broadcasts. But--and particularly in dealing with performances and displays--copyright has been mainly a law of public places. Should copyright--can copyright--bring private performances over the celestial jukebox within the author's control?

There is every reason for legislators to extend copyright and author's right to new forms of private use. One reason is that an author's personality can be compromised in private places no less than in public places--possibly more so. Another reason is economics. As performances of literary and artistic works migrate from public places--in which authors are compensated--to private places--in which they are not--the failure to compensate for private use can seriously undermine the economics of authorship. Further, to let private uses run free would deprive authors and publishers of the signals of consumer preference that are their lifeblood. There is no better way to tell authors and their publishers what works the public values and what works it does not than the price people will pay for their creations in the marketplace.

Can legal rules bring private uses such as photocopying and home audiotaping and videotaping under the author's control? This has been the single most bedeviling problem for copyright and author's right in the last quarter of the present century. Can the problem be solved in the next century?

One significant challenge comes from the new electronic networks that, because they serve so many customers--at both the uplink and downlink--may find it impracticable to monitor the content that is disseminated over their facilities, and may unwittingly aid and abet copyright infringements. The doctrines of contributory infringement and vicarious liability will need to be applied with a new sensitivity if they are to subject these new information utilities to liability for the uploading and downloading of copyrighted works from electronic bulletin boards. A lawsuit recently filed in the United States against the giant CompuServe network may answer some of these questions.

The point has already been made in the course of this Symposium that, over the longer term, the very information technologies that have created the problem of uncontrolled private use of literary and artistic works may come to their rescue. Much as the telephone company today can shut off service to a customer who does not pay his bill, the future proprietors of the celestial jukebox will be able to block a subscriber's access to its works if he does not pay the price of admission. Further, the billing will be far more discriminating than that by the telephone company, with different price tags attached to different works, depending on the work's value. The billing will be automatic and payment will probably be made directly within the system. In a word, fine-tuned, individual contract arrangements promise to replace a rough-edged copyright at this far and very important frontier for the use of literary and artistic works. Professor Ginsburg has already commented on this prospect, and Professor Kitagawa has explicated it in very pragmatic terms in the context of the "copymart."

There is a second concern about new uses of copyrighted works that has in industry circles received more emphasis than it deserves. Digitization can break a work into its component parts--not only a frame from a motion picture or a fragment of a painting, but into still smaller, ultimately meaningless, details. The fear has been expressed that, because digitization <u>can</u> accomplish this end, it will in fact be employed to this end. And, then, what will be left of the authorial vision in this exploding cyberspace?

In fact, and apart from transitory uses in multimedia, I believe that any prospect for the universal disintegration of works is an illusion. The fear is simply not grounded in the realities of human behavior. Humankind has always had a devouring appetite to enter the whole world created by the artist's imagination, and not just its nooks and crannies. I believe that in the next century, and beyond, it will settle for nothing less.

III. COPYRIGHT TRADE

The two driving principles, or norms, of copyright and authors' right that I have just described--the principle that confines protection to the works of authors, and the principle that extends rights into every corner where a work has value--indicate the proper direction not just for domestic lawmaking into the next century, but for international arrangements as well. These principles are the backbone of the Berne Convention. The Berne norms can bend, of course--and they have--but less so, and with less damaging results, than the alternatives. Berne offers the steadiest beacon I know for the coming century.

What of the trade process, that clamorous bazaar in which authors' rights can be traded for rice or rapeseed oil? Here, I think it is crucial not to

confuse the trade process with the free trade principle that the process purports to serve. It is the underlying principle that we must study if we care about the long term.

The principle of free trade vigorously echoes the two guiding norms of domestic and international copyright. Free trade, like the norms of author's right, copyright and the Berne Convention, argues for a level and brightly lit playing field worldwide, and for the extension of the author's control and right to remuneration into every corner where his work can find an audience. Free trade argues against discrepant, protectionist definitions of copyright subject matter and rights that tilt or obscure the playing field, and against domestic legislation that diverts the payments made by those who desire an author's work away from the author and into local pocketbooks. In a word, free trade stands for the noble--and, ultimately, very practical--goal of authorship without frontiers.

Will protectionist tendencies undermine the Berne Convention and the free trade principle into the next century? Here, I venture no predictions. But I can offer a cautionary tale, one whose moral is that protectionist measures can by their nature offer only temporary solutions.

In the nineteenth century, the United States of America was a net copyright importer--and, not coincidentally, an international copyright outlaw. By the late twentieth century, it had become a major--ultimately the major--copyright exporter and enforcer. To take just one example, over the past five years, revenues from foreign theatrical and video distribution of American films exceeded those from domestic U.S. distribution. But the digital revolution may change the terms of trade, with the result that, at least in some sectors, the United States may yet again become a net copyright importer. Over the very same five-year period I just mentioned, revenues from the sale of videogames in the United States exceeded domestic motion picture box office receipts. It is no secret that the two companies that dominated the videogame market were not American but Japanese; indeed both these companies sued American companies for copyright infringement.

The moral of this tale is that protectionist measures cannot secure a nation's interests over the long term; protectionist steps that a country takes today, it may come to regret tomorrow.

IV. AUTHORSHIP

What, finally, of the most important question of all: the conditions for authorship in the coming century? Here I can make two predictions, both with some confidence. First, the two great legal systems--author's right and copyright--for protecting the authorial enterprise will continue on their converging paths and, at some early but undetected point, will simply assimilate each others' identity. Second, digital technologies will dramatically reduce the infrastructure costs--printing plants, distribution channels, risk capital--that today interpose an often substantial distance between authors and their audiences. I would just add a few words about each of these two tendencies.

No mistake has persisted longer in the comparative literature of copyright and author's right than that these two legal systems operate from

diverging premises and produce diverging results. In fact, both on the economic front that dominates the rhetoric of the common law tradition, and on the authorial front that dominates the rhetoric of the civil law tradition, the two systems have long travelled converging paths.

On the economic front, a hard look at the history of copyright and author's right will reveal a shared concern for returning to authors the value of their works from every corner in which their works are enjoyed--although, to be sure, the common law systems have sometimes been slower than the civil law systems to reach this result. As Professor Vivant observed on the first day of this Symposium, it is perhaps time for the civil law tradition to rediscover economic rights.

On the authorial front, Adolf Dietz has shown us in his splendid General Report to the 1993 ALAI [International Literary and Artistic Association] Congress in Antwerp that moral right on the Continent is a far more balanced and pragmatic doctrine than is commonly thought. Of the common law environment for moral right, Professor William Cornish has on another occasion reminded us that such rights emerge not instantaneously, but through long evolution.

What impact will technological change have upon authorship? The digital future that I have described promises to liberate authors from the economic and institutional constraints that have encumbered their efforts for these past three hundred years. Once realized, this environment will enable authors, for the first time, to communicate as directly with their audiences as an author's voice can, whether between the hard covers of the traditional book or through electronic bulletin boards.

Some months ago, the chief executive of a major publishing house told fellow publishers that the digital environment will enable publishers to bypass libraries and to market their products directly to consumers. The boon to publishers was clear. However, if the speaker had not been a publisher, but rather an author, he might have added that the emerging digital facility will not only enable publishers to bypass libraries, but will also enable authors to bypass publishers, to communicate their works directly to their readers.

This reduction in infrastructure costs--this new ability of creators to bypass publishers and libraries, and to communicate directly with their audiences--holds a special, compelling promise for liberating authors in economically developing countries from the infrastructure constraints they now suffer in their attempts to communicate their vision worldwide.

The electronic future, in which anyone with access to a digital facility can be both author and publisher, is the next, and perhaps ultimate, phase in the long trajectory of copyright and author's right, connecting authors to their audiences, free from interference by political sovereigns or the stifling hand of artistic patrons. The main challenge will be to keep this trajectory clear from interference by short-sighted protectionism, and true to copyright's and authors' rights' historic logic, that the best prescription for connecting authors to their audiences is to extend rights into every corner where consumers derive value from literary and artistic works. If history is an accurate mirror, the result should be to promote political as well as cultural diversity worldwide, ensuring an abundance of voices, all with the chance to be heard.

SUMMARY OF THE PROCEEDINGS OF THE SYMPOSIUM

by

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ANALYSIS AND REPORT

Mr. Director General,
Ladies and Gentlemen,

In presenting the final report, I have at least a twofold duty: first that of not unduly lengthening the "beginning of the end of the week." Then that of not taking undue advantage of the fact of being the last speaker. Moreover, the title of my intervention ("Summary of the proceedings of the Symposium") is in itself an invitation to be neutral. I shall endeavor to be just that.

Even with that limitation, my task is an onerous one. Bear in mind that there have been 20 reports; add to that the opening addresses, the speeches made by the meeting chairmen and those made by participants from the floor. All this has been on the most varied of subjects, including private international law. You can thus understand why I crave your indulgence should you feel that you have been sold short.

So now we have come to the end of these three well-filled days. It has been very stimulating, in this temple of culture which the Louvre certainly is, to hear people speak enthusiastically, sometimes waxing lyrical, on new technology in general and digital technology in particular, with the applications of today, those of tomorrow (multimedia) and those of the day after tomorrow (the information "superhighways"). But rest assured, I am not going to go into detail again on technical matters, if only because I am singularly lacking in competence in that field. At the last Symposium, at Harvard last year, Professor Miller gave the final report, and he too presented himself as an ignoramus, saying that his personal computer was used only for updating the list of the wines in his cellar. I feel that I am in the same state of technical inferiority as him, except for the fact that I content myself with drinking my wines, and I prefer to keep even a fleeting memory of the good vintages that I have drunk rather than noting their irretrievable loss by recording the event in a computer memory.

It seems to me that the essence of the innovations we are concerned with can be summarized as follows: more quantity, better quality, farther, faster. They are of course differences of degree, but they are bound to bring about substantive differences. We can already see these developments with multimedia and artificial intelligence technology.

All this is very exciting, but we should be careful not to let ourselves be carried away. First, there have been other technological advances before the 1980s. After all, as Dr. Ficsor told us yesterday, an illustrated book or a cinema film is already, broadly speaking, a multimedia product. I also like Professor Goldstein's idea of the "celestial jukebox": it conjures up some interesting thoughts, and it does very cleverly emphasize both the planetary dimension of the problem and the idea of menu-driven consumption. At the same time it shows that there is a certain continuity to the technology.

We do have to be careful though. The market has not yet passed judgment, and there is no saying that all the innovations being trumpeted abroad (so much so that we even wonder how we have managed to survive up to now without them) will in fact be successful. Who says that the public at large will come out in favor of all multimedia products? How many travellers will there actually be on the information superhighways?

Finally--and this is the main point for us lawyers, who are there to speak of law--even if the change is a substantive change, there is nothing to say that the law has to change. Forty years ago Ripert, a famous French lawyer, in a work that has since become a classic (Les forces créatrices du droit or the forces that create law), derided those who were unable to speak of an institution without describing its development, who advocated all innovation as being progress, forgot the value of everything that was already there, the better to praise what was coming, and called for a speeding up of the development of law without giving any proper argument for the change.

No one here will have seen this as a self-portrait. For no one, happily, has intoned the old refrain of the legal void and the unsuitability of law.

In spite of everything, if we look into the wealth of literature available on this subject, there is indeed a rift between those who argue in favor of a thoroughgoing renovation of copyright and neighboring rights (which we in France group under the common heading of literary and artistic property) and those who would rather content themselves with some mere cosmetic work.

The former are in the majority among the exponents of what it is customary to call the cultural industries. They fear the effect of the uncertainties that technological progress is bound to cause in this area. It is not that they do not trust the courts to adapt the rule's relevant provisions. All they are afraid of is the trial and error. Focusing on the planetary dimension that I mentioned a moment ago, they dream of a uniform law that would remove the grey areas and make it possible to rise above the antagonism between copyright and civil law authors' rights, usually with a slight preference for copyright, to which they attribute many virtues.

The latter are more reticent. They rely on the past to show that literary and artistic property is sufficiently elastic to adapt. They think that technical and economic realities should not be allowed to obscure the personalistic dimension of copyright to be lost from sight. In a word, without disputing the difficulty on principle, they want to watch developments.

I might as well admit it straight away: I belong to that category. I agree entirely with the idea put forward by Professor Goldstein according to which one should avoid aggravating the ideological (he said "rhetorical")

differences between authors' rights and copyright. I do think, however, that there is also nothing to be gained by pretending that there is a consensus when in fact it is unachievable and in any event would be ambiguous.

It is in this frame of mind that I propose to take stock of the challenges of technology and trade that literary and artistic property is facing, to paraphrase the title of the Symposium. To do this I shall make a distinction between the origin of the law and its content.

I. ORIGIN OF THE LAW

Here the discussion is focused on copyright. The neighboring rights specialists should not take that amiss: neighboring rights are very new, and they do not present the same fundamental problems except when the line has to be drawn between the two categories (I shall be dealing with that). The two inevitable questions, as everyone has said, are: what works and what authors? These questions are closely connected, as Dr. Dreier has explained to us, as the definition of the work and the definition of originality both lead back to the concept of authorship. For the purposes of our exposé, however, we can and must distinguish them.

A. Protected Works

New technology makes us ask once again the age-old questions: what is a work? And, as all laws lay down the requirement of originality, what is originality?

I called them age-old questions because the specialists know well that they have been debated for a long time. The only thing that new technology does, as Professor Sirinelli pointed out in his introductory report, is restate the problems and make the practical stakes more clearly apparent.

1. First, what is a work? A daunting question. So daunting indeed that I prefer to put it in a less ambitious way and ask what the implications of new technology can be at that level.

Questions will be asked, for instance, about the role of chance. This is a time-honored debate. In principle, as Professor Sirinelli mentioned, copyright cannot protect "accidental" creations. French law would say that they were not strictly speaking, as our legislation requires, "works of the mind" (meaning of course the human mind). From that point of view interactivity is unlikely to bring about any fundamental changes. The user may of course have an important role to play, but, given the present state of technology, it seems that we can rely on the simple assumption that, at any given time, there is someone further back pulling the strings, the one Mr. Tournier yesterday called an "imaginateur," and it is to him, quite naturally, that authorship will be ascribed. Yet Professor Sirinelli pointed out that not all legal systems were so firm, and that in any event there would be borderline cases.

There is also the distinction between the work and the performance of the performer or between the work and the recording of the work. This is the

problem of dividing lines mentioned by Professor Ginsburg. What is at issue here is the boundary between copyright and the rights neighboring on copyright. That it is not a very clear boundary is illustrated by the fact that some have even considered affording copyright protection to interpretations of works by orchestra conductors or by film actors. And there is no heresy in that.

We in France and in the countries with civil law traditions find it harder, on the other hand, to understand how for instance sound recordings can in themselves be considered works, as they are in the United States of America. We have to make a mental effort, as for us it is almost a semantic error, so clear is it to us that the intellectual work must not be confused with the physical manifestation of that work.

We are also disturbed by the toing and froing of British legislation, of which Professor Cornish has informed us, on the subject of copyrights type II, which somehow correspond to neighboring rights and have been combined with the other kinds of copyright in the course of the 1988 reform. Professor Cornish tells us that he did not consider this to be progress, as it caused confusion precisely where a distinction had to be preserved. He added, and it was indeed very interesting to hear this from a British copyright specialist, that he wanted the protection provided by virtue of copyright to be both stronger and longer.

Finally, and above all, there is one implication of new technology that I do wish to mention. Several times during these three days we have heard tell of a new type of work that has emerged in the wake of the digital revolution. There would thus be literary, musical and cinematographic works and the like, and then there would be digital works as a separate category.

This way of looking at things seems to me completely contrived, and in this I share the opinion expressed by my neighbor, Dr. Ficsor. He told us that the change of format in no way alters the fact, which is essential in the field of copyright, that one is in the presence of works. In the same way as the Arc de Triomphe in Paris is an architectural work before being a conglomeration of particles, a digitized audiovisual work remains an audiovisual work and does not become just a sequence of zeros and ones. I was very pleased, a moment ago, to hear Professor Goldstein put forward the same idea. Yesterday Mr. Garnett told us something similar, namely that digital technology had no effect on the essence of copyright. And he was speaking of music, a field in which the applications of technology have been the most spectacular.

For the same reason I believe that a careful distinction should be made between the problem of protecting works and the problem of protecting actual information. It is true, as Professor Kitagawa mentioned, that a work stored in a database, insofar as it is subject to alteration every day and available to all potential users thanks to the resources of computer technology and the new communication media, can be considered a raw material, a sum of information. In my opinion, however, it remains fundamentally a work and is protected as a work and not as a sum of information. And it is the works that interest us, not their component elements, the "quarks" to use Dr. Ficsor's analogy.

2. Let us now speak of originality. It is a fascinating problem, and those of us who are members of ALAI (International Literary and Artistic Association) will remember that the subject was dealt with at great length at a recent congress. Now of course is not the time to go over all those discussions again. I merely wish to mention today that the copyright protection of certain works of technical character, such as software, has come up against serious objections in systems that are based on a very subjective, very personalistic approach to originality, understood as being the mark of the author's personality. That, as everyone knows, is true of France. This conception has been criticized, even in France, as being the product of romantic imaginings. When I say "romantic," you will of course be reminded of the discussion the day before yesterday. That discussion could be summarized as Michel Foucault versus Lamartine, for some speakers invoked Michel Foucault for help in showing that continental copyright conceptions, and specifically the French conception, were romantic ones, which of course was intended to be a criticism. I shall be blunt: I think that the criticism is devoid of foundation. As Mr. Kerever pointed out, we must not confuse personalism and romanticism. Historically, it is true, the personalistic conception reached its peak at a time which itself was that of the nineteenth-century Romantic movement. One can however trace it back to the French Revolution and even to the 1777 Decrees of the King's Council.

I would add that, far from being outdated, it should in my opinion be strengthened by the new technology. Professor Goldstein told us, at the end of his intervention, that one of the things to which we did not give enough thought, and to which we were going to have to give more thought, was the fact that new technology makes it possible to lower infrastructural costs, which, among other things, will lead to intermediaries being bypassed and to the author being brought closer to his public. This to my mind strengthens the arguments for a personalistic approach.

I shall now close this long digression and come back to software. The controversy is over, people may say, because the problem has been settled in almost all countries in favor of copyright protection. I nevertheless believe that it should still be talked about for three reasons.

First, France is not the only country in which the intrusion of software has caused difficulties: we could mention Japan and Germany. Secondly, the question is still on the agenda, whether one likes it or not, for a very simple reason, namely that it is not enough to declare software protected by copyright. There has after all to be a decision on the extent of that protection. Here of course I am anticipating somewhat my second part, which is devoted to the content of the law, but the two things are so intertwined that this is bound to happen. Now experience has shown that the implementation of copyright protection is not a foregone conclusion. We have seen this with the discussions on decompilation, for instance, which has given rise to some unusual provisions in the copyright field. Dr. Ficsor said this morning that if one claimed to have understood something of multimedia it was a bad sign. I believe that his comment applies all the more to the provisions on decompilation in the European Directive of May 14, 1991. Professor Ginsburg expressed the view that the Directive fell into line with the Berne Convention on this point, but I have my doubts. In any event, I have seen that the text is of daunting complexity. Mr. Rogard was too severe yesterday in his judgment on the Community texts as a whole, although I am tempted to say that

he is right as far as the Directive on Software is concerned. It is said, and I repeat this to my students, that Stendhal read at least one article of the French Civil Code every day to teach himself conciseness and accuracy. Without wanting to speak ill of the absent, I maintain that Stendhal would not have liked Article 6 of the Directive one little bit.

If we leave aside such questions of style and look to the substance, it is becoming certain that here the implementation of copyright protection is up against the problem of the scope of protection. Professor Jaszi explained to us how the American courts were reaching a stage at which they could only provide protection against slavish copying, and Professor Goldstein lent support to this jurisprudential news when he told us that there was a case of under-protection in his country. If one adds that in some countries (like France) software is governed by a regime specific to itself from the point of view of the rights of salaried authors or from the point of view of moral rights, it is clear that the application of copyright, unlike what was said some 10 years ago, is not a foregone conclusion.

Finally, we have to learn from these discussions for the sake of the future. And we already have an opportunity in the form of databases: as the specialists well know, the objections, the debates and the limitations on copyright are all the same. Dr. Ficsor mentioned in his report the "strange new clients" who are like elephants in a china shop, referring to software and databases. I think he is right, and Professor Ginsburg was also right to say that this in a general way raises the problem of the new frontiers of copyright. As she said, the problem is not all that new, as in a more classical context it also concerns compilations. This is not a French problem: it has also been seen in the United States of America with the Feist ruling. The solution is not clear to see, although the European example may be instructive: a number of people, notably Professor Gotzen this morning, have mentioned the proposed Directive; it settles the problem on the one hand by granting copyright protection and on the other by recognizing a sort of neighboring right in the form of the right to object to the extraction of data under certain circumstances.

This cohabitation, to use the words of Professor Ginsburg (Professor Cornish, for his part, spoke of apartheid), complicates things and affords some explanation for the violent criticism to which the text has been subjected, but it does in my opinion have the merit of tackling the real problem: it is the information itself that deserves to be protected. However, unlike Professor Kitagawa, I believe that it would be risky to base that protection on copyright.

We will come up against the same difficulty with multimedia or with the products of artificial intelligence that Professor Goldstein was talking about a moment ago. The truth of the matter is that there are limits to the scope of copyright, even in the Anglo-American systems which are usually more accommodating.

I would add, to complicate matters still further, that the differences of approach between countries are fraught with implications. Professor Ginsburg, for instance, showed us that the Berne Convention leaves each State free to exclude works that are not included in the list, and that in any event the definition of originality was left to national legislation. That is important

if one considers that it is one of the least well demarcated concepts in copyright, even in Europe. I was dismayed for instance to hear that, according to Professor Cornish, the originality requirement that the proposed Directive imposed on databases was stricter than the norm, whereas Dr. Dreier, for his part, considered it more lenient.

B. Authors

Here too there is a theoretical, even a philosophical debate that has never stopped, but which has become topical with the advent of computer technology and interactivity. On the theoretical aspect, I shall confine myself to saying that the philosophical viewpoint does not necessarily coincide with the lawyer's viewpoint. Michel Foucault, who has been quoted a number of times, did not reason in copyright terms. It is true, and Professor Jaszi was right to mention it, that the concept of authorship is a relatively recent one which did not exist in the Middle Ages for instance, and that it has been the subject of a great deal of controversy. One could no doubt add that there is not one single author concept, and that the perspective is not the same depending on whether the subject is literature, music, cinema or three-dimensional art. However, as Dr. Dreier said, there is in the copyright field a tradition among the civil law countries according to which the author is the natural person who created the work. What is more remarkable is that Professor Goldstein told us that the author was also a central figure in the American copyright system, and that for instance the doctrine of "works made for hire" should not be understood as a pronouncement of philosophical character on the insignificance (that is the term he used in his written report) of human authorship, but only as a means of settling a practical problem. So in that respect there is an extremely important point of convergence between the two systems.

At the practical level, the difficulties associated with new technology may be grouped under three headings.

First, originality is more and more relative. I would refer you to the example, described by Professor Jaszi, of the Internet. Generally speaking, it is certain that borrowings from preexisting works become easier (I almost said more usual) with digital technology. Dr. Dreier told us that with digitization, and the potential for dissemination that it created, there would be progressively fewer authors and more "contributors." That observation is no doubt accurate, but it is nevertheless only a question of degree, as it is well known that absolute originality does not exist. As Michel Schneider says in his book on plagiarism (Voleurs de mots, Gallimard, 1985), originality does not consist in being without origin, but rather in creating one's own origin.

Secondly, creation is more and more the result of collective work. The notion comes close to what we have just said, but it is nevertheless different. It consists in the realization that, even when he is not borrowing from preexisting works, the author is working not alone but in a team. According to Professor Jaszi that has always been the case, and too much emphasis has been placed on the individual aspect of creation. In any case it is certain that this observation is all the more valid today.

The difficulty arises from the fact that collective work is generally directed by an entrepreneur, whereupon the question arises whether copyright

should originate with the natural person who is the author or the one who is the entrepreneur; the replies vary from one legal system to the next. In the United States of America the "work made for hire" doctrine applies, whereas in Germany there is a presumption of assignment to the employer. French law, otherwise very personalistic, recognizes one exception (or anomaly, as some of our foreign friends mischievously point out to us), of which the multimedia industry for instance would dearly like to take advantage, namely the collective work, the rights in which originate with the person, either natural person or (more often) legal entity, who takes the initiative for making it and distributes it under his name. This qualification is however excluded by the law itself for audiovisual works, which are governed by rules peculiar to themselves (this is also true of the Berne Convention). And yet the multimedia work will often match the definition of the audiovisual work, so the obstruction is clear. What is also clear, and here the lesson to be learned goes well beyond the French situation, is the disadvantage of having exceptions to established provisions: when technology causes the categories to break up, it becomes difficult to keep the system cohesive. How for instance is one to deal with works incorporating audiovisual works, since the latter are subject to special rules? Should one envisage a sort of dissection, applying to the audiovisual part the provisions specific to audiovisual works and to the other part the provisions of ordinary legislation? The fact of asking the question provides the beginnings of a reply, as one senses that such dissection would not do justice to technical and artistic realities.

So ultimately we did not come up against any insoluble question. Thus far there is food for thought, but no cause for anxiety. Existing law is capable of solving the problems presented by new technology. Let us now see whether this reassuring observation applies also to the content of the law.

II. CONTENT OF THE LAW

Here the questions become less philosophical and more specific. It is a question of establishing whether, once it has come into being, the exclusive right that is accorded to authors or the owners of neighboring rights is suited to the technological and economic context. I shall speak first of patrimonial or economic rights and then, more briefly, of moral rights.

A. Economic Rights

The subjects to be dealt with are very numerous. I have selected six particularly important ones.

1. First, there is the principle of the exclusive right, which is under threat. The threat is direct, in the form of legal licenses, or indirect, by operation of competition law. The threat is often even underhanded, by way of an assertion of the public's right to culture, or in the name of economic realism. The latter argument is an old one, but it is back on the agenda with the advent of new technology and especially multimedia. The reasoning is quite simple: the economic stakes are such and the demand for works (or parts of works) is such that the exclusive rights system is perceived by some as being contrary to basic economics; it supposedly gives too much influence to

the creator and discourages investment. Without actually endorsing them, Professor Jazsi has echoed the objections from his experience of the situation in the United States.

The criticism is classic, and the reply is too. Copyright and neighboring rights are a cost factor and a management expense, but the cost and the expense are perfectly justified. They are not contrary to economic effectiveness either. For there is one thing after all that should not be overlooked: all these new media, these new carriers, these new information superhighways will have customers only if there is some content to offer. Mr. Rogard rightly mentioned this yesterday. The content is provided by the creators and performers, and so it is in everyone's interest to promote creation. That is one of the objectives of copyright and neighboring rights. The idea is clearly stated in the copyright countries, for instance in American law, but it is not absent from the authors' rights countries either.

On matters of principle, therefore, one has to be firm. I was pleased in this connection to hear Dr. Ficsor state that there was no question of extending the non-voluntary licensing arrangements under Article 11bis(2) of the Berne Convention to information superhighways. Like Mr. Parrot, I believe that we have to reason in the same way regarding the exclusive rights of performers, namely by interpreting the exceptions in the most restrictive way.

There are of course practical difficulties of implementation, but they must in no event allow legal licensing machinery to be used as an easy way out. Professor Koumantos used the classic but nevertheless very relevant example of cable distribution. There too, more flexible provisions were demanded in the name of practical and economic considerations, but it was eventually realized that there was no real legal problem, and collective administration made it possible to find a satisfactory solution.

2. The second challenge from the new technology is the effectiveness of the exclusive right. The risk has been mentioned many times: it is said that digital technology threatens the rights of authors and the owners of neighboring rights, on the one hand by promoting copying and on the other by making it impossible to identify borrowings. Both of these comments are valid ones: as far as the ease of copying is concerned, there are protection arrangements that can limit the risk. One should not however place too much faith in these technical expedients which the pirates, more often than not organized in networks, always manage to circumvent. To which Dr. Ficsor adds that there could here be a case of abuse, in that one would be trying to prevent the public from having access to works in the public domain.

As for unidentifiable borrowings, Dr. Gyertyánfy used the well-known example of sampling, which is sometimes impossible to prove. He also told us how necessary it was, if only from that point of view, to organize systems with the aid of new technology that will make it possible to identify works and indelibly "mark" them, so to speak (because, as he said, it is in the body of the work that the identification code is found).

Then there is the major question of private use. All copyright and neighboring rights systems have been devised in such a way as to afford more or less broad exemption for private use. However, the digital revolution has allowed private use to take place on such a scale that it is becoming, as

Professor Ginsburg said this morning, the usual and soon possibly even the only exploitation mode. Under such circumstances it is only normal to reflect on the actual principle of what is usually regarded as only a tolerance. There are of course limits to the author's power, both obvious practical limits and also legal limits that have to do with respect for private life. But there is no doubt that some new balance has to be found. That is the conclusion that has been so strenuously defended by Dr. Gyertyánfy and a moment ago by Professor Goldstein.

3. Another question raised by new technology is the structure of the exclusive right. I apologize for subjecting you, at this stage in the afternoon, to comments on a highly technical question, but I am afraid that it cannot be avoided.

First there is a problem of method, which we could describe as follows: where the prerogatives of authors or the owners of neighboring rights no longer seem capable of keeping pace with technological reality, should one look for a solution to the problem in a broad definition of an existing right or rather in the introduction of a new, separate right?

The first approach is in principle that of French copyright, which recognizes only two economic rights (if one disregards the droit de suite or resale royalty, which is separate), namely the right of reproduction and the right of representation, both of which are defined in the broadest possible way. For instance, we in France say that the right of reproduction includes the right of translation and the right of adaptation, which in fact are no more than its corollary. And even we say that the right of reproduction covers the possibility of including certain uses of the copy of the work. That is the doctrine of the right of destination or intended purpose, of which Mr. Tournier spoke to us yesterday.

According to the second approach, which is not only that of the Anglo-American copyright countries, there is a preference for listing and specifying the prerogatives of authors or the owners of neighboring rights (where they exist). It will be said for instance that they have a right of fixation or recording different from the right of reproduction of that first fixation, and also a right of translation, a right of adaptation, a right of distribution (or putting into circulation), the latter subject to exhaustion on the first instance of circulation. More briefly put, security is sought by analysis rather than manufactured artificially.

Each of these approaches has its advantages and drawbacks. The first, it seems to me, is more intellectually satisfying, but it does sometimes suggest that groping in the dark which the practitioners so rightly fear. It is significant, for instance, that even the French Law of 1985 abandoned it for neighboring rights, which are now divided into a great many prerogatives (right of fixation, right of reproduction, right of communication to the public, right to make available to the public by sale, exchange or rental), the exact scope of which is not always easy to grasp.

The analytical exercise seems to be in line with evolution. Whenever new technology has caused uncertainty as to the scope of an existing right, those involved have demanded the introduction of a separate right. This is understandable, but it is dangerous, because this "fragmentation" of rights is

liable to have an adverse effect on the cohesiveness of the system as a whole. It is not a question of neatness but rather of legal security. Such an accumulation of prerogatives results in overlaps that adversely affect the transparency of the law, which in turn leads to a logic of restrictive interpretation that backfires on the very people that one intended to protect better. To this it should be added that there is a risk of being very rapidly overtaken by technological evolution. Mr. Garnett told us in this connection that the convergence of technology was an indication that one should not legislate sector by sector. To me that seems a sensible finding.

Independently of this problem of method, we have to assess the implications of dematerialization. The phenomenon is connected with the implementation of digital technology and signal compression techniques. A good description of this was given by Professor Sirinelli in his introductory report. The difficulty is the following: copyright, and more especially the Anglo-American form of copyright, has evolved around the right of reproduction. How is one therefore to cater for this new reality? One could of course broaden the concept of reproduction, and say for instance that the display of a work on a computer screen constitutes a material fixation and may be assimilated to reproduction. However, as we can see, this does entail stretching the meaning of the word somewhat, and such an exercise has its limits. The truth of the matter, it seems to me, is that the procedures for the distribution of the work no longer appear to be essential. To take an example, Dr. Ficsor told us that some charged what amounted to a rental fee (which in a hypothetical case happened at the time of the distribution of copies) for what he called distribution by immaterial routes. Mrs. von Lewinski took the floor this morning to say that, in her opinion, the reply should be positive in the light of the 1992 Community Directive. I am not sure that her interpretation is actually compatible with the text of the Directive, but I do believe that she is right on the substance. In future we shall have to accept that the material or immaterial routes by which the work is made available are of less importance than the economic reality, which is that the author or owner of a neighboring right has to maintain control over all exploitation. That was the conclusion of Mr. Rogard on the subject of pay per view. It shows clearly that circumstances have to be perceived in a global way and retrospectively in relation to technological evolution, failing which there is a risk of having to rewrite texts before the ink has had time to dry.

There too the discussion might seem highly technical, but the implications of new technology are not assessed only in relation to high-flown principles. I maintain that there is additional proof in the form of the two concepts of fixation and publication. It is sometimes wondered whether the classical definition of fixation on a material medium does not refer more to analog than to digital technology. As far as French law is concerned, there seems to be no basis for this doubt, but the same is not true of the law of other countries. As for the concept of publication, which is essential to literary and artistic property, Professor Sirinelli has explained to us that it caused difficulties, for instance, for network-created works.

4. Another thing at stake is the scope of the protection conferred by the exclusive rights. I shall reiterate the observation that copyright does not seem to be the most suitable route for the effective protection of software and databases, as illustrated in the example of American case law analyzed by Professors Jaszi and Goldstein.

In a more general sense, there is a substantive problem, described very well by Professor Sirinelli. According to economic logic, what should be susceptible of prohibition is any use of the work, because it is a source of enrichment for the user. According to copyright logic, one can only punish borrowings that are substantial enough for the work to be recognizable. From this stem the difficulties in the assessment of the lawfulness of sampling. It seems that no limit exists in the field of neighboring rights, and that more effective protection could be considered.

5. A few words now on the various kinds of entitlement to remuneration. In certain cases, as we know, the exclusive right is replaced by a right to remuneration, for instance for private copying. At least two questions deserve to be considered. First, once again, due account has to be taken of the implications of dematerialization. This question was dealt with by Professor Sirinelli. For instance, remuneration for private copying is expected to be less substantial overall in the future. And, as the capacity of the surviving media will be very great, the royalty payable for them will be considerably greater. But there is a limit to what the consumer will agree to pay.

Then there is the controversy surrounding national treatment, which has been mentioned by Professors Ginsburg and Goldstein and also by yourself, Mr. Director General, in your introductory address. You spoke of the reasons why certain countries were reluctant to apply national treatment to this entitlement to remuneration: you said that national treatment was more difficult to implement in practice when there were important differences and distortions in the legislation of the countries concerned, or when, to use the image chosen by Professor Goldstein, the international playing field was not sufficiently level. It is indeed a fact that, with regard to private copying for instance, the right to remuneration does not exist in all countries, as Mr. Rogard regretted yesterday. One could of course reply that the Berne Convention was devised precisely to bring about upward harmonization, and that one had to start by applying the national treatment principle before the member States could discover the benefits of a higher level of protection. One is bound to wonder, however, whether this view is not something of a pipe dream at a time when competition is becoming more aggressive under pressure from economic interests.

6. Finally, there is the question of collective administration. As far as the principle was concerned, everyone agreed that it was becoming a necessity in the face of the new technology, but that it was not a panacea. Mr. Rogard told us why the producers of cinematographic works generally preferred individual management. Mr. Tilliet explained to us that, in publishing, one had to combine both individual and collective administration. And I heard Mr. Tournier mention the principle of subsidiarity, pointing out at the same time that the ideal solution was still individual negotiation based on exclusive rights, specifically the right to prohibit.

On procedure, all the speakers agreed that new technology could be of assistance in the carrying out of collective administration. Everything was said, and well said, on that subject. I am thinking in particular of the fascinating report by Mrs. Koskinen. I am also thinking of the suggestions made by Professor Kitagawa. The system advocated by him is intriguing: it ensures respect for the interests of the owners of rights because it rests on

a contractual basis, which illustrates Professor Ginsburg's contention that contracts will be playing a more important part. It is a realistic system in economic terms, because its success is determined by market response. One can only hope that this response will be a favorable one.

B. Moral Rights

It would be very embarrassing for a French lawyer, even if his time is limited, to end his summing-up without saying something of moral rights. The subject has not been covered very much, except by Mr. Correa, who was playing his part to perfection when he so vigorously defended it. It was also mentioned, more unexpectedly, by Mr. Rogard, who told us how attached cinema producers were to it.

The first question that springs to mind is whether moral rights are under threat in this new technological and economic environment. The reply is yes: new technology offers new opportunities for the manipulation and the mutilation of works, including the private sphere. In the latter situation, the protection of moral rights is sometimes quite simply disregarded, as in British and German law, for instance. And in any event such violations are difficult to prove, apart from which there is the right to privacy which prohibits investigations.

It should also be pointed out that the increased capacity of media sometimes makes it difficult actually to exercise the right of authorship (already a politically correct term in the United States, unlike our own "paternité"). If for instance a multimedia work contains 15,000 pictures, it is difficult to imagine how each author could be mentioned.

The threats are very genuine, but I do think that they should not be exaggerated. One could even, without it seeming paradoxical, wonder whether the new technology will not in fact come to the aid of moral rights, if only by permitting the identification of works, as we have seen. Mr. Garnett also told us yesterday that digital technology could improve the quality of ancient works and performances, which could, in a manner of speaking, be described as consistent with the moral interests of the authors and performers concerned.

There is one threat that is more serious because it is more fundamental. Moral rights are sometimes attacked head on for being incompatible with the demands of economic life and the dictates of administration.

We have to assume that the argument has had some effect, because the countries that signed the GATT Agreement agreed to moral rights being excluded from them. This was undoubtedly a political option. Its consequences will be many and it will place those countries that make substantial provision for this element of copyright in a difficult position. This is particularly true of French law, which places it in first position (and, as Dr. Dreier put it so well, makes it the raison d'être of copyright as a whole), and also of German law which, as we all know, is monistic in the sense that it refuses to dissociate the economic and the moral aspects of copyright.

With regard to substance, it seems to me that the fears expressed by the adversaries of moral rights are unfounded. Moral rights may, it is true, have sometimes been presented in an excessively dogmatic way on this side of the

Atlantic. But if we look at the facts objectively, we can see that they are not such a fearsome weapon. In his written report, Dr. Dreier mentioned for instance Article 93 of the German Law, which restricts moral rights in the cinematographic field according to the economic interests at stake. Even in France, as Professor Sirinelli said, it has never been suggested that either the publishing industry or the cinema industry have had to suffer from moral rights. Moreover, if there were to be any abuses, the courts would be there to punish them, as the Supreme Court of Appeal invites them to.

And of course there is no harm in saying that moral rights are one of the pillars of the Berne Convention, and the Berne Convention does not confine itself to national treatment: it constitutes a whole.

These are the essential questions that I have decided to put into perspective in this final report. I am very conscious of the fact that I have left many out. But that, as I mentioned at the beginning, is the rule of the game.

Mr. Director General, you opened this Symposium by quoting a saying by Victor Hugo which ended with the words "spread Paris across the world, enclose the world in Paris." What a great saying! Cynics might find it demonstrated a typically French (being from the provinces, I was cravenly tempted to say "typically Parisian") chauvinism. But for one thing there are no cynics in this room. Apart from which I think the genius of Victor Hugo is too universal for such a debate to be entertained. All I shall do, as I am not Victor Hugo, is make the more down-to-earth statement that, after Stanford, after Harvard, the world of intellectual property met again for three days at the beginning of June 1994. A great many ideas were stirred up. Let us hope that they will go forth into the world and multiply.

Thank you.

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