

THE PRIVATE COPYING
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OF
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SOUND AND AUDIO-VISUAL RECORDINGS
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A STUDY REQUESTED BY THE [COMMISSION OF THE EUROPEAN COMMUNITIES

BY

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1983

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THE PRIVATE COPYING OF SOUND AND AUDIO-VISUAL RECORDINGS

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FOREWORD

This comparative study of the private copying of sound and audio-visual recordings, a problem which may fairly be considered the most topical and controversial at present in the field of copyright and related rights, was requested by the Commission of the European Communities. It is hoped that the information and proposals for action contained in the study will make a useful contribution to the work of the Commission on the subject and to the discussions which are currently taking place in many Member States with a view to finding legislative solutions to the problem of private copying.

The terms of reference for the study were the following:

'Detailed Programme of Work for the Study

The study will cover the whole problem of domestic uses of works protected by copyright and related rights including the rights of performers.

The expression "domestic uses" is understood in the sense of the recording of sounds and images made by private persons without any commercial objective.

Firstly, the study will describe the situation on the practical level (the quantitative degree of the uses, and also the loss in earning which results for the authors, the performers and the producers of sound and audio-visual recordings); secondly, it will explain the legal aspects: the gap thus opened in the legal systems of protection of the rights of the authors, the performers and the producers.

There should then follow an analytical and comparative description of the laws relating to private use in the Member States of the Community and of the legislation in existence or under preparation in order to compensate the damage suffered by authors, performers and producers.

The study will be concluded by a proposal for community legislation.

There evidently will be no question of introducing an inquisitorial inspection at the homes of private persons. They must have the possibility to record. But it is necessary to reconcile the requirement of their freedom to record with the requirement for remuneration to be paid for the work of the authors, the performers and the producers.'

(xx)

The author would like to thank all those who have assisted her in the preparation of this study and, in particular, the many individuals and organisations who responded most helpfully to her requests for information and assistance in the gathering of statistics and information about consumer behaviour in relation to private copying.

The Directors and staff of the ten National Groups of the Association of IFPI National Groups in the European Communities, including their video sections, deserve a special word of thanks in this connection:

Associazione dei Fonografici Italiani (AFI)
British Phonographic Industry (BPI)
Den Danske Gruppe af IFPI
Deutsche Landesgruppe der IFPI
The Greek Group of IFPI
The Irish National Group of IFPI
Nederlandse Vereniging van Producenten en Importeurs van Beeld-en Geluidsdragers (NVPI)
Syndicat de l'Industrie Belge d'Enregistrements Sonores et Audio-Visuels (SIBESA)
Syndicat National de l'Edition Phonographique (SNEP, France)

as do the following national video associations connected with IFPI:

Danish Video Association
Syndicat National de l'Edition Videographique (SNEV, France)
Irish Videogram Association

The author also wishes to express her appreciation of the most valuable contributions made to the preparation of this study by:

Dr Jeremy J. Phillips, Lecturer in Law at the University of Durham, who contributed to Chapters 4 and 6 and gave most helpful and constructive advice on the remainder of the study. The kind assistance of the Common Law Institute of Intellectual Property (CLIP) in suggesting this collaboration is gratefully acknowledged; and

Michele Hung, who collaborated with the author in the writing of Chapters 1 and 2 and with the compilation and presentation of the economic and statistical information included in the study.

Finally, the author is also grateful to Moira Burnett, Marianne Harvey, Patricia Robinson and Carol Wilson for their assistance with the text, footnotes and bibliography, to Rowena Totty who patiently typed and retyped the text, and to the many colleagues who read and commented on successive drafts.

Gillian Davies
June 1983

CHAPTER 1 PRIVATE COPYING AND ITS EFFECTS
INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

1.1.1 The audio and video industries world-wide are confronted by the phenomenon known as "private copying", sometimes called "home taping". Private copying is the non-commercial copying of sound recordings (phonograms⁽¹⁾) and audio-visual recordings (videograms⁽²⁾) for personal, domestic use; in other words it is the act of recording in the home the music from a pre-recorded record or tape, the film from a pre-recorded videocassette tape or videodisc or a radio or television programme off-air. To do this all the copier needs is recording equipment and a blank tape.

1.1.2 Private copying represents a new and unauthorised use of phonograms and videograms which escapes the control of the present copyright system. It has resulted from the ready availability to the consumer from 1964 onwards of magnetic tape reproduction equipment, coupled with blank cassette tapes for use with such equipment. The equipment is simple to operate and, particularly in the case of audio equipment, inexpensive. The inducement to engage in private copying provided by such equipment far outweighs the individual consumers' awareness of and concern for the rights of copyright owners.

1.1.3 With truly startling foresight, a scholar writing as long ago as 1927 predicted that the practice of private copying for personal use,

'... in the hypothetical event that future inventions make reproductions a current and everyday practice, could be the death of copyright... With the progress in phonographic, cinematographic and radiophonic processes, it is already possible today and will be even easier tomorrow for thousands of persons to take possession of music or entertainment and bring them into their own homes'.⁽³⁾ (emphasis added)

1.1.4 More than fifty years later, this prediction has been fully realized and the threat to the copyright system has been shown to be real. The purpose of the copyright system from its earliest days has been to promote cultural activity by granting exclusive rights to authors and other creators; these rights enable right owners to exercise control over uses of their works and provide them with the economic incentives to create new intellectual works. The principle that this general purpose of the copyright

system needs to be preserved and maintained in the face of new technology is widely recognised:

'New technology should not alter these basic objectives. Rather, because it generally enables easier and faster copying and distribution of creative intellectual and artistic works, it likewise intensifies the need to extend the protection afforded by copyright to embrace these new uses of works of authorship.'⁽⁴⁾

'The principal object of successive statutes has been the protection of those who produce original work against competitive copying, copying for a market in which the original maker of the work ought to have the exclusive right.'⁽⁵⁾

1.1.5 Widespread private copying by individuals of sound and audio-visual recordings is devaluing the rights of authors, producers of phonograms and videograms and performers. This situation was never envisaged by existing laws on copyright and related rights and, in most countries, it is not against the law to make a copy or a limited number of copies of recordings for private use.⁽⁶⁾ (The expression "related rights" is used to denote the rights of performers, producers of phonograms and broadcasting organisations granted by continental legislations. These make a distinction between the rights of "authors", on the one hand, and the "related" or "neighbouring" rights of other right owners, on the other hand. The laws of Ireland and the United Kingdom make no such distinction, "copyright" protection being afforded to "makers" of phonograms and films and to broadcasters.) Even where private copying is against the law, however, normal methods of enforcement are not appropriate; detection is extremely difficult and, moreover, efforts to detect private copying would be undesirable since they would give rise to an unacceptable invasion of privacy.

1.1.6 The aim of this study is to describe the extent to which private copying represents a new use of protected works as well as its economic impact, to demonstrate the dangers it poses to the copyright system, the damage it is causing to the economic interests of right owners and to propose solutions consistent with the basic purpose of the copyright system. (References to the "copyright system" include related rights.) Solutions are required and must be found because:

'... the exclusive rights which are granted by national copyright, patent, trademark and design laws are granted because it is in the public interest to grant them. And the greater the

extent to which these rights are devalued, the less the benefit to the public interest... [it is, therefore, the purpose of copyright protection] to provide a climate in which these rights are sufficiently rewarding to fulfil the purposes for which they are granted'.⁽⁷⁾

1.1.7 The remainder of this chapter seeks to place the problem of private copying in the context of its economic impact on the legitimate audio and video recording industries, to define the problem, to identify the concern of the Commission of the European Communities with private copying and to explain the interests prejudiced by it. Subsequent chapters are concerned in detail with the following subject matter:

Chapter 2 contains a comparative study of current market developments in the blank tape and pre-recorded audio and video industries and of the incidence of private copying of sound and audio-visual recordings in the Member States of the EEC;

Chapter 3 discusses the international conventions relevant to private copying in the EEC countries;

Chapter 4 explains the national laws and legislative developments relating to private use and fair dealing in the Member States of the EEC;

Chapter 5 describes the various recommendations on the subject of private copying adopted by intergovernmental bodies and international non-governmental organisations;

Chapter 6 reviews national legislative developments related to private copying in non-EEC countries;

Chapter 7 puts forward conclusions and options for action; and,

Chapter 8 makes proposals for action followed by a recommendation for Community legislation in the form of a draft Directive.

1.2 EXTENT OF PRIVATE COPYING IN THE EEC

1.2.1 Sound Recordings

1.2.1.1 In depth surveys into the practice of private copying of phonograms conducted during the period 1976 to 1982 in most EEC countries⁽⁸⁾ have indicated that the percentage of households having access to audio recording equipment ("saturation" level) is now extremely high throughout the territory of the EEC.

In most EEC countries, over 60% of households have at least one tape recorder and the United Kingdom has the highest saturation level with 73%. All surveys show that music is copied far more often than anything else (Chapter 2, Table 6). Private copying of phonograms in particular is constantly on the increase and inflicts serious damage to the interests of authors, performers and producers.⁽⁹⁾ The vast numbers of blank tapes sold each year (Annex 5) give a clear idea of the colossal amount of music copied. The consistent decline in the recording industry since 1978 (Annex 2) comes therefore as no surprise in the light of such a widespread and uncontrolled phenomenon, coupled with the worldwide recession and with piracy.

1.2.2 Audio-Visual Recordings

- 1.2.2.1 Private copying of audio-visual recordings, commonly referred to as videograms, is a more recent phenomenon. A video recorder was first presented to the European public at the German Broadcasting Exhibition in the autumn of 1969. Video recorders were introduced on the EEC market on a small scale in 1971 and, in the early years, the number of households having access to such recorders was limited. Sales of video recorders have rocketed, however, over the past 3 years. In the United Kingdom, for example, consumer consumption through sale or rental of video recorders increased from 375,000 in 1980 to 1.7 million in 1982.⁽¹⁰⁾
- 1.2.2.2 The number of households with a video recorder has consequently followed this ascending trend and, in the United Kingdom, penetration (number of installed video recorders divided by total number of households in the country) rose from 3% in 1980 to 15% in 1982. Video now reaches every country in the EEC although individual rates of penetration vary widely. After the United Kingdom, the Federal Republic of Germany is the second most dynamic market whereas Italy and Greece lag far behind.
- 1.2.2.3 Due to the relative novelty of video recording equipment as compared with audio recording equipment, in-depth surveys into the practice of video private copying are few (Federal Republic of Germany and the United States of America) and date from 1979 and 1981.⁽¹¹⁾ Other more limited surveys also report on the practice, and all the information collected indicates that, while video recording equipment is used mainly to record television programmes, the practice of copying pre-recorded videocassettes on to blank video tapes by the use of two recording machines is already far from negligible.⁽¹²⁾ Studies of these surveys and of the video markets show that

private copying of videograms and television broadcasts is detrimental to the interests of right owners and other contributors to the audio-visual recordings copied (see paragraph 1.7 below).

- 1.2.3 The economic impact of the practice of private copying on the legitimate audio and video recording markets, and on the substantial industries which supply those markets, is significant and should neither be ignored nor under-estimated. A detailed analysis of the incidence of private copying of sound and audio-visual recordings in the Member States of the EEC is contained in Chapter 2.

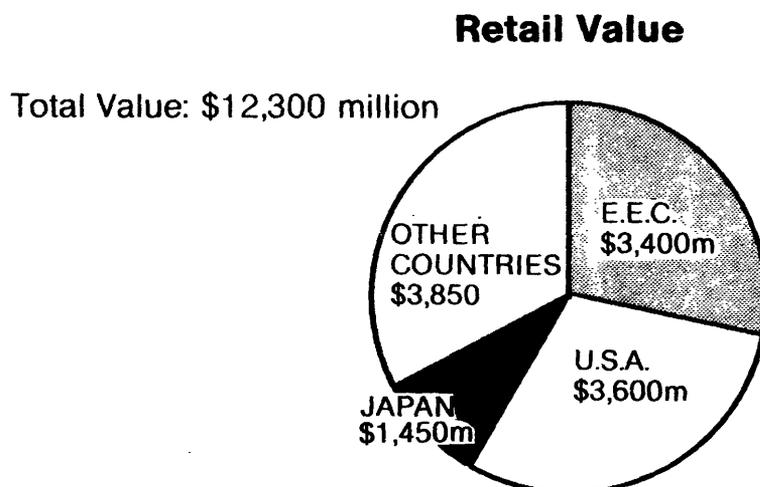
1.3 THE RECORD MARKET IN THE EEC

- 1.3.1 The recording industry of the EEC is a long-established industry, renowned for the high quality of its product and for the substantial turnover it generates. Indeed, in 1981, sales of pre-recorded audio records and tapes by legitimate producers of phonograms in the Member States of the EEC amounted to a retail value of US\$3.4 thousand million (Annex 2).

- 1.3.2 The recording companies of the Community together represent the second largest record industry in the world. Only that of the United States of America is more important in economic terms; in 1981, the sales value of the US industry was US\$3.6 thousand million (Annex 3). The United States of America accounts for the sale of approximately 30% of all pre-recorded audio records and tapes sold in the world; the EEC for the sale of almost 27%.

FIGURE 1

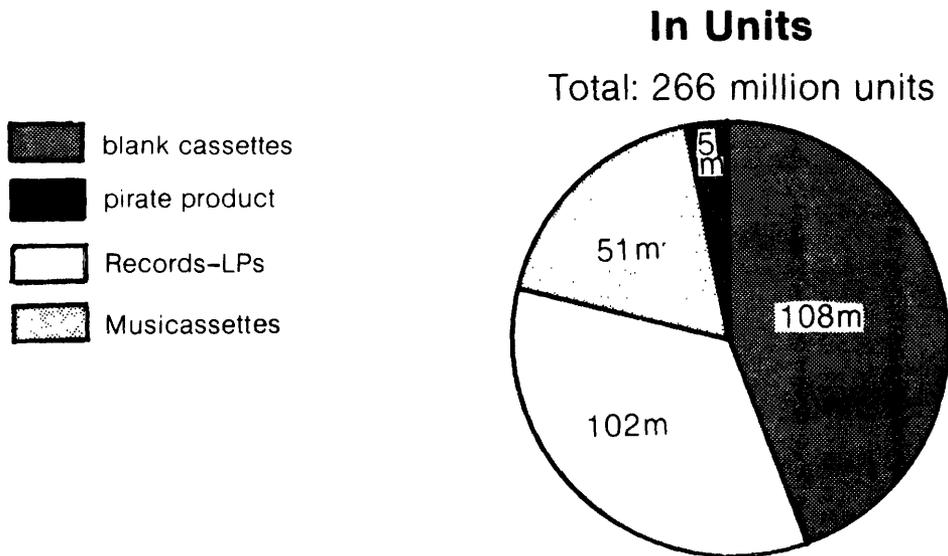
WORLD SALES OF SOUND RECORDINGS IN 1981



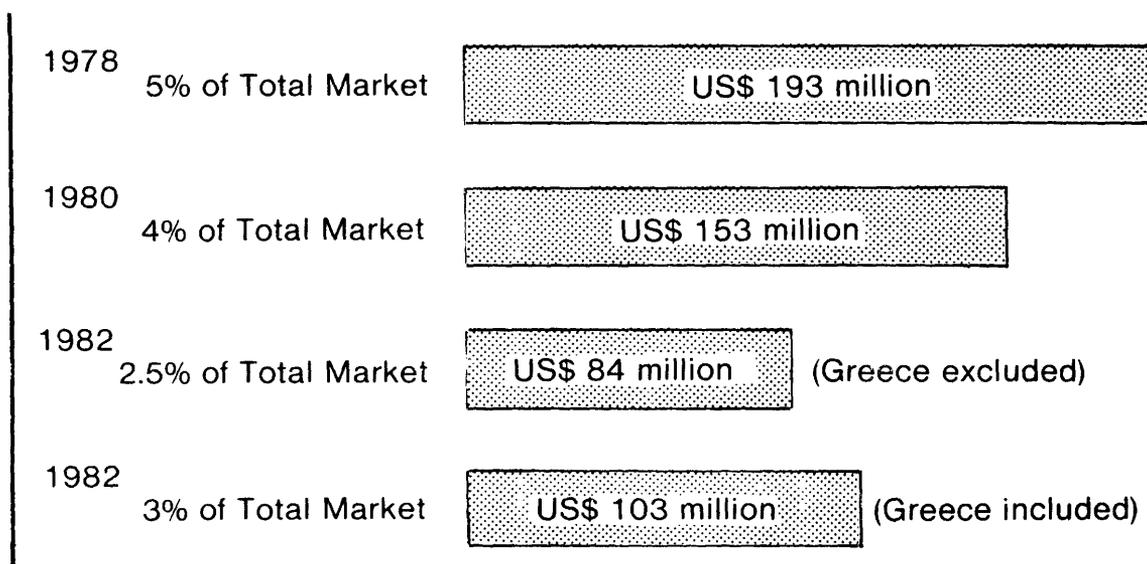
- 1.3.3 Whereas the industry had shown steady growth until 1978, from 1979 onwards it has declined in terms of real value as well as units sold and preliminary sales results for 1982 indicate that this downward trend is continuing. This recession in the recording industry is unprecedented and the social consequences resulting from it are already considerable. The number of persons directly employed in the production, manufacturing, wholesale and retail trades totalled over 130,000 people for the EEC in 1978 (Annex 10). The level of employment is now reported to be around 10% lower.
- 1.3.4 It should also be stressed that the state of prosperity or decline of the recording industry has a significant impact on employment in the music publishing industry and on the many thousands of authors, lyric writers, composers and performers (conductors, solo artists, musicians and actors) whose livelihood depends wholly or partially on the recording industry. The royalties paid by the recording industry to the authors' societies in the EEC countries for the right to record works in 1981 amounted to a value of approximately US\$205 million and increased at an annual rate of 22% from 1970 to 1978 (Annex 11). Thereafter, due to the decline in sales, royalties have shown a modest annual increase of 4.8% and, if account is taken of the official rates of inflation of each country, this means that the amount of royalties paid has dropped in real terms.
- 1.3.5 The recording industry is a major cultural industry in the EEC and an important source of foreign revenue, both from direct exports and from royalties derived from the licensing of the repertoire of the EEC countries abroad. Total exports from EEC countries (both to non-EEC countries and to other countries in the Community) amounted to US\$370 million in 1981; exports from the EEC countries to non-EEC countries were equal to US\$158 million, whereas imports from outside the EEC represented only US\$96 million showing a net positive balance of US\$62 million (Annex 4). There has also been a serious decline in the export trade of the EEC since 1978 when the balance of trade showed a surplus of US\$84 million in favour of the EEC.
- 1.3.6 In considering the economic and social significance of the EEC recording companies, it should also be borne in mind that the major recording companies based in the EEC have established subsidiary companies or appointed licensees throughout the world. World sales of phonograms were estimated at around US\$12,300 million in 1981 and UK recordings alone were estimated to represent 20-25% of world

sales in 1980, generating a turnover of some US\$2,800 million (£1,500 million). In addition, royalties payable to UK music publishers or their foreign licensees for the use of their music in recordings produced income of around US\$185 million (£100 million) in the same year. Broadcasting and other fees for the performance of these recordings generated a further sum of approximately US\$95 million (£50 million).⁽¹³⁾ Unfortunately, similar estimates for all EEC recordings are not available but it is fair to assume that the total revenue generated by EEC recordings is substantial.

- 1.3.7 All this activity cannot but be of major economic importance to the EEC. The fact that this trade has been in decline since 1979 should be of considerable concern to the governments of Member States. Tax revenue to governments has been reduced by loss of VAT on lost sales and revenue from corporation tax has also declined as a result of reduced profits. Moreover, those people made redundant in consequence of the decline swell the ranks of the unemployed who are presently imposing such considerable strains on the social welfare systems of Member States.
- 1.3.8 In the Federal Republic of Germany alone, the total turnover and expenditure of all music-related activities was estimated at 25,000 million Deutsch Marks⁽¹⁴⁾ (US\$11,000 million) in 1980-81. This represented 1.6% of the Gross National Product. If similar studies were available for other EEC Member States they would no doubt emphasize even further the economic importance of music for the EEC.
- 1.3.9 Private copying is not, however, the only threat which the sound recording industry faces at present. The industry is also continually menaced by piracy -- the deliberate manufacture of duplicates of legitimately produced phonograms without the authorisation of the original producer for commercial gain⁽¹⁵⁾ (see paragraph 1.5.3 below). Private copying and piracy are, therefore, both significant factors in the decline of legitimate recording sales. There is an adverse effect on sales whether a pirate duplicates a thousand copies of a successful recording for commercial exploitation or whether one thousand private individuals copy it at home for their own use. Figure 2 illustrates unit sales of sound carriers (legitimate pre-recorded audio records and tapes, blank cassettes and pirate product) in the Federal Republic of Germany in 1981.

FIGURE 2**SALES OF SOUND CARRIERS IN GERMANY IN 1982**

1.3.10 The recording industry has a constant battle on its hands to keep piracy under control and maintains a heavy investment in teams of investigators and lawyers in all the EEC countries whose task it is to locate the pirates and bring them to justice. In spite of the constant vigilance and best efforts of the industry's anti-piracy teams, inadequate remedies and penalties in the majority of the countries of the European Community result in piracy continuing to flourish. Figure 3 shows the retail value of pirate product in 1978, 1980 and 1982 and the percentage of the total market this represents.

FIGURE 3**ESTIMATED EXTENT OF PIRACY IN THE EEC**

1.3.11 Chapter 2 of this study contains a detailed analysis of the record market in the EEC and of the scale and impact of private copying of phonograms.

1.4 THE VIDEO MARKET IN THE EEC

1.4.1 As mentioned above, the video market is relatively new as compared with the record market. While the organisations representing the recording industry in the EEC and worldwide⁽¹⁶⁾ have been collecting reliable statistics on the state of the recording industry for many years, little research has been done in the video industry and, so far as the author of this study is aware, relatively little internationally-compiled statistical material is available. The information given in this study, therefore, has been compiled from a variety of published and unpublished sources and is necessarily incomplete.⁽¹⁷⁾

1.4.2 The most significant feature of the video market at present is the dominance of rental as a means of acquiring pre-recorded video programmes for domestic viewing and entertainment. The year 1981 has been described as the year "the software market took off" in the major EEC markets albeit in the form of rental rather than sales. In the Federal Republic of Germany, for instance, it is reported that in 1981 'the turnover of the main ten videogram distributors exceeded cinema earnings for the first time and took a total of US\$120 million in gross revenues'.⁽¹⁸⁾ It has been estimated that around 12 million pre-recorded videocassettes and discs entered the Western European Market in 1982 as compared with only 5 million in 1981. The outright sales to consumers of videocassettes and discs are expected to increase steadily throughout the 1980s as prices fall. Lower blank tape costs and more efficient duplication and distribution has already reduced the price of legitimate sales. In the Federal Republic of Germany and the United Kingdom, the prices of some videocassettes have already been cut by half over the past two years.⁽¹⁹⁾

1.4.4 The video market is one of great potential which promises to become of considerable economic importance to the EEC. The video programmes made available to the public in the form of pre-recorded cassettes (and discs) include films, television programmes and original productions of which music programmes represent an increasing proportion.⁽²⁰⁾

1.4.5 The video market therefore provides a new outlet for the productions of the EEC film and television industries and new opportunities for those who wish

to create specifically for the video medium. In the production, manufacture and retail of pre-recorded material there are opportunities for the development of a flourishing new cultural and entertainment industry in the EEC which could become an important source of foreign revenue, both from direct exports and from royalties derived from the licensing of the repertoire of the EEC countries abroad. In addition, the video industry has already created substantial numbers of new jobs in the EEC, in production, manufacture and distribution, and many more jobs could be created if the video industry is allowed to develop a firm base through adequate copyright protection. Authors, composers, publishers, producers and performers all stand to gain from the new employment opportunities offered by the video industry.

1.4.6 The development of the video market, of such potential economic and cultural importance to the EEC, has been hampered from its inception by the double threat of piracy and private copying. Piracy represents around 70% of the market in Belgium, the Netherlands and the United Kingdom and around 50-60% in the Federal Republic of Germany. In 1982, world sales of pirated copies of videograms were estimated to be in excess of US\$800 million⁽²¹⁾ with the United Kingdom accounting for a minimum of US\$160 million (£100 million) of this illegal trade.⁽²²⁾

1.4.7. Chapter 2 of this study contains more information concerning the video market in the EEC and describes the scale and impact of private copying of videograms.

1.5 DEFINITION OF PRIVATE COPYING

1.5.1 Private copying is the term which has come to be widely used to describe the non-commercial practice whereby individuals make unauthorised copies of phonograms or videograms for domestic use. Private copying is non-commercial in the sense that the reproduction is not made for commercial gain or profit, being normally undertaken in the privacy of the home by individuals for their own pleasure and that of their families. Nevertheless, private copying is a new and unauthorised use of copyright material made possible by technical development and represents an abuse of the reproduction rights of the producers and other right owners concerned with the original recordings copied. A reproduction right in copyright and related rights law gives the owner the right to authorise or prohibit the reproduction of his work. Where reproduction for private use is permitted, as is the case in some legislations, it is an exception to the reproduction right. As already mentioned

(paragraph 1.1.1 above), the practice of private copying is sometimes referred to as "home taping". In fact, there is a fine distinction between the two expressions since "home taping" does not necessarily imply that a recording is being copied; it could refer to the recording of a live performance. However, the two expressions are generally employed synonymously.

1.5.2 Private copying as defined above is the particular subject of this study; it must be distinguished from three other closely related, but non-private, activities:

- "Piracy": unauthorised copying for commercial exploitation;
- Copying for educational or institutional use;
- "Reprography": photocopying of texts.

1.5.3 Piracy

1.5.3.1 Piracy is unauthorised copying for commercial gain. In relation to phonograms and videograms, it means the manufacture of duplicates of legitimately produced phonograms or videograms without the authorisation of the original producer of the phonogram or videogram and the importation, distribution, or sale to the public of such unlawful duplicates for commercial gain. The word "piracy" has been used more generally to describe infringement of copyright since the early 18th Century⁽²³⁾ and is also used to denote the unauthorised reproduction for commercial purposes of literary, musical, artistic and other copyright works.

1.5.3.2 The problem of piracy has been recognised by the Commission for some years. In its document "Community Action in the Cultural Sector", published in 1977, it is stated in the chapter on 'Harmonization of laws on copyright and related rights' that 'the campaign against pirate editions of discs and tape recordings [is a] problem which will have to be dealt with'.⁽²⁴⁾ In the meantime, the Commission has published a study entitled "Piracy of Phonograms" prepared at its request by the author of the present study.⁽²⁵⁾

1.5.3.3 The terms of reference for that study were:

- (i) to provide a detailed description of the extent, nature and special characteristics of piracy of phonograms for each individual country in the EEC, and in the Community as a whole;
- (ii) to analyse the methods available to combat piracy of phonograms in the countries of the

Community, taking into account international conventions to which they are parties, their legislation or other means of regulation; and

(iii) to make proposals for action.

1.5.3.4 The Commission's programme for harmonisation of laws on copyright and related rights is referred to in the Commission's Communication to Parliament and the Council, entitled "Stronger Community Action in the Cultural Sector", dated 16 October 1982.⁽²⁶⁾ According to this document, the work now being done by Commission departments will result in a "green paper" which will open a wide-ranging debate on copyright, related rights and relevant legislation. It is understood that the "green paper", a consultative document containing proposals for the harmonisation of laws on copyright and related rights will be published in 1983. As regards piracy, it is stated that:

'Good care will be taken not to overlook one particular practice which undeniably constitutes a criminal offence - pirating. The Community is duty bound to take action to counter what amounts to theft of the remuneration that authors and interpreters should get from the legitimate use of records, films and books, in which they have invested their labour' ...⁽²⁷⁾

1.5.3.5 Piracy of copyright works, including phonograms and videograms, is considered an illegal act under the laws of most countries. So far as phonograms are concerned, in a large and increasing number of countries, including all ten Member States of the EEC, either the producer of the phonogram or the owner of the copyright in the musical and/or literary work embodied in the phonogram has a right in law to prevent the making of unauthorised copies of their phonograms for commercial purposes. The right of the producer of phonograms is recognised by two international conventions:

- the Convention for the Protection of Performers, Producers of Phonograms⁽²⁸⁾ and Broadcasting Organisations (Rome, 1961); and
- the Convention for the Protection of Phonograms Against the Unauthorised⁽²⁹⁾ Reproduction of their Phonograms (Geneva, 1971).

1.5.3.6 Like phonograms, videograms are protected by most national legislations against piracy (but only insofar as they are assimilated to cinematographic works or films) and are afforded similar protection under national laws.

1.5.3.7 The exclusive right of authors to authorise the reproduction of their works in any sound or visual recording is specifically recognised not only by most national laws but also by the Berne Convention for the Protection of Literary and Artistic Works, 1883. (30) Moreover, videograms are specifically protected by the Berne Convention which extends protection to 'cinematographic works to which are assimilated works expressed by a process analogous to cinematography'. (31)

1.5.3.8 Piracy is therefore in general terms illegal and subject to the law; enforcement of the right to prohibit unauthorised reproduction, if need be by action in courts of law, is the correct remedy for piracy.

1.5.3.9 On the other hand, in most countries and in several EEC countries, it is not against the law for an individual to make a copy or a limited number of copies of a phonogram or videogram for his or her private use. Private copying of phonograms or videograms is not permitted in Ireland and the United Kingdom. However, even if it is against the law, it has already been pointed out that normal methods of enforcement appropriate for piracy are wholly inappropriate for private copying. The problems of detection are overwhelming and serious efforts to detect private copying would give rise to an unacceptable invasion of privacy and be socially undesirable.

1.5.4 Copying for Educational, Institutional or Office Use

1.5.4.1 Non-private copying of phonograms and videograms is undertaken by many public and private organisations. Such recordings are made not for the personal use of the person making the recordings nor for that of his or her domestic circle, but for internal, business use within an office or firm, use within an educational establishment, use for archival or library purposes and use by a public service or other defined group. This kind of use is sometimes referred to as "semi-public use". (32) While such use is non-commercial in the sense that it is not done for sale to the public, it has commercial implications in that it is done partly for convenience but also in most cases to save the cost of purchasing the legitimate recording.

1.5.4.2 Whether or not this activity is illegal will depend on the law of each country and the exceptions permitted to the reproduction right under national laws.

1.5.4.3 A detailed examination of the law relating to this topic falls outside the terms of reference of this study. It is a huge subject of the greatest importance which merits in-depth research in its own right. Different considerations may apply, for example, to educational use and business use. Important and controversial issues arise (the public interest, enforceability of private rights within institutions, public access to information, etc.).

1.5.4.4 No up-to-date information on the extent of copying by educational or other public institutions is available. However, an indication of the size of the problem can be gauged from figures relating to secondary schools submitted by the Council for Educational Technology of the United Kingdom to a government committee in 1975. According to these figures, already by the year 1972-73, over 97% of secondary schools in the United Kingdom had audio recorders and 23% had video recorders. (33)

1.5.5 Reprography

1.5.5.1 It may also be useful to draw a distinction between private copying and reprography. Reprography is the term which has come to be used to denote the practice of photocopying texts. It refers to the case where an individual makes a photocopy of a text from a book, periodical or other publication, or of sheet music, for his own personal use. It also refers to the equally prevalent custom of making a number of photocopies for non-commercial use for use within an office, a firm, an educational establishment, a public service or other defined group. The availability of photocopying machines has made this practice very common and there is no doubt that authors' and publishers' economic interests are being badly damaged by reprography.

1.5.5.2 The problems arising from reprography are not the specific subject of this study. It is important to recognise, however, as the Commission of the European Communities has done, that the practices of private copying and reprography are both consequences of technical progress and pose closely related, although not identical, legal problems. There is a major difference, however, and that is that private copying is in the main exactly that: copying of almost exclusively copyright material for personal use by a private individual in the home. The bulk of photocopying is done by institutions and offices and much of what is copied is non-copyright material. While vast numbers of private individuals have audio and video reproduction equipment at home, they do not possess photocopying machines for personal use.

1.5.5.3 The Commission's Communication to the Council of 22 November 1977 on "Community Action in the Cultural Sector"⁽³⁴⁾ includes recommendations regarding both private use and reprography; concerning reprography the Commission referred to the massive photocopier boom and stated:

'Duplicators (photocopiers, microcopiers) are now extensively used in libraries, schools, universities, research institutes, documentation centres, etc., and it is only a matter of time before individuals also buy and use copiers as commonly as tape recorders. This poses the difficult problem of establishing a balance between the interests of users and the need for authors and publishers to obtain a reasonable return for their work. Whilst it is true that what is in the interests of users often also aids the spread of culture, one cannot discount the risk, particularly with regard to books and high-quality magazines, of a reduction in the numbers printed, which would in turn lead to a fall in publishers' revenue and, as a result, in authors' remuneration. If a large number of authors and publishers were unable to continue, then the copier would ultimately be the victim of its own prodigious success - it would suffer the consequences of having killed off the publications which provided its originals...'

The Commission went on to recommend that:

'as regards the reproduction of the written word ... a sum ought to be included in the selling price of equipment ... and the material they use ... to guarantee the remuneration which authors, publishers, and performers are entitled to expect (and must not be denied) ' ...

and suggested that the sum could be based on a percentage of the retail price. Moreover, as regards the use of large-scale reproduction equipment (by libraries, universities, etc.) the Commission proposed that

'a periodic fee could be charged on top of that paid at the time of purchase or rental'.

1.5.5.4 The problem of reprography has also been the subject of study and discussion by the Executive Committee of the Berne Union⁽³⁵⁾ and the Intergovernmental Committee of the Universal Copyright Convention.⁽³⁶⁾ A series of joint meetings of these Committees was held in the late 1960s⁽³⁷⁾ which culminated in a meeting on the reprographic reproduction of works protected by copyright held in Washington in June 1975. At the conclusion of the discussions, separate but parallel draft Resolutions were adopted and

subsequently approved by the Executive Committee of the Berne Union and the Intergovernmental Copyright Committee at their meeting in December 1975. These resolutions concluded that:

'a uniform solution at the international level could not be found for the time being, and that the States party either to the Berne Convention or the Universal Copyright Convention should seek, with a view to reconciling, where necessary, the needs of the users of reprographic reproductions with the rights and interests of the authors, a solution based on certain principles, namely, that it was for each State to resolve the problem by adopting any appropriate measures which, while respecting the provisions of the said Conventions would establish whatever was best suited to its educational, cultural, social and economic development, and that, in States where the use of reprographic reproduction processes was widespread, consideration could be given, among other things, to encouraging the establishment of collective systems to exercise and administer the right to remuneration'.⁽³⁸⁾

1.5.5.5 However, the Sub-committees took the view that the system of imposing a surcharge or levy on equipment was not as appropriate a solution in the case of reprography as it is for audio and video reproduction equipment. Three reasons were given for this:

- 'Whereas audio and video tape recorders are used by private individuals to record musical works, reprography is employed, in many cases, to reproduce non-protected material....'
- 'Whereas sound reproduction is generally effected for personal use and is therefore lawful (in most countries), the reprographic reproduction of protected works only poses a problem in cases where, in view of the circumstances in which it is carried out -- particularly systematic reproduction or reproduction for collective purposes -- it is unlawful or, at least, presumed to be unlawful....'
- 'Those users of reprography whose activities pose a copyright problem are public teaching and research bodies and undertakings grouped together in trade organisations. It is therefore relatively easy for owners of copyright to establish relations with the users of reprography on a contractual basis, whereas in the case of sound reproduction no such possibility exists since the users constitute a

group formed by a large number of private individuals or households, with whom it is impossible to contract.'⁽³⁹⁾

- 1.5.5.6 It is to be hoped that the Commission and its Member States will, in pursuance of the recommendations referred to above, take action to ensure equitable and appropriate solutions to the problem of reprography. No doubt it will be the subject of proposals in the forthcoming "green paper" to be published by the Commission and referred to above. In "Stronger Community Action in the Cultural Sector", of 16 October 1982, the Commission again draws attention to the problem of reprography and to the fact that the Court of Justice has already spoken out against 'the breach made in legal systems for the protection of copyright by the increase in the use of reprography'.⁽⁴⁰⁾

1.6 THE CONCERN OF THE COMMISSION WITH PRIVATE COPYING

- 1.6.1 The original initiative as regards the approximation of the intellectual property laws of the EEC Member States came from the European Parliament in the context of measures designed to protect the European cultural heritage. In its resolution of 13 May 1974, the Parliament requested the Commission to propose measures to be adopted by the Council for the approximation of national laws on 'the protection of the cultural heritage, royalties and other related intellectual property rights'.⁽⁴¹⁾

- 1.6.2 The Commission's recognition of the seriousness of the problem of private copying and its pre-occupation with the need for action to counter its negative effects was first made public in 1977, in the Commission's Communication to the Council dated 22 November 1977, entitled "Community Action in the Cultural Sector". A programme for harmonisation of laws on copyright and related rights was already envisaged at that time and the document referred, in particular, to the need to tackle the consequences of technical progress, including the question of providing compensation to right owners for unauthorised private copying (and reprography):

'As regards the reproduction of the written word, sounds and images, a sum ought to be included in the selling price of equipment (photocopiers, tape recorders, video recorders) and the material they use (photocopy papers, tapes) to guarantee the remuneration which authors, publishers, and performers are entitled to expect (and must not be denied); it could be based on a percentage of the retail price. For example, when purchasing equipment or materials,

users could pay a fixed fee which would cover subsequent utilization coming under the heading of copyright (including publishers' rights) and performers' rights.'⁽⁴²⁾ (emphasis added)

1.6.3 The difficulties faced by producers, in this case in the audio-visual field, as a result of the proliferation of new copying techniques combined with the introduction of cable and satellite transmissions were high-lighted in a written question from a Member of the European Parliament to the Commission.⁽⁴³⁾ On behalf of the European Federation of Audio-visual Producers, Mr Beyer de Ryke called for national and European legislation establishing the producer's right to a royalty on sales of videocassettes and tapes for recording. By way of reply, the Commissioner acknowledged the problems created by the development of audio-visual reproduction techniques and confirmed that these were being carefully studied by the Commission with a view to formulating its position.

1.6.4 The most recent expression of the Commission's concern with private copying and with its damaging influence on the cultural and economic life of the Community is to be found in "Stronger Community Action in the Cultural Sector", already referred to. The Commission expresses the view that

'cultural workers must especially be protected against the adverse effects of the development of techniques for the reproduction and transmission of the written word, sound and vision'.

Explaining the specific measures envisaged to improve the living and working conditions of cultural workers and its plans for harmonisation of laws on copyright and related rights, the document states:

'Because of its impact on employment, technological development has been seen to impoverish those who hold these rights (authors' and performers' rights). The general depression of their standard of living is in a large part due to the anachronisms of legislation, which is trailing well behind technology... There is also the problem of private recording by individuals using the latest reproduction techniques, a problem which will grow with the increase in the number of programmes offered in the home: cable networks, local television and, shortly, satellites.'⁽⁴⁴⁾

It continues:

'The measures being prepared will modernise the legislation so as to give authors and interpreters better protection against the adverse effects of technological development on their employment and their remuneration.'⁽⁴⁵⁾

In this document, the Commission would appear to have overlooked the damage that private copying is doing to the interests of producers of phonograms, producers of videograms and film producers. The terms of reference of this study, however, which refer to the gap opened by private copying in the legal systems of protection of the rights of authors, the performing artists and the producers, make it quite clear that the Commission does recognise that the producers' interests are damaged and require protection.

- 1.6.5 Although the question of private copying has arisen in the context of the Commission's examination of the economic and social difficulties facing the cultural sector, it cannot be too strongly emphasised that the cultural sector is simply those persons and undertakings involved in the production and distribution of cultural goods and services and that the issue is therefore of tremendous economic, as well as cultural, significance. In the absence of any specific exception in respect of goods and services protected by copyright, the provisions of the Treaty apply in the same way as to the production and distribution of any other goods and services. Moreover, before legislative action by the Commission can be undertaken, two fundamental obstacles must be overcome. Firstly, the legal powers necessary for action must exist in the Treaty, and, secondly, a crucial economic need for legislative action must be proven. The first question is dealt with later in this study (see 8.1.1 to 8.1.4) and the fundamental purpose of the entire study is to clearly demonstrate the legal need and the economic case for the implementation of a royalty on recording equipment and media. The cultural sector is composed not only of individual authors and performers, but also of entire industries which represent a substantial economic sector of the Community. The continued existence of these industries, and hence the livelihoods of individual authors and performers, depends upon effective copyright protection for the goods and services they supply. For these economic reasons, the Commission must reinforce the concern it has expressed by adopting specific measures to deal with the problems facing these industries, and in particular, with the problem of private copying.

1.6.6 Commenting on the Commission document "Community Action in the Cultural Sector", the European Parliament expressed its satisfaction that the report had been produced, but deplored 'the absence of a timetable for the introduction and implementation of the practical measures envisaged'.⁽⁴⁶⁾ This study, it is submitted, provides conclusive evidence of the urgent need for legislative action by the Commission.

1.7 THE INTERESTS PREJUDICED BY PRIVATE COPYING

1.7.1 Private copying interferes with the fundamental, primary right of owners of copyright and related rights to control the reproduction of their works and other copyright material. The reproduction right is the rock upon which the copyright system is built, enabling as it does right owners to authorise or prohibit the making of copies of their works. The person who makes a copy in his home of a record, a pre-recorded audio or video cassette, a videodisc or of a radio or television broadcast acquires, so far as the rights embodied in the copyright material copied are concerned, the same thing as he would acquire by purchasing a lawfully marketed pre-recorded audio or video cassette or disc.

1.7.2 There are five principal classes of persons whose rights may be abused and interests prejudiced by private copying of sound and audio-visual recordings:

- producers of phonograms;
- owners of copyright in cinematographic works (film producers, videogram producers, and/or co-authors);
- authors and composers;
- performers;
- broadcasting organisations.

1.7.3 It may be useful to define these five classes of persons in accordance with the meanings generally ascribed to them under the law of the copyright and related rights conventions.

1.7.3.1 Producers of phonograms are the persons who, or the legal entities which, first fix the sounds of a performance or other sounds. The original producer or his licensee is responsible for the production of the original sound recording and for making legitimate copies of it available for sale to the public for domestic use.

- 1.7.3.2 Owners of copyright in cinematographic works vary according to the legislation of the country where protection is claimed. In some Member States of the EEC, for example, Ireland and the United Kingdom, the film producer owns the copyright in his film. Other legislations include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, including the author of the script, scenario, musical work, as well as the film director, cameraman, etc. Those considered as co-authors vary from country to country. However, under many such legislations, there is a presumption that the producer is entitled to exploit the film for a limited period of years and, in others, the producer benefits from a cessio legis of the rights of the co-authors.
- 1.7.3.3 A film producer may be defined as the person who, or the legal entity which, is responsible for undertaking the arrangements necessary for the making of a film.⁽⁴⁷⁾ Film producers (and their licensees who distribute films on video) are also affected by private copying because, at present, a large proportion of the video programmes marketed in the form of videocassettes and discs is film repertoire. It is standard practice for films to be marketed first by way of theatrical exploitation and, thereafter, to be licensed successively for television, cable distribution and video distribution.
- 1.7.3.4 It may be useful to distinguish a producer of videograms from a film producer. He is the person who, or the legal entity which, first fixes the audio-visual programme for video exploitation. The primary use of the programme is video. The original producer or his licensee is responsible for making the original audio-visual work and for making legitimate copies of it available for sale to the public for domestic use.
- 1.7.3.5 "Authors" in the present context means all those authors whose works are used in the production of phonograms, films, videograms, or other audio-visual programmes, which may be privately copied from pre-recorded audio and audio-visual cassettes and discs. These may include authors of musical works (including composers, lyric writers, arrangers, etc.), authors of literary and dramatic works (including authors of books adapted for film or video, playwrights, scriptwriters, etc.) and authors of visual works such as scenery, costumes and other artwork. Finally, the term "author" includes those entities to which various authors' rights have been assigned, particularly publishers.

- 1.7.3.6 Performers are defined as actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. (48)
- 1.7.3.7 Broadcasting organisations means organisations which broadcast, that is, transmit by wireless means for public reception sounds or images and sounds. (49)
- 1.7.4 Private copying of copyright works, whether from a live performance, a broadcast or a pre-recorded audio or video cassette or disc, prejudices the rights of authors and their publishers.
- 1.7.5 Private copying of a sound recording, audio-visual recording, or film is an abuse of the producer's rights (or, in the latter case, of the rights of the owner of the copyright in the cinematographic work) and those of his licensee, if any.
- 1.7.6 Private copying of any sound or audio-visual recording of a musical or dramatic performance, whether or not the work performed is protected by copyright, is detrimental to performers.
- 1.7.7 In all these cases, private copying means a loss of income for those involved. Use is made without payment of copyright works, music, phonograms, cinematographic works, videograms, and broadcasts. Neither the copyright owners nor the performers concerned are paid for the additional utilization of their work, while producers suffer loss. There is no reason why consumers should benefit from technical developments at the expense of these creative right owners.
- 1.7.8 Authors and performers depend for a substantial part of their income on the entertainment industries to use and reward their services, whether it be the recording industry, the film industry, the video industry or the broadcasters. All these interests are adversely affected by private copying to the detriment of authors and performers and, ultimately, of consumers.
- 1.7.9 The damage to performers and the recording industry has been described as follows:

'The fact is that private copying is today no longer a harmless affair. It inflicts enormous damage upon creators, performers and producers of phonograms and videograms. It has been estimated that the loss caused to the British phonogram industry in 1980 amounted to £200 million. Surveys made in Japan have shown that 'hit' music is copied privately four or five times as frequently as the corresponding discs

are bought. Statistics from the Federal Republic of Germany indicate that writers and composers alone are suffering an annual loss of royalties amounting to some DM 80 million.

For the performers there is even more at stake. For them it is not only a matter of a loss of residual payments or royalties which they would receive in respect of the sale of phonograms and videograms, but their profession itself is endangered. Products of the media and music industries are visibly supplanting the professions of performers. Their further personal performances are no longer required when their artistic productions are available more cheaply and more easily in 'canned' form. Of equal importance, however, is the fact that the losses of the phonographic industry, due to the fact that private recording is primarily in the sector of the most successful popular records, results in their being less willing and less able to invest in productions which are from the start of limited market appeal but nonetheless may be more important from the cultural point of view. It is a known fact that it is thanks only to the profitable 'hits' that the broad spectrum of records can be produced, of which many are unprofitable. Independently of the personal fate of artists who thus suffer under-employment or unemployment, this development is not without its effect upon their profession as a whole and on the cultural life of each country. Uniformity and impoverishment of culture are inevitable consequences, even though they may be less susceptible of measurement and quantification than are the material losses.' (90)

- 1.7.10 The effect of private copying on the film industry also gives cause for alarm.

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

1. In that of exhibition at cinema theatres.

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

The possibility of such 'second showings' will be definitively lost when it is possible

for the cinematographic work to be copied by a large number of viewers when first shown by a broadcasting organization.

2. In that of broadcasting itself.

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

3. In that of videogram distribution.

It will be practically impossible to hire out or sell videocassettes or videodiscs of a film where this has been already copied on videogram by a large number of viewers when shown by a broadcasting organization. This situation is liable to compromise the amortization of the very considerable investments called for by cinematographic production and it is therefore the very continuation of cinematographic creation that is at stake.'⁽⁵¹⁾

1.7.11 As far as broadcasting organisations are concerned, to the extent that they hold exclusive rights in their own productions -- as authors or producers of original phonograms or telefilms -- it is evident that they too suffer from private copying. Moreover, broadcasters enjoy the right to authorise or prohibit the fixation and reproduction of unauthorised fixations of their broadcasts under the Rome Convention (Article 13) and under the European Agreement on the Protection of Television Broadcasts (Article 1(d)).⁽⁵²⁾

1.7.11.1 It has been pointed out by a representative of the European Broadcasting Union that 'the marketing of (broadcasters' programmes) in the form of phonorecords, sound cassettes, videocassettes, videodiscs, etc., will be less and less profitable the more private individuals make their own recordings of programmes that are of particular interest to them'.

1.7.11.2 Furthermore: 'to the extent that broadcasters hold exclusive -- original and/or derived -- rights in their television programmes, the opportunity for marketing the latter by way of pay-television, pay-cable and similar communication channels will diminish in so far as the programmes in question have been privately recorded (by) potential customers during the earlier broadcast'.⁽⁵³⁾

FOOTNOTES TO CHAPTER 1

- (1) 'Phonogram' is defined in Article 3 (b) of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), Rome 1961, and Article 1(a) of the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (Phonograms Convention), Geneva, 1971, as follows:
- 'Phonogram means any exclusively aural fixation of sounds of a performance or of other sounds.'
- (2) Videogram : "a term frequently used to denote all kinds of audiovisual fixations embodied in cassettes, discs or other material mediums" (WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights. Geneva, World Intellectual Property Organisation (WIPO), 1980, p.262)
- (3) E. Piola - Casselli, Trattato del diritto di autore e del contratto di edizione. Turin, 1927, p.424.
- (4) D. Ladd, Private Use, Private Property and Public Policy: Home Recording and Reproduction of Protected Works. Advance text from Yearbook 1983 of the International Copyright Society, p.75. Vienna, Manz'sche Verlags - und Universitätsbuchhandlung, 1983.
- (5) Whitford Report, Chairman The Honourable Mr. Justice Whitford: 'Copyright and Designs Law, Report of the Committee to consider the Law on Copyright and Designs' (UK). London, HMSO, March 1977 (Cmnd 6732), paragraph 23, p.6.
- (6) (a) Private copying is not permitted:
- i. of works in Belgium (Copyright Law, 1866, as amended 1958)
there is no specific legislation protecting producers of phonograms;
 - ii. of works or phonograms in Ireland (Copyright Act, 1963);
 - iii. of works in Luxembourg (Copyright Law, 1972, Article 11);
 - iv. of works or phonograms in the United Kingdom (Copyright Act, 1956, as amended 1983); (cf. Whitford Report, op. cit., paragraph 296).

- (b) Private copying is permitted:
- i. of works and phonograms in Denmark (Copyright Law No. 158, 1961 as amended 1977, Articles 11 and 46);
 - ii. of works and phonograms in the Federal Republic of Germany (but right owners have the right to claim compensation for private copying) (Copyright Law 1965 as amended 1974, Article 53, and see Chapter 4, paragraph 4.4.3.6 of this study);
 - iii. of works in France (Law No. 57-298 on Literary and Artistic Property 1957) - there is no specific legislation protecting producers of phonograms;
 - iv. of works in Italy provided the copies are 'made by hand or by a means of reproduction unsuitable for circulating or diffusing the work in public' (Law for the Protection of Copyright and Other Rights Connected with the Exercise Thereof, 1941 as amended 1981, Section 68);
 - v. of phonograms in Luxembourg (Law on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1975, Article 13(1));
 - vi. of works in the Netherlands (Copyright Law, 1912, as amended 1972) - there is no specific legislation protecting producers of phonograms.
- (7) Whitford Report, op. cit., paragraphs 83 and 84.
 - (8) For list of audio surveys, see Appendix 1.
 - (9) Producer of phonograms is defined in the Rome and Phonograms Conventions as : 'the person who, or the legal entity which, first fixes the sounds of a performance or other sounds' (Rome, Art. 3(c), Phonograms, Art. 1(b)).
 - (10) The Home Video Revolution in West Europe, London, Economist Intelligence Unit (EIU), Special report, No. 144, April 1983. p.95.
 - (11) For list of video surveys, see Appendix 2.
 - (12) See Chapter 2, paragraph 2.2.2.5.
 - (13) BPI Yearbook 1982, p.15.

- (14) K. Fohrbeck and A. Wiesand, *Musik, Statistik, Kulturpolitik. Daten und Argumente zum Musikleben in der Bundesrepublik Deutschland*. Published on behalf of the German Music Council and on behalf of the Federation of Producers of Musical Instruments. Köln, DuMont Buchverlag, 1982.
- (15) G. Davies, *Piracy of Phonograms*. A study prepared for the Commission of the European Communities. Oxford, ESC Publishing, 1981. (Commission Document No. XII/235/80).
- (16) The International Federation of Producers of Phonograms and Videograms (IFPI) and its National Groups and affiliated organisations represent over 600 members in 68 countries (June 1983).
- (17) Sources : British Phonographic Industry (BPI) Yearbook, London, 1982, Economist Intelligence Unit Surveys; Billboard; Music and Video Week; Screen Digest; Video Pro. (France); Association of IFPI National Groups in the European Communities.
- (18) The Home Video Revolution in West Europe, op. cit., p.32.
- (19) Ibid., p.34
- (20) Music and Video Week, 'Video Extra', February 1983, p.4-14.
- (21) A study on the UK Market for Home Video Products. London, The Economist Intelligence Unit (EIU), June 1982, p.203.
- (22) The Home Video Revolution in West Europe. op. cit., p.101.
- (23) G. Davies, op. cit., paragraph 1.2.1.
- (24) Commission Communication to the Council, sent on 22 November 1977. Bulletin of the European Communities. Supplement 6/77. Luxembourg, Office for Official Publications of the European Communities, 1977, paragraph 20, p.12.
- (25) For a detailed explanation of the problem of piracy in the EEC countries and the relevant legislation see : G. Davies, 'Piracy of Phonograms'. op. cit. (see footnote 15).
- (26) Com(82) 590 final, 16 October 1982.
- (27) Ibid. - Annex II, p.1, item 3.

- (28) Adopted in Rome on 26 October 1961 and adhered to by Denmark, The Federal Republic of Germany, Ireland, Luxembourg and the United Kingdom.
- (29) Adopted in Geneva on 29 October 1971 and adhered to by Denmark, France, the Federal Republic of Germany, Italy, Luxembourg and the United Kingdom.
- (30) Berne Convention, Article 9.
- (31) Berne Convention - Article 2(1); see also Report of the Meeting of the Sub-committee of the Executive Committee of the Berne Union and the Sub-committee of the Intergovernmental Copyright Committee of the UCC. Paris 13-19 September 1978 (Doc. B/EC/SC.1/VAD/5-IGC/SC.1/VAD/5); Report of the Subcommittee of the Intergovernmental Committee of the Rome Convention. Paris, 18-20 September 1978 (Doc. ICR/SC.1/VAD/5); G. Davies, Legal Problems Deriving from the Use of Videograms. Copyright, October, 1979, p.257.
- (32) G. Koumantos, Music piracy and recording of music by consumers. Paper presented at Council of Europe's Conference : The State's role vis-à-vis the Culture Industries. Strasbourg, 28-30 April 1980 (Council for Cultural Co-operation Doc. CC-CONF-IC5-E.), p.176.
- (33) Whitford Report, op. cit., paragraph 314.
- (34) Bulletin of the European Communities, op. cit., paragraph 24.
- (35) The Executive Committee of the Berne Union was set up under Article 23 of the Berne Convention.
- (36) The Intergovernmental Committee of the Universal Copyright Convention was set up under Article XI of the UCC.
- (37) Reports of: UNESCO/WIPO Committee of Experts on the Photographic Reproduction of Protected Works. Paris 1-5 July 1968. (Doc. RP/9); UNESCO/WIPO Working Group on Reprographic Reproduction of Works protected by Copyright. Paris, 2-4 May 1973. (Doc.: UNESCO/WIPO/R.P. 2/6) ; Executive Committee of the Berne Union and Intergovernmental Copyright Committee, Paris 5-11, December 1973 (Doc. B/EC/VI/10 and IGC/XII/17.)

- (38) Sub-committees of the Executive Committee of the Berne Union and of the Intergovernmental Copyright Committee on the reprographic reproduction of works protected by copyright, Washington D.C., June 16 to 21, 1975, Copyright, August 1975, p.159-176; Executive Committee of the Berne Union and the Intergovernmental Copyright Committee, December 1975. In "The Berne Union and International Copyright and Neighbouring Rights in 1975". Copyright, January 1976, p.15-16.
- (39) A. Kerever, The International Copyright Conventions and Reprography. Copyright, July-August 1976, p.196; See also report of Sub-committees, loc. cit.
- (40) Case 90/79, judgement of the Court of 3 February 1981. Commission of the European Communities v. French Republic. ECR (1981-2) 283-315, Item 16, p.302.
- (41) Resolution of the European Parliament on the motion for a resolution submitted on behalf of the Liberal and Allies Group on measures to protect the European cultural heritage. Official Journal of the European Communities No. C62, 30.5.1974. p.5.
- (42) Op. cit., paragraph 24, p.13.
- (43) Written Question No. 1683/81 of 1 February 1982 by Mr Beyer de Ryke to the Commission of the European Communities. Official Journal of the European Communities No. C92, 13.4.1982. p.40.
- (44) Com(82) 590 final, p.10 and Annex II, p.1 paragraph 3.
- (45) Ibid., Annex II, p.1, paragraph 3.
- (46) Resolution of the European Parliament on Community Action in the Cultural Sector. Official Journal of the European Communities No. C79, 5.4.1976. p.6.
- (47) c.f. United Kingdom Copyright Act 1956, Section 13(10).
- (48) c.f. Rome Convention Art. 3(a). It should be noted that the expression 'literary or artistic works' embodied in the Rome Convention takes its inspiration from Article 2(1) of the Berne Convention where this expression is defined as including 'dramatico-musical works and musical compositions with or without words'.
- (49) c.f. Rome Convention, Art. 3(f).

- (50) Statement by the I.F.A. (F.I.A.) International Federation of Actors and I.F.M. (F.I.M.) International Federation of Musicians entitled 'The Problems of Private Copying - Seen from the Standpoint of the Performers'. Copyright, July-August 1982, p.222-226.
- (51) Statement of the International Federation of Associations of Film Distributors (FIAD) and the International Federation of Film Producers' Associations (FIAPF), entitled 'Problems arising from the private copying of audio visual works'. Copyright, loc. cit., p.220--221.
- (52) Adopted in Strasbourg on 22 June 1960. Protocol to the Agreement of 22 January 1965 and Additional Protocol of 14 January 1974. Adhered to by i.a. Belgium, Denmark, France, Federal Republic of Germany and the United Kingdom.
- (53) Statement of the European Broadcasting Union - 'Private Recording of Radio and Television Broadcasts: The Broadcasters' Case'. Copyright, loc. cit., p.213.

CHAPTER 2 COMPARATIVE STUDY OF THE INCIDENCE OF PRIVATE COPYING OF SOUND AND AUDIO-VISUAL RECORDINGS IN THE MEMBER STATES OF THE EEC⁽¹⁾

2.1 MARKET DEVELOPMENTS

The impact of private copying of phonograms and videograms has to be considered in the context of current market developments in the audio and video industries.

2.1.1 Blank Audio Tapes

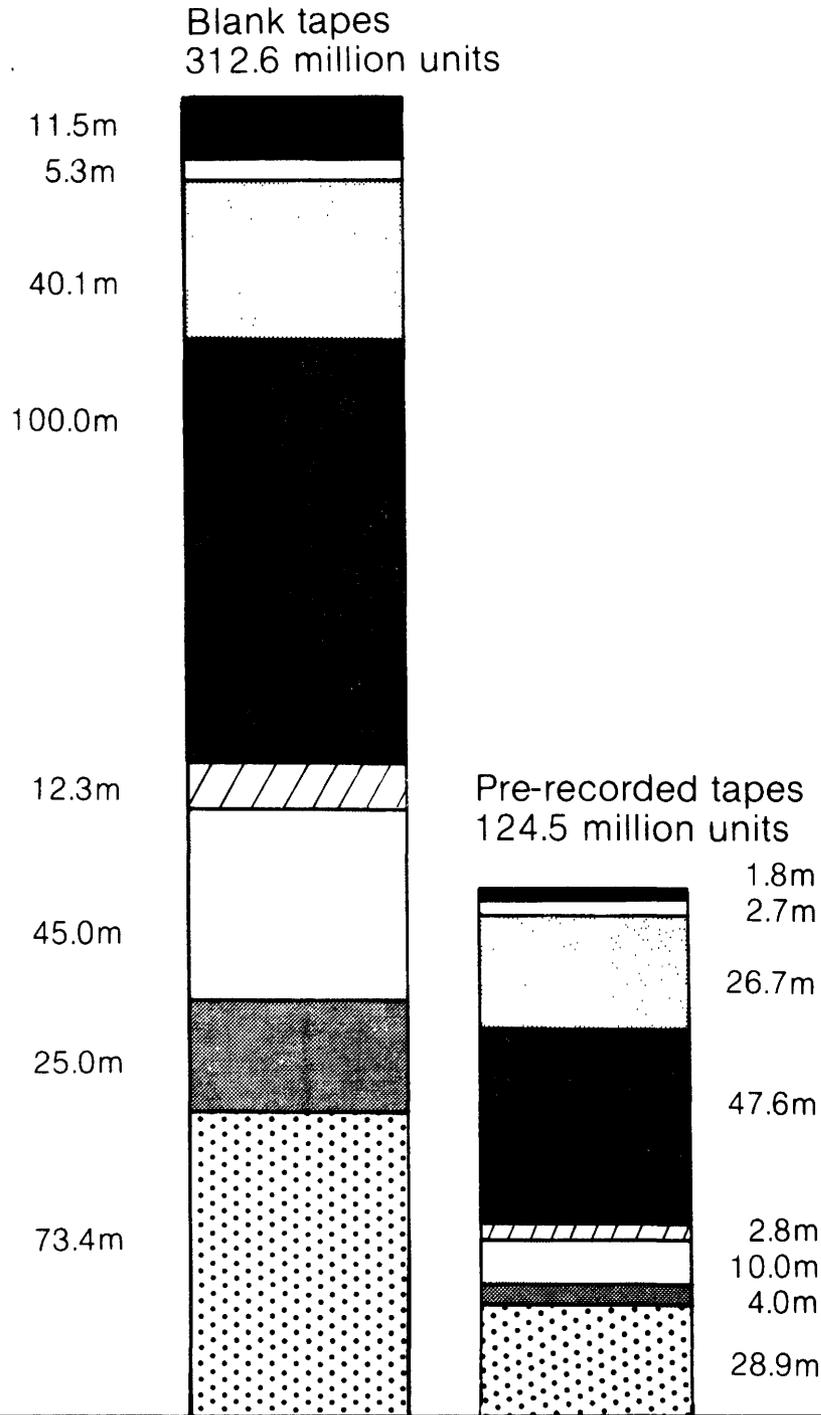
Since the mid-seventies, the penetration of recording equipment in the households of the EEC has been increasing very rapidly and this in turn has led to a similar increase in sales of blank cassettes.

2.1.1.1 Sales of blank cassettes (Annex 5) in all countries exceed by far sales of pre-recorded cassettes (Figure 4). In some countries, such as Belgium and the Netherlands, the number of blank tapes sold in 1981 was as much as 6 times higher than sales of pre-recorded tapes. In other EEC countries, the sales ratio is between 2 and 3 to 1 in favour of blank tapes. Sales of blank cassettes have shown a very steady increase over the past 10 years. In the Federal Republic of Germany, for instance, sales of blank cassettes have increased from 27 million units in 1972 to approximately 108 million in 1982. During this period, sales of pre-recorded cassettes increased from 6 million to 51.1 million. Whereas it took 10 years for pre-recorded cassettes to reach this level, blank cassettes attained similar unit sales within 5 years (Annex 6). The United Kingdom is another example of growth in the blank tape trade. Sales of blank cassettes have risen from 43 million units in 1977 to over 73 million in 1981 whereas sales of pre-recorded cassettes stood at only 28.9 million units during that year. These disparities are in fact much greater than they first appear when it is realised that most blank cassettes sold have a duration of 90 minutes on which approximately 2 LPs can be recorded. In the United Kingdom, 70-80% of all blank tapes sold have a duration of 90 minutes and the remaining 20-30% have a duration of 60 minutes. Cassettes lasting 2 hours now only represent a negligible part of the market. The public preference for C90s is also confirmed in Germany where it has been calculated that the average playing time of a blank cassette is 76 minutes.

FIGURE 4

SALES OF BLANK AND PRE-RECORDED AUDIO TAPES IN THE E.E.C.

Year 1981



- | | |
|--|--|
|  Belgium |  Greece |
|  Denmark |  Italy |
|  France |  Netherlands |
|  Germany (FR) |  United Kingdom |

See Annexes 2 & 5

(Ireland and Luxembourg not included)

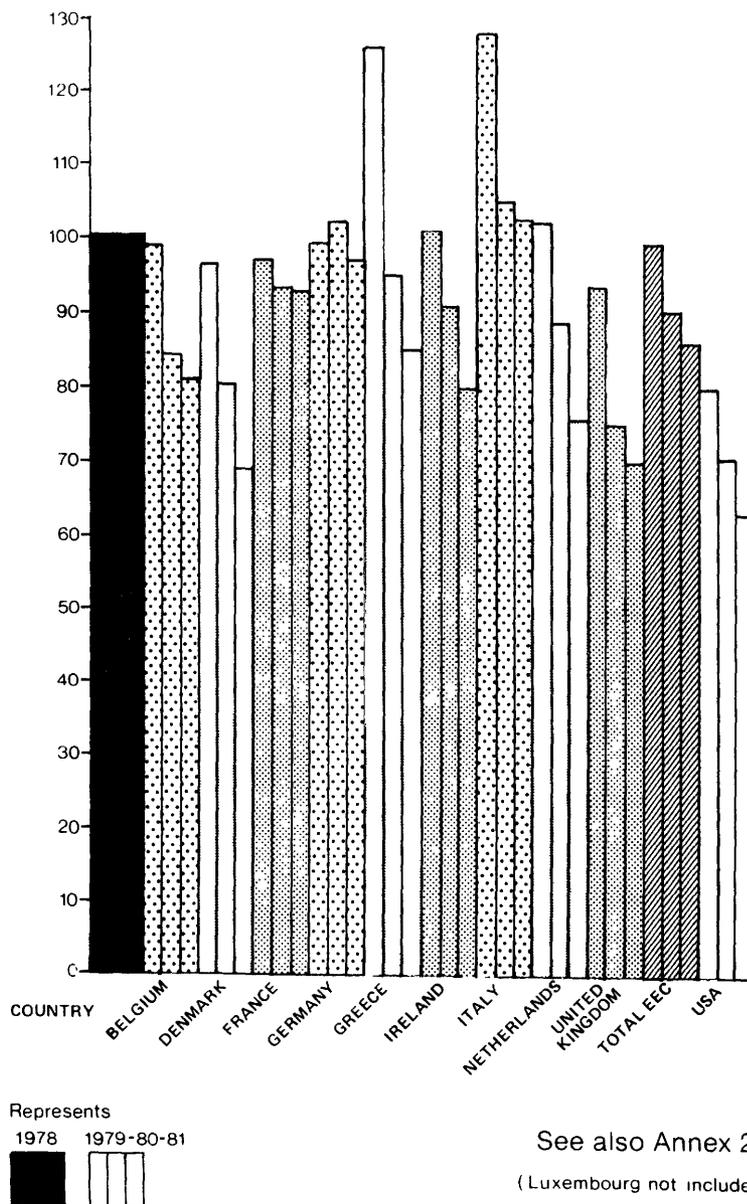
- 2.1.1.2 The "boom" in the blank tape industry cannot be said to provide many jobs in the EEC. In Germany, which is the only EEC country where domestic production of blank tapes is very significant, it has been estimated that less than 500 employees are needed to produce 100 million units per year.⁽²⁾ The manufacturing process in this sector is highly mechanized, whereas the production of phonograms and their fixation requires several stages of production. The latter involves highly skilled recording producers, arrangers and engineers, in addition to artists, before the resulting fixation can be duplicated in the manufacturing stage and a record or tape can finally be put on the market. At the retail level, the blank tape industry creates an insignificant number of jobs. There are no shops specializing in the sale of blank tapes which are usually merely picked up from the shelves of supermarkets and stores by the consumers. By contrast, many shops specialize in selling records and pre-recorded tapes and employ staff to give advice and assist customers to choose the right product. In Germany alone, 25,000 people are employed in the retail trade of pre-recorded product.
- 2.1.1.3 The blank tape industry does not even benefit the balance of trade of the EEC since the vast majority of blank cassettes are imported. In the United Kingdom, for instance, the only significant manufacturer of blank tapes ceased operations in 1980. Up to that time, EMI had accounted for approximately 6% of UK supplies but, since the closure of its plant, virtually all blank tapes sold in the United Kingdom have been imported.⁽³⁾ In the Netherlands, all blank tapes sold are also imported. The situation is very similar in France and Italy where the great majority of blank tapes sold on the domestic market are imported. Germany is the only EEC country which has a significant local production and a healthy positive balance of trade for this commodity. However, it should be noted that the majority of Germany's exports are to other EEC countries and that it has a deficit in its balance of trade for this product with countries outside the EEC. This deficit has been growing over the past few years due to the increasing number of low quality and cheap blank cassettes imported from the Far East (Annex 7).
- 2.1.1.4 It is clear, therefore, that the sales of blank tapes in no way benefit the economy of the European Community but they do cause immense damage to the pre-recorded music industry as a whole.

2.1.2 Records and Pre-recorded Tapes

2.1.2.1 It is significant to note that the recording industry has been experiencing a decline in sales of records and pre-recorded tapes since 1978 in all the EEC countries; this is illustrated in Figure 5.

FIGURE 5
PERCENTAGE DECLINE IN VALUE OF SALES IN
EEC MEMBER STATES AND U.S.A.

INDEX-BASE YEAR: 1978 = 100
 related to real inflation-adjusted value of Sales in each territory



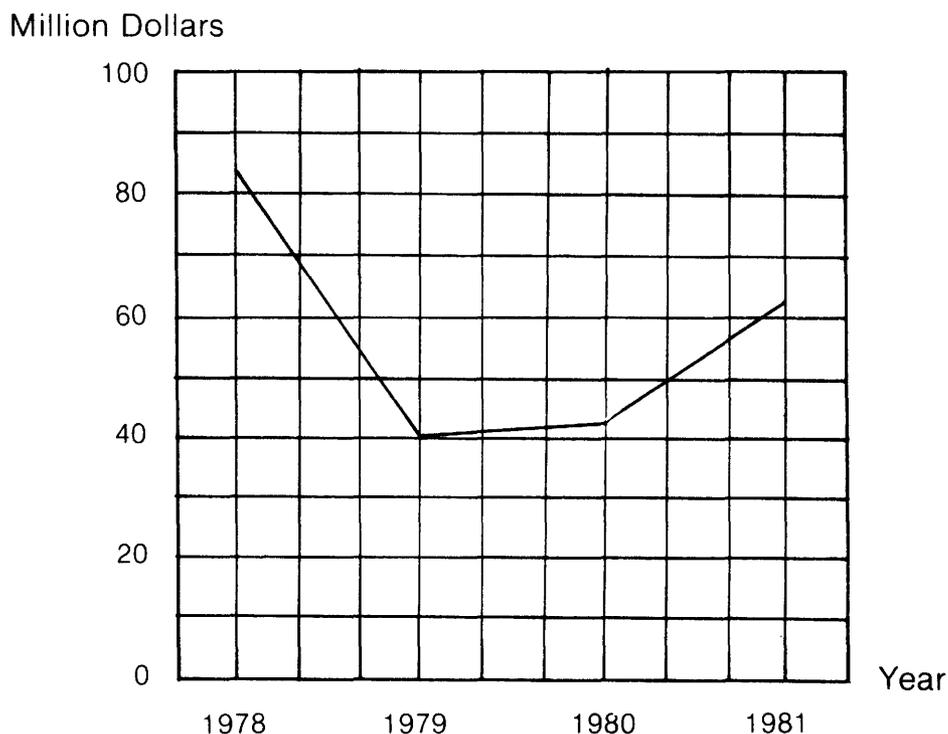
This is, of course, partly due to the general economic recession which is plaguing the western world but there is also no doubt that the extent of private copying outlined in all the surveys has had a particularly damaging impact on an industry which had until then been dynamic and prosperous. From 1971 up to 1978 there was an average annual increase of 18% in the turnover of producers of phonograms and a corresponding increase of 11% in units of records and pre-recorded cassettes sold (Annex 1). From 1978 to 1981, however, turnover increased by only 6.9% on average and, when inflation is taken into account, EEC turnover shows an average drop of 4.8% per year (Annex 2). During this period, sales of singles and LPs dropped by 2.5% and 4.5% respectively. Although cassette sales increased by an average of 4.3%, this in no way compensates for the decline in sales of LPs which in units are 50-75% higher than cassette sales (Annex 2). Results for 1982, which are just becoming available at the time of writing, do not give cause for much optimism. The Federal Republic of Germany shows a drop of 8.3% in LP sales (down to 101.9 million units) and, although music cassettes increased by 7.4% (up to 51.1 million units), there is an overall drop of 3.6%. Singles, on the other hand, showed an increase of 15.6% (54.7 million units). However, the turnover of the German recording industry dropped by 4.6% over the previous year and with inflation at 5.3% during 1982, the decline, in real terms, is far from negligible. In the United Kingdom, the total value of trade deliveries in 1982 was £272.5 million, which represents an increase of 4% over 1981. Over this period, however, the Retail Price Index rose by 8.6%. Hence there has been a further drop in the real value of trade deliveries. Sales of singles showed a slight increase of 1.7% in unit terms but the total market for long-playing carriers (LPs and cassettes) declined by 3.7%. In France, the first estimated results for the year 1982 show a modest increase of 3.5% in turnover whereas inflation stood at 11.8% during that year. In terms of units sold, singles increased by 2.5% over 1981 and cassettes by only 1%. On the other hand, LPs dropped by as much as 9% thus showing an overall decline. The worldwide recession of the late 1970s to date has resulted in an overall decline in worldwide sales of records and pre-recorded cassettes. Since 1978, there has also been a serious downturn in sales in the United States of America from US\$4.1 thousand million in 1978 to US\$3.59 thousand million in 1982, which in real terms represents a drop of over 12% per year (Annex 3).

2.1.2.2 This decline can also be noted in the external trade of the European Communities for this particular product (Annex 4). In 1978, the EEC exports of audio records and pre-recorded tapes to non-EEC countries amounted to US\$151 million and represented a net positive balance of US\$84 million. Imports from non-EEC countries increased from US\$67 million in 1978 to over US\$100 million in 1979 and 1980 and were down to US\$96 million in 1981. The balance of trade was down to approximately US\$40 million in 1979 and 1980, which is less than half the level of 1978 but recovered slightly in 1981 at around US\$62 million.

FIGURE 6

EEC BALANCE OF TRADE FOR SOUND RECORDINGS

1978 - 1981



See Annex 4

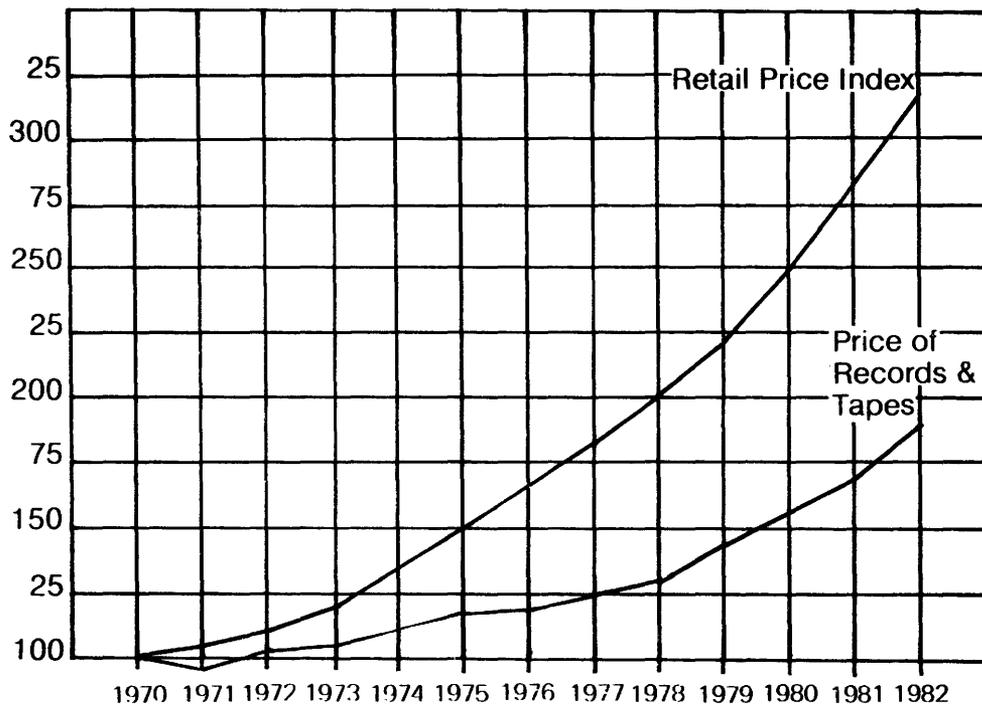
The EEC recording industry, which is the second largest in the world (just behind that of the USA), and is a significant earner of foreign currency, has declined substantially over the past three years. The slight recovery experienced in 1981 must not allow us to forget that the recording industry needs a sound base if it is to remain a strong economic asset for the European Communities.

- 2.1.2.3 In spite of the recession, falling sales and inflation, the prices of sound recordings have remained remarkably steady. Annex 8 shows that over the past 10 years prices of records and pre-recorded tapes have increased at a much slower rate than that of the retail price index in countries such as Belgium, France, the Netherlands and the United Kingdom. Figure 7 illustrates this for France.

FIGURE 7

COMPARISON BETWEEN PRICES OF SOUND RECORDINGS AND RETAIL PRICE INDEX IN FRANCE

1970 - 1982



See Annex 8

2.1.3 Blank Video Tapes

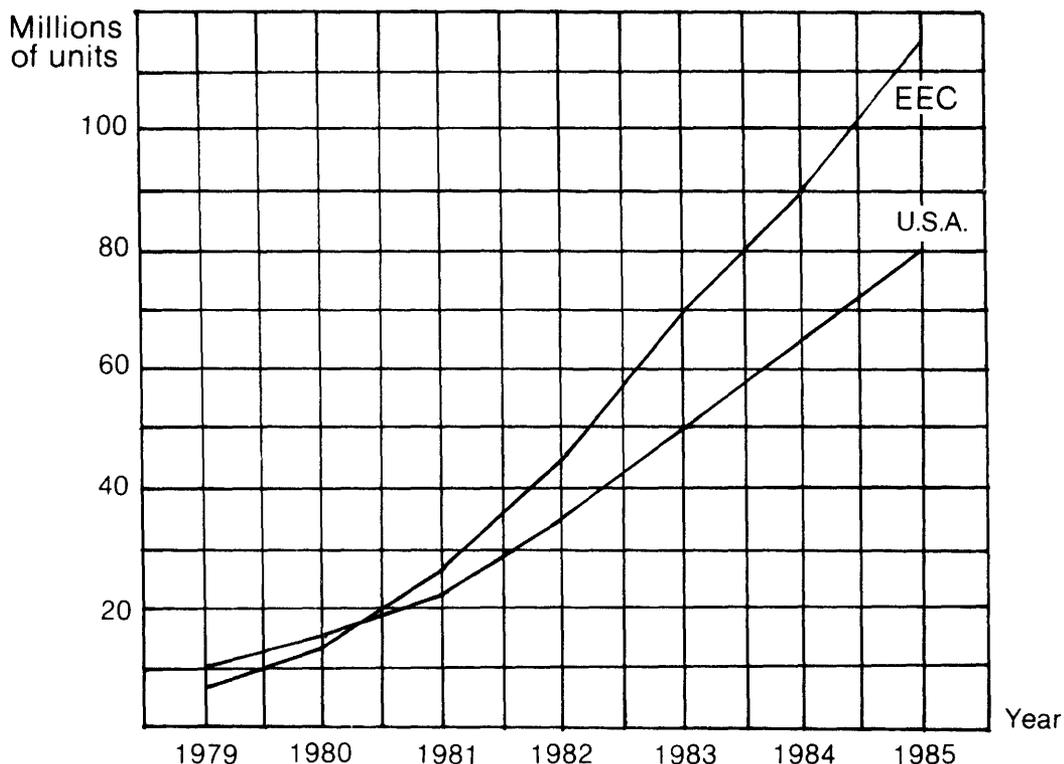
Consumer demand for video product in the major EEC markets has only become significant since 1980.

- 2.1.3.1 Since 1980, sales of video recorders have practically doubled every year in most EEC countries and an increase in sales of blank video tapes has followed very quickly. In the Federal Republic of Germany and the United Kingdom, sales of blank video tapes are particularly buoyant and were estimated at around 15 million units in 1982 in each of these two countries. Only four years ago, the market was scarcely in existence; in Germany, a mere 300,000 units were sold in 1978. France is the third largest market for blank cassettes; in 1982, an estimated 9 million units were sold. Belgium and the Netherlands are both small markets but sales of blank cassettes are reported to have reached as many as 2 million units in 1982. Total sales for the EEC are forecast to reach 70 million units in 1983 and to exceed 100 million units by 1985.

FIGURE 8

SALES OF BLANK VIDEO CASSETTES IN THE EEC AND THE U.S.A.

Estimates and Forecasts 1979 - 1985



See Annex 15

2.1.3.2 The fast rate of expansion of such a new industry in times of economic depression would be a subject for rejoicing if it were not for the fact that (as in the case of blank audio tapes) most blank video tapes, and in some countries, almost all, are imported from outside the EEC and particularly from the Far East. Japanese manufacturers are reported to supply between 60-70% of the total Western European market⁽⁴⁾ in spite of efforts by EEC manufacturers to increase their share of the market. Germany is believed to be the EEC country which has the highest production of blank video tapes although the exact figures are not known. The market is shared between three companies only and they are not obliged to publish figures. However, as regards blank video tapes, even Germany has a large deficit in its balance of trade due to large quantities of imports from countries outside the EEC. The United Kingdom is also experiencing a fast-growing deficit in the balance of trade for this particular product; its deficit amounted to only £10 million in 1979 but had reached £112 million by 1982 (Annex 16).

2.1.3.3 It is also worth noting that the majority of blank tapes sold have a duration of two to three hours and, moreover, may be re-used. This adds up to an enormous amount of potential copying especially for countries like Germany and the United Kingdom where sales were estimated at 15 million units each for 1982.

2.1.4 Videograms

2.1.4.1 Although private copying is extremely damaging for producers of phonograms, it has been a particularly acute problem for producers of videograms. Copies of phonograms appeared on the market and record and tape sales grew at a time when private copying did not exist, whereas producers of videograms have had to deal with this problem from the outset. Indeed, producers of videograms are, with the present state of legislation and trade practices, fighting a losing battle since all their investment in the creation of new programmes is promptly undermined by piracy and home taping and, as a result, most producers choose to exploit only pre-existing programmes on video in order to minimize their risks.

2.1.4.2 Sales of pre-recorded videocassettes are in fact relatively low at present in every country of the EEC and have only started to grow since 1981. In 1979, trade deliveries of videocassettes were as low as 50,000 units in France, 100,000 in the Federal Republic of Germany and 300,000 in the United Kingdom. In 1982, trade deliveries increased to 900,000 units, 1.6 million and 4.5 million

respectively. There are huge disparities in the size of the market between Member States. Compared with the three major EEC markets referred to, Belgium shows a modest sale of 340,000 units whereas Greece and Italy lag far behind with trade deliveries reported to be as low as 35,000 and 180,000 respectively (Annex 14). Italy has up to now showed very little interest in the video revolution but, with a population of over 57 million, Italy is a vast potential market. Trade deliveries of videocassettes in Western Europe in 1982 are estimated to be around 12 million units and the total software market at retail level (including sales and rentals) is valued at around \$1,125-1,250 million.⁽⁵⁾ The EEC market accounts for the vast majority of this turnover and an estimated 8 million videocassettes. Indeed, in contrast with the situation prevailing for blank tapes, the EEC is set to become one of the world's leading producers of videograms. London has become the major duplicating centre for Western Europe. In Germany, France and the Netherlands duplicating facilities are being extended. Moreover, feature films do not now represent the entire repertoire available on videocassettes. Since 1982, more original programmes are being produced especially for video such as documentaries, educational programmes and musical entertainment programmes. The video software industry is now beginning to emerge as a new cultural industry.

- 2.1.4.3 A new carrier of videograms has recently been launched on the EEC market; namely the videodisc. This medium has been available in the United States of America for the past few years (the system available is based on electrical capacitance instead of the laser system launched in Europe). The United States of America is the only country at present where sales of videodiscs are of any significance and, in 1982, videodiscs overtook sales of pre-recorded videocassettes for the first time. An estimated 6 million videocassettes were sold during that year as compared to 6.3 million videodiscs. In Europe, however, sales of videodiscs have been disappointingly low during the first year of their launch and, in January 1983, Philips announced a 25% cut-back in employment at their Blackburn plant in the United Kingdom.⁽⁶⁾
- 2.1.4.4 Videocassettes are still a comparatively expensive item for the general public to buy. Prices range from \$50-120 (F350-F900) in France and average prices are around \$60-80 in Belgium (BF3,500-4,000), Germany (DM150-200) and Greece (Dch.4,500). In the United Kingdom, videocassettes cost around \$55-65 (£35-40). Lower production costs have enabled prices to fall and in the United Kingdom and Germany it is already possible to buy videocassettes for under \$30 (£20).

If this trend continues, sales of videocassettes could increase quickly provided piracy is controlled and private copying regulated.

- 2.1.4.5 The huge disparities existing between sales of blank and pre-recorded video tapes are threatening the growth of this new cultural industry. Indeed, sales of blank videocassettes are 4 - 10 times higher than sales of pre-recorded videocassettes. Moreover, the new videodisc players enable copying from disc to tape simply by using a connecting cable. The copies obtained in this way are of a very high quality and this can only encourage further copying as the penetration of this kind of hardware increases.

2.1.5 The Rental Market

- 2.1.5.1 The video market also has its own particular features one of which is the predominance of rental over sales. In every country, rental transactions represent as much as 85-90% of retailers' activities. Rental will remain a major feature of the video business since it is a logical consequence of the nature of videocassettes; many consumers do not wish to view entertainment programmes, such as feature films, repeatedly and are therefore reluctant to pay the high sales price to acquire a videocassette and prefer to rent it. Unfortunately, producers are at present threatened by rentals since in most countries a legal framework does not yet exist to ensure that producers receive a fair share of the remuneration derived from rental transactions.
- 2.1.5.2 The number of video retail and rental outlets has soared uncontrollably over the past two years. In all the major EEC countries, there are very many outlets most of which are under-capitalised and overstocked. The trade and marketing experts consider that this situation undermines the development of a stable and healthy market.⁽⁷⁾ There are an estimated 7,000 retail outlets in the Federal Republic of Germany and double that number in the United Kingdom. This high number of outlets has led to cut-throat competition. Rental charges are extremely low and unprofitable. In the United Kingdom, overnight rental charges can be as low as \$2.5 (£1.50) and in France around \$2 (F10-12). Rental charges would need to be two to three times higher to be profitable. Indeed, it has been estimated that, in France, a videocassette needs to be rented about 50 times in order to break even (this represents a period of 3 - 4 months) and a cassette can be shown around 90 - 110 times before it deteriorates too much. On the other hand, the average commercial life of a title is only 6 months.⁽⁸⁾ As a result of this situation, many retailers are tempted to buy pirate cassettes or to copy some cassettes

themselves in order to achieve a profitable return from rentals.

2.1.5.3 Already, a fairly large proportion of people who rent videocassettes also copy the product they rent. Indeed, recent surveys⁽⁹⁾ have shown that the rental or lending of videocassettes is frequently accompanied by private copying. In the United States of America, a survey carried out in 1981 showed that 31.2% of users borrowing cassettes had copied some. In Germany, 23.5% of video users had taped cassettes they had borrowed. These figures are extremely high especially when considering that penetration of video recorders is still very low. In May 1983, penetration was around 12% in Germany and under 10% in the United States of America and double ownership in Germany represented only 1.6% of owners of video recorders. The extent of copying can only increase drastically with the fast increase in ownership of video recorders.

2.1.6 Saturation and Penetration Degrees of Audio Recording Equipment

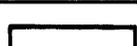
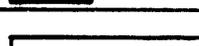
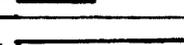
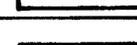
2.1.6.1 Audio recording equipment is now a very common feature of households and multiple ownership of cassette recorders is on the increase everywhere. The United Kingdom has the highest level of saturation in the EEC with 73% of households having at least one cassette player of any kind in 1980 as compared with 68% in 1979. In the Netherlands, current saturation levels stand at 67% and in France at 61%. In the Federal Republic of Germany, 69% of households had tape facilities in 1982 with an average of two per household. Even in Greece, penetration was reported to be as high as 67% in 1979.⁽¹⁰⁾ The number of recorders in households is expected to reach a point of near total saturation by the end of the century.

2.1.6.2 The forecast of penetration development of sophisticated audio equipment such as "music centres" (or "packaged systems") or rack systems ("compact systems"), (Annex 13), published by independent marketing consultants shows that penetration is increasing rapidly. Moreover, approximately 95% of such equipment has built-in recording facilities and by 1990 this proportion will reach 99%. It is also significant to note that penetration of simple record players is decreasing sharply everywhere as people tend to opt for more sophisticated audio equipment. Thus the possibility of recording music by simply pushing a button instead of using microphones or inconvenient leads can only encourage further copying of musical works and lead to a drastic increase in the level of private copying in the years to come.

2.1.7 Penetration of Video Recording Equipment

- 2.1.7.1 Over the past few years, many forecasts have been made of the increase in the number of video recorders in households. Although these forecasts may sometimes differ widely there is a general consensus on the fact that penetration will increase rapidly during this decade. The percentage of households with video equipment is still very low everywhere but there are already large differences between EEC countries. Figure 9 (and Annex 17) show estimates and forecasts on the penetration of video recorders. The United Kingdom again has the highest penetration level with 15% in 1982. Penetration in 1982 stands at 10% in the Federal Republic of Germany but is only 4.7% in France and less than 1% in Italy. In the USA, only 6.3% of households are estimated to have a video recorder.
- 2.1.7.2 One of the reasons why penetration is so high in the United Kingdom is because most of the video recorders in households are rented. In 1980, over 70% of domestic video recorders in use were installed under rental agreements. The fall in retail prices is, however, changing the balance between rental and purchase and, at the beginning of 1983, rented video recorders represented 55% of all domestic sets in use.⁽¹¹⁾ By contrast, rental of video hardware represents less than 1% in the United States of America.⁽¹²⁾ Thus, in the United Kingdom, rental promotes the consumer demand for video recorders and is expected to continue to do so throughout this decade. The opportunity to rent a set with a lower initial outlay combined with the assurance of maintenance at no cost to the customer greatly extends the potential of the UK market.⁽¹³⁾
- 2.1.7.3 The video recorder is a very new piece of equipment in all households. In Germany, three quarters of existing sets in households are only two years old⁽¹⁴⁾ and, in the United States of America, the survey carried out in 1981⁽¹⁵⁾ showed that about half the equipment owned by households had been purchased between 1980 and 1981. In France, also, most sets are less than 2 years old since there were only 134,000 sets in use in 1979 and approximately 900,000 in 1982 (Annex 18).

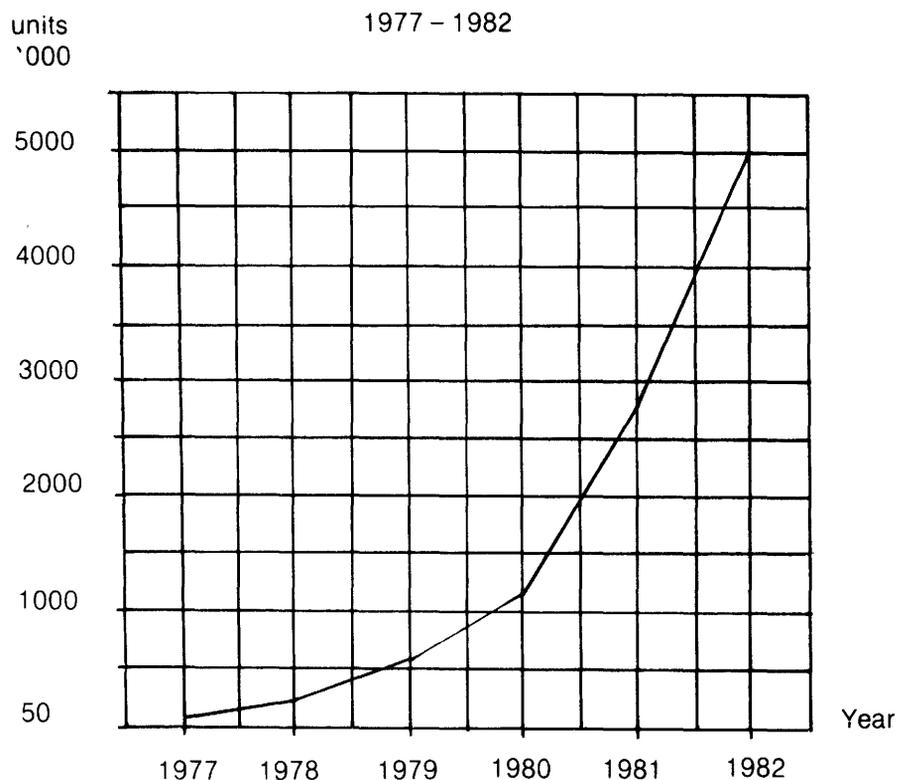
FIGURE 9**PENETRATION OF VIDEOCASSETTE RECORDERS IN HOUSEHOLDS IN THE EEC.****In 1982 & 1985 (estimates & forecasts)**

Belgium	1982 	4%
	1985 	11%
Denmark	1982 	8%
	1985 	16%
France	1982 	5%
	1985 	17%
Germany (FR)	1982 	10%
	1985 	26%
Greece	1982 |	0.5%
	1985 	4%
Ireland	1982 	3%
	1985 	10%
Italy	1982 |	1%
	1985 	3%
Netherlands	1982 	10%
	1985 	23%
United Kingdom	1982 	15%
	1985 	40%

● Luxembourg not included

See Annex 17

- 2.1.7.4 Penetration of video recorders is expected to rise sharply in the next few years in most countries; however, wide disparities will exist in the EEC (Annex 17). The United Kingdom is forecast to reach a penetration level of 40% by 1985 whereas in Italy, it is thought, only 3% of households will have a video recorder by then. This is even lower than the forecast for Greece (4%). The vast number of private television channels available in Italy is believed to make the Italian market less receptive to this new hardware. Some forecasters predict a penetration as high as 70% in the United Kingdom by 1990.⁽¹⁶⁾ This buoyant increase in ownership of video recorders will undoubtedly lead to large scale copying since recent surveys carried out in the USA⁽¹⁷⁾ and Germany⁽¹⁸⁾ show that recording of television and cable programmes is the main reason for acquiring a set. Artists, producers, authors and broadcasters will suffer great losses as a result of this new technological development. Programmes and films shown on television will have a much shorter life-span since repeats will become virtually impossible to impose on a public which has already recorded the programme.
- 2.1.7.5 Some could be tempted to say that the loss caused to right owners by private copying could be mitigated economically, so far as the national interest is concerned, by the tremendous yearly increases in sales of video recorders. Unfortunately, these sales do not even benefit the Community hardware industry since the vast majority of video recorders come from Japan. Video recorders originating in Japan and imported into the Community represented a market share of 80.5% during the first half of 1982; by the end of 1982, this share was reported to be some 87%.⁽¹⁹⁾ Figure 10 shows how exports from Japan to the EEC have increased dramatically since 1977.
- 2.1.7.6 In 1982, nearly half of Japan's exports of 10½ million sets were being shipped to the EEC (Annex 19). There can be no question of trying to impede technical development; video recorders will become a common item of equipment in households just like audio recorders. However, if adequate measures are not taken to protect right owners and to remunerate their creative efforts, then sources of new programmes will dry up. The fast expansion of the video hardware industry means that measures must be taken sooner rather than later if the public is not to be subjected to a continuous diet of old programmes or, indeed, deprived of pre-recorded video programmes altogether.

FIGURE 10**JAPANESE EXPORTS OF VIDEOCASSETTE RECORDERS
TO THE EEC**

See Annex 19

2.1.8 Social Importance of the Audio-Visual Industries

- 2.1.8.1 The damage inflicted by private copying has serious repercussions. The reduction in sales and opportunities for producers, performers and authors has led to a reduction in the level of employment in the audio industry.
- 2.1.8.2 In 1978, the number of persons directly employed in the production and manufacturing of sound recordings and the wholesale and retail trades totalled an estimated 130,000 people in the Member States of the EEC (Annex 10). All these countries now report a decline in employment in this sector. In France, it is estimated that the number of people directly employed by the recording industry in 1978 in production, manufacture and wholesale was 6,336. In 1979, employment had declined by 2% to 6,190. By the end of 1980, a further drop of 15% had occurred. In the Federal Republic of Germany, several record companies are reported to have trimmed their staff; (20) indeed, the number of people employed in the

production and manufacture of audio recordings fell by 8% between 1978 and 1981, from 13,000 to 12,000 people. The retail sector has also been affected and during the same period the level of employment dropped by 1,000 to 25,000. This decline is still continuing in Germany since the drop in employment is now estimated at around 10%. In the United Kingdom, the decline in employment is particularly striking. The workforce of the UK record industry (excluding retail activities) which consisted of 12,000 people in 1978 has now been reduced to an estimated 7,000 and the whole of the music industry is being affected. A recent economic and financial survey of the music industry in the United Kingdom reveals that, out of 418 music companies whose accounts were scrutinized, 40% showed a trading loss during the 1980-81 accounting period. ⁽²¹⁾ In the Netherlands, the picture is similarly depressing. Employment has fallen by 10% in the past three years in the production, manufacture and distribution sectors. In addition, PolyGram is now planning to reduce its workforce of 1,036 employees by 230 following last year's losses of 18 million guilders (US\$7 million) by the group in the Netherlands. ⁽²²⁾ In Ireland, the decline is believed to have been as much as 40%. In Italy, the recession in the record industry has begun to show its effects somewhat later. Up until the beginning of 1983, employment remained steady in this sector. However, in May 1983, a drop of 3-4% in employment was reported and by the end of the year the loss of jobs is expected to be in the region of 10% or more. The United States of America experiences similar problems. The number of US workers engaged in the manufacture of records and pre-recorded tapes has fallen from a high of 19,200 workers in 1978 to an estimated 15,000 in 1981. ⁽²³⁾ These lay-offs cannot be accounted for by the introduction of more efficient manufacturing technology, unlike other industries with shrinking workforces. The recording industry has long been -- in the manufacturing stage -- labour efficient and capital intensive.

- 2.1.8.3 The video industry has had to cope with private copying and piracy since its inception and it is therefore much more difficult to assess the impact of private copying on employment in the video industry. However, there is no doubt that the combined effect of private copying and piracy, which is widespread everywhere, has been to prevent the creation of jobs. In just over two years, the UK home video industry has provided an estimated 20,000 jobs. More jobs have been created over this period in the legitimate video industry than have been ⁽²⁴⁾ created by independent television in 26 years. It is believed that without piracy, ⁽²⁵⁾ and private copying this number could be doubled. This situation is assumed to be reflected in the rest of the EEC where no doubt many more jobs could be created.

2.2 CONSUMER PRACTICES

2.2.1 Audio Private Copying

Since the late seventies, private copying of phonograms has become so widespread that it has aroused a great deal of interest and concern from all circles: from the right owners who were beginning to realise the danger and feel the effects of this phenomenon, from the retail and distributive industries which service the traditional consumer of pre-recorded music, and from the mass media who were aware that they were witnessing a change in consumer practices with regard to sound recordings. As a result, many surveys have been commissioned and, although the methods used were sometimes very different, ⁽²⁶⁾ all of them concur on the nature and extent of private copying. The main results which are described below show that private copying of music is taking place everywhere on a large scale and is on the increase.

2.2.1.1 Ownership of Blank and Pre-recorded Tapes

All surveys available for national markets within the EEC show that, on average, owners of recording equipment own more tapes which they have recorded themselves than pre-recorded tapes bought in shops (see table below). In countries where two surveys are available, the more recent surveys show a widening gap between the number of "home" recorded tapes and pre-recorded tapes owned.

TABLE 1

OWNERSHIP OF BLANK TAPES AND PRE-RECORDED TAPES*

COUNTRY	Ref +	AUDIO		
		Average number of pre-recorded tapes	Average number of home-recorded tapes	Average number of blank tapes ready to be used
BELGIUM	B1(1978)	4.1 cassettes	12.4 cassettes	2.1 cassettes
			11.2 r to r tapes	1.6 r to r tapes
DENMARK	D1(1977)	11.6 cassettes	13.3 cassettes	Not applicable
FRANCE	F1(1976)	1.6 tapes	4.2 tapes	0.5 tapes
	F4(1983)	14.0 tapes	24.0 tapes	2.0 tapes
GERMANY**	G1(1978)	12.7 cassettes	15.3 cassettes	1.6 cassettes
	G2(1980)	14.6 cassettes	19.4 cassettes	1.6 cassettes
NETHERLANDS	N1(1976)	8.5 cassettes	12.5 cassettes	Not applicable
			10.0 r to r tapes	
	N2(1979)	11.0 cassettes	17.0 cassettes 11.0 r to r tapes	Not applicable

* per user/owner
 ** owners of the relevant type of cassette.
 r to r reel to reel tapes.
 + Key to surveys : See Appendix 1

2.2.1.2 Utilisation of Blank Tapes

It should be pointed out that the number of "home" recorded cassettes in households gives a misleading view of the amount of music recordings copied and, in particular, of the number of records copied. First, it should be remembered that the C90 cassettes lasting 1½ hours are now the most popular format everywhere. In the United Kingdom, C90 cassettes represent as much as 70-80% of the total market for blank tapes and two full LPs can be recorded on each of them. This tendency is also confirmed in France, where 58% of cassettes in households have a duration of 90 minutes or more and 42% have a duration of 60 minutes or less. (27) Moreover, the potential musical storage and playing capacity of blank tapes exceeds that of the playing time of music copied, because the tapes can be erased and re-used for fresh recording. The average extent to which this happens is shown on the table below. In general, a blank tape is used about twice.

TABLE 2

RE-UTILISATION OF BLANK AUDIO TAPES

Average number of times a blank tape is being used for recording		
BELGIUM	B1 (1978)	1.6 times
DENMARK	D2 (1980)	3.0 times
FRANCE	F1 (1976)	2.2 times
	F3 (1981)	2.3 times
GERMANY	G1 (1978)	2.0 times
	G2 (1980)	2.0 times
GREECE	GRI (1979)	2.87 times
UNITED KINGDOM	UK1 (1977)	2.1 times
	UK2 (1979)	1.99 times
	UK3 (1981)	1.91 times
USA	US2 (1979)	1.93 times

Key to surveys : See Appendix 1

The various surveys carried out in the United Kingdom were done by the same organisation on a comparable basis; they show a slight decrease in the rate of re-utilisation. The possible reason for this decline is the reduction in prices of blank tapes, on the one hand, and the improvement in sound quality, on the other hand. This would imply that people tend to keep their recordings more and thus do not just copy material they would not buy. (28) In France, a very recent survey confirmed this trend.

2.2.1.3 Extent of Private Copying

2.2.1.3.1 The great majority of people who have recording equipment make use of recording facilities. In the Federal Republic of Germany, the surveys show that 85-90% of people having access to recording equipment make recordings. In the Netherlands, the proportion is 90% and in Greece 94%. (29)

2.2.1.3.2 It should also be noted that a significant proportion of these people make recordings very frequently, that is, several times a month or even several times a week as is shown below:

TABLE 3

FREQUENCY OF PRIVATE COPYING

	<u>United Kingdom</u> (UK3 1981)		<u>Germany</u> (G2 1980)
	<u>from radio/TV</u>	<u>from disc/tape</u>	<u>from radio</u>
<u>Very often</u> (once a week or more)	14%	7%	not applicable
<u>often</u> (several times a month)	13%	17%	34.6%
<u>sometimes</u> (several times a year)	27%	37%	46.6%
<u>hardly ever</u> (less often)	20%	14%	17.7%
<u>Never</u>	25%	14%	not applicable
<u>Don't know/ No answer</u>	1%	2%	1.1%

Basis: respondents with recording equipment : 100%

2.2.1.3.3 Private copying has grown to such an extent over the past 10 years or so that it has now become a normal, everyday practice. Although the phenomenon at first spread unnoticed, it now represents a major challenge to society's approach to copyright. It has introduced a new factor; for the first time in the history of the copyright system everyone can copy copyright material at home. Although young people are those who make the most recordings (particularly of music), it can now be said that every section of the population engages in this activity: housewives as well as pensioners, workers as well as managers. The following table shows the incidence of home taping per age group for a few countries.

TABLE 4

PRIVATE COPYING AS A FUNCTION OF AGE

FRANCE (F2 1980)							
<u>Respondents having recorded discs on tapes over the past twelve months</u>							
<u>15-20 yrs</u>	<u>21-24 yrs</u>	<u>25-34 yrs</u>	<u>35-49 yrs</u>	<u>50-64 yrs</u>	<u>65 yrs +</u>		
64%	43%	45%	27%	11%	3%		
NETHERLANDS (N2 1979)							
<u>Recording behaviour over the last month</u>							
<u>15-19 yrs</u>	<u>20-24 yrs</u>	<u>25-29 yrs</u>	<u>31-34 yrs</u>	<u>35-39 yrs</u>	<u>40-49 yrs</u>	<u>50-59 yrs</u>	<u>60 yrs +</u>
72%	63%	49%	50%	64%	53%	44%	33%
UNITED KINGDOM (UK3 1981)							
<u>Respondents who have taped music</u>							
<u>15-19 yrs</u>	<u>20-24 yrs</u>	<u>25-34 yrs</u>	<u>35-54 yrs</u>	<u>55 yrs +</u>			
81%	73%	68%	53%	45%			
UNITED STATES OF AMERICA (US1 1979)							
<u>Incidence of music taping in the whole population</u>							
<u>10-17 yrs</u>	<u>18-29 yrs</u>	<u>30-34 yrs</u>	<u>45-59 yrs</u>	<u>60 yrs +</u>			
32%	32%	25%	16%	4%			

TABLE 5

PRIVATE COPYING AS A FUNCTION OF SOCIAL GRADE/FAMILY INCOME

FRANCE (F2)*				UNITED KINGDOM (UK3)**				
Farmer/Labourer		14%		Upper middle/ middle class		43%		
Shopkeeper/ Craftsman	)	29%	)	Lower middle class		38%	
Senior Executive/ Professional	)	47%	)	Skilled working class		37%	
Intermediate Executive/Employee	)	39%	)	Unskilled/unemployed		26%	
Worker		37%						
Unemployed or those not engaged in paid employment (e.g. housewives, O.A.P.)	)	10%)					
UNITED STATES OF AMERICA (US4)				GERMANY (G2) Income per month				
% of total population over 10	Album taping % of tapers	Selection Taping % of tapers	Ownership of cassettes	Lower incomes up to DM 2,000	Average DM 2,001 to 3,000	Higher Incomes DM 3,001 to 5,000 over DM 5,000		
under \$10,000	39%	18%	24%	own only blank cassettes	26.8%	24.3%	30.6%	26.9%
\$10-\$20,000	29%	42%	33%	own only pre-recorded	17.7%	14.6%	15.3%	14.9%
over \$20,000	32%	40%	43%	own both	55.5%	60.5%	54.1%	58.2%
	100%	100%	100%		100%	100%	100%	100%
* question: do you plan to do more home taping over the next 12 months?								
** question: have you ever made music recordings?								
Key to surveys : See Appendix 1								

2.2.1.3.4 A more surprising finding deriving from the surveys is that among people with recording facilities, those in the higher income brackets tend to record more. In France, in the 12 months preceding the survey, 47% of senior executive/professional people made recordings as compared with 39% of the middle/lower middle class and 37% of the working class. In the United Kingdom, 43% of the middle/upper middle class had recorded music as compared to 38.2% of the lower middle class and 37.3% of the working class. Similar results were shown in surveys carried out in the United States of America. In Germany, it is shown that the respondents to the survey possessing only blank tapes are those in the higher income brackets whereas those possessing only pre-recorded cassettes belong to the lower income group as shown in Table 5.

2.2.1.3.5 Thus, despite arguments to the contrary, the economically disadvantaged do not engage in large amounts of home taping in order to bring music into their homes. If anything, a proportionately larger amount of home taping is done by those in the highest income bracket who could well afford to buy the music they tape.

2.2.1.4 Nature of Recordings

2.2.1.4.1 Music is by far the most frequently recorded material. All the available surveys concur on this point.

TABLE 6

NATURE OF RECORDINGS

Country	Ref +	Music	Artistic Works (poems, plays etc.)	Spoken Words	Other	Don't Know/ no answer
BELGIUM	B1 (1978)	94%	-	-	6%	N/A
DENMARK	D1 (1977)	92%	-	-	3%	5%
	D2 (1980)	93%	-	-	0%	7%
FRANCE	F1 (1976)	82%	4%	-	14%	N/A
	F4 (1983)	90%	5%	-	5%	N/A
GERMANY*	G1 (1978)	89.4%**	0.3%	2.9%	6.1%	1.3%
	G2 (1980)	91.1%**	0%	1.8%	3.8%	3.2%
USA	US4 (1980)	75%	-	-	25%	N/A

* nature of last recording.

** this percentage refers to blank tapes which are being used for recording music and includes recordings of live concerts 0.6% (1978); 2.2 (1980); recordings of private play (music activities) 0.8% (1978), 0.78% (1980).

- included in column 'other'.

+ Key to surveys : See Appendix 1

Table 6 shows that music represents between 75-94% of all recordings. In countries where comparable surveys have been carried out (Denmark, France and the Federal Republic of Germany), the most recent surveys show in fact an increase in the percentage of music copied.

2.2.1.4.2 It appears, therefore, that the number of recordings consisting of private or professional subject-matter (such as family occasions or business reports) represent only a very small proportion of total recordings. The argument often put forward that a levy or royalty imposed on blank tapes would be unfair to those making such recordings seems therefore to be exaggerated. In fact, most recordings made for business purposes are made on a special kind of small-format tape; such tapes could easily be exempt from any levy. The number of private or professional recordings made on ordinary blank cassettes is very insignificant.

2.2.1.5 Nature of Music Recordings

2.2.1.5.1 The surveys show unanimously that the vast majority of music copied is still protected by copyright. With regard to the rights of producers of phonograms, there is no doubt that, in countries like the United Kingdom and Ireland where protection is granted for 50 years, nearly all available phonograms are still protected. Even in countries granting shorter terms of protection to producers and performers, such as the Federal Republic of Germany (25 years) and Luxembourg (20 years), it can be safely assumed that the majority of sound recordings copied are still protected. As regards the authors' rights in the music copied, the table below shows that the vast majority of music copied is modern music which is therefore protected by copyright as shown in Table 7.

2.2.1.5.2 As can be seen from this table, classical music often represents less than 10% of all music recordings (Germany & Denmark, around 6%, Greece 4%). In France, however, it represents around 14% of recordings and, in the Netherlands, 12%. Modern songs and "pop music" are the most popular types of music copied. They represent in all the EEC countries around 40-60% of all music copied (Table 7, columns D and E) and include no doubt all the most popular "current hits" on which recording companies rely to make profits and to compensate for the less successful recordings. If recording companies cannot rely on high sales for recordings of their most popular artists they will be less willing to take risks and invest in new talent. Contemporary authors and artists are those whose works and performances are copied and suffer most. Although the music categories shown in Table 7 may be somewhat arbitrary, since each country has its particular kind of music, it is no coincidence that

the highest percentages are to be found in the national repertoire (column D) and the international repertoire (pop music/disco/rock, column E). It therefore would be wrong for governments to assume that only the interests of Anglo-Saxon artists and authors and the interests of multinational companies are being affected by private copying. National creations and culture are just as much damaged by private copying and may be more so since national artists and recording companies have more limited finances. Indifference and inaction on the part of governments towards this problem could have dire consequences on the future cultural life of their countries.

TABLE 7

NATURE OF MUSIC RECORDINGS

(Basis 100%)

Country	Ref +	A Classical/ Opera	B Other serious music	C Light music	D National popular repertoire	E International pop music disco/rock	F Specialised music (jazz, blues soul, reggae)	G other	H other than music	I don't know
BELGIUM	B1 (1978) ^a	12% (inc B)		82% (inc D/E)			N/A	N/A	6%	N/A
DENMARK	D1 (1977) ^b	4%	8%	48% (inc D)		33%	N/A	N/A	3%	4%
	D2 (1980)	6%	N/A	35%	17%	34%	2%	N/A	0%	4%
FRANCE	F1 (1976) ^c	13% (inc B)		8%	37%	24%	(inc F)	N/A	4%	14%
	F2 (1980) ^d	18%	4%	(inc in A/D)	30%	31%	7%	10%	N/A	N/A
	F4 (1983)	14% (inc B)		4%	30%	42%	(inc F)	N/A	10%	N/A
GERMANY	G1 (1978) ^c	6% (inc B)			43% (inc C)	39%	(inc F)	1.5%	9%	1.5%
	G2 (1980) ^c	6.5% (inc B)			41.5% (inc C)	40%	(inc F)	3%	6%	3%
GREECE	GRI (1979)	4%		15%		36%	5%	2%	N/A	N/A
IRELAND	IRI (1982)	6%		16%	19%	36%	17%	6%	N/A	N/A
NETHERLANDS	N1 (1976) ^d	19%	24% (inc jazz)	(inc in A/G)		27%		30%	N/A	N/A
	N2 (1979) ^d	12%		22%	17%	28%		18%	N/A	N/A
UNITED KINGDOM	UK1 (1977) ^e	10%	N/A	28%		37.5% (inc D)	20.5%	1%	N/A	3%
	UK2 (1979) ^e	9%	N/A	31%		36% (inc D)	19%	2%	N/A	3%
	UK3 (1981) ^e	9%	N/A	29%		39% (inc D)	17%	2%	N/A	4%
USA	US2 (1979) ^d	10%	N/A	11%	15%	45%	19%	N/A	N/A	N/A
	US4 (1980) ^b	9%	32%*	4%	12% (country)	62% (inc Soul and blues)	2%	8%	N/A	N/A

* spiritual music
a) all recordings made
b) type of music recorded most often
c) nature of last recording made
d) types of music generally recorded
e) types of music recorded
+ Key to surveys : See Appendix 1

2.2.1.5.3 There is also evidence to suggest that it would be wrong to think that people mostly copy music they would not buy. The results of a survey just recently published in France⁽³⁰⁾ show the most revealing fact that the kind of music copied corresponds exactly to the categories of records and pre-recorded tapes sold. Thus people tend in fact to copy what they usually buy.

2.2.1.6 Sources of Recordings

2.2.1.6.1 The two main sources of recordings are radio and records (Table 8). Recordings from radio represent 55% of all recordings in Denmark, 68% in the Federal Republic of Germany and 21% in the United Kingdom; these figures may be compared with 30% of recordings made from records in Denmark, about 20% in Germany and a staggering 70% in the United Kingdom. Recordings from pre-recorded cassettes still represent a small proportion of total recordings, since to make such a recording requires the use of a second tape recorder. However, the increase in multiple ownership and the recent introduction on the market of tape-to-tape duplicators will no doubt lead to an increase of cassettes as a source of recording. This trend is already confirmed in the successive surveys carried out in Denmark, Germany and the United Kingdom. Television represents a minor source of music recordings and its importance is decreasing. Recording from other sources is negligible in all countries as will be shown in Table 8.

2.2.1.6.2 Table 8 also shows that recordings from records and pre-recorded tapes are increasing constantly and this would seem to suggest that more entire albums are being copied. This trend, which corresponds to the rapid increase in the number of households with sophisticated equipment such as "music centres" which are "custom built" for home taping, is particularly worrying for the recording industry.

2.2.1.7 Origin of Pre-recorded Music Recorded on to Blank Tapes

2.2.1.7.1 Records and pre-recorded tapes used for copying are mainly borrowed from friends (62% in the Federal Republic of Germany, 56% in Denmark); a small proportion is borrowed from libraries, the highest percentages being found in Belgium (10%) and Denmark (2%). An important proportion of albums and tapes copied also belongs to the tapper himself (29% in Denmark, 38% in Germany and 46% in the United Kingdom). A large percentage of people tend to copy their own albums in order to be able to listen to

them in their cars or while on holiday in the more convenient format of cassette. However, it can be seen from Table 9 that "borrowed records" represent in nearly all cases a higher percentage of recordings than "own records".

TABLE 8

SOURCES OF RECORDINGS

(Basis 100%)

Country	Ref*	Radio	Pre-Recorded Music		Home Recorded Tapes	Live Performance	Others	Don't Know No Answer		
			TV	Records					Tapes	
BELGIUM	B1 ^a (1978)	46%	7%		39%	3%	1%	4%	N/A	
DENMARK	D1 ^b (1977)	73%	3%	12%		5% ^g		N/A	1%	6%
	D2 ^b (1980)	55%	1%	30%		10%		-	-	4%
FRANCE	F1 ^c (1976)	20.2%	10.6%		46.4%	5.8%	2.2%	1.6%	13.2%	
	F3 (1981)	32%	10%		54%	N/A	3%	1%	N/A	
	F4 (1983)	24%	4%		61%	9%	2%	1%	N/A	
GERMANY	G1 (1978)	64.4%	6.3%	18.7%		1.8%	0.9%	inc.	6.5%	1.4%
	G2 ^d (1980)	67.9%	3.3%	19.8%		2.3%	0.8%	inc.	3.9%	2.1%
GREECE	GRI (1979)	55%	N/A	37%		N/A	N/A	N/A	8%	N/A
IRELAND	IR1 (1982)	24%	14%	48%		14% ^g		-	N/A	N/A
NETHERLANDS	N1 ^b (1976)		44%		49.5% ^g			N/A	6%	0.5%
	N2 ^b (1979)	39%	4%		51% ^g			N/A	3%	3%
UNITED KINGDOM	UK1 ^e (1977)	24%	4%	66%		5%	N/A	N/A	1%	N/A
	UK2 ^e (1979)	24%	3%	69%		4%	N/A	N/A	0%	N/A
	UK3 ^e (1981)	21%	2%	70%		6%	N/A	N/A	1%	N/A
USA	US1 ^a (1979)	29.5%	N/A		60.5%			10%	N/A	N/A
	US3 ^a (1980)	20%	5%		70% ^g			5%	N/A	N/A
	US4 ^f (1980)		40%		54% ^g			6%	N/A	N/A

a) sources of recordings
b) main sources of music recordings over the past 12 months
c) main source of last cassette taped
d) source of last recording
e) main source of recordings
f) sources of album selections taped
g) including home recorded tapes
- percentage negligible
inc. included in others
* Key to surveys : See Appendix 1

TABLE 9

ORIGIN OF PRE-RECORDED MUSIC RECORDED ONTO BLANK TAPES

Country	Ref*	own		friends		borrowed from library	other	don't know no answer
		records	tapes	records	tapes			
BELGIUM	B1 (1978)	46%		44%		10%	N/A	N/A
DENMARK	D1 (1977)	18%		57%		18%	3% ^a	4%
	D2 (1980)	29%		56%		9%	2%	4%
GERMANY	G1 (1978)	40%	3%	51%	6%	N/A	N/A	N/A
	G2 (1980)	35%	3%	55%	7%	N/A	N/A	N/A
IRELAND	IR1 (1982)	34%		62% ^b			4%	N/A
NETHERLANDS	N1 (1976)	43%		50%		7%	N/A	N/A
	N2 (1980)	41%		51%		8%	N/A	N/A
UNITED KINGDOM	UK1 (1977)	36%		55%		4%	1%	4%
	UK2 (1979)	42%		51%		3%	1%	3%
	UK3 (1981)	46%		47%		2%	1%	4%
U.S.A.	US1 (1979)	60%		40%		N/A	N/A	N/A
	US4 (1980)	57%		43%		N/A	N/A	N/A
a) including 2% records purchased with others b) including records/tapes borrowed from library * Key to surveys : See Appendix 1								

Moreover, if recordings of phonograms taken off-air from radio (see Table 8) are taken into account, it is clear that recordings made from records and pre-recorded tapes belonging to the taper himself represent a rather small share of all recordings made from commercial phonograms. It is indeed a well known fact that the vast majority of music broadcast consists of commercial records and pre-recorded cassettes. Thus, recordings made from radio and borrowed records and cassettes represent nearly 82% of all recordings in Germany, 60% in the United Kingdom and 69% in the Netherlands, whereas recordings made from the tapers' own records and cassettes represent only 8% of all recordings in Germany, 37%⁽³¹⁾ in the United Kingdom and 21% in the Netherlands. The above figures show only too plainly how extensive the copying of commercial phonograms is, whether it occurs directly or through the radio.

2.2.1.7.2 A new source of recordings from albums has emerged: this is the rental of records and pre-recorded tapes

from shops. Obviously the most prevalent reason for borrowing a record for one or two days is to copy it at home. This new phenomenon has not been taken into account in the most recent surveys (except in France) because its importance was too small to be quantified. In France, however, the survey carried out in 1983⁽³²⁾ has noted that 0.3% of recordings were made from rented records or pre-recorded tapes, whereas in 1976, when a similar survey was carried out, rental just did not exist. This development, although still negligible, is worrying the French recording industry since, in other countries where rental is more common, the local record companies have already experienced the damaging effects of such rental trade. This new phenomenon, which started in fact in Japan, in June 1980, has spread to North America and Scandinavia and is now threatening other European countries such as France, Germany and the United Kingdom. The recording industry has reacted quickly to this new threat by trying to obtain amendments to copyright legislation which would enable right owners to control the rental of copies of their phonograms. Meanwhile, in some countries (e.g. Germany, Japan and the United Kingdom) the recording industry has commenced civil court actions against record rental shops in order to try to put an end to this practice as soon as possible.

2.2.1.8 Reasons for Private Copying

2.2.1.8.1 The two main reasons given for copying music are, firstly, price considerations, that is, that taping is much cheaper than buying pre-recorded music, and, secondly, the pleasure of making personal selections of particular works. Various other reasons were also put forward such as "home taping is a hobby" and "saving record wear".

TABLE 10

REASONS FOR PRIVATE COPYING

(Basis 100%)

Country	Ref +	Cheaper than pre-recorded music	Making own selection	More practical	Sound quality better	Save record wear	Hobby	Rare* recordings	Copy for car	Other	Don't know/no answer
BELGIUM	B1 (1978)	21%	19%	17%	2%	5%	8%	8%	N/A	20%	N/A
FRANCE	F3 (1981)	19%	22%	16%	4%	7%	4%	8%	10%	10%	N/A
GERMANY**	G1 (1978)	20%	49%	5%	1%	N/A	1%	N/A	N/A	20%	4%
	G2 (1980)	26%	56%	1%		N/A	1%	N/A	N/A	20%	3%
NETHERLANDS	N1 (1979)	40%	39%	4%	2%	N/A	N/A	N/A	N/A	12%	3%
USA	US3(1980)	28%	38%	N/A	12%	12%	10%	N/A	N/A	N/A	N/A
	US4(1980)	25%	11%	9%	5%	8%	9%	N/A	17%	16%	N/A

* or difficult to find
 ** the question was: why did you buy a blank cassette at your last purchase?
 + Key to surveys : See Appendix I

- 2.2.1.8.2 Although price consideration is an important factor, it is not a major obstacle to buying pre-recorded music. Of all reasons given, the price aspect represents less than half the total answers. In Belgium, it represents 21%, in France 19%, in the Federal Republic of Germany 26%, in the Netherlands 40% and, in the United States of America, between 25-28%. Price consideration even came second in France and Germany. Indeed, as already pointed out above, these surveys have shown that people in the higher income brackets do more copying than others. Therefore, the price of pre-recorded music cannot be a real deterrent for this group of people.
- 2.2.1.8.3 The claim, put forward from time to time, that pre-recorded music is too expensive and that it encourages private copying is thus unfounded. It should be pointed out that records and pre-recorded tapes could be sold more cheaply to the public if the high sales taxes often imposed on this product could be reduced or abolished (Annex 20). Rates of Value Added Tax as high as 33% in France and 35% in Ireland add a substantial amount to the real selling price of records and tapes. Records and pre-recorded tapes are, if anything, underpriced at present in many countries of the EEC. The cost breakdown of a record recently published by the British Phonographic Industry and shown in Annex 9 demonstrates that profits are currently running very low for producers, who are sometimes trading at a loss. Over the past ten years, prices of records and pre-recorded tapes have increased far less than the Retail Price Index (Annex 8). In fact the profit margin of the dealer is higher on blank cassettes than on pre-recorded music in some countries. In Greece and the United Kingdom, the dealer margin on pre-recorded music is around 15% and 20% respectively as against 30% on blank cassettes.
- 2.2.1.9 Losses Due to Private Copying
- 2.2.1.9.1 A careful study of all the surveys can leave no doubt that private copying carried out on such a large scale is inflicting serious losses to the recording industry throughout the world. The opportunity for the majority of the population in the EEC (and the United States of America) to acquire musical works cheaply and conveniently has no doubt an effect on the purchasing behaviour of consumers. The difficult question is just how many potential sales are lost through private copying. Several attempts have been made to quantify losses.
- 2.2.1.9.2 In the United Kingdom, the 1979 survey⁽³³⁾ showed that an equivalent of 280 million LPs had been

copied, which represented an approximate retail value of £1,132 million (US\$2,490 million). During that year, only 74.5 million LPs and 25.2 million cassettes had been sold for a value of £367 million (US\$807 million) at retail level. The British Phonographic Industry has put forward a reasonable and conservative estimate based upon consistent evidence derived from the surveys that 25% of these private recording sessions replace the purchase of the LP, tape or single in question. The value of these copies, if sales had been made through normal retail outlets, would have been approximately £283 million (US\$622 million) in 1979, which is the equivalent of 70% of the value of retail sales during that year.⁽³⁴⁾

2.2.1.9.3 In the Netherlands, the survey carried out in 1979⁽³⁵⁾ showed that the equivalent of 70.5 million LPs had been copied during the year as compared to 37.5 million in 1976. It is also significant in terms of the consequential encroachment on the proprietary rights of producers, performers and authors to note that, out of the equivalent 70.5 million LPs copied, it is estimated that 40 million hours or 60 million LPs consisted of music protected by copyright.

2.2.1.9.4 In the United States of America, a recent survey⁽³⁶⁾ estimated that private copying could be responsible for around \$1,050 million lost sales for the recording industry in 1981. Pre-recorded sales for that year amounted to \$3,626 million. It is estimated that popular albums could sell 45% more copies were it not for home taping.

2.2.1.9.5 The examples cited above can only be rough estimates and different estimates, lower or higher, on the extent of sales lost through private copying could be put forward by other persons or bodies; but the fact is that, even if the loss is estimated at half the above figures, it still remains substantial. The prejudice suffered by right owners cannot be denied.

2.2.1.9.6 In the Federal Republic of Germany, it has been calculated⁽³⁷⁾ that the storage capacity of all blank cassettes sold in 1980 amounted to 6.9 billion minutes which was more or less equivalent to the total amount of pre-recorded music (7.3 billion minutes on records and cassettes) sold during the same year. It can therefore be said that blank cassettes are the most important sound carrier for music, coming well ahead of records and pre-recorded cassettes. Producers of phonograms receive a remuneration for their recordings of music which are sold in the form of records and pre-recorded cassettes but not for their recordings which are copied onto blank cassettes although blank cassettes have now become the most widely used of the three

carriers. The injustice thus suffered by producers, performers and authors has now become flagrant.

2.2.2 Video Private Copying

The advent of the home video industry is still very recent and for this reason very few surveys have yet been carried out on the practices of users of video recorders. The only EEC country which has carried out extensive research on this subject is the Federal Republic of Germany. Some information derived from more limited surveys and unpublished sources is also available for France, Ireland, Italy and the United Kingdom. In order to obtain a more comprehensive view of the problem of video private copying, comparisons have been made with surveys carried out outside the EEC, that is, in Sweden and in the United States of America. Consumer behaviour appears to be very similar in all these countries.

2.2.2.1 Ownership of Blank Video Tapes and Pre-recorded Video Tapes

2.2.2.1.1 The disproportion between the ownership of blank and pre-recorded video tapes is much greater than for audio tapes. Pre-recorded video tapes are still relatively expensive and are still a luxury for many. In France, prices vary from F350-900 (\$50-120), in Belgium an average price is about BF3,500-4,000 (\$65-80) and, in the United Kingdom, pre-recorded videocassettes cost around £35-40 (\$55-65). Blank videocassettes, on the other hand, retail at approximately F150 (\$20) in France, BF500-550 (\$12) in Belgium, and £7-9 (\$11-15) for a duration of 3 hours. The reasons why pre-recorded videocassettes are expensive are self-evident. The programmes contained in videocassettes often require huge capital investment (especially in the case of feature films) and their production involves many contributors (authors, actors, musicians, directors, producers etc.) all of whom are entitled to a fair remuneration for their work. Moreover, unit sales of videocassettes are still very low and this means that it has not yet been possible to bring prices down to a level which permits large-scale purchase by the general public.

2.2.2.1.2 As a result, many users of video recorders still only own blank videocassettes. The survey⁽³⁸⁾ carried out in the United States of America in 1981 shows that 68% of videocassette recorder users own no pre-recorded cassettes at all and 16% own between one and two pre-recorded cassettes. Tables 11 and 12 illustrate the disparities between possession of pre-recorded and blank cassettes.

TABLE 11

USA

<u>VIDEO CASSETTES IN HOUSEHOLDS</u>				
Cassettes	Total	Pre-recorded	Recorded by user or a friend	Blank
Average per household	26.95	2.71	19.84	4.39
Cassettes for the Median household	13.5	0	8	2
Source : 3rd Annual Diary Study of VCR Homes op. cit. page 86.				

2.2.2.1.3 In the survey carried out in the Federal Republic of Germany in 1982, similar results have been obtained and an interesting comparison can be made with the results obtained in 1979, as is shown below.

TABLE 12

GERMANY

<u>Video cassettes in Households</u> (average number)		
	Pre-recorded cassettes per VCR owner	Blank/home recorded cassettes per VCR owner
1979	0.5	5.9
1982	2.3	11.9
Source : GFM Video Studies 1979 and 1982 op. cit.		

- 2.2.2.1.4 In the United Kingdom, a more limited survey carried out in 1980⁽³⁹⁾ showed that, during the course of that year, users of a video recorder had bought on average 5.4 blank cassettes as compared to 1.5 pre-recorded cassettes. Another survey carried out in 1982 showed that the average number of blank cassettes owned per user of video recorder was 10.5.⁽⁴⁰⁾ In Ireland, there are an estimated 3-4 blank cassettes per video recorder but only 0.2 pre-recorded cassettes per set and, in Italy, the owner of a video recorder possesses an average of 5 blank cassettes and 0.8 pre-recorded cassettes.⁽⁴¹⁾
- 2.2.2.1.5 Both the German and US surveys show that for each pre-recorded cassette found in a household there are 9 blank or home-recorded cassettes. Such huge disparities, if sustained in the years to come, will prevent sales of videograms from developing normally and the reduction in prices which would follow from increased sales.
- 2.2.2.1.6 A trade practice which may have a significant effect upon the recording habits of video recorder owners has also been revealed by the US survey. As many as 58.8% of owners of video recorders had been given one or two blank cassettes when purchasing their equipment, whereas only 3.6% of them had been given a pre-recorded cassette. Right from the start, emphasis is being placed on recording programmes rather than playing them.

2.2.2.2 Utilisation of Blank Video Tapes

Blank video tapes are mainly used for recording programmes off-the-air, from television (or cable in the case of the United States of America). The most favoured cassette length seems to be from 3-4 hours. In the Federal Republic of Germany,⁽⁴²⁾ 23.8% of owners of video recorders had cassettes of 120-149 minutes duration but 53.7% had cassettes of 180-209 minutes. In the United States of America,⁽⁴³⁾ the most popular tape lengths are two hours for the owners of Betamax and 4 hours for the owners of VHS sets. In the United Kingdom, 72% of blank (or home-recorded) cassettes have a duration of 3 hours. Most programmes are recorded, then erased and the cassettes re-used. The question whether home-recorded cassettes had been erased was answered in the affirmative by 84.4% of the video equipment owners in the German survey. The survey also revealed that, on average, the user of a video recorder had erased cassettes 75 times in the course of the year. In the United States of America, 48% of owners of video equipment declared that they played back once or

twice what they had recorded and then erased. Although erasing of video recordings is obviously more widespread than for audio recordings, since audio-visual programmes have a more limited repetitive potential, an interesting development is now taking place; an increasing number of video users are tending to keep their recordings (see section 2.2.2.6 below).

2.2.2.3 Extent and Frequency of Private Copying

- 2.2.2.3.1 Private copying of audio-visual works is very widespread. In the Federal Republic of Germany, nearly all (94.8%) users of video equipment have already made recordings with their sets. In Sweden similar results were found.⁽⁴⁴⁾ About 90% of users make recordings from television and those who watch video do so for 1½ hours per day.
- 2.2.2.3.2 The German survey of 1982 also shows that, on average, 4.2 hours are being recorded each week by the owner of the equipment and 6 hours are being played back during the same period. This is an increase from 1979, when the corresponding figures were 3.5 hours and 3.9 hours respectively.
- 2.2.2.3.3 In the United States of America, the results are different. The 1981 survey shows an average of 3.23 hours recording time per week and a playing back time of 2.62 hours. The time during which the equipment is being used is much shorter than in Germany; also playing back time is shorter than the recording time which means that not all recorded programmes are being watched. The vast number of television and cable television channels in the United States of America no doubt explains the lesser use of the video equipment. Pre-recorded cassettes are played back for 0.68 hours per week.
- 2.2.2.3.4 When comparing these figures with the weekly levels of television viewing,⁽⁴⁵⁾ the extent of utilisation of the video equipment appears more clearly. In Germany, the average extent of adult television viewing is around 15 hours per week. At present, 6 hours consist of video programmes or the equivalent of 40% of the average weekly television viewing and 30% (4.2 hours) of the programmes viewed on television are being recorded.
- 2.2.2.3.5 In Sweden, video recorders are also used extensively. The average daily television viewing time is about 2 hours and video recorders are played for 1½ hours per day. Two out of three owners use their video set every week and as many as 30% use it on any given day. An even more interesting fact is that 10% of the

Swedish population, who do not have video sets of their own, watch video programmes once a week. 5% of the population watch a video programme every day.

2.2.2.3.6 The German survey puts a stronger emphasis on recording behaviour with regard to television programmes. The 1982 survey showed that, at least once a week, 33.2% of video users viewed and recorded a television programme at the same time, 41% watched a television programme and recorded another one and 55.1% recorded a television programme when not watching television.

2.2.2.3.7 In Ireland, the average owner of a video recorder tapes television programmes two or three times a week and, in Italy, domestic sets are used to record once or twice a week. (46)

2.2.2.3.8 The above examples all lead to the conclusion that video recorders are used very frequently (weekly) and principally to record programmes or to play programmes previously recorded. The figures also give an idea of the vast amount of copyright material which is being copied.

2.2.2.4 Nature of Recordings

2.2.2.4.1 Feature films are, by far, the type of programme most frequently recorded. An important aspect of the German survey carried out in 1982 was to ascertain from a representative cross section of video equipment owners what had actually been recorded on the blank cassettes. Feature films of various kinds represented 64.7% of all "home-recorded" cassettes; then came musical programmes (11.5%), sports (7.6%) and comedies (4.2%).

2.2.2.4.2 In Sweden, also, films top the list of recordings with 35% (20% television fiction and 15% feature films), then come entertainment programmes (19%), followed by children's programmes (15%) and music (10%). Current affairs and news (9%) and sport (7%) represent the remainder. Films not only come well ahead of all other recordings made, but they also represent the vast majority of videocassettes bought and rented. Entertainment and music programmes also tend to represent a far from insignificant and increasing part of recordings and play-backs. These findings seem to have been confirmed for other countries in various reports published by the media.

2.2.2.5 Sources of Recordings

2.2.2.5.1 The main source of recording is, of course, television. Indeed, most owners of video equipment

associate their machines with this facility. (47)
 Owners of video equipment were asked the source of their last recording in the German survey of 1982. The results are as follows:

- from the television receiver 95.4%
- from a pre-recorded cassette 1.9%
 (using another video recorder)
- from a "home-recorded" cassette 1.3%
 (using another video recorder)
- with a video camera 1.5%

Only 1.5% of all recordings consist of personal recordings (i.e. holidays, family occasions, amateur films). It can, therefore, confidently be predicted that over 90% of recordings consist of copyright material.

2.2.2.5.2 There have been practically no changes as regards sources of recordings in the Federal Republic of Germany since 1979 when the first survey was carried out. It is also worth noting that, in the four weeks preceding the survey, 49% of owners of video equipment had borrowed videocassettes (pre-recorded as well as "home-recorded" cassettes) from their friends or acquaintances and no less than 23.5% of these cassettes had been copied. When related to all video owners, this means that approximately 12% of all owners have copied cassettes.

2.2.2.5.3 In the United States of America, 74.8% of owners of video equipment interviewed claimed that they sometimes recorded off-the-air or from cable for their permanent collection. More than half the respondents (52.4%) also said that they had already traded videocassettes with other owners of video equipment and 31.2% mentioned that they sometimes made copies of videocassettes belonging to others. In Sweden, 90% of video owners make recordings from television.

2.2.2.5.4 It is interesting to note that, even with the present, relatively low, level of penetration of video equipment and in spite of the fact that only a handful of video owners have two video recorders, a significant amount of copying does nevertheless take place.

2.2.2.6 Reasons for Private Copying: Time-Shifting and Creating a Video Library

2.2.2.6.1 When video recorders were first introduced on the market, "time-shift", that is, the recording of a television programme broadcast at a time when the person making the recording was unable to watch it, was the only use associated with video recorders and,

indeed, for the majority of people, the possibility of "time-shift" is still the determinant factor for those buying a video recorder. A survey carried out in the United Kingdom in 1982 shows that 51% of video recording is done for "time-shift" reasons. (48) "Time-shifting" is thus the main reason for recording off-the-air and once the programme has been viewed it is then often erased.

- 2.2.2.6.2 However, over the past three years, a change has occurred in the behaviour of video users. They seem to have become more aware of the fact that video recorders are not just a "time-shifting" device but can be used to play audio-visual works from their personal collection. Indeed, more and more users are building up their own video library. The two German surveys illustrate this development particularly well. Users of video equipment were asked what they intended to do with the cassettes they had recorded. The answers were as follows:

	<u>1979</u>	<u>1982</u>
I intend to keep the recording	27.6%	37.8%
I will probably keep the recording	29.7%	35.8%
I will erase the recording	42.6%	26.4%

In the United States of America, 32.7% of the video owners interviewed said they were interested in building a video library, 47.9% said they watched a programme once or twice and then erased it and 19% said they were doing both, erasing and building a library.

- 2.2.2.6.3 These surveys show that a significant and increasing number of recordings is being kept permanently; this means that a certain percentage of "tapers" would certainly have considered buying a pre-recorded videocassette if they had been unable to record the programme in question. The argument often put forward that copyright owners suffer no loss as a result of video home taping, since the recordings are only made for "time-shift" reasons, is therefore unfounded.
- 2.2.2.6.4 The present high price of pre-recorded videocassettes is no doubt one of the reasons why owners of video equipment tend to record so much off-the-air and, in the Federal Republic of Germany, 57.6% of the persons interviewed claimed they would buy more pre-recorded cassettes if these were cheaper. The prices of pre-recorded videocassettes are now beginning to fall and it is hoped that this will help sales to increase. However, the practice of private copying is well-established and will always remain a convenient and cheap option.

2.2.2.7 Losses Resulting from Private Copying

2.2.2.7.1 The widespread practice of private copying is already holding down sales and making the rental of films previously shown on television extremely difficult.

2.2.2.7.2 So far, little work has been done on estimating the losses resulting from private copying of videograms. Only one recent study carried out in the United Kingdom⁽⁴⁹⁾ on the "Market for Home Video Products" made a tentative estimate of the extent of the losses to the video industry. That study estimated that the shortfall in revenue could be at least £13 million (US\$24 million) at the retail level and that the net loss to right owners could be in the region of £5 million (US\$9 million). This amount may not seem significant at present, but, with the rapid growth of the market for video recorders, it is clear that the problem of lost revenue is going to be of major importance in the future. In addition, there are other losses which cannot be accounted for easily, such as fewer takings at the cinema because of home taping of films. It will also become increasingly difficult for a broadcasting organisation to show the same film several times over a certain period of time. Broadcasters which enjoy exclusive (original and/or derived) rights in their programmes will find the marketing of the latter in the form of videocassettes to be less and less profitable as more private individuals make their own recordings of television programmes. Authors of original works also suffer from private copying and job opportunities for actors and performers become scarcer as original productions are discouraged. When all these factors are taken into account, losses due to home taping could prove to be much more substantial than the tentative figures quoted above. These losses are bound to increase in the next few years since penetration of video equipment is expected to rise sharply.

2.2.2.8 The Particular Importance of Rental in Video Entertainment

2.2.2.8.1 Rental has emerged everywhere as a predominant feature of the "home video industry". As pointed out above in paragraph 2.1.5.1, rental is believed to represent as much as 85-90% of all transactions at the retail level in all countries where home video entertainment exists.

2.2.2.8.2 The proportion of video users engaging in rental transactions is currently high in the major video markets. In the United States of America, 51.6% of owners of video equipment declared that they had already rented a pre-recorded videocassette. In the

Federal Republic of Germany, approximately 40% of video owners had rented at least one cassette during the previous four weeks of the survey. In the United Kingdom, 35% of video owners were estimated to be engaged in rental transactions in 1981 and this proportion is expected to rise to 50% by 1986.⁽⁵⁰⁾ The average number of tapes rented per user is forecast to stay at one per fortnight for the next few years. In the United States of America, owners of video recorders renting cassettes on average rented 12 cassettes over a six-month period. In Italy, which is just entering the video market, rental transactions are far less frequent. Forecasts for 1983 indicate that the average owner of a video recorder will be renting only two cassettes during that year.⁽⁵¹⁾

2.2.2.8.3 The emergence of video clubs, which charge their members extremely cheap rates as well as providing them with other advantages such as the possibility to reserve cassettes, is encouraging more frequent rental transactions. In the United Kingdom, around 40% of video owners now belong to a club and membership of video clubs seems to be increasing rapidly. In Germany, only 20% of video owners belonged to a club in 1981; one year later, this percentage was up to 43%.⁽⁵²⁾

2.2.2.8.4 Rental of videocassettes has become very popular over the past two years for two major reasons. Firstly, renting a videocassette is much cheaper than buying one. Overnight rental charges can be as cheap as F10-12 (\$1.5) in France, £1.50 (\$2.5) in the United Kingdom and £1 (\$1.5) in Ireland. Secondly, videocassettes, and in particular feature films, do not lend themselves to repeated viewing. The German survey shows that on average each pre-recorded cassette is played back 3.2 times.

TABLE 13

UNITED STATES OF AMERICA (1981)

Categories	Videogram purchased	Videogram rented
Feature films	75.1%	89.0%
Educationals/Documentary	7.1%	2.7%
Sports	4.4%	3.0%
Concerts/Musical Variety	3.5%	4.0%
Others	9.9%	2.3%
	100.0%	100.0%

Source : 3rd Annual Diary Study of VCR Homes op. cit. page 810.

TABLE 14

UNITED KINGDOM (1982)

Categories	Videogram purchased	Videogram rented
Feature films (including Musicals)	65% (6%)	95% (6%)
Music	2%	-
Sport	6%	2%
Children	4%	-
Documentaries	4%	-
Others	19%	3%
Total	100%	100%

Source : UK Market for Home Video Products op.cit. pages 148 and 149.

2.2.2.8.5 Because the price difference between videocassette rental and purchase is so wide, video users tend to choose different types of programmes, depending on whether they are buying or renting. Although feature films are by far the most popular category of videograms in both cases, it is interesting to note that the available surveys show that feature films comprise a higher proportion of rentals than purchases. The US survey shows that 75% of all videocassettes and discs purchased consist of feature films as compared to 89% of those rented. Similarly, in the United Kingdom, 95% of rentals consist of feature films as against 65% of all purchases. Users of video equipment tend to purchase a larger selection of programmes as is shown in tables 13 and 14.

2.2.2.8.6 Feature films continue to dominate the market. This is not only a reflection of the tastes of video users but of the fact that educational and entertainment programmes especially made for videocassettes are not readily available at present. Producers are hesitant to invest in original productions as they well know that piracy and private copying will prevent them from gaining a fair return on their investment.

2.2.2.8.7 Users of video equipment tend to view pre-recorded cassettes more frequently. At the end of 1981, only 14% of all video viewing in the United Kingdom was accounted for by pre-recorded cassettes but by mid-1982 this figure was up to 27%.⁽⁵²⁾ Thus, the market for pre-recorded videocassettes is assured of a bright future provided adequate legislation is enacted to help right owners to fight piracy effectively and to cope with the problem of private copying.

FOOTNOTES TO CHAPTER 2

- (1) Unless otherwise stated, statistics shown have been collected by IFPI (International Federation of Phonogram and Videogram Producers) and its National Groups and affiliated organisations. The audio and video surveys referred to in this chapter are listed in Appendices 1 and 2. The audio surveys have been given a key reference and in these footnotes they are referred to by their key reference.
- (2) A. Krieger, Auf dem Wege zur zweiten Urheberrechtsnovelle. GRUR, vol 6,1980, p. 547.
- (3) BPI (British Phonographic Industry) Year Book 1982, London, 1982, p.40.
- (4) The Home Video Revolution in West Europe. London. Economist Intelligence Unit (EIU). Special Report No.144, April 1983, p.28.
- (5) Ibid, p.32.
- (6) Ibid, p.100.
- (7) BPI Year Book 1982, op. cit., p.38; E.I.U. The Home Revolution in West Europe, op. cit., p.28.
- (8) L.S.A., No.887, 7 January 1983, p.88-90.
- (9) Verbraucherverhalten und - Ansichten von Besitzern von Videorecordern 1979, and Video Studie, 1982, surveys carried out by GFM(Gesellschaft für Marktforschung mbH, Hamburg, for ZPÜ (Zentralstelle für private Überspielungsrechte; 3rd Annual Diary Study of VCR Homes, Silver Spring (Maryland), Media Statistics Inc., Fall 1981.
- (10) Surveys :UK3; UK2; N2; F4; GR1.
- (11) EIU. The Home Video Revolution in West Europe, op. cit., p.98.
- (12) 3rd Annual Diary Study of VCR Homes, 1981, op. cit., p.B-19.
- (13) A study on the UK market for Home Video Products. London, the Economist Intelligence Unit (EIU), June 1982, p.87 and 91.
- (14) GFM Video Studie 1982, op. cit., p.III.
- (15) 3rd Annual Diary Study of VCR Homes, 1981, op. cit.
- (16) Television Today and Television Tomorrow. A guide to

new electronic media and trends in commercial television in Western Europe. London, J. Walter Thompson Co. Ltd., 1983, p.21.

- (17) Results of Special Mediastat Survey Conducted in Video Recorder Homes. Silver Spring (Maryland), Media Statistics Inc., 1979, p.2.
- (18) GFM Video Studie op. cit., p.7.
- (19) See Commission Regulation (EEC) No.3545/82 of 21 December 1982 introducing Community surveillance of imports of video tape recorders originating in Japan. Official Journal of the European Communities No. L371, 30.12.82 p. 31, and Screendigest, March 1983, p.47.
- (20) Billboard, 10 December 1982, p.9 and 59.
- (21) The Music Trade by Inter Company Comparisons. Billboard, 19.3.1983.
- (22) Music and Video Week, 25.6.1983.
- (23) United States International Trade Commission Report. 'Variety', Vol. 309, No. 2, of 10/11/82 p.97.
- (24) House of Commons Debates, 21 January 1983. Second reading of Copyright (Amendment) Bill. Hansard, HMSO, 21.1.1983.
- (25) Variety, Vol 309, No.11, 12/1/83.
- (26) In order to compare the results from the different surveys, it has sometimes been necessary to recalculate some figures.
- (27) French survey F4. 1983.
- (28) Ibid.
- (29) Surveys G1 and G2; N2; GR1.
- (30) F4
- (31) G2; UK3; N2.
- (32) F4
- (33) UK2
- (34) BPI Year Book 1982, op. cit., p.41.
- (35) N2
- (36) US3

- (37) G2
- (38) 3rd Annual Diary Study of VCR Homes, 1981, op. cit.
- (39) Survey on Video Market. Quarterly surveys (1980) carried out by the British Market Research Bureau Limited (BMRB) on behalf of The British Videogram Association (BVA), London.
- (40) E.I.U. The UK Market for Home Video Products, 1982, op. cit.
- (41) WEA European Co-ordinating Inc.
- (42) GFM Video-Studie 1982, op. cit.
- (43) Results of Special Mediastat Survey Conducted in Video Recorder Homes, 1979, op. cit.
- (44) O. Hulten. The Use of Video in Swedish Homes. EBU Review, Vol. XXXIII No.5, September 1982, p.14.
- (45) JWT Television Today and Television Tomorrow, 1983. op. cit.
- (46) WEA European Co-ordinating Inc. op. cit.
- (47) E.I.U. The UK Market for Home Video Products, 1982, op. cit. p.81.
- (48) Corporate Video, November 1982, p.52.
- (49) E.I.U. The UK Market for Home Video Products, 1982, op. cit, p.207.
- (50) Ibid., p.214.
- (51) Daten zum Video-Markt, 1982. Eine Dokumentation aus dem Hause Burda., Offenburg (Germany) Burda GmbH, 1982.
- (52) Corporate Video, op. cit., p.52.

CHAPTER 3 THE INTERNATIONAL CONVENTIONS RELEVANT
TO PRIVATE COPYING IN FORCE IN THE EEC
COUNTRIES

3.1 RELEVANCE OF THE CONVENTIONS

3.1.1 Private copying of sound and audio-visual recordings, as already noted, causes prejudice to a number of right owners (see Chapter 1.7 above). Two parallel and entirely independent interests subsist in every phonogram published, that of the author and that of the producer of phonograms. Similarly, as regards videograms, the interests of owners of copyright in cinematographic works (to which are assimilated works expressed by a process analogous to cinematography) and those of the authors of works adapted for cinematography are distinct and co-exist.

3.1.2 In the case of private copying of both sound and audio-visual recordings, the interests of performers are affected and the interests of broadcasters also have to be taken into account.

3.1.3 It is relevant, therefore, to examine the various international conventions in the field of copyright and related rights in force in EEC countries and to determine the extent to which, if at all, they provide protection to right owners against private copying. The relevant conventions are:

- The Berne Convention for the Protection of Literary and Artistic Works
- The Universal Copyright Convention
- The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
- The Convention for the Protection of Producers of Phonograms Against the Unauthorised Duplication of their Phonograms
- The European Agreement on the Protection of Television Broadcasts

The EEC Member States which are parties to these conventions are listed in Appendix 3.

3.1.4 The intergovernmental committees responsible for the administration of these conventions have considered the problem of private copying on a number of occasions.⁽¹⁾ These bodies have expressed views on the compatibility of the practice with the law of the various conventions, and, in some cases, made proposals for solutions to the problem. This chapter reports on the outcome of these discussions as regards the legal situation under the conventions. Proposals for legislative solutions to private copying put forward by the intergovernmental committees are referred to in Chapter 5.

3.2 THE BERNE AND UNIVERSAL COPYRIGHT CONVENTIONS

3.2.1 Under the Berne Convention (Stockholm Act 1967 and Paris Act 1971), authors of literary, musical and artistic works have the exclusive right of authorising the reproduction of their works, in any manner or form (Article 9 (1)),⁽²⁾ and the Convention expressly provides that any sound or visual recording shall be considered as a reproduction for the purposes of the Convention (Article 9 (3)). Authors also have the exclusive right of authorising the cinematographic adaptation and reproduction of their works (Article 14).⁽³⁾ Owners of copyright in cinematographic works are similarly protected by the Convention and enjoy the same rights as the author of an original work (Article 14 bis).⁽⁴⁾ Exceptions are permitted to these general rules in very limited circumstances (Article 9 (2)):

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

3.2.2 The protection afforded by the Universal Copyright Convention (as revised at Paris, 1971) is similar. Article 1⁽⁵⁾ obliges the Contracting States to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic⁽⁶⁾ and cinematographic works. Article IV bis (1)⁽⁶⁾ specifies that the rights referred to in Article 1 shall include the basic rights ensuring the authors' economic interest, including inter alia the exclusive right to authorise reproduction by any means.

- 3.2.3 Like the Berne Convention, the Universal Copyright Convention does not contain a specific provision regarding private use of works. Article IV bis (2) provides that any Contracting State may, by its domestic legislation, make exceptions 'that do not conflict with the spirit and provisions of this Convention' but the scope of this provision is limited in that States are nevertheless obliged to accord a 'reasonable degree of effective protection to each of the rights to which exception has been made'.
- 3.2.4 Two authoritative sources may be referred to for guidance as to the meaning of Article 9 of the Berne Convention: The Records of⁽⁷⁾ the Revision Conference held at Stockholm in 1967, at which time Article 9 was drafted, and Claude Masouy's⁽⁸⁾ Guide to the Berne Convention, published by WIPO.
- 3.2.5 According to the latter, the right of reproduction -- 'the very essence of copyright' -- had not previously appeared in the Convention for the following reason:
- 'Though the right was recognised, in principle, by all member countries, the problem was to find a formula wide enough to cover all reasonable exceptions, but not so wide as to make the right illusory.'⁽⁹⁾
- 3.2.6 Article 9 (2) was inserted in order to give member countries the power to cut down the exclusive right of reproduction and permit works to be reproduced 'in certain special cases'. In this study, we are concerned to determine what these 'special cases' may be and whether private copying may be considered to be such a 'special case'.⁽¹⁰⁾
- 3.2.7 In the preparatory Programme for the Stockholm Conference, it was expressly provided that the Convention should permit the reproduction of works for, inter alia, private use.⁽¹¹⁾ This specific mention of private use was not adopted, however, and the final formulation of Article 9 (2) was only settled upon after prolonged debate. The final formula embodied in the Convention consists of two phrases which apply cumulatively: the reproduction must not conflict with a normal exploitation of the work and must not unreasonably⁽¹²⁾ prejudice the legitimate interests of the author.

3.2.8 The cumulative effect of these phrases is spelt out in the Records of the Conference. If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment.⁽¹³⁾

3.2.9 Guidance as to the interpretation of this provision is given by Masouyé. The most relevant passages may be cited here.

'If the contemplated reproduction would be such as to conflict with a normal exploitation of the work it is not permitted at all. Novels, schoolbooks, etc. are normally exploited by being printed and sold to the public. This Article does not permit member countries to allow this e.g. under compulsory licences, even if payment is made to the copyright owner.'⁽¹⁴⁾

If the first condition is met (the reproduction does not conflict with the normal exploitation of the work) one must look and see whether the second is satisfied. Note that it is not a question of prejudice or no: all copying is damaging in some degree; a single photocopy may mean one copy of the journal remaining unsold and, if the author had a share in the proceeds of publication, he lost it. But was this prejudice unreasonable? Here, scarcely. It might be otherwise if a monograph, printed in limited numbers, were copied by a large firm and the copies distributed in their thousands to its correspondents throughout the world... In cases where there would be serious loss of profit for the copyright owner, the law should provide him with some compensation (a system of compulsory licensing with equitable remuneration).'⁽¹⁵⁾

3.2.10 Referring to the fact that national legislations often allow reproduction for 'the user's personal and private use', Masouyé points out that:

'Manuscript copies have little impact; but with the arrival of new copying techniques the situation changes. It is a matter not only of photocopies but also of tape-recorders.'⁽¹⁶⁾

It is little more than child's play to make high quality recordings of both sound and vision, either from discs or cassettes (re-recordings) or off-the-air (television as well as radio). The idea of a limitation to private use becomes less effective when copies can be made privately in large numbers.

If practical considerations do not offer copyright owners and their successors in title a chance to exercise their exclusive right of reproduction, it has been suggested that a global compensation might be provided for them, and that the money might be raised by imposing a levy on the material (tape, etc.) on which the sounds and images are fixed, as well as on the apparatus used for fixing.'⁽¹⁷⁾

3.2.11 The question arises as to how the provisions of the Universal Copyright Convention on the right of reproduction and the exceptions to it should be interpreted.

3.2.12 The report of the Conference of Revision of the Universal Copyright Convention (Paris, 1971) states on this subject:

'that where exceptions are made they must have a logical basis and must not be applied arbitrarily, and that the protection offered must be effectively enforced by the laws of the Contracting State'.⁽¹⁸⁾

3.2.13 The scope of the exceptions permitted by the Berne and Universal Copyright Conventions was the subject of discussion by a Working Group on the legal problems arising from the use of videocassettes and audio-visual discs, which met in 1977. Two conclusions of the working group are relevant here:

'It was pointed out that under Article 9 (2) of the Berne Convention private use was not automatically lawful. For it to be permitted, it was necessary that reproduction did not conflict with a normal exploitation of the work and did not unreasonably prejudice the legitimate interests of the author. The Working Group considered that, in view of the ease of reproducing videograms in the form of videocassettes, it was probable that such a mode of reproduction would not satisfy the restrictive conditions laid down by the above-mentioned provision and that, consequently, such reproductions were subject to the exclusive right of reproduction, under the Berne Convention.'⁽¹⁹⁾

On examining the provisions of the Universal Copyright Convention on the right of reproduction and the exceptions to it, the Working Group considered that the level of protection introduced by the text as revised in 1971 was no lower than that provided by the Berne Convention, and that, consequently, the exceptions to the right of reproduction permitted by the said revised text were not substantially different, as far as their scope was concerned, from those provided for in Article 9 (2) of the Berne Convention.' (20)

3.3 THE RELATED RIGHTS CONVENTIONS

3.3.1 The Rome Convention

3.3.1.1 The Rome Convention grants rights of reproduction to performers, producers of phonograms and broadcasting organisations.

Performers:

Under Article 7 of the Convention, performers enjoy inter alia the possibility of preventing:

- the fixation, without their consent, of their unfixed performance;
- the reproduction, without their consent, of a fixation of their performance:
 - (i) if the original fixation itself was made without their consent;
 - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent.'

However, under Article 19 of the Convention, performers lose the protection afforded by Article 7 'once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation'.

Producers of Phonograms

Article 10 of the Convention affords producers of phonograms 'the right to authorise or prohibit the direct or indirect reproduction of their phonograms'.

Broadcasting Organisations

Under Article 13 of the Convention broadcasting organisations enjoy the right to authorise or prohibit, inter alia:

'.... the fixation of their broadcasts; and
 the reproduction:
 of fixations, made without their
 consent, of their broadcasts.'

3.3.1.2 Article 15 of the Rome Convention expressly allows Contracting States to provide in national legislation for certain specific exceptions to the protection guaranteed by the Convention, including "private use". Consequently, the protection afforded to performers, producers of phonograms and broadcasting organisations may be limited by domestic legislation in the case of private use.

3.3.1.3 In this connection, however, it must be stressed that the protection afforded by the Rome Convention is a minimum. While the beneficiaries of the Rome Convention cannot claim that private use is an infringement of their exclusive rights under the Convention, there can be no doubt that the ease of reproduction made possible by technological developments is prejudicial to them and was never envisaged when the exception was included in the Convention.

3.3.2 The Phonograms Convention

3.3.2.1 The Phonograms Convention is an anti-piracy instrument. It was adopted as a result of the growing concern of the Contracting States 'at the widespread and increasing unauthorised duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms'. Article 2 of the Convention provides:

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

3.3.2.2 Private copying for personal use is not undertaken 'for the purpose of distribution to the public'. The concept of "distribution" is itself defined as meaning:

'any act by which duplicates of a phonogram are offered, directly or indirectly to the general public or any section thereof'.

It may be that this is the reason why the Phonograms Convention has no specific provision on the subject of private use.

- 3.3.2.3 However, it should also be noted that under Article 3 of the Convention the means by which protection is to be afforded to producers of phonograms

'shall be a matter for the domestic law of each Contracting State and shall include one or more of the following:

protection by means of the grant of a copyright or other specific right;
 protection by means of the law relating to unfair competition;
 protection by means of penal sanctions'.

- 3.3.2.4 This provision is relevant to the question of the limitations to protection which should be permitted under the Convention. According to Masouyé:

'The first point to make clear is that in the countries which honour the Phonograms Convention provisions by means of their unfair competition law, the question does not arise. Exceptions are only relevant when the phonogram producers enjoy a property right (copyright or neighbouring right) or when there are penal sanctions.'⁽²¹⁾

In fact, Article 6 of the Convention provides inter alia that:

'Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works...'

Thus, the principles of the Berne Convention as regards limitations on the protection of producers of phonograms are applicable. Moreover, nothing in the Phonograms Convention affects the protection afforded to authors by the Berne Convention as regards their works incorporated in legitimately produced phonograms. Thus, Article 9 (2) of the Berne Convention referred to above is relevant in this context.

- 3.3.2.5 Taking these considerations into account, it is submitted that there is a good case for the argument that producers of phonograms may claim, by virtue of Article 6 of the Convention, the same protection against private copying as authors may do under the Berne and Universal Copyright Conventions.
- 3.3.3 The European Agreement on the Protection of Television Broadcasts
- 3.3.3.1 The European Agreement on the Protection of Television Broadcasts grants broadcasting organisations the right to authorise or prohibit the fixation of television broadcasts or still photographs thereof, and any reproduction of such fixation (Article 1 (d)).
- 3.3.3.2 The European Agreement, like the Rome Convention, provides for a specific exception in respect of private use (Article 3 (1) (c)). However, a State party to the Agreement which wishes to withhold protection in the case of private use is obliged to make a declaration to that effect at the time of signature of or adherence to the Convention. However, Contracting States are not obliged to make such an exception. The Agreement provides for only a minimum level of protection.
- 3.3.4 As regards both the European Agreement and the Rome Convention, it is clear that the present-day abuse represented by private copying of the exclusive rights protected by these international instruments was never envisaged by those who drafted and adopted them in 1960 and 1961 respectively. Private copying on the scale described in Chapter 2 exceeds the scope of the "minor exceptions" from copyright which have traditionally been permitted by copyright legislation and which influenced the draftsmen of the international Conventions.
- 3.3.5 A number of Member States of the European Economic Community, following these Conventions, have allowed for limited exceptions to the reproduction right in their domestic legislation to allow copies to be made for personal or private use, "fair use", educational use and for other special purposes; in others, private copying is entirely prohibited. As noted above, it has been widely recognised, however, that the development of technology enabling an individual to make private copies which provide him with the entire content of a sound or audio-visual recording otherwise only commercially available to him, does indeed 'conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interests of the author', and other right owners.

FOOTNOTES TO CHAPTER 3

- (1) Joint Meeting of the Sub-Committees of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), the Intergovernmental Committee of the Universal Copyright Convention and the Intergovernmental Committee of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations on Legal Problems Arising from the Use of Videocassettes and AudioVisual Discs. Paris, September 18-22, 1978. (WIPO Doc. B/EC/SC.1/VAD5, section VIII); Joint Meeting of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention. Paris, October 24-31, 1979. (WIPO Doc. B/EC/XVI/14, paragraphs 53, 54, 59 and 60 and Doc. IGC(1971)/III/30 paragraphs 65, 66, 71 and 72).
- (2) Article 9 (1):
- (i) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (iii) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.
- (3) Article 14 (1):
- (1) Authors of literary or artistic works shall have the exclusive right of authorizing:
- (i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
- (4) Article 14 bis:
- (1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2) (a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(5) ARTICLE I

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

(6) ARTICLE IVbis

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

(7) Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967. Vols. I & II. Geneva, World Intellectual Property Organisation, 1971 (WIPO publication No. 311, French).

(8) Masouyé, Claude. Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). Geneva, World Intellectual Property Organisation, 1978 (WIPO publication No.615).

(9) Op. cit., paragraph 9.1

(10) Op. cit., paragraph 9.6

(11) Records of the Intellectual Property Conference of Stockholm op. cit. Main Committee I, Report, paragraph 78, p.1144.

(12) Masouyé, Claude. Guide to the Berne Convention, op. cit., paragraph 9.6, p.55

(13) Records.
Op. cit., paragraph 85, p. 1145.

(14) Op. cit., paragraph 9.7

(15) Op. cit., paragraph 9.8

(16) Op. cit., paragraph 9.10

(17) Op. cit., paragraph 9.11

(18) Records of the Conference for revision of the Universal Copyright Convention, Unesco House, Paris, 5 to 24 July 1974, paragraph 46, item 4.

- (19) Report of the Working Group on the Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs. Geneva, February 21 to 25, 1977. (Doc. UNESCO/WIPO/VWG/I/8, paragraph 32 and 'Copyright' April 1977, p.90).
- (20) Op. cit., paragraph 33
- (21) Masouyé, Claude. Guide to the Rome Convention and to the Phonograms Convention. Geneva, WIPO, 1981, paragraph 6.1 of the section dealing with the Phonograms Convention. (WIPO publication No. 617.)
See also: Records of the International Conference of States on the Protection of Phonograms. Geneva, October 18 to 29, 1971. Paris, Geneva, WIPO/UNESCO, 1975, paragraph 61 of the Reports. (WIPO publication No.318.)

CHAPTER 4 NATIONAL LAWS AND LEGISLATIVE
DEVELOPMENTS RELATING TO PRIVATE USE AND
FAIR DEALING IN THE TEN MEMBER STATES OF
THE EEC ⁽¹⁾

4.1 BELGIUM

4.1.1 Membership of Conventions

Belgium has adhered neither to the Rome Convention nor to the Phonograms Convention, but is a party to the Brussels Act 1948 of the Berne Convention, to the 1952 text of the Universal Copyright Convention and to the European Agreement on the Protection of Television Broadcasts.

4.1.2 Constitutional Provisions

4.1.2.1 The Belgian Constitution (revised to 29 September 1971) protects the fundamental rights enjoyed within its jurisdiction. These rights include the right of property which, it is assumed, includes copyright. Under Article 11 of the Constitution no person may be deprived of his property save in the public interest, in situations and in the manner which the law specifies, and on the condition that just compensation is paid for the property prior to its appropriation.

4.1.2.2 The precise relevance of this provision to the private copying of phonograms and videograms is uncertain, since the act of private copying may be regarded as a trespass upon the copyright owner's right rather than as an appropriation of it. Since the protection of producers of phonograms, broadcasting organisations and performers is effected through the law of unfair competition and not through the granting of a proprietary interest, it would seem doubtful whether Article 11 would be of any relevance to the protection of these categories of right owners as opposed to the protection of authors with respect to their works contained in phonograms and videograms.

4.1.3 Copyright Legislation

4.1.3.1 The Copyright Law dates from 22 March 1886, since when it has received only minor amendments. It grants no protection to producers of phonograms, broadcasters or performers; ⁽²⁾ these groups must instead protect their interests under the general provisions of the Civil Code and, in particular,

under the law on Trade Practices (see 4.1.4).⁽³⁾

4.1.3.2 Copyright protection covers all 'works of literature and art' (Article 1), which include the musical or literary works which may be incorporated into a phonogram or videogram. It is also assumed to be granted in respect of cinematograph films, to which videograms are presumed to be analogous. The Copyright Law is not explicit on this point, for it contains no special regulations pertinent to copyright in films; but the Berne Convention, which grants to owners of copyright in films the same rights as the author of an original work, is directly applicable under Belgian law. Legal theory and practice has concluded that it is not the producer of a cinematograph film but the script writer, director and film music composer who are initially entitled to copyright in it as "authors", and that the producer obtains copyright only by means of securing an express assignment. The owner of copyright in films enjoys his rights for the normal copyright term for works of collaborative authorship, i.e. until the end of fifty years from the death of the last surviving author (Article 5).

4.1.3.3 The Belgian Copyright Law does not permit the making of private copies for domestic use. It can thus be said that every making of a private copy of both phonograms and videograms is a civil infringement of the authors' or film copyright owners' copyright. Any wilful violation of copyright is also a criminal offence (Article 22).

4.1.3.4 The Belgian procedural rules with regard to civil infringement have recently been improved so as to facilitate speedy trials in urgent cases and so as to introduce the notion of "astreinte" (daily fine) for non-compliance with court orders. Neither these measures nor the procedure of "saisie-description" (seizure of described infringing copies pending the initiation of infringement proceedings) have much bearing upon the largely undetected infringement of copyright through private copying.

4.1.4 Unfair Competition

The Law on Trade Practices has proved to be of great assistance to producers of phonograms in their fight against commercial piracy. That law, however, is directed against acts of unfair or parasitic competition, and it is not easy to see how it could be of much practical use against the private copier who does not set himself up in competition with anyone. For the same reason, it is difficult to see how this law could be of much help to broadcasters or performers whose works are recorded privately without

their consent.

4.1.5 Case Law

So far as the author is aware, there have been no actions brought in Belgium against private copying.

4.1.6 Recent Developments

Within the last few years there have been two attempts to amend the Belgian Law of 22 March 1886 so as to provide for royalty payments on recording machines and blank audio and video tape for the benefit of authors and producers. (When reference is made to royalty payments on "blank tape", this should be understood as covering also tape intended for recording: thus the term "recording tape" is hereinafter mainly preferred.) The first was by way of a Bill introduced in the Chambre des Représentants on 24 October 1980, Article 5 of which proposed to collect an equitable remuneration from manufacturers and importers of machines and tapes likely to be used for private copying (which would then be permitted). The second was a Senate Bill introduced on 14 December 1981, Article 3 of which made proposals in broadly similar terms. Neither of these Bills has led to the amendment desired. It has been suggested that the Belgian Government will delay its decision on the adoption of a private copying law until it has concluded its deliberations on whether to amend the law so as to permit adherence to the Rome and Phonograms Conventions.

4.2 DENMARK

4.2.1 Membership of Conventions

Denmark has ratified both the Rome Convention (with effect from 23 September 1965) and the Phonograms Convention (with effect from 24 March 1977). Denmark is also a party to the Paris Act 1971 of the Berne Convention, to the 1971 text of the Universal Copyright Convention and to the European Agreement on the Protection of Television Broadcasts.

4.2.2 Constitutional Provisions

- 4.2.2.1 The Constitution of the Kingdom of Denmark Act of 5 June 1953 provides, by Article 73(1), that the right of property shall be inviolable, and that no person shall be ordered to cede his property except when required by the public weal (when special legal

provision must justify the cession and full compensation must be paid).

- 4.2.2.2 Since authors' works, phonograms, videograms, broadcasts and performances are all protected through proprietary rights, it follows that the provision of Article 73(1) is directly applicable to them.
- 4.2.3 Copyright Legislation
- 4.2.3.1 The Danish Copyright Law of 1961, as amended up to 1977,⁽⁴⁾ provides copyright protection for authors of works, producers of phonograms, producers of cinematograph films, broadcasters and performers.
- 4.2.3.2 Literary and musical works and cinematograph films are protected by copyright under the general provisions of Chapter I of the Law applicable to 'literary or artistic' works (Article 1). All such works are protected by copyright until the passage of fifty years from the death of the last surviving author (Article 44). From the context of Articles 1 and 5 of the Danish law it has been inferred that the authors of a film are those natural persons who make the creative contributions to it, as well as the director. The producer of such a work will only therefore be able to enforce copyright as an assignee of the authors.
- 4.2.3.3 Phonograms, broadcasts and performances are governed by Chapter V, which protects not copyright but 'other rights'. Producers of phonograms are given inter alia the right to authorise or prohibit the reproduction of their phonograms for a period of twenty-five years from the year in which the recording was made (Article 46).
- 4.2.3.4 No television or sound broadcast may be recorded on to records or tape by means of which it can be produced, for a period of twenty-five years from the year in which the broadcast was made, in the absence of permission from the broadcaster (Article 48).
- 4.2.3.5 Danish law also prohibits the recording of a performance of a literary, musical or dramatic work on any film or tape by which it can be reproduced, without the consent of the performer (Article 45). Where the performer has already consented to the making of such a recording, the recording of that performance may only be reproduced without the performer's consent after twenty-five years.
- 4.2.3.6 The making of an individual copy of a 'disseminated work' for private use is permitted under Danish law, with the restriction that such a copy, once made, may not lawfully be used for any other purpose (Article

11). It is clear that this provision in favour of private use applies to all works protected under the law, whether they be protected as works of copyright, or as 'other rights'.

4.2.3.7 The copyright infringement remedies provided by Danish law are both criminal (Article 55) and civil (Articles 56 and 57), including damages, seizure and the destruction of infringing copies. No distinction is drawn between remedies applicable to the infringement of authors' and composers' rights on the one hand and manufacturers', performers' or producers' rights on the other.

4.2.3.8 In general, criminal remedies are not available even against commercial pirates, and police intervention will not be forthcoming in the absence of fraud. Danish courts are known, in any event, to be lenient with those who are brought before them. There is no provision for punitive damages to be awarded in addition to ordinary compensation.

4.2.4 Case Law

So far as the author is aware, there have been no actions brought in Denmark against private copying.

4.2.5 Recent Developments

A report by the Copyright Committee to the Minister of Cultural Affairs published early in 1982 recommended the introduction of a royalty on audio and video cassettes, for the benefit of copyright owners. The proposed rate of the royalty was 0.08 D.krone per minute for audio cassettes and 0.20 D.krone per minute for video cassettes. It was expected that a Bill to implement these proposals would be introduced before the Danish Parliament in 1983. However, in May 1983, the Danish Parliament imposed a tax on blank and pre-recorded video tapes. A fixed rate of 30 D.krone is payable per cassette. Right owners receive no part of the monies collected, which are used for unspecified fiscal purposes. The imposition of this tax on video tapes is considered to make it very unlikely that the royalty scheme recommended by the Copyright Committee will be introduced in the foreseeable future.

4.3 FRANCE

4.3.1 Membership of Conventions

France has ratified the Phonograms Convention (with effect from 18 April 1973), but has not yet ratified the Rome Convention. France is also party to the Paris Act 1971 of the Berne Convention, to the 1971 text of the Universal Copyright Convention and to the European Agreement on the Protection of Television Broadcasts.

4.3.2 Constitutional Provisions

The French Constitution of 4 October 1958, as amended to 30 December 1963, protects numerous civil political liberties but not the right to enjoy property. In respect of such a right, it is provided that the law as enacted by Parliament shall determine the fundamental principles of property rights and civil and commercial obligations (Article 34).

4.3.3 Copyright Legislation

4.3.3.1 The French law of 1957⁽⁵⁾ recognises that, by the mere fact of creation, the 'author of an intellectual work' enjoys an exclusive incorporeal property right in it (Article 1). The concept of "intellectual work" apparently excludes phonograms but includes literary and musical works as well as cinematograph films (Article 3). The author of each component part of a film (whether or not that component was created specifically for the film), together with its director, are taken as being the film's authors (Article 14), and, in respect of all of the authors except the composer of the film music, the law presumes that the exclusive right to the commercial exploitation of the intellectual work which is embodied in the film will be enjoyed by its "producer" (the physical or legal entity who takes the initiative and responsibility in the making of the work: Article 17). Copyright in any protected work subsists until the passage of fifty years post mortem auctoris (Article 21).

4.3.3.2 The making of copies and reproductions which are strictly reserved for the private use of the copying party, and which are not intended for collective utilisation, is permitted (Article 41).

4.3.4 Unfair Competition Laws

4.3.4.1 Performers, producers of phonograms and broadcasters enjoy no copyright as such in the product of their labours; nor do they enjoy the protection of related rights legislation such as that implemented in Luxembourg under the Law of 23 September 1975.⁽⁶⁾

4.3.4.2 Some measure of protection is, however, granted under the "unfair competition" doctrine contained in Article 1382 of the Civil Code. The wording of that Article is so wide that almost every use by one person of another's intellectual or commercial creation can be brought within it. It reads:

'Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.'

By the application of this Article it has, for example, been established that a performer not only has a "moral right", analogous to the rights enjoyed by authors, in his performances, but that he also has the right to prohibit any unauthorised use of his performances (the Fürtwangler case,⁽⁷⁾ Orane Demazis,⁽⁸⁾ Spycret and others).⁽⁹⁾ This principle has recently been restated by the Cour de Cassation in the case of SNEPA v. Radio France.⁽¹⁰⁾ The Court held that, although performers are not protected by statute, they are entitled to insist that their performances are not used in any manner other than that authorised by them. From this it would seem that, in principle, a performer could object to the making of a private and unauthorised copy of a previously authorised performance.

4.3.4.3 France ratified the Phonograms Convention on the basis that the law of unfair competition and, in particular, Article 1382 of the Civil Code, provides protection for producers of phonograms. By virtue of the ratification (convention law becoming part of the national law on ratification), France is under an obligation to protect foreign producers of phonograms against the unauthorised manufacture, importation and distribution to the public of copies of their phonograms.

4.3.5 Case Law

4.3.5.1 So far as copyright is concerned, Article 41 of the Law of 11 March 1957, which allows the making of private copies which are strictly reserved for the private use of the copying party, has been subjected to judicial scrutiny in the Société Rannou Graphie decision, before the Paris Cour d'Appel, 8 October 1982.⁽¹¹⁾ In that case it was held that the company

had made an unlawful copy. It was the company, and not the client, which had acted as "copyist" within the meaning of Article 41 of the law throughout the whole process of reproduction of the work provided by the client. The company ensured the supply of paper, electric current and also in a general way made sure that the machine, situated on its premises, and thus kept under its surveillance, direction and control, was in good order. There was no need to distinguish between the case where the positioning of the pages to be photocopied and the operating of the on/off button were done by the client on the self-service principle and that where these operations were done, whether exceptionally or not, by the company itself or by one of its agents. The copies thus obtained were in no way reserved for the use of the company copyist. It had obtained a benefit analagous to that of a publisher and could not take advantage of the Article 41 exception to the exploitation monopoly granted by the law to the author and, thereafter, to the publisher of a work, who was frequently the assignee of the author's rights.

4.3.6 Recent Developments

- 4.3.6.1 Draft legislation providing for royalty payments on audio and video recording tapes is being prepared by the Ministry of Culture, in consultation with interested parties. This, together with provisions according comprehensive rights to performers and phonogram and videogram producers, is expected to be presented to Parliament during the course of 1983. In reply to a Parliamentary question put on 6 December 1982, the Minister of Culture stated that developments in all sectors of cultural activity called for the rights of creators to be respected. He went on:

'Private copying is becoming, in fact, a new method of exploiting musical and audio-visual works, over which performers, producers of phonograms and videograms have no control. The Intellectual Property Committee within the Ministry of Culture has decided that this situation would justify the introduction of a right to remuneration, from the sale of blank audio and audio-visual tapes, for the benefit of authors and the other right owners.... Such a solution... would allow the social status of creators and performers to be maintained, as well as allowing producers to continue to invest, without harming the expansion of new ways of disseminating works.'⁽¹²⁾

- 4.3.6.2 Until very recently it was envisaged that a royalty would be payable also on recording equipment.

However, since 1 January 1983, video recording equipment is subject to an annual tax of FF471, which is equivalent to the cost of a colour television licence. According to the Ministry of Communications, the monies collected from this annual tax will be used to assist the audio-visual industries generally and, in particular, television and private radio stations.

- 4.3.6.3 The amount of royalty payable on tapes is to be proportional to their duration. The scale of remuneration over a period of between one to five years is to be fixed by agreement between representative bodies of right owners and manufacturers and importers. Failing agreement, the scale will be fixed by a committee including representatives of the interested parties and presided over by a magistrate, who has a casting vote. Right owners will be obliged to donate 20% of their royalties to support cultural purposes. In respect of the royalty on audio tapes, right owners have agreed since 1976 that 50% will be paid to authors, composers and music publishers, 25% to producers and 25% to performers. In the case of video tapes, no division has as yet been agreed among right owners.

4.4 FEDERAL REPUBLIC OF GERMANY

4.4.1 Membership of Conventions

The Federal Republic of Germany has ratified both the Rome Convention (with effect from 21 October 1966) and the Phonograms Convention (with effect from 18 May 1974). Germany is also party to the Paris Act 1971 of the Berne Convention, to the 1971 text of the Universal Copyright Convention and to the European Agreement on the Protection of Television Broadcasts.

4.4.2 Constitutional Provisions

- 4.4.2.1 The Grundgesetz (the basic law for the Federal Republic of Germany promulgated on 23 May 1949 and amended to 31 August 1973) provides, by Article 14(1), that property and the right of inheritance are guaranteed but that their content and limits shall be determined by the laws. Article 14(2) provides that property imposes duties, and that its use should also serve the public weal. Article 14(3) further provides that expropriation of property may be effected only in the public weal, by special legal provision and in return for compensation fixed by reference to an equitable balance between the public interest and the interests of those affected by expropriation.

4.4.2.2 The German copyright legislation clearly confers a proprietary right upon all copyright owners, a right which is interpreted by reference to the constitutional protection accorded to all property (see 4.4.4).

4.4.3 Copyright Legislation

4.4.3.1 The German Copyright Law of 1965, as amended up to 1974, ⁽¹³⁾ protects the interests of authors, producers of phonograms, producers of videograms, performers and broadcasters.

4.4.3.2 Musical and literary compositions are protected by German copyright and, so far as videograms are concerned, Article 2 specifies that works protected under the Copyright Law include 'cinematographic works, including works produced by processes analogous to cinematography'. In principle, this copyright should vest in the author as creator of the work (Articles 1 and 7). There is no definition of the "author" of a film but, while the authors of all the component parts enjoy copyright in their contributions, it is the producer who enjoys the exclusive right of prohibiting or authorising the reproduction, distribution, public performance and broadcasting and transmission rights in the actual visual or visual and sound record upon which the cinematographic work has been fixed (Article 94). The duration of copyright in a work is until the end of seventy years from the death of its last surviving author, but the duration of the film producer's right under Article 94 is only twenty-five years from publication or (if there is no publication) production.

4.4.3.3 The producer of a sound record has, under Article 85(1), the exclusive right for twenty-five years to reproduce and distribute that sound record. In this context, the producer is understood to be the proprietor of the enterprise which undertook the recording.

4.4.3.4 Under Article 87(1) a broadcasting organisation has the exclusive right for twenty-five years to fix its broadcast on visual or sound records.

4.4.3.5 By Article 75 a performance of a work may be fixed on visual or sound records only with the consent of the performer, and those visual or sound records may only be reproduced with his consent. The latter right is not, however, enjoyed by film performers who, by Article 92, have no right under Article 75 to authorise or prohibit reproduction of a visual record of a cinematographic work once they have consented to the use of their performances in it. The rights of

the performer in respect of a visual or sound record fixing his performance expire twenty-five years after the publication of that record, according to Article 82. If the visual or sound record has not been published, then his rights expire twenty-five years after the performance.

- 4.4.3.6 The ineffectiveness of copyright legislation to prevent unauthorised domestic taping has led to two separate consequences under German law. The first is that the making of single copies of a work for personal use is permitted (Article 53(1)) whether the copy is made by the would-be user or by a third party; if the work is reproduced in a sound or visual record, however, the copying is only permitted if the third party makes the copy gratuitously. There is also an 'own use' exception (Article 54) which permits a number of otherwise infringing small-scale acts, such as the making of single copies for scientific use and inclusion in internal files. The second, original to German law but now enacted or under serious consideration in several other countries, is the royalty ("levy") provision of Article 53(5). That provision reads:

'If, from the nature of the work, it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions. A person who for commercial purposes introduces or reintroduces such equipment within the jurisdiction of this Act shall be jointly responsible with the manufacturer. This right shall not exist if, from all of the circumstances, it appears probable that the equipment will not be used within the jurisdiction of the Act for the said purposes. This right may only be enforced through collecting societies. By way of remuneration, each copyright owner shall be entitled to an equitable participation in the proceeds realized by the manufacturer from the sale of such equipment; the total claims of all copyright owners, including those coming within Articles 84 and 85(3) and Article 94(4) shall not exceed 5 per cent of such proceeds.'

The references to copyright owners other than authors, in the last sentence of the foregoing, are references to performers and the owners of rights in phonograms and videograms (but not in broadcasts) who also benefit from this provision.

4.4.4 Case Law

- 4.4.4.1 There is no German case law directly applicable to the question of the private copying by individuals of videograms or phonograms under Article 53 although the effect of Article 53 has been considered in the cases mentioned below. However, Article 53 was itself a legislative response to case law⁽¹⁴⁾ which established the illegality of private copying under the law which was then in force, the Copyright Law of 1901,⁽¹⁵⁾ and which affirmed the right of an injured right owner to obtain compensation even for exploitation of his work in a manner which did not produce any direct economic profit.
- 4.4.4.2 The constitutionality of Article 53(5) has been subjected to judicial challenge by a manufacturer of recording equipment but, in its decision of 7 July 1971, the Federal Constitutional Court rejected that challenge.⁽¹⁶⁾ The levy, accordingly, could not be viewed as had been alleged, as a violation of the manufacturer's rights of freedom of action, equal protection under the law, freedom of profession or protection of property. Nor could the legislative solution adopted by Article 53(5) be regarded as unsound (and therefore inconsistent with other constitutional rights), even though it could not be said that Article 53(5) represented the only way in which the problem of compensation for home taping could be solved.
- 4.4.4.3 It is worth noting another case with constitutional overtones (this time involving photocopying under Article 54 - the 'School-book judgment' of the Bremen District Court on 12 December 1975 (upheld on appeal as far as the Federal Court of Justice on 14 April 1978)).⁽¹⁷⁾ In that case, which involved the making of multiple copies of literary works for school use, the Federal Court affirmed that copyright was a constitutionally protected property, under Article 14 of the Grundgesetz (Constitution); for this reason, although considerations of public benefit might prohibit the author from barring the access of others to his work, it could not be concluded ipso facto that the author must be deprived of the right to receive a compensatory royalty.
- 4.4.4.4 The Courts also determined in this case that personal use within the meaning of Article 53 of the Copyright Law 1965 only existed when the reproduction was intended for use in the private sphere to satisfy purely personal needs of a non-professional and a non-commercial nature. (It is interesting to note in this context that, during consideration of the 1965 Act in Parliament before its enactment, Rapporteur

Lemmer expressly stated, referring to recording of school broadcasts under Article 47, that purchasing of recording equipment by schools did not come within the provision which became Article 53(5).⁽¹⁸⁾ The right of personal use within the meaning of Article 53 of the Copyright Law could therefore be claimed only by natural persons whereas reproductions made on behalf of legal persons within their area of responsibility were always to be viewed in the context of Article 54 of the Copyright Law. Thus copies made in school for use in class could not be regarded as for personal use, not even from the point of view of the school children, under Article 53.⁽¹⁹⁾ It would seem that if German law acts so as to protect the rights of the author even when they are eroded for the public benefit, its protection should be even more secure where the author is statutorily protected against the erosion of his rights by a merely private user.

4.4.5 Recent Developments

- 4.4.5.1 It has been generally agreed that the revenue attracted by Article 53(5) of the Copyright Law is far less than that which had been envisaged when that provision attained the force of law. This is because there has been a significant reduction in the purchase price of recording machines; accordingly, the sum raised per sale of recording machine, originally expected to average 15 DM a machine, had declined by 1981 to 2.60 DM a machine. Even if no account is taken of inflation, the effect of this reduction can be seen to be substantial.
- 4.4.5.2 Late in 1980, the German Government published a "Green Paper" on Copyright Law Reform. It noted the decline in income from the recording machine royalty, but considered it impractical to introduce a royalty payment on blank tape. An alternative proposal was put forward, that the 5% maximum royalty specified in Article 53(5) should be replaced by an 'equitable' percentage of unspecified magnitude, to be negotiated by right owners and manufacturers. This proposal has subsequently been abandoned.
- 4.4.5.3 More recently, the Government has proposed instead remedying the decline in royalty revenue by collecting a royalty based upon the running time of recording audio and video tapes, while still maintaining a low-level royalty payment on the sale of audio and video hardware. The rates proposed by the Government in a draft law published in August 1982 are:

audio tapes : 10 pf per hour
 audio hardware: 2 DM

video tapes: 40 pf per hour
 video hardware: 15 DM

The total income from such a proposed royalty is estimated at 47-48 million DM a year.

4.5 GREECE

4.5.1 Membership of Conventions

Greece is a party to the Paris Act 1971 of the Berne Convention and to the 1952 text of the Universal Copyright Convention. On the other hand, she is not a party to the European Agreement on the Protection of Television Broadcasts, and has acceded to neither the Rome nor the Phonograms Conventions.

4.5.2 Constitutional Provisions

4.5.2.1 The Constitution of Greece of 7 June 1975 provides that property is protected by the State but that rights deriving from property may not be exercised contrary to the public interest (Article 17(1)). It further provides that no one may be deprived of his property except for the public benefit, as specified by law and in return for full compensation (Article 17(2)).

4.5.2.2 From this it will be apparent that authors' rights in phonograms and videograms, which are protected by copyright, benefit from the protection of this provision. Since the Greek Copyright Law makes no provision for private copying, it is difficult to see how the making of private copies could be justified in terms of protection of the public interest.

4.5.3 Copyright Legislation

4.5.3.1 The Greek Copyright Statute 1920, which took its current form from the amendments of 23 November - 7 December 1944, (20) was itself indirectly amended by Decree 4264 of 1962 which entitled Greek authors to enjoy the benefit of the level of protection granted under the Berne Convention. Under Article 1, copyright vests in 'writers, composers, painters, authors of drawings, sculptors, turners and engravers of original works, arrangements or translations' for a duration of fifty years from the death of the author. Article 14 describes silent, sound and talking motion pictures as being works protected by copyright, and stipulates that the creators of their component artistic, literary, musical and

photographic parts, including actors, shall enjoy the same privileges as those of the creators of intellectual property mentioned in Article 1.

4.5.3.2 From the foregoing it can be seen that no direct copyright protection is enjoyed by the producer of phonograms or by the broadcaster. It is also implicit that the producer of a videogram (assuming the videogram to be protected as a 'motion picture') cannot enforce against any party any right in that work except by virtue of his being the assignee of such a right from its original owner.

4.5.3.3 Under the Law No.1075 enacted by Parliament in 1980, (21) performers are granted the right to authorise or prohibit any recording of their performances or any reproduction of such performances (Article 11). However, the part of the Law concerning performers' protection is not yet effective, as the necessary Presidential decree has not been issued. The right established in Article 11 is of fifty years' duration from the end of the year in which the recording of the performance was first made available to the public, or in which the recording was made if it was not made so available (Article 14). Once a performance is legitimately recorded or broadcast, its commercial exploitation is protected through the offices of an appropriate management body (Article 12). The legal limitations on copyright apply also to the performer's right (Article 15). Breach of this Law attracts substantial penal sanctions (Article 21). The constitutionality of the performers' protection section of this Law has been put in question, but following the adoption of amendments to it by Parliament on 15 March 1983, the Presidential decree necessary for its implementation is expected to be issued before the end of 1983.

4.5.4 Case Law

To the author's best knowledge there have been no cases on private copying.

4.6 IRELAND

4.6.1 Membership of Conventions

Ireland has ratified the Rome Convention (with effect from 19 September 1979) and its present copyright legislation is in conformity with the Phonograms Convention. However, Ireland would need to extend the protection granted by its copyright legislation to countries party to that Convention by Statutory Instrument. At present, such protection has only been

extended to countries party to the Rome Convention, the Berne Convention and the Universal Copyright Convention and it is possible for states not party to any of these Conventions to adhere to the Phonograms Convention. Ireland is party to the Brussels Act 1948 of the Berne Convention and to the 1952 text of the Universal Copyright Convention, but not to the European Agreement on the Protection of Television Broadcasts.

4.6.2 Constitutional Provisions

- 4.6.2.1 The Irish Constitution of 1937 has numerous provisions which relate to the protection of property rights and to the formulation of legislative policy with regard to the further protection of such rights.
- 4.6.2.2 Article 40.3.2^o provides that the State shall, in particular, 'by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate (inter alia) the property rights of every citizen'. This duty imposed upon the State is amplified by Article 43.1.1^o, which guarantees that no law may be passed which attempts to abolish the right of private ownership or the general right to transfer, bequeath or inherit property. This is, however, qualified by Article 43.2, by which the State recognises that the exercise of property rights ought, in a civil society, to be regulated by the principles of 'social justice', and that the delimitation of the exercise of such rights may be made with a view to reconciling their exercise with the exigencies of the common good. Even in the light of this qualification it is difficult to see how the Irish Government could render lawful the free private copying of videograms or phonograms, and it must be questioned whether legislation authorising the free domestic fixation of a broadcast would be constitutionally valid if copyright in a broadcast were ever to be vested in a copyright owner other than the state-owned monopoly, Radio Telefis Eireann.
- 4.6.2.3 A further provision of the Constitution charges the State with directing its policy towards showing that its citizens, all of whom have the right to an adequate means of livelihood, may through their occupations find the means of making reasonable provision for their domestic needs, and that the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good (Article 45.2). These provisions may provide a constitutional basis for legislative provisions which seek to preserve the interests of scriptwriters or composers, or to protect the recording industries from erosion or

extinction by the implementation of, for example, a royalty on blank tapes and recording equipment such as that operated in the Federal Republic of Germany or Austria (see 4.4.3.6 and 6.2.2).

4.6.3 Copyright Legislation

- 4.6.3.1 The Copyright Act 1963⁽²²⁾ provides copyright protection for the makers of phonograms and cinematograph films, and for the State broadcasting company. Note that, while the Irish text of the Constitution takes precedence over the English, the Irish text of the Copyright Act is an official translation of the English text which was passed by the Oireachtas (Irish Parliament).
- 4.6.3.2 Literary, musical and dramatic works of authors are protected under Section 8 of the Irish copyright legislation. The term of protection is for the duration of the author's life and then until the end of fifty calendar years from the end of the year of his death, or fifty years after the work's posthumous publication. Under Section 12 no 'fair dealing' with a literary, dramatic or musical work for purposes of research or private study shall constitute a copyright infringement. Thus domestic taping of works incorporated into sound recordings or cinematograph films is not per se permitted: the purpose of the making of the copy will determine its legality. The same is true of works which are copied from a broadcast performance.
- 4.6.3.3 Section 17 provides that the 'maker' of a sound recording (defined as the person who owns the record at the time when the recording is made) enjoys the sole right to authorise or prohibit the making of a copy of it for a period of fifty years from the end of the year in which it is first published. There is no exception permitting the lawful manufacture of individual copies for private use.
- 4.6.3.4 The 'maker' of a cinematograph film (defined as the person by whom the arrangements necessary for the making of the film are undertaken) enjoys under Section 18 the sole right to authorise or prohibit the making of a copy of it for a period of fifty years from the end of the year in which it was first published. The problems of interpretation of the definition of 'cinematograph film' which arise in United Kingdom law (see 4.10.3.3) are much less likely to arise in Ireland even though the definition of 'cinematograph film' is the same in each country's Act. This is because the Irish courts have adopted and employed rather more flexible canons of statutory interpretation. There is no exception permitting the lawful making of private copies.

4.6.3.5 Broadcasts made by Radio Telefis Eireann, the state broadcasting monopoly, are protected for fifty years from the end of the year in which they are first made (Section 19). The acts governed by copyright in a broadcast include the making of a cinematograph film or sound recording from it. In the case of such fixation, however, there is no infringement where the act is done for private purposes. Accordingly the domestic taping of a broadcast is not an infringement of copyright in the broadcast, whatever other rights it may infringe.

4.6.4 The Performers' Protection Act, 1968⁽²³⁾

Performers in Ireland do not enjoy copyright in their performances, but the fixation or reproduction of a fixation of a performance without the written consent of the performer is a criminal offence. There is no accompanying right to civil compensation or to equitable remuneration and, in any event, the making of a copy for private and personal use is not an offence within the meaning of the Act.

4.6.5 Case Law

There is no case law with regard to the legitimacy of making private copies of authors' works or of sound or visual recordings. It should be noted that, while Irish and United Kingdom copyright laws are closely related and often identical, Irish courts are not bound by English precedents (and *vice versa*). Because of the constitutional provisions described in 4.6.2 it is quite likely that any argument concerning the right to make such copies will take quite different lines in Ireland than it would in the United Kingdom.

4.6.6 Recent Developments

There have been no recent developments in Ireland, although there is a growing awareness of the scale of private copying.

4.7 ITALY

4.7.1 Membership of Conventions

Italy has ratified both the Rome Convention (with effect from 8 April 1975) and the Phonograms Convention (with effect from 24 March 1977). Italy is also party to the 1971 Paris Act of the Berne Convention and to the 1971 text of the Universal

Copyright Convention, but not to the European Agreement on the Protection of Television Broadcasts.

4.7.2 Constitutional Provisions

4.7.2.1 The Constitution of the Republic of Italy of 1947 provides that ownership is public or private, and that private ownership is recognised and granted by laws which prescribe the manner in which it may be acquired or limited in the interests of general accessibility; private property may also be expropriated in the public interest, but only as prescribed by law and on payment of compensation (Article 42).

4.7.3 Copyright Legislation

4.7.3.1 The Copyright Law No. 633 of 22 April 1941, as amended up to 1981, ⁽²⁴⁾ provides a fairly detailed set of regulations pertinent to the legality or otherwise of private copying.

4.7.3.2 All works of literature, science and art are covered by copyright (Article 1). So far as videograms are concerned, Article 44 provides that, with regard to cinematograph films, the authors of literary material, script and music, together with the director, are co-authors; but Articles 45 and 46 ensure that the film exploitation rights lie with the party who has organised the production of the work while non-film exploitation of literary and musical components by their authors is permitted under Article 49. Copyright in literary and musical works lasts until fifty years from the author's death (Article 25); copyright in a film is of fifty years' duration from the date of publication (Article 32).

4.7.3.3 Phonogram producers enjoy the exclusive right to reproduce their phonograms under Article 72. This right can be exercised for thirty years from the date of deposit (it is a requirement that one copy of a phonogram must be deposited with the competent authority within forty years from the making of the 'original plate', if copyright in it is to be enforced: Article 75).

4.7.3.4 A performing artist has the right to receive equitable remuneration from any person who records or reproduces his performance in any manner upon a phonograph record, cinematograph film or other contrivance (Article 80). This right terminates after twenty years from the date of the first authorised recording (Article 85). The performer also has a right to remuneration in respect of subsequent reproduction of a recorded performance by virtue of

Article 80.

- 4.7.3.5. The public 'organisation carrying on the broadcast service' (Radio Televisione Italiana (RAI)) has the exclusive right to record with gainful intent, upon phonograph records or like contrivances for the reproduction of sounds or voices, the transmitted or retransmitted broadcast emission (Article 79). This right, which is of 20 years' duration, was obviously intended to cover copying by sound recording devices only; but if video tapes can be demonstrated to be 'like contrivances', then the off-air taping of broadcasts of videograms will also be an infringement of the broadcaster's right (assuming that it is made with 'gainful intent'). It is possible to argue that the criterion of 'gainful intent' is established where the person recording the broadcast does so in order to save himself the cost of purchasing an authorised copy of a fixation of the broadcast, or of an authorised copy of a work which was already recorded.
- 4.7.3.6 The Italian law carries the narrowest copyright exception in favour of private copying. Under Article 68 the reproduction of individual works for the personal use of 'readers' is permitted if the copying is done by hand or by an uncommercial medium of reproduction. This exception would seem to be applicable only in respect of those copyright works which can be read (e.g. literature or sheet music) and which can be copied manually. It does not, however, seem applicable to the copying of phonograms or videograms; for since the copying of phonograms or videograms cannot be effected by hand, and since such copying results in the production of a copy which differs from the commercially released original only in its packaging, it is difficult to see how the wording of Article 68 could ever be applied in favour of the domestic copier of phonograms or videograms, even if their would-be users could ever be equated with 'readers'.
- 4.7.3.7 The Italian law carries the usual civil and penal sanctions for infringement, the latter where there is unlawful reproduction, sale or importation for profit-making purposes by the infringer (Article 171, as amended by Law No.406 of 29 July 1981). Penal sanctions in cases of piracy were increased substantially by the new law. The Italian legal system is not, however, renowned for the speed with which it despatches the cases brought before it.
- 4.7.3.8 It should be noted that any private copier who seeks to dispose of privately copied phonograms may find himself vulnerable to both civil and penal sanctions because such phonograms will not bear the official stamp of the SIAE, the Italian authors' society. This

stamp is applied to all legitimately produced phonograms in respect of which the author's copyright royalty has been paid; any record or tape on sale without it is assumed to be pirated, and a complaint from SIAE will be followed by police action. If SIAE brings a civil action itself, the record companies may join it.

4.7.4 Civil Code

Under Article 2601 of the Civil Code it is possible for the authors' society and the association of producers of phonograms to bring an action for damages for unfair competition in respect of acts which prejudice the entire industry. Such proceedings are rarely invoked. It is possible that they would provide a ground upon which the recording industry could complain about advertising practices employed by manufacturers of recording equipment and blank tapes who indicate too explicitly the unlawful uses to which those goods may be put.

4.7.5 Case Law

There has been no case law on the legality of private copying practices.

4.7.6 Recent Developments

Two Bills relating to private copying were presented before the Italian Parliament in 1981 (one before the House of Deputies, the other before the Senate). In both it was proposed to introduce a royalty both on recording equipment and tape. No decision has yet been taken by the Italian Parliament in relation to either Bill.

4.8 LUXEMBOURG

4.8.1 Membership of Conventions

Luxembourg has ratified the Rome Convention (with effect from 25 February 1976) and has ratified the Phonograms Convention (with effect from 8 March 1976). Luxembourg is party to the Paris Act 1971 of the Berne Convention and to the 1952 text of the Universal Copyright Convention, but is not party to the European Agreement on the Protection of Television Broadcasts.

4.8.2 Constitutional Provisions

The Constitution of the Grand Duchy of Luxembourg of 17 October 1868 (revised to 25 October 1956) provides that no one may be deprived of his property, except for reasons of public policy, and as stated in the law in consideration of fair compensation payable in advance (Article 16). By this standard one may wonder why Luxembourg allows the domestic copying of the subject matter of related rights but not of that protected by copyright (see 4.8.3.1 and 4.8.4.5).

4.8.3 Copyright Legislation

4.8.3.1 Cinematograph films and works expressed by a process analogous to cinematography (which should include videograms) are, as 'literary or artistic' works, the subject of copyright under the Law of 29 March 1972. (25)

So are the musical and literary works incorporated into them. Copyright in films vests in their maker (Article 27). Copyright subsists for fifty years from a work's lawful publication (Article 2). The Luxembourg law contains no special provisions permitting the making of individual copies for private use.

4.8.3.2 Any 'wilful or fraudulent' violation of copyright is an infringement in respect of which the infringer is liable to pay damages, a fine, or to the seizure and confiscation of infringing copies (Article 29). The swift trial of civil proceedings, as well as "saisie-description", is provided for.

4.8.4 Related Rights Legislation

4.8.4.1 The rights of performers, producers of phonograms and of broadcasting organisations are protected by the Law of 23 September 1975, which was enacted so as to enable Luxembourg to adhere to the Rome Convention. (26)

4.8.4.2 Producers of phonograms enjoy the right to authorise or prohibit the reproduction of their phonograms and the importation and distribution to the public of duplicates made without their consent (Article 8). This protection lasts for twenty years from the end of the year in which the fixation of the record took place (Article 12).

4.8.4.3 Performers of works also enjoy the right to authorise or prohibit the fixation of an unfixed performance as well as the reproduction of a fixation of a fixed performance (Article 3). This protection lasts for twenty years from the end of the year in which the performance took place (Article 12).

4.8.4.4 Broadcasters have the exclusive right, under Article 10, to authorise or prohibit the fixation of their broadcasts. This protection lasts for twenty years from the end of the year in which the broadcast was made (Article 12).

4.8.4.5 None of the related rights granted under the Law of 23 September 1975 may, however, be invoked against the making of any copy for private use (Article 13(1)). This means that the home taping of phonograms does not infringe the producer's right, even if it infringes the copyright in an author's work. On the other hand, the doing of the same act in relation to videograms is an infringement of copyright both in the film and in its component parts.

4.8.5 Case Law

There has been no case law on the legality of private copying practices.

4.8.6 Recent Developments

There have been no recent developments on the subject of private copying in Luxembourg.

4.9 THE NETHERLANDS

4.9.1 Membership of Conventions

The Netherlands is a party to the Brussels Act 1948 of the Berne Convention and the 1952 text of the Universal Copyright Convention. On the other hand, the Netherlands has not adhered to the Rome or Phonograms Conventions, or to the European Agreement on the Protection of Television Broadcasts.

4.9.2 Constitutional Provisions

The Constitution of the Kingdom of the Netherlands of 1972 provides that expropriation of means of public utility cannot take place except after a previous declaration of law that public utility requires such expropriation, and that compensation must be paid in advance except in times of war, riot, fire or flood (Article 165). Since Dutch law accords no proprietary rights to producers of phonograms or broadcasts or to performers, this provision is only applicable to the ownership of rights in authors' works (including videograms) in respect of which there is, however, a

private copying exemption without provision for compensation (see 4.9.3.2).

4.9.3 Copyright Legislation

4.9.3.1 The Law of 23 September 1912, as amended up to 1972, (27) is that which currently governs Dutch copyright. By Article 1 the 'author' of a literary or musical work or of a film, enjoys the exclusive right to reproduce it; this right lasts for fifty years following the year in which the author died (Article 37) or the film was published (Article 38). The Law does not specify who is the 'author' of a film, but Article 5 provides that, if separate works are combined in another work, the author is taken to be the person under whose direction or supervision the work is accomplished; Article 6 provides that a person according to whose specification and under whose direction a work is created is to be regarded as its author; and Article 7 determines that the employer of the author of a work may be taken to be the owner of its copyright. By the cumulative effect of these provisions the copyright in a videogram generally vests with its maker.

4.9.3.2 Copyright is subject to an important exception with regard to private copying. By Article 16(b) it is not an infringement of copyright to reproduce a work in a limited number of copies for the sole purpose of the personal practice, study or use of the person who makes the copies or who orders that they be made exclusively for himself. This provision, however, does not apply to reproductions made to order in the form of recordings of works or parts of works 'on an article intended for causing the work to be heard or seen'. Such copies, it should be noted, cannot be transmitted to third parties without the consent of the copyright owner.

4.9.4 Unfair Competition Law

Since performers, broadcasters and producers of phonograms derive no protection from the Copyright Law, they must rely upon the unfair competition provisions of Dutch law instead. These provisions, based on Article 1401 of the Civil Code, are of no practical use against the private copier because the burden of proof is very heavy, and because the plaintiff must both prove and quantify his actual loss. In the case of the making of an individual domestic copy, this loss is likely to be largely undetectable and of relatively little pecuniary value. It should be noted that, in the case of NVPI and others v. P.J.L Luiten, 1979, (28) where "bootleg" records were made and sold, the court acknowledged

that a tort had been committed but ruled that its extent was too limited for action to be taken. If a conclusion of this nature can be drawn where the act complained of was a deliberate commercial interference with the plaintiffs' rights, how much more likely would such a conclusion be drawn in respect of purely domestic acts.

4.9.5 Case Law

There has been no case law on the legality of private copying practices.

4.9.6 Recent Developments

The Minister of Justice has announced that new legislation providing for a royalty for the benefit of the right owners, to be collected on both recording equipment and recording tapes, is being prepared.

4.10 THE UNITED KINGDOM

4.10.1 Membership of Conventions

The United Kingdom has ratified both the Rome Convention (with effect from 18 May 1964) and the Phonograms Convention (with effect from 18 April 1973). It is party to the Brussels Act 1948 of the Berne Convention, to the 1971 text of the Universal Copyright Convention and to the European Agreement on the Protection of Television Broadcasts.

4.10.2 Constitutional Provisions

The copyright legislation of the United Kingdom is not subject to review or interpretation in the light of any national constitutional provision; indeed, the United Kingdom has no written constitution.

4.10.3 Copyright Legislation

4.10.3.1 The Copyright Act 1956⁽²⁹⁾ provides copyright protection for authors, the makers of phonograms, the makers of cinematograph films and certain makers of broadcasts.

4.10.3.2 Literary, musical and dramatic works of authors are protected under Section 2 of the Copyright Act. The term of protection is for the duration of the author's life and then until the end of fifty

calendar years from the end of the year of his death, or for fifty years after the work's posthumous publication. Under Section 6 no 'fair dealing' with a literary, musical or dramatic work for the purposes of private study shall constitute an infringement. Thus domestic taping of works incorporated into sound recordings or cinematograph films is not per se permitted: the purpose of the making of the copy will determine its legality. The same is true of works which are copied from a broadcast performance.

- 4.10.3.3 The 'maker' of a phonogram (defined as the person who owns the record at the time when the recording is made) or, in preference to him, a party which commissions the making of the phonogram for valuable consideration, enjoys under Section 12 of the United Kingdom law the sole right to authorise or prohibit the making of a copy of it for a period of fifty years from the end of the year in which it is first published. There is no exception permitting the lawful manufacture of private copies.
- 4.10.3.4 The 'maker' of a cinematograph film (defined as the person by whom the arrangements necessary for the making of the film are undertaken) enjoys under Section 13 the sole right to authorise or prohibit the making of a copy of it for a period of fifty years from the end of the year of registration or publication, depending upon the legal categorisation of the film under UK law. It is not certain that videograms wherein magnetic tape is employed are 'cinematograph films' under Section 13. This is because there is a strong tradition of literal interpretation in UK law. The statutory definition of a 'cinematograph film' (any sequence of visual images recorded on material of any description, whether translucent or not, so as to be capable, by the use of that material, of being shown directly or indirectly) is unclear in that, it has been argued, video tape involves the recording not of a 'sequence of visual images' but of mere electric impulses. The better view, as the Whitford Committee suggests, is that the definition of cinematograph film covers videograms also. In any event there is no exception permitting the lawful making of private copies.
- 4.10.3.5 Broadcasts made by the British Broadcasting Corporation and by the Independent Broadcasting Authority, but by no other broadcaster, are protected by copyright for fifty years from the end of the year in which they are first made (Section 14). The acts governed by this provision include the right to authorise or prohibit the making of a cinematograph film from a visual broadcast and the making of a sound recording embodying a sound broadcast. In the case of such fixation, however, there is no infringement where the act is done for private

purposes. Accordingly the domestic taping of a broadcast is not an infringement of copyright in the broadcast, whatever other rights it may infringe.

4.10.4 The Performers' Protection Acts, 1958-1972⁽³⁰⁾

Performers do not enjoy copyright in their performances, but the fixation or reproduction of a fixation of a performance without the written consent of the performer is a criminal offence. There is no accompanying right to civil compensation or to equitable remuneration and, in any event, the making of a copy for private and personal use is not an offence within the meaning of the Acts.

4.10.5 Case Law

- 4.10.5.1 Prior to 1911 any 'fair dealing' with copyright-protected matter was permitted under the common law. Since the Copyright Act of that year, however, 'fair dealing' with literary, dramatic, musical and artistic works (excluding cinematograph films) has been regulated by the express words of statute law. Professor Cornish has pointed out that it is by no means certain that the common law of 'fair dealing' is extinct;⁽³¹⁾ if it is not, then its provisions and those of statute law will give cumulative protection to the private copier.
- 4.10.5.2 As pointed out above (4.10.3.2), the copyright in authors' works is subject to a broad 'fair dealing' exception. Since 'fair dealing' with respect to the making of copies of phonograms and videograms has never been the subject of civil litigation, it is not possible to predict with confidence the outcome of any case on that subject. As a possible guideline, however, it is useful to note that in Hawkes v. Paramount (1934)⁽³²⁾ a 'fair dealing' case under the Copyright Act 1911, Lord Justice Slesser felt that the statutory exceptions to the exercise of copyright should be strictly construed. This view, it is submitted, is correct in that the 'fair dealing' exceptions are but limitations upon a recognised property right. In this context it should be noted that the Whitford Committee in its report on copyright law reform in 1977, Copyright and Designs Law,⁽³³⁾ was firm in its opinion that private copying should not of itself be regarded as 'fair dealing'. As it said, 'complete freedom for individuals ... to record for nothing from any source would not only weaken the record industry but also harm the interests of composers, writers, publishers, performers and others who are dependent on that industry, to the ultimate detriment of the whole community'.

4.10.6 Recent Developments

- 4.10.6.1 The Whitford Committee recommended that a 'levy' on recording equipment, similar to that operated in the Federal Republic of Germany, should be implemented. The Government in its Green Paper published in 1981⁽³⁴⁾ examined this proposal critically in the light of the evidence available to it, and concluded that:

'The Government has still not received convincing evidence that the introduction of a levy on audio or video equipment or blank tape would provide an acceptable solution to the problems or potential problems described: at the end of the day it may have to be accepted that there is in fact no acceptable solution.'

The Government did, however, invite public debate before making any final conclusion as to the desirability of introducing a 'levy'.

- 4.10.6.2 Since the publication of the Green Paper, the subject of private copying has attracted considerable attention in Parliament and the Government has made it clear that it is still studying the matter. In answer to an oral question in the House of Commons on 19 July 1982, the Under-Secretary of State for Trade, Mr Iain Sproat, stated:

'A levy on blank tapes is one of the possibilities which have been put to us in all the responses which have come in following the Green Paper and which the Government currently are considering. I assure my hon. Friend that I take this matter⁽³⁵⁾ as seriously as the video piracy business.'

- 4.10.6.3 In March 1983, a Bill was introduced into the House of Lords by Lord Willis.⁽³⁶⁾ This Bill, the Copyright (Amendment) (No.2) Bill 1983, provided that both (1) the unauthorised rental or distribution of audio or video recordings, in circumstances likely to lead to the unauthorised making of copies, and (2) the sale or distribution of machines the primary or a substantial likely use of which is the making of unauthorised copies, would constitute copyright infringement by 'authorisation' of an infringing act. This Bill, which would have substantially inhibited acts preparatory to private copying, lapsed on the dissolution of Parliament in May 1983.

FOOTNOTES TO CHAPTER 4

- (1) Unless otherwise stated the texts of national Copyright Laws can be found in the UNESCO publication, Copyright Laws and Treaties of the World (CLTW), loose-leaf edition, also available in French and Spanish.
- (2) Law on Copyright, of March 22, 1886, as amended up to March 11, 1958.
- (3) Belgian Trade Practices Act of July 14, 1971.
- (4) Act No.158 on Copyright and Literary and Artistic Works, of May 31, 1961, as amended on March 21, 1973 (Act No.174) and June 8, 1977 (Act No.240).
- (5) Law No.57-298 on Literary and Artistic Property, of March 11, 1957.
- (6) Law on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 23rd September, 1975, published in Memorial on 30th September, 1975. Copyright, March 1976, pp.77-80.
- (7) Paris Cour d'Appel 13 February 1957, Cour de Cassation 4 January 1964. RIDA (Revue Internationale du Droit d'Auteur), No. XXXXV, January 1965, pp.194-196.
- (8) Orane Demazis v. Compagnie Méditerranéenne du Film. Cour de Cassation, 30 January 1974. Bull. Civ. I, No.33, p.28, J.C.P. 1974 IV. 92.
- (9) Spycret Dame Rivière v. Sté Disc A2. Cour de Cassation, 29 April 1976. RIDA (Revue Internationale du Droit d'Auteur), No.LXXXX, October, 1976, p.166.
- (10) SNEPA v. Société Nationale de Radiodiffusion Radio France. Paris Tribunal de Commerce, 29 May 1978; Paris Cour d'Appel, 2 March 1979; Cour de Cassation, 5 November 1980; Versailles Cour d'Appel, 23 June 1982.
- (11) Société Rannou Graphie and Mme M. Rannou v. Comité National pour la Prévention des Reproductions Illicites and S.A. Editions Bordas; Decision of the Paris Cour d'Appel of 8 October 1982.
- (12) Question no.24096, from M. Bruno Bourg-Broc. Journal Officiel, February 1983.

- (13) Act dealing with Copyright and Related Rights (Copyright Act) of September 9, 1965, as amended up to March 2, 1974.
- (14) Supreme Court Decision of 18 May 1955, IZR 8/54, 17 BGHZ 266, GRUR, 1955, p.492 et seq and Decision of 18 May 1955 IZR 10/54, UFITA, 1955, Vol.20, p.335.
- (15) Law of June 19, 1901 Reichsgesetzblatt (RGL) 277.
- (16) Decision of July 7, 1971, 1BvR 775/66, 31 BVerfGE 248/255; GRUR, 1972, p.488.
- (17) Judgment of the Bremen District court of 12 December 1975. BVerfGE 31, 229, 231, GRUR, 1976, p.202. Decision of the Federal Supreme Court (Bundesgerichtshof) of April 14, 1978, Case IZR 111/76 Verwertungsgesellschaften Wissenschaft und WORT v. Freie Hansestadt Bremen; GRUR, 1978, p.474; IIC (International Review of Industrial Property and Copyright Law), Vol.10, No.2, 1979, pp.265-270; UFITA Bd. 83, 1978, p.227.
- (18) Bundestag 196th session, 2 July 1965, Bundesrat 285th session, 9 July 1965.
- (19) A. Dietz. Letter from the Federal Republic of Germany. Report on the development of Copyright between 1972 and 1979. Copyright, February 1980, p.103, paragraph 94.
- (20) Law on Literary Property, No.2387, of June 29, 1920, as amended up to 23 November-7 December 1944.
- (21) Law No.1075/1980 of September 23, 1980 on the permanence of employment of musicians of the State Orchestras of Athens and Thessalonica, on the calculation of the royalties payable to Greek playwrights, on the transfer of all jurisdiction for Cinema to the Ministry of Culture and Science, on the protection of performers and on job creation in state theaters. Copyright, November 1981, pp.288-290.
- (22) Copyright Act, No.10, of 1963.
- (23) Performers' Protection Act, 1968. An Act to prevent the Making of Unauthorised Records, Films and Broadcasts of Performances of Literary, Dramatic, Musical and Artistic Works. Act No.19 of July 2, 1968. Copyright, July 1969, pp.134-137.
- (24) Law for the Protection of Copyright and other rights connected with the exercise thereof, No.633, of April 22, 1941, as amended up to 29 July 1981, (Law No.406).
- (25) Copyright Law, of March 29, 1972.

- (26) Law on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 23 September 1975. Published in Memorial on 30th September 1975. Copyright, March 1976, pp.77-80.
- (27) Law concerning the New Regulation of Copyright, of September 23, 1912, as amended up to October 27, 1972.
- (28) NVPI, EMI Records Holland and WEA Records v. P.J.L. Luiten (Shop Tommy). District Court of Breda, 1 June 1979.
- (29) Copyright Act 1956, as amended up to 1983.
- (30) Performers' Protection Act 1972, of June 29, 1972. Copyright, January 1973, p.36.
- (31) W. Cornish. Intellectual Property : Patents, Copyright, Trade Marks and Allied Rights. London, Sweet & Maxwell, 1981, p.363 et seq..
- (32) Hawkes v. Paramount [1934] Ch.593; 103 L.J. Ch.281., 15 v. L.T. 294; 50 T.L.R. 363; 78 S.J. 367.
- (33) Whitford Report, Copyright and Designs law. Report of the Committee to consider the law on Copyright and Designs. Chairman: The Right Honourable Mr. Justice Whitford. London, HMSO, March 1977 (Cmnd 6732), paragraph 320.
- (34) Reform of the Law relating to Copyright, Designs and Performers' Protection. A Consultative Document, London, HMSO, July 1981, (Cmnd. 8302), Chapter 3, paragraph 23.
- (35) Hansard, 19 July 1982, Oral answers, p.10.
- (36) Copyright (Amendment) (No.2) [H.L.]. A Bill intituled An Act to Amend Section 1 of the Copyright Act 1956 as to extend the definition of authorisation of infringement of copyright. London, HMSO, 15th March, 1983.

CHAPTER 5 INTERNATIONAL DEVELOPMENTS

5.1 INTERGOVERNMENTAL RECOMMENDATIONS

5.1.1 Introduction

5.1.1.1 Private copying of phonograms and videograms has been the subject of discussion at intergovernmental level since 1977, when the problem was first addressed by a Working Group convened by UNESCO and WIPO to discuss the 'legal problems arising from the use of videocassettes and audio-visual discs'. Subsequently, private copying has been repeatedly on the agenda of sessions and Sub-committees of the Executive Committee of the Berne Union, the Intergovernmental Committees of the Universal Copyright Convention and of the Rome Convention, and other programme committees of UNESCO and WIPO. It has also been discussed in forums of the Council of Europe and, as already mentioned (see paragraphs 1.6.1 - 1.6.6, above), has given rise to concern by the Commission of the European Communities.

5.1.1.2 These intergovernmental discussions have resulted in a series of recommendations to national governments regarding possible legislative solutions to the problem of private copying of phonograms and videograms. In view of the very great relevance of these recommendations to the subject-matter of this study, the author has thought it appropriate to quote extensively the relevant extracts from the reports of the various bodies which have studied the matter. (In all the following quotations emphasis has been added.)

5.1.2 Meetings Convened by United Nations' Agencies (ILO, UNESCO, WIPO)

5.1.2.1 1977 Working Group

This working group⁽¹⁾ was convened by UNESCO and WIPO at the request of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention to study 'the legal problems arising from the use of videocassettes and audio-visual discs' both in relation to the protection of authors' rights and to that of the rights of performers, producers of phonograms and broadcasting organisations. Among the many topics considered was the scope of the exceptions to protection permitted by the international conventions, including that of private use. The

Working Group's conclusions were reflected as follows in its report:

'Scope of the Exceptions to Protection Permitted by the International Conventions : Private Use.

... As regards the legal aspect, the Working Group noted that in most national legislations both private use and fair use were exceptions to copyright and neighbouring rights, although the concept and limits of such uses could vary from country to country.

It was pointed out that under Article 9(2) of the Berne Convention private use was not automatically lawful. For it to be permitted, it was necessary that reproduction did not conflict with a normal exploitation of the work and did not unreasonably prejudice the legitimate interests of the author. The Working Group considered that, in view of the ease of reproducing videograms in the form of video cassettes, it was probable that such a mode of reproduction would not satisfy the restrictive conditions laid down by the above-mentioned provision and that, consequently, such reproductions were subject to the exclusive right of reproduction under the Berne Convention.

On examining the provisions of the Universal Copyright Convention on the right of reproduction and the exceptions to it, the Working Group considered that the level of protection introduced by the text as revised in 1971 was no lower than that provided by the Berne Convention, and that, consequently, the exceptions to the right of reproduction permitted by the said revised text were not substantially different, as far as their scope was concerned, from those provided for in Article 9(2) of the Berne Convention.....

In the face of this situation, the Working Group felt it necessary to draw attention to the fact that a great number of national legislations had not considered all the consequences of the restrictive conception of the limits on the right of reproduction provided for in the two Conventions mentioned. If those limits were to be respected, the Working Group thought that, as long as the state of technical progress did not allow copyright owners effectively to exercise the prerogatives of the exclusive right in the event of the private reproduction of videograms, the only solution seemed to be the establishment of a global compensation for authors or their

successors in title. It was pointed out that such payment would be in the nature not of a tax or other monetary imposition, but rather of an indemnification for being deprived of the opportunity to exercise exclusive rights.

The experts discussed the question whether the compensation should relate to the reproduction apparatus itself or to the material support on which the sequences of sounds and images were fixed, and indicated their preference for the latter solution....

As regards the owners of neighbouring rights, the Working Group noted that Article 15 of the Rome Convention provided for full exemption in respect of private use and therefore the owners could not claim, as could the authors, the exclusive rights provided for in that Convention with respect to such reproductions. It was felt, however, that the dissemination of videograms and the ease of reproduction referred to above were prejudicial both to performers and to producers of phonograms and broadcasting organizations. The experts were therefore of the opinion that, although it was impossible to invoke the obligations under an international agreement, considerations of equity justified the provision by national laws for participation by the owners of neighbouring rights in the proceeds of the global compensation. In this connection, mention was made of the relevant provisions in the legislation of the Federal Republic of Germany.

The Working Group felt it desirable that the payments in question should be received by those persons whose rights and interests were prejudiced by the private use of videograms and that collective agreements should settle the terms of distribution.'⁽²⁾

5.1.2.2 1978 Sub-committees

5.1.2.2.1 Sub-committees⁽³⁾ of the international copyright committees were subsequently convened in 1978 to study the legal aspects in relation to copyright of the use of videocassettes and audio-visual discs. Their main task was to seek solutions, based on the recommendations of the above-mentioned Working Group, that could be suggested to national legislators.

5.1.2.2.2 The Sub-committees examined and adopted an inventory of problems which was intended to give guidance to governments in formulating legislation on a whole range of subjects affecting the legal protection of videograms. The Sub-committees also discussed the question of private use in detail and, noting that the problems submitted to them for study related not only to copyright but also to aspects of the so-called neighbouring rights of performers, producers of phonograms and broadcasting organisations, stated:

'that the observations and conclusions of the 1977 Working Group, together with those resulting from the present deliberations, should be understood to apply not only to the audio-visual field but also to sound recordings'.⁽⁴⁾

The relevant extracts from the inventory of problems and report of the meeting follow.

5.1.2.2.3 Inventory of Problems⁽⁵⁾

'Private use

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

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

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

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

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

...

Field of application

The foregoing considerations should be taken to apply not only to audio-visual materials but also to sound recordings.'

5.1.2.2.4 Extracts from the Report⁽⁶⁾

' PRIVATE USE

It was asked whether distinctions should be drawn within the concept of private use, whether certain recordings might be considered as not conflicting with a normal exploitation of the work, in accordance with the terms of Article 9(2) of the Berne Convention.

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

It was pointed out, on the other hand, that the above-mentioned provisions of the Berne Convention determining the limits of exceptions to the right of reproduction were drawn up largely with reprography processes in mind, and that the situation under review was markedly different, in that the equipment necessary to make reprographic reproductions was not as commonly found in homes as the equipment for making sound or sound and vision recordings.

It was noted, in this connection, that the provisions of multilateral copyright conventions concerning the right of reproduction and the right of public performance, as well as the conclusion of the appropriate contracts between the various groups involved, made it possible to

settle the problems connected with the making of audio-visual cassettes and discs and their use outside the sphere of private use, and that the main difficulty lay in the delimitation of the latter, and in the absolute necessity of determining ways of compensating the owners of the rights. The opinion was expressed that the international Conventions did not contain any provisions which expressly forbade private use as such, and that it could be deduced from this that such use was tolerated. However, owing to the fact that it was not possible to control such use while at the same time respecting individual privacy and the inviolability of the home, it was considered that this tolerance was in any case prejudicial to the authors, and a fortiori when recordings made by an individual for his own use were circulated outside the family circle.

It appeared that compensation should be arranged for the owners of the rights, and reference was made to the system established by Article 53 (5) of the Federal Republic of Germany's copyright law of 1965,⁽⁷⁾ which instituted a charge based on the sales price of recording equipment. It was emphasized that this charge was not to be considered as a tax or para-fiscal levy, but as compensation due to the owners of exclusive rights to offset their inability to exercise such rights.

.....

The Sub-committees expressed the opinion that the institution of a charge, both on recording equipment and the supports would be likely to provide the best compensation for the prejudice caused.

Fears were expressed that any kind of levy, whether on recording equipment, material support or both, might be considered legalization of piracy, the user considering that in this way he had been authorized to use the said equipment and supports as he wished and to circulate the recorded copies without restriction. The wish was therefore expressed that the concept of private use be strictly defined and delimited before instituting a system to alleviate the harm suffered by copyright holders.

The Sub-committees reached the conclusion that, in view of the lack of technical means of preventing large numbers of uncontrolled recordings, the establishment of such a system should be recommended, this system consisting of a lump sum charge on the sales price of recording equipment and material supports and being intended to compensate all the professional groups whose interests were at stake. It was further specified that, although this levy was intended to offset the consequences of private use, it should not be taken as meaning that the various persons concerned would be deprived of the normal exercise of rights which they might be recognized as having by international conventions and national laws and contracts, to the extent that such exercise was possible.

This system had the further advantage of respecting the freedom of the private user, for whom the financial burden would, according to some speakers, be minimal. This solution also had the merit of simplicity, in that the compensatory amounts would be collected not from individuals but from the manufacturers of equipment and supports or the importers thereof.

As far as the collection of the charges was concerned, it was hoped that the intervention of several bodies, each representing a different category of interested parties, could be avoided and that efforts would be made to concentrate these operations within a single body....'

5.1.2.3 Sub-committee of the Rome Convention

- 5.1.2.3.1 A Sub-committee of the Intergovernmental Committee of the Rome Convention⁽⁸⁾ also carried out a study of the legal problems posed by the advent of videograms, including private copying, in 1978, and its study related particularly to the rights of the beneficiaries of the Rome Convention. Its brief was inter alia to look into solutions which might be offered to national legislators. The Sub-committee had available to it the report and inventory of problems of the Copyright Sub-committees referred to above and, so far as the subject of private copying was concerned, endorsed the conclusions reached by them:

'Private Use

The Sub-committee endorsed the conclusions reached by the Copyright Sub-committees which are reflected in Annex I to this report. It stressed that the compensation for the prejudice caused to those concerned should be based on a levy on both the equipment used in making the reproduction and on the material support used to fix the images and sounds. It, too, considered that payment should be collected globally and as far as possible by a single body, public, private or mixed, which could be responsible for distributing the proceeds among the different categories.'⁽⁹⁾

5.1.2.4 1979 International Copyright Committees

- 5.1.2.4.1 The Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention at a joint session held in 1979 'endorsed the main lines of the recommendations' submitted to them, by the Copyright Sub-committees referred to above.⁽¹⁰⁾ At this point some dissenting voices were raised to the principle of compensation for private copying:

'However, several delegations voiced reservations concerning the very principle of instituting a compensatory charge in the case of private use, as well as questioning the basis of assessment for this charge which could bear either on recording equipment, or on material supports, or again on both. Views were expressed to the effect that any levy affecting the sales price should only be made on one or other of the above-mentioned elements.'⁽¹¹⁾

- 5.1.2.4.2 The Committee also expressed the wish that the subject be examined further by a group of independent experts to take place in 1980.⁽¹²⁾

5.1.2.5 1979 - Rome Convention

- 5.1.2.5.1 The conclusions of the Sub-committee were considered by two further committees of the Rome Convention in 1979. A Sub-committee of the Intergovernmental Committee on the Implementation of the Rome Convention met in January/February 1979⁽¹³⁾ and adopted a series of recommendations concerning the protection of performers, producers of phonograms and broadcasting organisations. As regards private copying, the Sub-committee recommended that:

'States should also consider ways to ensure that compensation payments are made to right owners, especially to producers of phonograms and to performers in order to mitigate the economic consequences of private copying of fixations. In this last connection, the Sub-committee endorsed the recommendations of the Sub-committee on videograms which met in September 1978.'⁽¹⁴⁾

The Intergovernmental Committee itself met later in 1979⁽¹⁵⁾ and had before it the reports of both the above-mentioned Sub-committees for review. It endorsed the recommendation of the 1978 Sub-committee that a compensation for the prejudice caused by the private use of videograms to those concerned should be paid, noting that a levy could be based either on the equipment or on the material support or on both.⁽¹⁶⁾ It further stated that: 'in any event, all contributors and copyright owners should be beneficiaries of the levy envisaged'.⁽¹⁷⁾ The recommendations of the 1979 Sub-committee were endorsed in their entirety and the decision was taken to distribute them to all members of the United Nations' system.⁽¹⁸⁾

5.1.2.6 1980 - Report of Group of Experts

As mentioned above (paragraph 5.1.2.4.2), the suggestion was made that the subject of private copying be included in the terms of reference of a group of independent experts on the impact of cable television in the sphere of copyright, which was convened by UNESCO and WIPO in 1980.⁽¹⁹⁾ In the event, the Group did not study the matter although it recognised the importance of the problem and noted the narrow divide between piracy and private copying: 'the copies so reproduced may, and in many cases do, constitute the basis of commercial exploitation of unauthorised copies at a later stage'. It recommended that 'the question of compensatory charges ... should be examined on another occasion'.⁽²⁰⁾

5.1.2.7 Subsequent Developments and Future Action

5.1.2.7.1 Subsequently, the damage done to right owners by private copying has continued to preoccupy intergovernmental delegates. The Permanent Committee of the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighbouring Rights, at its 1981 session, made a strong recommendation for an international 'study of the problems of home taping and private copying of recordings and private recordings of broadcasts' to be carried out, as also for 'the convocation by WIPO of a worldwide meeting for the purpose'.⁽²¹⁾ It is

understood that budgetary problems have prevented WIPO from convening such a meeting to date, but the WIPO Programme 1984-85 does make provision for a meeting of governmental experts.

- 5.1.2.7.2 UNESCO's programme for copyright activities in the biennium 1984-1985 lays stress on the need to tackle 'the whole problem of copyright in the light of the changing techniques of reproduction and dissemination' and makes the following statement of principle:

'If, in fact, these new techniques are to play their full role as channels ensuring the free and balanced flow of knowledge and information and as factors of economic development and educational, scientific and cultural advancement, it is essential to find solutions to the specific problems raised by such techniques in the area of copyright and neighbouring rights and to make sure that the rights of authors or their successors-in-title are not appropriated or encroached upon by exclusively financial interests.'⁽²²⁾

This theme is repeated in UNESCO's Second Medium-Term Plan (1984-1989) for copyright:

'Moreover the traditional form of copyright, developed essentially in order to protect printed works, needs to be adapted to the present day, now that the emergence of revolutionary techniques -- reprography, disks and other forms of magnetic recording, cable transmission, communications, satellites and computers -- has completely transformed the conditions in which texts, images and sound are reproduced and disseminated, suggesting that in the future works may be disseminated instantaneously and universally, leaving no real possibility of ever learning or even estimating the number of users or the volume of material involved.

One of the tasks to be faced in order to cope with these technical changes is to find a way to protect the works which are carried by these new techniques or new supporting media and to protect the techniques or media themselves, either through copyright or through rights related to copyright. Work along these lines has already begun; it should be pursued and expanded.'⁽²³⁾

5.1.3 Meetings Convened by the Council of Europe

5.1.3.1 Committees of Legal Experts

5.1.3.1.1 In parallel with the debates on the subject of private copying in the committees of the Copyright Conventions and the Rome Convention, the competent organs of the Council of Europe have kept developments under review. The Committee of Experts on Legal Protection in the Media Field and its successor, the Committee of Legal Experts in the Media Field, have noted the reports of the Copyright Committees and received reports on legislative developments on the subject of private copying from the Member States of the Council of Europe. Since 1979, these bodies have had a series of discussions and exchanges of views on the copyright problems posed by private copying which have not so far resulted in any final recommendation or resolution. (24)

5.1.3.1.2 However, the Committee of Legal Experts in the Media Field, at its most recent meeting in 1982⁽²⁵⁾ -- acting on a proposal of the French delegation that the Committee of Ministers of the Council of Europe should send a recommendation to Member States concerning the need for right owners to be compensated and remunerated for private copying -- undertook a study of private sound and video recordings with a view to the possible preparation of a recommendation on the copyright aspects.⁽²⁶⁾ It instructed the Secretariat to obtain, in close co-operation with IFPI, more statistics and information on the problems raised and on the legislative measures envisaged in Member States. It noted that the present study was under preparation and the Secretariat has requested the assistance of IFPI in preparing a supplementary study covering those Member States of the Council of Europe which are not members of the EEC.⁽²⁷⁾

5.1.3.2 Meetings on the State's Role vis-à-vis the Culture Industries

5.1.3.2.1 The Council for Cultural Co-operation of the Council of Europe has embarked on a series of meetings 'to explore the present state of the European culture industries ... and the role of public intervention in their development'.⁽²⁸⁾

5.1.3.2.2 At the Conference on 'The State's Role vis-à-vis the Culture Industries' held in April 1980, (29) the subject of private copying was raised in the context of a session devoted to the music industry. There was general agreement on the need for governments to legislate to provide for remuneration, derived from compensatory royalties imposed on blank audio and video tapes and/or on hardware, to be paid to right owners in respect of private copying of phonograms. The suggestion was made that the Council of Europe should take initiatives on this matter, among others, in consultation with the Commission of the European Communities. The Conference had no mandate to make specific recommendations but the following extract from the final report of the Conference is relevant to this study:

'Increasing importance of copyright problems: much of the debates focussed on problems of copyright, and on the necessity to reform copyright legislations and systems. It was indicated that the new technological means favour home copying and illegal copying which both may infringe authors' rights and deprive creators and performers of their rightful income ...

The demands for a special levy on blank cassettes and/or tape recorders were expressed here in much firmer tones than similar suggestions about a levy on book copying had been expressed. Strict public action against piracy, counterfeiting and bootlegging was also suggested...

Copyright reform, and research and development as regards new technologies, are other matters which can be effectively realised only as joint European projects.' (30)

5.1.3.2.3 More recently, the problems posed by private copying were discussed in a follow-up meeting to the Conference referred to above: the symposium on 'Creative Artists and the Industrialisation of Culture: Music', held by the Council of Europe in November 1982. In this meeting, again it was recognised that private copying created problems for right owners and once more the suggestion was made that Council of Europe work on the subject should lead to a recommendation to Member States. (31)

5.2 INTERNATIONAL NON-GOVERNMENTAL RECOMMENDATIONS

5.2.1 Introduction

5.2.1.1 It is the right owners who are directly suffering the damage to their professions consequent upon private copying. It is not surprising, therefore, that most of the international non-governmental organisations representing the right owners have been agitating for some years for intergovernmental action and national legislation on private copying. They are unanimous in urging that remuneration derived from compensatory royalties imposed on blank audio and video tapes and/or on hardware should be paid to right owners for what is regarded as an entirely new use of their works and productions. It is a use not previously envisaged in legislation on the subject of private use and in equity should be paid for. It is encouraging that there is general agreement that authors and composers (including authors of cinematographic works - films and videograms), performers and producers of phonograms should participate in any remuneration.

5.2.1.2 The points of view of the various interested international non-governmental organisations on private copying were published in a special issue of 'Copyright', the bulletin published by WIPO, in 1980. (32) Articles by the following organisations were included:

European Broadcasting Union (EBU) -
International Bureau of Societies Administering
the Rights of Mechanical Recording and
Reproduction (BIEM) / International
Confederation of Societies of Authors and
Composers (CISAC) - International Copyright
Society (INTERGU) - International Federation of
Associations of Film Distributors (FIAD) /
International Federation of Actors (FIA) /
International Federation of Musicians (FIM) -
International Federation of Producers of
Phonograms and Videograms (IFPI) - International
Literary and Artistic Association (ALAI).

Extracts from some of these articles are quoted above in Chapter 1 (paragraphs 1.7.9 - 1.7.11). They demonstrate the identity of views already referred to on the majority of the issues posed by the problem of private copying.

5.2.1.3 Those resolutions adopted by international non-governmental organisations which have come to the notice of the author are cited in the following paragraphs.

5.2.1.3.1 XXIX Congress of CISAC, Hamburg, April 1975

'Private sound and audio-visual recordings

The International Confederation of Societies of Authors and Composers (CISAC), meeting in General Assembly at Hamburg from 21 to 25 April 1975 on the occasion of its XXIXth Congress,

noting the ever more generalised use of recording machines and the multiplication of private reproductions,

considering that this situation is more and more prejudicial to the legitimate interests of authors, performing artistes, phonogram producers and broadcasting organisations,

considering that machines that have recently been perfected for the private recording of audio-visual programmes will eventually entail similar dangers,

respectfully requests Governments to take measures similar to those adopted in Germany (Federal Republic) by means of appropriate legislation providing for the payment of an adequate royalty based on both the domestic manufacture and the importation of machines and/or blank⁽³³⁾ tapes facilitating the said recordings.'

5.2.1.3.2 XXXIst Congress of CISAC, Toronto and Montreal, September 1978

'Resolutions

The XXXIst Congress of the International Confederation of Societies of Authors and Composers (CISAC), meeting in Toronto and in Montreal from September 25 to 30, 1978, adopted the following resolutions under the headings indicated below:

Sound and visual reproduction for personal use
In the light of the report presented to it on
sound and visual reproduction for personal use,

Informed of the results of the deliberations led at Geneva in February 1977 and at Paris in September 1978 on the initiative by Unesco and WIPO on legal problems arising from the use of sound and audio-visual carriers,

Considers that the recording or fixation of protected works by individuals in their homes for personal use by means of machines and on carriers reproducing sounds and images does not lie within the framework of the exceptions to the exclusive right of reproduction allowed by Article 9(2) of the Berne Convention,

Recalls that, under Article IV^{bis} of the Universal Copyright Convention, wherever exceptions are granted to the author's fundamental rights a reasonable degree of effective protection shall be granted to the right to which exception is made,

Notes the impossibility for copyright owners of effectively exercising the prerogative of their exclusive right directly in relation to the users who make recordings and fixations of protected works within their homes,

Emphasizes that it is urgent for national legislators to institute practical measures for establishing a royalty on machines and carriers destined to reproduce sounds and images within the home in order to redress the grave prejudice caused to copyright owners.' (34)

5.2.1.3.3 XXIst Congress of IPA, Stockholm, May 1980

'Recommendation

The International Publishers' Association, meeting in Stockholm for its XXIst Congress,

- Concerned that rapid technical developments in recording techniques and equipment are evermore encouraging the public and private theft of intellectual property from the copyright owner and the creative artists on whose behalf he acts,
- Considering that no country, concerned with its cultural well-being, should tolerate such widespread illegal acts, tending towards the stifling of creative endeavour and the severe loss of employment in the artistic field,

- Aware that the sale of blank tapes reaches more than one million copies per annum throughout the world and that these are used primarily for the duplication of protected works,

Urges the governments to amend copyright laws with respect to the duplication of copyright material especially by home taping and to introduce immediately appropriate licensing schemes for the sale of blank tapes and home recording equipment to help remedy an injustice to all interested parties which threatens to undermine the cultural life of the community.'

(35)

5.2.1.3.4 XXXIInd Congress of CISAC, Dakar, November 1980

'Resolution

Widespread reproduction of works of the mind by means of audio and video recorders

The International Confederation of Societies of Authors and Composers (CISAC), meeting in General Assembly at Dakar on November 3 to 7, 1980;

Takes note that the generalized reproduction of literary and artistic works by means of audio and video recorders constitutes a world-wide phenomenon which is both irreversible and in a process of rapid development;

Expresses the conviction that this means of reproduction of works, which goes far beyond the necessarily restrictive definition of private copying, falls within the ambit of Article 9 of the Berne Convention and postulates the recognition of a right and a corresponding pecuniary entitlement;

Conscious that it is impossible for the author to enter private homes, declares its support for legislation which would envisage for the benefit of the author and his beneficiaries a royalty based on the retail or wholesale price of machines for reproduction and blank software (tapes or cassette tapes);

Stresses that the considerable profits made by manufacturers of machines for reproduction and of tapes are due essentially to the ease with which the public can reproduce works without any limitation as to quantity or duration;

*Affirms the necessity for which the royalty claimed should be paid to authors or their beneficiaries in order to stimulate the creation of works of which there is increasing consumption by the mass media;

Protests vigorously against a misappropriation of funds due to authors in favour of public funds, said to be for general benefit, by means of taxes or other para-fiscal measures;

Draws officially the attention of States to the threat which, more serious still than that of commercial piracy forbidden by the law, overshadows the future existence of authors because of the daily violation of their essential prerogatives and to the urgency of a remedy, since any retroactive effect would naturally be excluded;

Welcomes the fact that Austria, in the same manner as the German Federal Republic since 1965, has provided for suitable legislation on the private use of audio and video recorders.'

(36)

5.2.1.3.5 VIIIth Congress of INTERGU, Toronto, September 1981

'Resolution

The International Copyright Society (INTERGU), meeting in Toronto from September 21 to 25, 1981, for its VIIIth, Congress,

Private Reproduction

In consideration

- that intellectual property needs the same protection as material property
- that the culture of a people is dependent upon the protection of works of that culture,
- that the authors of a work are to share adequately in the commercial results of their works,

Furthermore, in consideration

- that increasing technical progress seriously restricts, undermines and in some cases completely destroys the exclusive right of the author to retain control over his work, due to the continually technically improved equipment made for reproduction, distribution and copying (in particular sound and video recording machines) and the recording material (tapes and video tapes and the cassettes that contain them),

Calls for from the national legislators

- (1) the fundamental retention by the author of the exclusive controlling right in his work;
 - (2) the introduction of a fee to be calculated on the basis of per item fees
- for each piece of equipment that makes the recording of copyright protected works possible

and simultaneously and equally

- for sound and video material supports on which works are to be fixed with the aid of this equipment (tape material, particularly blank cassettes for sound and video);
- (3) the improvement of procedural rules for the enforcement of copyright claims also having regard to consumer interests;
 - (4) the improvement of protection under criminal law in the case of copyright infringements (inclusion in business delinquency criminal law).⁽³⁷⁾

5.2.1.3.6 10th Ordinary FIM Congress, Geneva, May 1980

The 10th Ordinary Congress of the International Federation of Musicians at its meeting held in Geneva, from 5 to 9 May, 1980, adopted the following decision:

'Taxes for the benefit of performers on sound and sound/video recording devices and blank cassettes

The FIM Executive Committee is directed to take appropriate steps, in close co-operation with FIA and with the assistance of international organizations such as ILO, Unesco and WIPO, to ensure that governments in countries where this practice has not yet been introduced issue regulations to the effect that, when sound or sound/video recording devices as well as blank cassettes are purchased, a tax (licence fee or similar charge) must be levied for the benefit of performers.

Such tax (licence fee, etc.), or an essential part of it, to be remitted to the professional performers' organizations for the purpose of preserving, safeguarding and promoting the professions they represent.'⁽³⁸⁾

5.2.1.3.7 IFPI Board and Council Meetings, Lisbon, June 1982

The Board and Council of IFPI (International Federation of Producers of Phonograms and Videograms) at their meetings held in Lisbon from 30 May to 3 June 1982 reiterated IFPI's policy of seeking legislative solutions to the problem of private copying and decided that IFPI should continue to seek to obtain for its members:

'the specific right to royalties derived from charges on hardware and on blank tape, to compensate for the use made of phonograms and videograms where copies are made privately for domestic use'.⁽³⁹⁾

On the same occasion, the following Resolution was adopted and communicated to the Director General of the World Intellectual Property Organisation:

'The Board and Council of IFPI, meeting in Lisbon from 30 May to 3 June 1982,

Having discussed the continuing threat posed by the ever-growing practice of private copying of recorded music, and audio-visual works;

Wish to reiterate the urgent need to draw the attention of governments and the public to the unreasonable prejudice to the legitimate interests of authors, producers of phonograms and videograms and other right owners caused by this practice;

Urge WIPO to give due priority in its programme to the organisation of a world-wide forum to adopt recommendations to governments for legislation which will provide adequate protection for and reward to right owners for this new use of their works which relates to the specific subject matter of copyright.'

FOOTNOTES TO CHAPTER 5

- (1) Working Group on the Legal Problems Arising from the Use of Videocassettes and Audio-Visual Discs, Geneva, February 21 to 25, 1977 (Report: Doc. UNESCO/WIPO/VWG/I,8 and Copyright, April 1977. p.87 - 92).
- (2) Loc. cit. paragraphs 31 to 38.
- (3) Subcommittee of the Executive Committee of the Berne Union and the Sub-committee of the Intergovernmental Committee of the Universal Copyright Convention, joint meeting, Paris, September 13, 14 and 19, 1978, (Reports: Doc. B/EC/SC.1/VAD/5, IGC/SC.1/VAD/5, p.5 and Copyright, December 1978, p.406 et seq.)
- (4) Loc. cit. paragraph 17.
- (5) Loc. cit. Annex I, sections D, paragraphs D.1 to D.5 and F.
- (6) Loc. cit. paragraphs 26 to 36.
- (7) '...If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions. Any person who for commercial purposes introduces or re-introduces such equipment within the jurisdiction of this Act shall be jointly responsible with the manufacturer. This right shall not exist if, from all of the circumstances, it appears probable that the equipment will not be used within the jurisdiction of this Act for the said purposes. This right may only be enforced through collecting societies. By way of remuneration, each copyright owner shall be entitled to an equitable participation in the proceeds realized by the manufacturer from the sale of such equipment; the total claims of all copyright owners, including those coming within Articles 84 and 85, paragraph (3), and Article 94, paragraph (4), shall not exceed five per cent of such proceeds.'

- (8) Sub-committee of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations on Legal Problems Arising from the Use of Videocassettes and Audio-Visual Discs, Paris, September 18 and 20, 1978 (Report: Doc. ICR/SC.1/VAD/5 and Copyright, December 1978, p.413 et seq.)
- (9) Loc. cit. paragraph 17.
- (10) See Report of the sixteenth session of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), Paris, October 24-31, 1979, paragraph 48. (Doc. B/EC/XVI/14 and Copyright, December 1979, p.296 et seq.)
- (11) Loc. cit. paragraph 49.
- (12) Loc. cit. paragraph 53.
- (13) Sub-committee of the Intergovernmental Committee of the Rome Convention on the Implementation of the Rome Convention, Geneva, 29 January to 2 February 1979, Copyright, April 1979, p.101.
- (14) Loc. cit. paragraph 20.
- (15) Intergovernmental Committee of the Rome Convention, Paris, October 22 and 30, 1979, Copyright, December 1979, p.300 et seq.
- (16) Loc. cit. paragraph 41.
- (17) Loc. cit. paragraph 42.
- (18) Loc. cit. paragraph 12.
- (19) Group of Independent Experts on the Impact of Cable Television on the Sphere of Copyright, Geneva, 10-13 March 1980. Doc. Unesco/WIPO/IGC/CTV/9 and Copyright, April 1980, p.154.
- (20) Loc. cit. paragraphs 14 and 18.
- (21) WIPO Permanent Program for Development Co-operation Related to Copyright and Neighbouring Rights, Permanent Committee, Fourth Session, Geneva, March 23 to 25, 1981 (Report: Copyright, May 1981, p. 167 et seq.).
- (22) Draft Programme and Budget for 1984-1985, Part II - Programme Operations and Services, B. General Activities, (Doc. 22 C/5, paragraph 15107.)

- (23) Second Medium-Term Plan (1984-1989), XV. Programme Support, XV.I-Copyright. (Doc. 4XC/4, paragraphs 15005 and 15006.)
- (24) Committee of Experts on Legal Protection in the Media Field (MM-PJ): Meeting of January 15-19, 1979, (Report: Doc. MM-PJ(79)1); Meeting of September 29 to October 2, 1981: Report: Doc. MM-PJ (81) 10).
- (25) Committee of Legal Experts in the Media Field (MM-JU), November 29 to December 3, 1982. (Report: Doc. MM-JU (82) 7).
- (26) Loc. cit. Report, paragraph 36.
- (27) Loc. cit. Report, paragraph 43.
- (28) Council for Cultural Cooperation (CDCC) Report of the 34th Session. Doc. CDCC (78) 22, p.10.
- (29) 'Conference on the State's Role vis-à-vis the Culture Industries, Strasbourg, April 1980 - final report and evaluation of the Conference by Professor Ilkka Heiskanen; Strasbourg, Council for Cultural Cooperation, Cultural affairs, 1980. (Doc. C.C.Conf-IC-5-E.) For a Note on the results of the Conference in so far as they related to the sound recording industry, see the Appendix to 'Piracy of Phonograms' by Gillian Davies, Op.cit. (see Chapter 1, footnote 15).
- (30) Report of the Conference - loc. cit., p.211, 218, 219.
- (31) Report and Conclusions of the Symposium by J. Coenen-Huther. (Doc. CC-GP11 (82) 26; Appendix II (Proposals submitted by IFPI in agreement with some other participants).
- (32) Copyright, July-August 1982, p.211 et seq.
- (33) Text No.2 of the Resolutions adopted by the General Assembly of the XXIXth Congress CISAC, Hamburg, April 21 to 25, 1975 (Doc. CISAC/75/41.689 and Copyright, June 1975, p.137).
- (34) Copyright, December 1978, p.469.
- (35) Recommendation IV adopted by the International Publishers' Association (IPA) at its XXIst Congress, Stockholm, May 18 to 22, 1980. Copyright, July-August 1980, p.262.
- (36) Resolution adopted by CISAC at its XXXIInd Congress, Dakar, November 3 to 7, 1980. Copyright, December 1980, p.367.

- (37) Resolution adopted by the International Copyright Society (INTERGU) at its VIIIth Congress, Toronto, September 21 to 25, 1981. Copyright, December 1981, p.340.
- (38) Resolution adopted by FIM at its 10th Ordinary Congress, Geneva, May 5 to 9, 1980, Copyright, September 1980, p.301.
- (39) Minutes of the Council Meeting, Lisbon, 2 and 3 June 1982, p.15, and see IFPI Policy Statement on the Problem of Private Copying of Phonograms (Sound Recordings), 20 September 1982.

CHAPTER 6 NATIONAL DEVELOPMENTS OUTSIDE THE EEC

This chapter gives a brief account of the reaction to private copying on the part of a number of countries outside the EEC. It will be noted that, in some countries, legislation has already been enacted for the direct or indirect benefit of right owners who suffer from the effects of private copying. In other countries, it can be seen that debate on the implications of private copying is in full swing. It is significant that the countries where private copying is or has been the subject of developments are not exclusively the industrial consumer-oriented economies of the west: the Eastern block (Hungary) and the third world (Brazil) have also recognised the need to find legislative solutions for problems which possess a moral as well as an economic dimension.

6.1 AUSTRALIA

- 6.1.1 The Australian Copyright Act 1968 as amended to 1980 (1) is historically derived from the law of the United Kingdom. It is not therefore surprising to discover that, like the United Kingdom law, the Australian legislation makes no special provision with regard to the domestic copying of phonograms and videograms: such copying is always an infringement. As in the United Kingdom too, the making of a private recording of a sound or visual broadcast is permitted, if the copy is made for the private and personal use of the person making the copy (Section 111).
- 6.1.2 The Australian Copyright Act, like its United Kingdom counterpart, makes no provision at all for the protection of performers against the unauthorised reproduction of their performances. On the other hand, Australia has no criminal provisions analogous to the Performers' Protection Acts (see 4.10.4 above), which means that performers are quite unprotected against the making of copies of their performances, whether for commercial or for private purposes.
- 6.1.3 The unsuitability of the present law as a means of controlling private copying is not doubted. An attempt to utilise its provisions so as to inhibit the encouragement of home recording was equally unsuccessful in the case of RCA Corporation v. John Fairfax and Sons Ltd. (2) The defendant had published a newspaper article on the 'rock'n'roll' industry which pointed out that record companies faced a problem through the decrease in record sales on

account of competition from good quality taping equipment. The article then posed the rhetorical question: 'Why spend nearly \$10 on the new David Bowie album when you can tape it from 2JJJ?'. The plaintiff claimed that this constituted an authorisation, or at the very least an incitement, to music lovers to indulge in acts of home taping of phonograms without the permission of the copyright owners. This plea was rejected by the Supreme Court of New South Wales, the judge holding that, inter alia, there could not be an infringement through authorisation of the making of unlawful copies unless the person giving the alleged authorisation had some element of control over, or connection with, any specific infringer.

- 6.1.4 The problems caused to the recording industries through the extensive private copying of phonograms and videograms are currently the subject of official consideration. In July 1981 the Attorney General, Senator Peter Durack, announced a review of the audio and visual copying provisions of Australian law and invited submissions from interested parties by the end of that year.
- 6.1.5 Following the submission of comments from some 193 interested organisations and individuals the Attorney General's Department published in 1982 an Issues Paper.⁽³⁾ This paper was designed not as an official Governmental policy document but as an aid to the further discussion and better comprehension of the issues raised by audio and video recording. It is not yet possible to gauge the Government's likely reaction to reform proposals, but it should be noted that, in its 1980 Amendment to the Copyright Act, Australia has taken a much stronger line against erosion of literary copyright through the use of photocopyers than has any other common law based country.⁽⁴⁾ If its legislative policy is consistent, it will be unlikely to permit the continued erosion of copyright in sound and cinematograph recordings through extensive private copying. It is also significant that the Copyright Tribunal, in its decision of 17 May 1983 determining the amount of royalties payable for the broadcasting of sound recordings on FM radio, specifically took account of the factor of home taping. The Tribunal recognised that 'home taping has a serious effect on the sales of sound recordings and, therefore on the income of record manufacturers'.⁽⁵⁾

6.2 AUSTRIA

6.2.1 The Federal Law on Copyright, as amended to 1982,⁽⁶⁾ contains special provisions with regard to the making of private copies of works and other protected material. These provisions are clearly influenced by the law of the Federal Republic of Germany (see especially 4.4.3.6 above), but are not identical to them. It is interesting to note that Austria was the first country to introduce a royalty on the sale of recording tape for the benefit of right owners. The Law became effective in respect of audio tapes on 1 January 1981, and in respect of video tapes on 1 July 1982.

6.2.2 The provisions of the Copyright Amendment Law of 1980⁽⁷⁾ allow the reproduction of isolated copies of a work for the personal use of the copier (Article 42(1)), or for the personal use of another where the copy is made gratuitously (Article 42(3)). But Article 42(5) then introduces the following qualification:

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

Such provisions also apply to performers and owners of rights in sound recordings and photographs. Article 42(3) applies only to works and photographs.

6.2.3 The remuneration may only be collected by a collecting society, which is responsible both for distributing it among those entitled to benefit from it and for the repayment of money where a purchaser of recording material has paid a price including the royalty but does not use it for the purpose of private copying for personal use (Article 42(7)). However, there is no entitlement to repayment where

the non-personal use constitutes a "free use" of the work (i.e. a use expressly permitted by the Copyright Law as an exception to the author's exclusive exploitation rights). An Arbitration Board established under Article III of the Copyright Amendment Law⁽⁸⁾ has power both to decide on the level of the royalty and upon its distribution. It has not so far been called upon to intervene.

6.2.4 The Distribution of Remuneration with Respect to Sound Recordings.

6.2.4.1 Money raised under Article 42(5) must be paid to the collecting society (Austro-Mechana) within forty days of the month in which it became payable. Provision was made for 10% to be retained by the collecting society itself for the payment of its administrative expenses. These expenses have since fallen to 7%; thus the share, shown below, of each category of right owner has correspondingly increased. Right owners are obliged to donate more than half of their royalties for social purposes. It has not yet been decided exactly how this money will be used.

6.2.4.1 It was decided by agreement between right owners that, allowing for administrative expenses of 10%, the remainder of the money collected should be distributed to them in the following proportions:

Austro-Mechana	
(musical works, lyrics)	49%
LSG	
(phonographic producers and performers)	34%
Literar-Mechana	
(other literary works)	7%
Verwertungsgesellschaft Rundfunk	
(protected material, the copyright or neighbouring right in which is owned by broadcasters)	7%
Österreichische	
Interpretengesellschaft (ÖSTIG)	
(live performances)	3%

6.2.4.3 In 1981, the royalty on audio tapes was 1.20 Austrian schillings per hour of tape length. If an importer had a contract with Austro-Mechana the rate was 0.80 A.Sch. These royalties proved insufficient, bringing in nearly 6 million schillings instead of the 10 million schillings which had been expected. The royalty rates were accordingly raised on 1 January 1982 to 2.25 A.Sch. and 1.50 A.Sch. per hour respectively. Current figures apply until 31 December 1983.

6.2.5 The Distribution of Remuneration with Respect to Video Recordings.

6.2.5.1 From 1 July 1982 until 31 December 1983 the sum of 2.80 A.Sch. per hour is payable on video tapes. Right owners have agreed to divide the income as follows, from which Austro-Mechana deducts 10% for its administrative expenses:

Literar-Mechana LVG (literary works)	14.8%
VBK (Bildende Künstler)	1.6%
OSTIG (performing artists - income for live performances)	2.3%
LSG (income of producers and artists for recorded music)	4.0%
Austro-Mechana (musical works)	28.7%
Film producers (cinematographic works)	22.8%
Verwertungsgesellschaft Rundfunk (protected material, the copyright or neighbouring right in which is owned by broadcasters)	25.8%

6.3 BRAZIL

6.3.1 The need to introduce some sort of royalty on the sale of recording equipment or tapes has been recognised as the only way to ensure that right owners, who cannot practicably enforce their rights against private copiers, receive some sort of compensation for the loss of enforceability of their exclusive right. The Austrian approach (6.2) is, however, preferred to that of the Federal Republic of Germany (4.4).

6.3.2 A Bill amending the Copyright Law of 1973⁽⁹⁾ to provide for royalty payments in respect of private copying has accordingly been prepared, approved by the Ministers of Finance and Justice and will be debated by the Brazilian Parliament in the course of 1983. Right owners (of copyright and related rights) are to receive royalties payable on unrecorded audio and video tapes by manufacturers and importers of such tapes. The National Copyright Council is to approve the amount of remuneration payable and the criteria for its distribution. The actual collection and distribution will be carried out by the Central Office of Collection and Distribution of Copyright (ECAD).⁽¹⁰⁾ If right owners' associations do not agree on the division of the remuneration, 50% will go to copyright owners, and 50% to owners of related rights. The chances for adoption of the Bill are said to be good.

6.4 CANADA

6.4.1 The Canadian Copyright Act 1921 as amended to 1971⁽¹¹⁾ is closely modelled on the 1911 Copyright Act of the United Kingdom. Protection is granted to literary, dramatic, musical and artistic works of authors, and to sound recordings and cinematograph films as if they were works. The making of private copies of phonograms and videograms is prima facie an infringement of copyright. The only arguable defence is that of "fair dealing" for the purposes of private study or research under Section 17(2)(a) (see discussion on "fair dealing" in 4.10.5.2).

6.4.2 The Federal Government's Consumer and Corporate Affairs Department published in 1982 a survey of home taping practices in 1981, which showed that private copying was a rapidly increasing activity.⁽¹²⁾ No official legislative proposals have yet followed the publication of this report, but the Federal Cultural Policy Review Committee (the 'Applebaum-Hebert' Committee) has since submitted its report, in which a royalty on recording tape was strongly urged.⁽¹³⁾

6.4.3 The scheme proposed by the Applebaum-Hebert Committee is the payment of a royalty on each sale of a blank tape, the money thus collected to be assigned to a special fund. Each blank tape purchaser would receive a voucher, redeemable at the value of the royalty, towards the purchase price of a "Canadian recording" (i.e. one which is produced by Canadian artistes in Canada). The same was also suggested in respect of videocassettes.

- 6.4.4 Further consideration of the regulation of private copying was made by Dennis Magnusson and Victor Nabhan in their study. Exemptions Under the Canadian Copyright Act which, like the survey of home taping mentioned in 6.4.2, was produced for the Consumer and Corporate Affairs Department.⁽¹⁴⁾ The authors recommend the introduction of the compulsory licensing of audio and video recording for private use, coupled with a royalty on recording machines and/or tape, by express analogy with the Law of the Federal Republic of Germany (see 4.4.3.6). Such an approach, the authors maintain, would ensure that copyright owners would secure revenue for the large-scale recording for private use which cannot realistically be protected. They add that there is no point in preserving for copyright owners the unenforceable legal right to control such private recording.
- 6.4.5 A further analysis by Jim Keon, in a paper presented at a Symposium on the Economics of Intellectual Property Law in 1983,⁽¹⁵⁾ supports the conclusion that a royalty scheme should be introduced for the benefit of right owners, but is of the opinion that a royalty on recording tapes, which more accurately reflects patterns of use, would be preferable to a royalty on recording equipment alone. Keon also prefers that the computation of the royalty be based on a standard rate per unit of tape duration, rather than that it be calculated by reference to the wholesale or retail price of the tape. Keon submits, however, that the proposed scheme should operate outside the Canadian copyright system, so that payments of royalties to non-Canadians would either not be permitted, or would be allowed on a reciprocal basis only.
- 6.5 FINLAND
- 6.5.1 The Finnish Copyright Law 1961, as amended up to 1974, is very similar to that of Sweden (see 6.10 below).⁽¹⁶⁾ In November 1982, the Copyright Committee proposed that provision should be made for right owners to receive royalty payments on blank tapes in respect of private copying. The amount of the royalty was to be agreed by negotiation between right owners and organisations representing producers and importers of blank tapes. At the same time, the Finance Ministry was preparing a bill to impose a tax on cassettes following the Swedish example. The amount of tax suggested was 0.04 FIM per minute for audio cassettes and 0.25 FIM per minute for videocassettes.

6.5.2 Neither of these proposals has as yet been implemented.

6.5.3 It is understood that the Ministries of Education and Finance have discussed a solution combining these two approaches. Thus, a government tax would be imposed, and the monies would be applied in the following approximate proportions:

to right owners through their collecting societies	30%
for promotion of local recording and video productions	30%
for funding certain parts of the cultural budget of the Ministry of Education	30%

6.6 HUNGARY

6.6.1 On 20 November 1982 the Hungarian Copyright Law of 1969⁽¹⁷⁾ was amended by decree so as to provide for royalty payments to be paid in respect of sales of non-recorded audio and audio-visual tapes suitable for recording. Under this amendment which came into force on 1 January 1983, 8% of sales receipts for such tapes is to be levied with a view to distribution among right owners (Article 1(2)). In the case of domestically produced tapes, the manufacturer is liable to pay on the basis of the manufacturer's price. With respect to imported product, the domestic distributor pays on the basis of the wholesale price. Tapes circulated for export purposes only, or those which are not suitable for reproduction for private use, such as dictaphone equipment, are exempt from this royalty (Article 1(3)).

6.6.2 The remuneration collected is to be split between right owners as follows, in accordance with Article 1(4):

Audio Tapes

Authors	50%
Performers	30%
Producers	20%

Video Tapes

Authors and all other copyright owners	70%
Performers	30%

6.7 ICELAND

- 6.7.1 The Icelandic Copyright Act of 1972⁽¹⁸⁾ permits the making of single copies of a disseminated work for private use only. This limitation on copyright also applies to related rights. In 1982, a Bill on private copying was prepared by the Government, but has not yet been put before the Althing (Icelandic Parliament). It is likely to be put forward during 1983, notwithstanding the recent change of the Icelandic Government. It is understood that the Bill provides for royalty payments to right owners, derived from a royalty on recording equipment and blank tapes, and is likely to become law in the autumn of 1983 or early in 1984, subject to the programme of the new Government. Payments are to be made only on audio tapes, but there is provision for the Minister to extend the application of the Bill to video tapes also. Right owners have not as yet agreed on the division of the remuneration.

6.8 JAPAN

- 6.8.1 At present Japan has, with regard to domestic copying, one of the most liberal legislative provisions of any industrialised and cultured country. Under Article 30 of the Copyright Law 1970, as amended to 1978,⁽¹⁹⁾ it is permitted for a user to reproduce any work which is the subject of copyright or a related right for the purposes of personal use, of use by his family, or of other similar uses within a limited circle. Whether this relaxed attitude towards private copying is determined by the strength of Japan's recording equipment industries, by criteria of practical reality or by pro-user sentiments, it has been the subject of great interest in recent years among copyright-owning industries and those who depend upon them for their livelihood.
- 6.8.2 In 1977 the organisations representing authors, performers and producers of phonograms made a joint submission to the Government's Agency for Cultural Affairs (Bunka-Cho) with regard to the impact of domestic copying practices. The result of this submission was the establishment of a Sub-committee on Home Taping, which reported to the Commissioner of the Agency for Cultural Affairs in June 1981.
- 6.8.3 The conclusion drawn from the submission of this report was that, since there was no clear agreement between the industries affected by private copying as to what should be done about it, since the public was ill-informed as to the significance of the issues raised by it and since "world opinion" had still to be gauged, the time was premature for legislation. However, it was felt that a public information

campaign should be launched and that negotiations between copyright owners and recording equipment manufacturers should continue under the supervision of the Agency for Cultural Affairs. The Agency was also instructed to submit studies in respect of the ways that the problem could be solved by amendment of the Copyright Law.

6.8.4 In September 1983 the Copyright Advisory Council is expected to submit to the Commissioner of the Agency for Cultural Affairs its views on amendment of Article 30 of the Copyright Law, which its Subcommittee has been studying. The Government will then begin work on drafting the amendment. Right owners now envisage that private copying will be more precisely defined, and that they will be granted a right to receive remuneration payable on both recording tapes and equipment.

6.9 NORWAY

6.9.1 The Norwegian Act Relating to Property Rights in Literary, Scientific or Artistic Works (as amended to 3 June 1977)⁽²⁰⁾ permits the making of not-for-profit copies of any published work; this is equally applicable to works of copyright and neighbouring rights.

6.9.2 In June 1981, the Norwegian Parliament passed enabling legislation for the implementation of a tax on recording equipment and blank and pre-recorded audio and video tapes. As from 1 January 1982, 17½% of the highest price to dealer has been payable on recording equipment. The tax on blank tapes came into force on 1 July 1982: 3N.Kr. per hour is payable on audio tapes, and 15 N.Kr. per hour on video tapes. The bulk of the revenue from this tax will benefit the Norwegian Government and not the holders of copyright or related rights. However, the Government is putting aside a small amount of the monies collected, 5 million N.Kr. in 1983, which will be divided into four equal parts for distribution among authors, performers, producers and a fund for special projects. The money that producers receive from the fund is restricted in use, in that it has to be re-invested in local productions. It has not yet been decided in what proportion the producers' share will be split between record and video producers. So far the Law has not been applied to tax pre-recorded audio or video tapes.

6.9.3 This tax is intended to replace a previous tax on electrical hardware such as television sets, radios and recording equipment, the proceeds of which were applied for the benefit of the Norwegian broadcasting organisation.

6.10 SWEDEN

6.10.1 Like Denmark and Norway, Sweden permits the making of not-for-profit private copies of published works which are kept for personal use only. This facility overrides the copyright and related rights granted under the Law on Literary and Artistic Works amended to 1982. (21)

6.10.2 In 1982, however, the Swedish Parliament enacted legislation, effective as from 1 September 1982, providing for a tax on blank audio cassette tape (0.02 Sw.Kr. per minute) and blank and pre-recorded videocassette tapes (0.25 Sw.Kr. per minute). (22)

6.10.3 In the case of pre-recorded video tapes put on the market for hire, a 9-year agreement has been reached between the film and video industries and the Government that, in place of payment of the tax, a special levy of 40 Sw.Kr. per tape (24 Sw.Kr. if the programme is less than 73 minutes) will be paid to the Swedish Film Institute. The revenue from this special levy, expected to amount to about 15 million Sw.Kr. per annum, will be used to support Swedish film production and for other purposes relevant to the film and video industries.

6.10.4 The tax on blank audio and videocassette tapes is expected to raise about 120 million Sw.Kr. per annum. Two thirds of the amount is to be used for general budgetary purposes. The remaining 40 million Sw.Kr. is intended primarily for purposes relevant to the music, film and television industries. The 40 million Sw.Kr. is to be distributed as follows:

(i) In respect of blank audio cassette tapes, 8 million Sw.Kr. is to be distributed to authors, performers and phonogram producers as direct compensation for the use of their rights, in the following proportions:

STIM (authors)	40%
SAMI (artists and musicians)	30%
Producers	30%

(ii) 12 million Sw.Kr. is to be devoted to supporting "culturally desirable" phonogram production and certain other aspects of the music industry, including in particular activities aimed at supporting or creating

jobs for performers;

- (iii) 8 million Sw.Kr. is to be assigned from the revenue generated from the tax on blank videocassettes to funds for performing artists. (In its 1982 budget proposals, the Government had already allocated 14,726,000 Sw.Kr. to a Swedish Visual Artists' Fund. A further 5 million Sw.Kr. is to be allocated to this Fund, and a further 3 million Sw.Kr. is to be allocated to the Swedish Authors' Fund.; No money is to be paid to video producers;
- (iv) A total of 12 million Sw.Kr. is to be devoted to the film and video industry as well as to theatres and libraries.

6.11 SWITZERLAND

- 6.11.1 A draft Federal Law for the "Protection of Performers, Producers of Phonograms, Videograms and Video-Phonograms and Broadcasting Organisations" was put forward by Professor Pedrazzini in 1982. It contains, in Part IV, special provisions with regard to private copying. Under draft Article 13, the duplication of a fixed performance and the fixation of a broadcast are excepted from legal protection if done for the copier's private use and if the provisions of Article 14 are complied with. Under this provision, blank audio and video recording media may be subjected to a 'charge for use', payable by the 'producer' (in this instance, it seems, the manufacturer) or by the importer of such blank tapes. The beneficiaries of this charge are the right owners mentioned in this draft law (i.e. the performers, broadcasters and phonogram or videogram producers).
- 6.11.2 The "Pedrazzini Bill", despite attracting the support of all the right owners' organisations, has not progressed. However, the Swiss Federal Intellectual Property Office put forward proposals of its own in 1979 which, unlike those of Professor Pedrazzini, sought to deal with private copying under the general heading of authors' rights law. This proposal, which is still under consideration, would grant to authors alone a right to equitable remuneration in return for a statutory authorisation of private audio or visual recording of works broadcast on television or disseminated by cable.

6.11.3 It is understood that the Swiss recording industry has impressed upon the Minister for Justice the need for swift legislation in this matter, and that the case for introducing Professor Pedrazzini's draft in the proposed new law on authors' rights has been forcibly stated.

6.12 UNITED STATES OF AMERICA

6.12.1 US copyright law has long recognised the doctrine of "fair use" which was developed by the courts and permits individuals, in certain circumstances, to make use of at least part of an author's work without consent and without payment. The "fair use" doctrine was first accorded statutory recognition in the revised Copyright Act 1976.⁽²³⁾ Section 107 of that Act reads as follows:

'Limitations on exclusive rights: Fair use
Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that Section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.'

In the legislative proceedings prior to the enactment of this provision, it was made clear that the courts would be free to develop the fair use doctrine:

'Since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute...'⁽²⁴⁾

- 6.12.2 The question whether private copying is 'fair use' or an infringement of copyright has been the subject of controversial litigation in the so-called Betamax case (Universal City Studios Inc. and another v. 963 Sony Corporation of America and others) (125). In this case, two owners of copyright in lawfully broadcast films brought copyright infringement actions against not only an individual who recorded those films directly from the television broadcast but also against the manufacturer of the video recorder, the distributor and four retailers of the same equipment, and against the manufacturer's advertising agency (which encouraged the use of such machines in the recording of television programmes). In 1979, the Federal District Court dismissed the plaintiffs' action, holding that the private and non-commercial recording of television broadcasts did not constitute a copyright infringement and that, even if it did, the various corporate defendants would not in any case be liable either as direct, vicarious or contributory infringers. In 1981, this decision was, however, reversed by the Court of Appeals, which held that home video recording did not fall under the "fair use" provisions of the US laws and therefore constituted a copyright infringement.
- 6.12.3 The decision of the Court of Appeals in the Betamax case has been the subject of an appeal to the United States Supreme Court which heard the appeal on 18 January 1983. On 6 July 1983, the Supreme Court announced that it would be rehearing the case in the judicial term commencing 3 October 1983. The Betamax case relates to video taping only; however, the implications of the case for audio taping are clear.
- 6.12.4 In the meantime, on 27 January 1983, Senator Mathias and Representative Edwards introduced identical Bills in the Senate (S.31) and House of Representatives (HR 1030), entitled "The Home Recording Act of 1983". They had previously introduced Bills in the Senate and House in March 1982 providing both for royalty payments in respect of private copying and for rights in respect of record and video rental. The latter provisions were also newly introduced in the form of two separate Bills on 26 January 1983. The wording of the 1983 texts differs slightly from those of 1982. The home recording Bill is based on two principles:
- (i) copyright owners whose works are privately copied should be compensated by the payment of royalties levied on the sale of audio and video 'home recording devices and media';
 - (ii) consumers who make private copies at home for non-commercial use should not be liable for copyright infringement.

The royalties would be payable by manufacturers and importers of recording equipment and blank tape, collected separately for audio and video and shared between the relevant right owners. The amount of royalty paid is to be freely negotiated between the copyright owners and the manufacturers and importers of recording equipment and blank tape rather than, in accordance with the 1982 text, decided by the Copyright Royalty Tribunal. There is provision for a compulsory arbitration process if no agreement can be reached.

FOOTNOTES TO CHAPTER 6

- (1) Copyright Act, 1968, No.63, of June 27, 1968, as amended up to September 19, 1980.
- (2) RCA Corporation and Others v. John Fairfax & Sons Limited and Others. Judgment of the Supreme Court of New South Wales - Equity Division, of 30 March - 1 April 1981. (1981) 34 A.L.R. 345, [1982] R.P.C.91.
- (3) Review of Audiovisual Copyright Law. Issues Paper. Attorney-General's Department. Canberra, Australian Government Publishing Service, 1982.
- (4) Copyright Amendment Act 1980, No.154 of 1980.
- (5) Decision of the Copyright Tribunal of 17 May 1983. Application under S.152 of the Copyright Act 1968 by WEA Records Pty Ltd., Astor Records Pty Ltd., RCA Ltd., PolyGram Records Pty Ltd., CBS Records Australia Ltd., Festival Records Pty Ltd. and EMI (Australia) Ltd. Re: Stereo F.M. Pty Ltd. (2MMM).
- (6) Copyright Statute. Federal Act on Copyright in Works of Literature and Art and on Related Rights (Copyright Act) of April 9, 1936, as amended up to February 19, 1982.
- (7) Copyright Amendment Law, 1980 (No.321, of July 2, 1980).
- (8) Op.cit., Article III, paragraph 1.
- (9) Law on the Rights of Authors and other Provisions, No.5988, of December 14, 1973.
- (10) Statement by José Carlos Costa Netto, former President of the National Copyright Council. WIPO Worldwide Forum on the Piracy of Broadcasts and the Printed Word. Geneva. March 16 to 18, 1983 (WIPO Doc. PF/II/S/28).
- (11) Copyright Act of June 4, 1921, as amended up to December 23, 1971.
- (12) J. Keon. A Report on the Home Taping Practices of Canadians. Canada, Consumer and Corporate Affairs, March 1982.
- (13) L. Applebaum and J. Hébert. Report of the Federal Cultural Policy Review Committee. Ottawa 1982.

- (14) D. Magnusson and V. Nabhan. Exemptions under the Canadian Copyright Act. Canada, Consumer and Corporate Affairs, 1983 (Copyright Revision Studies).
- (15) J. Keon. Paper presented at a Symposium on the Economics of Intellectual Property at the University of Western Ontario, 1983.
- (16) Law No.404 relating to Copyright in Literary and Artistic Works, of July 8, 1961, as amended up to July 31, 1974.
- (17) Decree of the Minister for Culture (No.15, of November 20, 1982) amending Decree No.9, of December 29, 1969, implementing Copyright Act No.III of 1969. Copyright, May 1983, pp.166-167.
- (18) Copyright Act of May 29, 1972.
- (19) Copyright Law, No.48, of May 6, 1970, as amended by Law No.49, of May 18, 1978.
- (20) Act relating to Property Rights in Literary, Scientific or Artistic Works, No.2 of May 12, 1961, as amended up to June 3, 1977.
- (21) Law No.729, of December 30, 1960, on Copyright in Literary and Artistic Works, as amended up to December 19, 1982.
- (22) Law Concerning the Tax on Certain Cassette Tapes, of 24 June 1982. Swedish Code of Statutes, SFS 1982:691.
- (23) An Act for the General Revision of the Copyright Law, title 17 of the United States Code, and for other purposes (Public Law 94-553), of October 19, 1976, as amended to May 24, 1982.
- (24) House Report, H.R. Rep No.1476, 94th Cong., 2nd Session, p.65-66 (1976), reprinted in US Code Congress and Ad. News, 5659, p.5679-5680.
- (25) Universal City Studios v. Sony Corporation of America et al, 659 F.2d 963 (9th Circ. 1981), cert. granted, 102 S.A. 2926 (1982) (No.81-1687).

CHAPTER 7 CONCLUSIONS AND OPTIONS FOR ACTION

7.1 CONCLUSIONS

7.1.1 Impact of Private Copying on Right Owners

It is submitted that Chapters 1 and 2 of this study have provided ample and conclusive evidence of the huge scale of the practice of private copying of phonograms and videograms and of the damage it is causing to the interests of right owners and to the economies of the Member States.

7.1.1.1 Phonograms

Sales of legitimately produced copies of phonograms (records and pre-recorded tapes) have declined steadily since 1978 throughout the Member States and, moreover, sales have been displaced by private copying on an enormous scale. Public consumption of music has greatly increased but there has been no corresponding sale of recorded music: as has been seen, nearly all private copying substitutes for the copyright owners' protected product. This has led in turn to reductions in investment and employment opportunities. Private copying will continue to injure the audio recording industry unless a solution is found.

7.1.1.2 Videograms

The economic impact of private copying on the video market is less easy to determine. However, its ultimate effect on the video industry and on film and television production can be predicted. It is submitted that the available surveys demonstrate that owners of copyright in videograms, films and television programmes are being harmed by private copying. Permanent retention of privately copied video programmes -- "librarying" -- accounts for a significant and increasing amount of video recorder use. As video recorders become cheaper, the market for them will expand and their advent has already had a significant economic impact on traditional markets -- film and television -- and on the market for the struggling new pre-recorded video industry. The film and television production industries have been increasingly relying on subsidiary markets to survive -- including the video market itself -- and this trend will undoubtedly continue. Private copying threatens the video market and may reduce demand for other subsidiary markets such as repeats of films and

television programmes on television and those of the future such as cable and satellite distribution now becoming a reality in Europe.

7.1.2 Evidence of Governmental Concern

- 7.1.2.1 It is clear from the information contained in Chapters 4, 5 and 6, that there is a high degree of concern with the problem of private copying in government circles both at intergovernmental and national levels. Since the mid-1970s, the intergovernmental committees concerned with copyright and related rights have consistently recommended that governments should seek solutions of a copyright nature to the problem and introduce legislation providing for royalties to be raised on the sale of recording equipment and/or tape for the benefit of right owners.
- 7.1.2.2 Four governments have now introduced such legislation: Austria, Federal Republic of Germany, Hungary and Sweden. Many more are considering its introduction. Among the Member States of the European Community, the subject is a live issue in Denmark, France, Federal Republic of Germany (which, as has been mentioned, is planning to impose a royalty on the sale of recording tape in addition to the existing levy on hardware), Ireland, Italy, Netherlands and the United Kingdom.
- 7.1.2.3 More governments in other parts of the world, including important trading partners of the European Community, are seriously contemplating this kind of legislation: as we have seen, these include Australia, Canada, Japan and the United States of America.
- 7.1.2.4 In these circumstances, it is particularly appropriate that at the present time the Commission of the European Communities should have recognised the importance of the problem and commissioned this study, requesting a proposal for Community legislation.

7.1.3 Need for Action by the Commission

- 7.1.3.1 The widespread intergovernmental concern referred to is shared by the Commission. The Commission has recognised that private copying is having a damaging influence on the cultural and economic life of the Community. It has stated its intention of taking action by means of its programme for approximation of laws on copyright and related rights to redress the negative impact that private copying and other technical developments are having on right owners. (1)

- 7.1.3.2 The advent of digital technology, and particularly the compact disc, will greatly increase the dangers to the recording industry of both piracy and private copying. The compact disc, digital tape and digital broadcasting will all provide a perfect master for copying for commercial purposes or in the home. Looking further to the future, new technology will undoubtedly have a significant effect on the methods by which consumers will obtain access to and acquire copies of both sound and audio-visual recordings. Home entertainment will increasingly be provided by electronic delivery systems received over cable and satellite systems. Optical fibre cable systems will provide two-way communication, enabling the consumer to have access to an almost infinite "bank" of recorded material, which can then be copied for private use. If the Community recording industry is to survive, then remuneration for right owners in respect of private copying is essential in view of the increased opportunities for this new use of recordings offered by developing technology.
- 7.1.3.3 There are a number of reasons why Commission action is considered particularly appropriate.
- 7.1.3.4 At present, only one Member State has legislated on private copying: the Federal Republic of Germany;⁽²⁾ several others are currently considering doing so. It would be desirable, therefore, for the Commission to take the lead by issuing guidelines in the form of a Directive to Member States' governments which would establish the general principles to be followed in preparing their individual laws on the subject. This would ensure a uniformity of approach and avoid the introduction of differing rules of law in this new branch of the law of copyright and related rights.
- 7.1.3.5 There are substantial differences in the extent and duration of protection afforded to right owners within the European Community by present legislation on copyright and related rights.⁽³⁾ For example, national legislation in Belgium, France, Greece and the Netherlands does not grant phonogram producers the right to authorise or prohibit the reproduction of their phonograms. In other Member States where this right does exist there are substantial discrepancies in the duration of the phonogram producer's protection (see Appendix 4). Similarly, no specific rights in favour of performers exist in those countries which do not protect phonogram producers, although performers have acquired protection in France as a result of case law. Elsewhere in the Community the level of protection afforded to performers varies considerably both as to its extent and its duration. Action on private copying presents the opportunity to avoid the

problems that different right owners and levels of protection cause in applying the principles of equal national treatment on which the Treaty of Rome and the copyright and related rights conventions are based.

- 7.1.3.6 The Community also has the opportunity to take the initiative to set an example to non-EEC countries and its overseas trading partners (from whom the copyright industries of the Member States earn significant royalty income) thus encouraging them to amend their copyright laws to provide for rights to remuneration for private copying.
- 7.1.3.7 The copyright industries of the Member States make a significant contribution to the balance of payments. (4) Their predominant role in world markets is being undermined by private copying; they are suffering from falling sales which in turn are leading to reductions in employment. It is in creativity that lies the strength of the cultural industries of the Community: authors, composers, publishers; the film industry; phonogram and videogram production; television programming; all these have a vital and creative role to play. These industries need to be encouraged and protected. The new video industry, if given adequate protection, promises to be a new growth industry creating new jobs and capable of making an important contribution to the national economies of Member States.
- 7.1.3.8 It is submitted, therefore, that the Commission has an interest in taking the lead to ensure a Community solution to the regulation of rights to remuneration for private copying by national laws and, in consequence, by the relevant international copyright and related rights conventions.

7.2 OPTIONS FOR ACTION

While the overwhelming majority of opinion in both government and private circles favours a private right solution to the problem of private copying, compatible with the copyright and related rights system, (5) two other options have been suggested: the imposition of government taxes on recording equipment and tape (and even in some cases on pre-recorded material) and government support for so-called spoiler systems, better described as copyright protection devices. (6) There are fundamental difficulties with both these options. The revenue from government taxes is not earmarked to benefit the right owners whose rights are undermined by private copying. As for spoiler systems, no satisfactory device capable of universal application has yet been invented. The case for the three options is discussed below.

7.2.1 Private Right or Government Tax

7.2.1.1 All the intergovernmental recommendations referred to have stressed that a copyright solution to private copying, giving right owners a right to remuneration, should be sought. It is recalled that this principle was expressed as follows by the intergovernmental copyright sub-committees in 1978:

'It was emphasised that this charge was not to be considered as a tax or para-fiscal levy, but as compensation due to the owners of exclusive rights to offset their inability to exercise such rights.'⁽⁷⁾

7.2.1.2 The statements of the Commission on this subject as well as the terms of reference for this study also stress the need to reconcile the requirements of the freedom of the public to make copies with those of providing remuneration for the work of the authors, the performers and the producers.

7.2.1.3 It is submitted therefore that a private right solution is both justified and necessary; it is also based on sound legal principles.

7.2.2 The Legal Basis for a Private Right Solution

7.2.2.1 The fundamental purpose of the copyright and related rights system is to act as a stimulus to creative activity. Thus, since the eighteenth century, copyright laws have sought to provide the legal framework for the protection of creators by granting to them certain exclusive legal rights of control over the various uses to which their creations are put. These exclusive legal rights have enabled right owners to obtain economic benefits from the exploitation of their works. In this way, right owners obtain a sufficient reward for their efforts and are thereby encouraged to create.

7.2.2.2 This system has developed because it has been generally accepted that, as a matter of principle, creators should be rewarded and others should not be able to appropriate their skill and labour without payment.

7.2.2.3 As new means of using works and new forms of creation arising from new techniques have become available, it has been necessary to adapt the laws of the world and the international conventions to take these new developments into account. Some national legislations have been more flexible than others in adapting to

these changes and in responding to the need to protect new forms of intellectual property. New uses of works to which copyright legislation has had to adapt in the past or must adapt in the future have been described as follows:

'The adaptation of copyright rules to technology began with piano rolls and jukeboxes, then with motion pictures, broadcasting, sound recordings and television, and recently with computers, cable television and photocopying machines.'⁽⁸⁾

- 7.2.2.4 In this connection, it is interesting to note that the present German legislation on private copying incorporated basic legal principles that had been recognised and confirmed by the Supreme Court in 1955.⁽⁹⁾ On that occasion, the Court held that the recording of protected phonograms by means of a tape recorder constituted a copyright infringement even if intended merely for private use without any intent to earn a profit. The Court stated that home audio recording would lead to a decrease in the sale of records and, thus, was likely to adversely affect the economic interests of copyright holders. It also made the following observation which is particularly relevant in the light of technical developments and showed great foresight:

'Important in construing statutory copyright provisions is the legal principle which governs copyright law, namely, that the author's control over his work is the natural consequence of his intellectual property, which merely found its recognition and formation through legislation. According to this notion new possibilities to use an author's property, provided for by development of technology, are to be included in the exclusive right of the author. A general principle that the rights of authors cease in the private sphere of an individual is unknown to copyright law. Generally the author is entitled to compensation for any use of his or her work, even if no direct commercial profit is gained.'⁽¹⁰⁾

- 7.2.2.5. The Courts of other countries have been less daring and many new uses of works and other protected matter have resulted from technical advances which were never contemplated by existing legislation in most Member States of the European Community. It is now generally accepted that most national copyright and related rights laws both within the Community and elsewhere have lagged behind technical developments, are out of date and are no longer capable of ensuring to the beneficiaries of such laws the secure exercise of their rights and a proper reward for the use of their works. Thus, there is a need to develop and

adapt the law to protect right owners against these new uses. If this is not achieved, there is a real danger that copyright legislation will have failed in its purpose of providing sufficient rewards to right owners to encourage creative activity. If such legislation no longer serves its purpose, the public interest will be the first to suffer from a decline in such activity and the lack of choice consequent upon the resulting decrease in the availability of cultural materials.

'...The basic legislative problem is to ensure that the copyright law provides the necessary monetary incentive to write, produce, publish and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should, because of copyright restrictions...'⁽¹¹⁾

7.2.3 The Need for Remuneration for Right Owners

7.2.3.1 It is in this context that the impact of private copying on right owners and the cultural industries is to be considered and solutions sought.

7.2.3.2 Even where private copying is against the law, as is the case in Ireland and the United Kingdom, the difficulties of enforcing private rights in private houses have already been pointed out. Thus, to make private copying an infringement of the reproduction rights of right owners under the laws of all Member States, leaving right owners to enforce their rights as best they may, would not be a solution. Moreover, in principle, the general public should not be denied the benefits afforded by access to new technology.

7.2.3.3 The fact remains that private copying represents a new use of works and other protected material over which the right owner is unable to exercise any control. The copyright system:

'presupposes a direct relationship between the owner of copyright and the user of copyright material. The assumption which underlay the grant of exclusive rights to the copyright owner was that he can give or withhold his licence in respect of the use of his material'...

Thus, enforcement of copyright presented no special problems in the past, particularly after the appearance of collecting societies in the 19th century.

'However, the ready availability of and widespread access to audio and video recording equipment and material have in effect severed the direct relationship which the copyright owner in the past, may have had with the users of his material'.⁽¹²⁾

7.2.3.4 On the premise that copyright legislation should enable the right owner to exploit the normally expected markets, it is imperative that he exercise control over or receive remuneration for new channels of distribution. Private copying has become the most widespread means of distribution of music to the public. Phonograms -- the original sound recordings -- rely at present on the sale of copies in the form of records and pre-recorded tapes as channels of distribution. But, as we have seen in Chapter 2, in all Member States for which surveys on private copying exist, private copying of phonograms has reached a level where more minutes of music are privately copied per annum than are sold legitimately by producers of phonograms on records and pre-recorded tapes.

7.2.3.5 The question is posed therefore whether it is possible to devise a method of remunerating right owners for this new use of their works or

'whether we must throw up our hands and accept all home copying as lawless but uncontrollable, or lawful because it is uncontrollable'.⁽¹³⁾

7.2.3.6 It is submitted that private copying should not be permitted without having due regard for the skill, talent, investment and risk involved in the creation of phonograms and videograms, and that the most appropriate solution would be for all the Member States to follow the example of the Federal Republic of Germany and to introduce legislation to provide for a right for right owners to claim a royalty on the sale of audio and audio-visual recording equipment and/or blank tapes and other materials capable of recording from the manufacturers or importers of recording equipment and recording tape.

7.2.3.7 Such a royalty is entirely justified on the following grounds:

- to provide remuneration for a new and uncontrollable use of phonograms and videograms;
- to compensate right owners for a derogation from the fundamental, primary right in phonograms and videograms, that is, the right to control reproduction;
- to off-set the damaging economic impact of

private copying on the phonogram and videogram markets.

7.2.3.8 In this connection, it is submitted that this study has clearly demonstrated the extent of private copying and the damaging economic impact the practice has on the markets of the Member States of the European Community. However, it should be noted that the German legislation (as well as that of Austria) is grounded on a crucial premise: copyright owners are not required to prove market damage before being able to benefit from the protection of the law and the remuneration derived from it. Economic damage is proven but should not be a pre-requisite for action. The basic principles of copyright described above should apply to the new use represented by private copying irrespective of the economic impact of the practice. However, the economic damage suffered by right owners should be taken into account in fixing the level of royalty payable. There is a good case for substantial royalties to be paid. Detailed recommendations concerning the legislation required to introduce a royalty system and proposals as to the manner in which such a system could be administered are dealt with below in Chapter 8 under Proposals for Action.

7.2.4 Government Tax

7.2.4.1 Governments are prone to welcome new methods of raising taxes. Several, when presented with submissions from right owners requesting that royalties should be paid on recording equipment and tapes to provide remuneration to right owners for private copying, have found the idea of imposing a charge on the sale of recording equipment attractive. However, the revenue from the charge has been seen by them as a new source of revenue to be used either as a straightforward tax for the exchequer or to provide funds for various so-called cultural purposes. The right owners get either no share or only a small amount.

7.2.4.2 Four such systems have been introduced in Denmark, France, Norway and Sweden and have been described in Chapters 4 and 6 above.⁽¹⁴⁾ It is noteworthy that Sweden has imposed a tax on the sale of pre-recorded videocassette tapes as well as on blank video tapes. Revenue from pre-recorded video tapes will be used for cultural purposes connected with the Swedish film and video industries. By contrast, two-thirds of the tax on blank audio and video tape will be used for general budgetary purposes. Of the total income to the State, the right owners only receive 29.6%. A similar situation exists in Norway where both blank and pre-recorded audio and video tapes are taxed and

the right owners' share is even smaller. Denmark has imposed a fiscal tax on blank and pre-recorded video tapes. In France, video recording equipment is subject to a substantial annual tax. In neither Denmark nor France do the right owners participate in the revenue from the taxes. Details of all these taxes are given in Chapters 4 and 6, above.

7.2.4.3 It is submitted that the trend demonstrated by these examples of government taxes on audio and video recording tape and, in France, on equipment, is much to be regretted. It should be noted that, in France, the draft legislation prepared by the Ministry of Culture originally provided for royalty payments on both recording equipment and tapes.⁽¹⁵⁾ Since the introduction of the tax on recording equipment, the idea of a⁽¹⁶⁾ royalty on that equipment has been abandoned.

7.2.4.4 Government taxes of the kind referred to are entirely incompatible with the copyright system. They do not provide a solution to the problems of private copying. On the contrary, it has been argued⁽¹⁷⁾ against the introduction of a royalty system that the resultant increase in prices would fall on the consumer and would run counter to government policies to control inflation. The imposition of taxes on recording equipment makes a private right solution to private copying all the harder to achieve.

7.2.5 Spoiler Systems

7.2.5.1 For many years, the audio recording industry has sought to resolve the problem of the taping of records by the development of a so-called spoiler system, more accurately described as a copyright protection device. Research has been sponsored both in Europe and the United States of America aimed at finding a technical solution to the problem by incorporating into the pre-recorded record or cassette a signal which would be inaudible when the record is played but which would react with tape-recorder circuits to prevent copying altogether or to spoil any copy made by superimposing unwanted noise. So far, research has been unsuccessful.⁽¹⁸⁾ Research has also been done into the possibility of encoding a protected programme with a signal which would be activated to stop recording by a decoder incorporated in recording equipment. Such a device would only be operable if the decoding mechanism were to be incorporated in all domestic recording equipment.⁽¹⁹⁾ So far all research has pointed to the incontrovertible fact that whatever spoiler device may be invented, it can be overcome by anti-spoiler devices sooner or later.

- 7.2.5.2 It is relevant to mention that the UK Green Paper suggested that the recording industries continue research into spoiler systems and offered to:

'seriously consider supporting this solution to the problem by introducing legislation to make illegal any anti-spoiler devices which might subsequently be developed'.⁽²⁰⁾

- 7.2.5.3 It is submitted that even with government support it would be extremely difficult to reach an agreement with hardware manufacturers (overwhelmingly non-EEC) to include decoders in recording equipment, in particular, if much expense were involved; even if major manufacturers did agree, it would be difficult to bind those not party to the agreement. Moreover, it is doubtful that a sufficiently universal system of legislation on the lines suggested by the United Kingdom could be established or, if it were, successfully policed. Even if such a spoiler device were to be installed on each new piece of hardware put on the market, to begin with it could only have a very limited impact on the amount of private copying carried out in view of the already high penetration of recording equipment in the households of the EEC (see paragraph 2.1.6. above). In France alone, there are approximately 15.6 million tape recorders⁽²¹⁾ and in Italy a further 11.3 million.⁽²²⁾ The total number of tape recorders in the EEC can be estimated at around 90-100 million. It would take between 5-10 years before replacement sets were purchased by the majority of households.

- 7.2.5.4 If hardware manufacturers were forbidden by law to fit anti-spoiler devices, this would not deter enterprising small traders from producing and marketing such devices, to be fitted to recording equipment after sale. Enforcement of the law would cause the same difficulties as arise in relation to private copying: it would be impossible to raid peoples' homes in order to discover whether or not they had fitted an illegal anti-spoiler device.

- 7.2.5.5 In the words of the Register of Copyrights of the United States of America:

'Although it may be possible for spoiler devices to discourage home taping in the short term, it appears likely that the only result from building a better mousetrap in the form of spoiler devices will be the education of smarter mice.'⁽²³⁾

FOOTNOTES TO CHAPTER 7

- (1) See Chapter 1, section 1.6, et seq.
- (2) See Chapter 4.4.
- (3) See Appendix No. 4.
- (4) See Chapter 1, section 1.3 and 1.4.
- (5) See Chapter 5.
- (6) UK Green Paper, Reform of the Law relating to Copyright, Designs and Performers' Protection. A Consultative Document. London, HMSO, July 1981, Cmnd. 8302, Chapter 3, paragraph 6, p.13.
- (7) See Chapter 5, footnotes 3 and 5.
- (8) D. Ladd: Private Use, Private Property, op. cit., pp.9 and 10 (see Chapter 1, footnote (4)).
- (9) Supreme Court Decision of 18 May 1955, 17 BGHZ, 266.
- (10) Loc. cit.
- (11) Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill, Copyright Law Revision Part 6, p. 13-14, 89th Cong. 1st Session (1965).
- (12) Review of Audio-Visual Copyright Law. Issues paper. Attorney General's Department, Canberra, Australian Government Publishing Service, 1982, paragraph 228.
- (13) D. Ladd, op. cit., p.13.
- (14) Denmark: May 1983: see Chapter 4,
section 4.2.5;
France: January 1983: see Chapter 4,
section 4.3.6.2 et seq;
Norway: June 1981: see Chapter 6,
section 6.9.2 et seq;
Sweden: May/June 1982: see Chapter 6,
section 6.10.2 et seq.
- (15) See draft circulated to interested parties by the Ministry of Culture in 1982.
- (16) See draft circulated to interested parties by the Ministry of Culture in 1983.

- (17) UK Green Paper, loc. cit. Chapter 3, paragraph 14, p.15.
- (18) Unpublished Report by the Wolfson Institute of Noise and Vibration of Southampton University, commissioned by the British Phonographic Industry (BPI), 1978; Home Taping of Sound Recordings. A solicitation of technological proposals by the Recording Industry Association of America (RIAA), March 1980.
- (19) CBS Copyright detection device, Billboard, 2 October 1982, p.1, 70.
- (20) UK Green Paper, loc. cit.
- (21) Le Monde, 5 March 1983.
- (22) Billboard International Buyer's Guide, 1982-1983. Beverley Hills, Billboard Publications Inc., 1982.
- (23) D. Ladd, op. cit., p.33.

CHAPTER 8 PROPOSALS FOR ACTION

A. PROPOSALS FOR COMMUNITY LEGISLATION

Introduction of a Private Right Royalty Payable for Personal Use

8.1 LEGAL BASIS FOR COMMUNITY LEGISLATION

8.1.1 Copyright and related rights are not specifically referred to in the EEC Treaty. Nevertheless, it is clear from the jurisprudence of the European Court of Justice that the provisions of the Treaty relating to the free movement of goods (Articles 30-36), the freedom to provide services (in particular Article 59) and the rules of competition (Articles 85 and 86) apply to goods and services which are protected by copyright, in the same way as to other goods and services.⁽¹⁾ The existence of the rights of authors, performers, producers and others, which are established by national legislation, is guaranteed by Article 222 of the EEC Treaty, but their exercise nevertheless comes within the ambit of the Treaty.

8.1.2 However, the fact that the national copyright and related rights legislation is subject to, and may be limited by, the operation of EEC law does not of itself justify the approximation of that legislation. The legal basis in the Treaty for the approximation of national laws is Article 100, which provides for the Council to act on a proposal from the Commission by issuing directives concerning matters which directly affect the establishment or functioning of the common market. This power to approximate the laws of Member States is indeed expressed as a duty, to the extent required for the proper functioning of the common market (Article 3(h)).

8.1.3 The objectives of the Community, as stated in Article 2 of the Treaty, include the promotion of a harmonious development of economic activities and a continuous and balanced expansion. In the context of private copying, it is obvious that the proliferation of this new use of protected recordings is undermining the development and expansion of the Community recording industry, and it is proposed that a Directive to Member States should be issued by the Council, on recommendation from the Commission, under Article 100 of the Treaty.⁽²⁾ A directive is an eminently suitable instrument for this purpose, since it instructs Member States to enact legislation embodying the relevant principles, but leaves to the individual Member State the form and method by which

the results are to be achieved.

8.1.4 The purpose of the Directive would be to ensure approximation of legislation in all the Member States to provide for right owners to have the right to demand a royalty from manufacturers and importers of audio and audio-visual recording equipment (hardware) and on the sale of blank audio and video tapes and other media intended for recording purposes. One single charge on each item of recording equipment, tape or other recording medium would be payable with respect to the claims of all right owners. The right to claim royalties could only be enforced through collecting societies. Each right owner would be entitled to an equitable share of the revenue derived from the royalties.

8.1.5 Detailed discussion of this proposal, with suggestions as to the manner in which the royalty scheme should be operated, follows.

8.2 EFFECT OF THE ROYALTY

8.2.1 Permitted Recordings

Legally, the result of such legislation would be to introduce a compulsory licence to permit the public to make copies for their personal use from radio or television broadcasts, cable and satellite transmissions or from pre-recorded records, tapes, videocassettes or discs in return for equitable remuneration. It would serve the dual purpose of providing right owners with remuneration for the use of their protected material and of permitting the general public freedom to benefit from the advantages of recording equipment.

8.2.2 Infringing Recordings

8.2.2.1 Unauthorised recordings of live performances would remain protected by exclusive rights.

8.2.2.2 Private recordings made under the royalty scheme could only be used for private use; use for any other purpose such as commercial use (sale or rental) or public performance would be prohibited.

8.2.2.3 If privately made recordings were used for non-private purposes, that would constitute an infringement.

8.3 THE CLASSES OF PERSON ENTITLED TO BENEFIT

8.3.1 As we have seen in Chapter 1, there are five principal classes of persons whose rights may be abused and interests prejudiced by private copying of phonograms and/or videograms:

- producers of phonograms;
- owners of copyright in cinematographic works (film producers, videogram producers, and/or co-authors);
- authors and composers;
- performers;
- broadcasting organisations.

8.3.2 Private Copying of Phonograms

The beneficiaries of royalties on audio recording equipment and tape would be:

- producers of phonograms;
- authors and composers;
- performers.

To the extent that broadcasting organisations are producers of original phonograms, which are privately copied off-the-air, and to the extent that they are assignees of authors' and composers' rights, they too would be entitled to benefit.

8.3.3 Private Copying of Videograms

8.3.3.1 All five of the categories of right owners listed above would be entitled to benefit from royalties on video recording equipment and tape. Broadcasting organisations again would benefit to the extent that they hold exclusive rights in their own productions as authors or producers of original phonograms, works or telefilms, and to the extent that they are assignees of the rights of others.

8.3.3.2 There is general agreement⁽³⁾ between right owners as to the rights of these various categories to benefit from private copying royalties, although there may be differences as to the division between them (see paragraphs 8.7.1-8.7.2 below).

8.3.4 The Interest of Broadcasters

8.3.4.1 There is, however, one area of disagreement. It has been suggested on behalf of broadcasting organisations that they should benefit from private copying royalties in their capacity as broadcasters. Their case is based on the premise that off-air recording means the recording of broadcasts, whether sound or television. They assert that:

'whatever the programme, and whoever may be the right holder(s) in the programme, it is the broadcasters' specific contribution that renders off-air recording both possible and sufficiently attractive'.⁽⁴⁾

8.3.4.2 It is difficult to see that broadcasters suffer any damage or financial loss from off-air recording of broadcasts of phonograms and videograms (except in so far as they are producers themselves as already mentioned). It is the purpose of broadcasting organisations to broadcast and the broadcasting organisation is not competing with private copying for his market. If a phonogram is privately copied off-air, it is not the broadcaster who loses a potential sale but the phonogram producer.

8.3.4.3 Broadcasting organisations are expressly excluded from participation in the remuneration arising from the private copying royalties paid under the legislation in the Federal Republic of Germany.⁽⁵⁾ Likewise, broadcasters do not benefit from the Austrian Copyright Amendment Law adopted in 1980 providing for royalties for home taping.⁽⁶⁾ The Austrian decision not to grant broadcasting organisations any such remuneration was made in the course of the parliamentary debates. The Report and Application of the Judicial Committee says in this connection:

'The Committee ... has modified the Bill ... (bringing it into line, incidentally, with the legal situation obtaining in the Federal Republic of Germany) so as not to allow the broadcasting organisation equitable remuneration for what is known as private taping in respect of its neighbouring rights in the broadcast ...'

8.3.4.4 The German and Austrian example on this point has been followed by the new Hungarian Decree of 1982.⁽⁸⁾ It will also be noted from the review of legislative developments regarding private copying contained in Chapter 4 above, that the current proposals for legislation put forward in other countries do not include broadcasting organisations among the beneficiaries of private copying royalties.

8.3.4.5 The legislators presumably have taken the view that no competitive relationship exists between the activity of broadcasting organisations and private copying and that therefore the latter cannot be considered prejudicial to them.⁽⁹⁾ As regards the Austrian decision, the following comment has been made:

'With all due caution, it may be concluded that a political intention is here expressed, the grounds for which are probably that, taking into account the circumstances as they exist in Austria, the broadcasting organisation suffers no loss in income as a result of "private" taping.'⁽¹⁰⁾

8.4 THE CASE FOR ROYALTIES ON BLANK TAPE AND HARDWARE

8.4.1 On what basis should the royalties be calculated? There are three possibilities:

- (i) a royalty payable solely on blank tape and on tape intended for recording (hereinafter referred to together as "recording tape");
- (ii) a royalty payable on recording tape, supplemented by a royalty on tape recording equipment;
- (iii) a royalty payable solely on tape recording equipment (hardware).

8.4.2 A royalty on all recording tape suitable for private copying is justified because it is on this material that phonograms and videograms are privately copied, and the number of tapes purchased by an individual is likely to reflect the amount of copying he engages in. Such remuneration will not exactly match the number of times copying takes place, since tapes may be used more than once. But the introduction of royalties on recording tape would at least result in a remuneration payable to right owners more appropriate to the actual use of their works than if a royalty were to be imposed on hardware alone. A royalty on recording tape alone appears to have been recommended by some governments because it is thought to be more sensitive to actual use than a machine levy. However, a royalty on recording tape supplemented by a royalty on hardware would ensure a more equitable return to the affected parties. A royalty on both hardware and recording tape would also reflect the fact that manufacturers of both hardware and recording tape are dependent on the availability of pre-recorded music to make their products useful.

8.4.3 In his report on "Copyright in the European Community"⁽¹¹⁾ Dr A. Dietz recommended that all the EEC countries should introduce a royalty on sound and video recording devices in return for a right for the private user to make recordings for himself of commercially produced phonograms, as happens in the Federal Republic of Germany at present. In a more recent article,⁽¹²⁾ Dr Dietz said that he now takes the view that royalties should be paid on both hardware and recording tape.

8.4.4 A royalty on hardware is appropriate because modern tape recording equipment is particularly suitable for private copying. Three characteristics of such equipment are especially relevant:

- (i) it is comparatively inexpensive and, by the use of cassettes, has become particularly simple to operate -- the price of video recording equipment is continually being reduced;
- (ii) it enables cassettes to be used over and over again for the making of fresh recordings;
- (iii) most types of hardware, for example "music centres", cassette recorders, double music cassette recorders and video recorders which are designed for easy recording from radio, records or other cassettes and from television actively encourage private copying, including giving detailed advice on how to home tape in the operating instructions.

8.4.5 In this connection it is interesting to note the following statement:

'One must be sensitive to the warnings of the West German Government that recording technology may change so that recording machines with permanent integral recording storage may replace the present type of machine that requires tape or other such material as a recording medium. If such a development is likely, it would seem wise to adopt a machine levy from the beginning rather than be forced to convert to one in the future as technology changes.'⁽¹³⁾

8.4.6 Another argument in favour of royalties being paid on both recording equipment and on tape is that the Federal Republic of Germany, the only Member State to have legislated on private copying to date, has now decided to extend its present law to provide for right owners to have the right to royalties from recording tape as well as hardware. This solution is

also the one that has found most favour in intergovernmental recommendations.

8.4.7 There are at least three factors which make a royalty on hardware alone less than satisfactory:

- (i) first, as the cost of audio recording equipment has come steadily down in real terms over the past 10 to 20 years and the same trend has already occurred in relation to video recording equipment since its introduction and will no doubt continue, the return which would be available from a royalty on hardware alone fails to reflect increased penetration of the market by hardware and the consequent escalation of the occurrence of private copying;
- (ii) second, utilisation of hardware varies considerably from one owner to another and a royalty on hardware does not reflect the number of copies made;
- (iii) third, people buy hardware less frequently than blank tape. Moreover:

'the number and value of machines sold may eventually peak and begin to fall, reflecting market saturation. It may also be feared that machine sales may be particularly vulnerable in periods of downward pressure on consumer disposable income'.⁽¹⁴⁾

8.4.8 A royalty on hardware alone has been levied in the Federal Republic of Germany since 1965 and the "levy" recommended for the United Kingdom by the Whitford Committee⁽¹⁵⁾ referred exclusively to recording equipment. However, the Intergovernmental Copyright Sub-committees recommended a levy⁽¹⁶⁾ on both recording equipment and on recording tape and the German Government is planning amending legislation to introduce a royalty on the sale of recording tape⁽¹⁷⁾ in addition to the existing royalty on hardware.

8.4.9 A royalty on hardware alone has been advocated by some on the ground that:

'some unscrupulous dealers could circumvent the levy [on blank tapes] by selling tapes having trivia recorded on them'.⁽¹⁸⁾

It is believed that this is not a real problem and that legislation can deal with it as the Austrian legislation has done by using terminology which avoids the use of the expression 'blank tape' and instead refers to recording tape or other medium 'suitable for making copies and intended for that purpose'. The Austrian law refers to 'sound or visual recording media intended for the purpose [of copying/ (recording material)]'. (19)

- 8.4.10 It is submitted that a solution providing for royalties on both hardware and recording tape would ensure a more equitable return to right owners. Both recording tape and hardware are necessary to enable private copying to be carried out and therefore a royalty on both products is justified.
- 8.4.11 It should be emphasised at this point that only one single royalty representing all claims of right owners should be paid in respect of each item of audio or video recording equipment and tape.

8.5 THE BASES OF CALCULATION OF ROYALTIES

8.5.1 Recording Tape

8.5.1.1 Two bases for calculating the royalty on recording tapes have been suggested. These are:

- (i) to base the royalty on a percentage of the price of the recording tape, whether manufacturer's or wholesale or retail price;
- (ii) to base the royalty on the playing time of the recording tape.

8.5.1.2 It is submitted that the latter system is the more equitable. A price-based royalty is inappropriate because neither the extent of the use made of the right owners' works by private copiers nor damage inflicted on the right owners by private copying depends directly on the price of the recording tape. Such price varies substantially between low quality and high quality tapes and is affected by factors totally unrelated to their recording capacity. However, both the extent of the use of rights and the damage done to right owners depend strongly on the amount of private copying carried out, and this in turn depends on the playing time of the recording tape. Therefore, playing time provides a fairer basis.

8.5.1.3 In setting such a flat rate, two problems will have to be taken into account. First, the amount of the royalty should increase in relation to the recording capacity of the recording tape. Thus, with respect to audio tape, the royalty on a C90 tape would be higher than the royalty on a C60 tape. Likewise, the royalty would increase in proportion to the recording time of video tapes. Second, a system should be introduced to cope with adjusting the rate in the light of monetary inflation.

8.5.2 Hardware

In the case of recording equipment suitable for private copying the royalty should be calculated as a percentage of the manufacturer's or importer's price. No deduction should be permitted for non-recording parts of a piece of domestic audio or video equipment; it is the juxtaposition of such non-recording parts of equipment (such as tuners and turntables) with the recording parts in, for example, a "music centre" that has made private copying so easy and therefore so widespread. Again, provision should be made for adjusting the rate to keep pace with inflation.

8.6 CALCULATING THE RATE OF ROYALTIES

8.6.1 It is submitted that the goal should be to ensure that right owners receive reasonable remuneration for the use that is actually made of their works through recording for private use. The rate of royalty should take account of the protected works embodied in the recording as well as the skill, talent, labour, risk and capital which go together to make a phonogram or videogram. In determining the quantum, account should be taken of the serious economic damage and loss caused to right owners by private copying, the extent of which has been described in Chapters 1 and 2. In order to provide an equitable level of remuneration to right owners, the royalties should be substantial.

8.6.2 The actual rate of royalty should be decided upon nationally and established either by free negotiation between the right owners and the manufacturers and importers of recording equipment and tape or by a competent tribunal or government agency on the basis of evidence and submissions from interested persons, including right owners, suppliers of recording equipment and tape and the general public. If the rates are fixed by common agreement there should be provision for review by a tribunal or other competent authority. In any case, provision should be made for the rates to be automatically reviewed from time to time to take account of market and technical

developments, inflation, etc.

- 8.6.3 Various suggestions have been made as to the factors which should be taken into account in fixing rates of royalty. Obviously, the quantum of royalty on recording tape should be determined taking into account the quantum of compensation (based on manufacturer's or importer's price) payable on recording equipment, if any, and vice versa.
- 8.6.4 As regards royalties on recording tape, it has been proposed by right owners in many countries that the remuneration recovered by each right owner should be an equitable percentage of the return that right owner would receive from the sale of a pre-recorded copy. The justification for this approach is that the act of private copying is an infringement of the right of reproduction. As a result, the privately made copy contains the same protected material as the pre-recorded original. Moreover, the damage done by private copying takes the form of damage to sales of pre-recorded copies.
- 8.6.5 It follows that the royalty for a recording tape of a given playing time should be a percentage of the sum of the returns to the various classes of right owners which result from the sale of a pre-recorded copy of the same playing time. The price breakdowns of a popular LP or cassette in the United Kingdom, reproduced in Annex 9, show that the royalties paid to the authors account for 6.25% of the retail price less tax, the artists' royalties for an average of 12.5% and the contribution to producers' overheads and profit (if any) for 25% of the retail price less tax (40% of the wholesale price).

8.7 DIVISION OF ROYALTY

- 8.7.1 It is submitted that decisions as to the division of royalties should be left to negotiation at national level between the various right owners affected. The proportions payable to the different categories of right owners will be influenced by the relative strength or weakness of their level of protection under the national legislation on copyright and related rights. The varying solutions to the division of private copying royalties in force in some countries and the subject of prior agreement between parties in other countries where legislation on private copying is anticipated, show that there can be no hard and fast rule.

8.7.2 However, in the absence of agreement between the parties, there should be the possibility of referring any dispute on the division of royalties to a tribunal or other government authority for a decision.

8.8 METHODS OF COLLECTION AND DISTRIBUTION

8.8.1 Who Should Pay?

The obligation to pay the royalties should be imposed on the manufacturers and importers of recording equipment and tape at the point of sale by them into their domestic market. This is the system adopted by the Federal Republic of Germany and collection at these points involves the least amount of difficulty and cost. As already mentioned, one single royalty should be payable for each item of audio and video recording equipment and tape, representing all copyright claims.

8.8.2 How Will Royalties be Collected?

8.8.2.1 Royalties should be collected only through collecting societies approved by the government for that purpose. As the Intergovernmental Copyright Sub-committees suggested, it would facilitate the process of collecting and distributing the royalties if there were only a single society. However, it may be difficult for the various interested copyright claimants to reach sufficient agreement. There are two alternative solutions: firstly, to legislate to provide that royalties may only be collected through a single collecting agency which has established that it has the support of the various groups of right owners affected and is reasonably representative of those owners; alternatively, the law could provide that the burden of setting up a scheme for collecting and distributing the royalty rests with the right owners. The latter solution was proposed by the Whitford Committee in relation to the revision of the UK law which recommended that copyright owners be given the incentive to co-operate and form the necessary collectives.

8.8.2.2 In fact, there is no reason to anticipate any difficulties in this regard. It would depend on national circumstances whether such an organisation was public or private and whether an existing collecting society was used or a new society was set up. In many countries societies already exist, sometimes under state supervision, for the collection and distribution of royalties. Their experience shows that, given adequate remedies, a collecting society

is able to enforce the collection and distribution of royalties at reasonable cost. Administrative expenses of collecting societies vary between 15-25% of their gross incomes and can be as low as 8% (Annex 21). There would need to be an obligation on manufacturers and importers to supply returns of hardware and recording tape sold by them into their domestic market. The collecting society would need to be given the usual right to inspect the books of manufacturers and importers.

- 8.8.2.3 It is common practice in countries where more than one collecting society exists, each representing different categories of right owners, for the societies or their members to agree among themselves that one collecting society will collect on behalf of all right owners, passing revenue over for distribution by each collecting society to its own members.
- 8.8.2.4 It is proposed, therefore, that the initiative for establishing or deciding upon suitable collecting societies should rest with the right owners. However, a tribunal or other government authority should have a role in determining the representativity of collecting societies, confirming their authority to collect and approving their systems of operation.

8.8.3 Distribution of Royalties

- 8.8.3.1 A number of methods of distribution are possible for each category of beneficiary which would ensure equitable distribution of funds collected. In many countries, distribution of other royalties to many categories of the proposed beneficiaries of private copying royalties already takes place, and the methods used may well prove appropriate for the royalty proposed for private copying. Analogous systems of distribution may prove applicable in other countries.
- 8.8.3.2 In principle, distribution should take place in a way based on the principle of payment for use. It will for obvious reasons be impossible to log each instance of private copying, but a combination of market share, sales, broadcasting logs, popularity ratings and other similar statistical methods may be used.

8.8.4 Enforcement and Administration

8.8.4.1 It should be emphasised that it is not necessary for police, customs or tax authorities to assume responsibility for the collection or distribution of royalty payments. Nor need there be any question of administration costs being borne by public funds. Such costs should be deducted from the revenue collected prior to its distribution to the beneficiaries.

8.8.4.2 The approved collecting society or societies -- for example, it may be appropriate to establish separate collecting agencies for audio royalties and video royalties -- would be responsible for collection and taking legal action, when required, against manufacturers and importers of recording equipment and tape who fail to pay.

8.9 EXEMPTIONS

8.9.1 Legitimate commercial users of blank tape and other approved groups such as, for example, legitimate manufacturers of pre-recorded audio and video cassettes, broadcasting organisations and national sound archives, ought to be able to buy tape royalty-free. An exemption system could be managed by the responsible collecting societies with a right of appeal to the tribunal or government authority responsible for the private copying royalty system.

8.9.2 It should be left to national legislation or negotiation to determine which users would be entitled to exemption. The way in which such exemption operates in each country may depend on the method of collection adopted, and should therefore be settled at national level.

8.10 NATIONAL TREATMENT OF FOREIGNERS

8.10.1 Both under existing legislation in the Federal Republic of Germany and under the new Austrian legislation, the right of beneficiaries to collect royalties in respect of private copying is considered to give rise to national treatment under the Rome, Universal Copyright and Berne Conventions, and therefore to give rise to an obligation to pay a share of the royalty to foreign beneficiaries.

- 8.10.2 Under any new laws, whether or not foreign beneficiaries will share in the remuneration may depend on the way legislation is drafted. It can be argued that if a tax or levy is raised there is no need for payment to foreign beneficiaries. If, however, the remuneration is based on a specific right, this will involve payment to foreign beneficiaries. This is a further reason why the Commission should ensure, in the context of harmonisation of copyright and related rights in the Community, that producers of phonograms and performers have specific rights in every Member State.
- 8.10.3 If, as a result of Community action for approximation of Member States' laws on the subject of private copying, legislation based on specific rights is introduced throughout the Community, this will entail affording national treatment to right owners in phonograms and videograms not merely from other Member States but also from States members of the conventions mentioned.
- 8.10.4 It is submitted that this is not a consideration that should deter the European Community from taking action. The whole basis of the international copyright system is that foreign copyright owners from other convention countries are treated in the same manner as nationals of each Member State of the Convention in question. As we have seen in this study, the music and video industries of the European Community are predominant in the world market. Member States are large net exporters of copyright material and the cultural industries of the community earn substantial and economically significant royalty income from overseas. Thus the European Community has an interest in setting an example to other States by introducing copyright legislation on private copying. There is no doubt that its leadership will be quickly followed by many of those states currently considering the introduction of such legislation, including many of the most important trading partners of the Community. This would result in significant inflow of royalties from non-EEC countries on the basis of reciprocity. If the Member States of the Community, major exporting countries, will not afford remuneration to right owners for private copying, their principal trading partners may hesitate to do so.

B. RECOMMENDATION FOR A DRAFT DIRECTIVE IN RESPECT OF PRIVATE COPYING

ARTICLE 1:

The making of single copies of sound and audio-visual recordings for the personal use of the person making the reproduction from

- (i) pre-recorded carriers of sound and audio-visual recordings (discs, cassettes or any other material supports) and
- (ii) radio or television broadcasts, cable distribution systems, satellite transmissions or any other means of transmission of sound and audio-visual recordings,

shall be permitted in return for equitable remuneration by way of a royalty payable to right owners in accordance with the following provisions.

ARTICLE 2:

The owners of rights in sound and audio-visual recordings referred to in Articles 6 and 7 below shall be entitled to claim a royalty in respect of reproduction for personal use of such recordings. Broadcasting organisations shall not be entitled to claim such a royalty in respect of reproduction of broadcasts for personal use.

ARTICLE 3:

The source of remuneration for right owners shall be a royalty payable on sales of audio and video recording equipment and of audio and video blank tape suitable for recording and other media intended for recording (recording media). The royalty shall be paid by manufacturers or importers for commercial purposes of such equipment or media.

ARTICLE 4:

The minimum level of royalties payable on the sale of recording equipment and on recording media shall be as follows:

- i) For audio and video recording equipment: 5% of the manufacturer's price or the price paid by the importer.
- ii) For audio recording media: 1 ECU per playing hour.
- iii) For video recording media: 3 ECU per playing hour.

Subject to these minimum royalties, the level of royalty shall in each case be fixed by the national law of each Member State or by agreement between the right owners. If, in the latter case, the right owners are unable to agree then the matter shall be referred to a national copyright tribunal or similar body for decision. The national law shall provide for periodical review of the levels of royalties payable.

ARTICLE 5:

The proceeds of such royalty shall be divided between right owners in proportions to be established by the national legislation of each Member State or by agreement between the right owners. If, in the latter case, the right owners are unable to agree then the matter shall be referred to a national copyright tribunal or similar body for decision. Such body must take account of the estimated losses incurred by different right owners in coming to its decision.

ARTICLE 6:

For the purposes of this Directive, owners of rights in sound recordings shall be authors, performers and producers of phonograms. They shall be entitled to participate in the remuneration arising from sales of audio recording equipment and media.

ARTICLE 7:

For the purposes of this Directive, owners of rights in audio-visual recordings shall be owners of rights in cinematographic works and works expressed by a process analogous to cinematography, owners of rights in other protected subject-matter incorporated in audio-visual recordings and performers. They shall be entitled to participate in the remuneration arising from sales of video recording equipment and recording media. Ownership of rights in cinematographic works shall be established in accordance with the national legislation of each Member State.

ARTICLE 8:

All claims for remuneration by right owners must be made through a collecting society.

ARTICLE 9:

Any failure by manufacturers and importers of recording equipment and recording media to comply with the obligations imposed on them pursuant to Articles 3 and 4, hereof, shall be an infringing act under the relevant national copyright and/or related rights legislation of Member States.

NOTES ON THE DRAFT DIRECTIVEGENERAL REMARKS

The Directive is drafted on the premise that the Commission's intention, as expressed in the terms of reference for this study, is that the beneficiaries of royalties on recording equipment and recording media should include authors (including authors of cinematographic works), performers and producers.

If such right owners are granted a right to remuneration in return for freedom for members of the public to make single copies of sound and audio-visual recordings for their personal use, then this amounts to a compulsory licence and must be recognised as a specific exception to the reproduction right which is fundamental to copyright protection. The control of both piracy and private copying depends on the exercise of the reproduction right of authors and other right owners such as producers of phonograms and film producers. However, it must be recognised that producers of phonograms and, indeed, film producers do not at present enjoy a specific right to authorise or prohibit reproduction of their products in some countries of the Community. Similarly, performers remain unprotected in some Member States. Certain of these differences in protection are described in Chapter 4, above, and others are apparent from Appendix 4. It is assumed that the Commission will wish to take account of these discrepancies in the context of its programme for the approximation of the copyright and related rights legislation of Member States.

ARTICLE 4:

Rates of Royalties on Audio Recording Equipment and Media

In order to arrive at the minimum rates of royalty proposed in the draft Directive, a number of calculations and assumptions have been made in order to compare the level of remuneration which would be derived from different levels of royalty with such figures as are available to illustrate losses suffered by right owners. In the United Kingdom, for instance, the British Phonographic Industry has made a very reasonable assumption that 25% of the music copied would have been bought if the possibility to make private copies did not exist. Lost sales were estimated on that basis to amount to £283 million (US\$622 million) at retail level in 1979 (paragraph 2.2.1.9.2). These lost sales represented an approximate loss to all right owners of £98 million (US\$213 million). Losses to authors were around £14

million (US\$30 million), those of performers are estimated at £28 million (US\$60 million) and those of producers average £56 million (US\$123 million) (see paragraph 8.6.5). The rapid increase in penetration of tape recorders probably means that the losses suffered by right owners are now higher.

The same assumptions applied to the Netherlands lead to an estimated DFL300 million (US\$140 million) in terms of lost sales in 1979 due to private copying. This represents an estimated loss of DFL105 million (US\$49 million) to right owners.

The tables on pages 193 - 195 show a comparison between the revenue which could be derived from a minimal royalty rate of ECU 0.10 per hour of blank tape and 2% on sales of hardware and those from a higher rate of ECU 1 on blank tapes and 5% on hardware. When looking at the estimated losses for the United Kingdom, it is significant to note that the higher royalty rate would only yield revenue of US\$144 million, whereas losses were estimated to be at least equal to US\$213 million. In the Netherlands also, revenue from the higher rate would not completely compensate for the losses incurred by the right owners. Accordingly, the proposal outlined in the draft directive of a royalty of ECU 1 on each hour of blank tape sold and 5% on the wholesale value of hardware can only be regarded as a minimum which would ensure a fair, if not total, compensation to right owners for the uncontrolled use of their works.

Video Recording Equipment and Media

It is much more difficult to propose an equitable royalty rate to compensate right owners for losses due to video private copying. The video industry is still very young and, as has already been pointed out, statistics on this industry are very hard to obtain and sometimes are simply not available. Any estimates which may already have been made as to losses incurred by right owners (2.2.2.7) are very quickly out of date since the video market changes daily. However, it is commonly agreed that the sums of money involved in the video field are greater than for audio since there are more right owners involved in the making of a film and the investment required is often enormous.

Since it has not been possible to quantify those losses, the recommendations of the draft directive have been based on existing or proposed legislations. In Austria, (paragraphs 6.2.4.3 and 6.2.5.1) the royalty to be applied to blank video tapes is 3.5 times higher than that levied on blank audio tapes. In Germany, current proposals to amend the copyright

law (paragraph 4.4.5.3) provide for a royalty on blank video tapes three times higher than that on audio tapes and present legislation provides for a royalty of 5% on hardware. It therefore seems reasonable to propose in the draft directive a royalty of ECU 3 per hour of blank video tape and a royalty of 5% on sales of hardware. Calculations have also been made with lower royalty rates for the purposes of easy comparison (see tables on pages 193 - 195).

It may well be that such a royalty would at present be more than adequate considering that the video software market (including sales and rental) for Western Europe was estimated at around US\$1,250 million only in 1982 (paragraph 2.1.4.2). However, video private copying affects not only video producers but also film producers and companies making television programmes. This proposal may seem to favour video producers by granting them a compensation which is comparatively more advantageous than that offered to audio producers. However, the video market is expanding rapidly and it may well be that in a few years' time this royalty will be judged insufficient. If one is to base the proposal on today's circumstances it might be fairer to ask for a royalty of ECU 1 on both audio and video blank tapes.

ARTICLE 7:

In this Article, account is taken of the fact that the ownership of rights in cinematographic works differs between Member States and that the Berne Convention expressly leaves the question to be decided by the legislation of the country where protection is claimed (Article 14 bis (2)(a)).

PROPOSED ROYALTIES ON SALES OF BLANK AUDIO TAPES IN THE EEC
Calculations based on 1981 Sales
 (figures in millions)

Country	Units sold	Number of hours*	Royalty at ECU 0.10/hr	US\$	Royalty at ECU 1/hr	US\$
BELGIUM	11.5	14.95	1.49	1.68	14.95	16.82
DENMARK	5.3	6.89	0.69	0.77	6.89	7.75
FRANCE	40.1	52.13	5.21	5.87	52.13	58.66
GERMANY	100.0	130.0	13.0	14.63	130.0	146.27
GREECE	12.3	15.99	1.60	1.8	15.99	17.99
IRELAND	5.0	6.50	0.65	0.73	6.50	7.30
ITALY	45.0	58.50	5.85	6.58	58.50	65.80
NETHERLANDS	25.0	32.50	3.25	3.66	32.50	36.57
UNITED KINGDOM	73.4	95.42	9.54	10.74	95.42	107.36
TOTAL EEC	317.6	412.88	41.29	46.46	412.88	464.52

Exchange Rate : 1 ECU = US\$0.888746

* It has been assumed that cassettes lasting 1½ hours (C90) have 60% of the market.

PROPOSED ROYALTIES ON SALES OF BLANK VIDEO TAPES IN THE EEC
Calculations based on 1981 Sales
 (figures in millions)

Country	Units sold	Number of hours*	Royalty at ECU 0.50/hr	US\$	Royalty at ECU 3/hr	US\$
BELGIUM	0.55	1.375	0.687	0.77	4.125	4.78
DENMARK	0.6	1.5	0.75	0.85	4.5	5.06
FRANCE	4.9	12.25	6.125	6.89	36.75	41.35
GERMANY	10.0	25.0	12.5	14.07	75.0	84.39
IRELAND	0.05	0.125	0.062	0.07	0.375	0.42
ITALY	0.5	1.25	0.625	0.70	3.75	4.22
NETHERLANDS	1.4	3.5	1.75	1.97	10.5	11.81
UNITED KINGDOM	9.0	22.5	11.25	12.66	67.5	75.95
TOTAL EEC	27.0	67.5	33.75	37.98	202.5	227.98

Exchange Rate : 1 ECU = US\$0.888746

* It has been assumed that on average video cassettes bought have a duration of 2.5 hours.

PROPOSED ROYALTIES ON HARDWARE
(figures in millions)

	Royalty of 2%	US\$	Royalty of 5%	US\$
FRANCE*				
<u>Sales Value</u>				
<u>Audio Hardware</u>	F21.6	3.1	FF54.1	7.8
<u>F1082.5</u>				
Video Hardware				
<u>F1001.7</u>	F20.0	2.9	F50.1	7.3
UNITED KINGDOM**				
<u>Sales Value</u>				
<u>Audio Hardware</u>	£9.0	14.6	£22.5	36.4
<u>£450.0</u>				

* 1981 Sales (estimates)
** 1982 Sales (estimates)

FOOTNOTES TO CHAPTER 8

- (1) Judgment of the European Court of Justice of 8 June 1971, Case 78/70 Deutsche Grammophon Gesellschaft mbH v. Metro - SB - Grossmärkte GmbH & Co. KG [1971] E.C.R. 487.
- Judgment of the European Court of Justice of 18 March 1980, Case 62/79, S.A. Coditel and Others v. S.A. Cine Vog Films and Others [1980] E.C.R. 881.
- Judgment of the European Court of Justice of 20 January 1981, Cases 55 and 57/80, Musik-Vertrieb Membran GmbH and K-Tel International v. GEMA [1981] E.C.R. 147.
- Judgment of the European Court of Justice of 6 October 1982, Case 262/81, S.A. Coditel and Others v. S.A. Cine Vog Films and Others, Case 262/81, [1982] 8 E.C.J.R. 131.
- (2) Article 100 reads as follows:
- 'The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.
- The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.'
- (3) See, for example, the 'Views of International Non-Governmental Organisations on Private Copying', Copyright, July/August 1982, p.211-232.
- (4) Loc. cit., p.212.
- (5) Article 87(3) of the Federal German Copyright Law 1965.
- (6) The protection of Article 42(5) of the Austrian Copyright Amendment Law 1980 is not extended to broadcasting organisations. See R. Dittrich: 'Letter from Austria', Copyright, March 1981, p.84 and EBU Review, Volume XXXIII, July 1982, p.29.
- (7) In 'Report and Application' of the Judicial Committee, section 422 of the appendices to the stenographic records of the National Assembly of Austria, p.1 cited in EBU Review, loc. cit. p.31.

- (8) Decree of the Minister for Culture amending Decree No.9, of December 29, 1969, supplementing Copyright Act No III of 1969 (No.15, of November 20, 1982). Copyright, May 1983, pp.166-167.
- (9) T. Collova: Reproduction sonore et visuelle pour l'usage personnel. RIDA (Revue Internationale du Droit d'Auteur), Part III, No. 101, July 1979, p.99.
- (10) EBU Review, loc. cit., p.31.
- (11) A. Dietz. Copyright Law in the European Community. A comparative investigation of national copyright legislation with special reference to the provisions of the Treaty establishing the European Economic Community. Produced at the request of the Commission of the European Communities. Alphen aan den Rijn (The Netherlands), Sijthoff and Noordhoff, 1978, (European Aspects - Law Series, 20). paragraph 360.
- (12) A. Dietz. Ton - und Bildaufnahmen sowie Fotokopie (reprographische Vervielfältigung) zum eigenen Gebrauch in Recht und Praxis der Bundesrepublik Deutschland, (Sound and Video Recordings and Photocopies (Reprographic Duplication) for Private Use in the Law and Jurisprudence of the Federal Republic of Germany), p.463.
- (13) D. N. Magnusson and V. Nabhan: 'Exemptions Under the Canadian Copyright Act. Canada, Consumer and Corporate Affairs, 1983 (Copyright Revision Studies).
- (14) Canadian study, op. cit., p.204.
- (15) Whitford Report, op. cit., p.83. (See Chapter 1, footnote 5.)
- (16) See Chapter 5.
- (17) See Chapter 4.4.
- (18) UK Green Paper, Chapter 3, loc. cit., paragraph 18, p.16. (See Chapter 4, footnote 34).
- (19) Austrian Copyright Amendment Law 1980, Article 42.

GROWTH OF THE EEC MARKET 1971-1978
(Units and Value in Millions)

COUNTRIES	UNITS		WHOLESALE VALUE		Average Annual Increase
	1971	'1978	1971	1978	
BELGIUM **	12.9	27.0	BF 911.7	BF 2,300.0	14.24%
DENMARK **	4.6	9.2	DKr 62.0	DKr 180.8	17.10%
FRANCE	76.5	160.2	FF 515.0	FF 1,837.0	19.96%
GERMANY (FR)	86.9	206.1	DM 468.1	DM 1,060.0	13.03%
ITALY	33.2	51.6	no information		
NETHERLANDS	24.3	55.0	Gld 141.8	Gld 310.0	12.42%
UNITED KINGDOM	110.0	196.0	£ 40.0	£ 250.1	31.61%

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EEC

Average growth : 10.95%

Average growth : 18.06%

* No information available for Ireland

** Figures include only IFPI member companies which represent about 85% for Belgium and Luxembourg and 80% for Denmark.

Source : Association of IFPI National Groups in the European Communities.

AUDIO
SALES OF RECORDS AND PRE-RECORDED CASSETTES IN THE EEC
1978 to 1991

A. Wholesale Value (in millions)
(the indexes represent the real, inflation adjusted value)
Index 1978=100

<u>Country</u>	<u>Currency</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
BELGIUM	BF	2,300.0 (100.0)	2,372.8 (98.7)	2,160.4 (84.2)	2,232.8 (80.9)
DENMARK	DK	230.0 (100.0)	242.7 (96.3)	227.0 (80.2)	229.0 (72.4)
FRANCE	FF	1,850.1 (100.0)	1,987.0 (97.0)	2,170.2 (93.2)	2,448.0 (92.7)
GERMANY(FR)	DM	1,060.0 (100.0)	1,096.0 (99.4)	1,187.0 (102.0)	1,197.0 (97.1)
GREECE	DR	1,026.0 (100.0)	1,538.0 (126.0)	1,448.4 (95.0)	1,616.0 (85.1)
IRELAND	I£	7.0 (100.0)	8.0 (101.0)	*8.5 (90.8)	*9.0 (79.8)
ITALY	IL	64,556.5 (100.0)	94,382.0 (127.5)	94,000.0 (104.8)	110,000.0 (102.5)
NETHERLANDS	Df1	310.0 (100.0)	330.0 (102.0)	307.0 (88.7)	280.0 (75.7)
UNITED KINGDOM	£	250.1 (100.0)	265.9 (93.7)	251.8 (75.3)	262.0 (70.0)
TOTAL EEC	US\$	1,946.5 (100.0)	2,201.0 (99.4)	2,082.5 (90.2)	1,783.6 (86.1)
Approximate Retail Value	US\$	3,700.0	4,200.0	4,000.0	3,400.0

Average drop for the EEC : 4.8% per year.

* Projected figure as actual figure not available.
Source : Association of IFPI National Groups in the EEC.

AUDIOSALES OF RECORDS AND PRE-RECORDED CASSETTES IN THE EEC(1978-1981)B. SINGLES & EPS (in million units)
Index 1978 = 100

<u>COUNTRY*</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
BELGIUM	12.0 (100.0)	12.5 (104.2)	11.3 (94.2)	11.8 (98.2)
DENMARK	1.5 (100.0)	2.1 (140.0)	2.1 (140.0)	2.2 (146.7)
FRANCE	62.8 (100.0)	60.4 (96.2)	57.8 (92.8)	65.1 (103.7)
GERMANY(FR)	46.3 (100.0)	47.8 (103.2)	45.0 (97.2)	47.3 (102.2)
ITALY	18.7 (100.0)	22.6 (120.8)	19.1 (102.1)	21.5 (115.0)
NETHERLANDS	14.0 (100.0)	17.0 (121.4)	14.0 (100.0)	12.0 (85.7)
UNITED KINGDOM	88.8 (100.0)	89.1 (100.3)	77.8 (87.6)	77.3 (87.1)
TOTAL EEC	244.1 (100.0)	251.5 (103.0)	227.1 (93.0)	237.1 (97.1)

Average drop for the EEC : 0.8% per year.

- * Figures not available for Ireland.
In Greece singles have practically disappeared from the market.
Source : Association of IFPI National Groups in the European Communities.

AUDIOSALES OF RECORDS AND PRE-RECORDED CASSETTES IN THE EEC
(1978-1981)C. LPs (in million units)
Index 1978=100

<u>COUNTRY*</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
BELGIUM	13.0 (100.0)	11.5 (88.4)	9.1 (70.0)	8.9 (68.4)
DENMARK	5.4 (100.0)	6.4 (118.5)	5.6 (103.7)	5.5 (101.9)
FRANCE	76.0 (100.0)	66.3 (87.2)	64.4 (84.7)	63.6 (83.7)
GERMANY (FR)	112.5 (100.0)	111.2 (98.8)	109.7 (97.5)	111.1 (98.8)
GREECE	4.3 (100.0)	5.7 (132.5)	6.3 (146.5)	5.7 (132.5)
ITALY	16.9 (100.0)	18.8 (111.2)	17.2 (101.8)	20.0 (118.3)
NETHERLANDS	35.5 (100.0)	32.0 (90.1)	27.0 (76.1)	24.0 (67.7)
UNITED KINGDOM	86.0 (100.0)	74.5 (86.6)	67.4 (78.4)	64.0 (74.4)
Total EEC	349.6 (100.0)	326.4 (93.4)	306.7 (87.7)	302.8 (86.6)

Average drop for the EEC : 4.7% per year.

* Figures not available for Ireland.

Source : Association of IFPI National Groups in the European Communities.

AUDIOSALES OF RECORDS AND PRE-RECORDED CASSETTES IN THE EEC
(1978-1981)D. CASSETTES (in million units)
Index 1978=100

<u>COUNTRY*</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
BELGIUM	2.0 (100.0)	2.3 (115.0)	2.2 (110.0)	1.8 (90.0)
DENMARK	4.7 (100.0)	4.1 (87.2)	3.1 (66.0)	2.7 (57.4)
FRANCE	19.7 (100.0)	17.7 (89.8)	21.7 (110.2)	26.7 (135.6)
GERMANY (FR)	47.3 (100.0)	43.4 (91.8)	44.4 (93.9)	47.6 (100.6)
GREECE	2.5 (100.0)	2.9 (116.0)	2.5 (100.0)	2.8 (112.0)
ITALY	8.0 (100.0)	8.7 (108.7)	8.0 (100.0)	10.0 (125.0)
NETHERLANDS	5.5 (100.0)	4.0 (72.7)	4.5 (81.8)	4.0 (72.7)
UNITED KINGDOM **	21.2 (100.0)	23.6 (111.3)	25.2 (118.9)	28.9 (136.3)
Total EEC	110.9 (100.0)	106.7 (96.2)	111.6 (100.6)	124.5 (112.3)

Average increase for the EEC : 4.1% per year.

* Figures not available for Ireland.

** Including cartridges : 0.6 in 1978, 0.1 in 1979.

Source : Association of IFPI National Groups in the European Communities.

AUDIOSALES OF RECORDS AND PRE-RECORDED CASSETTES IN THE EEC
1978-1981E. Long Playing Carriers (Cassettes and LP's)
(in million units)
Index 1978=100Total EEC *

<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
460.5 (100.0)	433.1 (94.1)	418.3 (90.8)	427.3 (92.8)

Average drop for the EEC : 2.4% per year.

* Ireland excluded.

AUDIOSALES OF RECORDS AND PRE-RECORDED TAPES IN THE U.S.A.1978-1982(figures in millions)
Index 1978=100

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982**</u>
<u>UNITS</u>					
Singles	190.0 (100.0)	212.0 (111.6)	157.0 (82.6)	147.0 (77.4)	137.2 (72.2)
LPs	341.3 (100.0)	290.2 (85.0)	308.0 (90.2)	272.0 (79.7)	241.5 (78.8)
Cartridges	133.6 (100.0)	102.3 (76.6)	85.0 (63.6)	50.0 (37.4)	13.7 (10.3)
Cassettes	61.3 (100.0)	78.5 (128.1)	99.0 (161.5)	124.0 (202.3)	183.2 (298.9)
<u>Retail Value</u>					
(US \$)	4,131.4	3,676.1	3,682.0	3,626.0	3,592.0
(Index)*	(100.0)	(80.0)	(70.6)	(63.0)	(58.8)

The average drop in turnover is 12.3% per year in real terms.

* The index is adjusted to reflect inflation.

Source : Recording Industry Association of America Inc. (RIAA).

** From 1982, a new methodology has been used to record statistics. Had the same methodology been used between 1981 and 1982, it would have shown a much bigger drop in value -- 9.6% (without taking inflation into account) and in units -- 9.4%.

IMPORT / EXPORT TRENDSFor Audio Records and Pre-Recorded TapesA. BELGIUM

(Value in millions)

	<u>1978</u> BF	<u>1979</u> BF	<u>1980</u> BF	<u>1981</u> BF
<u>Imports</u>				
from EEC	1,458.0	1,669.0	1,857.0	2,047.0
from ROW *	82.0	113.0	118.0	127.0
Total	<u>1,540.0</u>	<u>1,782.0</u>	<u>1,975.0</u>	<u>2,174.0</u>
<u>Exports</u>				
to EEC	507.0	469.0	478.0	508.0
to ROW *	22.0	18.0	16.0	29.0
Total	<u>529.0</u>	<u>487.0</u>	<u>494.0</u>	<u>537.0</u>
<u>Balance of Trade</u>				
with EEC	- 951.0	- 1,200.0	- 1,379.0	- 1,539.0
with ROW *	- 60.0	- 95.0	- 102.0	- 98.0
Total	<u>- 1,011.0</u>	<u>- 1,295.0</u>	<u>- 1,481.0</u>	<u>- 1,637.0</u>

* Rest of the World.

Source : Institut National de Statistique.

IMPORT /EXPORT TRENDSFor Audio Records and Pre-Recorded TapesB. DENMARK

(Value in millions)

	<u>1978</u> DKr	<u>1979</u> DKr	<u>1980</u> DKr	<u>1981</u> DKr
<u>Imports</u>				
from EEC	76.1	76.7	65.2	73.6
from ROW *	41.4	57.9	61.4	54.3
Total	<u>117.5</u>	<u>134.6</u>	<u>126.6</u>	<u>127.9</u>
<u>Exports</u>				
to EEC	8.4	12.8	14.7	34.9
to ROW *	12.3	12.7	10.6	17.0
Total	<u>20.7</u>	<u>25.5</u>	<u>25.3</u>	<u>51.9</u>
<u>Balance of Trade</u>				
with EEC	- 67.7	- 63.9	- 50.5	- 38.7
with ROW *	- 29.1	- 45.2	- 50.8	- 37.3
Total	<u>- 96.8</u>	<u>- 109.1</u>	<u>- 101.3</u>	<u>- 76.0</u>

* Rest of the World.

Source : Danmarks Statistik/Danish National Group of IFPI.

IMPORT /EXPORT TRENDSFor Audio Records and Pre-Recorded TapesC. FRANCE

(Value in millions)

	<u>1978</u> F	<u>1979</u> F	<u>1980</u> F	<u>1981</u> F
<u>Imports</u>				
from EEC	111.8	121.3	151.7	178.7
from ROW *	<u>40.1</u>	<u>50.6</u>	<u>58.6</u>	<u>62.3</u>
Total	151.9	171.9	210.3	241.0
<u>Exports</u>				
to EEC	179.2	170.0	152.4	163.9
to ROW *	<u>85.6</u>	<u>90.9</u>	<u>96.8</u>	<u>115.1</u>
Total	264.8	260.9	249.2	279.0
<u>Balance of Trade</u>				
with EEC	+ 67.4	+ 48.7	+ 0.7	- 14.8
with ROW *	+ <u>45.5</u>	+ <u>40.3</u>	+ <u>38.2</u>	+ <u>52.8</u>
Total	+ 112.9	+ 89.0	+ 38.9	+ 38.0

* Rest of the World
Source : Statistiques Douanieres.

IMPORT / EXPORT TRENDS

For Audio Records and Pre-Recorded Tapes

D. FEDERAL REPUBLIC OF GERMANY
(Value in millions)

	<u>1978</u> <u>DM</u>	<u>1979</u> <u>DM</u>	<u>1980</u> <u>DM</u>	<u>1981</u> <u>DM</u>
<u>Imports</u>				
from EEC	151.6	143.5	186.4	224.1
from ROW *	36.8	69.9	73.1	62.2
Total	<u>188.4</u>	<u>213.4</u>	<u>259.5</u>	<u>286.3</u>
<u>Exports</u>				
to EEC	100.0	100.3	100.2	125.8
to ROW *	132.7	130.4	119.3	140.1
Total	<u>232.7</u>	<u>230.7</u>	<u>219.5</u>	<u>265.9</u>
<u>Balance of Trade</u>				
with EEC	- 51.6	- 43.2	- 86.2	- 98.3
with ROW *	+ 95.9	+ 60.5	+ 46.2	+ 77.9
Total	<u>+ 44.3</u>	<u>+ 17.3</u>	<u>- 40.0</u>	<u>- 20.4</u>

* Rest of the World.

Source : Federal Authority for Statistical Purpose.

IMPORT /EXPORT TRENDS

For Audio Records and Pre-Recorded Tapes

E. IRELAND

(Value in millions)

	1978	1979	1980	1981
	£	£	£	£
<u>Imports</u>				
from EEC	4.0	3.7	3.5	5.8
from ROW *	0.7	0.5	0.6	1.5
Total	4.7	4.2	4.1	7.3
<u>Exports</u>				
to EEC	1.4	2.6	3.0	2.8
to ROW *	0.2	0.2	0.2	0.2
Total	1.6	2.8	3.2	3.0
<u>Balance of Trade</u>				
with EEC	- 2.6	- 1.1	- 0.5	- 3.0
with ROW *	- 0.5	- 0.3	- 0.4	- 1.3
Total	- 3.1	- 1.4	- 0.9	- 4.3

NOTE : Official import /export statistics include pre-recorded video tapes. The recent boom in the video industry accounts for the sharp rise in imports in 1981.

* Rest of the world.

Source : Irish Customs & Excise.

IMPORT/EXPORT TRENDS
For Audio Records and Pre-Recorded Tapes

F. ITALY

(Value in millions)

	1978 <u>Lire</u>	1979 <u>Lire</u>	1980 <u>Lire</u>	1981(e) <u>Lire</u>
<u>Imports</u>				
from EEC	11,404.6	12,668.9	26,730.3	28,066.8
from ROW *	6,349.5	12,899.5	11,573.4	12,152.1
Total	<u>17,754.1</u>	<u>25,568.4</u>	<u>38,303.7</u>	<u>40,218.9</u>
<u>Exports</u>				
to EEC	7,111.2	10,246.7	7,211.0	7,571.6
to ROW *	7,144.7	<u>5,965.6</u>	6,856.0	<u>7,198.7</u>
Total	<u>14,255.9</u>	<u>16,212.3</u>	<u>14,067.0</u>	<u>14,770.3</u>
<u>Balance of Trade</u>				
with EEC	- 4,293.4	- 2,422.2	- 19,519.3	- 20,495.2
with ROW *	- 795.2	<u>- 6,933.9</u>	- 4,717.4	- 4,953.4
Total	<u>- 3,498.2</u>	<u>- 9,356.1</u>	<u>- 24,236.7</u>	<u>- 25,448.6</u>

* Rest of the world.

(e) Estimated

Source : I.S.T.A.T. Statistica Mensile Commercio Estero.

IMPORT /EXPORT TRENDS

For Audio Records and Pre-Recorded Tapes

G. NETHERLANDS

(Value in millions)

	<u>1978</u> <u>DFL</u>	<u>1979</u> <u>DFL</u>	<u>1980</u> <u>DFL</u>	<u>1981</u> <u>DFL</u>
<u>Imports</u>				
with EEC	86.8	103.4	91.1	104.3
from ROW *	24.7	45.2	44.8	37.7
Total	<u>111.5</u>	<u>148.6</u>	<u>135.9</u>	<u>142.0</u>
<u>Exports</u>				
to EEC (e)	90.0	117.0	159.0	190.0
to ROW *(e)	58.2	72.0	101.0	102.9
Total	<u>148.2</u>	<u>189.0</u>	<u>260.0</u>	<u>292.9</u>
<u>Balance of Trade</u>				
with EEC (e)	+ 3.2	+ 13.6	+ 67.9	+ 85.7
with ROW *(e)	+ 33.5	+ 27.0	+ 56.2	+ 65.2
Total	+ <u>36.7</u>	+ <u>40.4</u>	+ <u>124.1</u>	+ <u>150.9</u>

(e) Estimated.

* Rest of the World.

Source : Central Bureau of Statistics.

IMPORT /EXPORT TRENDS

For Audio Records and Pre-Recorded Tapes

H. UNITED KINGDOM
(Value in millions)

	<u>1978</u> f	<u>1979</u> f	<u>1980</u> f	<u>1981</u> f
<u>Imports</u>				
from EEC	10.9	11.7	16.9	17.5
from ROW *	<u>10.4</u>	<u>13.6</u>	<u>13.2</u>	<u>10.4</u>
Total	21.3	25.3	30.1	27.9
<u>Exports</u>				
to EEC	26.0	22.7	20.5	12.0 (e)
to ROW *	<u>24.1</u>	<u>19.3</u>	<u>16.0</u>	<u>13.5 (e)</u>
Total	50.1	42.0	36.5	25.5 (e)
<u>Balance of Trade</u>				
with EEC	+ 15.1	+ 11.0	+ 3.6	- 5.5
with ROW *	+ <u>13.7</u>	+ <u>5.7</u>	+ <u>2.8</u>	+ <u>3.1</u>
Total	+ 28.8	+ 16.7	+ 6.4	- 2.4

(e) Estimated - Figures are only partially available due to industrial action during part of this year.
* Rest of the world.

IMPORT /EXPORT TRENDS

For Audio Records and Pre-Recorded Tapes

I. E.E.C.*
(Value in millions)

	1978 US\$	1979 US\$	1980* US\$	1981 US\$
<u>Imports</u>				
External trade only	66.9	105.8	107.1	96.1
Total including intracommunity trade	261.3	322.6	367.5	395.0
<u>Exports</u>				
External trade only	151.0	146.2	148.3	158.2
Total including intracommunity trade	333.6	336.1	346.4	369.5
<u>Balance of Trade</u>				
EEC external trade only	+ 84.1	+ 40.4	+ 41.2	+ 62.1
Total including intracommunity trade				

Constant exchange rate : End of year 1981-Financial Times.

* Greece is not included.

ESTIMATED SALES OF BLANK AUDIO TAPES(Units in millions)
(1977-1982)

Country*	1977	1978	1979	1980	1981	1982
BELGIUM	7.0	9.5	10.0	10.5	11.5	N/A
DENMARK	N/A	4.7	5.0	5.0	5.3	N/A
FRANCE**	24.0	28.0	31.0	36.2	40.1	44.0
GERMANY (FR)	80.0	88.0	90.0	92.0	100.0	108.0
GREECE	N/A	11.0	11.8	12.2	12.3	N/A
IRELAND	N/A	N/A	N/A	N/A	5.0	N/A
ITALY	20.0	N/A	35.0	40.0	45.0	49.0
NETHERLANDS	12.0	N/A	N/A	24.0	25.0	25.7
UNITED KINGDOM	43.0	50.1	59.4	69.1	73.4	N/A
USA	N/A	N/A	N/A	N/A	225.0	254.6

* No information available for Luxembourg.

** Apparent sales.

N/A Not available.

Source : Association of IFPI National Groups in the European Communities, Billboard.

ESTIMATED SALES OF BLANK AUDIO CASSETTES IN
THE FEDERAL REPUBLIC OF GERMANY
(1965-1982)

YEAR	MILLION UNITS
1965	0.5
1966	1.0
1967	2.0
1968	4.0
1969	6.0
1970	10.0
1971	17.0
1972	27.0
1973	40.0
1974	55.0
1975	63.0
1976	75.0
1977	80.0
1978	88.0
1979	90.0
1980	92.0
1981	100.0
1982	108.0

Source : Deutsche Landesgruppe der IFPI.

IMPORT/EXPORT OF BLANK AUDIO CASSETTESDENMARK

	Value (in millions)			Units (in millions)		
	<u>1979</u> DK	<u>1980</u> DK	<u>1981</u> DK	<u>1979(e)</u>	<u>1980(e)</u>	<u>1981</u>
<u>Imports</u>						
from EEC	21.7	16.4	17.8	2.5	1.9	2.1
from ROW*	13.2	17.9	18.6	1.7	2.4	2.5
Total	34.9	34.3	36.4	4.3	4.3	4.6
<u>Exports</u>						
to EEC	2.0	1.4	2.4	0.19	0.14	0.2
to ROW*	2.0	1.5	3.2	0.25	0.18	0.4
Total	4.0	2.9	5.6	0.44	0.32	0.6
<u>Balance of Trade</u>						
with EEC	- 19.7	- 15.0	- 15.4			
with ROW*	- 11.2	- 16.4	- 15.4			
Total	- 30.9	- 31.4	- 30.8			

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(e) Estimates.

* Rest of the World.

Source Danmarks Statistik/Danish National Group of IFPI.

IMPORT/EXPORT OF BLANK AUDIO CASSETTES

UNITED KINGDOM

	Value (in millions)				Units (in millions)		
	1979 £	1980 £	1981 £	1982 £	1979+	1980+	1981 1982
<u>Imports</u>							
from EEC	10.4	7.5	10.2	12.4	23.6	18.3	26.1
from ROW*	20.4	17.0	19.1	16.7	46.4	41.7	48.1
Total	30.8	24.5	29.3	29.1	70.0	60.0	74.2
<u>Exports</u>							
to EEC	5.8	6.7	3.0	6.8	8.6	10.0	5.0
to ROW*	4.9	4.5	2.1	3.2	7.4	6.5	2.4
Total	10.7	11.2	5.1	10.0	16.0	16.5	7.4
<u>Balance of Trade</u>							
with EEC	- 4.6	- 0.8	- 7.2	+ 5.6			
with ROW*	- 15.5	- 12.5	- 17.0	- 13.5			
Total	- 20.1	- 13.3	- 24.2	- 19.1			

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* Rest of the World.
+ Estimated - Before 1981 the Customs and Excise did not measure the precise quantity of blank cassettes imported and exported.
Source : Customs & Excise.

COMPARISON BETWEEN INCREASES IN PRICE OF PHONOGRAMS AND THE GENERAL RETAIL PRICE INDEX
IN BELGIUM, FRANCE, NETHERLANDS AND THE UNITED KINGDOM

	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
<u>BELGIUM</u>													
Average LP price	-	-	100.0	105.6	108.2	114.9	122.2	120.6	123.2	126.8*	-	-	-
Retail Price Index	-	-	100.0	106.9	114.9	132.9	147.3	158.6	167.8	174.4*	-	-	-
<u>FRANCE</u>													
Price of records and tapes	100.0	99.4	101.1	103.2	111.4	116.0	119.8	124.5	130.8	146.2	157.5	169.6	187.8
Retail Price Index	100.0	105.5	112.0	120.2	136.7	152.8	167.5	183.2	199.8	221.3	251.3	285.0	318.7
<u>NETHERLANDS</u>													
Average LP price	100.0	97.1	101.9	108.2	112.8	116.9	114.1	108.6	113.3	118.4	129.4	140.2	-
Retail Price Index	100.0	107.5	115.9	125.2	137.3	151.3	164.6	175.5	183.1	190.4	204.3	217.9	-
<u>UNITED KINGDOM</u>													
Pop LP price	100.0	106.5	106.5	106.5	115.3	137.8	162.9	167.9	190.0	215.1	235.1	225.0	-
Retail Price Index	100.0	109.3	117.1	127.9	148.5	183.5	215.1	249.1	269.8	305.9	360.9	403.7	-

* Estimated

- Not available

Note: The terms of reference differ slightly between countries; however, this table shows clearly that the prices of phonograms increase at a slower rate than other consumer goods.

Sources: SIBESA (Belgium); SNEP (France); NVPI (Netherlands); BPI (United Kingdom).

COST BREAKDOWNS OF PRE-RECORDED MUSIC
IN THE UK

Cost

In the examples of cost breakdowns shown here the artists' royalty has been assumed at 12½% less deductions and the mechanical copyright royalty as 6¼% of the retail price less tax which is typical for first recordings and statutory for subsequent recordings of a copyright musical work.

Design and packaging costs can vary considerably on a marginal basis and the same is true of recording costs. The cost per unit of items such as these varies of course with the volume of sales of any particular title, but the figures shown give a reasonable, average guide to the type of expense that is incurred. Similarly advertising and promotional costs vary and for a television-advertised album a unit cost of more than £1 would not be unusual. The figure shown is an average and the cost would be lower for the majority of releases. After meeting all these component costs, record companies should be looking for a contribution towards their overheads and profit which is equal to about 40% of the wholesale price in order to allow a reasonable trading profit and the necessary funds for reinvestment.

COST BREAKDOWNS

Retail Price	Pop LP £4.39	Pop Cassette £4.59	7" Single £1.10
VAT	57	60	14
Dealer margin	87	104	17
Distribution and dealer discounts	60	60	16
Artist royalty	39	39	10
Mechanical copyright royalty	24	25	6
Design and packaging	20	15	2
Manufacturing	38	43	16
Recording	20	20	5
Advertising and promotion	48	48	10
Contribution to overheads	52	52	15
Profit (Loss)	(6)	(7)	(1)
	£4.39	£4.59	£1.10

Source : BPI Year Book 1982, p.24.

SOCIAL IMPORTANCE OF THE RECORDING INDUSTRY - 1978 (ESTIMATES)

(Number of people who directly or indirectly benefit from the activities of the recording industry)

Number of Persons Employed in :	BELGIUM	DENMARK	FRANCE	GERMANY(FR)	IRELAND	ITALY	NETHERLANDS	UNITED KINGDOM
Productions (recording studios)	50)	45 )	)	)	)	) 3,000))
Manufacture	) 500 )	) 50 )	) 6,336 )	) 13,000 )	) 367 )	)	) 1,450 )	) 12,000)
Wholesale	)	)	)	) 500)))))
Retail	1,500	750	12,000/13,000	26,000	400	40,000	5,000	12,500
Printers	70	30	-	-	-	-	500	-
Music Publishing Industry	100	30	-	3,000	20/30	-	500	6,000
Authors' Societies (in music depts)	100	80 ¹	-	600	-	600	80	-
<u>Musicians</u>								
Total	600	6,267 ²	6,000/8,000	18,000 ²	-	6,000/8,000	-	-
FIM Members ³	500	3,800	1,600	7,000	1,564	2,512	1,350	38,887
Session Musicians	250	200	3,000	1,500/2,000	350	3,000	400	5,000

1 Persons employed by NCB

2 Members of joint performers/recording industry collecting societies

3 International Federation of Musicians

Sources: Association of IFPI National Groups in the European Communities, International Federation of Musicians.

ROYALTIES COLLECTED BY AUTHORS' SOCIETIES
FROM PRODUCERS OF PHONOGRAMS 1970-1978

(Value in Millions)

	BELGIUM BF	DENMARK DK	FRANCE FF	GERMANY(FR) DM	ITALY L	NETHERLANDS DFL	UNITED KINGDOM £
1970	48.7	2.7	31.0	55.1	2,318.8	8.5	2.7
1971	56.6	3.5	32.0	68.5	2,807.1	10.4	3.7
1972	47.0	3.7	46.0	71.1	3,220.8	12.6	5.2
1973	76.9	3.5	75.5	81.5	4,163.9	15.5	7.7
1974	86.1	4.4	92.0	91.9	5,033.8	19.9	9.7
1975	56.7	5.7	120.0	95.7	5,750.2	22.7	11.9
1976	87.3	7.6	130.0	107.1	7,383.7	29.2	12.7
1977	137.0	11.7	162.0	130.8	8,409.4	33.5	13.6
1978	<u>137.5</u>	<u>15.1</u>	<u>210.0</u>	<u>165.8</u>	<u>9,000.0</u>	<u>39.7</u>	<u>18.4</u>

Average

Variation % + 19%

+ 26.1%

28.2%

+ 15.1%

+ 18.7%

+ 21.3%

+ 27.9%

Average variation for the EEC* : 22.3%

* No information available for Ireland.

Source : Authors' Societies/Association of IFPI National Groups in the European Communities.

ROYALTIES COLLECTED BY AUTHORS' SOCIETIES
FROM PRODUCERS OF PHONOGRAMS 1978-1981

(Value in Millions)

	BELGIUM BF	DENMARK DK	FRANCE FF	GERMANY (FR) DM	ITALY L	NETHERLANDS DFL	UNITED KINGDOM £
1978	137.5	16.0	210.0	165.8	9,000.0	39.7	18.4
1979	127.2	17.8	247.7	189.2	10,700.0*	39.0	19.9
1980	121.9	18.5	244.5	192.0	11,300.0*	41.5	21.5
1981	<u>103.4</u>	<u>19.9</u>	<u>253.9</u>	<u>190.0</u>	<u>12,500.0*</u>	<u>50.0</u>	<u>20.7</u>
Average							
Variation % -	9.0%	+ 7.6%	+ 6.8%	+ 4.9%	+ 10.6%	+ 8.4%	+ 4.2%

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Average variation for the EEC** : + 4.8%

* Estimates.

** No information available for Greece and Ireland.

Source : Authors' Societies/Association of IFPI National Groups in the European Communities.

PENETRATION DEVELOPMENTBELGIUM

	1976	1978	1980	1982	1984	1986
<u>Sets in use</u> (million units)						
Radio Recorders	0.4	0.8	1.2	1.5	1.9	2.3
Packaged audio systems	0.6	0.7	0.8	0.9	1.0	1.0
Component audio systems	0.6	0.8	1.1	1.3	1.5	1.7
Record players	1.2	1.0	0.7	0.5	0.3	0.2
<u>Penetration %</u>						
Radio Recorders	12%	24%	35%	43%	54%	66%
Packaged audio systems	18%	21%	24%	26%	28%	29%
Component audio systems	18%	24%	32%	38%	43%	48%
Record players	36%	30%	21%	14%	9%	6%

Source : Mackintosh Consultants Company Limited.

FRANCE

	1976	1978	1980	1982	1984	1986
<u>Sets in use</u> (million units)						
Radio Recorders	1.5	2.9	4.0	6.0	8.0	10.0
Packaged audio systems	1.2	1.6	1.9	2.2	2.5	2.6
Component audio systems	1.0	1.7	3.0	5.0	7.0	9.0
Record players	9.5	9.0	8.2	6.6	5.0	3.9
<u>Penetration %</u>						
Radio Recorders	8%	16%	21%	30%	39%	47%
Packaged audio systems	7%	9%	10%	11%	12%	12%
Component audio systems	5%	9%	16%	25%	34%	42%
Record players	52%	48%	42%	33%	24%	18%

Source : Mackintosh Consultants Company Limited.

FEDERAL REPUBLIC OF GERMANY

	1976	1978	1980	1982	1984	1986
<u>Sets in use</u> (million units)						
Radio Recorders	7.3	10.8	14.0	16.5	18.7	21.0
Packaged audio systems	5.8	6.4	6.9	7.3	7.7	8.0
Component audio systems	3.3	4.5	5.7	6.9	7.9	8.7
Record players	10.6	10.4	9.8	9.1	8.3	7.3
<u>Penetration %</u>						
Radio Recorders	32%	47%	60%	70%	79%	88%
Packaged audio systems	25%	28%	30%	31%	32%	33%
Component audio systems	14%	20%	24%	29%	33%	36%
Record players	46%	45%	42%	39%	35%	31%

Source : Mackintosh Consultants Company Limited.

ITALY

	1976	1977	1978	1979	1980	1981
<u>Sets in use</u> (million units)						
Radio Recorders	2.0	2.6	3.1	3.6	4.2	4.9
Packaged audio systems	1.2	1.4	1.7	1.9	2.1	2.3
Component audio systems	0.7	0.7	0.8	0.9	1.1	1.5
<u>Penetration %</u>						
Radio Recorders	12%	15%	18%	20%	23%	27%
Packaged audio systems	7%	8%	10%	11%	12%	13%
Component audio systems	4%	4%	4%	5%	6%	8%

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Source : Mackintosh Consultants Company Limited.

NETHERLANDS

	1976	1978	1980	1982	1984	1986
<u>Sets in use</u> (million units)						
Radio Recorders	0.8	1.4	1.8	2.2	2.6	3.0
Packaged audio systems	1.0	1.2	1.4	1.5	1.6	1.6
Component audio systems	0.8	1.1	1.4	1.8	2.2	2.6
Record players	2.2	1.8	1.5	1.2	0.9	0.6
<u>Penetration %</u>						
Radio Recorders	18%	30%	38%	46%	54%	61%
Packaged audio systems	22%	26%	29%	31%	33%	33%
Component audio systems	18%	24%	29%	38%	46%	54%
Record players	49%	39%	32%	25%	19%	13%

Source : Mackintosh Consultants Company Limited.

UNITED KINGDOM

	1976	1977	1978	1979	1980	1981
<u>Sets in use</u> (million units)						
Radio Recorders	3.3	3.8	4.5	5.8	7.1	8.2
Packaged audio systems	7.7	8.3	8.7	9.0	9.2	9.5
Component audio systems	1.6	1.7	1.7	2.1	2.5	2.9
<u>Penetration %</u>						
Radio Recorders	18%	21%	24%	29%	35%	41%
Packaged audio systems	39%	42%	44%	46%	47%	47%
Component audio systems	8%	9%	9%	11%	13%	14%

Source : Mackintosh Consultants Company Limited.

SALES OF PRE-RECORDED VIDEOCASSETTES
Units - Estimates and Forecasts 1979-1985
 (Trade deliveries)

Country*	1979 ('000)	1980 ('000)	1981 ('000)	1982 ('000)	1983 ('000)	1984 ('000)	1985 ('000)
BELGIUM	N/A	N/A	120	340	N/A	N/A	N/A
DENMARK	50	100	100	N/A	N/A	N/A	N/A
FRANCE	50	150	400	900	1,200	3,000	N/A
GERMANY (FR)	100	320	950	1,600	N/A	N/A	N/A
GREECE	N/A	N/A	35	N/A	N/A	N/A	N/A
ITALY	25	70	120	183	215	300	400
NETHERLANDS	100	200	270	450	700	N/A	N/A
UNITED KINGDOM	<u>300</u>	<u>1,500</u>	<u>3,200</u>	<u>4,500</u>	<u>N/A</u>	<u>N/A</u>	<u>N/A</u>
TOTAL EEC	700	1,400	5,200	8,150	N/A	N/A	N/A

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USA 5,500 6,000
 (+ 6,300 videodiscs)

* No information for Ireland and Luxembourg.
 N/A Not available.
 Sources : IFPI National Groups, Screendigest (USA).
 WEA European Co-ordinating Inc.

SALES OF BLANK VIDEOCASSETTES
Units - Estimates and Forecasts 1979-1985

EEC	1979 ('000)	1980 ('000)	1981 ('000)	1982 ('000)	1983 ('000)	1984 ('000)	1985 ('000)
Country*							
BELGIUM	N/A	N/A	N/A	2,000	N/A	N/A	N/A
DENMARK	170	350	600	N/A	N/A	N/A	N/A
FRANCE	N/A	1,800	4,900	9,100	N/A	N/A	N/A
GERMANY (FR)	1,500	4,000	10,000	15,000	N/A	N/A	N/A
IRELAND	5	15	50	125	150	160	N/A
ITALY	100	200	500	1,000	1,300	2,000	3,000
NETHERLANDS	N/A	N/A	1,400	2,500	N/A	N/A	N/A
UNITED KINGDOM	N/A	5,500	9,000	15,000	20,000	40,000	50,000
TOTAL EEC	7,000	13,500	27,000	46,000	70,000	90,000	115,000
U.S.A.	1979	1980	1981	1982	1983	1984	1985
	10,000	15,500	22,500	36,000	50,000	65,000	80,000

* No information for Greece and Luxembourg.

N/A Not available

Source : IFPI National Groups, L.S.A. 7 January 1983, Video Pro Jan. 1983, WEA European Coordinating Inc.

IMPORT/EXPORT OF BLANK VIDEOTAPESDENMARK

	Value (in millions)			Units (in millions)		
	1979 DK	1980 DK	1981 DK	1979(e)	1980(e)	1981
<u>Imports</u>						
from EEC	10.3	11.4	20.5	0.20	0.22	0.4
from ROW*	8.8	16.4	44.6	0.13	0.26	0.7
Total	19.1	27.8	65.1	0.33	0.48	1.1
<u>Exports</u>						
to EEC	0.5	2.3	13.1	0.006	0.028	0.157
to ROW*	0.2	0.2	0.5	0.003	0.002	0.005
Total	0.7	2.5	13.6	0.009	0.030	0.162
<u>Balance of Trade</u>						
with EEC	- 9.8	- 9.1	- 7.4			
with ROW*	- 8.6	- 16.2	- 44.1			
Total	- 18.4	- 25.3	- 51.5			

(e) Estimates.

* Rest of the World.

Source : Danmarks Statistik/Danish National Group of IFPI.

IMPORT/EXPORT OF BLANK VIDEOTAPES

FEDERAL REPUBLIC OF GERMANY

	Value (in millions)			Units (in millions)				
	1979 DM	1980 DM	1981 DM	1982 DM	1979	1980	1981	1982
<u>Imports</u>								
from EEC	4.9	11.6	21.7	44.6	0.1	0.5	0.9	2.1
from ROW*	49.2	121.9	274.0	411.4	2.4	6.9	14.0	22.1
Total	98.2	113.5	295.7	456.0	2.5	7.4	14.9	24.2
<u>Exports</u>								
to EEC	20.6	29.6	65.5	160.9	0.5	1.0	2.8	7.8
to ROW*	26.0	23.6	61.6	114.4	0.6	0.7	1.9	4.7
Total	46.6	53.2	127.1	275.3	1.1	1.7	4.7	12.5
<u>Balance of Trade</u>								
with EEC	+ 15.7	+ 18.0	+ 43.8	+ 116.3				
with ROW*	- 23.2	- 98.3	- 212.4	- 297.0				
Total	- 7.5	- 80.3	- 168.4	- 180.7				

* Rest of the World.
Source : German Customs.

IMPORT/EXPORT OF BLANK VIDEOTAPES

UNITED KINGDOM

	Value (in millions)			Units (in millions)			
	1979 £	1980 £	1981 £	1979+ £	1980+ £	1981 £	1982 £
<u>Imports</u>							
from EEC	2.2	2.4	5.8	0.5	0.6	2.1	2.4
from ROW*	19.6	32.2	73.6	3.9	6.6	14.9	35.6
Total	21.8	34.6	79.4	4.4	7.2	17.0	38.0
<u>Exports</u>							
to EEC	6.3	7.8	9.9	1.2	1.6	2.8	6.5
to ROW*	5.9	7.7	9.7	1.2	1.6	1.3	4.9
Total	12.2	15.5	19.6	2.4	3.2	4.1	11.4
<u>Balance of Trade</u>							
with EEC	+ 4.1	+ 5.4	+ 4.1				
with ROW*	- 13.7	- 24.5	- 63.9				
Total	- 9.6	- 19.1	- 59.8				

* Rest of the World.

+ Estimated - Before 1980 the Customs and Excise did not measure the quantity of blank tapes imported and exported.

Source : Customs & Excise.

PENETRATION OF VIDEOCASSETTE RECORDERS IN HOUSEHOLDS

Estimates and forecasts 1978-1985

YEAR	BELGIUM	DENMARK	FRANCE	GERMANY(FR)	GREECE	IRELAND	ITALY	NETHERLANDS	UNITED KINGDOM	U.S.A.
1978	-	-	-	0.5%	-	-	-	0.9%	-	0.7%
1979	-	1.4%	0.7%	1.2%	-	-	-	1.7%	-	1.5%
1980	0.2%	2.7%	1.3%	2.8%	-	-	-	3.0%	3.0%	2.2%
1981	3.0%	4.2%	2.7%	5.1%	-	-	-	6.2%	6.5%	4.1%
1982	4.0%	8.0%	4.7%	10.0%	0.6%	3.2%	0.8%	9.7%	15.0%	6.3%
1983	6.0%	9.2%	7.4%	14.5%	-	-	-	14.3%	25.0%	8.0%
1984	-	-	10.0%	20.5%	-	-	-	19.8%	35.0%	10.0%
1985	11.0%	15.7%	17.0%	26.5%	4.0%	10.0%	3.0%	22.9%	40.0%	14.0%

- Not available

Sources : Association of IFPI National Groups in the European Communities.
Screendigest.

EIU Video Revolution in Western Europe.

JWT : Television Today and Television Tomorrow.

SALES AND PARK SIZE OF VIDEOCASSETTE RECORDERS IN FRANCE
1979-1984

YEAR	SALES (units)	PARK SIZE* (units)	% OF HOUSEHOLDS WITH VCR
1979	86,000	134,000	0.7%
1980	144,000	278,000	1.3%
1981	266,000	544,000	2.7%
1982	356,000	900,000	4.7%
1983	500,000	1,400,000	7.4%
1984	500,000	1,900,000	10.0%

Source : L.S.A. No.887, 7 January 1983

* Park size = number of VCRs installed in households

JAPANESE PRODUCTION AND EXPORTS OF VIDEOCASSETTE RECORDERSUnits of VCR

	<u>Production</u>	<u>Exports</u>	<u>Exports to EEC</u>
1977	762,919	401,522	55,000
1978	1,470,859	973,327	250,000
1979	2,204,105	1,671,202	600,000
1980	4,441,212	3,443,843	1,450,000
1981	9,542,765	7,354,796	2,900,000
1982	12,500,000	10,650,000	4,940,000

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Source : Screendigest.

SALES TAXES* APPLICABLE TO AUDIO AND VIDEO TAPES/DISCS
IN MEMBER STATES OF THE EEC

COUNTRY	AUDIO		Tapes ¹	VIDEO	
	Discs			Sales ²	Rental
BELGIUM	25%		25%	25% or 19% ³	19%
DENMARK	22% ⁴		22%	22%	22%
FRANCE	33.33%		33.33%	33.33%	17.60%
GERMANY(FR)	13%		13%	13%	6.5%
GREECE	12% & 4.8% ⁶		12% & 4.8%	12% & 4.8%	12% & 4.8%
IRELAND	23%		35%	35%	35%
ITALY	10%		10% ⁵	10% ⁵	10%
LUXEMBOURG	10%		10%	10%	10%
NETHERLANDS	18%		18%	18%	18%
UNITED KINGDOM	15%		15%	15%	15%

* VAT (Value Added Tax) except for Greece.

1 pre-recorded and blank audio tapes.

2 video discs and videocassettes (blank and pre-recorded).

3 25% without surcharge, 19% with surcharge.

4 an additional tax of 30% of the wholesale price is also levied on records.

5 blank tapes bear a higher VAT rate of 18%.

6 12% turnover tax and 4.8% stamp duty.

COLLECTING SOCIETIES

ADMINISTRATION EXPENSES
(expressed as a percentage of the gross revenue)

COUNTRY**	Societies administering producers' and/or performers' rights	Percentage	Societies administering authors' rights	Percentage
BELGIUM			SABAM	25%
DENMARK	GRAMEX	16%	KODA NCB	N/A
FRANCE			SACEM/SDRM	24-25%
GERMANY (Federal Republic)	GVL	7.9%	GEMA	12.5%
GREECE			AEPI	25%
NETHERLANDS			BUMA STEMRA	25%
UNITED KINGDOM	PPL	10%	PRS MCPS	16% 20-25%

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** No information available for Ireland and Italy. There is no collecting society in Luxembourg. The information relates to the years 1981-1982.

LIST OF AUDIO SURVEYS REFERRED TO IN THE TABLES

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AUDIO SURVEYS

- | | | |
|---------|-----|---|
| BELGIUM | B1 | "Etude du Marché des Enregistrements sur Bandes et Cassettes". 1977. Survey commissioned by SIBESA (Syndicat de l'Industrie Belge d'Enregistrements Sonores et Audio-Visuels) and SABAM (Société Belge des Auteurs, Compositeurs et Editeurs). |
| DENMARK | D1 | "Cassette Recording 1977 in Finland, Sweden, Norway and Denmark". Survey carried out in 1977 by the Nordic Omnibus. |
| | D2 | "Gallup Survey concerning the Music Recording Habits in Finland, Sweden, Norway and Denmark". Survey carried out in January 1980 by Gallup Poll for Teosto, Finnish Group of IFPI, Nordisk Copyright Bureau, Swedish Group of IFPI, Norwegian Group of IFPI and Danish Group of IFPI. |
| FRANCE | F1 | "Les enregistrements sur bandes et cassettes". Survey carried out by SOFRES for SACEM/SDRM/SNEPA April 1976. |
| | F2 | "Le monde de la musique: les enregistrements de disques sur cassettes". Survey carried out by Louis Harris - France Organisation. May 1980. |
| | F3 | "Attitudes et comportements des Français à l'égard de l'enregistrement privé". Survey carried out by SOFRES and CETREC and commissioned by GIEL, SCART and SIERES. October 1981. |
| | F4 | "Les enregistrements à usage privé". Survey carried out by SOFRES, May 1983. |
| GERMANY | G1 | "Musik-Überspielung auf Leer-Cassetten". Survey carried out by GFM (Gesellschaft für Marktforschung mbH) for GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten mbH) and the German Group of IFPI. April 1978. |
| | G2 | Idem - November 1980. |
| GREECE | GR1 | Survey on Audio Private Copying, IFPI Greek Group, 1979. |

- IRELAND IRI Survey of Recording Practices in Ireland. Survey conducted by the Irish National Group of IFPI, 1982.
- NETHERLANDS N1 "Onderzoek naar het maken van geluidscopieën op banden en cassettes door particulieren". Survey carried out by the Stichting voor Economische Onderzoek der Universiteit van Amsterdam (SEO) for STEMRA (Stichting Toot Exploitatie Van Mechanische Reproductie Rechten der Auteurs) and NVPI (Nederlandse Vereniging van Producenten en Importeurs van Beeld en Geluidsdragers). June 1976.
- N2 Id - September 1980 (field work done in 1979).
- UNITED KINGDOM UK1 "Tape Recording - Report on a Quantitative Survey". Survey prepared by the British Market Research Bureau Limited on behalf of the BPI (British Phonographic Industry) and MCPS (Mechanical Copyright Protection Society). November 1977.
- UK2 Id - January 1980 (field work: 4th Quarter 1979).
- UK3 Id - February 1982 (field work: 4th Quarter 1981)
- UNITED STATES OF AMERICA US1 "A Study on Tape Recording Practices among the General Public" conducted for the National Music Publishers Association (NMPA) and the Recording Industry Association of America (RIAA) by the Roper Organisation Inc. June 1979.
- US2 "A Survey of Households with Tape Playback Equipment" commissioned by the Copyright Royalty Tribunal and carried out by R. Hamilton & Staff. September 1979.
- US3 "Blank Tape Buyers - Their Attitudes and Impact on Pre-recorded Music Sales". Survey prepared by CBS Records Market Research. 1980.
- US4 "A Consumer Survey - Home Taping". Survey prepared by Warner Communications Inc. 1982 (field work done in 1980).

VIDEO SURVEYS

GERMANY

Verbraucherverhalten und-Ansichten von Besitzern von Videorecordern. Survey carried out by GFM (Gesellschaft für Marktforschung mbH) for GVL (Gesellschaft zur Verwertung von Leistungsschutzrechten mbH). Hamburg, December 1979.

Video-Studie 1982. Survey carried out by GFM (Gesellschaft für Marktforschung mbH) for ZPÜ (Zentralstelle für private Überspielungsrechte). Hamburg, August 1982.

UNITED STATES
OF AMERICA

Results of Special Mediastat Survey Conducted in Video Recorder Homes. Spring-Summer 1979. Silver Spring (Maryland), Media Statistics Inc., 1979.

3rd Annual Diary Study of VCR Homes. Fall 1981. Silver Spring (Maryland), Media Statistics Inc., Fall 1981.

EEC MEMBER STATES PARTIES TO INTERNATIONAL CONVENTIONS
RELEVANT TO PRIVATE COPYING

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EEC MEMBERSHIP OF THE INTERNATIONAL UNION FOR THE PROTECTION
OF LITERARY AND ARTISTIC WORKS (BERNE UNION)

founded by the Berne Convention (1886),
completed at Paris (1896), revised at
Berlin (1908), completed at Berne (1914),
revised at Rome (1928), Brussels (1948),
Stockholm (1967) and Paris (1971).

AS IN MARCH 1983

<u>Contracting States</u>	<u>Date of Entry into Force</u>	<u>Latest Act by which the State is bound</u>
BELGIUM	December 5, 1887	Brussels (Substance) Stockholm (Administration)
DENMARK	July 1, 1903	Paris (1971)
FRANCE	December 5, 1887	Paris (1971)
GERMANY - FEDERAL REPUBLIC OF	December 5, 1887	Paris (1971)
GREECE	November 9, 1920	Paris (1971)
IRELAND	October 5, 1927	Brussels (Substance) Stockholm (Administration)
ITALY	December 5, 1887	Paris (1971)
LUXEMBOURG	June 20, 1888	Paris (1971)
NETHERLANDS	November 1, 1912	Brussels (Substance) Paris (Administration)
UNITED KINGDOM	December 5, 1887	Brussels (Substance) Stockholm (Administration)

EEC MEMBERSHIP OF THE UNIVERSAL COPYRIGHT CONVENTION (UCC)State of Ratifications and Accessions as in March 1983

<u>Contracting States</u>	<u>Date of Entry into Force of Convention</u>	<u>Latest Act by which the State is bound</u>
BELGIUM	August 31, 1960	1952 Text
DENMARK	February 9, 1962	1971 Text
FRANCE	January 14, 1956	1971 Text
GERMANY - FEDERAL REPUBLIC OF	September 16, 1955	1971 Text
GREECE	August 24, 1963	1952 Text
IRELAND	January 20, 1959	1952 Text
ITALY	January 24, 1957	1971 Text
LUXEMBOURG	October 15, 1955	1952 Text
NETHERLANDS	June 22, 1967	1952 Text
UNITED KINGDOM	September 27, 1957	1971 Text

EEC MEMBERSHIP OF THE ROME CONVENTIONConvention for the Protection of Performers
Producers of Phonograms and Broadcasting Organisations
(October 26, 1961)State of Ratifications and Accessions as on 1st March 1983

<u>Contracting States</u>	<u>Deposit of Instrument</u>	<u>Entry into force</u>	<u>Ratification(R) Accession (A)</u>
DENMARK*	June 23, 1965	September 23, 1965	R
GERMANY - FEDERAL REPUBLIC OF*	July 21, 1966	October 21, 1966	R
IRELAND*	June 9, 1979	September 19, 1979	R
ITALY*	January 8, 1975	April 8, 1975	R
LUXEMBOURG*	November 25, 1975	February 25, 1976	R
UNITED KINGDOM*	October 30, 1963	May 18, 1964	R

* The instruments of ratification or accession deposited with the Secretary-General of the United Nations contain declarations made under the Articles mentioned hereafter: for Denmark, Articles 6(2), 16(1)(a)(ii) and (iv) and 17; for Germany (Federal Republic of), Article 5(3) concerning Articles 5(1)(b) and 16(1)(a)(iv); for Ireland, Article 5(3) concerning 5(1)(b); Article 6(2) and Article 16(1)(a)(ii); for Italy, Articles 6(2), 16(1)(a)(ii),(iii) and (iv), 16(1)(b) and 17; for Luxembourg, Article 5(3) concerning Article 5(1)(a) and (b); 16(1)(a)(i) and 16(1)(b); for the United Kingdom, Article 5(3) concerning Articles 5(1)(b), 6(2) and 16(1)(a)(ii), (iii) and (iv).

EEC MEMBERSHIP OF THE GENEVA (PHONOGRAMS) CONVENTIONConvention for the Protection of Producers of Phonograms
against Unauthorised Duplication of their Phonograms (Geneva, October 29, 1971)
State of Ratifications and Accessions as in March 1983

<u>Contracting States</u>	<u>Deposit of Instrument</u>	<u>Entry into force</u>	<u>Ratification(R) Accession (A)</u>
DENMARK	December 7, 1976	March 24, 1977	R
FRANCE	September 12, 1972	April 18, 1973	R
GERMANY - FEDERAL REPUBLIC OF	February 7, 1974	May 18, 1974	R
ITALY	December 20, 1976	March 24, 1977	R
LUXEMBOURG	November 25, 1975	March 8, 1976	A
UNITED KINGDOM*	December 5, 1972	April 18, 1973	R

* The United Kingdom declared by Notification, addressed to the Secretary General of the United Nations, and which took effect on March 4, 1975, that the Convention is applicable to the following territories: Gibraltar and the Isle of Man.

EEC MEMBERSHIP OF THE EUROPEAN AGREEMENT
ON THE PROTECTION OF TELEVISION BROADCASTSAGREEMENT
(June 22, 1960)

<u>Contracting State</u>	<u>Entry into Force</u>
BELGIUM*	March 8, 1968
DENMARK*	November 27, 1961
FRANCE	July 1, 1961
GERMANY* - FEDERAL REPUBLIC OF	October 9, 1967
UNITED KINGDOM*	July 1, 1961

PROTOCOL
(January 22, 1965)

<u>Contracting State</u>	<u>Entry into Force</u>
BELGIUM	March 8, 1968
DENMARK	March 24, 1965
FRANCE	March 24, 1965
GERMANY - FEDERAL REPUBLIC OF	October 9, 1967
UNITED KINGDOM	March 24, 1965

* The instruments of ratification were accompanied by reservations in accordance with Article 3, paragraph 1 of the Agreement.

SURVEY OF THE PROTECTION OF AUTHORS OF LITERARY AND ARTISTIC WORKS, EXCLUDING CINEMATOGRAPHIC WORKS

<u>COUNTRIES</u>	<u>LEGISLATION</u>	<u>DURATION OF PROTECTION</u>	<u>LEGAL RIGHTS GRANTED TO AUTHORS</u>
BELGIUM	Copyright Law of 22 March 1886 amended to 11 March 1958 and Berne Convention	50 years post mortem auctoris (pma)	(a) The reproduction of a work (b) The making available to the public/publication of a work (c) The distribution of a work (d) The broadcasting of a work (e) The public performance of a work (f) The distribution by cable of a work
DENMARK	Copyright Law No. 158 of 31 May 1961 amended to 8 June 1977	50 years pma	(a), (b) - includes (c) and (e) and by implication (d) and (f)
FRANCE	Law No. 57-298 on Literary and Artistic Property of 11 March 1957	50 years pma	(a) - includes (c), (b) - includes (e) (d) and by implication (f)
GERMANY - FEDERAL REPUBLIC OF	Copyright Law of 9 September 1965 amended to 2 March 1974	70 years pma	(a) (b) (c) (d) (e) (f)

GREECE	Law on Literary Property of 29 June 1920 amended to 23 November - 7 December 1944	50 years pma	(a) (b) (e)
IRELAND	Copyright Act of 8 April 1963	50 years pma	(a) (b) (d) (e), (f) - exception for broadcasts of Radio Eireann
ITALY	Copyright Law No. 633 of 22 April 1941 amended to 29 July 1981	50 years pma	(a) (b) (c) (d) (e) (f)
LUXEMBOURG	Copyright Law of 29 March 1972	50 years pma	(a) (b) (d) (e) ⁺ (f) ⁺
NETHERLANDS	Copyright Law of 23 September 1912 amended to 27 October 1972	50 years pma	(a) (b), (c) - as long as not appeared in print, (d) (e), (f) by implication
UNITED KINGDOM	Copyright Act of 5 November 1956 amended to 13 May 1983	50 years pma	(a) (b) (c) (d) (e), (f) - exception for BBC and IBA broadcasts

+ = equitable remuneration only when administration entrusted to collecting society

SURVEY OF THE PROTECTION OF OWNERS OF RIGHTS IN CINEMATOGRAPHIC WORKS (INCLUDING VIDEOGRAMS)

<u>COUNTRIES</u>	<u>LEGISLATION</u>	<u>DURATION OF PROTECTION</u>	<u>OWNERSHIP OF RIGHTS</u>	<u>NATURE & EXTENT OF RIGHTS</u>
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- (a) Copyright to producer (without prejudice to copy-right in pre-existing works);
- (b) right of exploitation to producer, without consent of co-authors or by presumption of law ¹ and without prejudice to the rights (copyright and/or moral rights) of the co-authors;
- (c) copyright to the co-authors.

1 In a number of legislations, particularly those based on the French law, the presumption in favour of the producer does not extend to the composer of the music specially composed for the film.

2 By co-authors most legislations mean: authors of pre-existing works and all others who have made an original contribution to the film, for example: the author of the script, the author of the adaptation, the author of the dialogue, the author of the musical work, with or without words, specially composed for the work, the director.

BELGIUM	Berne Convention (Copyright Law of 22 March 1886 amended to 11 March 1958)	50 years from death of last surviving co-author	(c) - determined by legal theory and practice	See Chart I
DENMARK	Copyright Law No.158 of 31 May 1961 amended to 8 June 1977	50 years from death of last surviving co-author	(c)	See Chart I
FRANCE	Law No.57-298 on Literary and Artistic Property of 11 March 1957	50 years from death of last surviving co-author	(b)	(Art.17) The authors of a cinematographic work, except for the author of the musical compositions...shall be bound to the producer by a contract which, in the absence of a clause to the contrary shall constitute the transfer to his benefit of the exclusive right of cinematographic exploitation.... See Chart I for rights of co- authors. 2 2
GERMANY - FEDERAL REPUBLIC OF	Copyright Law of 9 September 1965 amended to 2 March 1974	25 years from publication or (if unpublished) production. The rights of the co-authors subsist for 70 years from death of last surviving co-author.	(a) (b)	(Art.94) The producer shall have the exclusive right to reproduce the cinematographic work, distri- bute it and utilise it for public presentation or for broadcast (including cable distribution). Moreover, the producer shall have the right to prevent any distor- tion or shortening of the cinemat- ographic work which may prejudice his legitimate interest therein. See Chart I for rights of co- authors.

GREECE	Law on Literary Property of 29 June 1920 amended to 23 November - 7 December 1944	50 years from death of last surviving co-author.	(c)	See Chart I
IRELAND	Copyright Act of 8 April 1963	50 years from publication	(a) or the person who commissioned the making of the film	Reproduction, public performance, broadcasting, cable distribution - exception for broadcasts of Radio Eireann
ITALY	Copyright Law No.633 of 22 April 1941 amended to 29 July 1981	(b) 50 years from date of first public showing if this takes place not later than 5 years from production; otherwise 50 years from production		See Chart I
LUXEMBOURG	Copyright Law of 29 March 1972	50 years from publication	(a)	As in Chart I. Also see Art. 26(1) for distribution right
NETHERLANDS	Copyright Law of 23 September 1912 amended to 27 October 1972	50 years from death of author or 50 years from publication if author is, inter alia, a legal person	(a)	As in Chart I N 53
UNITED KINGDOM	Copyright Act of 5 November 1956 amended to 13 May 1983	50 years from publication	(a)	Reproduction, public performance, broadcasting, cable distribution - exception for BBC and IBA broadcasts

SURVEY OF THE PROTECTION OF PRODUCERS OF PHONOGRAMS

<u>COUNTRIES</u>	<u>LEGISLATION</u>	<u>DURATION OF PROTECTION</u>	<u>LEGAL RIGHTS GRANTED TO PHONOGRAM PRODUCERS</u>
			(a) The reproduction of a phonogram
			(b) The broadcasting of a phonogram
			(i) Authorisation
			(ii) Equitable remuneration
			(c) The public performance of a phonogram
			(i) Authorisation
			(ii) Equitable remuneration
			(d) The distribution by cable of a phonogram
			(i) Authorisation
			(ii) Equitable remuneration
DENMARK	Copyright Law No.158 of 31 May 1961 amended to 8 June 1977	25 years from recording	(a) (b)(ii) (c)(ii)
FRANCE	Unfair competition law (international protection resulting from membership of Phonograms Convention)	(a)	
GERMANY - FEDERAL REPUBLIC OF	Copyright Law of 9 September 1965 amended to 2 March 1974	25 years from publication/fixation	(a) (b)(ii) (c)(ii) (d)(ii)

IRELAND	Copyright Act of 8 April 1963 50 years from publication	(a) (b)(ii) ⁺ (c)(ii) ⁺ (d) ⁺ (ii) ⁺
ITALY	Copyright Law No.633 of 22 April 1941 amended to 29 July 1981 30 years from deposit	(a) (b)(ii) (c)(ii)
LUXEMBOURG	Law on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 20 years from fixation	(a)
UNITED KINGDOM	Copyright Act of 5 November 1956 amended to 13 May 1983 50 years from publication	(a) (b)(i) (c)(i)

* Exception to (d) when cable distribution is of a Radio Eireann broadcast.
 + In the case of unpublished phonograms there is a right of authorisation.

SURVEY OF THE PROTECTION OF PERFORMERS

<u>COUNTRIES</u>	<u>LEGISLATION</u>	<u>DURATION OF PROTECTION</u>	<u>LEGAL RIGHTS GRANTED TO PERFORMERS</u>
			(a) The recording of a performance (g) Equitable remuneration for the communication to the public of a recorded performance
			(b) The broadcasting of a performance (h) Equitable remuneration for the distribution by cable of a recorded performance
			(c) The communication to the public of a performance (by some other technical device such as a loudspeaker)
			(d) The distribution by cable of a performance
			(e) The reproduction of a recorded performance
			(f) Equitable remuneration for the broadcasting of a recorded performance
DENMARK	Law No.158 of 31 May 1961 amended to 8 June 1977	25 years	(a) (b) (c) (e) (f) (g)
GERMANY - FEDERAL REPUBLIC OF	Copyright Law of 9 September 1965 amended to 2 March 1974	25 years	(a) (b) (c) (d) (e) (f) ¹ (g) (h) ¹

(a) (b) (c) (d)² (e) (f) (g) (h)²

50 years

Law No.1075 of
23 September 1980
(NB: Not yet in force)

GREECE

(a) (b) (c) (d) (e)
NB: No civil right of action

Performers' Protection
Act of 2 July 1968

IRELAND

(a)³ (b)³ (d)³* (e)³ (f)* (h)*

Copyright Law No. 633
of 22 April 1941 amended
to 29 July 1981
20 years in respect of
reproductions of a performance;
20 years minimum in respect of
other rights pursuant to
membership of Rome Convention

ITALY

(a) (b) (c) (e)⁴

Law on the Protection of
Performers, Producers of
Phonograms and Broadcasting
Organisations
20 years

LUXEMBOURG

(a) (b) (e)
NB: No civil right of action

Performers' Protection
Acts 1958-1972

UNITED KINGDOM

- 1 = if records have previously been published
- 2 = this could be understood to be included although not mentioned explicitly
- 3 = equitable remuneration only
- * = see definition of diffusion in Article 16 and also Article 80
- 4 = only if the original recording was made without consent or the reproduction is made for purposes different from those for which consent was given

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- (ii) Articles published in RIDA (Revue Internationale du Droit d'Auteur) are also published in Spanish and French in the same issue).
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