COPYRIGHT AND CHALLENGES TO COPYRIGHT: THE CASE OF 'PIRACY' AND 'PRIVATE COPYING'

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Dedicated to my entire family,
 to those who believed in me,
 to my 'other half', and to
 the memory of those who
 who are not amongst us
 anymore to take pride
 in this achievement

Αφιερώνεται σε ολοκληρωτικά την οικογένειά μου,
 σε όλους τους που πιστεύαν σε μένα,
 στο 'έτερο του ημίσυ', και στη μνήμη αυτών
 που δεν είναι πια ανάμεσα μας
 για να καμαρδούν αυτό το κατορθώμα
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Copyright and Challenges to Copyright: the Case of 'Piracy' and 'Private Copying'

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ABSTRACT

Copyright represents a constant and delicately poised balance among three, often competing interests: the author’s and his/her rights in a protected work; the entrepreneur’s who exploit such works and his/her own rights; and finally, the public who needs to have access to these works.

However, especially since the mid-twentieth century, the system of copyright, and even its existence itself, has been seriously challenged. These challenges have come from the attitude of the ‘developing countries’, the advent of new technologies, and the consequent changing nature of piracy and private copying.

This thesis examines these challenges in particular in relation to the audio-visual industries. Findings drawn from a wide range of sources ranging from private industry sources to intergovernmental bodies are used to determine the extent of piracy and private copying and the effects of these on the copyright industries and copyright owners alike.

Different ways of meeting the challenges to copyright are explored in detail including technological solutions or ‘fixes’, trade-oriented measures, legal remedies, and educational programmes. Detailed attention is also paid to recent steps taken by the European Union and the GATT to establish a framework of copyright protection across the world. The likely success of all these measures is addressed in the concluding chapter.
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CHAPTER 1

INTRODUCTION

Copyright is above all a property right. The subject matter of that property is incorporeal, intangible. The property is an intellectual property in that it originates in the human mind before it is reduced in a material form. In a nutshell, intellectual property, and, consequently, copyright is concerned with the legal rights which may be asserted by individuals or legal entities against some or all other persons in respect of the product of the human intellect.

Copyright is a right of diversity. It seeks to cope with the problem of how best to reconcile the partly shared, partly contradictory interests of three different groups of people: the legitimate needs of the members of the public, and of the society as a whole, for access to material of importance for information, education and entertainment; the legitimate needs of the creators of that material; and finally, the equally legitimate needs of the entrepreneur who exploits and disseminates that material.

This balance is succinctly expressed in Article 27, paragraphs 1 and 2, of the Universal Declaration of Human Rights, which states:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In order to achieve such a delicately poised balance, copyright is subject to limitations which safeguard the public access, namely limitations of duration, exceptions that render some uses of protected works free, and compulsory licences. At the same time, however, it grants exclusive rights to authors, producers and distributors in order to enable them to exercise control over uses of their
works and provide them with the economic incentives to create and disseminate new works, thereby stimulating cultural activity, a result which cannot be other than for the common good.

Copyright may be an exclusive right but is not a monopoly in the classic sense of the term. At best, it is a relative, 'qualified' sort of monopoly in that it enables the copyright owner to stop anyone else copying or otherwise exploiting the work he/she enjoys rights in, but it vests him/her with no right to prevent the exploitation of an identical or similar work produced through the independent endeavour of another person.

Four arguments can be advanced in favour of copyright. These arguments also constitute the underlying principles upon which the modern international copyright system is founded.

(1) The natural law/justice argument. The author is the creator of the work which is the expression of his personality, and like any other worker, he is entitled to the fruits of his efforts.

(2) The just reward for labour/economic argument. Copyright provides the economic basis for investment by authors and cultural industries in the creation, production, and dissemination of works to the public. Such an investment will not be made unless there is a reasonable expectation of recouping it and making a profit.

(3) The stimulus to creativity/cultural argument. The works produced by creators form a considerable national asset. Thus the encouragement and the reward of creativity are in the public interest as a contribution to the development of national culture.

(4) The social argument. It is a social requirement that it is in the public interest that authors and rightowners should be encouraged to publish their works so as to permit the widest possible dissemination of works to the public at large. If the ideas and experiences of creators can be shared by a wide public within a short period of time they contribute to the advance of society.

These four fundamental principles are cumulative and interdependent. They are applied in the justification of copyright protection in all countries, although different legal systems put greater emphasis some than on others.
Copyright has two types of roots and both these roots are tightly linked with the invention and subsequent development of means of large-scale production of works, in particular the printing press. It started as an exclusive right of the entrepreneur (i.e. printer and publisher) to make copies, to reproduce the work of an author, and, by implication, to stop others doing so. On the other hand, it became vital to protect the author now that his/her work could be copied much more easily in much higher numbers, and it was also felt that the author should share in the profits of this new exploitation of his/her work. This double set of roots is still reflected in the two major copyright systems of today. These are, respectively, the common law, mainly Anglo-Saxon legal system; and the civil law, principally Continental European legal system. The former gives priority to the natural law/justice argument, while the latter puts more weight on the economic and social arguments. Their principal differences can be outlined as follows:

- In the droit d'auteur philosophy, copyright is an absolute, unrestricted and, essentially individualistic natural right. Moreover, as intellectual works emanate from acts of personal creation, they are considered to be part of the personality of the creator, and remain linked to him/her throughout their life. In contrast, according to the 'copyright' philosophy, copyright is the right to prevent the copying of physical material and aims to protect the owner against unauthorised reproduction or use of that material.
- The two systems use different tests of 'originality' to determine whether a subject matter is susceptible to protection. The civil law requires an personal imprint or independent creation and a relatively high level of creativity. The common law requires the investment of sufficient independent skill and labour, or proof that the work is not simply a copy. Thus, the former is more strict, while under the latter the scope of protected works is wider.
- Under the Continental system, the nature of rights is both moral and economic, while under the Anglo-Saxon is exclusively economic.
In the droit d'auteur tradition, only physical persons are recognised as original copyright owners. The philosophy of the copyright tradition is that whoever takes the initiative in creating the material and makes the investment to produce it and market it, taking the financial risk that such activities involve, should be allowed to reap the benefit. Thus, in Anglo-Saxon systems corporate bodies and/or legal entities may also be first-instance copyright owners.

- Under civil law, authors are regarded as the actual physical creators even if they are employed or commissioned by someone else. By contrast, common law regards the employer as a copyright owner unless a contract provides otherwise.

- The Anglo-Saxon tradition requires that a work be fixed to be protected, whereas in the Continental tradition the author of a work shall by the mere fact of its creation enjoy a property and no fixation or material support is required.

- In droit d'auteur systems, compulsory licences are generally not accepted, while in copyright systems the economic dimension of copyright could justify them more easily. Moreover, under the latter system, protection is granted because it is deemed to be in the public interest to stimulate creativity and to ensure the widest possible dissemination of works, whereas the former puts the emphasis on the private interests of the author first.

- Finally, the regulation of contracts in the Anglo-Saxon system is minimal, in direct contrast with the Continental system which favours such regulation in order to remedy the disparity between the author, who is deemed as the weaker party, and the entrepreneur who exploit the work.

Notwithstanding the apparent differences between these two regimes, they are both based on the dual premise that copyright ought to be protected against misappropriation and must be preserved vis à vis the challenges that has recently been called upon to face. Especially since the mid-twentieth century, copyright has been plagued by formidable and distinct, but also cumulative and interdependent, strains which have come to question the underlying purpose and threaten the very existence of its system. The present thesis sets out to explore in detail the nature, the manner in
which, and the extent to which, these challenges have impinged on copyright, and seeks ways to counter their consequences.

The first of these strains is reflected in the stance of the so-called 'developing countries'. These nations, that represent three-quarters of the world's population, envisage copyright either as a totally alien concept to them due to particular social, cultural and/or even religious circumstances and beliefs, or, at best, as a barrier that stands in their way towards economic and cultural development. For they view the exclusive rights that copyright grants to intellectual creators as a unwarranted monopoly over information, and the economic rewards that copyright provides as too high a price to pay for having access to much needed material. And, in order to secure that vital access, they frequently resort to copyright theft and rank amongst the most flagrant violators of intellectual property worldwide. The attitude of the 'developing countries' has created a deep division in the realm of international copyright and has adversely affected the creation of a universally uniform framework for its protection.

The second strain that copyright has been called to face has come about with the advent of new technologies. Indeed, technological developments have been posing to copyright a three-fold challenge. Firstly, they have ushered copyright into an increasingly complex and integrated environment, in which established notions of copyright (i.e. author, work, ownership) look far less sustainable, and in which traditional divisions between print, broadcasting and electronic media are becoming more and more blurred. Within such a dynamic -confused and confusing- milieu, there are many who question whether copyright has a place at all. Secondly, they have dramatically augmented and facilitated both the accessibility and the use of information, and have placed the technology at the fingertips of everyone within the community. They have also made possible an easy and fast copying and distribution of intellectual and artistic works. Consequently, they have brought the debate about access to copyright, a debate which is also present at the international arena, much closer to home. At the heart of this contention lies, on the one hand, the desire of the public and/or
the individual to be allowed to make use of these technologies for the widest possible dissemination of knowledge, and, on the other, the desire of the intellectual creators to control the use of their works in order to secure the economic reward which is due to them. Finally, probably the most substantial challenge that the new technologies pose to copyright arises not only because they enable an easy and fast copying, but also because that copying increasingly becomes a more obvious, widely accepted, fundamental, and even legitimate part of the creative process and expression. In fact, the electronic media are fostering a proliferation of new creative forms, some of which require, encourage or facilitate copying, which more often than not, is unauthorised. Indeed, new technologies have transformed a relatively minor irritant which copyright theft was prior to their advent, into a major problem of dimensions quite unprecedented some decades ago.

The phenomenon of copyright theft, more commonly referred to as ‘piracy’, has taken root in three different areas, inhabited by different characters, with different backgrounds and motives.

The first such area is the ‘developing countries’. This is a vast market for the pirates, both professional and amateur, who abuse copyright on a worldwide scale. Copyright theft at that level is often ‘justified’ by pirates and tacitly ‘approved’ by governments as a means to meet the needs of these countries’ population who is hungry for education and technology and cannot afford to pay for copyright.

The second area is the electronic world around us. Here, pirates are well-established and well-connected, and have the technical know-how to attack all the media sectors, from books, music, video and films, to cable and satellite broadcasts, and even computer software. At this level, piracy is principally a highly sophisticated, almost industrial, process. The electronic pirates often have their own factories and manufacturing plants, and their own worldwide distribution networks. They also have become a large-scale industry which successfully competes, and frequently overshadows, the legitimate international conglomerates, and which even completely dominates whole markets. Finally, the electronic pirates have a strong presence in every country around the globe, namely in both
'developing' ones that 'import' and 'consume' copyrighted material and 'developed' ones that 'produce' and 'export' such material, they play for high stakes aiming at large profits, and their operations are often closely linked with organised crime.

The third area is very close to home, and even within it. While the piracy that occurs in the two aforementioned milieus represents a systematic and large-scale abuse of copyright, at that third level there is a casual, day-to-day, abuse of copyright which takes place in millions of private dwellings across the world. Piracy here is of a small, individual, scale, and appears relatively harmless and even innocent. For the motive of this type of abuse is not commercial profit; instead, it is the mere private use and enjoyment of copyrighted material. Due to its nature, that form of piracy is often exempted from liability by copyright legislation under the specific headings of 'exceptions', and 'free' or 'fair' use. However, this phenomenon, known as 'private copying', is the form of piracy most feared by copyright owners because it is hidden, pervasive and, above all, difficult to control. Consequently, this form of copyright theft is probably the most troublesome area of copyright abuse and the most complex to deal with.

The aforementioned three areas constitute the main expressions and kinds of copyright theft, and thus appear and reappear throughout the present thesis, occasionally overlapping but almost never dependent on each other. Finally, it must be stressed that, copyright theft, in whatever form or level, has negative repercussions which are not only social and cultural, but also, and indeed predominantly, economic. These repercussions are strongly felt at an individual, national and international level. Consequently, the confrontation of the phenomena of 'piracy' and 'private copying' has become a priority for all parties concerned: copyright owners and industries alike, governmental authorities and enforcement agencies, and finally, international intergovernmental bodies and organisations.

The examination of the effects of 'piracy' and 'private copying' is primarily focused on the audio-visual sector (i.e. music, video, film, satellite broadcasts).
much on the fact that the respective copyright industries are the most afflicted by the cumulative
effects of the two phenomena, which may also be the case, but mainly due to the fact that there is a
wide availability of statistics for a complete picture to be drawn. This is particularly true in the case
of music piracy. Indeed, the International Federation of the Phonographic Industry (IFPI) has kindly
provided a large number of rare, and often unpublished, data and other material that were put
together and made it possible for a trend to be drawn as regards the course of music piracy during
the last fifteen years (1978-1993). That trend provides for an estimate of the music piracy in terms of
its value and of pirate units, which are then compared with the value and the units sold of legitimate
recordings, to result to a percentage of the total market (legitimate and pirate) that piracy occupies.
The above estimates look at the situation both at a worldwide level and at five distinct large
geographical areas the world is divided into for the purposes of the present thesis. Furthermore, the
picture of music piracy is graphically complemented by a series of world maps that succinctly depict
the gravity of the problem and its universal dimensions.

The present thesis also contains interesting quotations and valuable pieces of information
about the nature of piracy, the size of its impact on copyright industries, and ways as well as policies
towards its confrontation. Such information has come about from a number of interviews, where a
set of questions was submitted in the form of a questionnaire (see Appendix) to key figures in
copyright industries and associations, who greatly contributed to the research and the understanding
of the magnitude of the piracy problem. Additionally, in order to demonstrate the cost of ‘piracy’ and
‘private copying’ for copyright owners and industries alike, an array of tables is produced which are
compiled from figures appearing in renowned studies as well as rare literature. However, while the
evidence as to the damage caused by ‘piracy’ is overwhelming, the same cannot be said for ‘private
copying’. For there is data and other information, found even in studies which argue that the cost of
‘private copying’ is higher than that of ‘piracy’, that if piece together tend to disclaim somewhat such
findings and/or provide a different perspective under which the extent and the impact of private
copying is assessed. Thus, they render the appraisal of the exact effects of private copying a far more complex process as opposed to the evaluation of piracy.

In attempting to analyse the strains and investigate the abuses that copyright has been called to face, and to examine the ways the copyright system can be preserved and protected against such challenges, the present thesis moves along the following lines.

- In Chapter 2, an historical introduction to copyright is undertaken in order to retrace its stages of evolution and development from its earliest indications in ancient civilisations and its emergence with the first copyright legislation, up to its internationalisation with the first international copyright Conventions.

- Chapter 3 looks at the philosophy that divides international copyright into different approaches. It focuses, in particular, on the case of ‘developing countries’ whose approach towards the issue, which is defined by a variety of factors such as economic conditions, and social, cultural, and even religious beliefs, seriously challenges international copyright and leads to its abuse on a worldwide scale. Finally, it examines whether there are any prospects for change as regards that approach, and what may be the agents that can bring about such a change.

- Chapter 4 describes the relation of copyright to technology, and scrutinises the manner in which the latter has challenged the former, by questioning its basic notions, by forcing it to adapt to novel situations, by creating frictions between copyright owners and copyright users as to the access to protected works that technology has facilitated, and by changing the nature of piracy and fostering the emergence and the proliferation of private copying.

- Chapter 5 defines the problem of piracy, examines its causes and its effects, and juxtaposes the different prisms through which different actors, be they individuals or whole nations, view the issue.

- Chapter 6 draws a graphic picture, interspersed with facts, figures and estimates of the occurrence and the cost of three forms of copyright theft: book, video/film, and music piracy. That picture surveys the situation at an international level, at a regional level (vast geographical areas), and on a
country-to-country basis. Particularly, as regards music piracy, a trend is also drawn as to its course during the last fifteen years (1978-1993).

- Chapter 7 is concerned with private copying. It examines whether it is a free/fair use or an unauthorised use of copyright synonymous to piracy as such. It also critically assesses the origins and the effects of the phenomenon. And, it cautiously evaluates the likely damages it is causing to copyright owners and industries alike, bearing in mind the private nature of the activity.

- Chapter 8 accounts for the various solutions, systems, devices, remedies and measures (legal, technical, fiscal, and even trade-oriented) that have been put forward over the years to confront piracy and private copying. It also judges their application, efficacy and viability, and seeks to identify the most suitable of them so as to effectively protect and control the use of copyright material, as well as to secure the economic reward of the copyright owners and not to excessively impede the public access to intellectual works.

- Chapter 9 reviews the recent efforts of two international bodies, namely the European Union and the General Agreement on Tariffs and Trade (GATT), towards the protection of copyright. It particularly examines in detail the latest steps that have been taken towards the establishment of a uniform framework of protection across the world.

- Finally, the Conclusion of the present thesis asks whether unauthorised copying at all levels (i.e. individual, industrial, amateur, and professional) can be controlled and in what ways. To that end, it sets out to put forward ideas, proposals and guidelines as to what should be done by all the parties involved in the copyright realm.

To sum up, the following remarks should be made at this point.

Firstly, it must be stressed that any attempt to quantify and qualify the cost of unauthorised copying is in fact a far more complex process than it might be presumed. The research of this thesis has been inundated with data whose base or origins were not always clear. Indeed, some of the studies relied upon for information even suggest that copyright industries tend to inflate figures and
exaggerate the likely damages, perhaps in order to pressurise national and international legislative bodies to initiate the necessary action (this feeling is particularly strong in the case of 'private copying'). Consequently, the numbers quoted throughout the thesis should be treated as estimates which provide a mere indication of the size of the problem.

Secondly, one may notice a certain inconsistency in the 'piracy' tables (Chapter 6). For instance, piracy in a particular year (in terms of value, units and percentage of the total market) may appear to be dropping while figures as regards years in either side of that particular year may show an increase, and vice versa. In such cases, it may be assumed that it is the years in either side which depict the real trend. That discrepancy is mainly due to the scarcity of data for that particular year, and as a rule, the older the statistics the more limited they are. Nevertheless, copyright theft is indeed a grave problem of our times. As an overall consideration, it can be said that music piracy worldwide was at a particularly high level in the mid-1980s, and has been constantly on the increase during the 1990s where it also reached its highest point ever. Currently (1993), its value stands at US$ 2 billion, representing a little over 6% of the legitimate market, and more than one fifth of all recordings sold are pirated.

Thirdly, it can be argued that the fact that copyright theft has become so well established and widespread, so much a part of human nature, coupled with the fact that it is based on difficult to forsake motives that range from a thirst for information, greed for profit, and even sheer convenience, render its complete eradication an almost impossible task. Therefore, any hope for its confinement does not rely solely on whatever solutions that may be devised, however sophisticated. It largely depends on the change of attitude of those who engage in piratical activities, be they individuals or entire countries. To that end, those who prize copyright must persuade those who do not that its theft is a crime like any other kind of theft.

Fourthly, it can be suggested that as far as copyright itself is concerned, in order for its system to be preserved and maintained vis à vis the challenges that has been called to face in recent
years, it needs to be constantly updated to keep abreast with and accommodate technological
developments that have been disputing its legitimacy and creating significant problems of
enforcement up-to-date and will continue to do so in the years to come.

Finally, an opinion shared by many is that there is nothing universal about copyright. Indeed,
its very concept from a philosophical, theoretical and pragmatic point of view differs from country to
country, since each has its own legal framework influenced by social, cultural and economic factors.
The present thesis, having been influenced by an environment that attaches a great deal of value to its
protection, is definitely pro copyright and against infringement. If, however, the same thesis had been
undertaken in another part of the world, its tenor, and indeed its whole approach, would probably be
very different.
CHAPTER 2
COPYRIGHT: AN HISTORICAL INTRODUCTION

2.1 Prehistory and History

"Copyright and its origins must be set in a larger context which encompasses the organization of cultural and economic life, the social attitude towards intellectual creations and their uses, and the position of the creator in society."

(Ploman & Clark Hamilton 1980, p 5)

It may be futile to look for clues of copyright, as we refer to it nowadays, in early civilisations. After all, the term 'copyright' is of a relatively recent origin. However, latent aspects of it and its implications in some cultures, or even their non-existence in others, have been played a pivotal role in formatting the attitudes and policies towards copyright of whole countries up to date. Hence, at present, these discrepancies justify the different stances of nations and dominate the international debate that surrounds copyright.

An historical retrospection reveals that nascent expressions of the contemporary concept of copyright date as back as ancient Egypt, the first Greek city states, the Roman Empire and the early Jewish law Talmud. And, as most studies indicate, the first ever notion of copyright as 'intellectual property' was born within those civilisations. In fact, the word 'property' itself comes from the Latin word *proprius*, which means 'one's own' (Phillips & Firth 1995). With that borne in mind, the term 'intellectual property' denotes the rights, legal or other, which may be asserted against others in respect of the product of the human intellect; one of these rights is the right to copy (copyright).^1

Throughout the present thesis, the term 'copyright' is used in a generic manner, unless otherwise stated, to describe the various systems of law, which nowadays protect not only authors in the traditional sense of the word, but also other rightowners (such as performers, phonogram and videogram producers and broadcasting organisations). Evidently, however, the discussion of the history of copyright is mainly concerned with authors and publishers.

^1^ In view of that connection, the terms 'copyright' and 'intellectual property' are used interchangeably throughout the present thesis. The term 'intellectual property' is defined in Article 2 (viii) of the Convention Establishing the World Intellectual Property Organisation (WIPO) to "include the rights related to:
- literary, artistic and scientific works;
- performances of performing artists, phonograms and broadcasts (the so-called 'neighbouring' or 'copyright related' rights);
- inventions in all fields of human endeavour (patents);
And, cases where one person was punished for copying the literary or aesthetic output of another were known much before the concept of copyright took shape.

For instance, in ancient Egypt, if persons other than members of the priesthood were overheard reciting the sacred rituals, they were liable to immediate execution. Also, a similar prohibition applied to the replication of the hieroglyphs which described these rituals (Kabesh 1983, ‘WIPO Forum on the Piracy of Broadcasts and of the Printed Word’).

In classical Greece, during the 6th century BC, the artist-creator is connected with his work eponymously, and the copying, falsification or any distortion of his creation entailed social strictures (Kotsiris 1986). Authors and poets were concerned that their authorship should be recognised; plagiarism and any sort of appropriation was deemed dishonourable. Thus, when Plato’s disciple Hermodorus copied his master’s speeches and lectures with the intention of selling them for his own benefit, he was unanimously condemned (Steward 1989). In fact, Hermodorus’ theft is perhaps the best known crime in the prehistory of copyright. And, as Gurnsey (1995) posits, Hermodorus’ actions echo the modern day pirates’ claim to perform a service to mankind, because, without Hermodorus’ copies, many of Plato’s speeches would have vanished.

In addition, at about the same time, the first appearance of the notion of intellectual property can be placed with the first ever recorded personal claims for literary and artistic creativity to be recognised (Ploman and Clark Hamilton 1980; Bettig 1992).

In the Hebrew Talmud, it is said that the principle of reference was valid (Kotsiris 1986). By virtue, principles formulated by teachers were passing down from generation to generation with reference to the name of their creator. Bettig (1992) suggests the obligation to report something in the name of him who said it links ancient Jewish law to a modern notion of copyright, property rights

- scientific discoveries;
- industrial designs;
- trademarks, service names, and commercial names and designations;
- protection against unfair competition;
and all other rights resulting from Intellectual activity in the industrial, scientific, literary or artistic fields.”
and even moral rights (whether conceived as such or not at that time). At a later stage, in the rabbinical law, studies report the beginning of the practice of an author giving his permission for a copy of his work for payment (Kotsiris 1986). However, with the advent of the Middle Ages, that practice seems to have been abandoned. Rabbinical authorities reportedly held the opinion that one was allowed to copy a manuscript without the consent of the author, and it was considered a blessing to permit scribes to make copies (Katsh 1989).

In ancient Rome, although there was no official recognition of copyright, authors were aware that publication and use of their work involved intellectual as well as moral interests (‘ABC of Copyright’ 1981). Under the development of commerce, the first publishing system appears where contracts are signed with booksellers of the time. Whereas, in the previously mentioned example of Hermodorus his practice was condemned, Cicero praised his publisher Atticus for successfully selling his speeches (Stewart 1989). Although Bettig (1992) argues that authors did not make a living by selling their works and earning royalties, studies of Roman literature indicate that they were not satisfied with glory alone but drew money from their writings (‘ABC of Copyright’ 1981).

Intellectual property becomes an object of trade. The market inspectors were buying the manuscripts and were conceded the right for reproduction and performance of the works. Also, according to Kotsiris (1986), public disapproval was the sanction against appropriation of foreign intellectual creation. The reproach was uttered by authors themselves, too. The poet Martial openly called the plagiarists thieves, and considering his verses as his children, he accused them of kidnapping in one of his epigrams (Stewart 1989).

Somewhere in the history of the aforementioned societies, and in particular in the Graeco-Roman civilisation, lie the origins of modern copyright. The fact that the modern-day countries, namely Greece and Italy, which inherited these civilisations, show little respect to copyright, is
mainly due to the particular 'realities' that prevail in each of these countries and to other factors that affect the national policies towards copyright and its protection.3

On the other hand, there are other ancient cultures, particularly in Asia and Southeast Asia, where intellectual creations were never attributed to the creator but instead to the whole community; consequently, the concept of copyright as an individual right has always been misunderstood. Not surprisingly, many of the present-day countries, which have been decisively influenced by these cultures, rank amongst the most egregious violators of copyright.

For instance, research in ancient Indian civilisations concluded that their history is a history of societies and not of persons. It was not of interest who said it but what was said; hence, all literary and philosophical masterpieces were anonymous (Stewart 1989; Bettig 1992). According to Ploman & Clark Hamilton (1980, p 4), "although the artist may have been professional, his communication - the message- was conceived as expressing the sense of the community". Intellectual property cannot be perceived as such since the expression and the form of new ideas is destined to be used by all (Kotsiris 1986).

Similarly, in the Balinese culture, intellectual property in the sense of personal possession is non-existent. According to the Balinese philosophy, culture and art are products of an anonymous, community-oriented, participatory process and are intended to express the collective thought (Bettig 1992).

In one of the most ancient civilisations ever, the Chinese, there has been a deeply rooted tradition. Works of literature were produced as a service to the public and there were cases when individuals-creators would deem it undignified to accept royalties or fees as compensation for their effort. Moreover, in traditional Chinese culture, the highest form of compliment an artist or author could receive was to have his work copied (Gadbaw & Richards 1988).

3 Examples of these countries' piracy record, particularly as regards the audio-visual field, are mentioned in Chapter 6 of the present thesis. And factors that may influence copyright policymaking are dealt with, in a generic manner, in Chapter 3, section 3.4, of the present thesis.
The concept of copyright is absent not only in societies of Asia/Southeast Asia. The notion of intellectual property, as 'one's own' private property, is also alien to the Islamic world. According to holy scriptures of the Koran, "whosoever is in earth belongs to God". God's ultimate property implies that His ownership supersedes the right of the individual to property, and sets the general constraints on private property rights (Behdad 1989).

At this point, it must be added that cultural attitudes, social organisation, and legal as well as religious conceptions may explain why copyright did not emerge in the Asian continent, but only in part. One should also consider that the aforementioned cultures were almost exclusively oral cultures. For example, although the Chinese developed writing in the third millennium BC, writing in China was first used in service to the empire instead of for literary or religious purposes. Thus, the system of writing limited the rates of attainment of fluent literacy, and certainly limited the audience for written works and the possibilities of a market for manuscripts (Bettig 1992). And, as Eisenstein (1979) stresses, the mode of communication is the key to understanding the absence of a conception of literary property up through the Middle Ages. This, it must be stressed, is true not only in the case of Asia but also in the case of Europe.

Indeed, in the early medieval period (prior to the first millennium AD), the situation in Europe was equally unsuitable for the notion of copyright to emerge due to several factors: not only because of the mode of communication, but also because of the general relation of production and the specific organisation of literary creativity (Bettig 1992).

- Firstly, as far as the latter, under the decisive influence of the Roman Catholic Church, any production, preservation and dissemination of both intellectual and artistic knowledge was centralised within a monastic system. The monks, who functioned equally as copyists, scholars, and authors, freely used and reproduced literary works, often without concern for attribution. Instead,

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4 Indeed, the fact that copyright did not emerge in Asia can be also explained in view of the fact that the printing press was introduced and developed in medieval Europe. The implications of the printing press on the evolution of copyright will be discussed later in the present chapter.
authorship was attributed to the monastery as a 'moral person' whose duty it was to record and
preserve the word of God. The ubiquitous monastic chronicler, as Katsh (1989) underlines, had
renounced personal property. Moreover, the monks were the only ones who had the means and the
ability to copy a manuscript. The outcome of their efforts was often a team-work and hence difficult
to be attributed to one person alone (Stewart 1989).

- Secondly, as regards the relations of production, it can be said that the corporate structure of
medieval society meant that people saw themselves primarily as members of a group than as
individuals, which, in turn, implied collective forms of creativity and consumption. Thus, it was felt
that all the existing literature was a fund of man's knowledge, rather than belonging to its individual
authors (Katsh 1989).

- Finally, as far as communication, two were the dominant modes. On the one hand, medieval Europe
was primarily an oral culture in terms of the general population. Hence, artists disseminated their
works by recitation due to the absence of techniques for mass production of works, and due to a
high percentage of illiteracy amongst the populus. On the other, the scribal culture, initiated by
literate monks, worked against the concept of intellectual property rights because this mode of
communication lacked the power to preserve individual contributions to art and literature (Eisenstein
1979).

All the aforementioned constituents were anything but conducive for copyright to be properly
conceived. However, despite the absence of such a notion and its implications, the monks were often
keenly aware of their moral interests as authors; and the disapproval for a foreign work's
appropriation, as in ancient Greece and Rome, was still preserved. Perhaps the most characteristic
and best known example of that is the recorded case of a monk named Columba who visited his old
blind teacher Abbot Finnian with the intention of secretly copying the latter's work 'The Book of
Psalms'. It is said that Finnian, after discovering the action of his disciple, accused him of theft for
copying his original work without his permission. When Columba refused to return the copy, the
case was referred to King Dermott who ruled in favour of Finnian as follows: to every cow her calf, and consequently to every book its copy (Kotsiris 1986; Stewart 1989). As Ploman & Clark Hamilton (1980) posit, the above decision appears to be the first instance in early European history of the adjudication of a copyright issue.

With the advent of Central Middle Ages (1000-1400 AD), the spread of literary activities in society accelerates. Not only monasteries but also laymen and secular establishments undertook the reproduction of books. In the twelfth and thirteenth centuries, the Church had been gradually losing its monopoly over knowledge and the dissemination of information; and eventually it would succumb to the emergence of a trade in manuscripts. Along with it, two new classes emerged: those who dealt with existing manuscripts (‘libraires’), and the ‘stationers’ who, for a fee, organised the reproduction of texts and their distribution among the public paving the way for the modern publishers (Kotsiris 1986; Bettig 1992).

According to Ploman & Clark Hamilton (1980), the scene is set for the arrival of printing. An invention that was meant to change not only the way of communication, of the dissemination of information, and the distribution of knowledge in society, but also the whole nature of copyright.

2.2 Evolution and Early Development

“[Copyright] evolved in response to specific changes in a specific environment.”

(Ploman & Clark Hamilton 1980, p 1)

These changes were undoubtedly the advent of the printing press and its aftermath, namely the mechanisation of the reproduction process. The invention of typography by Johan Gutenberg in 1436 led to the introduction of printing in Europe in the late fifteenth and early sixteenth centuries.

The Gutenbergian achievement signalled a radical change not only for copyright but also for all mankind. Prior to it, it was extremely difficult to duplicate a work. A manuscript could only be rewritten by hand, thus limiting the possibility of a large number of copies. With this development,
the multiplication of the same manuscript saw a manifold increase, its production became faster and its dissemination easier and, most importantly, cheaper. That resulted in a new market for books for a public who previously had no access to manuscripts available in the past only to the most privileged members of society. With time, the demand for literary and artistic works increased, and the ‘stationers’ prospered. However, printing and publishing required considerable investment: acquisition of works from authors (or republication of classics which were edited and/or translated anew) and presses and paper were expensive. Also, processes were slow and therefore labour costs were substantial. The initial capital investment and the expenditure in wages and materials could be recouped only over a long period particularly as prices were not very high. Here was, for the first time, the classic situation of the entrepreneur who made an investment and wanted to recover it and make a profit. That classic situation, many believe, provided the starting point for the evolution of copyright as an entrepreneurial right (Black 1989).

Soon, however, the printers and publishers were faced with competition, often unfair, from speculators who copied their editions and printed works already published. As a result, they were quick to form themselves into guilds and turned to the authorities to redress their complaints.

In this situation, the following pattern emerged. National authorities around Europe granted to printers and publishers exclusive privileges which comprised a ban on anyone other than the beneficiary to print or sell the privileged work(s). Thus, Bettig (1992) argues, copyright first appeared as an economic privilege for publishers in the form of monopolies. However, in every country where the privileges were introduced, while the aim was to legitimise publishing, this had little to do with benefiting the publisher and even less the author, who was seldom mentioned (Gurnsey 1995). Instead, the authorities’ interest was to control the book trade, which represented a new method or mode of communication, and to encourage a new industry (Bettig 1992; Davies 1994). Moreover, as Stewart postulates (1989, p 15):

“It did not take the authorities long to realise that by restricting the rights to privileges, which were granted to a small number of people, they could control all publications quite easily...
and this gave the Governments a easy and effective weapon allowing them to exercise a very tight censorship over this new medium.”

Indeed, as Feather (1988) underlines, it was not until the early eighteenth century that the link between copyright and censorship was finally broken.

The very first ever privileges were granted in Venice. In 1469, when Johann of Speyer brought the printing press in the city, the authorities granted him an exclusive privilege for the use of the printing press for a five-year term. Later, the scope of privileges extended to include the exclusive edition of individual titles or classes of works. Such a privilege was granted by the Venetian Senate to Aldus Manutius in 1495. Similar laws regulating the printing and publishing trade became common in many other European countries by the beginning of the sixteenth century. For example, the first privileges were granted in Germany in 1501, in Britain in 1503-1504, and in France in 1507 and 1508. Such grants of exclusivity by the state were the forerunner and the foundation of the later system of copyright (Bettig 1992). Indeed, as Stewart (1989) stresses, modern copyright systems derive three basic features from the privileges: an exclusive right of reproduction and distribution was granted; that right had a limited duration; and, fines, seizure, confiscation of unauthorised copies, and sometimes damages, were introduced as remedies of infringement of that right. In some cases, remedies were more drastic. For example, under the French decree Ordonnance de Moulins of 1566, the penalty for infringement was death by hanging or strangulation.

Many analysts, however, believe that the true precursor of modern copyright laws came in 1557, when Mary I of Tudors awarded a Royal Charter to the London-based Stationers’ Company. This Charter, which more than any other was to link copyright and censorship (Gurney 1995), required the Stationer’s Company to set up a registration system in which member printers and publishers listed the titles of their publications and thereby procured exclusive rights to print and copy them. Stationers were also allowed to sell the books to another member, or inherit them as part of an estate.
Undoubtedly, the system of privileges bore characteristics similar to the present-day copyright laws. However, there are those who express a dissenting view and see that connection through a different perspective. As Rose (1993) argues, this practice might be thought to imply a form a copyright, and yet the bookowners' property was not a right in the text as such but in the book as a physical object. Rose adds that copyright did not protect a work itself but rather a stationer's right to publish or copy a work. And, as Rose concludes, the regime in which stationer's copyright was born was what we might call a regime of regulation rather than a regime of property. Moreover, as Davies (1994) stresses, the role and status of the author was minimal due to two main reasons. First, in the early days of printing, most books published were old or classical texts. And second, the author still looked to patronage for his chief source of income; because, while he owned the manuscript, he was dependent on the printers and publishers if he wished to communicate his work to the public. Furthermore, as Bettig (1992) argues using as an example the Royal Charter of 1557, while the law protected the economic interests of Company members, nothing in it referred to the protection of author's rights in their creative works. Since only licensed printers and publishers could legally make copies, authors were in a weak position to bargain when seeking publication of their works. Consequently, the generated economic rewards fell to stationers, not the authors. Finally, as Patterson (1968) adds, authors, not being members of the Stationers' Company, were not eligible to hold copyright, so that the monopoly of the stationers meant that their copyright was, in practice and in theory, a right of the publisher only.

Notwithstanding, in the (late) sixteenth and seventeenth centuries, a general feeling for the author's personal interests had developed around Europe, mainly resulting from the influence of the Renaissance which gave impetus to the projection of personality and individualism. For example, from 1642 onwards in England, the publisher had to have the author's consent to print and to use his name (Davies 1994). However, as Rose (1993) underlines, based more on ideas of honour and reputation than on property in the economic sense, this notion of authors' interests had emerged in
the context of a traditional patronage society. Indeed, patronage remained the major form for support for authors until roughly the mid-eighteenth century (Bettig 1992). The transition from the stationer’s right to copy to author’s copyright in Western Europe was a long and slow process. The influence of the Enlightenment and the gradual end of absolute monarchy led inexorably to the end of privileges. As Kerever reports:⁷

“All the States of Western Europe experienced a changeover in that the effect of the law was to replace the sovereign by the author himself as the source of the right to prohibit unlawful copies, whereby the right was transferred to the publisher under a contract. This changeover was far from simultaneous.”

The English Statute of Anne came first in 1709-1710. Many consider this Statute the foundation upon which the modern concept of copyright in the Western World was built. Indeed, it contained some major innovations. First, it was the first to be adopted by Parliament as opposed to royal decree, and the first to be unconnected with censorship (Davies 1994). As Rose (1993) adds, the passage of the Statute marked the divorce of copyright from censorship and the establishment of copyright under the rubric of property rather than regulation. Second, it introduced the first monetary fines for infringement, those being one penny per page, half to go to the right’s owner and half to the Crown. Given the period, these fines were harsh and, allowing for adjustments for time and earnings, potentially far harsher than today. It also allowed for the forfeiture and destruction of offending material, something which has been consolidated in subsequent legislation and is now a standard part of most copyright laws (Gurnsey 1995). Third, and most importantly, it laid down the first term of copyright, fourteen years from the date of publication, plus a further fourteen if the author was still alive when this expired. Also, Rose (1993) adds, authors were legally recognised as possible proprietors of their works (previously only members of the Stationers’ Company could hold copyright). Thus, Davies (1994) concludes, the statutory copyright was not to be limited to the

members of the guild, and it was not to exist in perpetuity (the Royal Charter of 1557 empowered the members of the guild to claim copyright in perpetuity). Finally, it can be argued that, by abolishing the perpetual monopoly of the Stationers, the Statute struck a balance between the demands of the publishers and what was considered as the interest of the public at large to have access to copyrighted works.

However, much as the Statute of Anne is considered the first ever copyright law, it was not really concerned with authors but with securing the rights of the publishers (Gurnsey 1995). As Feather (1988) notes, nowhere in the Statute is there any attempt to define 'literary property' or the 'rights' which it protected. The courts were gradually coming round to view that these rights originated with the author when he wrote the book, and that he then sold them to a publisher to whom they were, consequently, transferred intact. 'Literary property' was what a publisher obtained from an author; it was a publisher's right not an author's right. As Rose (1993) concludes, authors' primary economic relations were still typically with patrons. In fact, it was not until 1754 that Samuel Johnson's letter (a document often referred to as the 'Magna Carta' of the modern author) rejecting Lord Chesterfield's belated gesture of patronage in connection with the Dictionary signalled that circumstances were changing and that professional authorship was becoming both economically feasible and socially acceptable. And, it was not until 1774 that, in a legal case in the House of Lords (Donaldson vs Becket), the judges ruled in favour of author's rights. This was confirmed by the 1814 Copyright Act which set the copyright term at the author's lifetime, thus confirming the author of a work as the main focus for copyright (Gurnsey 1995). Finally, the 1842 Copyright Act was even more crucial for the idea of copyright as an author's right in that it

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6 It should be noted that there is only case, the only known case in fact, where copyright is nowadays still statutorily exempted from limited duration. In the UK, the 1988 Copyright Act has granted a perpetual right to royalties in favour of the Great Ormond Street Hospital for Sick Children in respect of the exploitation of Sir James Matthew Barrie's play 'Peter Pan', which the playwright has bequeathed to the hospital.

7 In fact, this case is central to the development of copyright law, for it established that, after a period of time, the rights to a book, created by the author, would pass into what was later to be known as 'public domain' (Feather 1988).
established the principle of post mortem protection (author’s lifetime plus 42 years after his death) (Feather 1988).

As it has been previously argued, the recognition of author’s rights was far from simultaneous in the Western world. The transition from privileges to copyright lasted for over a century after the Statute of Anne was passed. The following examples are indicative of that slow process (‘ABC of Copyright’ 1981; Davies 1994). Denmark and Norway recognised perpetual property rights to authors and their successors between 1741 and 1814. In Spain, a law legalised copyright in 1762 while stipulating that the privilege to print a book would be granted to the one who is the author. The copyright clause of the US Constitution, framed in 1787, prevented the future printing and publication of books and writings without the consent of the author. It also vested the Congress with the power to promote the progress of useful arts by limiting the exclusive right of authors on their writings. The first US Copyright Act was introduced in 1790. In France, the revolutionary decrees of 1791 and 1793 secured the performing right and consolidated the author’s exclusive right of reproduction respectively. In Italy, copyright replaced the privileges in the various Italian States early in the nineteenth century and a law on copyright was adopted in 1865 following the unification of the country. Finally, in Prussia, authors were not to obtain rights of their own until 1837.

Through the eighteenth and early nineteenth centuries, however, the increasing recognition of copyright was not the only development. Growing literacy, industrialisation of publishing, and the arrival of cross-border trade brought about an increasing demand for books and other publications, a demand which could only be met in part by legitimate publishers. All this had also an impact on authors. Especially those whose countries had passed copyright laws were becoming increasingly aware that their works were reproduced and performed freely in countries who had not introduced such legislation.
Although no one can really assess the full damage either to authors or publishers because of insufficient data from that period, it can be said that books and sheet music were the popular targets and thus suffered most from misuse, or even outright piracy. It can also be argued that English and French nationals and businesses were the worst hit not only due to their countries’ colonialism and the popularity of their respective languages, but also due to the fact that some of their neighbouring countries lacked the regime and/or the will to protect foreign copyrighted material.

On the one hand, England experienced the piratical predisposition of its Irish and Scottish neighbours, as Feather (1988) reports. In fact, it is said that the real problem was the import of Irish reprints into England rather than domestic piracy. The Irish reprints were indeed a problem, especially after an Act of 1739 which forbade the import of English-language books into England. The problem was further exacerbated by developments in the book trade in Scotland. Throughout the eighteenth century, the London book trade had difficulty in supplying the growing market of booksellers in the north of the country, and the Scots (and the Irish) stepped in to fill the ‘gap’. As Gumsey (1995) reports, this course of action constituted probably the first instance of a systematic and sophisticated piracy, an approach in which pirates sought to secure both the manufacture and distribution of their products.

While English publishers were a target in Ireland and Scotland, English authors suffered mainly from the USA attitude. The Copyright Act of 1790, while it provided for protection of the American works on a national level, it specifically allowed the piracy of foreign published works. That spirit of the law gave to the United States the characterisation of one of the world’s major pirates (Altbach 1986). It is worth stating the example of the prominent English author, Charles Dickens, that Pitman (1982) recalls. Having no protection there, he visited the USA and by giving readings in big cities was able to recoup through admission fees some of his lost royalty income.

On the other hand, France, as Kotsiris (1986) reports, is the country that had been culturally plundered by Swiss, German, and especially, by Dutch and Belgian pirates. In fact, Brussels was the
centre of literary piracy for French books. After having failed to reach an agreement, on the basis of reciprocal treatment, with the two latter states, France took a very liberal and pioneering initiative. With a bold legislative step, in 1852, copyright protection was extended to all works, regardless of the place of publication or the nationality of the author. By the same Decree, piracy of works published in other countries is also considered illegal within its boundaries. Any sale, exportation or transportation of pirated copies was a criminal activity and thus was prohibited (Kotsiris 1986; Ploman & Clark Hamilton 1980). With its action, France ruled in favour of advancing the rights of authors without any condition of reciprocity, contrary to the stance of most nations of the day who insisted on protection for their works abroad as a prerequisite to the protection of foreign works.

As Schrader (1971) reports, representative of that latter view was Denmark, who was the first country to extend the possibility of protection to foreign works first published in other states upon the condition of mutual treatment. Its 1828 Decree introduced into international copyright the principle of reciprocity. Even though the French regulatory initiative by far outweighed the Danish one, the idea of mutuality was difficult to abandon. Besides, as it is argued by Kent & Lancour (1972), each national law is concerned mainly about its authors and usually discriminates against foreigners. Schrader (1971) recalls that the first treaties between countries were concluded by Prussia and other States of the German Confederation from 1827 to 1829; and England, in 1837, offered protection within its boundaries to authors of books published initially abroad upon the condition of reciprocity.

The efforts of countries to confront foreign piracy through regional treaties led to a significant development, namely recognition that copyright was no longer a purely national issue. However, the system of bilateral or multilateral agreements sooner rather than later appeared increasingly inadequate (Ploman & Clark Hamilton 1980). According to Schrader (1971), this is due to several factors: first, such treaties were of a short life; second, they could be and indeed were easily denounced; third, they were connected with agreements of a commercial nature and this
contributed to an uncertain duration; and finally, their increased number was conducive to confusion concerning the status of a given work.

Hence, the need for international protection was recognised; and, governments were quick to realise that the establishment of a regulatory framework all around the world was necessary in order to create a common legal basis according to which the exploitation of works and the payment of rights could come into effect (Kent & Lancour 1972). International instruments that would oblige contracting states to protect foreign works on a universal scale had become an imperative. And that imperative signalled a real turning point in the history of copyright; it switched its focus beyond national boundaries to the international arena where it remains today. That transition started with the first ever international copyright Convention, namely the Berne Convention 'For the Protection of Literary and Artistic Works' in late 19th century (1886) and was completed in the mid-1950s with the Universal Copyright Convention (UCC).

2.3 Concluding Remarks

The aim of the foregoing historical retrospection has been to retrace the steps of the development of copyright through the centuries, a development that spans over two-thousand years. From the first indications, in some ancient civilisations, of the intellectual creator's awareness to protect his work, to the advent of the printing press and the first germs of copyright in the system of privileges in the Middle Ages. And from the first ever copyright statute in the eighteenth century, to the first international copyright Conventions of the nineteenth and twentieth centuries.

In considering the changing historical context of copyright, Barbara Ringer's notion of the three eras of authorship is perhaps valuable, as Davies (1984) suggests. These eras are the 'Age of the Patronage' which existed prior to the Statute of Anne, the 'Age of the Triangle' (author-publisher-reader) which succeeded that Statute, and the 'Age of the Media' which has existed since about 1950.
After World War II, and immediately prior to the ‘Age of the Media’, the international community was pursuing two objectives with respect to copyright, that have sometimes been thought to be in conflict, as Schrader (1971) postulates. The first objective was the protection of cultures in all their manifestations. The goal was to eliminate barriers that impeded international cultural exchange through the progressive expansion of legal protection for cultural products. The second objective was the desire to assure the broadest possible dissemination of information and culture in general. At the time of the formation of the Universal Copyright Convention (1952), the first objective predominated. However, since that time, and as the ‘Age of the Media’ was dawning, interest in copyright protection has apparently receded, and the second objective has prevailed.\(^\text{1}\) It is this factor that has become very important for copyright, both at the national and the international stage.

For the ‘Age of the Media’ has brought about two distinct, but equally radical, challenges to the copyright system as a whole. The first is reflected on the stance of the so-called ‘developing’ countries, countries that have largely felt hampered by international copyright, and have seriously questioned it under a social, political, economic and philosophical prism. The second challenge resulted from technical developments that promised to facilitate both a broad dissemination of information and culture, and an easy access to copyrighted material by copyright users and the public at large.

Consequently, the aim of the following two chapters (Chapters 3 and 4) is to examine the strains that these challenges have imposed on copyright, and the various consequences they bore for the system itself.

\(^{1}\) That shift is particularly reflected on the debate that surrounded the ‘Protocol Regarding Developing Countries’ which was introduced during the simultaneous revision of the Berne Convention and the UCC in 1971 (Chapter 3, section 3.2, of the present thesis).
CHAPTER 3

CHALLENGES TO COPYRIGHT AT THE INTERNATIONAL STAGE: THE CASE OF DEVELOPING COUNTRIES

3.1 Different Approaches/Systems

Since the end of the 19th century, the concept of copyright not only did develop rapidly but also acquired new aspects. The sweeping changes brought about by the industrial revolution placed the protection of international copyright, as an intellectual property right, under new, but also distinct, social, political, economic and philosophical perspectives.

Concurrent with these stances, the international stage is occupied by the following players (Phillips & Firth 1995, p 379), a brief description of which follows:

- Developed capitalist economies (mainly Western European countries, the USA and Japan), which both produce and consume large quantities of intellectual property. These countries perceive their interest as being served by the greatest degree of protection and enforcement of copyright, of which they create most of the world’s current stock.

- The socialist economies around the world, which may be industrially advanced or not, and which are torn between their desire to create products and stimulate copyright production and their practice of supporting state enterprise and public trusteeship of the means of such production. These countries are generally neither conspicuous producers nor consumers of intellectual property, at least in comparison with the developed capitalist economies.

- Developing countries (DCs), which include a large body of countries known as ‘Least Developed Countries’ (LDCs), which consume far more intellectual property than they can produce or pay for, and which they can obtain largely through foreign aid and co-operation, charity or piracy. This group, as Tocups (1982, p 408) succinctly underlines, represents three-quarters of the world’s
population and only one fifth of its income, while the developed countries have a quarter of the world’s population and fourth-fifths of its income.

- The Islamic world, which stretch from Africa to the Middle East and as far as Asia/Southeast Asia and therefore includes most of the developing and less developed countries, although it qualifies as a flagrant consumer of copyright, has had, despite some exceptions, little interest in intellectual property. Islamic cultures, as Steidlméier (1993, p 159) notes, articulate a coherent, sophisticated and distinctly non-western view of property rights.

The above categorisation has two main corollaries. First, it divides the world of copyright into four socio-legal approaches/regimes: in countries with a free market economy, in countries with a socialist economy, in developing countries, and countries with an Islamic economic system.1 Second, it creates significant challenges to the ideology of international copyright.

First, a brief overview of the four approaches/regimes reveals the following characteristics.

(a) Countries pledging the system of a free market economy have certain basic principles in common, which Ploman & Clark Hamilton (1980) account as follows: the relationship between the intellectual creator and the society is primarily characterised by economic constituents; the most important trait of copyright is that it caters for the concept of ‘property’, attributing to the creator’s rights an exclusive character; and subsequently, the creator has a (limited) monopoly over his work that allows him to decide its use and exploitation. The principle of monopoly led some to accuse copyright of having close links with capitalism. In that respect, it constitutes the dividing ground between the countries with a system of free market economy on the one hand, and the socialist and Islamic countries on the other [sections (b) and (c) below]. In addition, countries that subscribe to free market economic principles at home want to impose a highly regulated market for intellectual goods on the rest of the world, one in which intellectual creators may reap the fruits of their labour.

1 The Islamic countries can alternatively fall under the latter two approaches/regimes, depending on circumstances that will be explained in the following pages.
That brings this group of countries in contrast with the developing countries [section (d) below] that resist free competition at home and envision a totally unregulated world market for intellectual goods, one in which competition is the lifeblood of commerce. Finally, many developing countries do not recognise the monopoly claims of copyright asserted by copyright business as legitimate (Steidlmeyer 1993, p 157).

(b) In the socialist or societal system, the notion of copyright as property, which is the key feature in the free market economies, is absent (Altbach 1986). Stewart (1981) levels considerable criticism at this system. Firstly, he characterises it as a challenge to international copyright. Secondly, he anathematises its totalitarian philosophy as it may negate the whole notion of copyright on the basis that all intellectual creators should find reward for their work in dedicating it to the community represented by the State per se. Stewart (op. cit.) steps up his polemic by accusing countries with such a philosophy of seeing individual rights as unnecessary and harmful. Although the socialist system recognises the moral rights of the intellectual creator, his economic rights are overruled. His relationship with society, in contrario to systems of a free market economy which is regulated by commercial factors, is ruled "by the cultural policies pursued by a socialist society" (Ploman & Clark Hamilton 1980, p 28). According to Stewart (1989), the societal theory, despite stressing the social importance of the creator, claims that he can only function if he represents and expresses the ideas of a socialist society. Furthermore, community interests are exerted against individual authors' will if a work is regarded as a national treasure. The principle of monopoly that enables the intellectual creator to disseminate his work is non-existent in the socialist system. Ipso facto, Ploman & Clark Hamilton (1980) clearly state that, the right of use and exploitation of intellectual works is allowed only within the network of state-owned or public agencies and corporations. For instance, authors and artists could not bargain for royalties or sell their work to foreign publishers except through a state trading enterprise. Instead, royalties are paid in accordance with a state tariff based on the type and size of the edition. Finally, Soviet codifiers, for instance, have created a status in which wages
are paid only for production, a system standing midway between western concepts and those of the socialist ideal. This status was often referred to as 'a law of personal rather than property relationships'.

The main principles of the Islamic economic system must be seen through its stance towards property rights, and thus towards copyright as one such right. The following review, provided by Behdad (1989), serves to underline why the case of the Islamic world is a *sui generis* one.

An Islamic economic system is regarded by its proponents as a just and humane social order, neither capitalist nor socialist, which is in accordance with the teachings of Islam. The most significant controversy amongst Islamic economists is about the limits of private property rights. Islamic movements aim at establishing a 'third path' by objecting to the inequalities of the capitalist systems while keeping clear distance from the socialist regimes. The definition of private property rights and property relations has become the key element in differentiating this 'third path'. However, as it will be seen below, Islamic economics fails to establish the characteristic elements of distinction between an Islamic economy and capitalism; and, by failing to provide a paradigm for the study of the social relations of production and control, does not distinguish itself from socialism. In fact, Islam is open to a wide range of interpretations on property rights, and thus the determination of the extent of such rights is the *problematique* of this system. The root of the dilemma is the widely shared belief that the ownership of property belongs to God. Thus, a state representing the will of God, namely an Islamic state, may impose limits on individual property rights. The Koran is explicitly clear about God's ownership; yet, at the same time, the right of the individual to hold property is accepted and respected. That dichotomy becomes a highly critical political issue where, as in the past four decades, a growing segment of the political movements in Muslim countries strive to establish an Islamic economic system and where the interpretation of the Koran varies significantly. Three general approaches may be identified on the issue of private property rights. Behdad refers to them as 'laissez faire', 'populist', and 'populist-state control'. First, the proponents of the 'laissez faire'
approach claim that there is nothing in the classical works of Islamic jurisdiction to countenance the limitations on property rights; and thus, while noting the obvious difference between Islam and the socialist system, see little difference between Islam and capitalism. Second, the 'populist' approach simply sees property rights belonging to the whole society, and may even imply imposition by the state of certain ceilings on large scale ownership. This approach strongly connotes a model of state ownership. Third, the 'populist-state control' approach clearly puts the state in a central position. Private property is subject to a pecuniary principle and as such it is neither natural nor irrevocable. An Islamic ruler may limit the use of property or confiscate it if the monetary principle is violated. This approach is based on the responsibility of the state to maintain a social balance by state intervention which resembles the socialist system. Finally, it can be said that certain principles of the last two approaches resemble certain traits of the socialist system but, nonetheless, do not coincide with it.

To conclude the review of the Islamic economic system, the following remarks must be made. Irrespective of the above three approaches, the strong Islamic notion of the ultimate ownership by God sets the general constraints on private property rights. These constraints are further specified by the inherent in the Koran prohibition of hoarding (cornering the market), riba (excessive gain), and monopoly of any kind. Consequently, if copyright is perceived to entail one or all of the above restrictions, is clearly alien and unacceptable in a ‘true’ Islamic economy and culture. Moreover, the fact that two of the aforementioned three approaches contain communist principles, coupled with the fact that many Muslim political regimes are totalitarian (theocratic and/or monarchic), may explain the reason why the Islamic economic system is often associated with the socialist one as previously described. In addition, many countries of the Islamic world are either developing or least developed, and thus they fall, more often than not, under the general heading of ‘developing countries’.
Finally, a very important point should be stressed. From the foregoing analysis, the hypothesis that emerges suggests that there are indeed close philosophical, socio-economic, and political links between developing, socialist and most Muslim countries. That hypothesis can be summarised as follows. In both the socialist and Islamic economic systems, the state plays a decisive role in the production and distribution of goods and services, the growth of individual capital is limited, and, where production conditions require the establishment of large enterprises, such enterprises must be established and controlled by the state. That strongly resembles the very nature of development process of Third World countries which requires governments to intervene more widely and bear a greater number of responsibilities than in developed countries with a free market economy, in order to meet the many and varied needs of their peoples. In most developing countries one will also find that the private sector initiatives are not able, for several reasons, to satisfy these needs, and that the rights of people to development takes a certain priority over private property claims. Because of this, the state takes a more active role than in the case of developed countries. From a legal point of view, the effect of this state of affairs in socialist, Muslim, and developing countries in general, tends to be an emphasis placed on the good of society as a whole and a corresponding limitation of intellectual property rights including copyright. Because, as developing countries argue, if intellectual property is a right, it is a secondary and it is one conferred by society. In this view, intellectual property claims can be subordinated to more fundamental claims of social well-being, and thus intellectual property is primarily a form of common property.

Consequently, under such a perspective, the following reference to the challenge of the developing countries can be seen to include the nations of the Islamic world as well as the socialist countries (unless a distinction is made). Also, in that light, it can be argued that the previously mentioned four players which occupy the international stage with respect to copyright are reduced into just two: developed and developing countries.
The most serious challenge that international copyright has been called to confront since the 1960s and the 1970s up to date is the approach of the developing countries. In fact, the stance of this very large group of nations created a deep, even entrenched, division in the realm of intellectual property and has had paramount consequences as far as its protection is concerned universally. Their approach moves along two main axes, basically distinct but also parallel and overlapping, which also constitute the two main aspects of the debate involving copyright per se: the economic and the philosophical. Both aspects have contributed to the materialisation of the challenge that meant to put the international copyright system at stake. However, because the latter is by nature complicated and rather abstract, it is much more difficult to grasp than the former. The assessment that the economic aspect is quite straightforward and more tangible along with the fact that copyright, since the end of the 19th century, has been attributed the trait ‘commercial commodity’, led to the following argument. Copyright analysts contend that the challenge the developing countries represent is not founded on ideological grounds. This argument is based on the practical hypothesis that developing nations need to have access to copyright but they do not have the means to pay for it. The fact that they have to import, at a high cost, a large number of intellectual property products from countries that have already established such a production, namely the developed world, renders them mere importers and consumers of copyright and makes the indigenous intellectual production by them a fastidious and distant possibility.

In simple terms, the above theory implies that the chasm that divides international copyright between developing and developed countries' approach is of an economic substance. From the foregoing, the challenge that emerges is that should the needs of the developing world not be accommodated, they may opt out of and waver the international copyright protection system.

The term 'developing countries' is coined by UNESCO and is based on economic and technological grounds.
Consequently, the aim of the ensuing analysis will be three-fold. Firstly, to account for the attempts that have been made by the international copyright community to confront and bridge the aforementioned challenge/gap (section 3.2). Secondly, to review the philosophy that divides (capitalist) developed and developing/least developed countries by examining its economic/commercial lining (section 3.3). And thirdly, to see whether there is any prospect of change in the attitude of developing countries towards the protection of copyright, and to put forward some final thoughts as regards the very substance of the philosophy that divides international copyright (section 3.4).

3.2 ‘The Protocol Regarding Developing Countries’: Before and After

The challenge that the developing countries represent materialised in full scale during the 1960s and 1970s. Efforts to face that challenge were realised in the provinces of the Stockholm Revision Conference of the Berne Convention (1967), and the Paris Revision Conference of the Berne and the Universal Copyright Conventions (1971). These efforts resulted in the renowned ‘Protocol Regarding Developing Countries’ (hereinafter mentioned as ‘the Protocol’).

The debate that led to the Protocol is a real landmark in the history of copyright development and deserves a special mention for three main reasons: first, it highlights in the most outright way the challenge of the developing countries; second, it constitutes the first ever clashpoint of a worldwide scale between developed and developing nations over copyright; and third, its deliberations reveals clues and causal effects that resulted to the chasm that divides the world of copyright in developing and developed.

What precipitated the Protocol? What were its raisons d'être? What were the principles it set out? What were its fate and its aftermaths? In such a heated debate that surrounded the Protocol, there are unavoidably conflicting views. The following review will not endorse the one or the other; its ambition is to provide for the necessary conclusions through an balanced approach of
these opposite opinions. Finally, a retrospective look through this debate's stages will be undertaken as an attempt to shed light on the crux of the division between developed and developing countries.

(a) Pre-Stockholm era

The conditions that paved the way for the advent of the 'Protocol' were not directly related to copyright as such. In fact, it was the universal geopolitical realignments caused by the phenomenon of decolonisation around the 1960s that created the initial presuppositions for that milestone. For, the vast majority of countries that fall under the label 'developing' in today's terms, had been until the late 1950s colonies of Western European empires that were the first to establish copyright legislation in the 18th century (i.e. France and England). As a result, the developing nations did not have the chance to introduce indigenous copyright laws as their colonial powers imposed on them their own legal approach to the issue (McFarlane 1982). During the zenith of colonialism, the first international copyright agreement came into force, namely the Berne Convention in 1886. The colonial powers adhered to it and their accession included all the countries of their empire, too.

Tocups (1982, pp 406-408) provides a very comprehensive account of the sequels and the significance of this action. The developing countries were forced to inherit a membership of a Convention in whose drafting they had almost no participation and did not adhere to it at their own discretion as they were not responsible for their foreign relations. In fact, as Professor J.H. Reichman (1989) notes, some developing nations felt that they were not free to reject conventions they saw as unequal when seeking to secure recognition as independent states. As a corollary, some of them became unwillingly members of the international treaties as a condition of their emancipation from colonial status ('International Symposium on Trade-Related Aspects of Intellectual Property - Part II', p 863).
Following the decolonisation, the newly independent states realised that they did not share with their former rulers a common belief in the principles of copyright set out by the Berne Convention and started to see their membership uncertain. The developing nations, having been entirely left out of the process towards an international copyright framework, proved to be inexperienced and economically as well as culturally dependent upon the export of copyright from the developed countries. It also became evident, as Whale (1971) points out, that the newly independent states held many misconceptions about the importance of the protection of intellectual works that the Berne Union pledged. This comes to no surprise, as Whale (1971) underlines. For no effort had been made by the colonial powers to explain the role that an efficient copyright legislation can play in these countries’ development. McFarlane (1982) agrees with that view by adding that when the colonial powers left, very little was done to initiate the newly independent nations into the benefits which could emanate from the international system of copyright.

As a result, the developing nations discovered three things: first, that their interests in and their needs from copyright were different than their ex-rulers’ (Tocups 1982); second, that they were reluctant to be bound by laws created for them rather than enacted by them (McFarlane 1982); and third, that the protection of copyright was in itself a form of neo-colonialism (Feather 1993). These three factors bore some very substantial similarities: they represented the driving rationales of the developing countries’ policy towards copyright right after their independence; they constituted the theatres of confrontation between the less developed and the more advanced countries; they stood for the three grounds on which the developing countries were based to exert pressure upon both the developed countries and the international copyright system as a whole; and finally, they had the inherent potential to provide for a compromise between the opposing sides so that the imminent crisis in international copyright could be averted.
Soon, it became clear that such a compromise was to depend on whether, and also the way in which, the developed countries would respond to the needs the developing nations were claiming to have.

Did, indeed, the developing nations have special needs? What were these needs? Olian (1974, p 88) clearly states that "[o]f the many problems facing developing countries, none is more urgent than the need for wider dissemination of knowledge, for ultimately this will act to further the educational, cultural and technical development of their people". Indeed, as a study undertaken by UNESCO (‘ABC of Copyright’ 1981) stresses, in the 1960s these newly independent states, under great pressure to meet the educational thirst of their people, needed access to university textbooks and materials in their local languages that were not available in their own markets. This lack forced them to turn to more advanced countries for a transfer of knowledge, as Olian (1974) succinctly underlines, and rendered them mere importers and consumers of intellectual works. However, they soon realised that they were facing a serious impediment in their pursuit of cognition: financial difficulties that stood in their way in obtaining rights to translate and reproduce the so much desired educational materials (‘ABC of Copyright’ 1981).

It can be said that urgent educational needs combined with limited economic resources is a coin with two sides. Its interpretation varies according to the angle of the approach. From the point of view of the developing countries, these two factors hinder their access to translation and reproduction of educational copyrighted works. From where the developed countries stand, they argue that the two constituents prevent the less developed nations from according full protection to the copyright materials the latter had been importing and consuming.

At this point, Tocups (1982, p 410) focuses on the gist of that dual interpretation through an economic prism. He categorically notes that “[t]he economic aspects of copyright protection are at the heart of the problem facing developing countries”. McFarlane (1982) elaborates more on this argument. In his view, the economic factor holds a protagonistic role in the debate between
developing and developed countries by being mirrored in the trade balance of payment between the
two sides. Analytically, the countries-exporters of copyrighted material enjoy extremely favourable
trade balances; in contrario, the states-importers inevitably are in a deficit so far as their balance of
payment is concerned. Additionally, as Barker (1970) more simply states, what the developing
countries really wished was to save the foreign exchange they had to spend on importing copyrighted
works and in paying the demanded royalties of the copyright proprietors in developed nations.

Whatever the nature of the developing countries' grievance might have been, that group of
nations believed that their needs and interests would be better served and met with the adoption of
some special provisions relaxing their access to copyrighted works for the purposes of teaching,
study and research, as Ploman & Clark Hamilton (1980) summarise. One of their most characteristic
demands, for instance, was the abolition of the 'safeguard clause' that did not allow them to leave
the high level of protection of the Berne Convention (50 years after the death of the author) for the
lower one of the Universal Copyright Convention (25 years post mortem auctoris).3

As it was mentioned earlier, the developing countries, soon after they gained their
independence, were not keen to be bound by Conventions which had been created without their
participation. Therefore, they used that reluctance to step up the pressure for the bannning of the
'safeguard clause' by threatening, at times, to denounce both Conventions (Schrader 1971).
Something like that could end up in an unbridled piracy on their part, and could not only harm the
economic interests of the developed countries, but also jeopardise the existence of the entire
international copyright system.

It is widely accepted that the continuation of copyright is secured by striking a balance
between the needs of the copyright users and the interests of the copyright owners. If this argument
is transferred in the international arena, the compromise between the demands of the developing

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3 The famous 'safeguard clause' was annexed in a form of a Declaration to the Article XVII of the Universal
Copyright Convention (1952). It was intended to ensure the relation of the UCC with the Berne Convention in the way
that works stemming from countries which withdraw from the latter would not be protected under the former.
countries (copyright users in a universal scale) and the claims of the developed ones (copyright owners) becomes a pressing need. The importance of such a compromise is accurately encapsulated in the following phrase (Olian 1974, p 81):

"Of the many problems which have confronted the development of international copyright law in recent years, none has aroused so much concern as that of reconciling the needs of developing and advanced countries."

As a result of the mounting pressure by the developing countries, an international meeting of copyright experts was held in Brazzaville (August 1963). During the deliberations of that conference, where African and Asian nations joined their dissenting voices, their representatives articulated, for the first time ever, their claims so formally and universally. Those demands are well incorporated in the Preamble to the recommendations adopted by that Conference (Olian 1974, p 95):

"International copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works; these conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African Continent." 4

Consequently, as it is mentioned in the UNESCO's study 'ABC of Copyright' (1981), the delegates of the developing nations argued for a revision of both international copyright Conventions aiming at inducing and obliging authors to release their rights for educational purposes subject to payment of reasonable fees.

The Brazzaville Conference not only was the first meeting of its kind, but also it can be characterised as the forerunner of the Stockholm Conference, four years later, where the 'Protocol Regarding Developing Countries' was adopted. For it provided the incentive for an array of fora, meetings, recommendations and suggestions which, being directly linked to the specific needs of developing countries as far as copyright, rendered the 'Protocol' seem almost like a logical sequel. A summary of the above activities that precipitated it is provided by Tocups (1982, pp 411-413):

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4 The text of the Preamble is referring to 'the African Continent' as the Brazzaville Conference was held in Africa under an initiative of African countries. However, it can be said that the 'specific needs' the Preamble calls for are a common denominator shared by developing countries all around the globe and virtually apply to all of them.
- In December 1963, the governing bodies of the Berne Union and of the UCC met in joint session and adopted a resolution for studying possibilities of revisions to the two international Conventions.
- In 1964, a study group suggested a new article relaxing copyright standards be annexed to the Berne Convention at its coming revision due to be held in Stockholm in 1967.
- In July 1965, that new article favouring developing countries was vested with formality and was submitted to a Committee of Intergovernmental Experts for consideration by representatives of developed countries.1
- Finally, an East Asian Seminar on copyright that was held in January 1967 gave developing nations a chance to organise and strengthen their position and arguments vis a vis the developed ones in preparation for the Stockholm Conference due later that year.

(b) The Stockholm Conference for the revision of the Berne Convention (1967)

The Stockholm Conference responded to the mounting, well orchestrated pressure, and the demands of the developing nations by agreeing upon the ‘Protocol Regarding Developing Countries’. That ‘Protocol’ was intended to be attached as an Annex to the text of the revised Berne Convention.2 It also comprised what, in today’s terms, would be called ‘a special treatment’ for developing countries in giving them the possibility of waiving some copyright restrictions to the principles of the Berne Convention (‘ABC of Copyright’ 1981; Kunz-Hallstein 1982).

1 It is worth mentioning that the reaction of the developed countries’ representatives to the submission of this article had been heavily criticised. They had been accused of exhibiting an apathetic resignation and futility and a notable lack of leadership and affirmative programs contrary to the developing countries’ representatives who had fought effectively and tenaciously. The above criticism was indicative of two things: first, of the determination of the developing countries to claim their demands in direct contrast to the unprepared developed ones; second, of the climate and the underlying disposition of the advanced countries which did not seem quite favourable towards the developing countries’ ‘specific needs’, right before the imminent revision of the Berne Convention in Stockholm (1967).

2 The initial proposal by the Conference Study Group was to insert the ‘Protocol’ into the Berne Convention as a new article and was based primarily on some previously mentioned recommendations made between 1964-1965 by experts, officials, and the Secretariat of the Berne Union. Later, it was decided to have the form of an Annex as it was intended to be in force only for an interim period. Hence, it would be more appropriate the ‘Protocol’ be attached to the Convention rather than being a new article included in its main body (Olian 1974).
The basic purpose of the 'Protocol' was to establish a lower level of copyright protection, within the Berne Union, for developing nations which were not capable of granting full protection, according to Berne standards, to foreign authors (Tocups 1982). As Kunz-Hallstein (1982) underlines, by enabling a developing country-member of the Berne to reduce and/or restrict national copyright protection, the 'Protocol' would give easier access to copyrighted works accruing from developed nations.

The main principle of the 'Protocol', set out in Article 1, was that any country regarded as 'developing' "in conformity with the established practice of the General Assembly of the United Nations" could avail itself of some specific reservations for an initial 10 year-period if it did not deem itself immediately in a position to provide full copyright protection due to its economic, social and cultural situation and needs (Olian 1974, p 99). Those specific reservations were basically five, and they were related to: translation rights; reproduction for educational and cultural purposes; the term of copyright; broadcasting privileges; and, use for teaching, study and research.

The 'Protocol' adopted a system of licences for translation, and for reproduction/publication that are called 'compulsory' or 'statutory'.\footnote{Any country listed in the Annex to Resolution No.1897 (XVIII) of the General Assembly of the United Nations, adopted November 13, 1963, is to be considered a 'developing country' [UN Doc. A/5515 (1964)].} However, it can be argued that the former term is more broadly accepted and widespread as it clearly denotes the obligation of copyright owners to permit usage (translation, reproduction and publication) of copyrighted works under certain presuppositions.

\footnote{That dual appellation is scholarly explained by Stewart (1989, p 84). He argues that both forms are included in the term 'non-voluntary' licensing system, and are often called 'compulsory' in a wider sense. 'Compulsory' is a licence requiring the copyright owner to grant his authorisation (for translation, reproduction, publication) without waiving his rights to negotiate the terms for his consent and with the provision that the authorities (judicial or administrative) would fix the rate of remuneration if no agreement is reached between him and the copyright user. 'Statutory' is a licence under which the copyrighted work can be used freely upon the condition that the copyright user pays a fee to the copyright owner. The difference between the two kinds of licences is the following: Under the former, the user has no right to use the copyrighted work against payment of a fixed royalty negotiated with the copyright proprietor. However, the owner and/or his representatives is bound by law to allow the use of the protected work against payment of an equitable remuneration. Under the latter, the licensee derives the right for usage of the protected work directly from the statute that also ensures the equitable remuneration.}
1. **Compulsory licences for translation** are issued under two requirements: after a waiting period of 3 years from first publication of the copyrighted work; and, when the applicant (future copyright user) has established that, either he has requested and been denied authorisation by the owner of the right to make and publish the translation, or that he had been unable to find the copyright proprietor after due diligence.

2. **Compulsory licences for reproduction/publication** were introduced to enable publishers in developing countries to obtain rights for reproducing/publishing works already translated, solely for educational and cultural purposes; and, under the condition that the protected work had not been made public in a country in its original form within 3 years from its first publication.

3. The developing countries were also accorded the right to reduce the term of copyright protection from the maximum period of 50 years (after the death of the author), set out by the Berne Convention, down to 25 years post mortem auctoris.

4. A fourth limitation that the ‘Protocol’ introduced includes the right, with special provisions, to regulate the copyright owner’s exercise of his broadcasting right and reduce its scope somewhat.

5. The most important and extremely ambivalent limitation provided by the ‘Protocol’, however, was the fifth one. It allowed for a possibility of restricting protection of all literary and artistic works, intended exclusively for use for teaching, study and research in all fields of education, provided that the owner’s compensation was assured.

However, these 5 limitations were not entirely welcomed and gathered dissenting views. The following reference to these views reflects the stance of the developed countries.

Karp (1971) refers to the principles of the ‘Protocol’ with a direct and concrete critical disposition. To him, it set out a set of exemptions that could result in downgrading the protection of international copyright by permitting the developing countries to: grant compulsory licences for translation, reproduction and publication of copyrighted works; limit the economic rights of
copyright owners for teaching and study purposes; and, encroach upon standards of protection required for member countries of the Berne Convention.

Especially as far as the fifth limitation, its ambiguity is best articulated by Olian (1974, p 100):

"The vagueness and breadth of this last provision seemingly opened a Pandora’s box of potentialities for abuse in view of the flexibility of such standards."

Ringer (1971) continues the criticism of that fifth limitation and ironically characterises it as a 'coach-and-horses' provision that anyone could drive the same through it. To her, it was unlimited as to subject matter and any use could be permitted without even the formalities of compulsory licences. McFarlane (1982) believes that the compulsory licences could severely cut back the right of translation and could substantially increase the various forms of free use for educators, broadcasters and other copyright users. Stewart (1989) levels a two-fold criticism at the compulsory (non-voluntary as he calls them) licences. Firstly, they deprive the owner of a complete control over his work, he cannot prohibit its use and he is unable to preserve the integrity of it as mass dissemination could bring alterations he becomes aware of too late. Secondly, his economic rights are at stake; compulsory licences reduce the level of remuneration as the bargaining power of the owner to negotiate due payment is weakened. Finally, as Gurnsey (1995) postulates, the idea of compulsory licensing in developing countries largely backfired because it was a good, if rather naive, one. It should, in theory, give the dual benefits of improved local access, whilst ensuring the payment of royalties. In practice, however, the idea fell quickly into disrepute, often providing little more than a charter for mass, uncontrolled copyright theft. Even in those few countries, Gurnsey concludes, where the idea was not greatly abused, it appears to have had little impact on reducing book prices or improving access to material.
(c) Post-Stockholm era

The above criticisms clearly indicate that what the 'Protocol Regarding Developing Countries' had bequeathed was a controversial and extremely uncertain legacy and had landmarked a very crucial period in the history and development of copyright. The prevailing climate of the era that succeeded the 'Protocol' was not at all favourable towards the division between developing and developed countries, even though it was intended to resolve it; but also, it was by no means amicable towards the very continuation of international copyright.

To provide for an insight of the post-Stockholm era, answers to the following questions are deemed necessary: How was the 'Protocol' perceived to be? What were the reactions and objections to it? What was its fate and its aftermath?

In the deliberations of the Stockholm Conference that resulted to the 'Protocol', as Ringer (1971) suggests, the developing countries were well organised and fiercely committed. The 'Protocol' was perceived by them to be "a necessary and legitimate means of meeting their immense and urgent needs for education materials, as well as the quid pro quo for their continued membership in the Berne Copyright Union" (Tocups 1982, p 413).

In contrario, the developed nations lacked organised leadership and concrete counterproposals, something they had been accused of in the past too, as previously mentioned. Under the pressure of the developing countries, they were forced to retreat from entrenched position to entrenched position and, at the end, the former gained nothing more than a paper victory (Ringer 1971). Indeed, the developing countries may had been granted the concessions they desired, but the 'Protocol' never came into force because of the rigid opposition it encountered from the developed countries (Kunz-Hallstein 1982). The latter made it clear that they would never ratify the 'Protocol' and its limitations. As McFarlane (1982) notes, impasse appeared inevitable and the very existence of international copyright was, for the first time in its history, seriously in danger. For, rather than
settling any differences and bridging the chasm between developed and developing nations, the 'Protocol' created instead a crisis in international copyright law.

It is worth reviewing hereinafter where the developed countries based their objections to the 'Protocol' and how the developing countries reacted to that opposition as well as the 'Protocol' itself.

Whale (1971) states that copyright owners and exporters opposed it as an unnecessary encroachment of the Berne Convention standards and principles based on two grounds: firstly, for a Convention with low-term protection already existed, namely the Universal Copyright Convention; secondly, for they deemed the sacrifice of their rights they were called to make unreasonably heavy.

Ploman & Clark Hamilton (1980) present the arguments of both sides. As far as the developed countries, the 'Protocol' was said to permit legalised piracy. To the developing ones, it bore the stamp of the advanced world since everything had been done to accommodate the changes proposed by the developed nations in order to render the 'Protocol' acceptable to them.

Schrader (1971) also caters for the two divergent stances. The developing nations felt they had been betrayed and were frustrated by a victory only on paper. They accused the developed world of placing profit above their tremendous needs for improvement in education, knowledge and standards of living. The developed nations, from their point of view, felt, quite simply, that copyright plays a minor role as far as the problems of developing countries are concerned. They argued that, even if the 'Protocol' had been implemented, the improvement would not have been what the developing world had hoped for. As Schrader (1971, p 341) succinctly notes, "[f]or them, this is an economic problem outside the realm of copyright".

Karp (1971) places his argument on a different level. He expresses, through a two-fold doubt, the negative reaction of the advanced nations, not towards the 'Protocol' itself, but towards the demands of the developing countries uttered during the deliberations of the Stockholm Conference. Firstly, he characterises the term 'developing country' in conformity with the established
practice of the United Nations, as elastic and of a formidable breadth. Under such a broad definition a vast majority of UN members could qualify as ‘developing’, entitled to compulsory privileges.

Secondly, he considers the ‘freer access’, which the developing countries desired, elusive. That group of countries had asked for the possibility of voluntary licences (instead of the non-voluntary ones the ‘Protocol’ adopted) in order to be negotiated more easily. What ultimately they had called for was the prerogative of translating, reproducing and publishing a work without the owner’s permission, or at a royalty lower than the owner demanded for a voluntary licence he would be willing to issue.

According to Olian (1974), the ‘Protocol’ was not only a practical failure as it was not ratified by the developed countries. It was also a theoretical one, from the standpoint of the developing nations, as most of its relaxations-provisions, intended for their benefit, seemed virtually useless and defective. For instance, the concession permitting them to reduce the term of protection to 25 years would only apply to a small number of intellectual works and would result in practically no saving in royalties paid to copyright exporters-countries. Moreover, the administrative formalities required for the issuance of compulsory licences for translation, reproduction and publication not only were too expensive, time consuming and frustrating; but also, would do very little to ensure that needed intellectual works would actually reach the public they meant to reach.

While the above provisions of the ‘Protocol’ might have not convinced the developing nations to be a real aid, some others represented a considerable threat to the international copyright protection system in the eyes of the advanced countries. For example, Article 1(e) of the ‘Protocol’, with its ambiguous terminology such as ‘teaching, study and research in all fields of education’, and ‘educational and cultural purposes’ as far as the right to restrict protection of all literary and artistic works, aroused fears of possible abuse. Indeed, Article 1(e) was the proviso that met the strongest

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9 Characteristic of the failure of the ‘Protocol’ is the fact that from the 26 developing countries belonging to the Berne Convention, only 1 country ratified it without reservations within the first six months of its existence (Olian 1974).
opposition on behalf of copyright owners (authors, publishers, etc.). Tocups (1982) claims that this provision does not offer any real guarantee that intellectual creators would be paid anything. Subsequently, as Barker (1970, p 2598) mentions, they "... saw no reason why their property should be taken from them to assist developing countries ...".

Schrader (1971) posits that developing countries truly are in need of economic assistance. However, intellectual creators should not be singled out as the only segment of a community to pay the whole cost of any aid, no matter how imperative that aid is. Whale & Phillips (1983) add to Schrader's rationale by arguing that it is not generally disputed that developing nations are entitled to cultural and material assistance. However, it would not be just for the accommodation of such needs to be done only at the expense of copyright owners. It would be highly unfair, as Olian (1974) suggests, for the intellectual creators to bear exclusively the brunt of economic aid. Interestingly illuminating is the following example which, incidentally, articulates the USA view. During an 'International Symposium on Trade-Related Aspects of Intellectual Property', Professor Hudec, referring to the strengthening of copyright protection by the developing countries, categorically stated (1989, p 321):

"We are telling them that they have to do this, but since the end result is for their own benefit, we should not have to pay anything for it."

The frustration and resentment of the developing countries was focused on the lack of understanding on behalf of the advanced nations and the fact that the latter had not taken into account that they themselves had been, some decades ago, under development. The developing nations expected a more sympathetic approach to their urgent needs and their disappointment is well encapsulated in the following quote (Ploman & Clark Hamilton 1980, p 61):

"To endeavour to constitute intellectual creations into a monopoly for exploitation would be unbecoming. The more civilized a nation, the less ought to be its desire to exploit another nation not so fortunately placed."
Dorothy Schrader (1971) very succinctly highlights the prevalent climate soon after the failure of the 'Protocol'. On the one hand, the developing countries were in a state of despair, betrayed even by themselves. The international atmosphere was charged with their threats to denounce the international copyright Conventions. On the other, the developed nations were in no mood of exultation, even though they did not ratify the ‘Protocol’. They feared that, unless some way out to the impasse were found, the situation might return to the chaos of the early nineteenth century when no international copyright agreement existed.

Under such a state of stress and tension, some erratic solutions had been put forward. Barbara Ringer (1971) refers, very critically indeed, to one such proposal, mainly endorsed by the USA. It was suggested that the Universal Copyright Convention be amended in such a way as to induce developing countries to withdraw from the Berne Union and adhere to it. Thus, the USA advocated the transformation of Berne into an elite club, comprised only of a small group of copyright-exporters countries. Had this myopic, even blind attitude been prevailed, the balance between the two Conventions would have been seriously disturbed, if not entirely destroyed, and the damage to the edifice of international copyright would have been irreparable.

(d) The Paris Conference for the revision of both Berne and Universal Copyright Conventions (1971)

In order to avert the imminent crisis and release the tension between developing and developed countries, it was decided the Berne Convention and the UCC be revised simultaneously in the Paris Conference. That joint revision intended to accomplish a compromise between conflicting interests and demands.

The basic purpose of both revisions is comprehensively reported by Ringer (1971) and Olian (1974). It was aiming at according parallel concessions that would meet the genuine and satisfy the practical needs of the developing countries for easy access to educational, scientific and technical intellectual works. The smouldering difficulty, however, was to avoid two pitfalls: first, not to
weaken the structure and scope of copyright protection offered by developing countries; second, not to damage or impair the rights of copyright owners.

The initial proposals, as Whale (1971) notes, were the following: in the case of Berne, to replace the 'Protocol' with an Additional Act that would allow developing nations-members of the Union to waive some limitations of the principles which bind the developed countries; as far as the UCC, to include in its provisions the rights of reproduction, broadcasting and public performance; finally, to permit developing countries to leave the Berne Union for the UCC without the sanctions of the 'safeguard clause'.

The first sign of compromise came from the developed countries. They indicated that were not generally opposed to the above proposals. Probably because, as Whale (1971, p 184) posits, they had more to fear from the presence in the Berne Union of a large number of countries not strongly wedded to the concept of copyright than from a withdrawal of some for the lower level of protection of the Universal Copyright Convention. As Whale & Phillips (1983) argue, the developed nations might have been called, once again, to make sacrifices but of a far less drastic nature than those that would have been accrued from the 'Protocol' had it been ratified.

One of the most central aims of the Paris Revision Conference was the establishment of an international mechanism for according to developing countries a greater degree of access to copyrighted works while respecting, at the same time, the copyright owners' rights (Ploman & Clark Hamilton 1980). This goal had been achieved thanks to some novelities and relaxations introduced in both Conventions. These provisions were basically six.

As far as the Berne Convention is concerned, there were two revisions. First, the Paris Act did not cover the Stockholm Act as a whole but only the 'Protocol Regarding Developing Countries'. In the Paris revision the 'Protocol' was substituted by an Appendix which formed an

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10 It should be noted that the abolition of the clause was a demand of the developing countries to be included in the provisions of the 'Protocol' but was never met.
integral part of the new Act (in the Stockholm Act it had the form of an Annex not integrated to the text of the Berne Convention). Additionally, the 'Protocol' was to become a dead letter as soon as the Paris Revision Act took effect (it came into force in 1974). Second, the Paris text drastically confined the breadth of the infamous Article 1(e) of the 'Protocol'. Whereas, as already discussed, that provision virtually allowed any encroachment of copyright owners' rights exclusively for purposes of teaching, study and research in all fields of education, the Paris Act allowed the possibility of introducing exceptions only in respect to translation and reproduction rights. Hence, it is said that the Paris Appendix catered for a satisfactory balance between the legitimate rights of developed countries and the urgent needs and demands of the developing ones.

As regards the revisions to the Universal Copyright Convention, the main novelties related to owners' rights as well as relaxations favouring developing countries that the Paris Act introduced are comprised in the revised articles Vbis, Vter and Vquater.

- First, Article Vbis embodies in the most outright way the desired balance between copyright users and copyright owners. On the one hand, it extends the copyright owners' principal rights to include the exclusive right to authorise reproduction, by any means, public performance and broadcasting. On the other hand, it allows any contracting state regarded as 'developing' in conformity with the established practice of the General Assembly of the United Nations, to avail itself of some specific exceptions to copyright protection catered for in the articles Vter and Vquater. This can be done upon notification valid for an initial period of 10 years that can be renewed, unless the state ceased to be regarded as 'developing'.

- Second, Article Vter introduced a compulsory licence system for translations that can be granted under the following four conditions: after a waiting period of 3 years from first publication; if a translation has not been published in a language of a developing country; when the applicant, following specific administrative formalities, has either requested and been denied authorisation by
the owner, or that after due diligence on his part, he was unable to find the owner of the right; and finally, only for purposes of teaching, scholarship or research.

- Third, Article Vquater imposed a compulsory licence for reproduction, which may be obtained for a publication of a particular edition only for use in connection with systematic instructional activities, and only if copies have not been disseminated in the developing country at a reasonable price within a specific period. The administrative procedures that the applicant must follow for a reproduction licence are the same with those provided for in article Vter for translation licences stated above.

- The final concession of the Paris Act Appendix to the developing countries was the abolition of the 'safeguard clause' (art.XVII of the 1952 text of the UCC). The developing nations can withdraw, without risking any sanctions, from the Berne Convention and adhere to the UCC if proper notification is given, at the time of withdrawal, that a country regards itself as 'developing'.

(c) Post-Paris era - Future

Many believe that the two international copyright Conventions, revised in Paris, have successfully overcome the crisis in copyright brought about by the Stockholm 'Protocol Regarding Developing Countries'. For they have strengthened rather than weakened international copyright and they have laid the foundations for a worldwide system of protection and the ratification of the revisions (which was due in 1974) would substantially contribute to restoring stability in copyright and would materially reinforce both the Berne and the Universal Copyright Conventions. Subsequently, copyright protection would be enhanced and developing countries would be induced to one or both Conventions.

Undoubtedly, the above developments are truly a step towards a positive direction. However, it can be counterargued that solely membership of one or both Conventions is not a panacea. For the mere reason that, as Professor Reichman (1989) stresses, “to have joined the international Unions or the UCC hardly commits a member state to respect the highest standards of protection”
However, even this reality can be questioned and opposed. How are the developing countries expected to respect the highest copyright protection standards when the latter have only lately become fashionable in certain developed and industrialised states? For instance, the United States joined the high term Berne Convention only in 1989 and China adhered only to the UCC in 1992.

What the Paris Revision Conferences really contributed to the development of international copyright was that they could serve as a forum for discussion of divergent views and as a common ground on many highly controversial issues (Olian 1974).

The crisis that threatened international copyright might have been averted, for the time being. Nevertheless, in order for this attempt to be fruitful and for the future of copyright to be secured, some things more have to be done. The special provisions of the Paris Acts favouring developing countries were the first clues of sympathy towards their special needs on behalf of the developed world. What is required from the developing nations, in exchange, is a change of attitude and a shift on their policy towards copyright. They have to realise that by gaining access to copyrighted material via unauthorised use or piracy and by offering no protection at all, they would enjoy only short-term advantages. In contrario, recognition of copyright is the most effective way of ensuring creation of intellectual works and dissemination of culture and knowledge, and thus offers long-term benefits. In addition, the developing countries ought not to rely solely on licences for translation, reproduction and publication of needed educational materials. Because this implies that they will continue to play the role of consumers of intellectual property, which is a role of profound dependence on the developed countries. Instead, they have to realise that encouragement of the growth of domestic relevant industries, by giving a motive for intellectual creation, which can be found in copyright, to national creative workers will enhance the creation and the distribution of works, save the currency...
paid to copyright exporters-countries, and finally, foster the development of the entire country and its economic progress and the formation of an indigenous and autonomous cultural life.

Whether the developing countries can realise the benefits of a strong intellectual property protection regime will depend on the philosophical, but also social and economic, prism they envisage copyright through, an review of which follows.

3.3 The Philosophy that Divides: The Myth of Weak Protection and the ‘Costs versus Benefits’ Doctrine

(a) The Myth of Weak Protection

In simple terms, there are two conceptual views of intellectual property rights. As Adeyinka (1992, p 45) briefly states, one perceives of intellectual property as public goods or free goods ('collective ownership'), and the other contends that they are primarily the private property of their creators ('private ownership'). These inherently conflicting principles are tailor-made for the division between developed and developing countries. The latter generally invoke the public goods principle to justify weak protection regimes, whereas the private property principle has inspired the stronger protection regimes of the former. As Adeyinka (op. cit., at 47-48) continues, from the perspective of the developed countries, the philosophical perception of intellectual products as public (therefore free) goods is translated into pragmatic policy by developing countries in their failure to create adequate protection for copyright. In that context, developed nations clearly perceive the economic importance of copyright and regard its protection as a fundamental right comparable to a physical property right, while developing nations view copyright protection as a fundamentally economic policy question (Gadbaw & Richards 1988, p 2). Therefore, the justification for weak protection is ultimately taken from its abstract public good context and posited behind several assertions that seek to link weak protection to national social and economic aspirations. Such arguments take several
forms, but four main substantive claims are said to run through them. These four claims can be summarised as follows:11

(1) First, it is claimed that weak protection saves the country money. For instance, the country is able to avoid paying royalties for acquiring copyright material if its domestic regime refuses to protect the supplier's rights. As a consequence, the prices for the unlawfully copied products will also be cheaper than might otherwise have been the case. Simply put, this assumption takes for granted that price is the only thing which changes between an environment of protection and one of non-protection. However, the fear of high prices arising from copyright protection is a mistaken view of how competition works, as Rapp & Rozek (1990, pp 101-102) underline.12 Because a strong copyright protection regime can foster intellectual creations that eventually will bring about greater choice for the consumer, and more competition. And dynamic competition keeps the prices down and produces a stream of new products that can compete in price and quality with existing products.

(2) Second, countries peddling the free goods viewpoint assume that weak protection promotes domestic industries. It is also assumed that since the sole beneficiaries of any national law protecting copyright are foreign suppliers, intellectual property laws prevent local industries from rising to the developed countries' standards unless they are allowed to copy ('free riding').

(3) A third claim, closely linked with the second, assumes that weak protection facilitates the acquisition of technology because it prevents foreign suppliers from exercising a monopoly on their products in their own country. It is also assumed that, since protection of copyright owned by foreign firms blocks the much needed acquisition of technology sought by the developing country, local firms and government agencies should be given the freedom to copy. However, the thought


12 Although Rapp & Rozek refer in their study to patent protection, it can be said that the same applies to copyright protection, too.
that by waiving copyright protection desired technology will enter the country is nothing but a fallacy. No country is going to obtain this technology by eliminating intellectual property protection. In fact, the non-protection option bears the cost of a widening gap between advancing international practice and local practice since it is likely to impair the nation’s ability to generate technology at home without, at the same time, acquiring more than small increments of new technology. In fact, the acquisition of technology is pragmatically aided rather than deterred by the presence of strong copyright protection. The capability of recipients is strengthened and the willingness of suppliers is encouraged. Finally, more can happen as a result of the receipt of technology if the receiving environment is one of protection.

(4) The fourth and final claim is actually an accumulation of all the aforementioned erroneous assumptions. Developing countries simply believe that because a weak copyright protection regime saves them money, promotes domestic industries and facilitates the acquisition of technology, it reduces their economic and technological dependence on the developed countries.

To conclude the review of the aforementioned claims, some final considerations could be added (Adeyinka 1992, pp 48-50). Firstly, the argument that a weak copyright protection facilitates the acquisition of foreign know-how fails to fully consider the effect of such a protection on the availability of such know-how in the first place. Indeed, if weak protection did facilitate technological acquisition, most developing countries would be expected to be far more technologically self-sufficient than they are today. Clearly, however, this is not the case. Secondly, weak protection is believed to create the incentive to profit by merely copying. In fact, however, it creates a false illusion that the country’s domestic copyright industries are creative when in reality they are only recycling an original product with minor adjustments. If mere copying is what many developing countries refer to as promotion of local industries, then they need to seriously rethink that concept. Thirdly, copying foreign technology and copyright products without acquiring the knowledge to adapt and enhance them will not significantly lessen technological, cultural or
economic dependence. In reality, it will only tend to aggravate that dependence on developed countries.

Indicative of that tendency is the example of Nigeria that Adeyinka (1992, pp 51-53) refers to in his case study. It should be noted that Nigeria has the most prolific and best developed book publishing industry in black Africa. With a stronger copyright law, Adeyinka argues, local publishers would have been encouraged to strike advantageous bargains with domestic and foreign suppliers. Instead, its weak protection regime made it far more profitable for domestic distributors and sellers to print foreign and local material without authorisation; and in the end, the Nigerian education sector became even more dependent on foreign sources, as local writers lost the incentive to produce. As Adeyinka (op. cit., at 48) concludes, the myth of weak protection has come to haunt developing countries.

Finally, it is generally suggested that in order for the developing countries to overcome their wrong assumptions as regards the weak copyright protection they must realise the benefits that a strong protection yields, an examination of which follows.

(b) ‘Costs versus Benefits’ Doctrine

A developing nation, in which there exists a potential base for piratical activity, is faced with two essentially economic choices regarding copyright: either to enact a regime of enhanced protection, or do nothing and opt for free access (‘free riding’) allowing piracy to continue unbridled. Undoubtedly, the choice towards enhanced protection will impose identifiable short-term economic costs; but ultimately, it yields long-term benefits. The developing countries fear that these costs will outweigh the benefits. However, this is a grave misconception, as it can be seen through a juxtaposition of the two, a brief summary of which follows.

On the one hand, the long-term benefits associated with a strong protection regime are: an increased rate of technology transfer both from abroad and within the nation itself; the creation of an
infrastructure which incites creative activity; the provision of incentives for increased foreign direct investment, which caters for foreign exchange (both through investment itself and through export earnings) and creation of jobs; the promotion of the flow of new ideas and information from developed countries; the encouragement of domestic copyright industries to develop, which will bring about a wider availability of products that are beneficial not only to the consumer but also to the society as a whole; and finally, an increase in the rates of economic growth that will eventually lead to an improvement of the standard of living of the country as a whole.

On the other hand, the short-term economic costs of introducing a strong copyright protection regime will primarily come in the form of the dislocation caused to piracy-based and/or piracy-related industries, either through a termination of sales of products newly protected by copyright, or through royalty payment to newly protected local owners and/or foreign suppliers. It should be noted that these short-term costs are directly related to the first of the four main substantive claims often put forward by the developing countries in favour of weak protection previously discussed, namely the illusion that unauthorised copying saves the country money.

The misconception of developing countries as regards the long-term benefits and the short-term costs is largely founded on two main grounds. First, as Rapp & Rozek (1990) note, these benefits may be difficult to realise in underdeveloped and/or static economies, something which is often the case in many countries of the Third World. Second, as MacLaughlin et al. (1988) stress, it can be also be very difficult for a developing nation to subject itself to the loss of relatively certain current revenues, that result from piratical activities, in exchange for less readily quantifiable future benefits.

Nevertheless, what the foregoing analysis of both the myth of weak protection and the costs versus benefits doctrine clearly suggest is that for most developing nations the long-term benefits of a strong copyright protection appear to outweigh the short-term costs that would result from enacting such a regime. It is thus concluded that protecting copyright should be a public policy goal
for developing countries seeking sustained economic growth. Otherwise, they will always lag behind the more developed world, and their economic, technological and cultural dependence will perpetuate.

3.4 Prospects for Change

If, indeed, the long-term benefits of a strong copyright protection regime outweigh the short-term costs, what are the prospects for a change towards a reduction of piracy worldwide? How easy is it to overcome the myth of weak protection? Is economic development the only decisive factor for such a change, or are there other parameters to be considered in that equation?

The idea of copyright law as an inducement for intellectual creation and a protection of such a creation raises a typical problem in the international copyright debate; the so-called ‘chicken and egg’ quandary (Adeyinka 1992, p 54). That conundrum, which is well embedded in the attitude of the least developed countries in particular, is about whether economic progress should be attained before a nation adopts strong copyright law (the protection aspect), or whether strong protection is itself a prerequisite to economic development (the inducement aspect). As one such country was reputed to have remarked concerning America’s enthusiasm in the area of international intellectual property protection “[y]our Fort Knox is full of gold, so you protect it; our fort has no gold, so why have protection?” (Sherwood 1990, p 168). Based on that reasoning, least developed countries may wait forever to adopt strong copyright protection.

Many, however, argue that such perceptions are likely to change once developing countries become fully market oriented. It is interesting to look at the findings of a study which was undertaken by Gadburg & Richards (1988) to assess the prospects for change in seven such countries (i.e. Argentina, Brazil, India, Mexico, South Korea, Singapore, and Taiwan), whose economy has been gradually growing in recent years, a fact that earned them the attribute of Newly Industrialised Countries (NICs). In evaluating the possibility of copyright reform, the governments of these
countries made at least an implicit, subjective, effort to weigh the benefits that piracy brings to their national economies against the potential benefits (and the avoidance of potential losses) associated with the provision of copyright protection.

The aforementioned study came to the following three conclusions:

- First, they view the protection of copyright (and intellectual property rights in general) primarily as an economic issue, and not an issue of moral right or wrong. Hence, they view copyright protection as a negotiable issue.

- Second, they recognise the value of copyright protection when it applies to their own citizens. This brings to mind the example of a Malaysian editorial, that Gurnsey (1995, p 31) refers to, which reads “copyright means that you can reprint the works of the Bard but not a local writer”.

- Third, they adopt their copyright policies in an ad hoc manner because copyright protection is not a major domestic issue in its own right.

It should be noted that such an ad hoc approach towards the development of copyright policy reflects three main things. First, that the countries studied are not really committed to the strengthening of copyright protection. Second, that there are other constituents that take precedence in the copyright policymaking. For instance, in the case of Argentina, Brazil and Mexico, copyright policy has generally not been a matter considered by senior government officials; instead, it is the industrial property laws (those dealing with patents, trademarks, and design protection) that are deemed primarily to serve as a central component in the transfer of technology and foreign investment (Gadbaw & Richards 1988, p 19). And finally, that there is an innate lack of understanding that permeates the thinking on copyright in many developing countries. For instance, the fact that the concept of copyright is alien to the Asian/Southeast Asian culture is clearly mirrored on the attitude of South Korea, Taiwan, Singapore and India mentioned in the above case study.

The argument that economic development and integration to the world economy could lead to an improvement in copyright protection is further put to the test by two more studies (Lepp 1990;
Antons 1991) which set out to explore possible changes in intellectual property regimes among the members of ASEAN (Association of Southeast Asian Nations), namely Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Their findings showed that several of these nations have recently either introduced new copyright legislation or improved the existing one in order to strengthen the enforcement of intellectual property rights. Among the factors which have influenced these changes are the region's increased economic development and the desire to attract foreign investment. However, and more importantly, it was also concluded that most of these nations would not have considered reforming their law without the pressure of the Americans and/or organisations representing rightholders worldwide, such as the IFPI (International Federation of the Phonographic Industry).

Furthermore, the assumption that there is a close relation between the level of protection provided and the state of economic development in a country fails bluntly to explain why piracy is still rife in many countries, some of which certainly cannot be classed as undeveloped, such as Eastern European and Middle Eastern states.

In the case of Eastern Europe, copyright is not widely recognised, either at a government or individual level. This may in part be founded, as previously discussed, on the ideological ground that copyright is a private monopoly contrary to the societal welfare, but it is not the only reason. Especially since the collapse of the Soviet Union and the whole Eastern Block, governments in the region have had other priorities than to enact, adopt or strengthen a copyright protection regimes.

The case of the Middle East, as already argued, is indeed a *sui generis* one. The region includes some of the richest countries on earth, countries which also claim a high level of cultural and social development. However, they have, at best, a very casual attitude to copyright. This raises the question of why this wealthy area, which can well afford to pay for its copyright material, does instead resort to piracy. This may in part be due to the fact that the concept of copyright is alien to Koranic law, but there are also wider issues involved. As Phillips & Firth (1995, pp 379-380) report,
in some cases this is because a strong national or cultural homogeneity makes the countries of this
group culturally self-sufficient, and in some cases because the wealth creating possibilities of
intellectual property have failed to shine beneath the brilliant light of the petro-dollar.

From the foregoing, the following conclusion may be drawn. There is no philosophical,
cultural or other basis for global intellectual property rights. In fact, copyright policymaking, and
thus any prospect for change towards the strengthening of protection worldwide and the reduction of
piracy, depends heavily on cultural, social, economic, even religious constituents and priorities that
vary widely between countries, whether these are developing or not. As Evenson (1983, p 333)
accurately puts it, intellectual property rights are created by individual states as matters of nationalist
policy.
CHAPTER 4

TECHNOLOGY AND COPYRIGHT

4.1 The Relation of Copyright to Technology

"Copyright itself is a by-product of technological innovation."
(Whale & Phillips 1983, p 245)

What the above quotation really connotes is not that copyright is a derivative of technological progress as such; it simply emphasises the close, almost symbiotic, relationship between the two. It also stresses an interconnection that has been gathering more and more importance through the stages of copyright development and technology evolution. Copyright as an intellectual property right, argues Benko (1988, p 226), influences the creation, ownership and control of an important resource in today's markets, that is technology.

Initially, as Pitman (1982) notes, copyright came into existence in response to a need. That need was the accommodation of changes which had been accrued from a major technological breakthrough that constituted the third stage of communications, as some studies like to refer to (Stewart 1989): the invention of typography.1 It is a commonplace to say that printing gave birth to a new technological era and with it to copyright. In fact, prior to the remarkable Gutenbergian invention, there was no real need for protection of intellectual creators against unauthorised duplication of their works (Whale & Phillips 1983). "There were no copyright laws because there did not have to be ... [a]n economic interest that might have encouraged legal protection did not exist." (Katsh 1989, pp 172-173).

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1 As Stewart (1989) suggests, there have been four stages of communications in the history of mankind. These are briefly described as follows:
(a) Speech: ranging from the basic signals of primitive civilisations to the sophisticated languages of antiquity.
(b) Writing: ranging from early civilisations to the 15th century as the only mode of communication in a permanent form.
(c) Printing: from the invention of typography (1436) as the only mode of communication suitable for rapid reproduction for mass communications to the 20th century.
(d) Electronic communications of the 20th century.
Copyright did not only come into being in response to a technological change, but also its legal framework has developed in reply to technological advance; in essence, it has always been inseparably bound to technological development. As Professor Koumantos, President of the International Literary and Artistic Association (ALAI), proudly points out (1981), it is the evolution of technology that has created the mass media and thus rendered possible for every intellectual creator to fulfill his most ardent desire: to communicate with people through his work. The interdependence between copyright and technology appears rather obvious.

On the one hand, technology represents an opportunity for it opens up the access to human creativity works, information and knowledge that copyright is about. It provides with unprecedented opportunities for communication between people and nations, fostering the 'global village' of Marshall McLuhan. The ever growing increase of audience is the greatest contribution of technology to intellectual creation; the absence of an audience deprives the intellectual worker of his creative incentive.

On the other hand, it is the copyright system upon which the (modern) mass media and information distribution ultimately depend. As Chesterman & Lipman (1988, p 12) succinctly underline, “none of them could have developed without the ‘currency’ of copyright, regulating the trade in ‘products of mind’, protecting the investment in ‘cultural works’, and dividing the profits according to ‘royalty’ percentages.”

Since the introduction of typography (1436), no major changes in communications technology occurred until the 19th century. During that timespan, the relationship between technology and copyright appears quite complementary: media, such as books and magazines, assist the intellectual creator in disseminating his work to the public, whereas it is possible for the copyright owner to enjoy some comfort and certainty, knowing that copyright law is designed to ensure that his rights and interests in his endeavour enjoy protection (Black 1989).
Circa 1950, we move from the 'Age of the Triangle' (author, publisher and reader) to the 'Age of the Media'. That transition has been marked by the advent of the electronic media, represented the fourth communications stage, as Ploman & Clark Hamilton (1980) like to see it, and has involved radical changes in communications technology (Davies 1984). Over the following years, with the evolution of techniques, the number of vehicles for using and enjoying copyrighted works has gained a quickening tempo and speed, resulting in a plethora of media of communications. The modern world is bedazzled by a pleiad of contemporary technological developments ranging from photography to motion pictures, reprographic reproduction, phonograph records, audio tape players, radio, television, videocassette recorders, satellite and cable broadcasting, computers, data networks, and finally, electronic storage and digitisation of information that ushered the world in a new era, the era of global communications and information technology.

This broad spectrum of techniques holds a promise both for the intellectual worker as well as for the society which benefits from his creativity. The introduction of these new technologies has enabled knowledge and information to be spread more widely to the masses (Talab 1986). Puri (1990, p 18) praises these technological novelties for revolutionising modes of information distribution and for having greatly expanded the channels for dissemination of copyright material. In that way, he argues, access to copyright works has been made easy and quick, which is favourable to users, and caters for, at the same time, additional income to owners. Each new medium of communications presents new vistas for creative expression. McFarlane (1982, p 5) pictures very comprehensively the novel situation. In a not very distant past, few intellectual creators would have imagined that their brain children could have been carried across continents as part of a satellite or cable broadcast, or that their work could be recorded from a television set through a video cassette recorder, or that they could be stored in a data-processing system. Ploman & Clark Hamilton (1980,

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2 In Barbara Ringer's terms (1976), cited in Davies, G. (1984) 'New technology and copyright reform', EIPR, Vol.6, No.12, p.355. Ringer divides the history of copyright in three eras: the 'Age of Patronage' (prior to the first copyright legislation), the 'Age of the Triangle', and the 'Age of the Media'.

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pp 153, 167) complement the above argument by commenting on the expectations and the opportunities these new media represent. For instance, video could open new horizons for community action and self-expression; satellites could provide the infrastructure for the 'global village'; cable could cater for the flexibility to choose between a variety of channels; and, through the advent of the computer, the technology is coming within the reach of everyone.

The emergence of all these new media in combination with the galloping pace of technological evolution could not but decisively affect the law of copyright. Primarily, contemporary technology challenges copyright law in two positive ways. First, as Stewart (1989) suggests, it has given a considerable impulse to it because of the vast number of uses which increase the potential reward of intellectual creators. Second, it has urged it to show sufficient flexibility so as to accommodate all these technological advances within the existing, national and international, regulatory regimes. Only in that way the copyright system can keep itself up-to-date with the changes which stem from the ever growing number of electronic devices; and, retain its significance that, in McFarlane's terms (1982), lies in its ability to adapt to novel situations created by the speed of technology's development.

Initially, copyright was specifically adapted to the technology of print, and hence was well entrenched in it. A characteristic case of that is reported by de Sola Pool (1983, p 17). At the beginning of the century (1908), the US denied copyright protection to piano rolls on the grounds that they were not 'writings' in a tangible form readable by a human being. This concept of copyright excluded from protection many new technologies of communication. But the development of leisure and communications industries, such as the motion pictures, the recording, and the broadcasting industries, have all persuaded the legislators to grant them the protection that the courts were unwilling to give, not only in the US but worldwide.

Similarly, at the time the original text of the Berne Convention was adopted, modern media did not exist. But the arrival of techniques, such as cinema, broadcasting, video, satellite and cable -
to mention some of them—urged their inclusion under the protective auspices of the Union. The manner in which the Berne Convention, through its successive revisions, has been adapted to those developments illustrates the positive influence of technology on copyright law.

As Porter (1991) reports, it mirrors a growth in the rights of copyright owners to pursue new opportunities to exploit their creations using modern technological advances. Furthermore, the evolution of technology did result not only in a growth of rights but also in a proliferation of categories of right owners. The international copyright community recognised the fact that not only authors—in the traditional sense of the word—but also artists, producers of audio-visual products and broadcasters were in need of protection across the globe. To that end, a series of so-called ‘neighbouring rights’ Conventions were introduced in the 1960s and the 1970s, which include: the 1961 ‘Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations’ (Rome Convention); the 1971 ‘Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms’ (Geneva Convention); and, the 1974 ‘Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite’ (Satellites Convention).

However, in the light of contemporary developments, established notions of copyright law appear rather obsolete (de Sola Pool 1983). For example, the subject matter of copyright stretches beyond its traditional boundaries of print to incorporate, *inter alia*, from choreographic, sculptural, graphic and audio-visual works to airwaves, binary codes and multimedia works, and even industrial artefacts (designs, moulds, photographs, layouts, etc.).

This has the following corollary. As Higham (1993, p 355) stresses, the categorisation of works into literary, artistic, dramatic and musical does not make much sense anymore. By virtue of digital technology, digitised texts, data, video, audio, image and animation become fundamentally the same. Chesterman & Lipman (1988, p 149) provide illuminating examples of the today’s nebulous subsistence of copyright. ‘Literary works’ include nowadays football pools coupons and railway
timetables, whereas the definition of 'artistic works' extends to video games, furniture designs or even spare parts for cars.

New technologies are a mixed blessing for copyright. For they represent both an opportunity and a challenge. An opportunity, because they open up the access to intellectual creations, and information in general, fostering the world of global communications. And a challenge, because they render possible an easy and difficult to control copying which may deprive the rightowners of a proper reward for the use of their works.

By and large, new technologies bear some common characteristics as far as copyright. A summary of the most pivotal of them, which sheds some light on the dangers they represent, follows.

According to Ladd (1984, p 24), they are basically four:
- First, a trend towards the increased importance of display and performance for the distribution of traditional works.
- Second, a widespread ownership of devices for use and copying of these works' display and performance by the public.
- Third, the practical impossibility of traditional intellectual property rights' enforcement by traditional means against uses which are increasingly private and enormous in scale.
- And finally, the new technologies have brought about a great deal of doubt and ambiguity about the very applicability of copyright control.

As Ploman & Clark Hamilton (1980, p 188) state, technology has made possible new uses for which the exclusive rights of owners are neither clearly defined nor undoubtedly established. Also, new communications technology involves uses of protected works on a scale and in a way which almost eliminates the possibility of individual control (op. cit., at 180). The above factors create a trend towards a decentralised, individualised use of communication modes (op. cit., at 151 and 184).
Higham (1993, p 355), referring specifically to digital technology, adds to the loss of 'centrality' another two inherent characteristics of new technologies. First, the 'dematerialisation' of copyrighted works that renders the separation of information from the medium by which is conveyed easier. And second, the susceptibility of already digitised information to merge, manipulation, transmission and usage, mixage, combination and alteration.

All the above traits of contemporary technological advances pose challenges, represent menaces (Koumantos 1981), hold fears (Ploman & Clark Hamilton 1980), and are the principal source of strain for copyright (Ladd 1984). For they have raised issues that put copyright at stake and threaten not only its continuation but also its existence per se.

4.2 Issues and Problems Raised by the Evolution of Technology

"Copyright is not only faced with ... traditional problems, ... divergent philosophical perspectives, ... but it must also deal with one of the most important challenges in a long period - the impact of contemporary technology."

(Altbach 1986, p 1648)

Indeed, technological developments have been posing a multifaceted challenge on copyright ever since the introduction of the printing press. Firstly, they have presented the users of technology with unprecedented opportunities to fulfil their fundamental needs, such as communication of ideas and thoughts, dissemination of information and distribution of knowledge. In that way, they seem to favour the consumer rather than the creator of that information and knowledge who wishes to control the diffusion of his work and be rewarded for its use. Secondly, they have been increasing the pressure for a redefinition of basic concepts of copyright, such as 'author', 'work' and 'ownership'. Additionally, they have been increasingly questioning the parameters of that ownership, namely its monopolistic undertones. Subsequently, they have placed extra gravity on the heated debate that lies

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3 These characteristics were also stressed by a number of experts-participants to the 'WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights', held at Harvard University, USA, March 31st to April 2nd, 1993.
at the heart of copyright; namely the access to protected material, and therefore to new technologies, by the public at large. Finally, they have opened new vistas for the creation and distribution of productions protected by copyright and neighbouring rights; at the same time, they may also lead to conflicts with the normal exploitation of such productions and may unreasonably prejudice the interests of owners, paving the way for the proliferation of the phenomena of 'piracy' and 'private copying'.

The aim of the following analysis is to deal with the aforementioned emerging issues, and examine both to what extent have new technologies caused problems for and impinged negatively on copyright, and whether there is a need for change or for continuity as regards the present regime.

4.2.1 ‘Author’, ‘Work’ and ‘Ownership’

Ladd (1984, p 23) believes that the broad contemporary spectrum of technological developments tends to overwhelm authorship and copyright; if only because it constantly tests our understanding and our will to vindicate the values of these concepts. Why is that? Katsh (1989, pp 175, 180) suggests three possible reasons. First, every new medium incites parallel and distinctive changes in the very nature of authorship and intellectual creation. Second, new media of communications are revolutionising the means of creating works and are altering the form in which these creations appear. Third, especially in the light of digital technology, intersection of variant creative forms becomes much easier as their boundaries become less distinct. As Ploman & Clark Hamilton (1980, p 183) succinctly state, the new media have made possible new methods for intellectual creation which, in turn, have resulted in new categories of ‘authors’ and ‘works’ that are difficult to accommodate into the traditional notions of authorship and copyright.

During the early stages of communications technology, as Ithiel de Sola Pool (1983, p 16) notes, the printing press was a bottleneck where uses of works could be examined and controlled. With the advent of electronic reproduction, this procedure has become antiquated. Established
practices, like the payment of royalties in a conventional way, have become complicated. And, the traditional compulsory permission of the author before using his works has become practically unworkable. According to Ploman & Hamilton (op. cit., at 188), copyright owners are no longer able to permit, and hence, to control all the possible uses of their works.

Neil Turkewitz utters melodramatically: "Authors' rights are dead." For the author-focused protection system has failed to provide an adequate legal framework for coping with the tremendous impact of technology on copyright. Modern technology has rendered author's control over his work an untenable premise.

Prior to the 'Age of the Media', the economic relationship between author and his work was balanced and he could expect a proper remuneration upon his investment (Black 1989). However, as Katsh (1989) underlines, new technologies have changed the economic value of authorship by merely enhancing a large-scale distribution of intellectual creations. To Professor Koumantos (1981), that development represents a compromise of the author's economic interests. To substantiate his argument, Koumantos (op. cit., at 16-17) provides a comprehensive reference to several media: Photocopying reproduction is nowadays accessible by everyone and satisfies a vast number of users uncontrollable by the author. Reproduction of music and/or films on audio and/or video cassettes has become simple; "[w]hy buy carriers, burdened by authors' royalties ... when one can produce them oneself on the basis of a carrier graciously lent by a neighbor?" (op. cit., p 17). Finally, the transfer of a television broadcast, through satellite or cable, renders limited diffusion of works inoperable and deprives authors (and copyright owners in general) of a just recoupment of their labours. That is why, to paraphrase Ploman & Clark Hamilton (1980), in the eyes of the public these media ushered in an electronic utopia, whereas to copyright owners they appear as an unholy alliance.

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What will be the implications of the coming period of transition from traditional media to
digital technology? What are or will be the challenges posed on fundamental notions of copyright
and its subject matter by DAT (Digital Audio Tape), DAB (Digital Audio Broadcasting), CD-ROM
(Compact Disc-Read Only Memory), and other interactive multimedia? Digitisation has
revolutionised the way people consume protected material. It has created an 'electronic delivery' of
works as opposed to the traditional process of distributing these works via analogue carriers of audio
and video. In all likelihood, digital diffusion will come to have increasing importance for all the
members of the society. And, in that new environment, new categories of media are emerging.

First, DAB (Digital Audio Broadcasting) is a novel transmission technique for the music
industry. It offers the prospect of CD-quality stereo sound, improved reception without the problems
associated with present technology (interference, limited reach, etc.), and a greater number of
services within the same amount of radio spectrum and additional features and types of services.

Second, the concept of 'celestial jukebox' is born. It consists in a vast database of digitally
stored recordings distributed via satellite to home subscribers. It will permit consumers to separately
access, and to download if they so choose, recorded music without regard to third party
broadcasting decisions and scheduling.

A third concept is that of 'multimedia'. The term itself is amorphous. What is clear, however,
is that multimedia works combine text, graphics, sound, images, computer software and associated
computer hardware to create a new, typically interactive, product on a CD-ROM format which can
be played on a computer or modified television screen.

Finally, digitisation, and the development of cheap electronic storage devices, now allows the
creation of 'knowledge banks' where information can be stored 'densely'. For example, a typical
CD-ROM disk (12 cm) is capable of storing as much information as approximately: 1,000 floppy
discs or roughly 50 text books; up to 650 megabytes of data equivalent to 250,000 A4 pages of text;
7,000 photographs; 72 minutes of animated pictures; two and a half hours of recorded sound; and finally, a combination of two or more of these.

The advantages to the public of the above developments are evident; easy access to databases, where information can be effortlessly printed out, downloaded, altered, mixed and manipulated *ad infinitum*, and unlimited possibilities for communication via 'information highways'. On the other hand, the convergence into one medium of transmitting and storing text, images and sound is altering the landscape of copyright and copyright-related businesses beyond recognition.

What about the ‘author’, however? That convergence renders it difficult to control exploitation, and a series of complex questions emerge, as Higham notes (1993, p 358). Should the author be entitled to continue to decline to allow his/her work to be incorporated into databases if he/she wishes, even if that inhibits the flow of information or renders rights clearances impracticable? Should there instead be a system of compulsory licensing for a fair payment? Finally, should formal consent always be required by a neighbouring right holder for his/her performances to be stored on a knowledge bank and/or included in a multimedia work?

In turn, however, as Higham ponders (*op. cit.*, at 356), what exactly is the definition of a ‘multimedia work’? Should it be treated as a film, a literary, artistic, dramatic work, or what? Is a multimedia work protected at all under existing laws and as what? Finally, is there any virtue, after digitisation, in distinguishing between types of work? In fact, the categories of authorship have by definition broken down in the new environment. Works in digital form are embodied in a form of a binary code as just ‘ones’ and ‘zeros’. A ‘one’ or a ‘zero’ for a literary work, for instance, is no different than a ‘one’ or a ‘zero’ for a musical work.

The problems that multimedia create extend beyond mere definitions of basic notions of copyright into the field of the author’s moral rights. Because anything placed in a multimedia work must be digitised, the manipulation of the original work, either by the multimedia producer or the user, becomes extremely easy (Scott & Talbott 1993, p 288). For example, as Short (1994)
underlines, the question of moral rights intrude when a publisher, who has a copyright deal with an 
author, interferes with the author’s work in a way unacceptable to the latter. The problem, Short 
(ibid.) continues, becomes even more acute for international publishing because different countries 
have different approaches to moral rights. Furthermore, as Higham (1993, p 358) notes, where moral 
rights are inalienable, there will be an increase in the tension between the authors from countries 
where moral rights are strong and the wishes of those who want to produce multimedia works. In 
vie of the above, moral rights are one reason why so many people in the creative community fear 
multimedia. However, one must ask how relevant moral rights would be in a world of multimedia 
and interactive products? The answer would seem to be ‘not very’. Indeed, the fact that digitisation 
encourages manipulation, adaptation, and even distortion, can make the very essence of moral rights 
meaningless. Furthermore, as Christie (1995) and Cameron (1996) point out, the multiplicity of 
separate rights elements in any multimedia creation may render their enforcement impractical, or 
indeed even impossible.

At this juncture, the question that arises is whether copyright should continue to exist as such 
in the era of digitisation and networking. Is indeed copyright becoming increasingly obsolete vis à vis 
the challenges of the new environment? Some argue that it should be replaced by another, more 
appropriate, right. Others contend that it should instead adapt to accommodate these challenges. 
These two options will be discussed in the following pages.

The aforementioned problématique was the focal point of the debate that took place during 
two recent international Symposia under the auspices of the World Intellectual Property 
on Copyright and Neighboring Rights’ (hereinafter referred to as ‘WIPO 1993’); and, the 1994 
‘WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights’ (hereinafter 
referred to as ‘WIPO 1994’). For instance, Goldberg & Feder (WIPO 1993, p 40) point out that “the 
challenge of digital technology is no different in kind than the challenge of the print technology for
which copyright was first developed." However, as Dreier (WIPO 1993, p 195) counterargues, the blurring of the boundaries of what constitutes a work might prove difficult to deal with. Indeed, digital technologies promise to yield new forms of intellectual products and new applications will emerge where computer software will be incorporated in disks alongside video, audio, artistic and textual information. In view of that, Goldstein (WIPO 1994, p 264) doubts whether copyright, or even neighbouring rights, can support investment in the needed screening technology. Industrial property law, Goldstein posits, seems a more appropriate source of protection. As Primo Braga et al. (1990) notes, new technologies have already seriously blurred the distinction between copyright and industrial property rights, such as patents. From the foregoing, the following questions emerge. Are copyright and patents indeed converging? And should, therefore, multimedia objects be patented instead of copyrighted?

This ambiguity acquires particular significance in the case of computers, where the reach of copyright law has expanded to protect computer software despite the dissenting voices of computer companies that had lobbied hard for patent protection.  

On the one hand, the reasons why proponents of copyright protection saw it to be more appropriate may be summarised as follows. It might have been because protection for creativity and expression of ideas and information, conveyed via a computer program, can be sought solely through copyright. It may also have been because the presentation of a computer program was invariably in writing and thus looked like a literary work (Christie 1994). Thirdly, it might have been because computer software was (and is) created like other copyright works, namely by placing symbols in a medium (Benko 1988). Or, finally, it might have been because, as Chesterman & Lipman (1988, p 11) ironically suggest, “the issues raised by computers would confuse the patent laws still further.”

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5 Despite the fact that the issue lies outside the scope of the present thesis, it is worth casting hereinafter a brief glance at the debate on whether computer programs and computer software are a subject matter of copyright.
On the other hand, opponents of copyright protection argued that since the mental and financial effort supporting the production of software resembles inventive activity more than artistic creation, industrial property laws, such as patents, were more relevant since they were (and are) traditionally granted for technological innovations (Benko 1988; Christie 1994). Nonetheless, even the advocates of an industrial property approach recognise that patent laws would not be appropriate. The main attraction of copyright, as opposed to patents, appears to lie in its immediacy and the lack of formality in its application. For a product which is relatively short-lived, the long lead-in times to granting a patent are clearly unacceptable. Also tending to rule out the use of patents is both the cost of acquiring and renewing patent protection and the requirements on originality (Gurnsey 1995, p 111). Nonetheless, even the strongest advocates of copyright protection admit that its application in the computer domain is a compromise.

Indeed, nowadays, in the dawning era of multimedia, which involve a vast number of computer applications, copyright is certainly not the ideal solution. As Scott & Talbot (1993, p 286) underline, the protection offered by it on a database is very thin, since a copyright does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.

In that light, there are many who endorse a *sui generis* protection for computer software, that is a new flexible regime that could be tailored to the particular characteristics of the relevant subject matter. In fact, such an option had initially been put forward in the early 1970s but was never adopted. The reason why is explained by Gurnsey (1995, p 113), who argues that, with hindsight, it is unfair to criticise too heavily those faced with designing protection for software in the 1970s. For this, at that time, was an industry without precedent or parallel. Another two reasons why copyright was favoured are added by Christie (1994, pp 487-488). First, if copyright was to be used, it would not be necessary to go through the arduous task of drafting and passing new legislation. Second, and most importantly, copyright provided the potential for international protection, pursuant to the Berne Convention (Article 2 of the 1971 revision).
In fact, the hesitance of the international copyright community to endorse a *sui generis* protection regime for computer software is comprehensively reflected on the following case reported by Christie (1994, p 490). In 1993, the Australian Copyright Law Review Committee (CLRC), despite having identified the advantage of such an option, failed to recommend it and gave the following reason:

“The industry has become used to copyright protection. It has a familiarity with it. To depart from it entirely would be likely to create a good deal of uncertainty when, despite difficulties here and there, there is a common understanding and approach not only in Australia but in other countries as well.”

However, the real reason the CLRC did not want to recommend such a system was the politics of global trade. The Committee was concerned that countries important to Australia’s economic and trading interests would impose trade sanctions if Australia was to break ranks on the appropriate form of protection for computer programs.

In view of the above, many have contemplated a basis for a compromise between copyright and a *sui generis* option. One such proposal is put forward by Christie (1994, pp 491-493), although the author seems to favour an intellectual rather than an industrial property approach. Christie begins by considering the hierarchy of a computer program and identifies the following six levels: digital logic circuit; microprogramming; machine language; assembly language; high-level language; and, design. He submits that the sixth level (design) is the most important one. It is there, he argues, that the real creativity, and innovation (if any), will lie. It is at that level that the greater part of the creator’s resources will be spent. All the other five levels are a relatively routine process. Therefore, Christie concludes, it is the level of design that should receive intellectual property protection; and the most appropriate form of such a protection might be some type of design right. Notwithstanding Christie’s proposal, however, the legislative basis on which protection of computer software is founded is now fairly secure. Because key world markets, and principally the US which is also the
largest software producer, lead the way in defining copyright as the most appropriate one (Gurnsey 1995, p 113).

The general consensus may be that copyright should be maintained as the basis for protection of works in the networked era. Should, however, remain unchanged? So far, the historical response of copyright law to the changing nature of the subject-matter it sought to protect has been to create new classes of work. Should it continue to do the same? The answer would seem to be 'no'. Indeed, the development in and the convergence of information technologies may have reached such a stage that is no longer either helpful or meaningful to treat every copyright subject-matter as being one of the various classes of work identified within copyright legislation. With subject-matter that is digitised and supplied 'on-line' rather than via a traditional medium, it is not really relevant to categorise that subject-matter using one of the existing classifications (e.g., literary, dramatic, musical, or artistic work; sound recording; film; and finally, broadcast or cable programme). Thus, rather than create new classes of work, the more appropriate solution might be to abolish the classification of works altogether.

One way to arrive to such a solution, as Christie (1995, pp 527-530) comprehensively proposes, might be through a 'bification' of copyright, namely to reduce copyright law to two protected subject-matters and two exclusive rights.

Firstly, the two protected subject-matters would be a ‘Performance’ and a ‘Fixation’.
- A ‘Performance’ is defined as a transient (non-permanent) embodiment of a Work or a Fixation, and it includes a live performance of images and/or sounds as well as the transmission of images and/or sounds via a satellite broadcast.

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It should be made clear that the initial letters of the terms ‘Work’, ‘Fixation’ and ‘Performance’ are capitalised in order to distinguish them from those terms currently used in copyright law.
- A 'Fixation' is defined as a non-transient (permanent) embodiment of a Work or a Performance, and it includes, inter alia, a written manuscript, a sound recording of a musical performance, and a video recording of a broadcast.

Secondly, the two exclusive rights would be the exclusive right to make a transient embodiment of a protected subject-matter, and the exclusive right to make a non-transient embodiment of a protected subject-matter. Thus, there would be two infringing acts: a 'Presentation' and a 'Reproduction'.

- A 'Presentation' is defined as a transient embodiment of a Performance or a Fixation made without the consent of the right owner, and it includes an unauthorised performance of music previously performed or recorded, and an unauthorised broadcast of a film.

- A 'Reproduction' is defined as a non-transient embodiment of a Performance or a Fixation made without the consent of the right owner, and it includes the unauthorised recording on film of the performance of a dance, and the unauthorised copying of a CD on tape.

It should be noted that the above proposal is a mere attempt to take the necessary first steps towards the simplification of copyright in the digital era. Indeed, there are other issues apart from the protectable subject-matter and exclusive rights which any comprehensive copyright law reform would need to address. Some of the more critical of these are the issues of authorship and the definition of the 'Work' itself.

What about the definition of the 'Work' itself? The information infrastructure, Dixon & Self (1994, pp 468-469) argue, simply represents a change in form but not the substance of intellectual creations. Works will continue to be 'fixed', albeit in digital form; and nothing about the digital form of such works should substantially affect their treatment by the copyright law. However, even if it seems that 'ones' and 'zeros' might in theory qualify as a 'work', the fact that what was traditionally regarded as a single work may in its digitised form have to be considered a collection of millions of single data tends to obscure in practice the distinction between what is protected as a work and what
must remain unprotected as the mere information contained in a database. Moreover, as previously argued, there is a practical difficulty in determining what constitutes a work in a digital context; and that has its bearing on the determination of authorship.

Should lawmakers continue to insist on true authorship in view of the changing nature of copyright works? Goldstein (WIPO 1994, p 263) believes they should because it is an important *raison d'être*, not only of author's right, but also of copyright, that the law protects the sphere of privacy that creative authors need to pursue their art. Also, as Christie (1995, p 525) argues, authorship is a fundamental concept of copyright law because it is directly related to the ownership of intellectual property rights to a work. And finally, as Ralph Oman (WIPO 1993, p 24) categorically stresses, the author is at the centre of copyright and that vital core must be preserved.

The traditional approach of copyright law has been to require the identification of an author, often him/her being a single person, as a precondition to the granting of rights in the work he/she creates. However, in the emerging networked age, that traditional approach is seriously questioned by the following factors, which are comprehensively outlined by Christie (*ibid.*). First, there may be certain types of new works (e.g., ‘virtual reality’ works) which are not created directly by a human author but by a computer. Second, a number of the new ‘multimedia works’ may not be so much ‘authored’ as ‘compiled’ from pre-existing works. And third, there is a trend towards subject-matters in which the user plays a role in determining the ultimate nature of the work. What are the changes that the above three factors are likely to bring about?

As regards the first factor, the idea is that a new concept of authorship should be created. For instance, a step towards that direction was taken in the UK, in the context of the 1988 Copyright, Designs and Patents Act. As Christie notes (*ibid.*) notes, that legislation introduced the concept of a ‘computer-generated’ work, this being a work created by a computer in circumstances such that there is no human author, and deemed the author of such a work to be the person by whom the arrangements necessary for creation of the work are made.
As far as the second factor, Dreier (WIPO 1993, pp 191-196) advances the following possibility. Given the facilitated accessibility of pre-existing material via networking, the independent creation of a new work on the sole basis of unprotected ideas will become more and more unlikely. Rather, to an increasing extent, any future creative process would start on the basis of borrowing pre-existing material, adopt parts of it, alter them, and maybe some new material would be added. Therefore, in the not too distant future, there might hardly be any more 'authors', but a multiplicity of 'contributors'. Furthermore, if digital technology and networking have a tendency to replace the 'author' with mere 'contributors', the dissolution of what constitutes a 'work' seems to work in favour of the contributors' status as authors. Consequently, Dreier (ibid.) concludes, in a digital context, the rules of multiple authorship seem to be the appropriate model whenever several authors create a digital work in common, or whenever several clearly defined works are joined together in order to constitute a single new marketable product. Indeed, as Lucas (WIPO 1994, p 275) adds, originality -which has been deemed the factor that indicates and justifies copyright protection- will become more and more relative; and creation will be more and more a result of collective work. For example, as regards multimedia, French law recently recognised the notion of collective work, the rights in which originate with the person, either natural or corporate, who takes the initiative for making it and distributes it under his/her name.

Finally, in relation to the third aforementioned factor, namely that there is a trend towards subject-matters in which the user plays a role in determining the ultimate nature of a work, the following daunting issue arises. The fact that 'contributors' could qualify, under certain conditions, as authors eventually blurs the distinction between owner and user of copyright material. Therefore, as Marx posits, do all intellectual creations become common property and the eventual copyright owner is the public at large? That question is undoubtedly the most complex in the entire realm of copyright.
4.2.2 Public Access - the Imbalance

The revolution to communications technology has also come to question one of the basic functions of copyright: control of access, access to information.

What is the relation between copyright, technology and information? Benko (1987, p 49) caters for a brief, albeit accurate, answer. New technologies have shifted both the economic and social significance of information in ways that are just beginning to be realised; and, the increase of the value of information has disturbed the social cost-benefit equilibrium underlying intellectual property laws. That has resulted in profound questions directly challenging fundamental copyright principles.

What are these principles? Katsh (1989, p 169) provides a comprehensive account of how information is seen through the copyright legal doctrine: First, it assumes that control of information is both necessary as well as feasible. Second, it treats information as something that can and should be captured and controlled. Third, it mirrors attitudes about qualities of the media used to convey information that has to be controlled.

These principles are, if anything else, indicative of a trend towards control, manipulation, even monopoly over information. Taking that into consideration and bearing in mind the value of information for society, serious questions are now being raised. As it has been previously discussed, new communication technologies directly challenge basic copyright principles. Benko (1987, pp 49-50) seriously questions whether the above copyright principles adequately resonate the social costs and benefits of information today. Pitman (1982, p 118) also ponders. How much further copyright can develop in response to technological change ignoring contemporary voices that urge it to perform somewhat as a public service?

Such questions generate a much heated and full-scale debate that if nothing else is public. The nature of that debate is ideological, philosophical, even political; and it involves not only individuals, but also social classes, governments, even entire nations.
To Ladd (1984), that public debate and the new technologies are the two main sources of threat to copyright. The central issue of that debate, according to Lahore (1984, p 3), is the degree to which the public should be allowed to make use of these technologies for the dissemination of information and the distribution of knowledge. For, as Lahore (ibid.) continues, there is an apparent public interest in the free flow of information but no clear resolution of how to balance that interest vis à vis the property rights of copyright owners that have never been absolute. That ambiguity, along with the advent of new technologies, has resulted to a lack of balance between the legitimate rights of copyright owners and the interest of the consumers of these technologies, namely the copyright users. The photoduplicating machines, video tapes, videodisk players, cable and satellite TV, and the personal computers have enabled more and more people to have access to knowledge, information and entertainment.

The development of these technologies offers new prospects for creative expression, but also present new vistas for use. As Henry (1974, p 993) underlines, “the dilemma is exquisite” (sic). How to promote both the origination and accessibility of information in a society increasingly permeated by information technology and increasingly dependent on the use of information? That dilemma reflects an ongoing clash; to use Marxian terms, as Henry (1976, p 12) suggests, a fight between the ‘owners’ of means of intellectual creation and of information production, and the ‘users’ of their products. The history of communications technology, Lange (WIPO 1993, p 231) notes, shows that distances are often very large between the purpose of that technology perceived by its promoters and the actual use of it by its consumers.

What are the arguments of these conflicting sides? On the one hand, intellectual creators ought to be encouraged and rewarded by economic incentives and by protection of their works. Those who produce information goods and services, according to Porter (1991, p 8), argue that the greater the protection, the greater the investment of capital, time and labour. They also, as Lahore (1984, p 4) notes, claim a right to control the usage of their works, or at the least to receive proper
remuneration or compensation for this usage. On the other, the public must be able to take advantage of new communication technologies in gaining access to information and copyrighted material ('ABC of Copyright' 1981; Lahore 1984). As Henry (1974, p 993) suggests, new information technologies have dramatically augmented and facilitated both the accessibility and the usage of information. Hence, technology is the only means that may enable users to obtain the information that they need when they need it.

What do the users/consumers of information and copyright anticipate in the light of modern technology? Black (1989, pp 181-182) takes an in-depth glance at their expectations. Since, more often than not, a society benefits from technology, they consider that they have a right of access to technological advantages, which, not unnaturally, they wish to exploit for their own individual uses. They desire the widest and easiest access to informational goods and services which are concomitants to modern technology. Contemporary technology has created inexpensive machines to copy or reproduce (copyrighted) material. For the consumer/user that represents an opportunity for a fair use of the technology in which he has invested; thus, he should be free to copy and/or reproduce with impunity! According to Porter (op. cit., pp 8-9), that is the reason why, those who want a freer flow of information, resent the power of copyright owners to prevent works from being copied, or to excessively charge for reproduction. They argue that that imposes unwarranted restrictions on the flow of information; restrictions that are not only socially regressive but also technologically prohibitive.

What are the reactions of copyright owners to the above users' expectations? What are their answers, especially nowadays, when it seems that the balance has been tilted in favour of the users who take advantage of the increasing difficulty of owners to control the plethora of new uses of their works (Davies 1984). Their counterarguments are best put by Lahore (1984, p 4). To him, the claims for public access to information often can lead to an extension of free copying and reproduction as well as inadequate systems of remuneration. David Ladd, Register of Copyrights of the United Sates
of America in 1983, expresses outright, albeit extremely, the objection of copyright owners to a freer public access.7

“When advocates plead access in order to curtail copyright, they frequently do not mean access. Access, they have -in sale or rental, or borrowing from libraries, or in authorized copies, or through transmissions. What is meant, however, is convenience in use, by acquiring actual ownership of unauthorized and unpaid for copies.”

Whatever the arguments of copyright owners and the counterarguments of users/consumers may be, the imbalance of access reigns supreme and will continue to do so as technology evolves at a quickening pace. For Ploman & Clark Hamilton (1980, p 152), this is the most menacing trend in current technological development. They fear that a new distinction has been created: information-saturated and information-poor. And, such a state of affairs does not apply only to Marxian social classes, but also to entire nations as already discussed in the context of the present thesis (Chapter 3).

Finally, it can be argued that the aforementioned inequality has had the following corollary. Just as the public became readily accustomed to photocopying books, journals and other printed material, so it is now learning routinely to copy films and music, and to make unauthorised copies of electronic data. On the one hand, creators, producers and, in general, providers of information call this ‘stealing’; some users, on the other, call it simply ‘sharing’. Thus, there is a growing gap between the theory of copyright law and its practice. And, this gap is likely to widen in the years to come, potentially challenging the legitimacy of the law and creating significant problems of enforcement (Chesterman & Lipman 1988, p 21). Such a prospect is succinctly reflected on the phenomena of ‘piracy’ and ‘private copying’, an introductory reference to which follows.8

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8 A lengthy discussion as to the impact of the two phenomena on both the legitimacy and the enforcement of copyright law takes place in Chapters 5-8 of the present thesis.
4.2.3 Piracy and Private Copying

What is the relationship between technology and the phenomena of piracy and private copying? Its gist is well encapsulated in Hoffman’s phrase (1990); technology has been good to pirates. Much as the above argument seems simplistic, its consequences are overwhelming. Indeed, piracy has been closely linked with the evolution of technology ever since the invention of print. Every technological advancement and innovation has boosted its occurrence and has propagated its appearance. It is the new technologies, Dworkin (1983) argues, which have transformed a relatively minor irritant, that piracy was prior to their advent, into a major economic problem of international dimensions. And it is through these technology that the practice of private copying emerged to become a threat to industries and owners alike.

Piracy is of a technological nature. “It first appeared when technology made it possible” says Denis de Freitas, consultant of IFPI and prominent copyright expert, in a personal interview (24/3/1993).

The advent of the first offspring of the printing press, that is xerography, ushered the world into the electronic age; and, as Chesterman & Lipman (1988, p 26) stress, electronics and digital technology have changed the nature of piracy. In what ways?

Before the photocopying machine was introduced, good copies of texts were available solely by printing. Now, Marshall McLuhan’s prophetic utterances in 1964 are fully vindicated: in the age of the Xerox, every man is a publisher. Before compact disks and digital audio cassettes, high-quality duplicates of music were obtainable only through high-cost analogue (as opposed to digital) tape systems or record pressing. Satellite, cable and video recorders have enlarged audiences, have increased the channels available for copying and, correspondingly, have augmented the outlets for illicit material. Katsh (1989, pp 175-176) provides another dimension of the change of the nature of piracy. The strain for copyright in the electronic age arises not only because increased and easier copying occurs, but also because copying becomes a more obvious, widely accepted, fundamental,
and even legitimate part of the creative process and expression. "The electronic media are fostering a proliferation of new creative forms, some of which require, encourage or facilitate copying."

Electronic and digital technology have also changed the nature of piracy in rendering it less discernable and less detectable. The prominence of printed and television media, which may have allowed some degree of control over infringements, has no equivalent in the age of multimedia. For example, broadcasts can be picked up and retransmitted via cable and/or radio waves to new audiences without authorisation and audio-visual works can be recorded and the recordings can be used for purposes totally different from those of the original works. And, multimedia enable users of the networks to access perfect digital transmissions, retrieve, copy, store, manipulate, alter, and even add pieces of information to other pre-existing audio-visual recordings, and thus, to create 'new' works, without the owner's knowledge or permission. As a result, many copyright owners have no way of knowing whether, when and to what extent their rights are being violated.

New technologies have also facilitated both the act itself and the quality of the reproduction of protected material. For they render the making of replicas a 100% percent accurate, effortless, and inexpensive process. Such a development has two main corollaries.

On the one hand, it increases the pirates' margin for profit. Prior to digitisation, pirated copies were much cheaper than the original ones and of a poor quality. Nowadays, pirates use the latest available technology to reproduce audio-visual tapes and software not only virtually indistinguishable from the legitimate articles but also, paradoxically, even slightly better. As Taylor (1993) points out, poor quality, once deterrent to purchasing a pirate copy, has now disappeared altogether.

On the other, the increasing availability of digital recording equipment signals a proliferation of an activity that the copyright industries see it as synonymous to piracy, namely private copying. For formats such as DAT (Digital Audio Tape) and the forthcoming DAB (Digital Audio Broadcasting) offer CD-quality sound, and allow the user to make ad infinitum perfect copies of a
recording and enjoy music without loss of fidelity, which was typical of multi-generation copies of the analogue media.

Digitisation and networking has put an additional strain on copyright. They have a significant bearing on the ability of owners and judicial systems alike to determine and prove infringement. Present laws were built up primarily to restrict reproduction of a work in a tangible form. This emphasis on creation of a permanent tangible copy is now becoming increasingly questionable, if not impractical. Because the main feature of digital technology is that it permits the representation of each protected work in a binary code of ‘ones’ and ‘zeros’ and thus its storage in electronic memory, irrespective of the medium in which it was initially realised.

Technological advances have further challenged copyright in that works in digital form, as Dreier (WIPO 1993, p 194) underlines, serve increasingly utilitarian purposes rather than those of pure enjoyment or entertainment. Consequently, the dividing line between (private) enjoyment of protected works, which has so far been largely copyright-free, and their (public) commercial re-utilisation subject to copyright becomes more and more blurred. For example, the downloading from a network by a user, and the onward distribution of information to another market, are becoming an accepted part of commercial everyday life. Consequently, the more technology progresses and the more technological advances become available to large numbers of the public, the more it will be difficult to determine where ‘free’ or ‘fair’ use of copyright ends and where violation of copyright begins.

Finally, and by way of conclusion, the following questions emerge. Are the phenomena of piracy and private copying the price to pay for the technological progress? Are there ways to render technology and copyright compatible when, more often than not, they appear as adversaries? Is it possible to reconcile them when the violation of the latter is facilitated by the former?

In fact, technology can be harnessed in the fight against unauthorised copying. Indeed, digital technology in particular, despite the strains it imposes on copyright, is not all negative. For it has
significant applications to the detection, monitoring, licensing and deterrence of uses of copyrighted works in whatever form they may appear. As Gyertyanfy (WIPO 1993, p 160) comprehensively states, “there is always a technological fix for a technological fix”. However, he warns (ibid.), “technology itself cannot be the complete answer to the problems produced by technology”. In fact, no one could suggest that there is a causal link between technology and unauthorised copying. Technology merely facilitates its proliferation; the real causes of it lie elsewhere.

For instance, many view the legal regime and enforcement procedures as the ones at fault (Taylor 1993, p 259). Although this is certainly not the only reason, it is generally acknowledged that contemporary technology, by accelerating the movement and the production of information, has weakened the ability to enforce the law (Katsh 1989, pp 169-170). To Chesterman & Lipman (1988, pp 85-86), piracy is undermining the law itself. In order for the copyright legal system to have any relevance, it has to absorb the technological implications, rethink its assumptions, and redefine its role. Finally, as Ladd (1984, p 26) stresses, because of the technological innovation and its tempo, it is illusory to believe that these new technologies can be dealt with piecemeal and one-by-one. Rather, copyright law must, if it is to cope, be crafted with declarations of rights broad enough to encompass new uses as they appear, with any limitations (such as private copying) specifically enumerated and defined.

4.3 Concluding Remarks

In the course of the present chapter, the relationship between technology and copyright has been examined. In particular, the focus has been on certain challenges that the former poses for the latter, which, albeit distinct, are also interrelated. First, the impact of technology on copyright itself and its basic concepts has been scrutinised. Second, the fundamental issue of public access to protected material under the prism of technology’s evolution has been reviewed. And third, a
general, introductory mention has been made as regards two grave problems that copyright faces in the light of technological developments, namely piracy and private copying.

In the ensuing chapters of the present thesis (Chapters 5-9 and Conclusion), the aim will be the following. First, to investigate the causes and effects of piracy. Particular reference will be made to music piracy and a trend will be drawn as regards its occurrence and its cost over the past 15 years. Second, to examine whether or not private copying is a 'free use' of copyright material, and to assess its impact on copyright owners and industries alike. Third, to review how copyright law deals with the two phenomena and how technological applications have been used to control and clamp down on unauthorised copying. Fourth, to outline the efforts that international institutions, such as the European Union and GATT, have recently taken towards the creation of an international framework for a more effective protection and enforcement of copyright. And finally, to highlight the necessary components of an effective anti-piracy campaign, and investigate whether copyright has to redefine its role to accommodate the challenges that technology presents it with.
CHAPTER 5

PIRACY OF COPYRIGHT

Piracy of copyright is an issue of an inherently threefold nature: philosophical/ideological, legal, and economic. It may be that one of these aspects could prevail depending on the angle the issue is seen from, be it scientific, vocational, or other. Nevertheless, they complement each other and are intricately woven into the complex fabric of the piracy phenomenon. This view also acquires validity by being fully endorsed by prominent figures involved in copyright industries.1 These three parameters, albeit overlapping, are also quite distinct. Therefore, they deserve a separate scrutiny, which will be undertaken hereinafter, through an extensive literature review embroidered with illuminating examples and enlightening tables.

In the first part, an introduction into the realm of the issue will be provided. An attempt will be to: define the term ‘piracy’; examine its subsistence, its kinds and its forms; and finally, determine the relationship between copyright and piracy. In the second part, through three distinct sections, the aim will be to investigate its possible causes and effects, as well as the dissenting -theoretical, ideological, philosophical-opinions the whole issue generates.

5.1 Towards a Definition of the Problem

Piracy is, according to de Freitas (1990), a particular form of copyright infringement. Indeed, the term has been used to describe the infringement of copyright, and it appears as such an entry in the Shorter Oxford Dictionary, since the early 18th century (Davies 1986, p 4). There are two other kinds of infringement: ‘counterfeiting’ and ‘bootlegging’. Both, however, fall under the wide

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1 Denis de Freitas, consultant to IFPI (International Federation of the Phonographic Industry); Jack Black, President of BLACA (British Literary and Artistic Association); and, Mike Chattin of ITA (Independent Television Association). All three shared the same view during personal interviews in March 1993.
category of stricto sensu 'piracy' as they bear the trait 'unauthorised', which is the essence of the piracy phenomenon. 'Piracy' and 'counterfeiting' are mentioned more often than 'bootlegging'. That is the reason why they tend to be used alternatively, at least in common parlance. However, they are quite different and an apposition of their meanings, in general terms, is well provided by Dworkin (1983, p 1). 'Piracy' covers all kinds of unauthorised copying of someone else's intellectual property. 'Counterfeiting', on the other hand, has a more narrow meaning and is used to describe deliberate facsimile copying that leads the public to believe that the copy is the genuine one.

Much as its definition seems quite clear, piracy is a vague term with no settled legal meaning, as Reichman (1989, p 775) stressed, while addressing an international Symposium dedicated to the trade-related aspects of intellectual property (hereinafter referred to as 'TRIPs Symposium-Part II'). However, according to a view, succinctly expressed by Schein (1989) during Part I of the aforementioned Symposium (hereinafter referred to as 'TRIPs Symposium-Part I'), it may be difficult to determine, but when it happens to you, you will know it, and you will need no definition (p 377).

What constitutes an act of piracy? The term is used to describe the infringements of copyright owners' rights that are included in two wide categories: First, the right of reproduction, which can be violated by means of photocopying, audio and visual recording, or computer processing ('piracy' and/or 'counterfeiting'). Second, the right of performance, which can be encroached upon when the performance is live, or once it is 'fixed' and broadcast ('bootlegging').

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2 'Bootlegging' is more specific than piracy and counterfeiting. Therefore, its meaning, along with more specialised definitions of the other two kinds, will be given in the particular context of audio-visual piracy in Chapter 6 of the present thesis.

3 'Fixation', according to a WIPO definition, is the embodiment of sounds, images, or both in a material form sufficiently permanent or stable to permit them to be perceived, reproduced, or otherwise communicated during a period of more than transitory duration.
In a nutshell, an act of piracy is either the production itself, or the marketing of illegally obtained material, or both. Consequently, there are two types of infringement covered by law: 'primary' and 'secondary':

- 'Primary infringement' occurs when a work in material form, or a substantial part of it, is copied and disseminated in purpose of commercial profit without the permission of the copyright owner. Primary infringement, for example, occurs when a person actually commits the offence, or when that person 'authorises' someone else to do it.

- 'Secondary infringement' takes place when pirated articles are imported, sold, offered and/or exposed for sale and/or hire, exhibited in public, or distributed by way of trade. This kind of infringement, by no means secondary in importance, is designed to protect the copyright owner from those who would benefit from his/her work despite not having actually copied it. For example, secondary infringement is committed by a cable operator that receives broadcasts off-air and retransmits them without the consent of the right holder; and, in the case of public establishments where a video recording is shown to the clientele without prior authorisation of and payment of a fee to the copyright owner.

In the legal context, in a much as comprehensive and brief sense as possible, an act of piracy is any unauthorised and uncompensated appropriation, reproduction, distribution or simulation, for commercial purposes, of an intellectual creation that deprives the creator/owner of his/her economic and moral benefits.

The component of marketability holds a key place in the above definition. For it has significantly influenced the 'evolution' of copyright misappropriation through the ages in the following ways.

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4 'Substantial part', according to Black (1989, p 104), is open to interpretation by the courts. It can be either quantitative or qualitative. For example, a small part may be the most significant one.
Firstly, it has changed the very nature of piracy. Nowadays, the term does not imply only
what it used to in earlier times. Roger Femay, Chairman of the International Copyright Committee,
gave a comprehensive account of that shift during an international forum on piracy, held by the
World Intellectual Property Organisation in 1981 (hereinafter mentioned as ‘WIPO 1981’). In
connection with authors, for example, pirating a work consists essentially in copying it, followed by
claiming its authorship. *Prima facie*, that process may even spring to mind the notion of plagiarism.
However, with the added value of marketability, the term ‘commercial piracy’ has been created. To
Femay (WIPO 1981, PF/I/4, p 1):

“It has to do with the appropriation, not of the work -which generally remains intact- but of
the industrial operation that brought into existence the material object in which the work is
incorporated.”

The commercial element has ushered piracy into a new era by attributing to it previously unknown
dimensions. Commercial piracy does not anymore bring to mind plagiarism and it is now quite
distinct from what Thompson (1980, p 249) refers to as an artisan-type operation or a kind of spare-
time family enterprise. In recent times, piracy has mushroomed into a large-scale industrial operation
with grave economic consequences that involves all the copyright industries and every single medium
of communication, from books to computers and satellites.

Secondly, marketability has not only changed the nature of piracy but also perplexed its very
definition. In particular, the absence of commercial purposes in an act of appropriation of
copyrighted work without compensation and/or permission of the owner may even render that act a
lawful practice. Michaly Ficsor, currently Assistant Director General of WIPO, gave a characteristic
example of such a peculiar case during a WIPO international forum on piracy of broadcasts and of
printed works (hereinafter mentioned as ‘WIPO 1983’). To Ficsor (PF/II/S/9, pp 1-3), a properly
remunerated multiplication is not a real infringement and can be easily distinguished from sheer
piracy.
However, there is a very important area between these two poles that covers cases such as the non-commercial reproduction, e.g. of textbooks or videocassettes for educational purposes. Such an activity may ostensibly seem as an infringement of copyright. However, when the aim is not making a profit and the use of the copied material is confined within educational institutions, for instance, that activity is exempted from infringing copyright, under the legal doctrine of 'fair use'. On the other hand, however, it is not clear as to what the answer might be in a hypothetical case of a systematic multiple copying within educational establishments that would occur, as de Sola Pool (1983, p 214) postulates, if teachers and their students decided to use their VCRs to tape off-air whatever programmes were identified as worth studying.

To sum up, it may appear that the commercial element is the specific distinction between lawful practice and infringement. However, there is an underlying danger, clearly manifested in the above example, which is well put forward by Ficsor (ibid.). He warns that if we focus our attention too unilaterally on cases of copyright infringement with commercial motives, we may contribute to an ever increasing and more and more dangerous misconception of the purposes and principles of copyright. It should be noted that especially issues such as 'fair use' as well as the commercial or not purpose of copying provide large room for misunderstanding and misinterpretation. Hence, they generate endless and fervent ideological and philosophical debates that have been both dominating and tantalising the realm of copyright.3

What is the relationship between copyright and piracy? Jack Black, President of the British Literary and Artistic Copyright Association, simply opines: “Without copyright, there would be no piracy” (personal interview, 3/3/1993). Indeed, their coexistence goes way back. As Asser (1980) notes, 1993 is the year that marks the quincentenary of recorded book piracy since the first pirated edition can be traced in Germany in 1493. Chesterman & Lipman (1988, p 10) see that relationship

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3 A more profound look at the ‘fair use’ debate will be taken in the premises of Chapter 7, section 7.1, of the present thesis.
as so close that it becomes almost symbiotic. For the pirates and the system they exploit, like parasites and their host, predators and prey, cannot exist without each other.

The close symbiosis of the copyright system and its piracy often forces the former -be it individuals, industries, or even governments- to converse with the latter, in equal terms, as a 'necessary evil'. Some illustrating examples of such an anomalous situation are hereby mentioned.

There have been cases where the importer of a best seller has had to ask the pirates for a 'period of grace' in which to sell his books before the illegal edition appears on the market (WIPO 1983, PF/II/8B, p 5). In Brazil, as Ogan (1985, pp 66-67) reports, the owners of legally copied cassettes found themselves in the peculiar position of negotiating with the pirates. The former have agreed not to impound illegally distributed videos if the latter promise not to distribute legally authorised recordings. The pirates would also be required to refrain from putting into circulation any new products for six months unless the owners allow it (needless to say that the pirates refused the deal).

In Poland of 1993, the Polish Radio-Television Commission did not ask for the prosecution of the pirates. Not only that, but also President Walesa stated that "he appreciates people that take initiatives [emphasis added]". He accused them only of the way they envisaged his election campaign, and not of their piratical activities. In Malaysia, as Beier (TRIPs Symposium Part I, 1989, p 338) recalls, the recording industry said to the pirates: "We will give you the money and help you set up a business to sell legitimate records." The pirates replied: "That's not a bad idea, but we need copyright protection."

The commercial element, as previously mentioned, has made piracy a 'big business'. That, in economic terms, means money; and, the copyright system, in the form of some national governments, often sees that as an opportunity for additional income. Bettig (1990, p 64) reports that, in countries of Southeast Asia and Pacific Basin, videocassette pirates often have the tacit approval of the authorities who recognise the valuable foreign exchange that piracy could generate. Fenby (1983, p 128) mentions the example of Taiwan, where the government used to condone
counterfeiting as a limited but useful factor in boosting exports. In the words of a minister, “if counterfeiting was necessary to help sales abroad, then let it go on.”

It must be stressed here that the countries mentioned in all the above examples had been ranking high in the list of ‘the most pirating nations’ worldwide until very recently, and some of them still do. Also, the fact that the vast majority of such countries are either ‘less developed’ (LDCs), or ‘newly industrialised’ (NICs), is yet another indication of how differently the issues of copyright and piracy are seen through different perspectives. On the one hand, the above mentioned groups of nations; on the other, the ‘developed world’. That polarity, it has been repeatedly argued within the present thesis, has put copyright under a considerable strain. The entanglement of copyright between those two poles is well depicted in the causes of piracy as well as in the dissenting views that the issue spawns, which will be dealt with hereinafter.

5.2 Causes and Effects of Piracy

What are the causes and effects of copyright piracy? An effort to trace its multi-fold reasons and its multiple consequences will be undertaken through a following literature review interspersed with characteristic examples and divergent opinions.

(a) Causes

One primary reason for piracy is a major misconception about a very important component of copyright theory, namely the notion of property. Copyright is a form of property which is called ‘intellectual’. The fact that it is not tangible, renders it difficult for laymen, but also for legislative, administrative and executive authorities, to fully realise that its unlawful appropriation is a crime. In fact, as Hettinger (1989, p 32) argues, most of us have undoubtedly done something considered piracy by owners of intellectual property. And, as Gurney (1995, p 1) adds, if we are honest, piracy

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6 According to most studies such countries are: Taiwan, Korea, the Philippines, Singapore, Peru, the Dominican Republic, China, Pakistan, Hong Kong, Malaysia, India, Thailand, Indonesia, Egypt, Syria, Colombia, Ecuador, Mexico, Japan, Iran, Iraq, Jordan, and even Germany and the Netherlands.
is an abuse in which most of us play a part, enjoying music, software, videos and books with scant consideration of their origins or their legality. Also, as Hettinger (1989, p 35) opines, the unauthorised taking of an intellectual object does not feel like theft. Stealing a physical object involves depriving someone of that object, whereas taking an intellectual object deprives the owner of neither possession nor personal use of that object.

Schein (TRIPS Symposium-Part I, 1989, pp 377-378) gives two indicative examples of that misunderstanding. Firstly, there were the British who send troops to the Falklands in order to protect the islands from Argentina’s invasion; but, when they realised that a law enacted to protect artistic design violated some international treaties, they removed the protection from the artists. Secondly, if your wrist watch is stolen and the thief runs abroad, Interpol would be called to retrieve the former and punish the latter. The use of the word ‘crime’ is widely accepted for such activities, whereas for copying intellectual works the answer would be something like “we cannot do anything about that,... the only rights you have in this intellectual property are the rights that are given to you - there are no inherent rights to the property.” Yet, as Schein wonders (ibid.), there is an inherent right to a few rocks in South Atlantic, and for you to keep your watch.

The concept of copyright as property and its legitimisation as such has not only provoked a fervent global debate, but also induced different perceptions about piracy worldwide. Paul Steidmeier (1993, pp 158-162) posits that there are two key questions in that divisive debate. First, what counts as property; and second, to what extent may owners have exclusive claims over it. Consequently (p 158):

“It emerges that ‘property’ is a tremendously dynamic and fluid reality both in concept and historical sociological form. It is inseparable from cultural values and legal traditions.”

According to modern Western values, intellectual property confers upon the possessor rights for reward and protection over his intellectual creation. In contrario, non-western cultures view
intellectual property - if indeed can be 'property' - as public and/or common that should be shared freely.

Representatives of that latter view are, for instance, most of the countries of the Middle East and Southeast Asia which, not surprisingly, rank amongst the largest pirates worldwide. Asian artists, Bettig (1990, p 64) maintains, have traditionally viewed the copying of their work as an honour; Southeast Asians are not easily convinced that buying or renting pirated programmes is a criminal activity. As Reyes (WIPO 1983, PF/II/S/12, p 2) reports, the concept of copyright is more often than not unknown or misunderstood in most Asia; Asians live in a communal society where the spirit of sharing is very strong.  

A similar notion permeates the thinking of the citizens of the Caribbean Basin countries. The fact that these nations 'sit' squarely in the footprint of USA domestic satellite, has given the opportunity to individuals and even governments to encroach upon copyrighted material transmitted into their national space. However, Tom Tavares-Finson, representing Jamaica during a WIPO Forum on piracy (WIPO 1983, PF/II/S/19, pp 1-4), expressed the following opinion. It is agreed that satellite communication is for the common interest of mankind. Therefore, laws must be modified so that developing nations could benefit, and so that piracy would be regarded as legitimate sharing in one aspect of the technology advancement of mankind.

Another, extremely significant, reason for piracy is the matter of 'price'. Uchtenhagen (WIPO 1983, PF/II/S/18, p 2) succinctly explains why. Whenever unlawfully manufactured products have made their appearance, the determining factor has been the disparity in price between the original product and the copy. Piracy has only been able to develop where a market was open to its

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7 Many argue that such social concepts are likely to disappear once a society becomes fully market oriented, but this is open to debate. For instance, among many Southeast Asian countries, which have recently shown increased levels of economic development, there is a growing respect for copyright. However, as Lepp (1990) and Antons (1991) argue, most of those countries would not have changed their attitude without the trade pressure of the Americans. Furthermore, the initial argument fails to explain why, for example, the Shenzhen region in the China-Hong Kong border, with a economic growth of 10% per annum, still remains, according to the IFPI one of the most flagrant copyright violators worldwide and a major pirate export centre.
'products'. In Nigeria, for example, TV stations are alleged to broadcast illegally copied cassettes of Western entertainment. One of the reasons for this practice, Ogan (1985, p 68) contends, is the lack of funds for local production.

The above theory has worldwide consequences. The difference between costs in the developed countries on the one hand, and purchasing power and cost of living in the developing ones on the other, have driven the latter to result into piracy in order to close the 'price gap'. In that perspective, Boyd (1988, p 157) notes, many Third World video dealers argue that there is no reason to pay high priced legitimate products when material of similar technical quality are readily available from pirates. Moreover, there have been numerous cases where nations tried to justify their piracy activities in the name of that much needed balance. The price disparity is the driving force of piracy and counterfeiting, especially in the realm of print. As Abdur Razzaq, the invited specialist from Pakistan, argued during a WIPO Forum (WIPO 1983, PF/II/S/24, p 3), piracy is a phenomenon common to all developing nations dependent for their book supplies on developed countries. To him, due to exorbitantly high prices and scarcity of reading material, the developing world is compelled to import expensive books. Moreover, the developed countries fix the prices in accordance with their own economic terms (high cost of production, rising inflation, etc.). The result is, for instance, that imported textbooks have gone far beyond the reach of an average student. In addition, the meaning of property is something material and tangible to the average Asian, Reyes notes referring to Southeast Asian nations (WIPO 1983, PF/II/S/12, p 2). Therefore, it is rather difficult to make him pay a high price for something abstract and intangible like copyright.

So, what do the developing countries do? They resort to piracy to meet their needs. In the Dominican Republic, the case of the book store of the National Autonomous University of Santo Domingo is illuminating. Being far behind in the payment of imported books, it had its credit cut off by foreign publishers. Consequently, it had to fill its shelves with pirated editions in order to satisfy the demands of its students (WIPO 1983, PF/II/S/8, p 1). Koutchoumow (WIPO 1983, PF/II/8A, p
4), Secretary General of the International Publishers Association, warns that, because 75% of printed works are used for education, science, culture and vocational training, there is a tendency, in some people's and countries' views, to justify unlawful reproduction. School textbooks fall into the category of 'basic needs'. Consequently, claims have been made for the existence of a kind of justification, namely 'the ethics of piracy' (WIPO 1983, PF/II/8B, p 4). Another justification comes from Altbach (1986, p 1647). He argues that pirated editions in the developing world constitute a very minor share of the 'book world market'. He adds that piracy can be frequently constructive by creating a market for a book since an imported edition can be too costly for the local buyer. Grounds for justification emanate also from the need of developing nations to have access to protected works. Many small-scale and even bona fide publishing industries face exaggerated difficulties not only in locating copyright owners in order to get their permission to reproduce, but also in purchasing translation rights due to severe terms of payment. So, the conditions are ideal for the pirates to step in and satisfy the desire for knowledge (WIPO 1983, PF/II/8B, p 7). The Director-General of Taiwan's Board of Foreign Trade once stated:

"Taiwan comes in for unfair blame. Its exclusion from international organizations makes it difficult to get information, ... our businessmen and manufacturers run small to medium-sized enterprises and they are not able to set up their own marketing channels ... they produce goods according to specifications ordered by buyers ... they trust the buyers and follow their instructions. That makes them innocent, to some extent."

(Fenby 1983, pp 124-125)

According to the Algerian example (WIPO 1981, PF/I/S/1, p 3), piracy is due to the following market conditions: either the legitimate product is not available on the market, which leaves the field free for pirate goods, or the lawful product is very expensive and pirates are attracted by the possibility of offering cheap goods to win the favour of the public.

Indeed, in the light of the 'price gap', there have been cases where the pirates are the people's favourites. Not only because they offer a variety of cheap products to the 'poor consumer', but also because they present, as in the Filipino case (WIPO 1981, PF/I/S/18, p 2), a popular
product, the so called 'selection tapes', which carry popular songs attractive to the consumers, that no recording company can match. Surprisingly enough, even UNESCO seems to share the above view. According to its statement (WIPO 1981, PF/I/10, p 2), the internationalised foreign productions chosen by pirates are often of a good quality; and, the pirates assure the reproduction of national works to the satisfaction of the buyers. Fenby (1983, p 134) refers to the characteristic example of Taiwan, a country at the top of the 'piracy league'. It is the counterfeitors who are the people's choice there; undercover agents, who investigate piratical activities, are far from being popular and they are reproached for their lack of patriotism. In Nigeria (WIPO 1983, PF/II/S/14, p 3), even the sympathy of the police -in most cases- rests with the 'friendly' pirates.

Fenby (1983, p 152), anathematises another theory, prevalent in developing countries, in favour of the pirates’ popularity. According to that theory, piracy is a 'victimless' crime. Copyright owners (individuals or companies) are assumed to be wealthy and can afford to lose a few millions; and, counterfeitors and pirates become ‘Robin Hood’ figures who take revenue from the rich in order to distribute it to the poor.

Finally, it must be added that the matter of ‘price’ is a cause of piracy worldwide, not only in developing nations. The cheap pirate product appears to be attractive to consumers in developed countries, too. An impromptu street survey, conducted by a regional radio station in the UK ('Leicester Sound FM') during May 1993, showed that quite a few people would prefer to save money by buying a pirate cassette for 2-3 pounds instead of the legitimate copy worth 10-12 pounds.

As it has been previously mentioned, administrative, legislative and executive authorities, both in developed and developing countries, have very often failed to fully understand the very nature and subsistence of copyright. That is inevitably reflected upon the relevant legislation which -more often than not- is inadequate to deter piracy, and hence, in a way is conducive to the occurrence of the phenomenon.\(^8\)

\(^8\) Copyright and its protection against piracy will be dealt with in depth in Chapter 8 of the present thesis.
A document presented by the UNESCO Secretariat at a WIPO Forum on piracy gives a general account of loopholes in the international protective legislation (WIPO 1983, PF/II/8B, p 7). Firstly, not only there are countries that are not party to any of the universal copyright protection instruments, but also some of them have no national copyright legislation at all. Secondly, even within countries that have acceded to the Berne and the Universal Copyright Conventions, their relevant legal regimes have been proven very little help against unlawful reproduction. Most laws, either do not sufficiently clearly define the elements that constitute the offence of piracy; or the procedures provided for are slow to enable prompt action to be taken; or, finally, the penalties provided for are too lenient if compared to the damage caused. As a result, victims and authorities have to resort to circuitous legal procedures, only for the pirates to be sentenced on less appropriate legal grounds.

As Stanberry (1990, pp 36-37) also points out, there are significant endemic shortcomings in all the international copyright agreements and treaties. Firstly, none of them have legitimate, well structured dispute resolution or effective enforcement mechanisms. Secondly, most of them, instead of espousing an international code, simply mandate ‘national treatment’; but national treatment does not require a country to enact any legislation.

Consequently, as Reichman argues (Symposium-Part II 1989, p 780), the basic determinants of piracy are left to domestic laws. Only if a state’s domestic law provides less protection than its treaty obligations -if indeed it is a member- could that state clearly said to violate international law.

The above analyses vindicate Asser’s view (1980, pp 2, 9) that piracy is an “extremely underrated problem”. To him, the fact that almost all countries, developed and developing, have found

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9 Such grounds can be: fraud; unfair competition; trademarks; false identification of origin; personal rights, such as right of privacy or right of publicity; and, civil remedies such as damages.

10 ‘National treatment’ merely means that all persons are treated in accordance with current laws applicable to local citizens; if a local resident is granted no protection, a foreigner is also not going to enjoy any.
legal procedures not speedy enough, costs high, penalties light and difficult to obtain facts about piracy, are probably the reasons why copyright owners have been frequently reticent to do something.

There have been cases where, even in developed countries, not only copyright owners but also judicial as well as criminal authorities have underestimated the piracy problem. For example, as Nicholas Garnett, Director General and Chief Executive of the International Federation of the Phonographic Industry (IFPI), reports (WIPO 1993, p 103), one of the recurrent problems faced by the music industry in its fight against piracy worldwide has been the need to explain, often to highly qualified lawyers, that copyright protection in phonograms extends beyond the physical object to the aggregate of the sounds fixed and carried in a particular medium.

In one of the most ardent supporters of intellectual protection, namely the USA, the Supreme Court, in the famous Sears & Compco decisions (1964), cast doubt on the protection afforded to performers and to record manufacturers by prohibiting the states from protecting sound recordings against unauthorised duplication (Yarnell 1973, pp 241-243). Also, the United States does not recognise a right to diffusion or signal right under its copyright law (WIPO 1983, PF/II/S/26, p 5). It is noteworthy that, in 1994, USA has not yet acceded to the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).

In early 1980s Federal Republic of Germany, too little economic significance was attached to book piracy and it was not recognised as a special type of crime. As Mr. von Lucius reports (WIPO 1983, PF/II/S/11, p 2), this misconception is mirrored on the fact that criminal proceedings against book pirates were often dismissed on grounds of triviality or negligible guilt, and fines were imposed at a very low level.
Around the same period (1982), the maximum fine in the United Kingdom was 50 pounds, and Scotland Yard let it be known that requests for help against piracy would be 'looked at with a cold eye' (Fenby 1983, p 76).

In developing countries, the examples, of either absent legislative and regulatory provisions, or insufficient enforcement of such provisions, are even more indicative. Some nations, Taylor (1993, p 257) argues, simply do not accept that counterfeiting and piracy are a problem that requires legislation. It is a source of wealth to them, and that renders them unwilling to give up their profits.

As Fenby (1983, p 127) reports, judges in Taiwan frequently do not think that copying a foreign copyrighted product is a crime at all.

In the Dominican Republic (WIPO 1983, PF/II/S/8, pp 2-3), the legal causes of book piracy, for instance, are numerous: a) for the dealers of pirated editions there is no penalty at all; b) until the remedy of confiscation of pirate material is realised, the pirate has plenty of time to sell his stock. Hence, there is no proof, and the provision of confiscation becomes a dead letter; c) foreign authors are protected only if their country is bound with the Dominican Republic by a bilateral treaty. And, even if they manage to commence any legal action, the litigation is not only time and money consuming, but also -in some cases- the legal action is defeated altogether.

In countries such as Kenya and Singapore, for example (WIPO 1981, PF/I/S/S, p 2; PF/I/S/8, p 1), state enforcement agencies are not expected to command priority over the investigation of piracy when an over worked police force have to deal with other thriving types of crime (murders, robberies, bank frauds, drug smuggling and dissident movements).

In Mexico (WIPO 1981, PF/I/S/17, p 1), criminal authorities are not familiar with the special copyright legislation which does not normally form a part of the training of attorneys, criminal investigators, prosecutors and judges. Moreover, the term of imprisonment provided is short enough for pirates to secure their release on bail during the proceedings.
In China, where piracy of computer software and audio recordings is rampant, a minister claims that China is a large country and enforcement is not easy. Lawyers of Western companies tend to advise their clients to use ‘administrative means’, such as appeals to the authorities, to press their concerns; recourse to the courts should be a last resort.

From the foregoing, what someone could expect from both developed and developing countries since the universal conventions in the field of copyright do not contain any punitive remedy for copyright infringement or real sanctions for it? The only mode of redress, Taylor (1993, p 256) notes, is for a member to take the infringing state to the Hague International Court of Justice. The fact that no country is bound by the resulting decision is perhaps the reason why that action has never been taken so far.

As it has been previously discussed at length, there is a link between technology and piracy. The fact that technological innovations have revolutionised infringement has made matters worse for the already inadequate copyright protective legislation. Existing copyright laws, Labra argues (WIPO 1983, PF/IIS/7, p 1), fail to keep pace with the ineluctable technological progress, and it is becoming increasingly difficult to provide the necessary protection in the use of copyrighted works.

One example, that of the performers and producers of audio-visual recordings, is indicative of the deficiency of international conventions -not to mention national laws- to grant full protection to the rights of these parties. As Taylor (1993, pp 256-257) succinctly underlines, audio-visual recording equipment did not exist at the time of Berne Convention’s negotiations, and it was in its infancy at the time of UCC’s discussions. Hence, there is no separate protection afforded under these two Conventions to distinguish audio-visual fixations from the literary or musical works from which they are derived. Also, there are no separate rights granted to protect performers’ or producers’ expression. For, at the time of Berne’s and UCC’s inception, there was no need for such protection,
as there was no way of infringing it. The copyright regime is incapable of protecting musicians under international law.

The two major Conventions have simply become obsolete in that respect. An attempt to redress the problem was to create a series of ‘neighbouring rights’ to copyright in the form of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (1971). However, even those attempts were to face serious drawbacks. Firstly, Article 19 of the Rome Convention specifically excludes protection afforded to performers in the area of audio-visual recordings, since videograms, for instance, did not exist at the time of the Convention’s adoption (WIPO 1981, PF/I/3, p 3). In addition, Rome Convention does not provide producers of phonograms with protection against unauthorised import distribution (WIPO 1981, PF/I/9, p 2). Secondly, both Conventions fail to provide the desired protection as they are ratified only on a low scale, or even flagrantly ignored in some, mainly developing, countries. Thirdly, their existing provisions are not always applied strictly. Finally, national laws of member states are not always in perfect harmony with the undertakings made by the copyright and neighbouring rights conventions, and hence, do not take the necessary steps to ensure their application.

Last but not least, it must be stressed that numerous views share the belief that lack of education can be actually conducive to piracy, its propagation and its justification. Both in developed and developing nations, failure to pertinently educate, not only the relevant authorities, but also...
public opinion on social, ethical and economic aspects of the problem generates both grave misconceptions and dissenting voices over the phenomenon and its confrontation.

(b) Effects

The consequences of piracy and of inadequate intellectual property protection are of a multiple nature; also, they affect individuals, industries, the public at large, national governments as well as whole countries, both developed and developing.

The effects of piracy on performers, for example, are explicitly accounted by Morton, the president of the International Federation of Musicians (WIPO 1981, PF/I/3, pp 2-3), and in a statement of the International Labour Office (WIPO 1981, PF/I/11, pp 1-4): a) For a number of performers who have a direct interest in sales of recordings through a royalty, an illicit copy represents a loss of a part of that royalty; b) piracy leads to the performer losing control over his performance; c) piracy also damages the performer's individual artistic quality and reputation; d) pirated recordings, sold at a low price, devalue the performances and depress the prices of recordings generally; e) piracy results to a diminution of performers' employment prospects. In the event of a 'bootlegging', for instance, the artist may even lose an opportunity to establish a contract with a producer; f) finally, piracy strikes at the 'life investment' of the performer, who has devoted his life to perfecting its skills and has undertaken considerable capital expenditure. Any economic rights, for example, that the artist may obtain for the incorporation of his/her work in a videogram will be lost when that videogram is pirated.

In addition, performers suffer from the 'secondary effects' of piracy, particularly in the area of audio-visual recordings production industries. Producers tend to respond to piracy by losing confidence in new productions, or by undertaking lower cost projects. Also, piracy results to the
erosion of the 'non-theatrical' market for films through the so-called 'institutional' piracy, and the obsession of the film industry with a small number of the so-called 'blockbuster' films.

The above developments could seriously damage the performers' profession, both in developed and developing countries. The following statements of two different, in many ways, performers are illuminating ('IFPI Piracy Report', January 1992, p 8). Salif Keita, one of the most popular musicians all around Africa, once said:

"Never have I been able to live from my music. The pirates prevent African governments and African musicians from progressing. If nothing is done to stop piracy, there is a great danger that African music will die."

Also, the famous Michael Jackson has declared:

"... piracy or counterfeiting is theft and hurts all of us. Talented musicians are cheated by the sale of counterfeit copies of their work. The fans are sold records of a lesser quality. Criminals should not profit from our love of ... music."

Piracy, besides representing a violation of performers' and producers' intellectual property rights and their economic gains, it delivers a serious blow at the heart of copyright-entertainment industries. According to International Labour Office (WIPO 1981, PF/11, pp 1-3), it bears some very significant repercussions: on employment, not only of performers, but also of other professions such as technicians and production workers in general; on investment on new works; on sponsoring young and unknown talents; and ultimately, on national culture. In addition, piracy destroys fair competition, as it is underlined throughout a survey compiled by the Publishers Association and the IFPI on behalf of the UK Anti-Piracy Group (hereinafter mentioned as 'UK Anti-Piracy Group 1986').

Legitimate producers of copyright material incur major costs in developing their products and piracy seriously undercuts their ability to market these products. For instance, in the recording industry almost 9 out of 10 releases are not commercial successes, but the producer still has to pay

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As in the case, for example, of an unauthorised showing of a video movie to the clientele of an establishment (hotel, coffee shop, etc.), where the act of the secondary infringement is committed.
studio costs, musicians' costs, costs of marketing, advertising and development, as well as non returnable advances to the artists in the form of royalties.

Much the same applies to the much afflicted book industry. As Hoffman (1990, p 9) succinctly reports, pirates issued their own version of *Encyclopaedia Britannica* in Taiwan before the legitimate edition could be published. Some argue that piracy benefits the user by providing low cost editions. However, sooner rather than later, as Robert Craven, Chairman of the International Protection Committee, Association of American Publishers, counterargues (WIPO 1983, PF/II/S/15, p 3), there will be little for the ‘user’ to ‘use’. To Craven, piracy eventually contributes to the higher cost of legitimate editions; it eliminates the market on which publishing depends; it creates a discouraging environment for the entry of legitimate publishers; and finally, it destroys the climate for investment.

An important element of publishing is ‘cost’; cost to create and cost to disseminate. The following two tables best depict piracy's impact on book publishing by comparing legitimate and pirate publishing costs:

- The finding of the following Table 5.1 is that there is a very significant gap between the profit gained by a legitimate publisher (10%) and the profit gained by a pirate (70%) on a 100% basis of a book’s production cost.
Table 5.1 Comparison between a Legitimately Published Book and a Pirated Edition: Cost and Profit Margin.

<table>
<thead>
<tr>
<th></th>
<th>PUBLISHED BOOK</th>
<th>PIRATED BOOK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Write down</td>
<td>5%</td>
<td>No cost</td>
</tr>
<tr>
<td>Origination Costs</td>
<td>15%</td>
<td>No cost</td>
</tr>
<tr>
<td>Author</td>
<td>15%</td>
<td>No cost</td>
</tr>
<tr>
<td>Editorial overhead</td>
<td>15%</td>
<td>No cost</td>
</tr>
<tr>
<td>Paper &amp; (Re) production</td>
<td>20%</td>
<td>20%</td>
</tr>
<tr>
<td>Sales &amp; Distribution</td>
<td>20%</td>
<td>10%</td>
</tr>
<tr>
<td>Profit</td>
<td>10%</td>
<td>70%</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>100%</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

(Source: UK Anti-Piracy Group 1986)

- In the following Table 5.2, Clive Bradley, Chief Executive of the Publishers Association, compares the legal and the pirate incurring publishing cost over a book’s hypothetical retail price of 1 GBP (WIPO 1983, PF/II/S/2, pp 3-4). The finding is that any pirate can return 4 and a half times the net profit of a legitimate publisher on a book of identical physical quality sold at the same price.
Table 5.2 Legitimate vs Pirate Publisher: Contrast of Incurring Costs

<table>
<thead>
<tr>
<th></th>
<th>LEGAL PUBLISHER</th>
<th>PIRATE PUBLISHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royalty</td>
<td>10p</td>
<td>No payment to authors</td>
</tr>
<tr>
<td>Discount to bookseller</td>
<td>25p</td>
<td>25p (this can be less)</td>
</tr>
<tr>
<td>Production cost</td>
<td>20p</td>
<td>15p (no first cost or editorial costs)</td>
</tr>
<tr>
<td>Distribution cost</td>
<td>15p</td>
<td>2p (no warehousing, stocking, etc.)</td>
</tr>
<tr>
<td>Marketing cost</td>
<td>10p</td>
<td>None</td>
</tr>
<tr>
<td>Contribution to overheads</td>
<td>10p</td>
<td>3p (all cash in advance, no editorial or distribution staff)</td>
</tr>
<tr>
<td>Net Profit</td>
<td>10p (10%)</td>
<td>55p (55%)</td>
</tr>
</tbody>
</table>

In turn, James Bouras, Vice President of Motion Pictures Association of America and New York’s Deputy General Attorney, describes the piracy’s implications for the motion picture industry (WIPO 1981, PF/I/14, p 6). To him, piracy in other entertainment industries is essentially engaged in a single line of business: unit sales to consumers. However, the industry he represents has a lot of other traditional markets to protect, such as theatres, conventional television and pay-TV, and various non-theatrical outlets, such as hotels, schools, etc. The piracy of a specific film, for example, affects not only the market currently being served legitimately, but also the future potential revenue from subsequent markets that the pirates reach first. Sales of pirated videotapes of films, for instance, which have just opened in cinemas not only hurts theatrical attendance but also jeopardises the future potential sales of legitimate videotapes. The following two cases are indicative of the above situation (WIPO 1981, PF/I/11, pp 2-3). In Turkey, pirate recordings of ‘Grease’ and ‘Saturday Night Fever’ were on sale before the genuine copy could even be reproduced, with the result that the latter was never made. Similarly, in the USA, pirated versions of films like ‘Star Wars’, ‘Close Encounters of
the Third Kind' and 'Apocalypse Now' were on the market even prior to their official release in the cinemas.

When considering the adverse impact of piracy on copyright industries, an important factor that should be borne in mind is the economic contribution of these industries to national economies. In recent years, this has become particularly clear as a result of an array of studies carried out in selected (mainly) Western nations to precisely assess that contribution (Phillips 1985; Skilbeck 1988a and 1988b; Jehoram 1989; Hummel 1990; and, Siwek & Fuchtgott-Roth 1990). These studies' findings can be summarised as follows:

- Throughout the 1980s, copyright industries accounted for between 2 and 4 per cent of the Gross National Product (GNP) in almost all the countries studied; the one exception being the USA where the figure topped 4.8 in 1985, and has actually almost doubled in the latter half of the 1980s, from 2.8 per cent in 1984 to 5.8 per cent in 1990. The ensuing Table 5.3, which is compiled from data appearing in the all aforementioned studies, refers to that contribution on a country-to-country basis, and provides an estimate for an international average (Column 3).

<table>
<thead>
<tr>
<th>Country</th>
<th>Year of Study</th>
<th>Percent of GNP</th>
<th>Year of Data</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>1988</td>
<td>3.1</td>
<td>(N/A)*</td>
</tr>
<tr>
<td>Austria</td>
<td>1988</td>
<td>2.0</td>
<td>1984</td>
</tr>
<tr>
<td>Germany</td>
<td>1988</td>
<td>2.3</td>
<td>1984</td>
</tr>
<tr>
<td>Sweden</td>
<td>1982</td>
<td>6.6</td>
<td>1978</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>1986</td>
<td>2.4</td>
<td>1982</td>
</tr>
<tr>
<td>Finland</td>
<td>1981</td>
<td>3.5</td>
<td>(N/A)*</td>
</tr>
<tr>
<td>Finland</td>
<td>1985</td>
<td>4.0</td>
<td>(N/A)*</td>
</tr>
<tr>
<td>UK</td>
<td>1985</td>
<td>2.6</td>
<td>1982</td>
</tr>
<tr>
<td>USA</td>
<td>1984</td>
<td>2.8</td>
<td>1977</td>
</tr>
<tr>
<td>USA</td>
<td>1985</td>
<td>4.8</td>
<td>1982</td>
</tr>
<tr>
<td>USA</td>
<td>1990</td>
<td>5.8</td>
<td>(N/A)*</td>
</tr>
<tr>
<td>AVERAGE</td>
<td></td>
<td>3.6</td>
<td></td>
</tr>
</tbody>
</table>

* Year of Data not available
- It is suggested that if there is indeed a trend, in real terms, in increase of contribution by the copyright industries to the national income, then a whole percentage point to the international average would be added approximately every 12 years (Jehoram 1989). It should be noted that in the US case, this took place in less than five years (between 1977 and 1982, two whole points were added).

- The importance of copyright industries as regards the issue of employment is also underlined. For example, in 1982, UK copyright industries (excluding the computer software industry) employed half a million people (Phillips 1985). In the USA, in 1977, the copyright industries employed 2.2 million people, that is approximately 2.2% of the civilian labour force. By 1990, these figure had more than doubled, that is 5.4 million people were employed or 4.6% of the US work force (Siwek & Furchtgott-Roth 1990). In Germany, in 1988, copyright industries employed 800,000 people, which is equivalent to a 3.1% of the population in gainful employment (Davies 1994). Finally, estimates suggest that between 2.2 and 3.5 per cent of employment in Western countries is dependent on copyright based-activities (Hummel 1990).

- One of the aforementioned studies (Skilbeck 1988b), referring particularly to the UK, further concluded that copyright industries make a significant commercial contribution to the balance of payments on both the visible account (goods) and the invisible sector (royalties). In 1988, their total export earnings represented 2.4% of total UK exports. The copyright industries were also shown to have a particularly rapid growth; 127% over the period 1982-1988 compared with 38% for exports overall.

- Finally, all the aforementioned studies concluded that industries that have recently moved upwards in rank of economic significance are all service or information-oriented (e.g. copyright industries), in inverse proportion to industries representing more traditional sectors of the economy which have sharply declined (Jehoram 1989). For instance, it was found that UK copyright industries form a substantial part of the economy, greater in size than manufacturing industries, such as food, motor,
drink, and tobacco industries (Phillips 1985). Similarly, in the USA, between 1977 and 1990, the copyright industries had experienced an annual growth of 6.7% per year whereas, during the same period, the remaining sectors of the US economy had grown at only 2.7% per annum (Siwek & Furchtgott-Roth 1990). That trend is succinctly reflected on the statement of the President of the USA-based 'Paramount Video' who stressed that "more and more of our exports are going to be copyrighted material instead of wheat, beef and automobiles" (Bettig 1990, p 66).

There have been claims by experts -depending on the interests those experts represent- that some copyright industries are more afflicted than others by piracy and intellectual property inadequacies. However, as Hoffman (1990, p 9) suggests, the losses of domestic and export sales and royalties, and the damage to finances and reputation, are especially heavy in all the communication and information industries.

The above assertion is clearly reflected on an investigation (Investigation No. 332-245), undertaken in 1988 by the US International Trade Commission (hereinafter mentioned as 'USITC 1988'), which was intended to evaluate the economic effects of intellectual property right inadequacies and infringement on selected US industries in 1986. That investigation is worthy of special attention for four main reasons:

- It comprehensively identified which industries are more likely to be affected by piracy than others. The largest damage should be expected: a) where the technology required to produce infringing versions of legitimate products is readily available and relatively inexpensive; b) where sales are made directly to consumers who, either are indifferent, or unable to identify differences between legitimate and pirate products; c) and finally, where the cost of genuine innovation is so much higher than that of imitation. The above three factors clearly indicate that the industry more vulnerable to infringement is the 'entertainment industry' which includes publishing, motion pictures and all audio and video recordings (p 107).
- The 'USITC 1988' distributed a Questionnaire to a wide range of industry sectors that benefit from intellectual property protection in order to evaluate losses resulting 1) from intellectual property inadequacies and 2) from infringement:

1) A cross-section of companies belonging to the 'entertainment' sector reported aggregate worldwide losses of around US$ 2.1 billion due to intellectual property inadequacies. More than 95% of these (around US$ 2 billion) represent revenue losses from fees or royalties not paid or never generated after licensing intellectual property rights abroad (pp 103, 106).

2) Another representative sample from the 'entertainment' industry (a total of 9 companies) estimated their lost revenues and lost profits resulting from infringement as follows (p 110):

<table>
<thead>
<tr>
<th>Table 5.4 US Entertainment Industry: Lost Revenues and Lost Profits from Foreign Infringement of Intellectual Property Rights in 1986</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estimated lost revenue (US$ millions)</td>
</tr>
<tr>
<td>% of reported infringing sales</td>
</tr>
<tr>
<td>% of worldwide sales</td>
</tr>
<tr>
<td>Estimated total lost profits (US$ millions)</td>
</tr>
<tr>
<td>% of worldwide sale</td>
</tr>
</tbody>
</table>

- Based on the above 'USITC 1988' Investigation, Feinberg & Rousslang (1990, pp 79-90) have undergone their own research in order to provide estimates of how infringing sales abroad affected profits of legitimate US producers in 1986. A selection of figures that appeared in the above research, taken solely in relation to the 'entertainment industry', result to the following Table 5.5. It

14 For its 1988 investigation, the USITC collected data from 245 US companies classified into 5 broad industry sectors: 1) entertainment and publishing; 2) other consumer products; 3) computer related; 4) industrial; and 5) extractive, natural resources, and chemical products. However, because the focus of the present thesis is on the audio-visual piracy of copyright, reference to the above studies will be confined in findings related to 'entertainment industries' only.
should be noted that the ensuing estimates are derived from a cross-section of the above industry sector; and, figures in parentheses show the number of companies that provided these estimates.

<table>
<thead>
<tr>
<th>Table 5.5 Costs of Foreign Piracy to Legitimate Producers in the US Entertainment Industry in 1986: Pirate Sales, Profits to Pirates and Consumer Gains</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pirate sales (US$ billions)</td>
</tr>
<tr>
<td>As a % of worldwide sales</td>
</tr>
<tr>
<td>Estimated lost profits (US$ millions)</td>
</tr>
<tr>
<td>As a % of worldwide sales</td>
</tr>
<tr>
<td>Profits to pirates (US$ millions)</td>
</tr>
<tr>
<td>Gain in consumer surplus (US$ millions)</td>
</tr>
</tbody>
</table>

It must be noted that the term 'Gain in consumer surplus' denotes the benefit accrued to the consumer from the enhanced price competition that piracy brings (Feinberg & Rousslang 1990, p 80). The findings that are derived from the above table can be summarised as follows: a) the static gains to consumers are more than half as great as the losses of legitimate producers; b) the latter are larger than the profits gained by pirates; and c) the profit losses of legitimate producers might well be smaller than the gains to consumers and pirates combined (Feinberg & Rousslang 1990, pp 79, 89).

- Finally, the 'USITC 1988' Investigation's concluding remarks (p 101), albeit concerning US industries, have a worldwide application. Failure to protect intellectual property rights against infringement may lead to several types of losses: current and future losses of revenue to legitimate owners; losses to the world economy in total; reductions of incentives for investment in new products or processes that could be copyrighted; and finally, social losses in that fewer new or improved products will be available in the future.

This last type of loss will eventually harm the consumers themselves, despite the temporary gains they enjoy from enhanced prices that piracy brings. The consumers also loose for they do not have any consumer rights, as Tim Dabin, Anti-Piracy Co-ordinator of British Publishing Industry
Piracy is also detrimental to the public at large. It hurts, Yarnell (1973, pp 235-237) points out, various segments of the community, ranging from the consumer, to the artist, to the legitimate retailer and wholesaler, even to the law enforcement agent. Indeed, the pirate does not take financial risks, he does not incur the legitimate manufacturers' huge expenses. Piracy also contributes to a lessening respect for the law, and the authorities are also affected because piracy has become so widespread. Additionally, as Bradley points out (WIPO 1983, PF/II/2/S/2, p 4), pirates do not pay the intellectual creators, and fail to provide any genuine service to the community.

Gilbert Grégoire, Assistant President of the International Federation of Associations of Film Distributors, stresses that piracy's repercussions are not only economic but also cultural (WIPO 1983, PF/II/2B, p 2). As Yarnell explains (ibid.), piracy hinders the efforts of legitimate companies to offer a wide selection of products, to meet the widely varying interests of the public. The pirate copies only the 'hits'; without the income from big sellers, the selection available to the public will decline.

Along with the public, governments suffer financial losses, too. David Gibbins, Director of Anti-Piracy Operations of IFPI, explains in what ways (WIPO 1981, PF/I/12, pp 2-3). Pirates seldom pay sales, income or other taxes or value-added tax (VAT); they make no returns or false returns of their trading activities; and, when pirate products are imported and exported, they are often smuggled or covered by false identification of the nature of the products or their value to evade import duties.

Finally, piracy impinges negatively on both developed and developing countries. Denis de Freitas provides a brief but comprehensive account of that fact (personal interview, 24/3/1993). As far as the former, piracy simply erodes the income of copyright industries. In the case of the latter, it
floods the country with cheap copies; it undermines the incentive for domestic production; it
discourages local culture; and, it has a very serious impact on the development of Third World
countries.

Interestingly enough though, the more one country indulges in piracy, the more is afflicted by it. At first sight, de Freitas (1992, pp 3-4) warns, a pirate production of a book much needed to a developing country, for instance, at a lower price than a legitimate one might appear to be a beneficial service to the local community. In effect, however, it is nothing but inimical. Especially for developing nations, piracy entails more profound consequences than financial losses. As UNESCO Secretariat stresses out (WIPO 1983, PF/I/8B, p 3), it constitutes a further obstacle to indigenous cultural development and the assertion of cultural identity by developing people. Piracy, Bradley adds (WIPO 1983, PF/I/S/2, p 5), renders copyright material provision to developing countries impossible; it prevents rights from being made available; it works against investment in stock and in co-operative ventures and training programmes; and finally, it hinders intellectual creators from getting a fair return for their work. Additionally, as Koutchoumow pinpoints (WIPO 1983, PF/I/8A, p 3), piracy makes it economically unfeasible to set up distribution networks for cultural, educational and scientific products. Hence, it considerably restricts the variety of copyrighted material and continually increases the dependency on foreign countries. Consequently, the consumer suffers too; for instance, piracy ensures that students are exposed only to foreign ideas and cultures ('UK Anti-Piracy Group 1986', p 9).

To sum up the above arguments, piracy results to the standardisation of public taste, and discourages national creativity and production in developing countries (UNESCO, WIPO 1981, PF/I/10, pp 2-5). It also stultifies the growth of the local industries which disseminate intellectual works to the public (de Freitas 1992, p 5). Moreover, piracy functions to the detriment of developing nations in another, additional domain; a domain which implies serious repercussions for the very development of those nations. Piracy seems to deter the developed world from transferring vital
technology, knowledge and information to nations under development; and hence, it deprives the latter of the much needed access to scientific, educational or other copyrighted material.

5.3 Dissenting Voices over Piracy

It has been previously argued that there is nothing ‘universal’ about copyright; for copyright policy heavily depends on particular social, economic, political, and even religious or philosophical views. Thus, copyright infringement could not be an exception. Consequently, there has been a vast number of views about ‘piracy’ expressed around the world, sometimes quite controversial, diametrically opposite, and even extreme. Some of them have already been mentioned here and there throughout the present chapter, mainly in relation to developing countries trying to justify their piratical activities. However, it will be interesting hereinafter to cast a selective glance at opinions uttered in turn by experts, piracy victims, and even pirates themselves, that encapsulate a much heated debate.

How is it possible a straightforward term, such as ‘piracy’, to originate diametrically opposite views? The following quotations provide some of the main grounds where such a divergence lies upon.


“... one person’s piracy can be another person’s freedom of speech.”

Altbach (1986, p 1647) suggests two more premises:

“What is piracy and ‘literary theft’ from the point of view of the industrialised nations is something else to [the] Third World ...”, and

“What is piracy to one nation is ‘fair use’ to another.”

A phrase of the famous writer Salman Rushdie appears to vindicate all the above opinions:15

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15 Rushdie refers to the Soviet Union and other Eastern European countries, where the state used to exercise a strict control upon publications, and where the finest flowering post-war literature occurred without copyright or royalties,
"Where a book cannot be published legitimately, because of the repressive character of the country's regime, covert publication loses the stigma of robbery and becomes, in fact, an important public service."

(Chesterman & Lipman 1988, *ibid.*

To some, de Freitas (1992, p 3) argues, the term 'piracy' may have a slightly romantic connotation conjuring up visions of swashbuckling buccaneers, whose activities, Conte (WIPO 1981, PF/I/5, p 1) adds, may have been rendered noble in a way through children's literature. In that light, Dr. Carlos Alberto Primo Braga (TRIPs Symposium-Part I, 1989, p 313) suggests, voicing a view shared by some developing countries, that "from a cultural point of view, it is important to remember that Sir Francis Drake is a hero from an Anglo-Saxon perspective, but he is a thief from a Spanish perspective." He also suggests (*ibid.*) that, instead of the word 'pirates', the term 'corsairs' could be used because most pirates in Third World have all the legal mandates and abide by local laws to do what they do. Indeed, as Altbach (1986, p 1648) underlines, a number of Third World countries have enacted far-reaching legislation which permits them to use foreign copyright material fairly freely.

However, as Asser (1980, p 11) counterargues, the fact that some developing states have copyright laws permitting compulsory licences under certain circumstances, may constitute a kind of 'legalised piracy'. Not surprisingly, Asser and those who share his view, come under attack from Valdehuesa, Director of the Philippines Press Development Academy (1980, pp 10-11). He asks that, if the laws of a country allow compulsory licences, then who has the competence to call it otherwise and proceed to blacklist that country as a pirating one. He carries on to claim that the word 'pirate' is used indiscriminately, whether to individuals, societies or whole nations. He finally

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in the form of illegal *samizdat* papers. Nevertheless, the example is indicative of the fact that disregard to copyright can be seen differently from different angles when particular circumstances are in place.

16 These legal mandates that Braga refers to are the 'compulsory licences'. They are a kind of concessions made by developing countries, under the 'Protocol Regarding Developing Countries' (1971), for the latter to have access, under specific conditions, to copyrighted material. An analysis of the 'Protocol' is provided in Chapter 3, section 3.2, of the present thesis.
concludes that Mr. Asser and his peers reduce and malign whole nations without taking into account that the issues of piracy and copyright are complicated ones and involve national sensibilities.

Some other views, more extreme than that of Valdehuesa, were expressed during a WIPO international Forum on piracy in 1981 by invited specialists from developing countries where, not surprisingly, piracy is thriving. Mr. Djohardin from Indonesia, without directly denying that his country is engaged in piratical activities, simply reminded the Forum that the primary source of piracy, that is the 'mother tape', is not produced in his country (WIPO 1981, PF/I/S/6, p 2). Also, Mr. Seghrouchni from Morocco claimed that there are no pirates in his country in the advanced sense of the term, which presupposes the use of sophisticated equipment. To him, what is found in Morocco is a kind of 'cottage piracy' and this is probably true for the majority of Third World countries. Such kind of piracy "does not in any way resemble that experienced in the industrialized world, either in its quality, or in its volume or in the motives for it" (WIPO 1981, PF/I/15, pp 1-2).

Another view envisages piracy as a kind of retaliation. Some developing countries are alleged to argue that among those in developed nations who complain about piracy today, there were many who encouraged such activities in the past. It is believed that, in that way, musical riches of the developing world have been plundered (UNESCO, WIPO 1981, PF/I/10, p 2). In that light, Boyd (1988, p 159) adds, some entrepreneurs in developing countries assert that the West took their culture and artefacts and thus they are now returning the compliment.

To all the above arguments there is strong opposition, mainly coming from studies undertaken in developed countries and/or representing copyright industries. To Davies (1986, p 9) "[t]he pirate is a parasite, living off the creativity, talents, art and investment of others." To de Freitas (1992, p 3) "there is nothing romantic or swashbuckling about the pirates ...; they are criminals ... engaged in theft ...".

A more extreme view is uttered by Menon (WIPO 1981, PF/I/S/10, p 1): "Piracy is like prostitution. As long as there is a demand for it, it will exist." Even a video pirate himself once
stated: "It's a tough profession. The pimps, black-market arms dealers, and counterfeiters all play along" (Chesterman & Lipman 1988, p 53). Also, it is often suggested that there are close links between pirates and 'organised crime' worldwide. John Hall QC, the then Director-General of IFPI, explained the relevancy of that argument during a WIPO international Forum on piracy (WIPO 1981, PF/I/1, p 5). Piracy, with its quick and large profits, quickly attracted hard and ruthless criminals. Pirates are often the same people who are active in other illegal enterprises.

The balance between the interests of intellectual creators and the general public -which is the principal purpose of copyright- provides yet another ground for dissenting opinions in the question of how piracy is envisaged from different standpoints, be they individuals or whole nations.

As Louie Reyes (WIPO 1983, PF/II/S/12, pp 2-5) claims, voicing the developing countries' view, the emphasis is placed on the copyright owner's rights instead of the user's needs (p 2). That is, in determining royalty fees, the owner does not always take into consideration the user's capacity to pay for this kind of property and his needs for it. This is perhaps, Reyes posits, the most sensitive area in the complex question of piracy (p 4). Finally, he concludes (p 5):

"If 'piracy' is regarded by some quarters as stealing, it can also be said that depriving sizeable number of one's fellowmen of knowledge is an injustice."

The above juxtaposition of jarring opinions is by no means exhaustive. The complexity of copyright and its infringement never ceases to generate polarising arguments and controversial debates. As Chesterman & Lipman (1988, p 35) succinctly note:

"Like the distinction between 'freedom-fighter and 'terrorist', it largely depends on which side you're on."

Sides could be differentiated concurrently with philosophical, ideological, economic or even legal criteria. This does not apply only to individuals or whole countries, but also to the realm of copyright per se. Indeed, both copyright law and those who rely upon and enforce it are often puzzled and divided in determining whether intricate, private activities, such as the phenomenon of 'private copying', constitute 'piracy' or 'free use' of copyright (to be discussed in Chapter 7, section 7.1).
However dissenting the views about piracy may be, one thing is for certain. Its consequences are overwhelmingly felt by copyright owners and industries alike. A clear picture of its negative effects can be drawn through a detail reference to facts, estimates and trends of the piracy problem, which is provided in the following chapter.
CHAPTER 6

INTERNATIONAL PIRACY: FACTS, ESTIMATES AND TRENDS

6.1 Introductory Remarks

The background -legal and theoretical- and the general reasons and effects of piracy, as well as the dissenting opinions that the issue generates have already been discussed in length. Therefore, the issue will be approached through a different perspective hereinafter. In order for a more graphic and detailed picture to be drawn, there will be a mention of facts, estimates and figures as well as a series of data concerning three out of a wide range of copyright industries: book, video (and film), and music. The above selection does not by any means imply that those are the only forms of piracy ever encountered, or that those three industries are the worst affected -which also may be the case. For there is, for instance, a very alarming form of piracy, namely software piracy, but data for a trend to be drawn and for a complete evaluation of its impact is not enough due to its recent appearance. Suffice it to say, however, that figures as to incurring losses to the legitimate industry of up to US$ 13 billion a year are commonly applied. In view of the above, the selection was made on the basis of a wide availability of information; in fact, there is a plethora of facts concerning book, video, and especially music piracy that will render a overall assessment more feasible.

There are some noteworthy differences between those three forms that must be mentioned at this point. These differences do not rest upon the importance of piracy in the respective industries; book, video and music piracy are equally significant. There are four main factors that appear to grant to video piracy a status of prevalence. Firstly, it is not only because of the VCR’s and subsequent TV’s increased popularity over the other two media, and/or of the fact that it is a more recent form than the other two. Secondly, it is also a matter of quality; and thirdly, it is a matter of profit, too. Unlike print or audio piracy, where any copy of a book or record can be used as the ‘master’ to
make unlimited copies, the most lucrative form of video piracy is to acquire and duplicate the legitimate-master copy of the film just before its cinema release (Chesterman & Lipman 1988, p 56).

In that way, both the quality and the high price of the bogus copy are assured. In fact, the profit margin available to the illegal producer is much greater than in the case of either books or sound recordings. Unlawful reproduction of a book, for instance, allows the pirate to avoid paying royalties, but he still have to print and distribute the book at a cost similar to that of a legitimate product. Likewise, even if sound recordings can be cheaply reproduced on tape, their quality is not always achieved; also, their average retail selling price is much less than that of a video recording, which also can be further exploited profitably through rental (Commission of the European Communities, Green Paper 'on copyright and the challenge of technology' COM (88) 172 final of 7 June 1988, p 36). Finally, it is a matter of release/distribution. Unlike books or music which are released concurrently in all markets and are distributed in unit sales, film products are released on the various markets at different times and are exploited through an ordered procession of distribution channels. The elapsed time between various distribution outlets -which can vary from days to months and even years- undoubtedly facilitates audio-visual piracy. It is said, for instance, that the earlier the point along the 'distribution pipeline' a film is pirated, the greater the loss.

Although video piracy is considered a more tempting target than book or music piracy due to the above factors, the focus in the following pages will be on music piracy. Mainly because of the fact that there is much more international as well as detailed data available for that form of piracy than for any other. This is due to the excellent running of the international body which represents the interests of the music industry, namely the International Federation of the Phonographic Industry (IFPI). By virtue of that fact alone, the ensuing examination of music piracy will be much more detailed than that of book and video piracy. Consequently, the section devoted to music piracy (6.4 below) will contain:
- a compilation of annual data that will eventually picture a piracy trend for the last 15 years (1978-1993) worldwide;
- the 'ups and downs' of piracy in five large geographical areas that the globe will be divided into.

Out of each area, some countries will be selected as examples of 'piracy centres' (import, export, circulation of pirate products), or because they are of a special interest due to developments that have taken place there throughout the years; and finally,
- some parallel comparisons will be attempted, both international and regional, in the ensuing pattern: between legitimate and pirate unit sales, and between legitimate and pirate sales in US dollars. Also, some rough estimates will be undertaken as to the piracy share of markets, both in terms of units and value.

Finally, for clarification purposes, the following two remarks ought to be made. First, the term 'piracy' will be employed hereinafter to denote all kinds of piracy (piracy strictu sensu, counterfeiting, bootlegging, etc.) unless a distinction is made. Definitions of all kinds will be provided as they appear in the individual context of books, videograms, and phonograms. Second, in parallel to video piracy, reference will be made to 'film piracy'. In fact, these two terms often tend to be used synonymously. Simply because the most attractive target of video piracy are by far feature films; without films to be illegally copied there would simply be almost no video piracy. Any losses suffered by the video industry due to piracy are certainly a matter of concern for the motion pictures industry, too.

6.3 Book Piracy

The piracy of printed material usually falls into the following two categories: 'Pirate edition', which is a cheap reproduction in a low-quality paper and binding not intended to pass off as the original and is sold at a low price. On the other hand, a 'counterfeit edition' is a not so cheap reproduction which is intended to simulate the original and thus is sold as such aiming at a profit.
Piracy of the printed word occurs in many different ways: from textbooks (school, college and university-level ones) and reference works (encyclopaedias and dictionaries) to unauthorised translations and popular titles (novels).

Book piracy is as old as printing itself. However, for the first 500 years or so after the invention of the movable type (1436), the problem was not so acute. It was in the 19th century that three major separate developments gave to the piracy business an enormous boost. First, the spread of literacy in almost all parts of the world. Second, both the increasing availability of modern, simple and, above all, cheap offset printing machines and, at the same time, the advent of the photocopying machines have made the reproduction of parts, or even the whole, of a book cheap and easy. Last but not least, the worldwide state of the economy; inflation and economic troubles in the developing countries have widened the 'price gap' between European and American publishers, and Asian, African and Latin American readers and students. That third development explains why the bulk of the world's large scale commercial piracy is largely confined in these vast areas. They represent the centres of book piracy that Western publishers became aware of in the late 1970s and gravely concerned about in the 1980s when pirate sales have been increasing much faster than legitimate ones.

The following Table 6.1 provides an estimate as to the cost of piracy to the international book trade for the last 25 years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Millions of GB pounds</th>
</tr>
</thead>
<tbody>
<tr>
<td>1967</td>
<td>1</td>
</tr>
<tr>
<td>1977</td>
<td>100</td>
</tr>
<tr>
<td>1983</td>
<td>500</td>
</tr>
<tr>
<td>1986</td>
<td>1000 (almost)*</td>
</tr>
<tr>
<td>1993</td>
<td>1000 (over)*</td>
</tr>
</tbody>
</table>

* rough estimate

Sources: Chesterman & Lipman (1988); Gurnsey (1995)
The increasing popularity and internationalisation of the English language inevitably puts British and US publishers alike amongst the worst hit, if not the most affected, by book piracy.

First, it is interesting to see the losses the respective industries suffered in the mid-1980s (1984-1986) in selected territories. In the following Tables 6.2 and 6.3 a 'Top 10' list of the most pirating nations is provided; the countries are classified in order of importance and figures represent value of estimated lost sales (both domestic and export) in local currencies:

<table>
<thead>
<tr>
<th>Country</th>
<th>(US$ millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taiwan</td>
<td>118</td>
</tr>
<tr>
<td>Singapore</td>
<td>107</td>
</tr>
<tr>
<td>Korea</td>
<td>70</td>
</tr>
<tr>
<td>Philippines</td>
<td>70</td>
</tr>
<tr>
<td>Malaysia</td>
<td>20</td>
</tr>
<tr>
<td>Nigeria</td>
<td>11</td>
</tr>
<tr>
<td>Egypt</td>
<td>10</td>
</tr>
<tr>
<td>Brazil</td>
<td>8</td>
</tr>
<tr>
<td>Thailand</td>
<td>7</td>
</tr>
<tr>
<td>Indonesia</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>427</strong></td>
</tr>
</tbody>
</table>

Table 6.3 Book Piracy: Losses to UK Publishers in 1984/1985 in 9 Selected Countries

<table>
<thead>
<tr>
<th>Country</th>
<th>(GBP millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taiwan</td>
<td>25</td>
</tr>
<tr>
<td>Singapore</td>
<td>16</td>
</tr>
<tr>
<td>Korea</td>
<td>11</td>
</tr>
<tr>
<td>Nigeria</td>
<td>6</td>
</tr>
<tr>
<td>Indonesia</td>
<td>5</td>
</tr>
<tr>
<td>Pakistan</td>
<td>5</td>
</tr>
<tr>
<td>Egypt</td>
<td>4.5</td>
</tr>
<tr>
<td>Malaysia</td>
<td>3</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>(see text below)</td>
</tr>
<tr>
<td>TOTAL</td>
<td>75.5</td>
</tr>
</tbody>
</table>

Source: UK Anti-Piracy Group (1986)

It must be added that the above numbers are just an indication; the overall losses of the British and US publishing industries are much bigger worldwide. For example, in Saudi Arabia sales of an illegal edition of one British book alone cost the legitimate publisher 1 million pounds (UK Anti-Piracy Group 1986).

The similarities observed in the above two Tables (6.2 and 6.3) are by no means coincidental. The countries appearing on them are a representative sample of international book piracy centres, both in terms of domestic markets as well as exports. The ensuing series of data and facts from some of these nations is more than indicative. Figures for Saudi Arabia, for instance, are not included in Table 6.3 to avoid any possibility of double accounting with export figures from Indonesia, Singapore and Taiwan. Saudi Arabia is indeed a distribution centre between Taiwan and the Middle East; it is also, along with all the Gulf States and Jordan, a market where more than a quarter of all books on sale are pirated.

Taiwan enjoys a pirate bond with Nigeria, too. It is estimated that during one given year alone (i.e. 1982), 25% of the Nigerian market have been taken by pirate editions, and unauthorised
reprints exported from Taiwan were in the region of 1 million pounds. The Taiwan pirates also engage in other 'activities'; they send regular trade delegations to Africa to take orders that once went to UK and US publishing houses. In fact, Taiwan is the starting-point of one of the major pirate-trade routes: Taiwan - Hong Kong/Singapore - India/Africa.

Far East and Southeast Asia is probably the biggest free pirate marketplace. A survey undertaken by UK Anti-Piracy Group (1986) showed that in 1986 alone 1.4 million pirate books producing around 15 million pounds revenue to the pirates were circulating freely in Singapore, Malaysia, Thailand, Indonesia and Hong Kong; it is also suggested that such numbers can be valid at any given time. In Korea, catalogues of thousands of pirated books circulate openly; and translations, virtually all unauthorised, represent the 75% of the local publishing industry. Another country where piracy dominates legal book publishing is Pakistan; it is said that nearly all the English language textbooks were at some point pirated.

Finally, Middle East is another main market for book piracy. Syria, Lebanon and Egypt all serve as centres for pirating foreign publications, exporting illegal editions, and distributing pirate copies manufactured in Pakistan or Singapore.

Ultimately, and as regards global book piracy in the mid-1980s, a graphic picture is provided by the UK Anti-Piracy Group, where the world is divided into five areas (see World Map 1): areas where illegal editions are exported from; areas where piracy dominates book publishing; areas where the publishing industry is under attack by local and/or foreign pirates; areas where illegal imported editions prevent the growth of a local industry; and finally, areas where illegal photocopying endangers the publishing industry (it should be noted that certain areas appear white in the Map because there is no information available).

However, in the second half of the 1980s and contrary to the above grim picture, there had been some promising developments. For example, a study conducted by the International Intellectual Property Alliance (IIPA) in 1988 focused on the very same 'Top 10' countries that appear in Table
PIRACY – A GLOBAL DISEASE

Illegal editions are exported from:
Lebanon, Singapore, Syria, Taiwan

Piracy dominates legal book publishing in:
Pakistan, South Korea, Taiwan

Legitimate publishing industry is under attack by pirates, local or foreign:
Argentina, Bangladesh, Bolivia, Central America, Colombia, Egypt, India, Indonesia, Korea, Malaysia, Mexico, Nigeria, Philippines

Illegal imported editions prevent the growth of a local publishing industry:
North African countries, West & East African countries, Middle East countries, Iran, Saudi Arabia, United Arab Emirates

Illegal photocopying further endangers the publishing industry particularly in universities

(Source: UK Anti-Piracy Group 1986)
6.2. It was confirmed that US publishers were still losing US$ 222 million to book piracy in these territories alone. However, losses had dropped more than 50 per cent (52%), from US$ 427 million (Table 6.2), since 1986 (study by the US International Trade Commission 1988). The study by IIPA formed a ‘black list’ where the 10 costliest countries of 1986 became 12; Singapore was dropped, while Saudi Arabia, India and China were added.

However, the aforementioned development appears to have been only a temporary one. According to the International Publishers Association (IPA), losses of both US and UK publishers are on the rise again in the early 1990s. For instance, in 1992, UK losses stand at 200 million GBP, while US losses have topped US$ 500 million, almost a third of the total world losses, with the largest offenders (for both US and UK publishers) being China and the ex-USSR countries (Gurnsey 1995).

6.3 Video/Film Piracy

"Piracy engulfed the film industry like a wave ... especially home video. The industry just didn’t think about it."

(Chesterman & Lipman 1988, p 46)

In fact, the first ever pirate videotape appeared in 1979, just three years after the home-consumer version of the VCR was introduced (by Sony and JVC in 1975-1976). And it was not until 1982 that the then major US motion-picture companies (Warner Brothers, RCA, MGM and Columbia) realised that VCR was here to stay and released a backlog of their films on videotape. However, by then it was too late; had they acted earlier the situation might have been controlled (Chesterman & Lipman 1988, pp 48-49).

The sudden boom of video/film piracy did not come about solely because the industry just did not think about it. It also had to do with some more complex factors associated with the way in which right owners, producers, companies, even governments approached the video as a medium and the VCR per se.
Firstly, a lack of policy appears to be a very significant factor. As Ogan (1985) suggests, policy makers failed to address the use of VCR as an extremely pervasive communication phenomenon of the 1980s (p 63). They saw it as not being a mass medium and thus they never (or at least initially) considered it to be relevant to national communication policies (p 67). Government officials, especially in developing countries, turned a blind eye to the proliferation of pirated videocassettes. They probably viewed the VCR popularity with a sense of relief since the elite-VCR owners no longer pressured the government for changes in national broadcast content (pp 64, 66).

Secondly, another factor contributing to the attractiveness of video piracy has been the distribution policy of film producers. New films are not released simultaneously on all markets. In addition, major publicity that usually precedes the release creates a demand for the work. When this occurs in markets where no immediate release will follow or no release on video at all, it creates a ready market for pirate products. In fact, it is often said that the Achilles’ heel of the motion pictures industry is, on the one hand, the time gap between the cinema and video releases of new movies, which is known as the ‘video window’, and, on the other, the distribution time itself of a film into theatres.

Third, the pirates were additionally aided by the right holders and the companies’ insistence on, not only releasing films to cinemas well before they put them on videotape, but also, in some cases, refusing to issue them to the video market altogether. Instead of welcoming the new medium as a supplementary source of income for productions already shown to the cinema, or for not commercially successful ones, they saw VCR as a threat to their profit. Indeed, it has been confirmed that increased use of video has been accompanied by decreased cinema attendance, for instance. However, it must be noted that it is the distribution policy of the film producers that can result into the availability of pirate versions of new films before their theatrical release rather than the VCR’s increase use.
Finally, there is a fourth factor that has been held responsible for the propagation of video/film piracy and which lies beyond the matter of policy of industries and owners towards the video as such. Many analysts believe, as Gurnsey reports (1995, p 99-100), that copyright theft has been increasing significantly worldwide in the 1990s as a result of deregulation in many national broadcasting environments. A corollary of deregulation is the proliferation of terrestrial TV channels which, in turn, is putting pressure on those responsible for programme provision and not all this results in the legitimate use of material. Additionally, with satellite delivery growing in importance, many unscrupulous private sector broadcasters and cable operators have been pirating and redistributing signals with no consideration for the rights of legitimate industries and owners.

Video piracy takes multiple forms and involves a broad range of violations of proprietary rights, much wider than book or music piracy.

- 'Pure piracy' occurs when a version of a film or other audio-visual work that has not been released on videotape is copied and this copy is used as a master for mass duplication.
- A 'back-to-back' or 'tape-to-tape' is a copy of a legitimately released videocassette. This also constitutes 'piracy strictu sensu', and like the 'pure pirate' copy, it has either no packaging at all, or an obviously fake one.
- 'Counterfeit' is a copy of a legitimate videotape dressed up in illicit packaging in order to pass as the genuine one.
- 'Bootleg' is the clandestine recording off-air on videotape of a television, cable or satellite broadcast.

The above mentioned forms of video piracy are the most clear-cut ones. However, there are other activities that should be placed under the piracy general heading and should be considered when losses due to piracy are accounted for:

- Distributing, selling and renting of mass produced unauthorised copies of videocassettes;
- unauthorised interception and commercial use of satellite signals carrying legitimate film and video products;
- holding unauthorised public performances; and finally
- 'parallel imports', when legitimately licensed videotapes for one territory are imported and distributed into other territories without consent and without licensing agreements.

The multifold nature of video piracy renders its exact extent difficult to ascertain. Elisabeth Greenspan (1983, p 116), consultant to the Motion Pictures Association of America (MPAA), explains why:

"... video piracy does not involve a unitary, monolithic problem, but rather a variety of discrete offences involving distinct technologies and causing different forms of damage."

The impact of any kind of piracy is usually assessed in terms of the financial loss it causes and of the share of the legitimate market it occupies. Due to the nature of the film business, as Fenby (1983, pp 83-84) stresses, it is almost impossible to establish a precise monetary value for the loss caused by pirated material. A film’s value lies not in the print, but in the box-office receipts. In addition to immediate revenue losses, motion picture companies face a threat in the long run; a pirated film/video, when reissued, can cause a slump in future earnings and can seriously affect the release in ancillary markets, namely television, cable, etc.

Therefore, statistics as to the size of pirate markets are by nature unreliable and should be treated as rough estimates. It is generally suggested that such a size may range from the 'Top 5' even up to the 'Top 40' of the legitimate theatrical market worldwide.

The ensuing data will attempt to draw a general picture of international video piracy within the 1980s. It is estimated that throughout the last decade the worldwide losses to film and video industries ranged from US$ 700 million to US$ 1.2 billion. The situation as to the size of the damage is indicative in 1986, for instance; US$ 1 billion losses representing one-quarter of the motion picture industry's total US$ 4 billion annual revenue. In 1991, the Motion Pictures Export Association of
America (MPEAA) estimated the video piracy losses, of its members alone, at over US$ 6 billion a year.

In a breakdown by geographical area, the picture is as follows:

The territory that excels all others is the Middle East and the Arab world. This does not come as a surprise if one considers that, especially the Persian Gulf region, is on average the highest VCR-penetrated area in the world (above 70%). This, coupled with the lack of domestic film industries and the dearth of cinema theatres, has produced a market characterised as an international bazaar of 'stolen' intellectual properties (Bettig 1990, p 62). At least 85% of sold or rented video cassettes in the Gulf countries and Jordan are pirate, while Egypt's percentage, the only country in the region with a significant domestic film industry, is at 75% (Boyd 1988, p 157). According to a study conducted by the Motion Pictures Export Association of America (MPEAA) as to the impact of film/video piracy on US motion picture industry, the most lucrative per capita outlet of all is by far Saudi Arabia (losses of US$ 75 million), followed by Turkey (US$ 45 million) and Egypt (US$ 37 million). An additional reason why Middle East/the Gulf is seen as the largest international video piracy centre is because all its nations are major manufacturers of pirate videocassettes, major importers of illegal copies (from the Far East), and major exporters of bogus videotapes (to Africa and Europe) (Bettig 1990, ibid.).

Far East Asia is another troublesome region as it includes some of the world's exporting capitals of illegal videotapes: Malaysia, South Korea, the Philippines, Indonesia, and finally, Singapore where 90% of the market was pirate in 1986. Even in the highly developed Japan, the world's third largest market, the share of the legitimate market seized by video piracy ranged between 20-30% and the retail value of illegal videocassettes was US$ 345 million in 1986.

As far as the Americas, the coin has certainly two sides. In the North, there is the country with the largest motion picture and video industries worldwide and with the most intact market of all
in terms of video piracy. In the USA it is estimated that the size of the pirate market is at a mere 10%, while in the neighbouring Canada runs a little higher at 10 to 15 per cent.

The situation in Central and South America as well as in the Caribbean Basin is quite the opposite. The region includes major centres of pirate activities, such as interception of satellite signals and retransmission of cable broadcasts, mainly originating from the USA. Brazil, for example, where 80 to 85% of video tapes in circulation are pirated, is by far the leading pirate nation in Latin America, followed by Argentina and Mexico where video piracy controls 60% and 40% of the market respectively.

In fact, the regions of Far East Asia and Latin America have been consistently troubling the US motion picture industry throughout the 1980s. In 1984, for example, total losses to piracy were estimated at US$ 1.3 billion in ten countries alone selected from these two areas (Singapore, Taiwan, South Korea, Indonesia, Malaysia, Thailand, the Philippines, India, Brazil and Mexico).

The situation in the world’s second largest market, i.e. the EEC, has had some considerable ‘ups and downs’ within the last ten years. In the early 1980s, the market share of video pirate products ranged from 50% to 60%, and a single country had assumed the title of the international video piracy capital. It was the UK, where 5.2 million of the 6.7 million videocassettes were pirate copies (1981), a daunting 78% of the business (Fenby 1983, p 85). Towards the mid 1980s, the percentage of the Community’s pirate market dropped to 35-40% (1986), and the UK rate plummeted to 14% per cent. Recently, however, there seems to be an upward turn in Europe’s decreasing piracy trend as counterfeit goods are sweeping the continent. An explanation for that latest development is succinctly provided in a report by Ted Wassel in The European (24-30 June 1994, p 22). It is believed that open internal European Union borders and depressed wage levels have enticed Far Eastern counterfeiters in Asia to move their operations to Western Europe.1 It is

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1 It must be noted that the report refers to the practice of counterfeiting in general. The example of fake video products provided in the following pages is used to serve the purpose of the present section on video piracy.
also said that the UK, which in the early 1980s was an importer of counterfeit products (and leading video piracy centre), has become the biggest producer and the focal point for counterfeiting across Europe. Indeed, it is estimated that today, in the UK alone, video piracy amounts to 50 million copies, and counterfeiters deprive the film industry of about 250 million pounds a year. Key factors that make it an ideal breeding ground for pirate operations is Britain’s readily available cheap pool of labour, often from West Indies and Asia, combined with a high level of production know-how, as well as the fact that the country is one of the most highly VCR-penetrated in the world (71 per cent in 1991) and certainly the largest video market in the whole Europe (over 1 million pounds in rental and sell through copies in 1995). In fact, the resurgence of piracy in the UK in recent years -now accounts for a 20% of the market- is depicted in the following Table 6.4, which refers to the earnest activities of FACT, the investigatory body of the British and US video/film industries, to curb the problem by raiding pirate establishments, confiscating equipment and even prosecuting pirates.

Table 6.4 Activities of UK’s Federation Against Copyright Theft (FACT) 1991-1993: Videocassettes and VCRs Seized, Raids and Prosecutions

<table>
<thead>
<tr>
<th>Year</th>
<th>Tapes seized</th>
<th>VCRs seized</th>
<th>Raids</th>
<th>Prosecutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>48386</td>
<td>172</td>
<td>760</td>
<td>71</td>
</tr>
<tr>
<td>1992</td>
<td>85880</td>
<td>404</td>
<td>1116</td>
<td>93</td>
</tr>
<tr>
<td>1993*</td>
<td>68589</td>
<td>303</td>
<td>1036</td>
<td>81</td>
</tr>
<tr>
<td>TOTAL</td>
<td>202855</td>
<td>879</td>
<td>2912</td>
<td>245</td>
</tr>
</tbody>
</table>

*first 9 months

Source: FACT (Federation Against Copyright Theft)

The attractiveness of video piracy, already been discussed in depth, is clearly underlined in the following example. In a large scale seizure undertaken across Europe throughout 1993, fake goods were ranked in a 'Top 10' list according to volumes seized. The top position on that list was not surprisingly occupied by the Walt Disney's Aladdin video in various languages, which was
released the same year (The European, ibid.). In fact, it seems that the Disney’s feature films are a priority in the list of video pirates and counterfeiters. The place of the latter’s latest onslaught on the former is, not surprisingly, the UK, as Lisa Buckingham reports (The Guardian, 16/9/1995, p 1). Piracy in Britain now accounts for between 25-30% of all cassette sales of Disney films. The company, whose latest video of The Lion King is forecast to sell about 4.4 million copies when is released, claims that 1 million counterfeit tapes of the film have already been sold thanks to the efforts of organised crime and Northern Ireland terror groups, who are said to extract 2.5 million pounds a year in protection money from video pirates. In fact, it is thought that The Lion King alone has generated about 4 million pounds for organised crime in the UK.

The booming of video piracy in recent years in Europe is not confined solely to the UK. The motion pictures industry faces serious problems in countries of the former Iron Curtain, such as Russia, Bulgaria, Poland and the Czech Republic. Film piracy has also made Italy and Greece two of the largest violators of US products, namely first and fourth respectively, principally as a result of a recent, almost chaotic, deregulation in their broadcasting regimes. In 1994, for example, in Italy piracy amounted to approximately US$ 350 million. In Greece, the same year, around 180 private TV stations operating without licences nationwide brought the amount of piracy to approximately US$ 60 million and the US film industry calculated losses of around US$ 120 million in unpaid royalties.

6.4 Music Piracy

In the first part of the present section the focus will be on the different kinds of music piracy. Their definitions will be provided, and their individual attributes will be discussed. In the second part, the examination will turned to the growth of music piracy through various stages during the last thirty years. In the final part, a detailed analysis will be attempted as to the phenomenon’s occurrence during the last fifteen years, both on an international and a regional level.
Music piracy takes the following three main forms:

- 'Piracy strictu sensu', which is the unauthorised duplication of an original phonogram without any attempt to copy labels, artwork, the legitimate producer's trademark and other features that comprise the packaging. It is a generally cheap copy that is sold accordingly at a reduced price and the sound quality varies.

- 'Counterfeiting' is the illegal reproduction of both an original phonogram and its total packaging, and it is intended to pass off as the genuine copy.

- 'Bootlegging' is the unauthorised recording of either a live performance or a radio broadcast, and also the unauthorised release of an artist's unpublished work.

Although the above three forms fall under the general heading of 'piracy' they bear some distinct characteristics. These traits play a significant role as to the appearance of each form around the world, and therefore it is worth discussing them hereinafter.

First, 'piracy strictu sensu' is the least sophisticated and most prevalent kind and it is encountered in most markets. The low reproduction cost of a pirate product makes it cheap to buy and increases the potential gain. That form of piracy has been appealing particularly to underdeveloped markets where inadequate and/or non existent copyright laws and enforcement have made the legitimate music industry reluctant to invest and thus, to establish very little or no presence at all. Consequently, people's thirst to have ready and cheap access to popular Western music regardless of quality has been quenched by pirates interested solely in making quick profits and not in promoting local talent and musical culture. That is the reason why, in most developing countries, 'piracy strictu sensu' has either obtained a very strong foothold, or completely dominates the market.

Second, 'counterfeiting' is more costly than simple piracy as it is intended to imitate both the original copy and its packaging in toto, but it brings much higher rewards since the counterfeit copy can pass off as the genuine. That kind of piracy was initially and still is largely confined to the
developed markets of western world. In the early 1980s, for instance, counterfeiting was occupying an average 30-40% of the pirate market around Europe, while in the USA it was the dominant kind (55%). The reasons why counterfeiting obtained a strong foothold in developed markets were both technological and economic. The western world had the technical know-how for the development of colour duplicating equipment and offset printing that enables the production of almost exact replicas, often indistinguishable from the original. Most importantly, however, it was a matter of price. Such sophisticated copies would sell at a price equivalent to or only slightly less than the legitimate product. Therefore, although accounting for a relatively small proportion of the total sales of pirate products worldwide, in money terms, sales of counterfeit goods in the developed world account for well over half the total turnover of pirate recordings worldwide (Edwards 1983, p 108). It must be added that the above assertion does not apply only to counterfeit but also to all pirate products. As Fenby (1983, p 73) underlines, few businesses demonstrate the economic gap between the developed and the developing world as clearly as the pirate music industry.

Third, ‘bootlegging’ is a rather sui generis form of piracy as it does not infringe the producer’s rights but those of the artist. Pirates are attracted to it in countries where it is a less risky activity due to the lack/inadequacy of legal protection for performers. ‘Bootlegging’ can also be highly profitable due to the demand for such recordings/performances of famous artists. Music fans attach to bootleg copies a special value as a rare memorial and as an exceptional collector’s item. In fact, there are cases where people take pride in following closely record fairs around the country and spend hours there trying to dig out a unique legendary performance and pay a high price for it, regardless of it being an unauthorised recording.²

‘Bootlegging’ is the less prevalent form of piracy and it is said to be mainly confined to developed markets. Studies undertaken in the early 1980s suggest that ‘bootlegging’ occupied the

² That example came up during an informal discussion with a British collector.
highest worldwide share of the pirate market in North America (in Canada 40% and in the USA 20%), while in Europe it was much lower, and in developing countries insignificant or non existent.

At this point, it is pertinent to cast a retrospective glance at the early stages of music piracy and the reasons that led to its growth to one of the most profitable businesses in the world.

"The music business is dominated by six giant transnationals - CBS, EMI, Polygram, RCA, WEA and the pirates."

(Chesterman & Lipman 1988, p 41)

i) 1960 - 1978

The advent of the audio cassette in the mid-1960s was a mixed blessing for the record industry. On the one hand, coupled with the development of inexpensive tape recorders, gave a tremendous boost to the business by making music available to an increasing number of the public.

On the other hand, however, it marked the beginning of the piracy's growth. During the 1960s music boom, the market was expanding so rapidly that there was room for everyone, including the pirates.

Tape recording was a gift to them; no other medium was as easy to duplicate and to manufacture (Chesterman & Lipman 1988, p 37). Prior to the 1960s, the copying of vinyl discs - the then only existing format - was a messy process that required substantial investment in equipment and capital, as well as a considerable degree of expertise. By the end of the decade the cassette had become not only the industry standard but also, by far, the most attractive format to the pirates. In fact, nowadays, thirty years after its introduction, the music tape holds the indisputable title of the most pirated medium ever that even the advent of the popular CD could not displace. An additional, equally significant, factor which encourages cassette instead of record piracy is that, whereas the bulk of (legitimate) record sales have traditionally gone through music stores, tapes are being sold in increasing numbers by retailers, including supermarkets, petrol stations, etc. Such retailers not traditionally involved in the music business are an easy prey for the pirates (Davies 1986, p 6).

It is not quite certain whether the above factor is due to an erroneous distribution policy of the music industry. Nevertheless, record companies are said to have contributed in a way to the rapid
expansion of piracy especially during the 1970s. As Fenby (1983, p 74) and Edwards (1983, p 108) very accurately put it, they were becoming almost blasé about million-sale gold records and were falling over themselves to pay huge sums of money to stars. While the legitimate business took ever increasing prosperity for granted and the industry was primarily preoccupied with catering for the unprecedented demand for music in the developed markets, little attention was paid to the pirates, who, mainly based in the developing countries, found themselves in an exceptionally creamy position and moved in.

In 1973, for example, world music piracy stood at US$ 500 million, and an estimated 15% of the market had fallen to the pirates (Gumsey 1995). Notwithstanding, it was not until 1978, when the losses began to appear in their annual balance sheets, that the record companies realised the full scale of piracy and the damage it was causing (Chesterman & Lipman 1988).

ii) 1978 - 1989

In the late 1970s and early 1980s everything was going wrong for the music industry. The 1960s boom was a thing of the past and, especially between 1978-1982, there had been a steady decline both in units sold and in turnover. In the interim, the piracy business was prospering. Between 1978-1982, sales of unauthorised recordings amounted to the region of US$ 1 billion a year, around 10% of the world phonogram total (legitimate and pirate) market (mainly cassette market).

By 1984-1985, the pirates’ revenue reached the highest point in twenty years (US$ 1.2 billion). That figure led experts to see the music pirates as equivalent to the second largest international conglomerate in the business, or even the largest in terms of distribution network (Chesterman & Lipman 1988, pp 43, 45).

In the mid-1980s, the pattern of international music piracy was the same as it had been for the past ten years and the pirates had a real stranglehold on the developing/underdeveloped countries
across the globe. The following examples for 1984, for instance, provide a concise picture of areas and countries where cassette piracy is thriving (for an worldwide picture of the tape piracy status in 1984, see World Map 2). According to experts (The IFPI Report 1984-1985; UK Anti-Piracy Group 1986), the most egregious pirates lie: in the regions of Middle East and the Persian Gulf, where piracy dominates over 90% of the total market (legitimate and pirate) for pre-recorded tapes; in Africa, where 95% of music is on tapes, the pirates occupy over 70% of the total market (with the exception of South Africa where the percentage is just 5%); in Latin America, almost half the total market is pirate; in Western Europe, while the average percentage is less than 10%, there are problematic countries where tape piracy ranges from 25% up to the staggering 80% of the total market (Italy 25%, Spain 50%, Greece 64%, Portugal 80%).

Undoubtedly however, the region that holds the title of tape piracy bastion worldwide is the Far East/South East Asia where, as it has been repeatedly argued throughout the present thesis, the concept of copyright is unknown to, and hence not respected by, most Asians. Consequently, piracy captures well over 70% of the total cassette market (with the striking exception of Hong Kong and Japan where the percentage is not more than 2%); and, nations in the region are major export centres of pirate products. Following the routes established by the book pirates (see section 6.2 above), they supply almost all the aforementioned piracy-dominated regions with large numbers of unauthorised recordings (for a worldwide illustration of movements of pirate sound recordings, see World Map 3). The ensuing examples are indicative: One case is that of Singapore which during the 1970s was the biggest manufacturer of illegal audio tapes worldwide and in 1981 had exported 120 million pirate units. It is estimated that in 1985, 50 million were produced for export intended to reach West Africa, where, in only six raids at the end of 1984, over 1 million tapes were seized on import from

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2 It must be borne in mind that throughout the 1980s music cassettes are by far the most pirated format. Record piracy is less of a problem or is insignificant and relative data is scarce or not available. Therefore, most studies, either by individuals or by IFPI, when present piracy figures they actually refer to tape piracy.
The map shows the size of the market for pirate, counterfeit and bootleg tapes in 1984 calculated as a percentage of the total market for pre-recorded tapes in each country.

(Source: UK Anti-Piracy Group 1986)
 Movements and seizures of counterfeit and pirate records and tapes

(Source: UK Anti-Piracy Group 1986)
Singapore. Another piracy capital is Indonesia, where it is said that virtually 100% of all recordings sold in mid-1980s were unauthorised. In 1985, around 30 million pirate tapes were exported, mainly to the Gulf states. There is evidence, for instance, that two of the principal distribution centres for Indonesian music pirates are located in the United Arab Emirates and Saudi Arabia. In 1984, most of the 50 million pirate tapes sold in the latter were imported mainly from Indonesia and Singapore; a significant proportion of it were subsequently re-exported to Middle East and Africa.

The second half of the 1980s started well for the music industry mainly because, in 1986-1987, two very auspicious perspectives emerged.

Firstly, a worldwide reduction of piracy had been registered. Especially in 1987, the retail value of pirate products dropped significantly to around 5% of the world total phonogram market from over 10% in late 1970s-early 1980s, marking a trend that was intended to last until the beginning of the 1990s. The above development resulted from a decline, often very significant, of tape piracy rate in areas and countries that had been ranking amongst the most flagrant violators of copyright throughout the 1980s. That improvement is also apparent through a comparison of cassette piracy figures for 1984, 1986 and 1987 (an illustrated comparison is offered by juxtaposing the world maps for the respective years, see World Maps 2, 4 and 5). Some of the most indicative examples are provided hereinafter. In Far East and South East Asia, the primary example is that of Singapore -once the largest manufacturer of pirate goods and major export centre- where tape piracy dropped from 85% in 1984 to 51% in 1986 and plummeted to just 10% in 1987. A drastic decrease between 1984 and 1987 has taken place: in Indonesia (from virtually 100% -according to some sources- to 46%); in Philippines from 40% to 19%; in Thailand from 55% to 10%; in India from 90% to 78%; and, in Malaysia from 85% to 65%. In Latin America, Middle East and Africa, the examples are fewer: Between 1984 and 1987, the percentage of the total market that tape piracy occupied had fallen dramatically in Egypt from 75% to 20%, and in Turkey from 90% to 10% (although the Turkish pirate record market is higher, around 35%); in Peru from 90% to 78%; in
Tape piracy in 1987

(Source: IFPI Secretariat 1988)
Chile from 50% to below 10%; and, in Brazil from 30% to 15%. Finally, even problematic countries in Europe had showed encouraging developments: in Greece the percentage dropped from 64% in 1984 to 35% in 1986 and to 24% in 1987; and in Spain from 50% in 1984 to 30% in 1986 and to 17% in 1987.

The second positive sign for the music industry emanated from the success of the popular Compact Disc (CD), whose success was largely responsible for reviving the flagging fortunes of the recording industry in the early 1980s. In fact, the introduction of the CD in 1983 had a decisive effect and in 1989 the value of legitimate album sales had doubled since 1978, from US$ 10.2 to US$ 21-22 billion.

The industry would have every reason to rejoice over that boom in sales if it had not been for piracy. At the end of the 1980s, the picture is the following: The industry losses for the decade amounted to well over US$ 12 billion and statistics indicate that a staggering 1 out of every 4 pre-recorded tapes sold worldwide was a pirate copy (IFPI 'Piracy Report', January 1992, p 1).

iii) 1990 - 1993: The era of CD piracy

It can be said that CD is the music carrier of the 1990s as both the industry and the pirates focus their attention on that new medium for different reasons. For the legitimate industry it was a mixed blessing. Its advent and its increasing popularity signalled a boost in album sales, especially during the second half of the 1980s and well into the 1990s. However, its introduction was also the second major landmark in the history of music piracy. Pirates, like consumers, have accepted this format as the medium of the immediate future and are moving into production in increasing numbers.

Nicholas Garnett, Director General and Chief Executive of IFPI, recounts that, at the inception of the CD era, it was widely believed that piracy of phonograms using digital technology would not occur for two main reasons. Firstly, because the patents controlling the systems were owned worldwide by two giant corporations, both with large stakes in the market. Secondly, the
necessary infrastructure for manufacturing was thought and it was both too expensive and too sophisticated. And, Michael Edwards, Director of Operations of IFPI, recalls what everybody thought then: “Here at last was a sound carrier that was unpiratable. How naive we all were!” (IFPI ‘For The Record’, April 1994).

Production difficulties have been gradually overcome simply because CD pirates do not need to own a production facility. Michael Edwards explains why (IFPI Review 1993; IFPI ‘For the Record’, April 1994). Pirates are nowadays able to place orders with plants that they know are unfamiliar with record industry practices, or that will turn a blind eye to suspicious orders. This is happening because the majority of CD plants are controlled by investors and managers who have little experience of the record industry. For the first time a significant segment of the production capacity worldwide is not under the control of the legitimate industry. A pirate may be based in one country, place orders with CD plants in a number of other countries, and arrange for the pirate products to be shipped to yet more countries. Today, CD piracy has become a truly international problem. While tape piracy tended to be confined within national borders, CD piracy knows no such limits. Pirate CDs are sold all over the world, both in the richest markets as well as in the developing ones. The problem is aggravated by the current worldwide over-capacity in CD manufacturing that has increased at a much greater pace in the 1990s than the demand for CDs themselves. Currently, it is estimated that the CD manufacturing capacity is as high as double the output for legitimate CDs. This over-supply of production capacity means that CD plant proprietors are under pressure to obtain orders from any source whatsoever. In turn, several plants, especially in developed markets, in order to maintain turnover are not looking too closely at whether their customers in fact have the right to reproduce the sound recordings they have actually ordered. The pirates are in an exceptionally strong position, particularly by the proliferation of CD plants in developing countries where there is inadequate copyright protection and/or enforcement. No wonder such countries are the major worldwide suppliers of pirate CDs.
The CD not only did break fresh ground for the proliferation of 'strictu sensu piracy' during the 1990s. It gave an impetus to 'counterfeiting' and 'bootlegging' to become large scale operations, too. Nowadays, 'bootlegging' has grown into an extremely lucrative business. The number of titles available has doubled over the last three years. The CDs are attractively packaged and available at the same price as legitimate releases. High quality 'counterfeiting' has also been facilitated. Counterfeit CDs are harder to detect than counterfeit cassettes because not only is the sound quality almost identical but also the general appearance is often very close to the original. With today's printing technology, the counterfeiter is able to produce a copy good enough to fool the customer.

At the beginning of the 1990s, the worldwide picture of piracy is rather ambivalent for the legitimate music industry (see World Map 6).

On the one hand, the value of pirate recordings has stabilised at 5% of the total market. Also markets that were once overrun by piracy are now among the fastest growing legitimate markets in the world. The most positive sign comes from Far East/South East Asia, albeit with the notable exceptions of Thailand where piracy increased from 40% in 1989 to 53% in 1990, and Pakistan where the percentage is still over 70% per cent. Apart from these two countries, total piracy in the region fell by 33% to US$ 206 million in 1990 from US$ 330 million in 1989. Indicative examples are: Singapore, where piracy has been effectively eradicated (85% in 1984); Indonesia, where it has stabilised at around 20% (virtually 100% in mid-1980s); Malaysia, where it plummeted to just under 20% (from 85% in 1984); and finally, India and South Korea, where it fell to 39% and 24% respectively (from 90% in 1984 in both countries). Piracy in 1990 declined drastically even in Saudi Arabia -the capital of piracy in the Gulf/Middle East region- although it is still controls around 50% of the market (from 95% in the 1980s).

On the other hand, however, 1990 held some quite ominous signs. The value of unauthorised recordings reached their previous highest level (1984) of US$ 1.2 billion. In addition, piracy is rampant in Africa and it is growing at an alarming rate in Central and Latin America. Finally, new
WORLD PIRACY MAP

This map shows the size of the Piracy Market in 1990 calculated as a percentage of the total unit sales.

WORLD MAP 6

Music piracy in 1990

(Source: IFPI Piracy Report, January 1992)
large pirate markets emerged: Eastern Europe, where piracy accounted for about 70% of the market as a whole; and, the awakening of the sleeping Chinese giant, where CD plants have been growing like mushrooms since 1990.

CD piracy is well and truly the problem of the 1990s. From 1989 onwards, developed and developing markets alike have been systematically penetrated by large quantities of pirate CDs manufactured principally in the Far East and/or Eastern Europe. During the past four years, world sales of unauthorised units have been boosted from 400 million in 1990 to the staggering figure of 752 million in 1993, which corresponds to a 20% of the world total market in unit terms. And, in 1992, the value of pirate recordings broke the US$ 2 billion mark. During the same period, sales of pirate CD units have enjoyed an eight-fold increase: from 9 million in 1990 to 75 million in 1993. In 1993, the value of CD piracy was US$ 700 million which corresponded to almost 40% of the total value of all unauthorised recordings sold worldwide.

A final observation concerning piracy in the 1990s should be made at this point. Despite the initial forecast, the CD has not yet overtaken the cassette as the main pirate format but it is likely to do so in the future considering its increasing popularity among the pirates. For example, pirate cassettes increased only by 5 million last year, from 675 million in 1992 to 680 million in 1993, whereas unauthorised CD units almost doubled, from 38 million in 1992 to 75 million in 1993.

At present, the music industry stands on the threshold of a digital revolution. New emerging technologies, such as the DAT (Digital Audio Cassette) and the Mini-Disc, could become a piracy threat. Currently however, the CD is undoubtedly the flagship piracy format of the 1990s. For it is not only the music industry that it is under threat. Computer software, movies, video games and books could all be casualties of CD piracy in the years to come (IFPI ‘For The Record’, April 1994).
6.5 Music Piracy Trend 1978-1993: Breakdown by Area

i) Worldwide Trend

In the previous section of the present chapter a detailed picture of the occurrence of music piracy worldwide for the past 15 years has been provided. In the following pages, the aim will be at presenting its overall trend between 1978-1993 through the ensuing comparisons: first, sales of pirate units will be collated with sales of legitimate units (Table 6.5, Columns 1 and 2). That will result to the percentage of the total market (legitimate and pirate) that pirate units occupy (Table 6.5, Column 3). Second, the value -in US dollars- of pirate recordings will be put in contrast with the value of legitimate recordings (Table 6.6, Columns 1 and 2). That will result to the percentage of the total market (legitimate and pirate) taken by piracy in money terms (Table 6.6, Column 3). Accordingly, the following two Charts will be produced (Charts 1 and 2): Chart 1 will compare pirate with legitimate units; Chart 2 will compare the value of pirate recordings with the value of legitimate ones.

Before looking at the characteristic milestones of piracy's occurrence, a couple of remarks should be made. The above Tables and Charts result from a compilation of statistics and estimates provided by IFPI, namely annual piracy reports and a collective study about legitimate world sales [Hung & Morencos (1990) World Record Sales 1969-1990]. The picture is by no means complete as some annual reports are not available, and studies base their estimates solely on those countries that supply information. As far as the percentages, they result from an arbitrary computation which aims at providing a mere indication of the scale of piracy, and therefore, should be treated as such.

In 1978, piracy became apparent. Almost 500 million pirate units corresponded to the very significant 17.5% of the total market in unit terms, whereas their value amounted to 8% of the total market. During the next few years it appears to be a relative decrease in pirate units. The two-year period between 1984-1985 it has been a real milestone for music piracy, probably the biggest within the past 15 years. In 1984, the value of pirate recordings reached their peak compared with the value
### Table 6.5: World Music Piracy 1978-1993: Pirate vs Legitimate Units (in millions) and Percent of the Total Market

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Pirate (in millions)</th>
<th>Legitimate (in millions)</th>
<th>% of the Total Market</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>416</td>
<td>2000</td>
<td>17.50</td>
</tr>
<tr>
<td>1980</td>
<td>315</td>
<td>2200</td>
<td>12.50</td>
</tr>
<tr>
<td>1982</td>
<td>270</td>
<td>2150</td>
<td>11.10</td>
</tr>
<tr>
<td>1984</td>
<td>540</td>
<td>2370</td>
<td>18.50</td>
</tr>
<tr>
<td>1985</td>
<td>630</td>
<td>2400</td>
<td>20.80</td>
</tr>
<tr>
<td>1986</td>
<td>470</td>
<td>2300</td>
<td>17.00</td>
</tr>
<tr>
<td>1987</td>
<td>385</td>
<td>2400</td>
<td>13.80</td>
</tr>
<tr>
<td>1988</td>
<td>477</td>
<td>2800</td>
<td>14.50</td>
</tr>
<tr>
<td>1989</td>
<td>409</td>
<td>2500</td>
<td>14.40</td>
</tr>
<tr>
<td>1990</td>
<td>500</td>
<td>2900</td>
<td>14.70</td>
</tr>
<tr>
<td>1991</td>
<td>724</td>
<td>3000</td>
<td>19.40</td>
</tr>
<tr>
<td>1992</td>
<td>752</td>
<td>3200</td>
<td>19.00</td>
</tr>
</tbody>
</table>

Data for the years 1979, 1981, 1983, 1988 is not available.

### Chart 1: Pirate vs Legitimate units

Data 1981

---

159
Table 6.6 World Music Piracy 1978-1993: Pirate vs Legitimate Value (in US $billions) and Percent of the Total Market

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Pirate</th>
<th>Legitimate</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>0.884</td>
<td>10.20</td>
<td>8.00</td>
</tr>
<tr>
<td>1980</td>
<td>1.1</td>
<td>12.30</td>
<td>8.20</td>
</tr>
<tr>
<td>1982</td>
<td>0.915</td>
<td>11.20</td>
<td>7.50</td>
</tr>
<tr>
<td>1984</td>
<td>1.2</td>
<td>12.00</td>
<td>9.00</td>
</tr>
<tr>
<td>1985</td>
<td>1.1</td>
<td>12.20</td>
<td>8.20</td>
</tr>
<tr>
<td>1986</td>
<td>0.96</td>
<td>14.00</td>
<td>6.40</td>
</tr>
<tr>
<td>1987</td>
<td>0.997</td>
<td>17.00</td>
<td>5.50</td>
</tr>
<tr>
<td>1989</td>
<td>1.1</td>
<td>21.50</td>
<td>4.80</td>
</tr>
<tr>
<td>1990</td>
<td>1.2</td>
<td>22.50</td>
<td>5.00</td>
</tr>
<tr>
<td>1991</td>
<td>1.5</td>
<td>26.60</td>
<td>5.30</td>
</tr>
<tr>
<td>1992</td>
<td>2.1</td>
<td>28.80</td>
<td>6.80</td>
</tr>
<tr>
<td>1993</td>
<td>1.9</td>
<td>30.50</td>
<td>5.90</td>
</tr>
</tbody>
</table>

Data for the years 1979, 1981, 1983, 1988 is not available.

Chart 2: Pirate vs Legitimate value
of legitimate ones (9% of the total market). And in 1985, pirate units corresponded to the staggering 21% of the total unit market, the highest point ever. In the second half of the 1980s, the legitimate industry entered a period of recovery, enjoying the beneficiary effects of the popularity of CDs. Especially from 1987 onwards, there has been a healthy increase both in units sold and in turnover, while the value of pirate recordings has been restricted to around 5% of the total market. In the 1990s, the impact of CD piracy began to be felt. In 1992-1993, despite the fact that unit sales and value of legitimate recordings broke the 3 billion and the US$ 30 billion marks respectively, the value of piracy reached the US$ 2 billion mark and corresponded to just under 20% of the total units market.

ii) Breakdown by Area

In the present section, the course of music piracy between 1978-1993 will be examined through a breakdown by geographical area. The world will be divided into the following five regions:

- Europe (which includes the nations of the European Union, the rest of Western Europe, and Eastern Europe);
- Middle East - Africa - The Mediterranean (which includes all Middle Eastern countries, the Persian Gulf states, the African continent as a whole, and Mediterranean nations such as Turkey, Cyprus and Malta);
- Latin America (which includes Central and South American countries);
- North America (which includes the USA and Canada);
- Asia - Australasia (which includes the Far East and South East Asia, Australia and New Zealand).

Firstly, the aim will be to record the annual occurrence of piracy in each of the above five vast markets in terms of pirate units sold and their respective value. The resulting picture will be demonstrated on five respective Tables (Tables 6.7-6.11, Columns 1 and 2). A comparison with the value of legitimate recordings sold will not be attempted as relevant information is scarce, especially
for the years between 1978-1989. Secondly, the effort will be to provide an overall average, for each area, of the pirate share of the total market in terms of unit sales. In addition, when feasible, a mention of the percentage that different piracy formats (LPs, cassettes, CDs) occupy will be made (Tables 6.7-6.11, Column 3). It should be noted that such a computation for the years 1978-1989 will be arbitrary and should be treated as a mere indication. IFPI -the main source of information-started providing a total market piracy percentage from 1990 onwards, making also a distinction between the shares of the two dominant piracy formats for the 1990s, namely cassettes and CDs. As far as record piracy, its overall occurrence between 1978-1993 has been either insignificant, or even negligible. Especially prior to 1990, relevant information has been extremely limited to one or two countries per area per annum. Therefore, percentages provided for each area for the years 1978-1989 mainly reflect cassette piracy. Finally, characteristic example-countries from each of the above five areas will be mentioned.

In reference to the percentage of the market that piracy captures, either in terms of units or value, the following remark has to be made. Due to the clandestine nature of piracy, it is inherently difficult to obtain any precise figures. A brief reference to some possible ways of doing so follows. A fairly approximate evaluation may be obtained on the basis of those cases in which police, or other enforcement bodies activities have led to appreciable results in terms of seized pirated goods. Another way was referred to by Ms Tsiliri of the IFPI Greek National Group (personal interview 27/4/1994). Estimates on piracy percentages are provided by the record companies-members of the IFPI National Group. Furthermore, she was reluctant to exactly explain the style and fashion of seizure operations that could provide some indication. Neil Sarsfield, IFPI Operations Executive, replied to a similar question in a more laconic way (5/2/1994): “Mainly from observation”.

It is rather obvious that both the above executives refused to disclose any information that could jeopardise the modus operandi of the enforcement agencies in their fight against piracy.
a) The Americas (Tables 6.7 and 6.8)

In the American Continent, music piracy is truly a coin with two sides. As far as the North (USA and Canada) is concerned, there is an oxymoron: it is the only region in the world where piracy, particularly since the mid-1980s, has been confined below 10% of the market (in 1981, for instance, that figure was 18%). On the other hand, however, USA is the largest pirate market worldwide in terms of pirate sales. In the 1990s, US industry losses amount to over US $400 million annually, despite the fact that the pirate share of the market, both in terms of units and value, is around 4-5 per cent.

In Central and South America the situation is completely different. During much of the 1980s, piracy accounted for an average 40% of the market; and, following a decrease between 1989-1991, it reached its peak in 1992 (51% of the market). The region includes countries like Brazil, which in 1993 it was the seventh biggest market worldwide in terms of pirate units sold and Paraguay, where the rate was nearly 100% in 1992 and exports of pirate recordings to neighbouring countries amounted to 2 million units. Paraguay is also a country where the percentage of the pirate market was bigger than that of the legitimate one (units and value) in 1990 and 1991. The situation was the same in Bolivia (1990), Peru (1992), El Salvador and Nicaragua (1992 and 1993). However, it is Mexico that has by far the biggest piracy problem in the world. In per capita terms, it is the world’s largest market for unauthorised recordings. It is also Latin America’s largest music market, both for legitimate and pirate products. In spite of the size of the legitimate market, 2 out of every 3 cassettes sold in Mexico are pirate; and, the number of pirate tapes sold in 1992 was exceeded only by China which has a population 10 times greater than that of Mexico.
### Table 6.7  Music Piracy in Latin America
1978-1993: Units (millions), Value (US $millions), Percent of the Total Market (units)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>LATIN AMERICA</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Units (millions)</td>
<td>Value (millions)</td>
<td>% market (units)</td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>12</td>
<td>25</td>
<td>22%</td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>44</td>
<td>86</td>
<td>25%</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>25</td>
<td>65</td>
<td>40%</td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>30</td>
<td>50</td>
<td>44%</td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td>35</td>
<td>60</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>30</td>
<td>40</td>
<td>44%</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>16</td>
<td>22</td>
<td>46%</td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>72</td>
<td>96</td>
<td>33%</td>
<td>tapes</td>
</tr>
<tr>
<td>1990</td>
<td>79</td>
<td>160</td>
<td>35%</td>
<td>49.4</td>
</tr>
<tr>
<td>1991</td>
<td>83</td>
<td>164</td>
<td>36%</td>
<td>49</td>
</tr>
<tr>
<td>1992</td>
<td>145</td>
<td>302</td>
<td>51%</td>
<td>65</td>
</tr>
<tr>
<td>1993</td>
<td>139</td>
<td>277</td>
<td>47%</td>
<td>65</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CDs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>2.2</td>
</tr>
<tr>
<td>1980</td>
<td>1</td>
</tr>
<tr>
<td>1982</td>
<td>0</td>
</tr>
<tr>
<td>1984</td>
<td>1</td>
</tr>
<tr>
<td>1986</td>
<td>1</td>
</tr>
<tr>
<td>1988</td>
<td>1</td>
</tr>
<tr>
<td>1990</td>
<td>1</td>
</tr>
<tr>
<td>1991</td>
<td>1</td>
</tr>
<tr>
<td>1992</td>
<td>1</td>
</tr>
<tr>
<td>1993</td>
<td>1</td>
</tr>
</tbody>
</table>

![Graph showing % market in units over years](chart.png)
Table 6.8 Music Piracy in North America 1978-1993: Units (millions), Value (US $millions), Percent of the Total Market (units)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>N AMERICA</th>
<th>% market (units)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Units (millions)</td>
<td>Value (millions)</td>
</tr>
<tr>
<td>1978</td>
<td>66</td>
<td>332</td>
</tr>
<tr>
<td>1980</td>
<td>74</td>
<td>560</td>
</tr>
<tr>
<td>1982</td>
<td>60</td>
<td>400</td>
</tr>
<tr>
<td>1984</td>
<td>60</td>
<td>320</td>
</tr>
<tr>
<td>1985</td>
<td>25</td>
<td>120</td>
</tr>
<tr>
<td>1986</td>
<td>25</td>
<td>212</td>
</tr>
<tr>
<td>1987</td>
<td>36</td>
<td>354</td>
</tr>
<tr>
<td>1989</td>
<td>46</td>
<td>423</td>
</tr>
<tr>
<td>1990</td>
<td>52</td>
<td>471</td>
</tr>
<tr>
<td>1991</td>
<td>36</td>
<td>368</td>
</tr>
<tr>
<td>1992</td>
<td>47</td>
<td>479</td>
</tr>
<tr>
<td>1993</td>
<td>43</td>
<td>433</td>
</tr>
</tbody>
</table>

% market in units

Year

165
b) Middle East - Africa - The Mediterranean (Table 6.9)

These three regions form a vast area which has always included major export and distribution centres of pirate goods, ever since the era of book piracy. It is also a market where digital technology has not yet been fully established. Within the 1980s it had unusually high percentages of pirate records, but the music cassette is still the dominant piracy format.

No wonder, if one considers, for instance, that more than 95% of all African music is on tape, and there is only 1 CD factory in the whole of Africa based in South Africa. Nowadays, in a continent plagued by piracy, there is probably only one striking exception. In Ghana, the pirate share of the market was just 3% in 1993; in the first four months of 1994, 20,000 pirate cassettes have been confiscated and many pirates have been taken to court. In some other countries that had managed to confine piracy below 10% in the 1980s, namely South Africa, Egypt and Zimbabwe, the pirates have taken control once again in recent years. Finally, in Ivory Coast and in Kenya, sales of pirate products (units and value) have been consistently exceeding sales of legitimate ones during the 1990s.

Middle East and the Gulf are another two areas where piracy has a strong foothold. Saudi Arabia is a major example of that. In 1992, sales of unauthorised recordings both in terms of units and value, outnumbered the legitimate ones (the situation was the same in the United Arab Emirates in 1993). Saudi Arabia ranks amongst the 10 biggest pirate markets worldwide: in 1992, it was seventh in terms of units sold and 10th in terms of value of pirate products; in 1993, it held the same place in terms of units and it was ninth in terms of value.

From the three Mediterranean markets of Cyprus, Malta and Turkey, the latter is the only relatively encouraging example in terms of piracy reduction. The share of the market captured by piracy plummeted to 13% in 1991 -the lowest point ever- from around 80% during the 1980s. That development was largely due to the efforts of the Turkish President of IFPI during the second half of
Table 6.9 Music Piracy in Middle East-Africa-Mediterranean 1978-1993: Units (millions), Value (US $millions), Percent of the Total Market (units)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>M.EAST-AFRICA-MEDITERRANEAN</th>
<th>Units (millions)</th>
<th>Value (millions)</th>
<th>% market (units)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td></td>
<td>42</td>
<td>104</td>
<td>60%</td>
</tr>
<tr>
<td>1980</td>
<td></td>
<td>50</td>
<td>135</td>
<td>70%</td>
</tr>
<tr>
<td>1982</td>
<td></td>
<td>55</td>
<td>160</td>
<td>70%</td>
</tr>
<tr>
<td>1984</td>
<td></td>
<td>160</td>
<td>350</td>
<td>76%</td>
</tr>
<tr>
<td>1985</td>
<td></td>
<td>150</td>
<td>340</td>
<td>N/A</td>
</tr>
<tr>
<td>1986</td>
<td></td>
<td>62</td>
<td>160</td>
<td>70%</td>
</tr>
<tr>
<td>1987</td>
<td></td>
<td>90</td>
<td>186</td>
<td>75%</td>
</tr>
<tr>
<td>1989</td>
<td></td>
<td>47</td>
<td>103</td>
<td>58%</td>
</tr>
<tr>
<td>1990</td>
<td></td>
<td>49</td>
<td>130</td>
<td>37%</td>
</tr>
<tr>
<td>1991</td>
<td></td>
<td>48</td>
<td>173</td>
<td>35%</td>
</tr>
<tr>
<td>1992</td>
<td></td>
<td>52</td>
<td>140</td>
<td>31%</td>
</tr>
<tr>
<td>1993</td>
<td></td>
<td>62</td>
<td>144</td>
<td>34%</td>
</tr>
</tbody>
</table>

Tapes: 47, 49, 48, 52, 62
CDs: 103, 130, 173, 140, 144

![Bar chart showing % market in units over years from 1978 to 1993 with a spike in 1987.]
the 1980s, Mr Nesuhi Ertegun. In the last three years, however, piracy is on the rise again. In 1992, Turkey ranked tenth among the 10 biggest pirate markets worldwide in terms of pirate units sold.

Finally, the following overall observation should be made. Despite the aforementioned examples of individual countries, piracy in the three regions in discussion has been gradually decreasing during the last ten years, from 76% of the market in 1984 to 34% in 1993.

c) Asia - Australasia (Table 6.10)

Before proceeding into a detailed reference of characteristic example-countries from that area, an important distinction should be made. In the region of Australasia, namely Australia and New Zealand, piracy has been restrained to around 5% of the total market for the last 15 years. Therefore, the figure that appears in Column 3 of Table 6.10 for the years between 1978-1987 refers almost exclusively to piracy within Asia, except from Japan and Hong Kong where piracy has been negligible. From 1989 onwards, the distinction between Asia and Australasia becomes obvious. The apparent reduction of the market's piracy share in the 1990s is misleading; this is due to the inclusion in the equation of Australasia, where levels of piracy have been consistently low.

The potential threat for the legitimate industry comes from Asia, especially in the 1990s that the CD is becoming increasingly popular as piracy format (see relevant caption in Table 6.10). The following facts give indeed a cause for concern: in the first six months of 1993, 40 CD plants exist in Asia with a manufacturing capacity of 150 million CDs per annum, far exceeding the legitimate demand for the region. According to the IFPI, this over-supply of production capacity means that CD plant proprietors may be under great pressure to obtain orders from any source whatsoever. Even those with the best intentions may not understand concepts such as exclusive licences, and suspicions are not always aroused in circumstances where someone who is familiar with the industry would know that a pressing order is not from a legitimate source.
Table 6.10  Music Piracy in Asia-Australasia
1978-1993: Units (millions), Value (US $millions),
Percent of the Total Market (units)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>ASIA-AUSTRAALASIA</th>
<th>Value (millions)</th>
<th>% market (units)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Units (millions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td>250</td>
<td>200</td>
<td>70%</td>
</tr>
<tr>
<td>1980</td>
<td>120</td>
<td>150</td>
<td>70%</td>
</tr>
<tr>
<td>1982</td>
<td>100</td>
<td>190</td>
<td>70%</td>
</tr>
<tr>
<td>1984</td>
<td>250</td>
<td>350</td>
<td>60%</td>
</tr>
<tr>
<td>1985</td>
<td>380</td>
<td>450</td>
<td>N/A</td>
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<tr>
<td>1986</td>
<td>330</td>
<td>440</td>
<td>61%</td>
</tr>
<tr>
<td>1987</td>
<td>214</td>
<td>268</td>
<td>51%</td>
</tr>
<tr>
<td>1989</td>
<td>288</td>
<td>329</td>
<td>23%</td>
</tr>
<tr>
<td>1990</td>
<td>186</td>
<td>206</td>
<td>25%</td>
</tr>
<tr>
<td>1991</td>
<td>238</td>
<td>382</td>
<td>19%</td>
</tr>
<tr>
<td>1992</td>
<td>360</td>
<td>623</td>
<td>15%</td>
</tr>
<tr>
<td>1993</td>
<td>408</td>
<td>571</td>
<td>19%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>tapes</th>
<th>CDs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>32.5</td>
<td>0.1</td>
</tr>
<tr>
<td>1980</td>
<td>14</td>
<td>4.5</td>
</tr>
<tr>
<td>1982</td>
<td>18.5</td>
<td>5</td>
</tr>
<tr>
<td>1984</td>
<td>19</td>
<td>13</td>
</tr>
<tr>
<td>1986</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td></td>
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<td>1989</td>
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<td>1990</td>
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<td>1991</td>
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<td></td>
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<tr>
<td>1992</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

% market in units

169
The nations of Far East and South East Asia have been traditionally considered world piracy capitals, both in terms of domestic markets as well as in terms of exports of pirate products. The strong foothold that piracy had obtained in the region during the 1980s drew the attention of both IFPI and the RIAA (Recording Industry Association of America). Both these bodies started to exert all sorts of pressure in order to induce those countries to reduce their levels of piracy and improve their copyright protection. The ‘target list’ included the following countries: India; South Korea; Taiwan; and, the members of the ASEAN (Association of Southeast Asian Nations), which includes some of the most egregious violators of copyright, such as Indonesia, Singapore, Malaysia, Thailand and the Philippines.

Particularly from 1989 onwards, several of the above countries began to strengthen their enforcement provisions and to increase the criminal sanctions of their laws. It should be noted that foreign, particularly American pressure, was not the only factor which has influenced these changes. It was also the region’s increased level of economic development, and the desire to attract foreign investment.

The effort of the legitimate music industry was partly successful, however. The levels of piracy have been significantly attenuated in India and South Korea, but these two countries still rank among the 10 largest pirate markets in the world. In 1992, India ranked eighth in terms of value of pirate products and third in terms of units sold, while South Korea ranked seventh in value and eighth in units. In 1993, India ranked sixth in value terms and third in unit terms, while South Korea was not included in the ‘Top 10’ list.

As far as the ASEAN nations, only Thailand did not improve its piracy status. The pirate share of the Thai market did actually increased in the 1990s. The reasons that led to that development are recounted by Lepp (1990, pp 33-34). The introduction of an intellectual property rights Bill to the Parliament in 1989 led directly to a no-confidence vote and the government was ousted. The Thai press criticised many ministers for ‘selling out’ to the US pressure. In 1992 and
1993, Thailand ranked, in terms of value of pirate recordings, ninth and eighth respectively in the 'Top 10' list of the world's largest pirate markets; in terms of units sold, it held the sixth place in both years.

However, the Asian country that poses the biggest threat to the legitimate music industry worldwide is China. China is home to the world's largest gang of CD pirates. Over the past two years, the number of CD plants has grown from just 3 in 1992 to 26 by the end of 1993. The current manufacturing capacity is 75 million units per year. That figure corresponds to nearly 10 times the level of domestic sales and almost half of the production of the rest 14 CD plants in the whole Asia. In 1992, pirate CD units sold in China amounted to 10 million, which corresponds to almost a quarter of the total worldwide sales of pirate CDs (38 million). The Chinese pirates generally use pressing equipment that has been discarded from legitimate plants. Most of the 26 CD plants operate with tacit government consent in areas where freewheeling and often unregulated foreign investment has been tolerated by authorities. The plant managers include pirate-CD producers chased out of Singapore, Taiwan and other Asian countries. Chinese pirates cost the neighbouring Hong Kong record industry alone more than US$ 6 million annually. Pirate CDs smuggled across the border have sent the piracy rate rocketing in Hong Kong, from negligible amounts to 20% of the market in just twelve months (1993). The large quantity of pirate products seized illustrates how rampant is CD piracy in China. In 1993, in just one day, 23,000 units were confiscated in 30 shops in one region of China alone. No wonder why China is currently the biggest pirate market in the world in terms of units sold. According to IFPI estimates, sales of unauthorised copies reached 215 million in 1992, which represent an 80% of the legitimate total sales (270 million units), with a retail value of over US$ 380 million which exceeds by far the legitimate market (US$ 310 million).
d) Europe (Table 6.11)

Europe is the second biggest legitimate music market in the world. Between 1978-1993, piracy level in the region has been the third lowest worldwide, behind USA and Australasia. The share of the total market captured by piracy has always been confined below 15% (except 1978 when it was estimated at 33%). The figure could actually have been lower if it were not for certain countries, such as Italy, Portugal, Spain and Greece, where the piracy rate was much higher than the European average, especially during the first half of the 1980s. From 1985 onwards, a gradual piracy reduction in the above territories brought down the overall percentage to 10% in the early 1990s. However, some of these countries' piracy 'contribution' is still significant.

A characteristic example is that of Greece. Without Greece's piracy percentage in 1990, for instance, the European rate would be 5% instead of 10%. That occurred despite a drastic decline of piracy in the country, from 80% in 1978 down to 15.6% in 1990, the lowest point ever. That commendable development took place thanks to the spirited efforts of the IFPI Greek National Group throughout the 1980s. These efforts are all the more significant if one considers the lack of personnel that plagues the Group. During an interview with an official (27/4/1994), it has been disclosed that there are only two persons in charge of investigating piracy's occurrence in the entire country. Despite the above shortcoming, the Group's activities record is indicative for the last 10 years in terms of pirate products seized and pirates caught (Table 6.12).
Table 6.11 Music Piracy in Europe
1978-1993: Units (millions), Value (US $millions),
Percent of the Total Market (units)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>EUROPE</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Units</td>
<td>Value</td>
<td>% market</td>
</tr>
<tr>
<td></td>
<td>(millions)</td>
<td>(millions)</td>
<td>(units)</td>
</tr>
<tr>
<td>1978</td>
<td>45</td>
<td>248</td>
<td>33%</td>
</tr>
<tr>
<td>1980</td>
<td>26</td>
<td>175</td>
<td>9%</td>
</tr>
<tr>
<td>1982</td>
<td>28</td>
<td>100</td>
<td>15%</td>
</tr>
<tr>
<td>1984</td>
<td>42</td>
<td>127</td>
<td>15%</td>
</tr>
<tr>
<td>1985</td>
<td>40</td>
<td>125</td>
<td>N/A</td>
</tr>
<tr>
<td>1986</td>
<td>32</td>
<td>106</td>
<td>12%</td>
</tr>
<tr>
<td>1987</td>
<td>34</td>
<td>174</td>
<td>11%</td>
</tr>
<tr>
<td>1989</td>
<td>24</td>
<td>155</td>
<td>14%</td>
</tr>
<tr>
<td>1990</td>
<td>43</td>
<td>233</td>
<td>10%</td>
</tr>
<tr>
<td>1991</td>
<td>94</td>
<td>387</td>
<td>10%</td>
</tr>
<tr>
<td>1992</td>
<td>122</td>
<td>556</td>
<td>14%</td>
</tr>
<tr>
<td>1993</td>
<td>99</td>
<td>481</td>
<td>11%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>tapes</th>
<th>CDs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>23.5</td>
<td>2.5</td>
</tr>
<tr>
<td></td>
<td>22</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>4</td>
</tr>
</tbody>
</table>
Table 6.12 Activities of the Greek IFPI National Group 1983-1994: Pirates Captured and Audio Tapes Seized

<table>
<thead>
<tr>
<th>Year</th>
<th>Pirates captured</th>
<th>Cassettes seized</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>70</td>
<td>49996</td>
</tr>
<tr>
<td>1984</td>
<td>162</td>
<td>48000</td>
</tr>
<tr>
<td>1985</td>
<td>123</td>
<td>25695</td>
</tr>
<tr>
<td>1986</td>
<td>104</td>
<td>14950</td>
</tr>
<tr>
<td>1987</td>
<td>102</td>
<td>13579</td>
</tr>
<tr>
<td>1988</td>
<td>78</td>
<td>6974</td>
</tr>
<tr>
<td>1989</td>
<td>21</td>
<td>11511</td>
</tr>
<tr>
<td>1990</td>
<td>28</td>
<td>6558</td>
</tr>
<tr>
<td>1991</td>
<td>46</td>
<td>14208</td>
</tr>
<tr>
<td>1992</td>
<td>52</td>
<td>17402</td>
</tr>
<tr>
<td>1993</td>
<td>52</td>
<td>14872</td>
</tr>
<tr>
<td>1994*</td>
<td>30</td>
<td>7155</td>
</tr>
<tr>
<td>TOTAL</td>
<td>868</td>
<td>230900</td>
</tr>
</tbody>
</table>

* First 3 months

Source: IFPI Greek National Group

Despite the overall low piracy percentage in Europe, the region has some representatives in ‘Top 10’ list of the world’s largest pirate markets. In 1992 and 1993, Germany ranked fourth in terms of value of unauthorised recordings, while in terms of units it held the ninth and tenth place respectively. Italy has always been problematic. In 1992 and 1993, it ranked fifth in terms of value of pirate products; and in 1995, the illegal cassette market is estimated to be larger than the legitimate one. A interesting comparison between the above two countries is worth mentioning. In 1995, in Italy there are the same numbers of pirate CDs sold as in Germany, which has a recorded music market ten times the size. Finally, France joined the ‘Top 10’ list in 1993, occupying the tenth place in terms of value.

In the 1990s, the threat for the legitimate record industry stems from the infant free market economies that emerge in the new democracies of Eastern Europe. Lack of protective provisions for
sound recordings, or even absent or obsolete copyright laws in most countries of the old Iron Curtain, coupled with the thirst of their public for Western music, created a paradise for the pirates.

In early 1990s, the piracy rate in the region was over 70% per cent. CD piracy, in particular, is extremely popular in Eastern Europe. In fact, figures from countries that information is available for are indicative. For example, in Czechoslovakia (Czech and Slovak Republics from 1993), Hungary and Poland, the number of pirate CDs is the highest in the whole Europe. The piracy problem that such figures represent is aggravated by the opening of the internal European borders. Large quantities of pirate CDs can be easily smuggled in the markets of Central and Western Europe. In Greece, for instance, Athens Airport Customs officers arrested in June 1994 one person alone who was carrying 2,000 pirate CDs manufactured in a Bulgarian plant. It was then discovered that behind him there was a whole network that has flooded areas of Northern Greece and Athens with counterfeit CDs. In the UK, at the end of July 1994, detectives and trading standard officers seized 10,000 CDs at Dover after stopping a Bulgarian truck, in what they believe was the country's largest single batch of counterfeit discs. Police believe that pirate CDs are being manufactured in Eastern Europe and China, with profits helping to fund paramilitary groups in Northern Ireland.

A strong indication that piracy reigns supreme in Eastern Europe is provided by Poland. In 1992 and 1993, it ranked fourth in the 'Top 10' list of the world’s largest pirate markets in terms of units sold, while in terms of value it held the sixth and the seventh place respectively. It is estimated that in 1992, when the pirate share of the market was 78%, 70 million cassettes were sold; the country's budget was depressed by at least US$ 25 million due to losses suffered by Polish producers. Poland is also a great export centre. Producers from the neighbouring countries of Czech & Slovak Republics, Hungary, Austria and Germany suffer losses from Polish imports of pirate recordings.

What could be the reason for the piracy boom in the 1990s across Eastern Europe? Eastern European experts believe that Western record companies are entering the new market too slowly.
The Hungarian managing director of Multimedia Laszlo Hegedus recounts how pirate cassettes of famous western artists were a vital element of the underground’s cultural fabric during the era before the democratisation. Music represented freedom against political oppression and the pirates were regarded as heroes. The very same ‘heroes’ have nowadays become the ‘villains’ that threaten the local music industry’s existence. They face no competition from legitimate sources as popular pop and rock music is largely unavailable in Eastern Europe. According to Hegedus, it is unlikely that the region will enjoy a profitable music industry for the next 5 to 10 years. He is quoted saying that trying to sell records at the same prices as in Western Europe will not work. “Only if Western companies can compromise over prices ...”. On the other hand, however, the reaction of the Western record companies is voiced by Beatrice von Silva Tarouca, Vice President of Business Development at Warner Music. “We are prepared to accept piracy to a certain extent”, she says. The problem, however, is that “the currency may not be convertible and the royalties that we are offered for our products are sometimes too low to make the business worthwhile.” She carries on saying that local companies should focus on local artists and the local market. “Don’t try to imitate the West” is her final advice (IFPI ‘For The Record’, June 1992, pp 4-5).

Recent developments in the Eastern front are encouraging. In June of 1992, IFPI opened its Eastern European office in Warsaw, Poland. Piracy rate in the country has fallen considerably, from 96% in 1990 to 67% in 1993. In 1991, Hungary, Czech and Slovak Republics, along with Poland signed association agreements with the European Community. Copyright laws are updated in many Eastern European countries. This is largely due to the strenuous efforts of IFPI, which believes that the whole region represents an important area of potential growth for the legitimate record industry.
6.6 Concluding Remarks

The above examination attempted to shed some light on the facts of piracy. Despite some encouraging signs observed in passing, the sheer numbers quoted insofar suggest one thing; that the problem continues largely unabated and copyright theft is a grave problem of our times and is here to stay. The fact is that the market for piracy is largely based on greed. It is accepted as an inevitable part of human nature, and subsequently, there will always be a market for illegal material, be it audio, video, printed or any other. With technical change in hardware and broadcasting increasingly tending to favour the consumer, the coming years will see a constant battle as rightowners seek control and remuneration for the use of their works. How well they succeed, will determine the nature and the future of the copyright industries across the whole media spectrum.
CHAPTER 7

PRIVATE COPYING: 'FAIR USE' OR PIRACY - FACTS AND DOUBTS

After having extensively examined the causes, effects and the impact of audio-visual piracy, the focus is now shifted in another grave challenge that technology has presented copyright with. The ensuing analysis will probe specific areas of the copyright law that deal controversially with the definition of unlawful use of protected material, and the possible effects of such a use on selected copyright industries.

In the first section, the legal doctrine of 'fair use' will come under scrutiny. In line with the focus on specific industries, a specific area of that doctrine, namely 'private copying' of audio-visual recordings, will be examined and the debate around it will be reviewed. In the second section, the aim will be to define the exact degree of damage that 'private copying' causes to the music and video industries. This will be achieved through a critical interpretation of existing data.

7.1 'Private Copying': a 'fair use' or a Form of Piracy?

Before trying to cater for an answer to the above question, that has sparked a vehement debate within the realm of copyright, it is pertinent to cast a comprehensive glance at the background of the 'fair use' doctrine.

The term -that can be found under various headings in different national laws- has been used to describe technically infringing, but excused from attracting liability, uses of copyright. That is perhaps why it is commonly referred to as 'free use' of copyrighted material, or as 'defence' to copyright infringement.

1 'Fair use' in US law; 'fair dealing' and 'permitted acts' in UK and UK-derived legislation; and 'limitations', 'exceptions', or 'exemptions' in other legal systems all bear similar meanings.
It arises from the most fundamental purpose of the copyright system, which is to strike a balance between two classes of people. On the one hand, the intellectual creators who have an interest in authorising or prohibiting uses of their works and in receiving a proper return for their creations; on the other, the general public who need to have wide and cheap access to intellectual creations. Therefore, it can be said that 'fair use' acts "as a buffer between copyright protection and public requirements" (Ploman & Clark Hamilton 1980, p 199). It has also been characterised as "a powerful anticopyright tool" that functions "as a 'safety valve' on the rigidity of the law's definition of copyright" (Henry 1974, p 999). 'Fair use', Leavens (1981, pp 6-7) contends, has been justified on the constitutional grounds that promotion of the progress of science and arts is sometimes served by allowing limited exceptions to the copyright owner's limited monopoly - a monopoly whose ultimate aim is to stimulate artistic creativity for the general public good.

Today, 'fair use' limitations are included in all the international copyright and neighbouring rights conventions, even though the detailed rules vary considerably. Member countries of those conventions are allowed to exempt from protection certain works or uses of works and to make exceptions to the three basic rights of the intellectual creator, namely the reproduction, the public performance and the broadcasting right. Such exceptions are permitted under certain presuppositions: those uses are compatible with fair practice; they do not conflict with the normal exploitation of the works; they do not unreasonably prejudice the legitimate interests of the creators; they do not contest the spirit and the provisions of the conventions; and, they accord a reasonable degree of effective protection to each of the above mentioned three rights.2 It should be noted, however, that the relevant provisions of the conventions are not jus cogens (compulsory law), and therefore, the member states are at liberty to incorporate or not fair use limitations in their national

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2 'Fair use' limitations are found in: the Berne Convention, art. 9(2); the Universal Copyright Convention, art. IVbis(2); the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, art. 15; the Geneva Phonograms Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms, art. 6; and, the European Agreement for the Protection of Television Broadcasts, art. 5.
laws. Moreover, the much general letter of those provisions leaves great room to open interpretation for individual cases.

Conclusively, 'fair use', by tilting the balance towards public access and away from private gain, permits certain borrowings. The doctrine has been called both a privilege and a limitation. For, in a general sense, it allows the 'free' use of a copyrighted work; and, more narrowly, it determines the limits of use without the consent of the copyright owner. However, one can observe the following caveat:

"At the heart of the fair use doctrine lies an analytical shortcoming - an inability to define precisely the extent to which one may borrow from a copyrighted work." This inability, the issue under discussion has been described as the most troublesome in the whole law of copyright. Arguments as to whether 'fair use' should be regarded as 'privileged' infringement, or whether simply it does not violate copyright at all have always been highly controversial. To what degree of certainty can a line be drawn between lawful practice and sheer infringements of copyright that constitute an act of piracy? The copyright law, in general, does not clearly define 'fair use'.

Consequently, answering the above complex question is left at the discretion of the courts. Nevertheless, the law lends a helping hand by providing a series of criteria for courts to consider in determining whether one's use of another's copyright is fair. The principal criterion is probably the 'purpose' of the use, and at least four others. The most indicative and widely referred to set of such factors are included in Section 107 of the 1976 US Copyright Revision Act:

- the purpose and character of use, including whether such use is of a commercial nature or is for

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3 In p 455 of an anonymous Note entitled 'Toward a unified theory of copyright infringement for an advanced technological era', Harvard Law Review (1982), Vol.96, No.2, pp.450-469 (hereinafter mentioned as 'Note 1982').

4 According to provisions of international copyright conventions as well as of national laws, 'purposes' within 'fair use' for which reproduction is allowed are in the following sequence: quotations from articles, films, broadcasts and photographs for purposes of criticism, teaching, commenting, and reporting of current events; scholarship; private study or research; public and political speeches in the course of legal proceedings and lectures justified by the information purpose; some religious and educational purposes; reproductions of pictures in catalogues for public exhibition; ephemeral fixations of broadcasts; and, reproduction for personal or private use.
non-profit educational purposes;
- the nature of the copyright work;
- the amount and substantiality of the portion used; and
- the effect of the use upon the potential market for, or value of, the copyright work.

At this point it should be noted that both courts and users ought to carefully consider all the above criteria in order to determine with certainty whether a practice is ‘fair’ or unlawful. Such a task becomes even more strenuous given the lack of a clear legal definition of the ‘fair use’ doctrine and the peculiarities of each individual case. Moreover, the application of the doctrine has been rendered much more precarious recently as technology has provided new tools which present major challenges to the reproduction right, namely music and video cassette recorders. In the light of such equipment capable of infringing copyright the already fine line between ‘fair use’ and piracy is becoming increasingly as well as alarmingly blurred.

Nowadays, the audio and video industries worldwide are faced with that practice, known as ‘private copying’ or ‘home taping’. It takes two main forms: First, there is audio taping of music (over 80% of all recordings) from records, cassettes and CDs which may be bought, borrowed by acquaintances or from libraries, or recorded from a radio broadcast. It appears that consumers indulge in audio taping for two main reasons. They are attracted by the convenience of making up a tape with their own selection of recordings that they possibly intent to keep permanently; and, they also gain financially as they spare themselves the expense of buying the original copy. Second, there is video taping of feature films (by far the type of programme most frequently recorded) from television broadcasts or by renting a videocassette and making a copy from it. Reasons put forward for home videotaping include: i) recording programmes for later viewing (‘time shifting’); ii)

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5 Another serious challenger is the photocopier which lies outside the scope of the present thesis.

6 There is a fine distinction between the two terms. ‘Home taping’ does not necessarily imply the copying of a recording; it could refer to the recording of a live performance, too. Also, ‘private copying’ is largely related to audio, while ‘home taping’ is mainly applied to video. However, as it is deduced from most studies, the two are generally employed synonymously, although ‘private copying’ is more widely used. In the lines of the present chapter the two terms will be used alternatively.
recording programmes for permanent collection ("library building"); and, iii) avoiding the purchase of a high-priced pre-recorded videocassette.

It should be stressed here, however, that although price considerations appear as reasons for both audio and video hometaping, most of the studies undertaken show that, of all reasons given, the price aspect represents less than half of the total answers. In fact, it is suggested that people in the higher income brackets "indulge" in private copying more than others.

According to the three most renowned surveys in the field, "private copying" is the non-commercial copying of phonograms and videograms for personal, domestic use.³ The practice has resulted from mid-1960s onwards from the ready availability to the ordinary consumer of inexpensive and easily managed equipment. That equipment, comprised of cassette tape recorders and blank magnetic tapes, permitted him/her to transfer recorded sound (at first) and image (later) from one carrier to another, perhaps editing in the process, at the comfort of his own private dwelling. Moreover, the development of cassette technology has enabled very large percentages of population to make cheap high quality copies of phonograms and videograms at home, either directly or through radio and television broadcasts.

The first - and in a way the foremost - industry seriously concerned about "private copying" was undoubtedly the music industry; the video was introduced much later (mid-1970s). There is a

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¹ Such studies, to mention the most extensive ones, include:

³ For these three specialised studies, which this section of the present chapter is largely relied upon for information, see note 7, a), b), c).

⁹ "Phonogram" is defined in international copyright conventions as any exclusively aural fixation of sounds of a performance or of other sounds. "Videogram" denotes, according to the WIPO Glossary of Terms of the Law of Copyright and Neighbouring Rights, all kinds of audio-visual fixations embodied in cassettes, discs or other material mediums.
very interesting theory as to what initially sparked the practice, best expressed by Jerrard (1987). To him it could have been the music industry’s very own fault. In the mid-1960s, the only medium where music was available on was the good old vinyl disk. Later, when the cassette and the cassette recorder were developed, the record companies, rather than welcome the new medium, did not produce many recordings in the new format. So consumers, in order to have material for use with the cassette players, started recording vinyl disks onto audio tapes.

In fact, the practice has become so widespread over the past twenty years that is now of a grave concern to the various copyright owners. As Davies argues in her famous ‘Piracy study’ (1986, pp 12-13), it represents a difficult to detect use of copyrighted material for which none of the right owners receives remuneration and, in economic terms, is considered more damaging to them than piracy. Indeed, as David Gibbins, Director of IFPI’s Anti-Piracy Operations, maintains (IFPI ‘Anti-Piracy Report’ 1982, p 3), in contrast to piracy, the music and video industries face no direct competition in relation to ‘private copying’, but rather the real beneficiaries have been the public and the hardware and blank tape manufacturers. To him, it legally presents a much more subtle and difficult problem than sheer copyright infringement.

Is ‘private copying’ a form of piracy, something that copyright industries strongly believe? Or does it fall within the private-fair use exception, as most recording equipment used for it is used by individuals in their homes? These questions harbour not only an entrenched debate between owners and users, but also a division within the former’s circles. The uncertainty in decisively answering these questions is further complicated by a lack of uniformity among the major copyright and neighbouring rights international conventions. For example, while the Rome Convention clearly refers to private use as an exemption from the right of phonograms producers, the letter of the Geneva (Phonograms) Convention does not exactly include such a use in the permitted limitations on protection. Moreover, the generalised provisions of both the UCC and the Berne Convention, despite allowing reproduction in special cases under certain conditions, do not precisely mention
private use as an exception. Furthermore, it must be borne in mind that the problem of 'private copying' does not arise within the confines of all the above Conventions, simply because its extent had not been contemplated at the time of their inception. For instance, in 1961 (year of signing of the Rome Convention), 'home taping' was not a threat as recording equipment was not yet widely or even available at all; and in 1971, a year the last revisions of the UCC and the Berne Conventions took place and the Geneva Convention was introduced, the practice was still in its infancy (phonograms) or non existent (videograms).

Such discrepancies in international law ultimately affect domestic legislation. As a result, some countries members of the above conventions permit 'private copying', while some others do not. The legislators are faced with an ineluctable dilemma when copyrighted works are reproduced for private use, as Ploman & Clark Hamilton point out (1980, pp 197-198). Should one, on the one hand, stick to a very strict interpretation of the reproduction right, the result is likely to be a massive infringement of copyright. If, on the other, provisions favouring the users are accepted, illegal reproductions could be fewer, but the owner runs the risk of suffering legally accepted encroachments into the normal exploitation of his work.

In turn, the courts envisage a conundrum that is not so much legal as it is moral. As Smyth (1984, p 42) and Stewart (1989, p 122) contend, all unrewarded appropriation of copyrighted works is undoubtedly legally wrong and all copying is prejudicial to the owner's interests to some extent. The questions are whether the private copier really causes anyone a commercial loss, and whether the prejudice is reasonable or unreasonable.

A reliable guide to judicial interpretation of whether 'private copying' is 'fair use' is catered for by the four criteria previously mentioned, which are included in section 107 of the 1976 US Copyright Act. It must be noted, however, that all four aspects must be satisfied if the interpretation is to be vested with validity. Upon these factors and the degree of their application to 'home taping' lies the fervent debate between those who believe it is an unauthorised use and those who see it as
"fair use". These for and against arguments will be dealt with hereinafter through a separate analysis of each of the four criteria as far as phonograms and videograms are concerned.

(1) First, the nature of the copyright work. This criterion concerns the substance of a particular work, that is whether the work is a film, a musical composition, or a whole book. That specific factor has rarely been relied upon by the courts since 'private copying' does not fundamentally change the nature of a work as much as the means of communicating or using the work ('Note 1982', p 459). Nonetheless, Bender (1993, pp 45-46) suggests, the criterion requires one to consider the differences among media. Copying a book, for instance, certainly can have an adverse effect on the owner's interests. Copying a video program, however, may cause more harm to the owner than the copying of a book (in actual market terms) because of the substantially smaller market for the program and because fewer copies are needed since it is designed for public performance.

(2) Second, the amount and substantiality of the portion used in relation to the work as a whole. As far as this criterion, Bender (ibid.) contends, the intent of 'fair use' must be borne in mind, which is to exempt small uses that do not harm the work. As more of the work is copied, the fair use defence becomes progressively less viable ('Note 1982', ibid.). In the context of the technologically advanced systems for 'private copying', however, the factor becomes wholly inapposite. As Lin (1985, p 340) succinctly notes, most home taping subsumes the entire scope of a copyrighted audio-visual work. Consequently, Leavens (1981, p 15) maintains, mass copying of that sort precludes an application of 'fair use'. Furthermore, as Lin (op. cit., at 337) posits, a recording is a 'copy'. By utilising a recorder to tape copyrighted works is similar to exercising the right of reproduction exclusively held by the copyright owner.

(3) Third, the purpose and the character of the 'suspect' use should be carefully considered, including whether such use is of a commercial nature. The problem here lies, Lin (1985, p 336) suggests, on whether private audio-visual recording of copyrighted works for non-commercial home use is to be considered an unlawful act such that the owner's economic interests are to be protected,
or whether it should be treated as a ‘fair use’ such that the public access to copyrighted works is to be facilitated. The conflict between these two competing interests was first brought to the courts in 1981 with the famous ‘Betamax case’, where Universal Studios brought a copyright infringement suit against Sony Corporation, manufacturer of the Betamax VCR. The focal point of the conflict presented in that case was the practice of home videotaping and whether it violates the rights of owners of copyrighted video programmes and motion pictures. The Supreme Court finally ruled (1984), following the contradictory rulings of the Federal District and the 9th Circuit Courts, that home videotaping for private, non-commercial use, was a legitimate fair use. That decision—a real milestone in the realm of ‘private copying’—created a strong precedent in favour of copyright users.

However, the decision was seen by owners to be one-sided and the dissent between the two competing interests was far from resolved. In fact, the embers of that debate were recently rekindled, ten years after the ‘Betamax case’, in the light of the 1994 case of US vs LaMacchia where a student made proprietary software available on a bulletin board so that it could be freely downloaded by others. The trial judge acquitted LaMacchia of criminal charge, because to find him guilty, the judge said, would criminalise all those who copy software (or any other protected material for that matter) in the privacy of their homes (Olswang 1995).

As far as the character of the use, there is the view, best expressed by Dworkin (1983, p 2), that piracy is not synonymous with unauthorised copying; not all copying is piracy nor is to be condemned simply as such. Individuals cannot exist without copying knowledge and skill from the efforts and ideas of others; it is a part of the learning process. The dilemma that arises here is articulated by Lin (1985, pp 339-340). A recording done for a ‘serious’ purpose such as research, which is traditionally recognised as beneficial to the society, falls within the ‘fair use’ limitations. Does the same applies to a recording done for a ‘frivolous’ purpose such as ‘time-shifting’ or ‘library building’? A possible answer to that moral rather than practical question is that such copying has never been a use upon which a claim of infringement could be based. A reproduction for personal
convenience and entertainment is no less worthy a use than is scholarship; it is not clear, after all, precisely what "progress of science and useful arts" entails ('Note 1982', p 458).

As far as the purpose of the use, there are those who believe that it is the commercial element that distinguishes piracy from private copying. However, the central question with 'private copying', Smyth (1984, p 51) opines, seems to be who is it hurting, despite being done solely for personal use and non-commercial gain. The reply that comes from certain circles is that both the author of the work and the entrepreneur who takes a financial risk in making the product suffer. That is the reason why the music industry, for example, envisages 'home taping' as a kind of piracy that causes losses running at around US$ 2 billion a year (1983 estimates, Dworkin 1983, pp 6-7).

Indeed, there are five principal classes whose personal rights and economic interests may be prejudiced by 'private copying' of audio-visual recordings: producers of phonograms; owners of copyright in cinematographic works (film and videograms producers); authors and composers; performers; and, broadcasting organisations (Council of Europe 1984; Davies 1984). The fashion in, and the extent to which, those people's rights may be abused are closely related to the fourth 'fair use' criterion, namely the effect of the use upon the potential market for and value of the copyrighted work, whose analysis follows.

(4) Fourth, the 'fair use' effect factor requires one, as Bender (1993, p 45) points out, to take into account the impact of the use on both the present/actual and the potential/future value of the work. This criterion is considered the most decisive element in the question of 'fair use' (Lin 1985, p 341); its importance lies in the economic theory underlying copyright protection (Leavens 1981, p 7). The question that arises here is whether and to what degree 'private copying' of phonograms and videograms harms the copyright owner's and industry's market.

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10 These are the constitutional grounds upon which the 'fair use' doctrine allows limited exceptions to the owners' limited monopoly.
The making of a recording of sound or image from a broadcast (television or radio), if done for private purpose, does not affect the broadcaster who loses no revenue if the viewing or the listening is deferred for another later time. However, such a recording would infringe the copyright in the film or music performance. The author of the copyrighted material would lose royalties which have not been calculated on a basis of a viewing/listening repeated by a private user.

As far as performers are concerned, they not only lose payments for the additional utilisation of their work, but also their profession itself is endangered. Their further personal performances are no longer required when their productions are available more cheaply and more easily in ‘canned form’.

The effect of ‘private copying’ on the film industry also gives cause for alarm. As Lin (1985, pp 334-335, 341) comprehensively describes, viewers would decline to see a rerun programme on TV or in a cinema if they have stockpiled their own library copies of that particular programme (‘library building’). Subsequently, the rerun and the rental market will decline, and the value of resale rights for both video and motion pictures producers and copyright owners will eventually be diminished. However, there are two warning notes, as Lin (op. cit., at 341) implies. Firstly, the loss of rerun audience may not only be due to owning a library copy. Having seen the program again in a cinema, on television, or on pay-TV channel; or watching some other programs may equally be some other reasons. Secondly, the usually ephemeral nature of the copy should be borne in mind. Since a principal activity involving ‘private copying’ is ‘time shifting’, it is reasonable to assume that most copies are erased after playback. An array of interesting facts about ‘time shifting’, which actually disclaim the fears of the film industry as to the effects that it may have for pre-recorded and rental video markets, are mentioned by Wasko (1994, pp 129-130). She argues that despite the fact that recording movies from TV was the most frequent ‘time shifting’ activity in the first years of home video growth (early 1980s), that novelty was gradually wearing off by the time the, previously mentioned, famous ‘Betamax case’ was settled (1984). For example, by 1986, the primary reason
most people surveyed gave for purchasing a VCR was to view rental movies. According to another estimate, only 30% of VCR viewing by 1987 was watching 'home-recorded' tapes, and the majority of VCR activity centred on watching pre-recorded ones. Finally, in 1988, it was reported that the average VCR owner spent only two-and-a-half hours recording tapes, but almost four hours playing tapes. Moreover, in surveys conducted in Europe and the USA show that the percentage of viewers who intend to keep the recording varies significantly among countries. Hence, the potential/future economic harm to the copyright owner cannot be fully ascertained.

In contrast, there is a school of thought - led by representatives of the blank tape industry, some sections of the hardware industry, and by certain consumer organisations- that rejects the claims of the copyright industries as to the harm done by audio-visual 'private copying'. It is claimed that much copying takes place from sources for which the consumer has already paid, either directly in the case of his own purchased records or tapes, or indirectly as in the case of recording off-air. As far as recording off-air, the exposure of authors via radio and television broadcasts it is further believed to be even beneficial to copyright holders since the popularity of successful creators and producers has been largely a factor of the promotion they have enjoyed from radio and television broadcasts. Therefore, any alleged economic harm done to owners' economic interests by off-air recordings should be viewed against a greatly enhanced revenue from the broadcasting of their works. 'Home taping' is said to stimulate consumers to buy records and pre-recorded tapes. Owners are also believed to receive additional benefits from VCRs creating a market for purchased or rented pre-recorded cassettes. Finally, the film industry is seen to profit from 'home taping' which has created an important market for older films and films considered commercial failures.

11 These surveys are mentioned in the studies referred to in notes 7 and 8.
12 These views were expressed in response to a discussion about 'private copying' initiated by the Commission of the European Communities in the context of its 1988 consultative document entitled Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. COM 88 (172) of 7 June 1988 (Chapter 3, pp 116, 122-123).
Insofar, the debate has been centred on the possible pecuniary losses of copyright owners. However, there is a school of thought that holds the view, articulated by Leavens (1981, pp 8-10), that focus on the 'effect factor' as an economic test is misplaced for two reasons. Firstly, because an owner should not be required to prove actual damages to overcome a 'fair use' defence. Secondly, because such a focus ignores certain non-economic harms. An unauthorised private use may have little economic impact on owner's rights, but may nevertheless significantly affect his personal or moral rights, such as his privacy or his control over his work's dissemination.

What about the impact of 'private copying' on the market for copyright industries?

According to Lin (1985, pp 334-335, 341), the advertising industry may be adversely affected by 'home taping'. 'Time shifting', followed by 'zapping' that can eliminate commercials during recordings, can reduce the audience's exposure to advertisements and may directly influence advertising rates. However, Lin (op. cit., at 342) suggests, the owners' fears of economic injury may be unfounded for two main reasons. Firstly, 'time shifting' may help to increase audience size as VCRs facilitate viewing that would otherwise be missed by audience members. It can be argued, therefore, that that activity has largely outweighed the ratings inaccuracy. Secondly, according to a survey presented in the 'Betamax case' (previously mentioned in relation to the third 'fair use' factor), the videotaping of a program is mainly done without anyone watching (92% of the time) and no commercials are deleted. It was also established that during playback only 25% of the time the viewer uses the 'fast-forward' button to pass through advertisements. Probably based on that particular finding, advertisers in Saudi Arabia - a country with 70% VCR penetration in 1984 - found that use of commercials on recorded cassettes is an ideal means of reaching a female audience (Ogan 1985, pp 64, 67).

Whatever the case may be as regards the advertising industry, the copyright industries whose markets are most likely to be affected by 'private copying' are undoubtedly the music, video and film
industries. The possible impact of private copying on these three is examined in the following section.

7.2 The Effects of "Private Copying"

The extent of the impact is believed to be largely concurrent with the following five main factors: (1) the degree of penetration of recording equipment in households; (2) the relation between sales of blank and pre-recorded audio and video cassettes; (3) the ownership gap between blank and pre-recorded audio and video tapes; (4) the re-utilisation of blank tapes and the possible frequency of "private copying"; and finally, (5) the particular importance of record and video rental. All these factors should be considered when assessing the effect of "home taping". The ensuing individual examination of each one of those parameters will endeavour to examine how well-founded the fears of the copyright industries are. That examination will be mainly concentrated on developed markets, and especially, as far as the music industry, on the three largest markets, i.e. USA, the EEC, and Japan. That particular selection has by no means been made at random, but rather for three main reasons.

Firstly, as Edwards (1983, p 113) suggests, less and/or undeveloped markets are not chosen since "private copying" is less of a problem there; for blank tapes sales are relatively small as pirate products are available at prices equal to those of blank ones. Whereas, as Davies (1987) claims, in developed markets such as the EEC, USA and Japan, the pirate market is well under 10% of the legitimate one in unit sales (with some notable exceptions), while "private copying" represents on average the equivalent of more than 300% of LPs and music tapes sales. Secondly, it is also the fact that the above mentioned developed markets are highly penetrated by audio and video recording equipment, something that implies the possibility of "private copying" in large numbers. Therefore,

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13 The following facts and figures, unless otherwise stated, are mainly based on findings and estimates provided by the studies referred to in notes 7 and 8.
data from such areas are of a great significance in the effort to investigate the effects of the practice in discussion. And thirdly, simply because figures from such markets are more widely available.

(1) The penetration of audio-visual recording equipment is the most important factor of all as it renders possible the practice of copying at home. Sound recorders are nowadays a very common feature of households worldwide. In her EEC study, Davies (1984, p 36) reports that such a penetration was expected to reach a point of near total saturation by the end of the century across Europe; indeed, by the end of 1990, the average penetration in the Community was well over 100 per cent. In Japan, penetration was expected to reach a saturation point much earlier, since in 1979 it was already 77.4% and the average number of audio recorders owned by households was 1.9 (WIPO 1983, PF/II/S/3, pp 2-3). In fact, at the end of 1990, audio recording equipment's penetration in Japan rated at a staggering 233% (Davies & Hung 1993, p 29). Finally, at the same time in the USA, the degree of penetration had reached an equally amazing 223 per cent. Moreover, the fact that 99% of equipment were expected to have built-in recording facilities by the year 1990, can only encourage 'private copying', by simply pushing a button, even further.

As far as the penetration of video recording equipment, suffice it to observe its fast-increasing trend which had appeared in developed markets like the EEC, Japan, and the USA between 1978 and 1985. In 1978, some degree of penetration was reported only in three countries and it was rather minimal (Germany 0.5%; USA 0.7%; Netherlands 0.9%). The situation, however, changed drastically in the following years up to the end of 1990. In Japan, for example, VCR ownership ratio increased by 2.6 per cent within six months of the same year; in May 1982 it was about 10 per cent and in November 1982 it had reached 12.6 per cent (WIPO 1983, ibid.).

The ensuing Table 7.1 is compiled from data found in three studies (Council of Europe 1984, p 100; Davies 1984, p 223; Davies & Hung 1993, p 29) and it refers to randomly selected years within the 1978-1991 timespan.
Table 7.1 VCR Penetration in Developed Markets Worldwide: EEC, USA and Japan

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>4%</td>
<td>11%</td>
<td>39.5%</td>
<td>51%</td>
</tr>
<tr>
<td>Denmark</td>
<td>8%</td>
<td>15.7%</td>
<td>39.3%</td>
<td>47.5%</td>
</tr>
<tr>
<td>France</td>
<td>4.7%</td>
<td>17%</td>
<td>41.6%</td>
<td>51.6%</td>
</tr>
<tr>
<td>Germany(FR)</td>
<td>10%</td>
<td>26.5%</td>
<td>53%</td>
<td>58.4%</td>
</tr>
<tr>
<td>Greece</td>
<td>0.6%</td>
<td>4%</td>
<td>23%</td>
<td>30.4%</td>
</tr>
<tr>
<td>Ireland</td>
<td>5%</td>
<td>10%</td>
<td>49%</td>
<td>55%</td>
</tr>
<tr>
<td>Italy</td>
<td>0.8%</td>
<td>3%</td>
<td>20%</td>
<td>31%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>9.7%</td>
<td>22.9%</td>
<td>45%</td>
<td>52%</td>
</tr>
<tr>
<td>Portugal</td>
<td>0.5%</td>
<td>4%</td>
<td>39%</td>
<td>32.2%</td>
</tr>
<tr>
<td>Spain</td>
<td>2.6%</td>
<td>5%</td>
<td>40%</td>
<td>48.7%</td>
</tr>
<tr>
<td>UK</td>
<td>15%</td>
<td>40%</td>
<td>64%</td>
<td>71%</td>
</tr>
<tr>
<td>EEC AVERAGE</td>
<td>5.5%</td>
<td>14.5%</td>
<td>41.2%</td>
<td>48%</td>
</tr>
<tr>
<td>USA</td>
<td>6.3%</td>
<td>14%</td>
<td>63.3%</td>
<td>71%</td>
</tr>
<tr>
<td>Japan</td>
<td>12.6%</td>
<td>35%</td>
<td>68%</td>
<td>71%</td>
</tr>
</tbody>
</table>

In turn, as far as the film industry is concerned, Ogan (1985, pp 64, 67, 69) provides some illuminating examples. The regions and countries with high VCR penetration are also the ones where cinema attendance is most depressed. In Norway, there are more cassettes viewed than cinema seats sold in a year. In Australia, a country where VCR penetration was around 60% in 1988, 51 theatres closed in the first five months of 1984 and admission declined an average 25-30 per cent. The example of Middle East is also indicative (Ogan 1985, *ibid*.; Bettig 1990, p 62). Some countries in the region are among the highest VCR-penetrated nations in the world; in Saudi Arabia there is a 70% penetration, and in Kuwait 8 out of every 10 households own at least one video recorder. Thus, it is no wonder why there has been a near 50% decline in box office revenues over the last decade in that region.14

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14 The example of Middle Eastern states may be indicative but is not particularly suitable for drawing outright conclusions due to the particular socio-political circumstances that are in place in that region, such as the banning from TV/cinemas of many popular feature films of Western origin which are considered contrary to the Islamic thought or are seen as containing subversive messages which are inimical to certain regimes.
(2) The disparity between sales of pre-recorded and blank audio/video tapes strongly implies that the latter are used for 'private copying' at the expense of the former. It is interesting to look at the situation, both in Europe and the USA - the two largest markets worldwide - in the early 1980s. Especially, the year 1982 is offered for comparison for three main reasons. On the one hand, it was the year when the video industry began to be significant; and, the sales ratio between pre-recorded and blank videotapes was already in the region of 1:6, both in the USA and Europe. On the other, in 1982, the music industry in Europe and the USA experienced an average sudden drop in turnover (in real terms) and in units sold (except cassettes), following a steady decline since 1978. Although pre-recorded cassettes was the only portion of the market that enjoyed an increase (little in Europe, but significant in the USA), the sales of blank ones increased accordingly. In the USA (1982), the ratio between pre-recorded and blank audio tapes was around 1:1.4. The number of blank tapes sold between 1981 and 1982 in almost all the surveyed European countries was as much as 4 times higher than sales of pre-recorded ones. The only possible exception was Norway, where there was an almost one-to-one correspondence (ratio 1:1).

(3) The fact that in early 1980s, both in Europe and the USA, the majority of audio and video tapes purchased were blank resulted in users owning more home-recorded and/or blank cassettes than pre-recorded bought in shops. The following indicative examples refer to highly penetrated countries, both in terms of audio recording equipment as well as videocassette recorders.

As far as audio tapes, the three 'private copying' studies, namely Council of Europe (1984), Davies (1984) and Davies & Hung (1993), suggest that where two surveys are available, the most recent one shows a widening gap in favour of home-recorded tapes. However, the examples of France, Germany, and the Netherlands show that the ratio between 'pre' and 'home' recorded either

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15 The music industry in 1982 involved the following carriers: singles, EPs (extended plays), maxi singles, LPs (long plays), and cassettes. CD (compact disc) was launched a year later (1983). The present examination of 'private copying' of sound recordings does not deal with CDs. Simply because re-usable optical discs which would allow the transfer of material from one CD to another have not yet been widely commercialised for home use, although blank CD is a reality at present.
remains almost stable between the two surveyed years, or is even decreasing. In the following Table 7.2, the figures in parentheses represent the years of the surveys; and, the figures referring to 'pre' and 'home' recorded cassettes represent an average number per user/owner.

<table>
<thead>
<tr>
<th>Country</th>
<th>Pre'</th>
<th>'Home'</th>
<th>Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>France (1976)</td>
<td>1.6</td>
<td>4.2</td>
<td>2.6</td>
</tr>
<tr>
<td>France (1983)</td>
<td>14</td>
<td>24</td>
<td>1.7</td>
</tr>
<tr>
<td>Germany (1978)</td>
<td>12.7</td>
<td>15.3</td>
<td>1.2</td>
</tr>
<tr>
<td>Germany (1980)</td>
<td>14.6</td>
<td>19.4</td>
<td>1.3</td>
</tr>
<tr>
<td>Netherlands (1976)</td>
<td>8.5</td>
<td>22.5</td>
<td>2.6</td>
</tr>
<tr>
<td>Netherlands (1979)</td>
<td>11</td>
<td>28</td>
<td>2.5</td>
</tr>
</tbody>
</table>

The ownership gap between the two types is much more wider in the case of videocassettes. For instance, in the UK (1980), the ratio was 1:3.6; in Germany, the average ratio between 1979-1982 was 1:8.5; and in the USA (1981), for each pre-recorded tape there were nine blank/home-recorded per household (ratio 1:9); and users made almost 75% more copies from rented/borrowed tapes than the number of pre-recorded ones actually purchased. In fact, within the 1980s, as VCR was increasingly becoming a mass medium, the already wide gap between sales of blank and of pre-recorded videocassettes either remained stable or increased by leaps and bounds. For example, the ratio in highly penetrated countries between 1982 and 1985 was as follows:
<table>
<thead>
<tr>
<th>Country</th>
<th>1982</th>
<th>1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>1:10</td>
<td>1:17.5</td>
</tr>
<tr>
<td>Germany (FR)</td>
<td>1:9.4</td>
<td>1:20</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1:5.5</td>
<td>1:6</td>
</tr>
<tr>
<td>UK</td>
<td>1:3.3</td>
<td>1:12.5</td>
</tr>
<tr>
<td>TOTAL EEC</td>
<td>1:6</td>
<td>1:17 (rough estimate)</td>
</tr>
<tr>
<td>USA</td>
<td>1:6</td>
<td>1:6</td>
</tr>
<tr>
<td>Japan</td>
<td>N/A*</td>
<td>1:20</td>
</tr>
</tbody>
</table>

* For Japan, 1982 sales of pre-recorded cassettes are not available, but an increase in ratio can only be assumed since 50,000 blank tapes were sold in 1982 in comparison with 120,000 in 1985.

Sources: Council of Europe (1984); Davies (1984); ‘IFPI News’ (1985)

If a parallel is drawn, for the same selected countries and years, between the above Table 7.3 and Table 7.1 (VCR penetration, see above), the finding is that increasing penetration directly corresponds to a widening gap between sales of blank and of pre-recorded video cassettes, with the exception of the USA where the ratio remains remarkably stable between 1982 and 1985 (in approximation). The situation is much the same for the second half of the 1980s. For instance, between 1987 and 1991, sales of blank videotapes enjoyed an increase of around 40% in the three largest world markets (Europe, USA and Japan).

(4) Along with the observed average outnumbering of pre-recorded music and video tapes by blank ones, there is another factor that give to the respective industries an additional cause for alarm: the possible repetitive utilisation of the latter, and the possible frequency in which they could be used for ‘private copying’. However, there are some equally important facts as well as doubts that have to be reported.
As far as the audio tapes, surveys have shown that the most popular are the 90-minutes duration ones, whose potential musical storage means that more than one album (LPs, cassettes, etc.) can be recorded on each of them. Also, it has been found that the average number of times a blank tape is being used for recording is 2, in the highly penetrated countries mentioned above (see relevant Tables), in the early 1980s. These two facts alone seem to imply an enormous amount of potential copying. For a 90-minute duration blank tape which, on average, could be used twice and could store two pre-recorded albums, may result to a displacement of sales of pre-recorded music to the detriment of companies and artists alike.

However, findings as to the frequency of 'private copying' are too limited for safe conclusions to be drawn. Moreover, it is not clear how many users intend to keep their private recordings for 'library building' or 'collection' purposes; admittedly, music programmes have a large repetitive potential. It can also be said, based on findings taken from the three 'private copying' studies that, in highly penetrated countries, a significant proportion of albums copied also belong to the user himself, which means that the album copied has been previously bought in shops. In the early 1980s that proportion was: 38% in Germany; 41% in the Netherlands; 46% in the UK; and, 57% in the USA. In fact, that particular trend continued unabated throughout the decade, particularly in the UK and USA cases where data is available.

As far as videocassettes, it has been widely ascertained that the most favoured length seems to be from 3 to 4 hours. That means that, on average, more than 2 feature films can be stored on each one of them. Also, the fact that erasing video recordings is a more widespread practice than for audio recordings due to the former’s more limited repetitive potential, could imply a frequent ‘home taping’. Nevertheless, there are contradictory findings as to the number of users that tend to keep their recordings. The relevant studies have been unable to establish beyond doubt whether permanent retention was the objective in a small or a large proportion of the cases.
Finally, it must be added that the previously acknowledged disparity in sales between blank and pre-recorded audio and video cassettes must be seen in relation to a fifth factor: the emergence of the 'rental practice' and the repercussions it bears for the 'sell-through market'.

Since the early 1980s, the home-video industry has been competing with one major 'rival', namely the video rental market. For example, the situation is indicative in the case of the United Kingdom, which is the third largest retail video market - for rental and sales - in the world (top is the USA, followed by Japan). A comparison between 1984 and 1994 is illuminating. In 1984, the average price of a pre-recorded tape was around 35 to 40 pounds; a blank videocassette of a 3-hours duration around 7 to 9 pounds; whereas overnight rental charges were as cheap as 1.50 pounds. In 1994, a pre-recorded one retails at approximately 11 to 16 pounds; the overnight rental charges remain relatively low at 2 or 2.50 pounds; finally, a blank videocassette of a 3-hours duration is around 2.50, and a 4-hours one is around 3.50 pounds. The price difference between blank and pre-recorded tapes becomes even more significant when the especially popular among consumers 3-packs of 3-hrs and 4-hrs blank videocassettes cost only 5-6 and 8 pounds respectively.

Consequently, within the 1980s, revenues from rentals had been much higher than from sales, both in the UK and worldwide. Since 1985, however, there has been a steep increase in sales of pre-recorded tapes. That eventually led to an interesting development. Since 1989 - the year that revenues from rentals were at their peak in the UK - the gap began to close significantly. The following table succinctly depicts that development (figures represent value in millions of pounds):

| Table 7.4 Rented vs Sold Videocassettes in the UK: 1989-1992 |
|------------------|-----------|-----------|
| Year             | Rental    | Retail    |
| 1989             | 569       | 300       |
| 1990             | 564       | 325       |
| 1991             | 544       | 375       |
| 1992             | 511       | 400       |

The UK example reflects a worldwide trend that now makes revenues from sell-through copies greater than revenues from rentals. In fact, that trend has been acknowledged by experts in the latest WIPO International Symposium (WIPO 1993, p 121). In 1991 for instance, revenues from sales and rentals of videocassettes totalled approximately US$ 6.8 billion and sales represented more than 50% of that amount.

Rental is a feature not confined only within the 'home video industry'. Record rental too has become a major issue for the record industry in the course of the 1980s. It competes directly with the sales market, especially for successful recordings. Commercial record rental shops only stock the 'Top 10s' or 'Top 20s' that are the very recordings on which music industry relies to make a profit. Furthermore, record rental leads to increased 'private copying'. It is simply much cheaper to rent a recording and make a copy rather to buy one and such a tendency is well acknowledged. The facts regarding Japan, for instance, the country that pioneered in the introduction of record rental shops, are indicative. Within ten years, the number of these shops has mushroomed; from just 34 in 1980 to around 6,000 in 1990. In addition, surveys have shown consistently that more than 90 per cent of those renting records copy them (Davies & Hung 1993, pp 52-55).

The example of Japan, despite the fact that it is outstanding, may be said to be somehow isolated. The fact that record rental shops appear in much fewer numbers in other highly penetrated countries around the world, coupled with the dearth of consistent facts, renders it difficult to assess with certainty how widespread is that practice. One thing is for certain however. The ever increasing penetration of equipment with built-in recording facilities (music centres) and digital technology that allows infinite reproduction and playback of perfect quality sound pose a threat to copyright industries. 'Rent and copy' a recording sounds more attractive than buying one and that could exacerbate the practice of 'private copying'.

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The recording industry on both sides of the Atlantic believes that the steady decline in turnover and units sold between 1978 and 1982 was due to an increasing degree of penetration of audio recording equipment that apparently facilitates 'private copying'. Has such a claim been substantiated and to what extent?

It is interesting to observe the change that has taken place in the pre-recorded/blank audio tapes sales ratio between 1977 and 1982 in selected countries, highly penetrated around that period. The ensuing table is compiled from figures appearing in the three studies on 'private copying' previously mentioned.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany2*</td>
<td>1:1.9 (1978)</td>
<td>1:2.3 (1982)*</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>1:2.4 (1978)</td>
<td>1:2.5 (1981)</td>
<td></td>
</tr>
<tr>
<td>USA2*</td>
<td>1:1.5 (1977)</td>
<td>1:1.3 (1982)*</td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>1:4.3 (1978)</td>
<td>N/A (not available)</td>
<td></td>
</tr>
</tbody>
</table>

Sources1: Council of Europe (1984); Davies (1984).
The second source gives different rates as to the sales of pre-recorded tapes in Germany and the USA for 1982 and hence the ratio changes.

The gap between pre-recorded and blank audio tapes has been significantly widened only in the Netherlands (67% saturation). In France (61%) and in the Federal Republic of Germany (69% saturation). The reason why specific reference is made to the 1978-1982 period is that the two 'private copying' studies (see note 11) include the most extensive data ever provided for a wide variety of countries.
penetration and an average of 2 recorders per household), the increase in ratio was smaller. In the UK, the country with the highest level of penetration in Europe (73%), the increase was noticeably minimal or, in approximation, even non-existent. In Greece (67%), the ratio has been remarkably invariable. As far as the USA case, figures from both sources show an average decreasing trend. Finally, as it has been previously mentioned, Norway is the striking exception in Europe (it does not appear on the above Table for data are limited for comparison). Even though it is a country with an average of 1.7 audio-recorders per home, there is no difference in units sold between pre-recorded and blank cassettes (data referring to 1982-1983).

The conclusion that can be drawn from the above comparison is the following: The degree of penetration of audio recording equipment does not necessarily imply a difference in sales of blank and pre-recorded audiotapes. The question whether that conclusion would be valid should different years were taken into account remains unanswered because of a limited availability of data.

A very important finding must also be reported. The three studies where data is taken from deal solely with the sales ratio between the two types of audiocassettes, where the gap in almost all European countries and the USA is apparent. It should be borne in mind, however, that blank cassettes are the only means of copying sound and music. Consequently, it would be interesting to compare unit sales of blank tapes and of all music carriers combined, namely LPs, EPs, singles, maxi singles, and tapes. In consistence with Table 7.5 (see above), the comparison will refer to the same selected countries. In the following Table 7.6, all figures represent millions of units sold in 1981-1982. Column 3 shows the percentage of blank tapes sold on the basis of total sales of all recordings.
Table 7.6  Blank Audio Tapes Sold vs Total Sales of Music Carriers in 1981-1982: EEC and USA

<table>
<thead>
<tr>
<th>Country</th>
<th>Blank tapes</th>
<th>All recordings</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>44</td>
<td>152</td>
<td>29</td>
</tr>
<tr>
<td>Germany (FR)</td>
<td>108</td>
<td>208</td>
<td>52</td>
</tr>
<tr>
<td>Germany (FR)2*</td>
<td>108</td>
<td>178*</td>
<td>61</td>
</tr>
<tr>
<td>Greece</td>
<td>12.3</td>
<td>8.5</td>
<td>-</td>
</tr>
<tr>
<td>Netherlands</td>
<td>25.7</td>
<td>39.5</td>
<td>65</td>
</tr>
<tr>
<td>UK</td>
<td>73.5</td>
<td>168</td>
<td>44</td>
</tr>
<tr>
<td>TOTAL EEC</td>
<td>326</td>
<td>671.5</td>
<td>48.5</td>
</tr>
<tr>
<td>TOTAL EEC*</td>
<td>326</td>
<td>643</td>
<td>51</td>
</tr>
<tr>
<td>USA</td>
<td>254.6</td>
<td>562</td>
<td>45</td>
</tr>
<tr>
<td>USA2*</td>
<td>254.6</td>
<td>578*</td>
<td>44</td>
</tr>
</tbody>
</table>

Sources: Council of Europe (1984); Davies (1984).
The second source gives different rates as to the sales of all recordings in Germany and the USA and hence the percentage changes.

According to the above figures, sales of all recordings exceed by far blank tapes sales although the percentage of blank tapes sold in comparison to sales of all recordings is rather significant in most cases (see Column 3). The situation is different only in Greece, where sales of singles and EPs were insignificant between 1978-1982; hence, sales of blank tapes exceed sales of all recordings. It should also be noted that the gap was maintained in each year between 1978-1982, despite an annual constant decrease in all recordings sales in inverse proportion to blank tapes sales that were on the increase throughout that period.

It should also be stressed that the decline of the record industry between 1978-1982 could be also attributed to some very important factors dominant during that timespan: worldwide recession; rising inflation; sales of relatively low quality products; and especially, the ever increasing prices of all sound recordings (due to the increase of Value Added Tax) may well have caused a drop in turnover and units sold. The 'price issue' of intellectual creations has always been a matter of
concern to the copyright industries for it has certainly been reported as a reason for piracy. As far as 'private copying', the aforementioned studies suggest that price considerations represent less than half of the total answers in surveyed countries (in Europe and the USA) between 1978-1982. However, there are certain facts that provide a different perspective and therefore have to be mentioned. The record industry claims that, between 1978-1982, prices of sound recordings have increased far less than the retail price index, and that pre-recorded music is not overpriced. That last claim actually comes to a complete contradiction with the rates of Value Added Tax (VAT) imposed on sound recordings;\(^{17}\) rates such as an average of 19% (1982) in the highly penetrated countries of Tables 7.5 and 7.6 (see above), and much the same across the whole EEC, certainly add a substantial amount to the selling price of music in the world's largest market. In view of the above, does expensive pre-recorded music encourages private copying? The experts believe that such a claim is unfounded. However, the following two factors rather imply the opposite. First, surveys undertaken during the 1978-1982 period showed that the profit margin of dealers had been on average higher on blank tapes than on pre-recorded ones, and producers of phonograms sometimes traded even at a loss. And second, as it has been established earlier, during the same timespan sales of blank cassettes exceeded by far the sales of pre-recorded ones.

The advent of CDs in 1983 had an immediate effect on pre-recorded music sales. Especially since 1985, album sales (LPs, cassettes, and CDs) have been showing actual signs of recovery in real terms. In 1989 for example, total world sales of all recordings amounted to US$ 21-22 billion as high as double the total world sales of US$ 11 billion in 1982 (the worst year of the crisis); and in 1993, value of total world sales enjoyed an almost threefold increase since 1982 (US$ 30.5 billion). Accordingly, units sales have also increased almost six times; 570 million in 1982 in contrast with 3.3 billion in 1993 (Hung & Morencos 1990; IFPI 'World Sales', April 1994).

\(^{17}\) The situation is no different as far as videograms. Taxes as high as those imposed on pre-recorded music in the EEC are also applicable to both sales and rental of videocassettes in 1982.
From the foregoing, the following unavoidable questions are raised. Firstly, if the record industry blames 'private copying' for the crisis it experienced between 1978-1982, then are we to assume that the healthy increase in turnover and units observed ever since is due to a decrease of such a practice? In fact, any claim by the music industry that 'private copying' displaces sales of sound recordings should be rejected. Not all home copies replace a sale, and figures which indicate how many do vary too much to be satisfactory. For example, that inconsistency is reflected on three such estimates referred to by Gumsey (1995, p 76). In the UK, it was once estimated that a 25% of sales is displaced by private copying; one Canadian survey suggested that the figure might be as high as 90% (which has to be disclaimed as a ridiculous figure); and, in Spain a study claimed that for every hour of music sold, a further four were copied for private use. In fact, one of the most detailed examinations of record sales and ‘home taping’ was conducted in the US in 1983. That study showed that, at that time, ‘home taping’ displaced around 32% of the record industry’s total volume, and it was estimated that around half the taping of borrowed records (from friends, libraries, etc.) would lose the industry a sale, a figure only slightly lower (40%) for copies taken off-air (Gumsey 1995, p 76).

That trend did not really change in the following years. For sales of pre-recorded cassettes and CDs have been on an constant increase throughout the 1980s in all the three world largest music markets, i.e. USA, EEC, and Japan (in Japan especially since 1986). A steady decline of LPs should be attributed to a loss of popularity as the oldest music carrier rather than to ‘private copying’. And the above overall rise has taken place during the period when ‘home taping’ is alleged to have increased.

Secondly, does that increase come as a result of a drop in VAT on sound recordings? In fact, VAT rates in 1992 have dropped to around 17% both in the ‘sample countries’ (in 1989 it was even lower at 16.5 per cent) and the whole EEC, namely 2 units down from 1982 (19%). Nevertheless, the VAT rates applicable to sound recordings are still far higher than those imposed on books, for
instance; VAT on the latter amounts to an average 5% in the whole EEC, and around 4% in the ‘sample countries’.

At this juncture, another important question emerges. Has the pattern of ‘private copying’ changed and in what ways, if any, between the early and late 1980s? In order to provide an answer, some of the previously mentioned five factors -which should be considered when assessing the effects of ‘private copying’- will be examined aiming at detecting possible changes through the years. For that purpose, along with some general considerations, specific comparisons will be attempted. For consistency purposes the basis will be the same, highly penetrated, European countries used in Tables 7.5 and 7.6 (see above), and which by the end of the 1980s have reached total saturation points; and data from those countries referring to 1981/1982 (the worst year of the crisis) and 1989 (claimed as one year of recovery for the record industry worldwide) will be put in juxtaposition.

In the following two tables, the common denominator will be the sales of blank audio tapes as opposed to sales of pre-recorded ones as well as to sales of all recordings (with the addition of CDs).

<table>
<thead>
<tr>
<th>Table 7.7 Pre-recorded vs Blank Audio Tapes Sold in the EEC between 1981/1982 and 1989: Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country</td>
</tr>
<tr>
<td>France</td>
</tr>
<tr>
<td>Germany</td>
</tr>
<tr>
<td>TOTAL EEC</td>
</tr>
</tbody>
</table>

Sources1: Council of Europe (1984); Davies (1984); Davies & Hung (1993).
The second source gives different rates as to the sales of pre-recorded tapes in Germany for 1982 and hence the ratio changes (see Table 7.5).

The above table reads as follows: between 1981/1982 and 1989, the gap between pre-recorded and blank tapes sold has closed slightly in France, more in Germany (on average from both sources), and...
tremendously in the UK. On the contrary, there has been an almost non-existent increase in Greece, and a much more significant one in the Netherlands. Finally, as far as the whole EEC (with the accession of Spain and Portugal since 1986) is concerned, the gap has been notably reduced.

In the following Table 7.8, all figures represent millions of units sold in 1989, and Column 3 shows the percentage of blank tapes sold on the basis of total sales of all recordings.

<table>
<thead>
<tr>
<th>Country</th>
<th>Blank Tapes</th>
<th>All recordings</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>59</td>
<td>132.9</td>
<td>44.5</td>
</tr>
<tr>
<td>Germany</td>
<td>108</td>
<td>195.6</td>
<td>55</td>
</tr>
<tr>
<td>Greece</td>
<td>14</td>
<td>8.5</td>
<td>-</td>
</tr>
<tr>
<td>Netherlands</td>
<td>28</td>
<td>38.1</td>
<td>73.5</td>
</tr>
<tr>
<td>UK</td>
<td>95</td>
<td>223.8</td>
<td>42.5</td>
</tr>
<tr>
<td>TOTAL EEC</td>
<td>427</td>
<td>746</td>
<td>57.2</td>
</tr>
</tbody>
</table>

*Sources: Hung & Morencos (1990); Davies & Hung (1993).*

The above table shows that sales of all recordings exceed the sales of the blank tapes, except from the Greek case where sales of vinyl singles are minimal. What is worrying, however, is the fact that the number of blank cassettes sold is very high in relation to sales of pre-recorded music, something that appears in Column 3. In fact, in the EEC alone, the percentage is well over 50. The situation in the other two large world markets, namely the USA and Japan, is even more alarming. In these two areas together, the average percentage ranges from 70 to 80, whereas the average pre-recorded/blank tapes ratio is much lower (1:1.6) simply because cassettes are very popular amongst all recordings.

It has been claimed that world sales of all recordings have been doubled between the two ‘index years’ (1982 and 1989). However, the sales of blank tapes have increased, too. A comparison between Table 7.6 (1981/1982) and Table 7.8 (1989) concerning the ‘sample’ European countries gives the following Table 7.9:
Despite some contradictory data (i.e. Germany) and individual cases (i.e. UK) that show a decrease in the percentage, on average more blank tapes correspond to the sales of all recordings in 1989 than in 1981/1982 as far as the EEC market is concerned. In fact, from the above mentioned countries, sales of pre-recorded music have increased since 1981/1982 only in the UK, whereas for Germany, one source of data shows an increase, the other a decline.

Although, as it has been established in Table 7.7, the gap between sales of blank and sales of pre-recorded tapes has closed on average in all three major world markets (i.e. EEC, USA and Japan) since the crisis year (1982), the practice of 'private copying' is far from over. In the EEC, for instance, albeit some exceptions (UK), sales of blank cassettes have increased in relation to sales of all recordings, and users still own more tapes which have recorded at home than tapes purchased in shops. Moreover, blank tapes are used on average 2 to 3 times, and the two most popular formats (C60 and C90) can incorporate full albums (one full CD and/or 2 LPs).

Table 7.9 Percentage of Blank Audio Tapes Sold in Relation to the Total Sales of Music Carriers between 1981/1982 and 1989: EEC

<table>
<thead>
<tr>
<th>Country</th>
<th>% of Blank to all Recordings</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>29</td>
</tr>
<tr>
<td>Germany</td>
<td>52</td>
</tr>
<tr>
<td>Germany2*</td>
<td>61</td>
</tr>
<tr>
<td>Greece</td>
<td>-</td>
</tr>
<tr>
<td>Netherlands</td>
<td>62.5</td>
</tr>
<tr>
<td>UK</td>
<td>44</td>
</tr>
<tr>
<td>TOTAL EEC</td>
<td>48.5</td>
</tr>
<tr>
<td>TOTAL EEC*</td>
<td>51</td>
</tr>
</tbody>
</table>

The second source gives different rates as to the sales of all recordings in Germany for 1982 and hence the percentage changes for the whole EEC too.
Finally, the most tantalising questions that spring from the evidence presented hitherto is whether the audio-visual industries have any reasons to fear and/or blame 'private copying'/home taping' and to see the blank tape industry as a rival? For example, figures of somewhere between 15 and 20% of the music industry's total revenue are increasingly quoted in recent years. If that is correct, then it suggests losses of between US$ 4.6 and US$ 6.1 billion, given that the industry's world revenues are known to have topped US $ 30.5 billion in 1993. However, there are also frequently voiced claims that such figures tend to be exaggerated.

At any rate, the answer to the above questions is that no one really knows. This is due to several reasons, most of which have already been explained in the course of the present chapter. Firstly, there is simply not enough data as to the exact extent and costs of private copying. For example, it is inherently difficult to calculate with precision how often the phenomenon occurs or the re-utilisation rate of blank video/audio cassettes. Secondly, claims such as more minutes of music are privately taped than sold each year and home taping displaces sales, put forward by the music industry, should be seen under a critical eye and, at any rate, should be treated as estimates difficult to validate. Similarly, as far as the film/video industry, the majority of programmes recorded off-air at home are, more often than not, not available in videocassette form and recording does not therefore substitute for purchase of pre-recorded tapes. Thirdly, certain facts presented insofar even suggest that the practice is not harmful for the interests of the industry. For instance, a US survey conducted in 1982 by Warner Communications Incorporation concluded that the market for music records and tapes is strengthened rather than weakened by a buoyant blank tape industry (Thorne

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18 For example, Davies & Hung (1993, p 22-23) present the following estimate: In 1989, 444 million hours of pre-recorded music (Lps, CDs and cassettes) were sold in the EEC. The recording capacity of blank tapes sold the same year (562 million hours), taking into account the possible re-use rate (2 to 3 times each tape), was equivalent to 1,405 million hours.

19 This conclusion was reached by the Commission of the European Communities after investigating the possible impact of 'home taping' in the context of a consultative document entitled Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, COM 88 (172) of 7 June 1988 (Chapter 3, p 127).
1984, p 124). It is also believed that 'home taping' can even be beneficial for the film/video industry as it stimulates consumers to buy or rent videos, thus creating additional markets. Fourthly, several studies undertaken throughout the 1980s suggest that taper's own recordings—which means they were actually bought before—appear to be an origin of copying in significant percentages worldwide; indeed, in some countries they fluctuate around or even over 50% (e.g. UK and USA). In addition, independent surveys in the USA, for instance, have shown that over 50% of private copying relates to subjects other than pre-recorded music (Thorne 1984, ibid.). Moreover, there is insufficient evidence to suggest that 'rental' would exacerbate 'home taping', something that the copyright industries feared in the early 1980s. Finally, the degree of penetration of audio recording equipment does not necessarily imply an increase in 'private copying'. For, despite the fact that sales of cassette players have reached, on average, total saturation points around the world today, only 40% of them have a record function, as it was revealed by the European Association of Consumer Electronics Manufacturers during an International Conference on intellectual property held in Athens in 1994.

In conclusion, it can be said that, albeit some strong indications discussed insofar, a clear picture as to the exact effect of 'private copying' (phonograms) and/or 'home taping' (videograms) is difficult to draw. Merely because both activities are by nature private and assessing consumer behaviour is an almost impossible task. In addition, the data and the figures presented above are often inconclusive and thus raise more doubts than facts. Moreover, there is still an ongoing debate as to whether such a practice is unauthorised or not. In fact, the law seem to favour the user as it was recently demonstrated in the 1994 case of US vs LaMacchia previously discussed.

Whatever the case may be however, one thing is for certain. Private copying needs to be controlled, both legally and technically, especially in view of the recent technological developments. As with the case of piracy, rightholders are faced with an uphill struggle to control the use of their works and receive remuneration for it. Cable TV, satellite and digital broadcasting, pay-TV, pay-per-

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20 Ibid., at 116, 122-123.
listen services and so on, that enable entire audio-visual recordings to be heard and copied will ineluctably affect both the copyright industries (sales) as well as the copyright owners (royalties) in the years to come.
CHAPTER 3

CONFRONTING ‘PRIVATE COPYING’ AND ‘PIRACY’

After having extensively analysed the impact of ‘piracy’ and scrutinised the potential effects of ‘private copying’, the objective in the following lines would be to examine possible ways of coping with these two issues. That goal will actually be dual: firstly, to enumerate the various solutions which have been -often repeatedly- put forward during the last thirty years and which range from legal and technical to political or even trade-oriented ones. Secondly, to critically assess them - particularly in the case of ‘private copying’ - in order to come up with the most feasible, effective and comprehensive ones, and even to propose new ones.

It should be stressed hereby that solutions to ‘piracy’ and ‘private copying’ ought to be seen through quite different perspectives. The difference lies both in the distinct nature of these two activities and in the goal the respective solutions target. ‘Piracy’ has been widely denounced as illegal - even by those who try to justify it - and the negative consequences that it bears for copyright owners and industries, the public and even culture itself, have long been ascertained. In the case of ‘private copying’, however, it has not been clearly established whether it is an unauthorised use of copyright and/or whether it hurts anybody. On the contrary, it has been suggested that it even benefits certain social groups and the society at large because it safeguards the public access to intellectual creations and maintains the balance between the competing interests of copyright owners and users.

Consequently, the proposed measures against the two problems have different objectives. Solutions to ‘piracy’ intend to sanction and prosecute the infringers, and reduce or eliminate its occurrence. Whereas in the case of ‘private copying’, they mean to control its frequency and compensate the copyright owners for the use of their intellectual creations. Therefore, oxymoron as it may seem, combating ‘piracy’ is rather straightforward, at least in theory. Dealing with ‘private
copying', however, in the light of its private nature and the debate that surrounds it, is a far more complex matter.

8.1 Private Copying

For the purpose of the present section, the pending question whether 'private copying' requires any solution at all will be put aside. Instead, the forthcoming analysis, through which an answer to the above question may eventually emerge, is based on the following hypothesis: 'private copying' entails certain detrimental consequences for copyright owners, and hence, it should be controlled and/or paid for. Solutions towards that direction have already been proposed and, by and large, are a given. These solutions fall under three categories: fiscal, technical, and fiscal and technical. The focus in the ensuing critical review will be on whether these solutions meet the purpose of their existence without undermining the copyright's dual principle. That is, on the one hand, to secure the owner's rights and interests over the use of his work; and, on the other, not to hinder in any way the user's need to have access to copyright protected material.

8.1.1 Fiscal Solutions

The idea that a compensatory system be introduced in order to mitigate the prejudice caused to the copyright owners by the use of their phonograms and videograms for private purposes has been under discussion at an international level for the last 20 years or so. In fact, since 1977 onwards, a series of recommendations and resolutions have been addressed to national governments for the legal implementation of such a scheme. Prima facie such a scheme seems rather straightforward. In essence, it is not. In fact, it raises as many questions as it purports to answer. Is it a fair system? Is it the consumer who bears the actual brunt? Does it really represent an 'equitable remuneration' for all indiscriminately the right owners? Does it function in accordance with the
principles of copyright? Finally, what are its consequences? The following critical assessment of the most renowned solutions aims to address the above problems and to provide the necessary answers.

In order to secure compensation of copyright owners, intergovernmental copyright experts have suggested the introduction of non-voluntary licence schemes into national legislation. Under such systems, copyrighted material can be used against payment of an equitable remuneration which derives, either from a standard fee fixed by a competent judicial and/or administrative authority (statutory licence), or from a royalty which is agreed after negotiation with the holder or with the collecting society that represents him (compulsory licence).

There are mainly two reasons for the introduction of non-voluntary licences. The first concerns cases where users have to have access to protected works and it is not practical for them to locate each copyright owner each time and obtain an individual licence (Stewart 1989, p 84). The second relates to cases where new technology has created new uses for protected works and has posed problems for the enforcement of copyright (Stewart 1989, pp 87, 88). The fact that the above mentioned cases refer to private copying explains why non-voluntary licences are deemed appropriate for dealing with the issue. There are two types of non-voluntary licence schemes that have been implemented by national copyright laws: the tax and the levy.

As regards the tax, it is designed to be imposed on the sales price, either of the recording equipment which enables blank media to be used repeatedly for the making of recordings, or of the blank recording media which are the material supports that phonograms and videograms are copied on, or of both. However, that system has the following two adverse financial consequences for the copyright owners. First, a price-based charge does not reflect either the extent of copying that is likely to occur or the subsequent prejudice potentially inflicted on the right holders (Hung & Davies 1993, p 226). Second, such a scheme does not deliver the money it should bring for the copyright owners. Facts from the only two countries that have been quick to introduce the system in early 1980s, namely Norway and Sweden, undoubtedly validate the argument. In Norway, only 27.2% of
the total revenue collected from the tax in 1991 was allocated to right holders; and in Sweden, it was a meagre 2.3% in 1988.1 In both cases, it is the government who collects the tax and decides about the allocation of the funds, and finally, it is the government which largely benefits from the tax and not the right holders. That process leads to a form of 'state patronage' which entails not only financial but also moral consequences for the intellectual creator in general. For it undermines the original intention of the copyright law according to which intellectual creators are protected from state pressures (Chesterman & Lipman 1988). As Stewart (1989) points out, the fact that the government becomes the provider of reward for creative effort, as in the case of the tax scheme, paves the way towards both artistic and political censorship where the state is the judge of what is worthy of remuneration and what is not.

In that light, it is not surprising that the tax system was abolished in Sweden in 1993, and similar calls from copyright owners have been reported in Norway. Moreover, it is indicative that up to date no other country has introduced a tax on recording equipment and/or on blank material supports as a solution to private copying.

Unlike the tax, the levy, sometimes called royalty, has been gathering wider support. As in 1993, it has been introduced in 20 countries worldwide and is expected to be the favourable option in future national private copying laws (Davies & Hung 1993). Like the tax system previously discussed, the levy is designed to be imposed on software (blank recording media), or on hardware (recording equipment), or on both. In reality, however, in the vast majority of national laws that have endorsed this type of non-voluntary licence scheme, the levy is imposed solely on software (Davies & Hung 1993, Chapters 6 and 7). This option is justified on the following grounds: it is on software that phonograms and videograms are copied; the number of blank audio and video tapes purchased is likely to reflect the amount of private copying; and finally, people buy software more frequently than

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hardware (Davies & Hung 1993, pp 224-226). It is believed, however, that a royalty on software should be supplemented by a royalty on hardware in order to ensure a more equitable compensation to the copyright owners. In fact, that 'dual royalty' appears to be the favourite option amongst national laws that are planning to introduce levy schemes in the future.

The levy differs from ordinary royalties in that it is not paid by the user but by the manufacturer and/or the importer of recording equipment and/or blank media, except in cases when such equipment and/or blank media are for export, or are imported by a private person for personal use. The levy also differs from the tax in three crucial points: firstly, it is not collected by the government but by the organisations responsible for the collective administration of copyright owners' rights, best known as collecting societies. Secondly, it is not based on the sales price of the blank recording media but is calculated according to the playing time of such media as the extent of private copying depends on their storage capability and not on their price. And finally, the levy should differ from the tax in the way which its rate is decided. The actual rate of the royalty that is to be distributed to right owners ought to be established by means of free negotiations between them, or their representative societies, and the manufacturers/importers that pay the levy on software and/or hardware. It should not be decided by the state in the form of tribunals or government agencies, something which is the case in some national laws that have introduced levy schemes. For, as previously mentioned in the case of the tax system, a legislative enactment on what is viewed as equitable remuneration represents unwarranted government intrusion into the marketplace which is contrary to fundamental principles of copyright.

The introduction of non-voluntary licence schemes has a decisive influence on the very principles of copyright law as it signals the legalisation of private copying. The significance of that development for the consumer/user is that the activity is not unauthorised anymore. In exchange for a payment, he is entitled to reproduce copyrighted material without the permission of the right
owner. For the copyright owner, however, such schemes entail a variety of negative consequences, both moral and economic.

Firstly, the effect of a levy or a tax is that his exclusive rights that form the basis of copyright are reduced to a mere right to equitable remuneration (Ploman & Clark Hamilton 1980, p 197). He cannot properly exercise his moral rights as he is deprived of the complete control over his work and cannot prohibit its use (Stewart 1989, pp 83, 84). Ultimately, as Berman (WIPO 1993, p 95) succinctly underlines, that contradicts the central concept of copyright.

Secondly, the way such compensatory schemes function, namely calculation and distribution of the private copying royalty, is said to further weaken the level of individual control the copyright holder has traditionally exercised. The funds from levies and/or taxes are divided according to nominal assessments of use, which include sales and air-play of works, the use of soundtracks for films and television and so on. All these new uses of works that electronic technology has created render the direct compensation for individual owners based solely on actual market success an almost impossible task. As Chesterman & Lipman (1988, pp 148-149) point out, the resulting trend is towards collective solutions. The copyright owner, being unable to track down each member of the audience that makes use of his work, increasingly relies on the collecting societies -most developed in the music industry- to fix his contribution for him. There are also cases where he is persuaded to assign his rights to these institutions which exercise them on his behalf. Both the above developments, however, undermine the owner’s individual rights that copyright is supposed to protect from institutional pressures.

Thirdly, such compensatory schemes not only do undermine the owner’s personal and moral rights, but also they contradict with the very purpose of their creation which is to cater for equitable remuneration. They are accused of involving a serious misallocation of funds, particularly apparent in the case of the tax system. They are also criticised of being highly unjust and discriminatory since
compensation is allocated primarily to popular and successful right holders and not to those really in need of subsidies.

Finally, it has been said that such compensatory schemes do not deliver the money they ought to bring due to another reason. The remuneration that stems from a levy and/or a tax imposed on software and/or hardware does not exactly match the number of times private copying takes place. Simply because such systems sanction unlimited acts of home taping regardless of the value of the work copied. The above drawback has led some copyright circles to suggest that equitable return could instead be achieved by means of a third compensatory system.

That scheme, known as the ‘pay at source’ solution, would still consist in a charge which would apply at the moment of first sale, not to the software or hardware as in the case of tax and levy, but to the material which is likely to be privately copied. That solution has already been adopted in varying forms in the fields of pay-TV, database operation and the marketing of computer software, where a rate is charged for the goods and/or services commensurate with the use which the user is expected to make of them. The advantage of this system lies on the fact that it could remunerate owners directly and proportionately in relation to sales and/or airplay of their works. However, the ‘pay at source’ approach bears the very disadvantages that all the non-voluntary licence schemes mentioned insofar share. It reduces the owner’s exclusive rights to a simple right to receive payment; it signals a loss of his moral and economic control over the use of his work; and finally, as collection and distribution of the ‘pay at source’ charge is carried out by collecting societies, the owner is not only dependent on them but he is also vulnerable to institutional pressures.

Insofar the effects of the above compensatory schemes have been examined from the point of view of the copyright owner. It is pertinent, however, to investigate the consequences that such systems bear for the copyright user, too. From the consumer’s point of view, those private copying solutions subsidise copyright owners at the expense of the public. It is rather difficult, as Lin (1985, p 346) stresses, to rationalise a compulsory fee structure to be in accordance to the public interest. The
criticism lies on their overly broad and cruel application as they impose a charge on all who purchase software and/or hardware (tax) or a recording ('pay at source' approach) regardless of the buyer's intention to copy or not. The levy system could escape that criticism in view of its following two characteristics: first, the charge is not paid by the consumer but by the manufacturer/importer of software and hardware; second, it exempts specific categories of users, such as visually and/or aurally handicapped, and professional users (e.g. recording studios, educational establishments, etc.).

In essence, however, the levy is as susceptible to social objections as the other two schemes. Firstly, the royalty manufacturers and importers pay is eventually passed on to the consumer through a price increase. Secondly, exceptions to particular groups of users do not solve the problem of the ordinary user who purchases blank tapes or recording equipment for purposes other than copying protected material and he is unfairly penalised when he does so. Finally, when considering the social consequences of the private copying solutions, one cannot but take into account the following argument. Payment by consumers in return for the right to copy may stimulate further acts of home taping and could indeed exacerbate the problem.

To sum up, it would be fair to say that fiscal solutions to private copying raise as many problems as they intend to address. From a social perspective, their overall application is not only unfair but it can also incite home copying rather than reduce it. As far as copyright owners are concerned, it appears that such schemes undermine their moral and economic rights which are enshrined in copyright per se. Moreover, those compensatory systems are not the appropriate remedy to the copying of works likely to take place in the immediate as well as the long-term future. As Berman, President of the Recording Industry Association of America, points out (WIPO 1993, p 99), all the above solutions are premised on the belief that they serve to mitigate some of the prejudice caused by private copying. However, the amount of revenue they generate will never sufficiently compensate the right owners for the unrestricted digital copying and/or the electronic delivery of their works. The increasing interchangeability of carriers and supports and the trend
towards integrated digital networks and integrated products combining data, image and sound render
the above schemes an inadequate tool to regulate future private copying practices. For instance, a
characteristic example of the above developments is that CD quality music will soon be available to
be accessed via the already widely used network Internet.

Finally, in view of such possibilities, the private copying royalty faces two distinct options. On the one hand, it could be replaced by a charge made for access to the networks for the transmission of entertainment products. On the other, it could be complemented by technical solutions that could control private copying. Even the 'pay at source' solution, which is thought to be the most financially beneficial to copyright owners when compared to the levy or the tax systems, would still not be sufficient when the integration mentioned above becomes commonplace. According to the very same experts that propounded that approach to private copying, it could be effectively applied in the future only if a technical solution is adopted to complement it.

8.1.2 Technical Solutions

The *raison d'être* of technical solutions to private copying has been undoubtedly the advent of the Digital Audio Tape (DAT). Its unprecedented copying capabilities has given a grave cause for concern to the copyright owners. DAT enables home tapers to make infinite digital perfect copies from digital sources, e.g. from CDs. Unlike analogue copying, no deterioration takes place in succeeding generations of copies. Each copy is identical to its source, a ‘clone’ of the parent, and can serve as a master from which other copies can be made resulting into a phenomenon called ‘serial copying’.

Copyright owners feared that the uncontrolled introduction of DAT would cause an escalation of private copying that would pose a threat on the exercise of their rights. Subsequently, a number of resolutions have been adopted by international non-governmental organisations calling upon national governments and intergovernmental authorities for the universal adoption of legal and
administrative measures to require DAT recorders to include a means of preventing and/or limiting their copying capabilities. Finally, it should be noted that proposals for technical solutions have been stemming primarily from the music industry since DAT concerns the recording of sound. And, although the focus of the present section will be to examine the most renowned of these solutions, a brief mention will also be made to similar ones already being contemplated by the motion pictures industry vis à vis the imminent commercialisation of the newly developed digital video recorder (D-VCR).

The rationale behind the proposed technical solutions is not as much to replace royalty schemes as it is to complement them. Similarly, their objective is not to compensate right owners for the use of their works and/or mitigate the prejudice caused by private copying. Instead, they aim at providing a degree of copyright protection to copyright holders by controlling and even physically preventing private copying in digital form. What remains to be seen, however, is whether technical solutions achieve their goal without raising more problems than they purport to solve, something which is the case with the compensatory schemes previously discussed. In fact, as it will become apparent through the ensuing examination of the most renowned proposals, all technical protection devices raise important issues as to their reliability in practice, as to their possible effects on use of the equipment for playing authorised material, and finally, as to how their use potentially affects the balance between right holders, equipment producers, and consumers/users.

The Copycode system was the immediate response of the international music industry to the introduction of the DAT. The device consists in a chip built into DAT recorders that would prevent copying from CDs or pre-recorded tapes by cutting a notch of frequencies out of the recorded music. The desire of the record industry for a mandatory legislative step that would require all DAT

\[2\] At this point, it should be added that the introduction of the first 'home' CD recorder in 1996 is likely to generate similar calls by the music industry. The CD recorder will allow the consumer to record on a blank CD (which is already a reality) the music of his/her choice from both analogue and digital sources as he/she would do with a conventional blank audio cassette or a DAT. Furthermore, that perfect quality 'home made' CD will be read by all existing digital music players (i.e. home hi-fi systems, portable 'discmans', car CD players).
equipment to be fitted with the Copycode strikes at the heart of the private copying contention, that is whether or not should the activity be prohibited. Subsequently, such a proposal raised the above mentioned important issues to such an extent that it sparked a vehement debate between record industries and DAT manufacturers, and eventually, failed to materialise.

The introduction of Copycode, as Chesterman & Lipman (1988, p 184) report, required the co-operation between the Japanese -who manufacture the hardware- and mainly the Americans -who produce most of the software. The Japanese industry refused to equip DAT recorders with the device pointing out that, since a royalty on blank tapes and/or recording equipment was already in place or was under consideration, it would be unreasonable to make recorders incapable of recording.

According to Jerrard (1987, pp 279-283), legal adviser of the Tape Manufacturers Group, the record industry has based its onslaught on DAT on a wrong assumption. There is no reason to suppose that the advent of DAT will change the existing practices; it is no easier to make multiple copies with a DAT recorder than it is with existing analogue equipment. It may be that DAT is of high quality and can record more material than conventional tape. However, the quantity and quality of recording is irrelevant to the legitimacy of private copying. In addition, as Jerrard categorically states (ibid.), the music industry has failed to envisage DAT as an opportunity and not as a threat. The development of DAT would create new products and consequently new markets. The adoption of a spoiler system would at worst prevent this happening and at best delay it considerably, since an anticopying device built into a DAT recorder would make it virtually impossible to sell a DAT recorder at all. The record industry, Jerrard concludes, would like to kill off DAT before it can produce its benefits.

At this point, it is worth reporting that a negative reception, similar to that of DAT by the music industry, appears to be in store for the latest steps in video technology. This time it is the motion pictures industry, spearheaded by Hollywood, that seems ready to undermine the newly
developed digital video disc (DVD) and digital video recorder (D-VCR) even before their introduction into the markets. Namely, an agreement has apparently been reached with hardware manufacturers so that the first such VCRs to go into the shops around 1997 will not actually be VCRs but mere VCPs (video cassette players) since they will not be able to record and will only be used for viewing pre-recorded digital video discs (the first blank DVDs will be introduced at a later date). The first digital VCRs with a ‘record’ function will not be launched until 1999, but even those will have a limited recording capability. For example, those destined for the UK market will be equipped with a chip which will allow recording from terrestrial channels but prevent recording from satellite subscription channels.

What prompted the film industry to delay the introduction of the blank DVD and to restrict the ‘record’ function of the D-VCR was the fear of an escalation of home taping. However, as previously argued in the case of DAT, there is no reason to assume that the arrival of digital equipment will have such a result simply because the quality of home copies will be perfect. Furthermore, the adoption of anticopying chips runs the risk of stultifying the development of digital recorders and the potential markets for hardware and software associated with them because such devices could make it very difficult to sell a D-VCR at all in the first place. For example, when British consumers were asked whether they would buy a VCR that could not record they answered:

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3 It should be stressed that the reason why Hollywood responded negatively to the arrival of DVD is not related to home taping, but it is nevertheless worthy of reporting at this point. The big US film studios, despite the fact that consumer electronics companies have already come up with a common standard for the design of the DVD, are threatening to block its advance by refusing to make their films available on it unless regional codings are introduced. What the Americans want is as many divisions between markets as possible (the latest estimate of probable number of regional DVD variations is five) in order to maintain the profitable status quo of delaying the distribution of films and videos across the world. What the Americans do not want is a film to come out on DVD in a universal format at the same time that they hope people will go to the cinema to watch it because they see a successful film in the cinema as the best marketing for eventual video release. Finally, what the introduction of regional codings mean is that European consumers, for instance, will be prevented from playing DVDs released in the US and they will have to wait for the cinema releases which sometimes can take up to six months to cross the Atlantic (report by Nicholas Moss, The European, 30 May-5 June 1996, p 25).
"probably not"; and such a possibility can only alarm the same manufacturers who agreed to make such recorders.

Conclusively, it can be said that the two cases mentioned above clearly reflect a traditionally depressing reaction to new technologies by the copyright industries. The music and the film industry alike have not learned the lessons of history and they repeat the same mistakes. For example, it was not so long ago that analogue audio tape players and video recorders were wrongly accused of destroying the LP and film markets respectively. In reality, however, both those media generated thriving markets and stimulated long-lasting demand. If DAT and DVD were to survive, they should be allowed to record. Similarly, if technical devices built into DAT recorders and D-VCRs were to be widely accepted, they should allow consumers to have access to copyright material thus maintaining a market upon which music software and hardware manufacturers depend their livelihood. For instance, the plans of the motion pictures industry (in association with consumer electronics companies) to introduce D-VCRs capable of recording before the end of the century is a step towards that direction. However, in view of the built-in chip that will limit their recording capabilities, it is difficult to predict what the consumer response will be to those recorders.

To turn to the music industry, a technical solution put forward to avoid the previously described pitfalls of the Copycode is known as Serial Copying Management System (SCMS). DAT recorders equipped with SCMS are able to make unlimited digital copies from digital sources, but are not able to make a direct digital copy of such a copy. In other words, this device actually

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4 This consumer response, as well as the previously quoted plans of the film industry regarding the D-VCR (release dates, recording capabilities, etc.), were reported by the BBC TV programme 'A Technophobe's Guide to the Future' (BBC2, 30/4/1996).

5 Whatever has previously been argued as regards DAT/DAT recorders and DVDs/D-VCRs must equally apply to blank CDs and CD recorders (to be launched in 1996). It should be noted that the first generation of blank CDs will indeed be able to record but only once (emphasis added). That way, their potential re-utilisation, which notably characterises both analogue and digital blank tapes and which is one of the main factors believed to be largely concurrent with the extent and impact of private copying (see Chapter 7, section 7.2), is rendered impossible.
allows only one digital-to-digital copy but prevents the phenomenon of 'serial copying', that is succeeding generations of flawless copies.

The SCMS was so widely publicised and demonstrated that two of the biggest consumer electronic companies, namely Philips and Sony, stated that the system would be incorporated in their respective new technological developments, that is the DCC (Digital Compact Cassette) and the Mini Disc. The SCMS was praised by its supporters to be the ideal technical solution to private copying in the digital era. It would prevent the potentially harmful pyramid effect of DAT to DAT copying, whilst, at the same time, it would retain the balance between copyright owners and users by allowing the latter to make infinite DAT copies from CDs. The system’s critics, however, counterargued that it does not go far enough. It would still facilitate the unlimited production of perfect, first-generation copies. Furthermore, it would not prevent private copying; it would simply restrict the exponential increase in this activity (Faure 1990, p 47).

Indeed, the SCMS shares with the Copycode spoiler previously discussed the same major drawback. The protection that both systems offer to copyright owners in the digital domain can be circumvented by recording via the analogue domain. The reason why these systems cannot be introduced for analogue is the vast amount of conventional recording equipment already available without these devices.

In order to rectify the above disadvantage, some sections of the hardware and recording industries have proposed that DAT recorders be equipped with a system called SOLOCOPY PLUS. That device would remove the analogue input and analogue to digital convertor from within the DAT recorder, thus preventing the first time copying of analogue sources. At the same time, digital copies would not serve as a master for further generation of digital copies since DAT to DAT copying would still be impossible. To sum up, the SOLOCOPY PLUS would have the same function as the SCMS, and it would be the counterpart of the Copycode in the analogue domain. The SOLOCOPY PLUS failed to materialise as a possible solution for two main reasons. First, it would
impair the access of consumers to copyright material when using conventional copying equipment. Second, if the incorporation of the system in the DAT recorders were to be made mandatory, it would have the effect of stimulating the market for digital products and drying up the demand for analogue ones, thus endangering the livelihood of conventional software and hardware manufacturers.

Some of the reasons why technical solutions did not live up to their objective— which is to regulate private copying in the digital era without raising additional problems— have already been referred to. These systems’ efficacy, however, has been further questioned in view of some other equally important factors. Firstly, they have been accused of containing inherent malfunctions. All the above devices operate by some sort of code embedded into DAT recorders that control the recording function. Official tests carried out by studio engineers and technical consultants have concluded that those codes interfere with sound quality, particularly in the Copycode case. Secondly, they have been charged with posing difficulties in respect of a differentiation between professional and domestic users’ products, and between machines for audio/video use and for data storage. Such distinctions must be made if DAT and DVD technology are to develop to the maximum. Professional users, such as recording studios, broadcasters, educational establishments and the like, have to have access to the benefits of such technology in order to meet their specific needs. Similarly, since DAT/DVD machines may have uses not involving reproduction of copyright material, devices built into equipment for audio/video use cannot be applied to equipment for data storage. Finally, fierce criticism has been levelled at all technical solutions on constitutional grounds. Those systems either prohibit or attempt to restrain private copying. To many, that kind of control and policing constitutes

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6 Although this assertion primarily refers to technical solutions regarding DAT recorders, the same can be said, at least in one particular aspect, for similar measures which are presently being contemplated for D-VCRs. Because, even though such measures have not yet been put into practice to be properly assessed, the initial plans of the film industry to prevent or at best restrict home videotaping have already raised the important question of consumer access to copyright material.
an intolerable intrusion into the privacy of the home and is unacceptable in a wider social perspective.

Conclusively, it can be said that the proposed technical solutions, plagued by a series of disadvantages, by and large fall short of their pledge to adequately regulate home taping. In view of that, many are inclined to believe that the only effective recognition of copyright owners' rights is equitable remuneration by means of compensatory systems. However, as it has been argued earlier, royalty schemes cannot begin to compensate right holders for the reproduction of their works by digital means. A future answer may lie in a combination of technical and fiscal solutions.

8.1.3 Technical and Fiscal Solutions

The failure of the systems discussed insofar to reach a consensus has forced the adoption of a more pragmatic and logical approach to the issue of private copying. Any solutions, in order to be viable and widely acceptable, have to follow certain guidelines. Firstly, they should neither prohibit nor restrain private copying; instead, they must allow the copyright owners and the music industry to monitor the activity whilst permitting users to have access to copyright. Secondly, they should not unfairly charge all indiscriminately the consumers regardless of their intention to copy or not; instead, they must make them pay only when they use protected material. Finally, they ought to secure the owners' reward for the use of their works, and facilitate the settlement and distribution of their royalties.

In that light, a possible solution, initiated in the USA by the RIAA (Recording Industry Association of America), could be the so called Personales System. That system targets one of the most popular practices of home tapers, which is to make compilations of their favourite recordings. The system, which is designed to combat the purported loss of revenue to record companies from private copying of borrowed records and music from radio stations, stores thousands of music selections in digital form on optical discs without interfering with sound quality. The introduction of
such a system could allow consumers to walk into a record store, select a number of their favourite songs, and emerge with a ready-made tape of those tunes. The recordings, according to estimates, would be available at a low cost (US$ 1 per selection); would be made very quickly (in approximately 10 minutes); and, would be of a superb sound quality (on high-bias cassette tapes with Dolby B noise reduction).

The advantages of the Personics System are that it automatically tallies royalties to individual record companies, and it contains safeguards to prevent unauthorised access to the master discs. Its major disadvantage, however, is that it is available outside the home where private copying takes place, thus disabling the proper monitoring of the activity. Subsequently, the system runs the risk of not being endorsed by consumers who would be forced to leave the comfort of their home in order to make their favourite compilations.

In order to overcome the above serious drawback, the introduction of a debit card system has been put forward by large sections of the international music industry. The idea of such a system would be that consumers wishing to make home copies would purchase a magnetic card which would represent a certain value. That value would allow a certain number of hours of copying and recording machines would not function without the insertion of such a card. The card would be reusable and could be credited with further value. It would also be able to record details of the recordings copied and this information could be read at the same time as the card was being credited with new value. That would have the advantage that the revenue derived from the debit system could be distributed with great accuracy to the copyright owners whose works had been copied, thus preventing misallocation of funds inherent in existing royalty schemes. The debit system appears to be an appropriate approach to the copyright's electronic delivery environment. In fact, the concept of music -and image- being relayed through interactive cable services is increasingly becoming an accepted part of everyday life. Furthermore, according to technology consultant Michael Tyler (IFPI 'For The Record', August 1992), digital audio broadcasting (DAB) will revolutionise the way people...
consume music. Tyler’s radical forecast suggests that high quality digital broadcasts downloaded into
the home could eventually replace today’s record stores to create ‘armchair record stores’ (ARS).
Tyler also argues that ARS could actually provide a new stream of revenue for owners and copyright
industries currently fearful of an escalation in private copying. However, as Tyler concludes, ARS
compensation cannot be based on remuneration akin to a home taping royalty; it must be an
alternative to sale.

In that light, any system that enables the consumer to order straight into home individual
recordings in digital quality for private copying should be complemented with a debit system.
Combining this with access to a music data file, the consumer will be able to compile his own menu,
to see the price of delivery on his monitor (TV or personal computer), to place his order which will
be copied, and finally charged by return cable. That way, the user is able to enjoy access to copyright
and the owner is rewarded for the use of his work. In fact, a debit system is en route to be put into
practice by a small London company, called ‘Cerberus Sound and Vision’, which will offer music of
CD quality on their ‘digital jukebox’ accessed via the computer network Internet. The company’s
customers will be invited to pay using a credit card and will then be issued a password allowing them
to select the music they want. The fact that worldwide famous artists have already signed up with
that company for the electronic delivery of their works shows the potential success of the system in
the years to come.

Any solution to private copying, apart from allowing access to users and making them pay
for it, should also fulfil its other two objectives: to monitor home taping and make sure that payment
is made where it is due. What is needed, to use Tyler’s statement (ibid.), is an information
infrastructure to keep track of who buys what track and who should be compensated for the
purchase.

For that purpose, the International Standard Recording Code (ISRC) was developed. The ISRC is encoded in the digital recording and does not physically appear on the product, thus
identifying recordings and not carriers. An ISRC is assigned by the first owner of the rights to a recording, it provides each individual recording with a unique international identification code, and acts as an efficient method of automatically identifying and qualifying the use of particular recordings throughout their life. The ISRC has all the potential to play a critical role in the development of DAB and other electronic delivery systems. The music industry believes that, in order that potential to be realised, its use should be made an obligation on a legal or regulatory basis. Once mandatory, it could provide the key to an efficient dissemination and administration of copyright material in the electronic environment. In addition, in the same way that CDs can carry an inaudible code, DAB will be able to transmit the ISRC. The code could be taken straight from the CD and transmitted over the air with the programme. Royalty collecting societies could connect their computers to programme outlets and pick up the copyright data directly, thus guaranteeing the fully automatic and of an unprecedented preciseness royalty settlement (Figure 1 illustrates how the system would work into practice). The advantages and benefits of the ISRC are comprehensively summarised in the ‘ISRC Practical Guide’ (1994, pp 11-12) published by the International Federation of the Phonographic Industry (IFPI), which is also the International Registration Authority of the code:

- it enables the use of copyrighted works to be monitored;
- it facilitates the collection and distribution of royalties;
- it can be accepted and implemented internationally;
- it provides a unique means to identify right owners for the purpose of rights administration;
- it may prove useful in the development of a debit system;
- its implementation is cost effective as it does not require special investment or technological measures;
- it assists in identifying pirate copies.

The application of technical devices, such as debit card systems, included in or associated with data bases, are forerunners of an electronic payments network and will result, in the near future, in better control and easier licensing. Furthermore, such developments render the highly controversial and inadequate system of compulsory licences a thing of the past. Specific applications of the digital technology in licensing are already a practice and/or are developing rapidly within the
FIGURE 1: How International Standard Recording Code (ISRC) works.
film industry, for instance, in the analogue field and can be introduced in DAB as well. Systems like pay-per-view, and video on demand (which offers the possibility to an individual of having not just a programme as in the pay-per-view but any film selected from a catalogue communicated to his home by cable) have the following advantages: they allow the proceeds to reach the rightholders directly; they improve the remuneration of authors and producers; and finally, by being encrypted, they enable the consumption of copyrighted material to be accurately monitored.

Finally, and by way of conclusion, the following caveat should be added. The implications of all the above developments have yet to be assessed on several grounds. For example, during the proceedings of the ‘WIPO Worldwide Forum on the Future of Copyright and Neighbouring Rights’ (1994), four such grounds were identified. Firstly, while all these systems are useful in the assertion of rights, most of them are not inviolable. Secondly, they should not substitute legal reasoning but ought to supplement the copyright law against unauthorised copying. Thirdly, their viability and effectiveness presuppose co-operation between the organisations responsible for the collective management of owners’ interests and the industries who manufacture these systems. And fourthly, whatever technical solutions are worked out will have to be considered with international standardisation in mind; fair royalty distribution in the world of the now beginning mass digital use of works cannot be achieved except by universal identification and tracking of works.

Ultimately, there is a fifth ground that should not be overlooked. Technical devices such as debit card systems will not only result to a better control of home copying and easier licensing of copyright works but will also facilitate the collection of detailed information about the user’s identity and a subsequent monitoring of his/her activities. Furthermore, depending on where this information is stored (e.g., in the databases of the system operator or in the files of the service provider), it will be possible to combine such information to form consumer profiles and behavioural patterns. Possibilities such as the above lead to an intrusion of privacy and bear significant ramifications for personal liberties, and thus ought to be addressed. For instance, technical solutions involving an
advanced cryptographic system for electronic transactional systems which would accommodate the privacy needs of individuals have already been put forward and certainly merit serious consideration.7

8.1.4 Future Systems

What may be the answer that the future has in store for the question of private copying? In the dawning networked age, works that were traditionally distributed in print, cassette, disk, film or other physical form, can simply be delivered and used electronically on the ‘information highways’ and the ‘celestial jukeboxes’. How future systems that will regulate home taping could avoid the pitfalls and shortcomings of the already mentioned solutions whilst securing the users’ access and the owners’ remuneration?

Although an important objective of an information infrastructure would be to allow broad public access to the networks, this does not mean, according to Dixon & Self (1994, p 469), that private copying will necessarily mushroom. Is it because the activity will eventually subside or level off when digital technology begins to offer more and more services to the consumer, as Nicholas Garnett, Director General of the IFPI, predicted during the ‘WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights’ (1993)? Or is it because, as Dixon & Self (ibid.) argue, the numerous systems for encrypting, decrypting, and controlling access and copying which are under development will facilitate the detection of unauthorised upload, transmission and download of works on the infrastructure? The latter rationale seems the most likely one. In fact, as it has been underlined during the proceedings of the latest ‘WIPO Worldwide Symposium on the Future of Copyright and Neighbouring Rights’ (hereinafter WIPO 1994), the very

7 In one such proposal, briefly described by Wilson (1988, pp 151-152), the individual is given a ‘digital pseudonym’ for every organisation he/she deals with. These pseudonyms enable the user to keep his/her identity secret and cannot be linked to form consumer profiles and behavioural patterns. Furthermore, the mechanism for conducting transactions is not centralised in the hands of a service provider but in a microprocessor which the individual holds in a form of a ‘card computer’.

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information technologies that have created the problem of unauthorised private copying of works may come into their rescue in the long run.

Towards that direction, some revolutionary proposals have been put forward in recent years by academics and intergovernmental bodies and have received the endorsement of the private sector. These proposals promise to resolve the highly contentious debate as to whether private copying requires a solution. They also pledge to put an end to the bedevilling problems that the activity poses for copyright owners and users alike. Finally, if implemented, they will drastically change the face of home taping from a private and controversial act to a clear-cut commercial transaction.

For example, one such future system, whose prospects have been explicated in pragmatic terms by Professor Kitagawa of Kyoto University during the aforementioned WIPO Forum (WIPO 1994, pp 115-130), is called 'Copymart' (Figure 2 illustrates how the system would work into practice). Copymart (CM) is a contract-based transaction model for copyright and consists of two data bases: the 'copyright market' (CRM) and the copy market (COM). The CRM is a registry of copyright, where individual owners and/or their representatives file their copyright information (identification, kinds and description of works, duration of copyright, licensing conditions, and even prices) and even information relating to unprotected and freely available works. The COM is a data base from which, upon request and in exchange for payment, copies of works are distributed to Copymart customers in accordance with the licensing conditions. According to Kitagawa, the Copymart has the following advantages: it operates as a marketplace for direct negotiations between right owners and users concerning licensing conditions and terms; it is compatible with a copyright codification and registration system (e.g. ISRC); and, it facilitates the dissemination of works with an assured system of royalty payment. The Copymart is also highly praised by other experts-participants to the 1994 WIPO Symposium. According to Professor Lucas (pp 280-281), it ensures respect of the owners' interests because it rests on a contractual basis, and it is a realistic system in economic terms because its success is determined by market response. And, to Professor Goldstein (p 265), such
fine-tuned, individual contract arrangements, promise to replace a rough-edged copyright at this far and very important frontier of private copying.

Another future system could be based on a project, initiated by the European Commission under its ESPRIT media research programme, entitled CITED (Copyright In Transmitted Electronic Documents). One major module of that project is devoted to digital sound and video recordings and its purpose, as Nancarrow & Boisson (1993) report, is to investigate whether a solution could be found to the private copying problem by using technical means to control the copying of copyright materials in a digital form. That module has been designed to include also the function of collection and distribution of royalties in a generic manner, so that it could provide the basis for an acceptable and accepted standard for the music and film industries. The way CITED would work is described by Long & Neesham (1993, p 22). It basically constitutes a large database where software modules would allow copyright administrators to assign specific ‘access’ rights to different users. The rights could either be linked to a password, or held on a credit-card style ‘swipe card’. In addition, the model would automatically link copyright material with the licence that would apply to a particular reference, and finally, it would maintain an audit trail so that all accesses to the system would be recorded. The model, as Nancarrow & Boisson conclude, could develop towards a pan-European CITED clearance centre to provide the necessary infrastructure for a comprehensive system of regulating private copying in the digital era. Finally, it should be added that, like ‘Copymart’, CITED allows for direct negotiations between the parties involved, thus serving the needs and interests of both users and owners for unimpeded access and properly allocated payment respectively.

In view of their auspicious prospects and numerous advantages, both systems have been dubbed models for the future. Nevertheless, both systems are still in an experimental phase and therefore their efficacy is difficult to ascertain. Indeed, further refinement is needed before they can be practically operable. However, if successfully introduced and accepted, they could contribute a great deal to effectively dealing with the issue of private copying in the networked age.
8.2 Piracy

Over the 30 years or so, a great deal of effort has been made at various levels in order to reduce, punish and prevent audio-visual piracy: universal Conventions have been signed; national and international legislation has been enacted and updated; governmental, intergovernmental organisations, and enforcement agencies have been established; variant proposals have been put forward in abundance; several solutions have been implemented; and finally, even some radical measures and countermeasures have been taken.

It would not be a hyperbole to say that in view of such a systematic endeavour one would expect the eradication of the phenomenon. However, piracy has proven to be a difficult to tackle problem due to a wide variety of factors often inherent in the very measures that aim at combating the phenomenon. The objective of the following review is to register the various kinds of anti-piracy action, and in parallel, to critically assess them in order to examine whether and/or where they fail.

8.2.1 Technical Devices

(a) Audio Piracy

The international record industry has stepped up its campaign to stamp out piracy within the last decade following the introduction of the Compact Disc in the mid 1980s. Not only because -as it has been previously underlined- CD piracy has rapidly become widespread and highly profitable. It is also because it has become so sophisticated that an equally sophisticated solution is needed to fight back and thus several such systems have been proposed so far.

First came the Copycode device (previously described in the context of private copying). Although it was initially intended to address the problem of 'home taping', it could also have been an effective anti-piracy standard. However, it failed to materialise for it did not meet one basic prerequisite that any solution should do in order to be viable. The music industry and the
manufacturers of DAT did not agree over its introduction for reasons not associated with piracy (see above section 8.1.2).

Soon after the Copycode, the ISRC was adopted (see above section 8.1.3). Although its primary objective was to facilitate the monitoring of private copying and the collection-distribution of royalties, it was also intended to assist the fight against piracy. However, the most promising technical system so far has been launched in 1993. The SID (Source Identification Code) provides a means of identifying the source of the mastering and the manufacturing of digital carriers, that is the physical product and not the recording (ISRC). SID consists of a unique series of numbers which are pressed onto a disc’s surface. The numbers are assigned to individual CD manufacturing plants and will identify not only any product coming from that particular plant throughout its life, but also the identity and location of the manufacturer. The SID, therefore, makes it possible to detect pirate and counterfeit products as soon as they hit the streets, giving an enormous boost to the work of anti-piracy enforcement bodies. Especially today, that there are over 200 CD plants worldwide with a combined production capacity of more than 2 billion CDs per annum which is about twice the number of legitimate CDs sold each year, SID will help to distinguish the legitimate from the illegal manufacturers. IFPI, who launched the SID in conjunction with Philips, has initiated discussions with WIPO aiming at introducing an international convention which will require member states to adopt legislation making the SID a compulsory requirement for all CDs manufactured and imported into these states. The SID has the following additional advantages: it can be implemented on any optical disc (e.g. CD-ROMs), and it does not affect the quality or lifespan of the disc. It is also cost effective; a pressing mould costs between 80 to 300 GB pounds, and the actual additional cost per CD will be negligible (less than 0.01 GB penny). Finally, it can be used together with other anti-piracy devices such as holograms and embossed logos [IFPI ‘Implementation of the SID Code’ (1994)].
However, these techniques, despite being sophisticated, have been rendered useless by the equally sophisticated pirates. Nowhere else in the world that is more apparent than in China, a country with 30 or so pirate CD plants which make it the largest pirate operation in the world. The following two examples are characteristic. A factory has recently been discovered there that makes those holograms, which are supposed to be the ‘badge of authenticity’. And, EMI Records Ltd. have recently found out that their copyright in the newly released ‘The Beatles’ CD collection is faithfully recorded on the Chinese pirate version.

Given the fact that today’s pirates have the technical know-how to outsmart the legitimate industry, can the SID Code be a real breakthrough in the fight against music piracy? It must be stressed that SID is not applicable to traditional music carriers such as cassettes. And piracy in the analogue domain is far from over yet, especially in countries where the MCs (music cassettes) are still the dominant format. What about the future? The answer that comes from IFPI itself, who initiated the SID, is indicative. Given time, money and effort, anything can be copied. On the other hand, however, in order for a pirate to effectively counterfeit a CD, he would have to ensure that each SID Code copied would relate to the original CD in question. As at any one time, the Top 10 albums (which are usually the most tempting to the pirates) are often owned by a minimum of 6 different record companies. Therefore the pirate would have to invest a great deal of money to successfully produce a genuine counterfeit CD as he would need a different mould for each title, when on average a mould costs 55,000 GB pounds. In view of the above, one can only hope that the SID will put out of business only small-time (‘cottage’) pirates who are involved because of the easy money and huge profits. However, it will not effectively deter the well organised and well connected pirates who are involved in large, multimillion dollar scale operations and organised crime.
The international motion pictures industry has invested heavily in money and technology to fight piracy over the last decade. By and large, those efforts have failed, more bluntly than those of the music industry, for a variety of reasons that will be accounted for hereinafter.

Firstly, it is not only technical systems that failed; it is also a matter of erroneous policy. The motion pictures industry, and in particular the big US film studios, have been persistently ignoring indications that the time gap between theatre and video releases, as well as between distribution across cinemas worldwide, of new feature films is indeed conducive to piracy, as previously discussed (Chapter 6, section 6.3 of the present thesis). It is often suggested that if the aforementioned time gap is compressed from years (in many cases that gap even amounts to ten years) to a week, the industry could bypass the pirates altogether. The following example is indicative of the industry's fault. Michael Johnson, the chief of Disney's UK video division, when asked to comment on the fact that his company's latest video *The Lion King* has already been heavily pirated (1 million counterfeit copies sold) even before its official legitimate release by video outlets, admitted that "we have been our own worst enemy by failing to shorten the window between the video release in America and in the UK" (*The Guardian*, 16/9/1995, p 1).

What has also been proposed in vain is the application of the principle of 'simultaneous' or 'instant' release, which is an idea endorsed by FACT (Federation Against Copyright Theft), the private investigative body of all the major US and British film producers and distributors. That could be achieved, for instance, by a satellite distribution where the signal would be coded and relayed by cable networks to chains of video cinemas using the new high-definition screens which are indistinguishable from film. Allowing for differences in time zones, this kind of link-up would allow a feature film to be transmitted from one single machine to every cinema in the world at the same time.
As one FACT official put it, "you could kill film piracy stone dead by simultaneous release" (Chesterman & Lipman 1988, pp 120-121, 184-185).

Secondly, in the case of home video, technical systems have had a dual goal: either to identify illegal copies, or to prevent back-to-back copying. Devices such as *hologram seals* imprinted on videocassettes were once thought to be impregnable. After the recent discovery of a Chinese factory - surely not the only one - that produces bogus 'authenticity badges', the wording that precedes the opening titles of a feature film on video and warns that legitimate cassettes must carry a genuine label hologram seems at least outdated. In the area of back-to-back copying, spoilers such as Copyguard and Macrovision were developed. Copyguard, designed solely for US TV standards, failed to work on PAL systems used in most other countries around the world. Macrovision was more promising. Introduced by the Japanese giant JVC, it was intended to be embodied into VHS-system VCRs and cassettes (the dominant format worldwide). It consisted in a timing device, called 'synch pulse', which ensured the reception of 25 pictures per second, and it produced two black bars across the picture, normally out of sight (at the top and bottom of the screen). If a delay occurred in the signal during recording from one VCR to another, the pulse arrived out of synch, and the black bars began to multiply until the picture was obliterated. It was included in most feature-film cassettes and, for some time, has proven to be very effective in blocking copying by an estimated 75% of VCRs. Macrovision was based on an earlier system (developed in the early 1970s) called 'wave shaper', which was built in all VCRs in order to convert weak negative pulses into strong ones. Without it, TV programs could not be recorded. 'Wave shaper' could have been the perfect spoiler and saved the industry millions, but Sony, who bought all the rights and patents to the invention, did not put it into practice in fear of competition (Chesterman & Lipman 1988, pp 96-97). However, Macrovision had a serious drawback which was soon discovered by the ever enterprising pirates; it

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4 Clearly, however, the big US film studios do not favour the option of 'simultaneous' release. Instead, they intend to pursue the same policy of distribution delay in the future, as it can be seen from their plans for the Digital Video Disc (supra note 3).
was functioning only between VCRs of the same system. Thus, they managed to circumvent it by making a copy on a Betamax machine and then back on to VHS, thus rendering it ineffective for non-VHS systems. The only thing that Macrovision eventually achieved was to put out of business amateur pirates. However, the perfect spoiler system may have already been invented without anyone knowing about it. Because, behind the erroneous policy of producers and distributors and the conflicting interests within the industry, there is another, more powerful group of people who monitor this kind of technology and are prepared even to suppress it if it suits them; the governments and the state security organisations. The case of the ‘Lamont spoiler’, reported by Chesterman & Lipman (1988, pp 98-99), is a characteristic example. Jim Lamont, a Yorkshire television engineer, developed in the early 1980s a magnetic spoiler system which he believed could stop the piracy not only the back-to-back copying of video programs, but also the piracy of audio tapes, computer data, and even prevent the interception of radio signals. But when Lamont applied for a patent, he received notice that it was “information which could be prejudicial to the nation’s defences” and must be handed over to the Ministry of Defence. There was no appeal or argument. The spoiler was seized, and he was told that even the application must remain secret until the ministry decided what to do with it. Not surprisingly, Lamont’s spoiler was never marketed.

Thirdly, piracy in the field of cable networks and satellite broadcasting has been much more of a problem than in the case of back-to-back copying. It proved to be a lot easier for unscrupulous cable operators to pirate signals off the air and relay them to their subscribers; and, the advent of DBS (Direct Broadcast by Satellite) exacerbated the situation even further as it is difficult to control who receives the programmes, especially in the case of spill-overs. The industry has invested money and effort in sophisticated systems, such as scramblers and ciphers, to seal the airwaves. However, the constantly advancing technology did not manage to keep the pirates at bay due to more than one factors, as it will emerge from the ensuing brief review of the major anti-piracy systems developed
insofar. The following Table 8.1 provides a summary of such systems (developed in Europe), their specifications and their success.

<table>
<thead>
<tr>
<th>Systems</th>
<th>Formats</th>
<th>Method</th>
<th>Piracy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cryptovision</td>
<td>Pal</td>
<td>Cut &amp; Rotate</td>
<td>No</td>
</tr>
<tr>
<td>Discret</td>
<td>Pal/Secam</td>
<td>Line Shuffle</td>
<td>Yes</td>
</tr>
<tr>
<td>Eurocrypt</td>
<td>Mac</td>
<td>Cut &amp; Rotate</td>
<td>No</td>
</tr>
<tr>
<td>Eurocypher</td>
<td>D Mac</td>
<td>Cut &amp; Rotate</td>
<td>No</td>
</tr>
<tr>
<td>Luxcrypt</td>
<td>Pal</td>
<td>Synch pulse</td>
<td>Yes</td>
</tr>
<tr>
<td>Nagravision</td>
<td>Pal/Secam</td>
<td>Cut &amp; Rotate</td>
<td>No</td>
</tr>
<tr>
<td>Payview 3</td>
<td>Pal</td>
<td>Synch pulse</td>
<td>Yes</td>
</tr>
<tr>
<td>Satbox</td>
<td>Pal</td>
<td>Synch pulse</td>
<td>Yes</td>
</tr>
<tr>
<td>VideoCrypt</td>
<td>Pal/Secam</td>
<td>Cut &amp; Rotate</td>
<td>No</td>
</tr>
</tbody>
</table>

Source: Cable and Satellite Europe, April 1992, p 70.

First came devices which simply removed picture synchronising information ("synch pulse") in much the same way as the video spoiler Macrovision previously mentioned. Those early encryption systems however, have been widely compromised. Either they fell to professional hackers who were prepared to invest in decoders as in the case of Luxcrypt, Payview 3 and Satbox (see Table 8.1); or they were circumvented in other ways. The example of VideoCipher II, developed in the USA by HBO, is characteristic of the latter case. VideoCipher II was thought to be a very effective anti-piracy device because not only did it consist of a code with constantly changing frequencies according to a mathematical formula (algorithm), but also each signal-recipient (cable operator or individual) needed a special password-key to receive services. The system was bypassed not because it had been cracked but because descramblers were found on the international market. In Mexico, Central America and the Caribbean, cable systems were reported having acquired smuggled versions of the VideoCipher II in order to supply customers in those areas with US encoded television services (Boyd 1988, pp 156-157).
Then came the second generation of encryption systems which included two methods of signal scrambling: either the ‘Line Shuffle’, where lines that make up the picture were reconstituted in a totally different order; or the more common ‘Active Line Rotation’ (Cut & Rotate), where the lines stayed in place but were cut at a randomly chosen for each line point. Both systems needed an algorithm and a password-key to decipher the signal contained in the widely known ‘smart cards’.

In order to secure the satellite services even further, leading European pay-TV operators such as BSkyB, Canal Plus and FilmNet, introduced a new transmission format, known as MAC (Multiple Analogue Components), which was easier to encode than the PAL (Phase Alternation Line) and SECAM (Sequential Couleur a Memoire) systems. The MAC used the ‘Cut & Rotate’ method and it was regarded as the ultimate anti-piracy protection format, for it offered the full encryption of the signal rather than simply scrambling the ‘synch pulse’ like the first generation systems previously mentioned (See above Table 8.1).

The second generation encryption systems were proudly reported to be unhacked (‘Cable & Satellite Europe’, April 1992, p 66), especially in the case of the ‘Cut & Rotate’ method (see Table 8.1). However, it was soon realised that cracking the algorithm was possible; if the picture is encrypted, it can also be unencrypted. Given time, pirates with sufficient skill and money could get inside a decoder and discover its numbers and hence duplicate ‘smart cards’ each of which could receive the signal. And, as if the above loophole was not enough, the pirates soon found another way to bypass the systems. A new and more reliable method of viewing the non-domestic channels came to the fore. The new vogue, as Clover reports (‘Cable & Satellite Europe’, September 1992, pp 62-65), is to subscribe to foreign channels through organised ‘smart card’ dealers. Subscriptions to a domestic premium channels are taken out, for which the card is sent to an intermediary dealer which, in turn, passes it to a subscriber abroad. A large market for illicit cards is at full swing across Europe, from Greece (reception of filmNet programmes) to Ireland (reception of BSkyB services). Especially in the latter case, the Irish Satellite Decoding Systems (SDS) offers a highly competitive
deal that Murdoch's company finds difficult to match. A typical package offers six channels for just 49 GB pounds and promises 'upgradeability': when BSkyB changes its transmission code, the pirate cards follow (Ruth Shurman, The Guardian, 5/12/1994, p 23).

Sealing the airwaves has proven to be a highly difficult and complex problem to tackle. Sophisticated encryption systems will not deter for long equally sophisticated hackers, and will certainly not discourage small-time pirates who find their way around them through the inexpensive swapping of duplicate 'smart cards'. These developments have led many to lay their hopes with copyright as the only solution. However, the law is not a loophole-free process. That was felt only too well in the previously mentioned case of BSkyB against SDS. When it was suggested that BSkyB could file a civil claim and/or seek an injunction against SDS to prevent the swap organisation from continuing its illegal trade, it was soon discovered that damages were not likely to be awarded for BSkyB would have to demonstrate what harm had been done to its business by the pirate dealer, as Clover reports ('Cable & Satellite Europe', September 1992, p 64). In fact, a Dublin High Court rejected such an attempt by BSkyB because the company failed to produce evidence of copyright infringement (namely similarities between its algorithms and those deployed in the unauthorised smart cards) which would mean revealing its code to a court full of interested pirates (The Guardian, 5/12/1994, p 23). In order to overcome the above shortcoming, it was even suggested that BSkyB could base its case on competition grounds, namely that SDS have press-ganged the BSkyB technology without paying licence fees for it, as Ritchie reports ('Cable & Satellite Europe', March 1994, p 29).

The case of BSkyB vs SDS -one of many surely- and its facts serve to succinctly highlight two very important points. First and foremost, the necessity that urges towards a change of policy as far as the protection of copyright and the battle against piracy. Second, the inadequacy of copyright law alone to curb piracy and defend against infringement, which leads, more often than not, to the
invocation of other procedures for that purpose. That latter point will be discussed in the following section.

8.2.2 Legal Remedies (copyright, trademark and unfair competition laws)

Remedies for piracy that are available to copyright owners can be found in two large areas of law: primarily in copyright law, but also in alternative legal approaches. These two general headings will be examined in detail hereinafter.

(a) Copyright Law

Remedies under copyright law fall under three main categories, common to many national laws worldwide: civil, criminal, and administrative.

1. Civil remedies

This type of remedies is further distinguished into two kinds: (1) compensatory and (2) preventive.

(1) Compensatory remedies primarily include damages and lost profits, but also court costs and attorney fees. However, remedies of that nature have certain serious shortcomings that often render them difficult to secure and largely ineffective in the battle against piracy. Not only are they slow, cumbersome and expensive for the large number of cases. But also they place a heavy burden on the right owner for it is with him that the so called 'onus of proof' rests. This means that the plaintiff has to demonstrate that he owns the copyright to the infringed work, that copyright subsists in that particular work, and that the defendant has carried out certain acts in relation to the work which amount to infringement. In practice, however, such matters can be difficult to establish. Moreover, the plaintiff has to demonstrate what harm the infringement caused him, a process that could often put him in a precarious position to disclose information about his copyright, that once it becomes common knowledge, it can benefit future pirates (the case of BSkyB vs SDS mentioned previously is an indicative example).
Apart from damages, there is another provision that has fairly recently been added to the civil compensatory remedies and has been introduced mainly in countries with a large indigenous copyright industry (e.g. UK and USA). According to that provision, courts have the power to order the delivery up and/or destruction not only of infringing copies but also of equipment which have been used or are intended to be used to carry out infringements. However, the courts may issue such orders once they are satisfied that articles are infringing copies or have been used or intended to be used for making infringing copies. The satisfaction of the courts may eventually place a burden on the right owner in that he may be required to provide evidence concerning matters similar to the process of claiming damages previously mentioned which bear adverse consequences for his case.

In view of the aforementioned shortcomings, civil (compensatory) proceedings are seen not only as hindering owners from being compensated after their rights have been infringed, but also as wholly inadequate to act as a deterrent against piracy. The latter disadvantage, however, is counterbalanced by the preventive remedies that are provided by civil law.

(2) Preventive remedies that can be obtained by civil courts consist mainly in ‘search and seizure’ orders and injunctions. These two types of preventive remedies can be found in more than one legal system. However, as a point of reference, the following review will primarily focus on two particular examples, one of each type, that are available under the UK law. These respectively are: (i) the ‘Anton Piller’ Orders, and (ii) ‘interlocutory’ injunctions.

(i) The success of infringement actions depend heavily on the availability at the trial stage of evidence concerning the alleged infringement. The Anton Piller Order’s function is actually dual: to prevent a defendant, when informed of impending litigation, to destroy, alter, move, or hide incriminating evidence; and, to allow the plaintiff to discover such evidence upon which he/she can base his/her case. The essential prerequisites for obtaining such an order are:

- there must be an extremely strong *prima facie* case;

® The name of the order is derived from the name of the plaintiff in the case where such a tool was first introduced: *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; [1976] 1 All ER 779.
- the damage, potential or actual, must be very serious for the applicant;
- there must be clear evidence that the defendant is in possession of incriminating articles, and that there is a real possibility that such material may be destroyed, altered, moved or hidden before any application *inter partes* (between parties) can be made.

The Anton Piller Order’s qualities can be summarised as follows:

- it involves an *ex parte* (in the absence of the defendant) application to the court;
- it is intended for immediate execution without notice or advance warning to the defendant;
- it compels the defendant to furnish full information about suppliers, customers, and retail outlets;
- it is a kind of civil search warrant (however, the order must extend no further than the minimum necessary to preserve the evidence concerned, a detailed record must be taken, no material should be taken not clearly within the scope of the order, and it should not be used to close down a competitor’s business);
- finally, failure to comply with it renders the defendant liable for ‘contempt of court’, for which the penalty is a fine or imprisonment (the latter is -in theory- indefinite until the defendant obeys the order).

In view of the aforementioned qualities, the Anton Piller Order became a frequently used and effective tool, but it also gave rise to abuses that blemished somewhat its success. In order to redress the situation, the Lord Chief Justice has recently issued a Practice Direction. Some of the important changes introduced by the Practice Direction are:

- the order is to be executed only on working days and office hours so that it will be practical for legal advice to be obtained;
- where a unaccompanied woman is in charges of the premises, a woman solicitor must be present;
- when the nature of the items that are removed makes this necessary, the applicant should insure them;
- finally, the most important change is that the order should now no longer executed by the plaintiff’s solicitor but by a ‘supervising’ one who does not act for the applicant. The supervising solicitor should be an experienced solicitor, having some familiarity with Anton Piller Orders.

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10 For instance, as Holyoak & Torremans (1995, pp 457-458) report, there were cases where the order was granted on the basis of a mere suspicion of infringement rather than on the basis of a very strong *prima facie* case. Additionally, the execution of the order was not always impeccable, e.g. the limits/restrictions imposed in the order were often exceeded, and the order was also used to harass the defendant and eventually drive him out of business.

11 Practice Direction [1994] 4 All ER 52.
Finally, it should be submitted that the aforementioned changes go a long way to meet the concerns for a proper execution of the Anton Piller Order, and the order itself will continue to be a very important weapon in the battle against piracy.\footnote{However, for reasons of completeness, it should be noted at this point that the Practice Direction is not totally successful in eliminating the possibility of future abuses. Because the new scope of the order contains certain shortcomings that are likely to cause confusion. Two such shortcomings can be identified: First, the problem of who may consent to entry to and searching of the premises, and to seizure, is not resolved. In the absence of the defendant, the Practice Direction rules that the order can be obeyed by a "responsible employee" and/or the wide category of person(s) appearing in charge of the premises. Some jurists claim that by virtue of this new development, the cornerstone of the Order, which is the defendant's consent to entry his premises, can now be avoided, and the Order can effectively become a search warrant. Because, for instance, as Willoughby (1994) explains, a person in charge of the premises who cannot readily contact the defendant and has no desire to spend his own money taking legal advice will have to comply with the order in fear of being liable for 'contempt of court'. A second problem is the poorly developed but crucial role of the 'supervising' solicitor. As Hall (1995, p 51) reports, he may abrogate the restriction on searching the absence of the defendant and the restriction on removal of items before a list of them has been taken and confirmed with the defendant if it appears 'unpracticable' to comply with these requirements.}

(ii) Copyright infringement often requires immediate action or a pre-emptive strike. The usual delays of the civil justice system are not helpful and there is a need to expedite matters. This is where 'interlocutory' injunctions play a very important role. Interlocutory injunctions can be granted in advance of the hearing of the case in a quest to freeze the situation before damage can occur, pending a subsequent trial on the merits.

A particular example of interlocutory injunction, available especially in the UK, is known as the 'Mareva injunction'.\footnote{The name of this type of injunction is derived from the name of the plaintiff in the oldest case in this area: 
\textit{Mareva Compania Naviera SA v International Bulk Carriers SA} [1980] 1 All ER 213.} It may be granted to a plaintiff who has reason to believe that the defendant will move his assets out of the jurisdiction of the court with the result that the plaintiff, even if he is successful, will be unable to obtain effective redress. The injunction is granted pending the determination of the case, and has the effect of freezing the defendant's assets and bank accounts -thus preventing him from carrying on his business- until the proceedings are completed. Quite often an Anton Piller Order is combined with a Mareva injunction, thus forming a potent anti-piracy weapon. Another very effective type of injunction available in the UK is a 'class injunction' which can be executed against anyone falling within the class of persons defined in the order. A crucial
point to make is that the defendant need not be named on the order. A 'class injunction' is vital where ex parte relief is required, but it has not been possible to obtain names of defendants for inclusion on the writ. This is a common situation in case of piracy and counterfeiting, where pirates have managed to conceal their identity and cover their tracks. For example, in the case where such an injunction was first introduced, the class was defined as those traders selling goods bearing the pirated brand name, even though the said traders were not named in the original order.14

The general approach to interlocutory injunctions in the UK has been set out by the decision of the House of Lords in American Cyanamid Co v Ethicon Ltd,15 which remains the leading case in this area. According to that decision, two of the major factors that should be borne in mind in the award of interlocutory injunctions are: first, parties have to show that there is a 'serious question to be tried' at a future date (i.e., the court must be satisfied that the plaintiff's claim of an alleged infringement is not frivolous or vexatious); and second, given that an injunction is a equitable right, the balance of convenience between parties must be considered (e.g., the general practice requires the plaintiff to undertake to compensate the defendant for any loss sustained by reason of the injunction if the plaintiff failed to prove the case at full trial).

Another major factor that has a decisive role in whether an interlocutory injunction is to be granted or not is the extent to which damages are likely to be adequate remedy for each party and the ability of the other party to pay. Normally, in order to obtain any injunction, it must clear that damages must not be an adequate remedy. If, on the other hand, as expressly stated in American Cyanamid, damages would be adequate remedy (and any loss caused to the plaintiff can be quantified in damages) and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appears to be. The implication of the latter is that the plaintiff must wait until trial for his/her injunctive relief

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14 EMI Records Ltd v Kadhill [1985] FSR 36.
and, more importantly, his/her copyright is transmuted into a mere right to damages. It is important to remember, however, that copyright is a qualified monopoly right and not a right to money.

In the light of the above, it can argued that there is another factor that should be taken into account when assessing an application for interim relief, which is a consideration of the strength of the plaintiff’s case. It is submitted that if a clear view can be formed that there is an infringement, then the courts, while always bearing in mind the balance of convenience, should be permitted to grant an interlocutory injunction, regardless of whether the plaintiff’s loss can be quantified in damages or whether the plaintiff can be compensated for the infringement by damages.  

Finally, it can be said that an injunction in general is an important anti-piracy remedy for two additional reasons: first, it is often accompanied by an order for the ‘delivery up’ of infringing material (a civil compensatory remedy previously mentioned); and second, compliance with an injunction is ensured by the possibility of liability to fines and/or imprisonment for ‘breach’, provided that the plaintiff can prove that the injunction has indeed been breached by the defendant.

Concluding the reference to the civil preventive remedies, a final remark should be made. Despite their numerous advantages, it is no longer either practical or appropriate for copyright legislation to be enforced solely by civil means. The scale of today’s piracy is such that has attracted organised crime. Therefore, as de Freitas (1992) states, it is no longer simply a matter for private individuals to assert their private (civil) rights. And, the use of civil procedures to deter such criminal activities is clearly not enough. What is also required is the application of criminal sanctions.

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16 It should be noted that paying regard to the strength of the plaintiff’s case was the practice before American Cyanamid and it was once again brought to the fore by Mr Justice Laddie in his judgement for Series 5 Software Ltd v Clarke in December 1995. The particular case was not an intellectual property case. However, as Edenhorough & Tritton (1996) argue, its effect for copyright case is significant. Not only because the judge re-examined what should be the correct approach in the exercise of a court’s discretion when considering whether or not to grant an interlocutory injunction. But also because Series 5 Software Ltd v Clarke will be of great assistance to a copyright owner who is concerned about the unquantifiable effects of the defendant’s activities on the market, if it is clear that the defendant is infringing.
2. Criminal remedies

Criminal remedies consist in fines and/or imprisonment. The main advantages of using criminal, as opposed to civil law, are speedy and comparatively inexpensive proceedings that can be taken to follow up raids. In fact, a number of national laws, as well as providing for fines and/or prison sentences, also provide for forfeiture of pirate copies and equipment seized during raids. This is a highly appropriate form of penalty, and thus enforcement bodies frequently resort to it. Notwithstanding their apparent advantages, however, criminal remedies have certain serious drawbacks. First, technology has made piracy so profitable that, in most cases, even high fines are inadequate as a deterrent. Second, even in countries where piracy is openly anathematised as a crime, courts are reluctant to impose custodial sentences and hence main culprits often remain free. Third, fines do not compensate copyright owners as they go to the State. Finally, further problems arise with regard to proving not only infringement, where it is necessary to establish *mens rea* (that the accused knew he was dealing in infringing articles), but also ownership and subsistence of copyright. Indeed, in the matter of proof, the prosecution encounters the same difficulties as it does in civil cases when claiming damages and/or when applying for an injunction (civil remedies previously discussed).

In spite of their procedural shortcomings, criminal remedies have the potential to be the most effective piracy deterrent ever provided by law upon two preconditions. That copyright owners and courts alike are not hesitant to resort to this type of remedies. And, that penalties are realistic and commensurate to the gravity of the piracy problem. It is indicative that in countries where piracy has had a strong foothold during the last decade, prison sentences were absent in the vast majority of national laws, and fines were more often than not small or even insignificant. Finally, it should be stressed that, in the fight against piracy, it is not only essential for criminal remedies to be preferred over civil compensatory ones, something that it was not the case until recently. It is also necessary
for criminal penalties to be constantly upgraded in proportion to the size and scale of piracy, which indeed is the observed trend especially in countries most afflicted by the problem.

3. Administrative remedies

The most widespread administrative weapon against piracy is action taken by national Customs authorities. The Customs are involved in the anti-piracy battle on two distinct levels. On the one hand, they deal with the actual acts of piracy that constitute offences under the civil and criminal provisions of the national copyright laws. Hence, they are law enforcement bodies entrusted with the responsibility for restricting and/or prohibiting not only the importation, exportation and distribution within the country of pirate goods, but also the entrance or exit of persons associated with piratical activities. In addition, they have the power to seize infringing articles or equipment not only upon importation but also at any time thereafter. On the other hand, the Customs take action against malpractices associated with trade which are in conflict or in breach of the Customs law itself. Such offences, not foreign to trading with infringing articles, may arise from a misdeclaration of value or of origin as well as failure to pay import-export duties and taxes, falsification of import-export documents, transportation of stolen goods, and finally smuggling.

The linkage between the Customs law and the copyright law gives the Customs legal competence to deal with piracy. However, competent authorities Customs may be, but the implementation or enforcement of anti-piracy legislation is difficult because of the peculiar nature of piracy which concerns not only tangible goods but also the intangible rights in goods. Therefore, for the Customs to be effective in their task, they have to collaborate, both nationally and worldwide, with the parties directly affected by piracy, namely copyright owners and their representative bodies. An example of such a liaison is the Memorandum of Understanding signed in 1988 between the International Federation of the Phonographic Industry (IFPI) and the International Customs Co-operation Council (CCC) which contains guidelines on joint action aiming at combating piracy.
Most importantly, however, Customs authorities need to be able to distinguish genuine from bogus products and for that they have to rely much on advance information about whether infringement has taken place, and who and how is responsible. Such information is provided by other law enforcement agencies and governmental authorities which have traditionally been doing work in this area as well as by private associations set up for that particular purpose by copyright industries themselves. In fact, bodies such as the above are directly involved in the anti-piracy campaign as it will be seen from the following examples; for the detection and investigation of piracy activities and trade are as important anti-piracy measures as the prevention, deterrence and punishment of piracy, and they can eventually lead into administrative as well as criminal action being taken.

As far as law enforcement agencies are concerned, a major example at the international level is that of the Interpol. In fact, the International Police Organisation has been actively engaged in the battle against piracy since 1977 by adopting a Resolution (No. AGN/46/RES/7) entitled “International Traffic in Stolen and Unlawfully Duplicated Motion Pictures and Sound Recordings” where it asks the National Central Bureaus to: co-operate with other NCBs who request assistance in investigating piracy activities; ensure that local police forces and their governments are aware of the problem; and finally, draw their governments’ attention to the need of becoming parties of international copyright agreements, of implementing effectively the provisions of any such agreements, and of adopting procedures and/or enacting legislation to combat piracy (1983 WIPO Worldwide Forum on the Piracy of Broadcasts and the Printed Word).

In turn, at a national level, a characteristic example of governmental authorities’ earnest commitment to fighting piracy can be found in the USA. Since the second half of the 1970s, investigating piracy activities and pursuing the pirates has been an increasing area of FBI activity. Over the past 20 years or so, the Bureau has undertaken the biggest worldwide clandestine operations, employing hundreds of undercover agents, that have resulted in thousands of raids and seizures of pirate products worth millions of US dollars. However, FBI is not the only state agency
actively involved in the anti-piracy campaign. Recently, under the Clinton administration, the State finally responded positively to the calls of the copyright industries, mainly coming from Hollywood and especially Walt Disney Co., to extend operations beyond the national borders since it is abroad where the big losses from piracy occur. Following that, CIA itself decided to enter the battle by resorting to intelligence and counter-intelligence, and even industrial espionage with agents infiltrating companies across the globe in order to unveil moves against ‘the financial interest of the USA’, as one official put it.

The USA examples mentioned above are a major exception in a sense that, in the vast majority of cases, governments and conventional law enforcement agencies have not been so willing to get involved in the detection and investigation of piratical activities. Confronted with that reality, media industries decided to go to it alone by establishing private detective and enforcement agencies as well as international intelligence operations, all supported by the industries themselves. Such initiatives have been particularly materialised in countries with a big domestic production of copyrighted material and a large investment at stake worldwide. For instance, that was particularly apparent in the UK during the 1980s. First, following the example of MPAA (Motion Pictures Association of America), which has set up local Film Security Offices in several countries around the world since 1977, the FACT (Federation Against Copyright Theft) was launched in 1982, which meant to be the private detective body of all the major US and British film producers and distributors. The FACT does not only investigate the sources and outlets of piracy but also conducts security inspections and raids and even prosecutes offenders, thus functioning fully as a private body which implements administrative remedies (see relevant Table 6.4, Chapter 6, section 6.3 of the present thesis). Similar are the activities of the BPI’s (British Phonographic Industry) anti-piracy Unit, and the IFPI’s (International Federation of the Phonographic Industry) anti-piracy Operations Department. In 1984, the FAST (Federation Against Software Theft) was established, and later the same year the music and video industries jointly launched JAPIG (Joint Anti-Piracy Intelligence
Group). And finally, in 1986, all the British copyright industries launched a collective campaign by forming the all-inclusive 'UK Anti-Piracy Group'.

The national and international co-operation between private associations as well as eagerly committed governmental authorities and state law enforcement agencies is necessary for an successful anti-piracy battle. For the detection and investigation of piratical activities that the former are in charge with could result to an efficient application of administrative remedies and could also greatly enhance the possibilities for an effective civil and/or criminal prosecution.

(b) Alternative legal approaches

There are numerous cases worldwide where anti-piracy remedies have been sought through laws other than copyright per se. There are several reasons for such a diversity. One reason may be the total absence of copyright or neighbouring rights legislation. Another reason may be the inadequacy and/or the inapplicability of copyright and/or copyright related laws. A third reason may be that other legal approaches contain provisions that can be used more effectively than copyright for the deterrence and punishment of piracy. And finally, it may be that alternative laws are employed not to replace copyright but to complement it and extent its borders for a more comprehensive protection.

Coupling other laws to copyright for extra protection is not a new development; in fact, it has been a point of constant deliberation ever since audio-visual piracy became a grave and complicated problem. For example, the widely shared conviction that only criminal law can be an effective anti-piracy weapon has resulted, over the years, in the consideration of crimes other than copyright infringement that may be charged as a result of piracy. In addition, it should be noted that copyright infringements can also constitute offences other than under copyright laws for which the penalties are often heavier than those provided under the copyright law.
The resort to alternative legal realms besides copyright has been very succinctly epitomised, by James Bouras of the Motion Picture Association of America (MPAA), as the “Al Capone theory of justice: if you cannot get them for murder, get them for tax evasion” (WIPO 1981, PF/I/14). In fact, in the USA, but also in various parts of the world, charges have been successfully brought against pirates for crimes, apart from tax evasion, such as: theft, fraud, conspiracy, conspiracy to defraud, forgery, receiving and buying stolen goods, obscenity, pornography, racketeering, extortion, drug smuggling, and finally, malpractices that constitute offences under the Customs laws (previously mentioned).

In addition to the above by no means exhaustive list, there are two legal approaches that are worthy of a more profound reference hereinafter. Trademark law (mainly in the USA) and unfair competition law (mainly in continental Europe) have been very frequently invoked either to replace copyright or to supplement it.

1. Trademark law

The American law and experience provide useful ideas on how to combat piracy and counterfeiting through an industrial property approach. The various protectable elements of a phonogram/videogram, other than copyright, which a pirate may infringe and upon which a lawsuit may be based, include:

(1) a trademark or trade name (identification and distinction of goods);
(2) a service mark (identification and distinction of services);
(3) a trade dress (overall appearance of product’s packaging);
(4) the title of a product or of a work therein;
(5) a fictional character featured in the product (imitation);
(6) the representation in packaging or advertising (false representation or imitation);
(7) the indication of origin (usurpation of ‘made in’ or indication of a false place of manufacture);
(8) the personal rights of performers (right of privacy or right of publicity).

Under the US Trademark Statute (Lanham Act), remedies available to a victorious plaintiff for all the aforementioned infringement actions are broadly similar to those available under copyright law. For example, the usurpation of personal rights (8) could provide the basis of a civil suit for an injunction
(temporary and/or permanent) and damages. As regards the rest of the actions (1-7), whose common ground is the element of imitation which is likely to cause confusion to the consuming public, the infringer is liable for damages, lost profits and attorney fees; but also, the courts can issue temporary restraining orders *ex parte* forbidding sale and providing for seizure of counterfeit goods, similar to 'Anton Piller Orders' and 'Mareva injunctions' available under the UK law (previously mentioned).

In addition to civil remedies, all the actions apart from the usurpation of personal rights could incurre criminal action, too. Finally, as far as the possibility of administrative remedies, there is a great advantage in using trademarks, rather than copyright, to seize counterfeits at customs, according to David Goldberg of the US Trademark Association (WIPO 1981, PF/7). A phonograms/videograms producer may use few trademarks on the products in his catalogue, but in contrast, because each work is the subject of its own copyright, he may have hundreds or even thousands of copyrights.

Thus, it may be easy and inexpensive for him to record all of his trademarks with Customs, but difficult and costly to record all his copyrights (US law has long provided for the recording of trademarks or trade names and copyright registrations with Customs). Finally, it should be added, that Customs are empowered to seize counterfeit phonograms/videograms bearing a counterfeit trademark not only upon importation but also at any time thereafter; in addition, Customs are allowed to destroy them after the trademark owner has been notified and has recorded the copyright registration for the particular phonogram/videogram involved in the seizure.

Apart from assisting copyright, however, there are situations where trademark law has successfully substituted copyright. For instance, in cases where pirates have managed to circumvent copyright by trading on products without specifically duplicating audio-visual works, or where a sound recording or motion picture has been unlawfully duplicated but for which copyright protection is unavailable. Trademarks have also been invoked in situations where is difficult for a copyright holder to assert a copyright claim due to disputes over ownership, or due to a failure to have complied with formalities which may have thrown the work into the public domain (such as the
copyright notice requirement). It is in such situations, Goldberg (op. cit.) argues, that the only or best remedy to piracy would be the trademark law as an alternative to copyright.

2. Unfair Competition law

The notion of the unfair competition law being an alternative to copyright has been particularly strong in Central European legal traditions. In fact, in countries of continental Europe, where phonograms/videograms producers had once no copyright or specific right, the law of unfair competition used to be (e.g. in Belgium and Holland), or still is (e.g. in Switzerland), their first line of defence against piracy. Indeed, the fact that especially producers (persons and/or legal entities) were the first to seek additional protection under the unfair competition law, proved to be the pacemaker for the appreciation of certain other rights related to copyright (particularly in France and Germany). These other rights, widely known as neighbouring rights, have been eventually afforded to them under international Conventions. In fact, the complementary relation between copyright/neighbouring rights and unfair competition laws is clearly depicted in Article 3 of the ‘Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms’ (Geneva Convention 1971), where the law relating to unfair competition is one possible means of protection (alongside copyright, neighbouring rights and penal sanctions).

There is a series of cases where the law of unfair competition can play an important complementary role in relation to copyright. For example, claims against imitation of a fictional character or false representation in the packaging or advertising of a product can be asserted, apart from under trademark law, under unfair competition law, too. In addition, several other situations, which are provided in the German competition law for instance, are mentioned hereby (Heker 1995, pp 77-78). An action under competition law may be initiated in cases where: unprotected or no longer protected works are published; copyright provisions are not applicable; the claimant is unknown; the legal situation is unclear; diffuse rights of numerous rightholders are infringed without
the owners reacting; or finally, where a person or company exploits another person’s copyrights in a manner which is likely to give an advantage against the latter’s competitors.

However, it should be stressed that, notwithstanding the aforementioned cases, the law of unfair competition cannot replace copyright altogether, it can merely function subsidiarily as a safety net. Primarily, because it involves a number of disadvantages in piracy cases that render it an ineffective means of protection, as Davies points out (1986, pp 40-41). First, a phonogram/videogram producer is not in direct competition with a dealer, manufacturer, or importer of illicit recordings, and thus no action may be possible against the latter. Second, unfair competition usually entails some form of deception of the public, which is not present if the pirate product is plainly an unauthorised copy. Third, and most importantly, the only remedy in an action based on unfair competition is an award of damages, which are rarely recoverable or adequate. The speedy remedies of an injunction and orders of ‘search and seizure’ and destruction, as well as criminal sanctions, are not generally available under unfair competition law, as they are in the case of copyright and/or trademark infringement.

By way of conclusion, and in relation to both the possible alternatives to copyright discussed insofar, the following point should be stressed. Trademark and unfair competition laws cannot be ‘copyright equivalents’ despite having been frequently labelled as such. They can only function as ‘extra protection’ regimes in order to complement and not to displace or replace copyright. Not so much because the protection they afford has different roots than the protection afforded under copyright. Or simply because copyright has to take preference over both of them as a lex specialis. But because the duration of protection afforded under both trademark and unfair competition laws is in principle unlimited, which could lead to the grant of an indefinite monopoly position with regard to the exercise of a right, and which could eventually hinder access to intellectual creations. And the reason why copyright is of limited duration is precisely to safeguard that access.
8.2.3 Trade-oriented Measures

Legal measures, as it has been discussed insofar, lack, by and large, the necessary effectiveness to act as real piracy deterrents. At a national level, especially in countries which have traditionally been 'hotbeds' of piracy, copyright laws either do not exist at all, or the protection they afford is superficial by providing for nominal penalties or for no enforcement of sanctions. Even in countries where copyright laws exist, their implementation is plagued by procedural shortcomings, and 'extra-copyright' legal regimes are no viable alternatives. At the international level, the major copyright and neighbouring rights Conventions do not afford comprehensive protection due to several factors: either they contain provisions that allow member states to exclude protection of certain works (phonograms, videograms, cinematographic works); or certain works are not protected to the requisite standard altogether and/or against some forms of public communication; or they do not clarify, nor grant specific/exclusive rights, to 'authors' (in a general sense of the word); or they enjoy limited membership; or finally, because they do not provide for any enforcement procedures and anti-piracy measures.

One result of the lack of an effective, multilateral discipline has been the resort to unilateral and discriminatory trade action on the part of intellectual property-originating countries against those countries practising, or allegedly practising, 'illegal' or 'unfair' actions with respect to intellectual property (Curtis 1990, p 36). Such initiatives have marked a significant departure from the traditional reliance on international copyright conventions and have emphasised a growing awareness of deficiencies in national copyright protection (Dembert 1985, p 74). A country that has first initiated, and primarily resorts to, such steps, thus epitomising the notion that copyright nowadays is more of a

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17 The 5 major such Conventions are: the Berne Convention; the Universal Copyright Convention; the (Rome) Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; the (Geneva) Phonograms Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms; and, the (Brussels) Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.
trade than a culture issue, is the USA, incidentally the leading exporter of copyrighted works worldwide. The US government is convinced that a foreign government’s failure to recognise, respect and protect the property rights of US transnational corporations is serious enough to warrant trade sanctions or even act as a trade barrier against those countries (Bettig 1990, pp 59, 64). The US government applies to such countries a specific policy, known as ‘the carrot and stick approach’, to enforce copyright protection and eradicate piracy. Two characteristic types of that approach are foreign assistance agreements, and unilateral/multilateral negotiations based on trade leveraging.

The first type links copyright to assistance programmes and uses foreign aid as the ‘carrot’. The International Security and Development Co-operation Act (1983) requires the President of the USA to consider the extent to which the government of a country permits the use of US copyrighted material in its territory without the copyright’s owner expressed consent in determining the level of assistance to that country under the Foreign Assistance Act, the Agricultural Trade Development Act, and the Arms Export Control Act. Upon a finding of copyright infringement, the President may reduce by one-half the amount proposed by Congress as aid for that particular country (Dembert 1985, p 95).

Contrary to foreign assistance programmes, unilateral/multilateral negotiations based on trade leveraging link the level of copyright protection to trade benefits contained in the Generalised System of Preferences (GSP), which admits imports of developing country manufacturers duty-free into the US. In this type of ‘carrot and stick approach’, the ‘carrot’ is financial aid and import privileges, and the ‘stick’ is the removal of such privileges as well as the denial of most-favourite-nation (MFN) treatment, and ultimately, trade sanctions under ‘Section 301’ of the US Trade Acts.

Two areas, where the US government used the above ‘tools’ to combat copyright and other intellectual property rights infringement, are the Caribbean/Central America region in response to a high rate of satellite signal poaching, and the Far East where piracy reigns supreme across a wide
range of US copyrighted material, from books and phonograms to videograms and computer software.

In the Caribbean/Central America region, the case of piracy consists in stealing US programming from satellite for redistribution or rebroadcast via subscription TV and cable systems, and in taping material to sell or rent to the home video market. Under pressure from US pay-cable and pay-TV organisations, two anti-piracy provisions and the principle of GSP were incorporated in the Caribbean Basin Economic Recovery Act (1983), known as the Caribbean Basin Initiative (CBI). One goal of the CBI, which was the cornerstone of the Reagan administration’s Latin American policy, was to offer trade concessions as an inducement to CBI states to stop the unauthorised interception and use of US satellite broadcasts and to adopt domestic intellectual property laws (Dembert 1985, p 92). The CBI’s two anti-piracy provisions require the President of the USA, who determines whether a country receives or not trade benefits, not to designate any country a beneficiary one under GSP if a government-owned entity or nationals in such country engage in the broadcast of US copyrighted material without the expressed consent of American copyright owners (Boyd 1988, pp 155-156).

In the Far East/Southeast Asia, countries have been relying heavily on the US as both an export market and a leading source of foreign investment; but they also rank amongst the most egregious violators of US copyrighted material. In that light, the US government has enacted a series of trade-oriented measures to combat piracy in those countries and to exert pressure on their governments to introduce or enforce intellectual property legislation that are responsive to US economic concerns. One such measure was a 1984 amendment to the 1974 US Trade and Tariff Act that broadened the definition of commerce to include ‘transfers of information’, and permits the US President to retaliate against any ‘unfair’, ‘unreasonable’ and ‘unjustifiable’ trade practices affecting intellectual property (Dembert 1985, p 74). Under Section 301 of the 1984 US Act, the lack of copyright protection is an unfair practise and therefore subject to trade retaliatory measures (Curtis
In addition, the 1984 US Act tied the possibility of classifying countries under the GSP, which grants import privileges, to the willingness of these countries to protect intellectual property (Antons 1991, p 78).

The most recent measures, however, extended the options of the two previous Acts even further. First, in 1988, Section 337 of the Tariff Act 1930 was strengthened with the aim of protecting high technology intellectual property. Although that Section was originally designed to regulate unfair imports to the US and not to deal with intellectual property infringements, it has grown to become almost exclusively concerned with the latter (Lee & Hull 1990). Second, under the new ‘Super 301’ Section of the US Omnibus Trade and Competitiveness Act (1988), the US Trade Representative (USTR) is to identify annually countries (‘priority countries’) that do not provide adequate protection to USA copyright/intellectual rights holders, or fair access to USA exporters who rely on such protection. The USTR also draws up ‘watch lists’ of priority countries which have been given deadlines for improving their intellectual property protection and which have been threatened with trade sanctions should such improvement not occur within 6 months (Curtis 1990, p 36; Antons 1991, p 78).

The combination of the provisions of the three US Trade Acts (1974; 1984; 1988) mentioned above can cause serious damage to priority countries’ economies. Virtually all the Far East/Southeast Asian countries have been consistently present in the USTR’s ‘watch lists’ since 1989. The most recent example of a country threatened with US trade sanctions is that of China, who, with its persistent piracy record discussed in previous chapters, has justly earned for itself the title of the world’s No 1 pirate. As far as US copyright industries are concerned, their total losses due to Chinese piracy amount to US$ 866 million (1994 estimate). In 1994 alone, American companies have filed as many as 25 copyright infringement lawsuits in Chinese courts, out of which only one has been victorious so far (namely Walt Disney’s case) but only ‘on paper’ since damages have not yet been awarded. As a result of those developments, on February 4th this year (1995), US
trade sanctions were announced by the USTR Mickey Kantor on Chinese exports, worth up to US$ 3 billion, which would attract punitive 100% tariffs. China immediately retaliated and threatened tit-for-tat sanctions by imposing 100% tariffs on US exports. But China has more to lose as a third of its exports go to the US and it enjoys an annual surplus of over US$ 20 billion in trade with the latter.

The two countries found themselves on the brink of a trade war that would cost manufacturers at least US$ 1 billion a year on each side; the threatened US sanctions and Chinese counter-sanctions were to go into effect on February 28th 1995. The imminent trade war was finally averted just two days before the above deadline expired when China offered a series of bona fide gestures: it promised to launch a mass media campaign urging its citizens to boycott pirate products, to step up its army campaign on pirate factories, to set up anti-piracy task forces, and to apply stiffer customs checks. Finally, the Chinese authorities did more than announce future plans. In an attempt to prove that they really ‘mean business’, they revealed that certain ‘drastic’ measures have already been taken. According to the newspaper ‘China Daily’, which reflects the views and policy of the Chinese government, as many as 2,665 persons have been sentenced to death for piracy since 1991, and 200 of them have recently been executed. Sadly, however, such measures clearly violate ethical and moral standards and human rights, and are totally unjustifiable, especially in cases of copyright infringement.

The trade war between USA and China might have been avoided, but only temporarily. There is little indication that the threat of draconian US sanctions will force the Chinese authorities to keep their promises or will deter the Chinese pirates themselves. For China has been consistently present in the ‘watch list’ of priority countries ever since the ‘Super 301’ Section of the 1988 US Trade Act came into force, but the number of pirate CD plants has doubled during 1994 (from 15 to 29). That notion of defiance is aptly mirrored on the statement of the Chinese foreign trade minister himself.

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18 In fact, in February 1996, a year after the agreement which put off the trade war between USA and China, it was reported that progress has been limited largely to the retail level whereas production and export of pirate goods continued unabated. According to the IFPI, for example, more than US$ 100 million worth of Chinese pirate music exports flooded Europe alone in 1995.
who played down the impact of a trade war by saying: “This is nothing terrible. There are countless markets abroad for Chinese products” (The Guardian, 6/2/1995). That statement echoes only too well the view of Thailand’s Prime Minister who responded to the threatened suspension of GSP privileges for his country under the 1988 US Trade Act in the following fashion (Lepp 1990, pp 33-34):

“The GSP rights will not be there for ever, and the United States can drop Thailand from the list of beneficiaries at any time ... I think it is more important for Thailand to stand on its own feet by producing competitive goods in the world market.”

A similar notion of ‘defiance’ was reported in the Caribbean following the threatened trade and financial aid barriers spelled out in the US administration’s Caribbean Basin Initiative (1983). In 1986, just three years after CBI was put into effect, a US Information Agency survey showed that 18 cable companies and 17 TV stations in the region rebroadcast US programmes taken unlawfully from satellites to over 1 million households (Boyd 1988, p 153). Does such defiance stem from the fact that the concept of copyright is alien to Far East Asian cultures? Or is it based on the conviction, shared by Caribbean nations (and other countries), that the programmes which come to them from satellites through their own air space should be consumed like international radio broadcasts that have never required the prior expressed consent of copyright owners (Boyd 1988, pp 154, 159). Or, finally, does it emanate from the deeply-rooted belief, especially amongst many Third World nations desiring Western products, that information and entertainment should be free for all and that trade barriers restrict that ‘free flow’. In fact, as Bettig points out (1990, pp 64-67), the US government has been repeatedly criticised of using that ‘free flow’ as the rhetorical device for justifying its efforts to pry foreign markets open for US capital, and of linking its anti-piracy drive to the larger role it plays in helping US capital to secure such markets. The most successful form of such an intervention has been the bilateral trade negotiations. Bilateralism allows the US to use its economic power to leverage Third World countries unilaterally to open up their markets for exploitation by US multinational corporations. Finally, it is often suggested, the US government is not interested in
bringing new countries into international intellectual property regime and in seeing improvements in their national legislation out of some altruistic motives or in order to combat piracy as such. But because such developments will ultimately allow the leading sectors of the US economy to capitalise on their global dominance over intellectual property production. As Lee & Hull (1990) underline, referring to Section 337 of the reformed 1988 Tariff Act, such measures, if examined closely, are little more than ill-disguised protectionism dressed up as intellectual property provisions.

Bilateral actions have been also heavily criticised of being an unhealthy development (Curtis 1990), because they could perpetuate a system, not only of discrimination against whole countries and economic imperialism (Stanberry 1990), but also of media and cultural imperialism (Boyd 1988). In addition, all the trade-oriented measures discussed insofar, suffer the same defects that seriously question their long-term efficacy, as Dembert (1985, pp 94-95) stresses. Not only do they involve problems of uncertainty in defining ‘unfair’, ‘unreasonable’ and ‘unjustifiable’ trade practices (Section 301 of US Trade Acts 1974, 1984 and 1988); but also, more importantly, they rely on the economic leverage that the US currently exerts over infringing countries, a position that may not exist in the future. The US seems to forget that when it was still a developing country, it refused to respect intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development [extract from a 1986 US Congress Report mentioned by Kaplinsky (1989, pp 376-377)]. That view was echoed by Professor Goldstein during the latest WIPO Worldwide Symposium on the future of copyright and neighbouring rights (WIPO 1994, p 266). The digital revolution may change the terms of trade and the US may yet again become a net copyright importer as in the 19th century. For example, over the past 5 years, revenues form the sale of videogames in the US exceeded domestic motion picture box office receipts. It is no secret that the two companies that dominate the videogame market are not American but Japanese (namely Sega and Nintendo); indeed, both these companies have sued American companies for copyright infringement. The moral of this example to Goldstein is that protectionist measures cannot secure a
nation's interests for ever; protectionist steps that a country takes today, it may come to regret tomorrow.

Finally, it should be added that trade-oriented measures, apart from their dubious protectionist undertones, questionable long-term efficacy and temporary nature, are not always applicable. For example, as Bettig (1990, pp 62-63) reports, bilateral negotiations based on trade leveraging do not exist with regards to Gulf States simply because most of them are expressly prohibited from receiving GSP privileges in their commercial relations with the USA. It should be borne in mind that most of the OPEC counties are highly VCR-penetrated and rank amongst the largest violators of US films worldwide. However, without economic leverage, and hence without active government support, the US motion pictures industry has had to resort to market strategies to capture home-video markets for legitimate distributors. These efforts include offering a video product with a superior visual image than that of the pirate version, establishing 'legitimate' relations with local dealers and supplying them with pre-recorded cassettes in reduced prices in an attempt to abridge the differential between pirate and legitimate copies, and finally, releasing dubbed or subtitled pre-recorded cassettes closer to the date of the initial release in the US. Nonetheless, those efforts have largely been unsuccessful, partly because of the lack of US trade leverage over the Gulf countries, but also partly because of the different economic roles these governments see themselves taking in the future global economy.

The limited success of the US film industry, however, does not necessarily entail that private (market) strategies, as opposed to government strategies, are doomed to failure. For example, the music industry, spearheaded by the International Federation of the Phonographic Industry (IFPI), has managed to have some success in its anti-piracy campaign by adopting different strategies. In the Middle East, for instance, by appealing to the Islamic sense of national justice, and in the Far East by working closely with local government and enforcement authorities (Hong Kong, where the share of the pirate market plummeted from 90% to 5% during the 1980s, is one example).
By way of conclusion it can be said that every offending country is an individual case that warrants a different approach. The diversity of political, cultural, economic, legal and social factors at play in every pirate nation makes it very difficult to adopt a uniform policy and strategy to combat piracy. Appeals based on self-interest are not effective and can be negative if anti-piracy is seen to be a pretext for protecting the rights of multinational companies. Instead, appeals should aim at persuading, while taking into account the divergent philosophical stances that surround copyright, that piracy is theft which harms not only foreign copyright owners but also local creativity and indigenous production. Anti-piracy campaigns should also consist of training programmes aiming at encouraging foreign governments to introduce or improve their copyright legislation, and public and private sectors officials to enforce existent laws. Finally, addressing the piracy problem, as Bettig (1990, p 68) notes, should begin with developing an understanding of the dynamics of transnational capitalism and the role of international communications corporations operating within this system. Especially developing countries should be convinced, and not threatened with trade sanctions or with denial of financial aid, that the long-term benefits of intellectual property protection - the increased flow of ideas, information and technology into the country accompanied by the necessary transfer of training, experience and knowledge, the development of human capital, the development of indigenous innovation that would bring about more consumer choice and more competition, and the increased rates of cultural and economic development - will eventually surpass the short-term costs that may accrue in the process.
In recent years, there has been an increasing awareness of the importance of copyright for international trading relations. Also, the desire to combat its infringement has gathered a renewed momentum. This has attracted the attention of international institutions such as the European Economic Community (nowadays European Union) and GATT (General Agreement on Tariffs and Trade).

On the one hand, the GATT initiated the TRIPs Agreement (Trade Related Aspects of Intellectual Property) in order to establish among its Member States a set of minimum standards for promoting an effective protection and enforcement of intellectual property rights. On the other hand, however, it became clear that the battle against piracy requires also a harmonisation of national laws. As Holyoak & Torremans (1995, p 4) argue, it is much easier to eradicate counterfeits at the source with a common set of minimum protection rules than afterwards at a national border once they are in circulation. That realisation led the European Union to embark on a series of initiatives (e.g., Directives, Regulations, Resolutions and Proposals) in an attempt to approximate the copyright laws of its Member States.

It should be noted that the initiatives of GATT and the European Union, although primarily concerned with their respective Member States, have truly globalising tendencies. Indeed, these two bodies have become major players in the realm of international copyright, and their efforts can substantially contribute towards an international framework for the effective protection of copyright in the years to come.

1 In this context, the term 'copyright' is used in a generic manner, thus incorporating the term 'neighbouring rights'.
9.1 European Union

The European Commission first set out its plans to harmonise aspects of copyright law across the Community in a 1988 consultative document entitled 'Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action' (COM (88) 172 final). The Green Paper covered certain areas which, at the time, were considered to be of great importance and urgency, including audio-visual home copying, rental right, and databases. However, underlying everything was the problem of piracy and a strong case was made for concerted actions towards its confrontation. This action could take the following forms:

- substantive new rights should be enacted, particularly in favour of producers of films and sound and video recordings, performers, and broadcasting organisations (the so-called 'neighbouring' rights);
- effective 'search and seizures' procedures should be created;
- remedies and sanctions should be strengthened;
- co-operation between the competent public authorities and rightholders' organisations should be promoted at national, Community and international levels; and finally,
- consideration should be given to extending the Council Regulation on counterfeit goods (Council Regulation 3842/86) to include goods infringing copyright.

The 1988 Green Paper was merely a consultative document. In view of the fact that copyright and neighbouring rights accounted at the time for an annual volume of business worth some 150 to 250 billion ECUs (approximately US$ 180 to 300 billion), namely 3 to 5% of the Union's Gross Domestic Product (GDP), and of the increasingly international repercussions of problems associated with these rights and their economic and cultural importance, the Commission soon realised that a more comprehensive approach was needed. Thus, in 1991, it publish a document ('Follow-up to the Green Paper: Working Programme of the Commission in the Field of Copyright and Neighbouring Rights', COM (90) 584 final), in which it set out a programme of action to be
undertaken in order not only to harmonise copyright and neighbouring rights, but also, and more importantly, to strengthen them at the same time.

The motivation behind the harmonisation process was to alleviate differences between the Member States which might impede the achievement and proper functioning of the European common market. The desire to provide more effective safeguards for copyright and neighbouring rights throughout the world was also a motivating factor behind the strengthening of rights within the Community in relation to rights existing outside it (particularly in the context of the GATT/TRIPs negotiations where the Commission has been an active participant).

The ensuing review of the developments that followed the Green Paper and the Working Programme will mainly focus on those concerned with the audio-visual field. It should be noted that, in recent years, the Union’s audio-visual market has been growing by 6% per annum in real terms and that rate is being sustained.

Accession to International Conventions

The Commission felt that a minimum common base for harmonisation was to be found in the most recent versions of the major international Conventions on copyright and neighbouring rights. Thus, in 1991, the Commission presented a proposal for a Council decision (COM (90) 582 final) requiring all Member States to adhere to the 1971 Paris Act of the Berne Convention, and to the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. However, due to the opposition of some Member States that wished to avoid the Community extending its competence to such international conventions, and the subsequent ruling of the Council that the Commission improperly sought to force Member State ratification of the Conventions by means of a decision, the proposed decision was replaced by a non-binding Resolution adopted by the Council in 1992. The Resolution leaves the initiative to the
Member States but notes that they should undertake to become parties to the two Conventions by 1/1/1995.

Private Copying

Private copying had been identified in the 1988 Green Paper as one copyright issue requiring immediate action. To that end, in 1992, the Commission informally submitted to the Council a draft directive. According to that proposal, private copying would be permitted in exchange for a harmonised Community-wide levy on both blank tapes and recording equipment (sound and video, analogue and digital), and that levy was to be paid by manufacturers and importers of both software and hardware. Following opposition by some Member States, namely the UK, Ireland and Luxembourg, which at the time did not (and still do not) have levies, the proposal never materialised into a directive. As a result, a formal proposal for a directive is still awaited.

Rental and lending rights

The Commission recognised that forms of exploitation of copyrighted works other than by traditional sale, such as the rental and lending of sound recordings and videos in particular, were becoming increasingly common. The legal situation in Member States concerning these forms of exploitation and varied considerably and was not always clear. In the absence of any express rules, for instance, the ‘exhaustion of rights’ principle could arguably threaten the rightowners’ right to control the rental and lending of their works once these had been put on the market with their consent.

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2 'Rental' means making available for use, for a limited period of time, and for economic/commercial advantage; whereas 'lending' means making available for use, for a limited period of time and not for economic/commercial advantage, when it is made through establishments which are accessible to the public.

3 The European Court of Justice (ECJ) has developed the doctrine of ‘exhaustion of rights’ based on the Articles 30-36 of the EEC Treaty. It attempts to stop the owner of intellectual property rights from preventing infinitely the free movement of goods within the Community. This means that the first marketing of copyrighted articles, for example, if
The need to address these problems led to the adoption of the Council Directive 92/100/EEC of 19 November 1992 ‘on rental and lending right and on certain rights related to copyright in the field of intellectual property’ (‘Rental Directive’). The main provisions of the Directive are:

- the introduction of an exclusive right for authors, performers, phonogram producers and film producers to authorise or prohibit the rental and lending of their copyrighted works even after these works are sold or distributed. The ‘exhaustion of rights’ principle clearly does not apply to these rights since both the rental and lending of originals and copies of copyrighted works are intended for use only for a limited period of time.

- The exclusive right to authorise or prohibit rental and lending may be transferred, assigned or subject to the granting of contractual licences. For instance, in film contracts between performers and film producers, the former are presumed, subject to contractual clauses to the contrary, to have transferred their rental right to the latter.

- Where authors and performers have transferred or assigned their rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, they shall retain the right to an equitable remuneration. This right cannot be waived, but its administration may be entrusted to a collecting society.

- In order to make rental and lending rights effective in all Member States for all rightholders, the Directive introduces, for the first time in Community legislation, a series of further rights related to copyright (‘neighbouring rights’). It provides for exclusive rights of fixation, reproduction, distribution and public broadcast for performers, phonogram and film producers, as well as broadcasters. Furthermore, the Directive harmonises these related rights across the Community at a high level, which frequently goes beyond the Rome Convention. For instance, it provides exclusive

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*Fixation* means the embodiment of sounds, images, or both in a material form sufficiently permanent to permit them to be perceived, reproduced, or communicated during a period of more than a transitory duration.
rights for performers and grants a separate distribution right for the purpose of intensifying the combat against piracy.

Finally, the following remarks should be made as regards the future significance of Directive 92/100/EEC. Firstly, in the context of this Directive, 'rental' is not restricted merely to the hiring out of physical copies, but could extend to making available material on an electronic delivery environment. Thus, this Directive has far-reaching implications in that it offers a framework which could serve as a precedent for a number of new services, such as video on demand and its variants. Video on demand and similar forms of use closely resemble the making available for a limited period of time of a cinematographic or audio-visual work, and could be considered a form of remote video rental. Secondly, the provisions of this Directive on rights related to copyright served as a point of reference for subsequent Directives concerned with neighbouring rights, namely the 'Satellite and Cable' Directive and the 'Term' Directive.

Satellite broadcasting and cable retransmission

The proliferation of cross-border satellite and cable broadcasts in Europe in recent years has accentuated the need for a harmonised set of relevant copyright rules. For that purpose, the EU Council adopted Directive 93/83/EEC of 27 September 1993 'on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission' ('Satellite and Cable Directive'). The purpose of this Directive is not only to create a uniform legal framework, but also to provide the basis for a more competitive Community broadcasting environment which will better serve the free flow of information and communication.

As far as satellite broadcasting, the major point is the definition of communication to the public by satellite and the law applicable to it. According to the Directive, communication to the public occurs solely in the country where the signal is emitted to the satellite ('transmission' or 'emission' theory). Thus, satellite broadcasters transmitting programmes that can be received in more
than one Member States need to comply only with the copyright rules of the country in which the
signal originates ('country of origin' principle). The Commission, in adopting the 'emission' theory,
rejected the so-called 'Bogsch' theory, which, incidentally, is consistent with the Berne Convention
(Article 11bis (1)). According to the 'Bogsch' theory, both emission and reception are essential
elements of the communication to the public by satellite; and, the copyright law of the emission
country and the copyright laws of the countries inside the foot of the satellite should be applied
cumulatively. To the Commission's view, the 'Bogsch' theory could negatively affect the creation of
a single audio-visual area for broadcasting because it has the following disadvantages:

- a person wishing to broadcast a programme by satellite would have to negotiate separately with the
  rightowners in all the states within the footprint (whereas the 'emission' theory allows broadcasters
to acquire all programme rights only in the country in which the signal originates);
- the lack/failure of only one contract would risk hindering the whole transmission;
- it might be difficult to ascertain the countries in which the signal can be directly receivable; and,
- it renders broadcasters liable to litigation if a signal, for which rights have been cleared in one
territory, spills over to another for which rights have not been acquired.

However, it should be noted that, while the Commission endorses the 'country of origin'
principle, it does not turn a blind eye to the impact of the satellite broadcast in the footprint
countries. Indeed, the 'transmission' theory does not entail that rightholders would be unable to
demand remuneration concurrent with the real extent of use of their protected works. On the
contrary, in arriving at a fee for the rights acquired, the parties may take into account all aspects of
the broadcast such as the actual and/or potential size of the public to which copyrighted material is
made available.

Finally, for the purposes of communication to the public by satellite, the (neighbouring) rights
of performers, phonogram producers and broadcasting organisations shall be protected in
accordance with the relevant provisions of 'Rental Right Directive' (Directive 92/100/EEC
previously reviewed). In addition, Member States must provide an exclusive right for the author to authorise the communication to the public by satellite of copyrighted works; and, this authorisation may be acquired only by agreement.

As regards cable retransmission, this Directive aims at preventing the obstruction of transfrontier programme retransmission and, to that end, it provides the following:

- cable retransmission can take place on the basis of individual or collective agreements between copyright owners, holders of related rights and cable operators;
- the cable operator cannot make up his programmes on the basis of the rights he has acquired beforehand and he must obtain authorisation from every rightholder in each part of the programme retransmitted;
- holders of related rights may exercise their right to grant or refuse authorisation to a cable operator only through a collecting society (it should be noted that this does not apply to the original or derived rights exercised by broadcasters in respect of their own transmissions);
- if a rightholder has not transferred the management of the relevant rights to a collecting society, the collecting society managing rights of the category in question is deemed to be mandated to manage his rights (the aim of collective administration is to ensure the smooth operation of contractual arrangements by preventing the intervention of outsiders holding rights to individual parts of the retransmitted programme); and finally,
- Member States shall ensure the appointment of mediator(s) whenever there is a deadlock in the negotiations for a cable retransmission right. Member States shall also ensure by means of civil or administrative law that parties enter and conduct negotiations regarding authorisation for cable retransmission in good faith and do not prevent or hinder such negotiations without valid justification.

Finally, and in direct relation to the ‘Satellite and Cable Directive’, reference should be made to the Commission’s latest initiative in its effort to regulate the Community’s broadcasting
environment and create a single European audio-visual area. In 1995, the Commission tabled a Proposal (COM (95) 154 final) for the approval of the 'European Convention relating to questions on copyright law and neighbouring rights in the framework of transfrontier broadcasting by satellite' ('Transfrontier Satellite Broadcasting Convention'), which was adopted by the Council of Europe in 1994. The aim of that Convention is to extend to a pan-European level the pursuit of the objectives set by Directive 93/83/EEC regarding satellite broadcasting, given the fact that the latter does not apply to broadcasts originating outside the European Union. As far as the Convention's subject-matter, it falls largely within the scope of the Community Directive. Namely, a transmission of works is governed by the law of the state in the territory of which the signal originates ('country of origin' principle); and nothing new is added to the provisions regarding the exercise of copyright and neighbouring rights, which have been already laid down in the text of Directive 93/83/EEC.

Duration of copyright protection

The harmonisation process that the Community has embarked upon would not be complete if Members States were allowed to accord different terms of protection to copyright and neighbouring rights. Such discrepancies not only could hinder the creation of a uniform basis for the protection of rightholders, but could also lead to disruptions of the free movement of goods within the Community. These two reasons led to the adoption of the Directive 93/98/EEC of 29 October 1993 'harmonising the term of protection of copyright and certain related rights' ('Term Directive').

As far as copyright, the main provisions of this Directive are:
- the term of protection for authors runs for the life of the author (or the last surviving author, if more than one) plus 70 years after his death;
- where the identity of the author is unknown, or a work is deemed to have been created by a corporation or other legal person (in those Member States permitting such), the term of 70 years begins to run after the date the work was lawfully made available to the public;
- as regards cinematographic or audio-visual works specifically, the Directive requires that the principal director of such a work be considered as its author or one of its co-authors. Member States are free to designate other co-authors. However, the term of protection shall expire 70 years after the death of the last of the following persons to survive, regardless of whether these persons are designated as co-authors: the principal director; the author of the screenplay; the author of the dialogue; and, the composer of music specifically created for use in the cinematographic or audio-visual work. Finally, Member States are allowed to introduce rebuttable presumptions that authors (i.e. directors) may be presumed to have transferred the exploitation of their works (i.e. films) to the producer (either a natural person or a corporate one).

As far as related rights, the Directive requires that:
- the rights of performers shall expire 50 years after the date of the performance, or from the date of the first publication ( fixation) or first communication to the public of such performance, whichever is the earlier;
- the rights of phonograms and films producers shall expire 50 years after fixation, or first publication or first communication to the public, whichever is the earlier; and,
- the rights of broadcasting organisations shall expire 50 years after the first transmission of the broadcast, either by satellite or cable.

Finally, two particular provisions of the ‘Term Directive’ that bear particular significance must be mentioned at this point. Firstly, this Directive includes a reciprocity clause regarding the protection of copyright and neighbouring rights vis à vis non-EU countries. Namely, rightholders from such countries do not benefit from the increased term of protection granted under the Directive unless these countries confer similar protection on EU nationals. Secondly, this directive has the potential to revive rights in some Member States where a protected work has already passed to the public domain but where in other Member States that work is still protected. Namely, the terms of
protection shall apply to all works and subject matter which are protected in at least one Member State, on the date of the implementation of this Directive (1/7/1995), pursuant to national provisions of copyright or relate rights or which meet the criteria for protection under Directive 92/100/EEC (the 'Rental Directive').

Counterfeit and pirate goods

The Council of the European Union, acting on a proposal from the Commission, has recently adopted a new Regulation intended to prevent the import, export and transit of counterfeit and pirated goods (Council Regulation No 3295/94 of 22 December 1994 'laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods'). This Regulation replaces an existing 1986 Regulation which was concerned solely with the prevention of free circulation of counterfeit goods (Council Regulation No 3842/86 of 1 December 1986 'laying down measures to prohibit the release for free circulation of counterfeit goods').

Apart from extending the rules to cover a wider range of operations to be undertaken by the competent authorities (e.g., customs authorities) such as transit and export, the new Regulation contains two other main innovations. First, the protective rules are extended to cover copyright and neighbouring rights. And second, powers are given directly to customs authorities, enabling them to act without first obtaining judicial authority or taking interim protective procedures. For instance, this Regulation obliges Member States to adopt the measures necessary to allow the competent authorities: to destroy counterfeit and pirated goods or dispose of them outside commercial channels, and to take any other steps which deprive the persons trading in such goods of any economic benefits.

5 In the context of this Directive, the term 'work' refers to material protected by copyright (author's right); and the term 'subject-matter' refers to material protected by neighbouring rights (phonograms, performances, films and broadcasts).
Databases

Recent years have seen a growth (real and potential) of multimedia products and services, and the emergence of the Internet and other networks as the means of their 'on-line' delivery. In 1992, for instance, the Commission predicted a trend towards greater user accessing of works from databases via networks rather than user acquisition of copies of works fixed on material supports. The Commission also expected that the EU market for databases would reach 3.5 billion ECU (over US$ 4 billion) in 1992, and grow exponentially thereafter. All the above accentuated the need for the legal protection of databases and led to the adoption by the EU Council of a Common Position for a Directive on the topic (Common Position No 20/95 of 10 July 1995), which later became Directive 96/9/EC of 11 March 1996.

This Directive seeks to protect databases on a dual basis: first, it harmonises copyright protection of databases in whatever form (i.e. on-line and off-line); and second, it introduces a parallel, *sui generis* from of protection that would be automatically available for all databases, but would be more limited than copyright protection.

The main provisions of the Directive as regards copyright are:

- in order to be protected by copyright, databases must constitute, by reason of the selection or arrangement of their contents, the author’s own intellectual creation;
- the author of a database is the natural person or group of persons who created it, or, where the legislation of the Member States permits, the legal person designated as the rightholder;
- the duration of copyright protection of databases is the same as that provided for literary works and is determined in accordance with the relevant provisions of the ‘Term Directive’;

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*According to the Common Position, a ‘database’ is a collection of works, data or other independent materials arranged in a systematic or methodical way and capable of being individually assessed by electronic or other means. This definition covers both electronic and non-electronic databases, and excludes haphazard collections.*
- the author of the database shall have, in respect of the expression of the database which is protectable by copyright, the exclusive right to do or authorise the following:
- reproduction (temporary or permanent, by any means and in any form, in whole or in part);
- translation, adaptation, arrangement or any other alteration;
- any form of distribution the public of the database of copies thereof;
- any communication, display or performance to the public; and finally,
- any reproduction, distribution, communication, display or performance to the public of the results of translation, adaptation, arrangement or other alteration.

- copyright protects the structure of the database and not the contents themselves. However, the Directive does not take away any rights subsisting in those contents themselves. For example, the permission of all the owners of rights in the contained materials would still be needed to incorporate them in the database and the n to distribute or transmit them;

As far as the sui generis right introduced by the 'Database Directive', the following remarks can be made:
- it is a new economic right which aims at protecting the substantial investment made by the database maker;
- it consists of a right to prevent the unauthorised extraction and/or re-utilisation of the contents of a database, in whole or substantial parts, for commercial purposes;
- it has the advantage that it exists automatically, regardless of whether the database can meet the 'originality' requirements to qualify for copyright protection under the Directive;
- its term is more limited than that of copyright protection. It will run from the date of creation of the database and will expire at the end of a period of 15 years from the date when the database was first made available to the public. Any substantial change to the contents in the database, which will result in the database being considered a substantial new investment, will result to a fresh 15-year term;
it is not covered by existing multilateral conventions (e.g., Berne, Rome, or Universal Copyright Convention), and thus it is not subject to the national treatment requirement expressed in those conventions. As a result, beneficiaries of the \textit{sui generis} right can only be nationals, residents or companies of a Member State. Nevertheless, the Directive makes provisions for agreements that could extend the \textit{sui generis} right to databases created by nationals and companies of non-EU countries.

Finally, it should be added that the 'Database Directive', and particularly its provisions regarding the \textit{sui generis} right, have important future implications for the following reasons. Firstly, the 'restricted acts' in relation to this new right (i.e. extraction and/or re-utilisation) are not those with which we are familiar in a copyright context. Instead, it is access and use that they seek to restrict, with copying no more than a special type of use. Thus, the \textit{sui generis} right is a right tailored to an information age and not tied to physical information carriers such as books and tapes. Secondly, the fact that this new right applies irrespective of the eligibility of a database for protection by copyright renders it indistinguishable from a fully 'multimedia right' which many have already called for. Ultimately, this Directive as a whole promises to be the basis of all complementary future initiatives concerning the aspects of copyright and related rights relevant to the emerging 'information society'.

**Information society**

If the information society is to develop successfully, the many services and products being created must be able to benefit fully from the 'information superhighway'. Their expansion must take place in a regulatory framework which is coherent at national, Community and international levels. There is no doubt that copyright laws should be adapted in order to respond to the new and varied requirements which may appear, raising unprecedented issues.
To that end, for example, the Commission of the European Union recently introduced a relevant consultative document, namely a Green Paper 'on copyright and related rights in the information age' (COM (95) 382 final, of 19 July 1995). This Green Paper sets out the background to a number of questions of copyright and neighbouring rights which seem to need examination in order for policy choices to be made as the information society develops. These questions are concerned with the application of rights to the content of the new products and services in the information society, including certain legal and technical aspects which are inseparably linked with the effective exercise of rights. Questions to be examined are:

- applicable law;
- exhaustion of rights and parallel imports;
- reproduction right;
- public communication right;
- digital dissemination or transmission right;
- digital broadcasting right;
- moral rights;
- acquisition and management of rights; and finally,
- technical systems of identification and protection.

9.1.1 An Overall Assessment of the European Union's Harmonisation Process

The Commission’s ambitious attempt to harmonise the copyright laws of the Member States was bound to be fraught with difficulty, not the least because Europe contains the two major and contrasting world copyright systems. On the one hand, the Anglo-Saxon copyright system, which has influenced copyright development throughout the common law world; and on the other, the Continental droit d'auteur and neighbouring rights systems which have influenced civil law countries worldwide. It is generally agreed that, so far, the civil law system, which has always been more
concerned to protect the interests of authors, has had a greater influence upon the harmonisation process.

A major example of that is one particular provision which reoccurs in three Directives (i.e. the 'Rental Directive', the 'Satellite and Cable Directive', and the 'Term Directive'). According to that provision, the principal director of a cinematographic and/or audio-visual work is to be considered as its author or co-author. This comes to a complete contradiction with the Anglo-Saxon system which has tended to attribute authorship to the film producer, despite the fact that Member States are free to provide for authorship to be shared between the principal director and other creators.

However, it should not be thought that the Commission has always preferred civil law solutions to those of common law systems. For instance, in the 'Satellite and Cable Directive' and as regards the copyright law applicable to satellite broadcasting, it rejected the 'Bogisch' or 'communication' theory and favoured the 'country of origin' principle which has been adopted in the major representative country in Europe of the Anglo-Saxon tradition, namely the UK. Another example is that of the 'Database Directive', which limits the copyright protection for compilations only to those which are the result of intellectual creation, thus reflecting the common law approach to copyright of the USA.

Taking the aforementioned examples into account, it can be said that, on the whole, the Commission has endeavoured to provide a framework to maintain a balance between authors and producers and to enable the effective participation of all parties in the economic exploitation of copyright and neighbouring rights. Many argue that that aim has indeed been achieved by a three-fold process. First, by giving all authors exclusive, transferable rights. Second, by introducing presumptions of transfer of such rights in some cases to producers. And third, by ensuring that authors (and indeed, performers) retain at least an unwaivable right to equitable remuneration once they have transferred, assigned or licensed their exclusive rights to producers and/or publishers.
Finally, it should be added that the European Union is undeniably a very active forum of copyright legislative activity. Indeed, it has set trends for many countries outside its borders to follow, and is now considered one of the major forces in the politics of world copyright development, along with the USA, the World Intellectual Property Organisation (WIPO) and the General Agreement on Tariffs and Trade (GATT).

9.2 GATT (General Agreement on Tariffs and Trade)

GATT is the largest trade forum worldwide. Its aim is to establish a multilateral trading regime among its Member States (which currently amount to over 120) in order to achieve trade liberalisation by means of reducing import-export tariffs and of preventing unfair competition. Since its establishment in 1947, there have been eight rounds of GATT negotiations (the so-called GATT Rounds) where Contracting Parties have been striving to meet the aforementioned goal. The latest such Round, which began in September 1986 in Punta del Este, Uruguay (the Uruguay Round), was completed in December 1993, and was officially concluded in April 1994 in Marrakesh, Morocco.

The Uruguay Round has been a real stepping stone for international copyright and its protection. For it was for the first time that the issue was ushered into the GATT agenda under an also newly introduced item for negotiations called TRIPs (Trade Related Aspects of Intellectual Property Rights). Until the Uruguay Round, the GATT approach to intellectual property had been limited and the forum had not dealt with the substantive national and international norms of protection of intellectual property rights.

According to the Declaration of Member States’ Ministers that launched the Uruguay Round, the ambitious objective of the TRIPs negotiations was to develop a multilateral framework of principles, rules and disciplines in order to promote effective and adequate protection of intellectual property rights (IPRs), and to ensure that deficient levels of protection and enforcement of IPRs do not themselves become barriers to legitimate trade. To that end, Contracting Parties should
undertake specific obligations to enact adequate substantive standards in their national laws for the protection of IPRs and for border and internal enforcement measures.

What is the rationale behind the inclusion of TRIPs into GATT? There are a number of reasons, such as:

- the increase in the percentage of international trade in goods protected by intellectual property rights since 1947;
- a mounting concern about the impact on trade of infringements of IPRs. For instance, the International Chamber of Commerce has recently calculated that up to 6% of total world trade is in products which violate intellectual property rights;
- a growing consciousness of the importance of IP as a proportion of international trade, especially in the context of the development of 'high tech' industries during the 1980s. That importance is succinctly underlined by the fact that IP will be one of the three main pillars of the future World Trade Organisation (WTO), which will eventually succeed GATT, alongside trade in goods and trade in services;
- the lack of adequate protection of IPRs in some markets can distort trade which, in turn, can lead to a loss of revenue and also to piracy and counterfeiting;
- the realisation that existing international IP Conventions do not provide a sufficiently effective body of rules for the enforcement of IPRs. Additionally, these Conventions, unlike GATT, do not contain any workable mechanisms either for resolving trade-related disputes or for ensuring compliance with the obligations they lay down;
- finally, given the volume of trade involved in the field of IP, the decision to initiate the TRIPs negotiations took full account of the desirability of finding a multilateral solution to the trade tensions emerging. For the alternative was likely to have been a recourse to unilateral action (whose most renowned examples are Sections 301 and 337 of the 1988 US Trade Act), whose negative consequences have already been underlined (Chapter 8, section 8.2.3).
The genesis of TRIPs has generated a vehement debate. Many argue that GATT is the appropriate forum for such an undertaking, while others would like to see such an initiative come from WIPO (World Intellectual Property Organisation), which incidentally administers all the IP Conventions. The aim of the following analysis will be twofold: to examine the main points of the TRIPs Agreement, focusing on copyright and neighbouring rights; and, in parallel, to compare its provisions with those of the Berne and Rome Conventions. However, the ultimate goal will be to investigate whether the TRIPs Agreement can live up to its pledge which is to improve the level of protection of IPRs on a worldwide basis.

9.2.1 The 1994 TRIPs Agreement

Summarising the basic features of the TRIPs Agreement, it can be said that it does three main things as regards IP and in particular copyright and related rights. First, it lays down the minimum standards of protection that each Contracting Party must provide; namely, it defines the subject-matter to be protected, the rights conferred, the limitations and exemptions to those rights, and the minimum term of protection (Part II, Section 1). Second, it specifies in detail the procedures and remedies that must be available so that rightowners can effectively enforce their rights (Part III). Third, it makes disputes about the respect of these obligations subject to an international dispute settlement mechanism (Part V); the functioning of that mechanism is probably the most basic feature of GATT as an international trade forum.

Analytically, the provisions of particular importance to copyright and neighbouring rights are as follows:

- Part I contains provisions of general application, such as national treatment (Art.3) and most-favoured nation (MFN) treatment (Art.4). It should be noted that these two principles constitute the embodiment of the whole GATT philosophy. According to these principles, and as regards the protection of IP, each Member State shall accord to nationals of other Member States treatment no
less favourable than that it accords to its own nationals (national treatment); and any favour, advantage, privilege or immunity granted by a Member State to the nationals of another country shall be granted immediately and unconditionally to the nationals of all other Member States (MFN treatment).

However, there are notable exceptions from these obligations which are created in respect of the (neighbouring) rights of phonogram producers, performers and broadcasters. The obligation of Member States to accord national treatment and MFN status to these categories of beneficiaries only applies as regards those rights provided under the TRIPs Agreement (Articles 3(1) and 4(c)). Furthermore, exempted from the MFN obligation is any favour, advantage, privilege or immunity accorded by a member and granted in accordance with the provisions of the Berne Convention or the Rome Convention authorising that the treatment accorded be a function not of national treatment, but instead of the treatment accorded in another country (Art.4(b)). In other words, the TRIPs Agreement allows reciprocal treatment in respect of neighbouring rights; which, in effect, means that Members are allowed to grant foreign works/nationals the levels of protection’ awarded to them in their national territories (‘country of origin’ in the light of the Berne Convention principles). Finally, it should be stressed that these exemptions generated a great deal of friction between signatory states of the TRIPs Agreement and bore significant consequences on the outcome of the whole GATT negotiations.

The rationale behind these exemptions was explained by Adrian Otten, Director of the Policy Affairs Division of the GATT Secretariat, during an international conference on IP held in Athens, Greece, in April 1994 (hereinafter referred to as ‘The 1994 Athens Conference’). The TRIPs

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As Blakeney (1994) explains, ‘protection’, for the purposes of Articles 3 and 4 of the TRIPs Agreement, includes matters affecting the use, availability, acquisition, scope, maintenance and enforcement of rights.

That Conference was organised by the European Communities Commission (Directorate General XV) in co-operation with the Greek authorities, and was entitled ‘International Conference on Intellectual and Industrial Property - Objectives and Strategies’. One of its objectives had been to assess the outcome of the TRIPs Agreement which was due to be officially signed in Marrakech, Morocco, on the 15th of April 1994.
Agreement, while establishing for the first time a truly multilateral recognition that neighbouring rights holders should benefit from IP protection, it nonetheless leaves substantial differences in the level of protection granted under the laws of different countries. It is precisely because of that, Otten claims (p 25), that the principles of national treatment and MFN treatment do not apply to those rights of the related rights holders which are not provided under the TRIPs Agreement. In other words, these exemptions were included in the TRIPs Agreement because some signatory states, whose legislation affords high levels of protection to neighbouring rights' holders, were not willing to treat equally works and/or nationals of other Members where such high standards are not provided or recognised.

The question of exemptions was an issue of intense debate until the last day of the negotiations between two decisive protagonists of the Uruguay Round, namely the EU and the USA. The background of their confrontations, which focused in particular on the treatment of audio-visuals, is comprehensively presented by Dworkin (1995, p 171).

On the one hand, the EU has adopted an aggressive policy with respect to some of the measures which increase protection for rightholders (such as, for instance, concerning the extended term of protection for copyright and related rights under Directive 93/98 discussed in section 9.1). These measures will be available to those from outside the Union only on the basis of reciprocity of treatment. For, it is claimed, reciprocity is the only answer as long as the exporting country does not accept to increase its domestic level of protection. One of the recipients of that claim is the USA, who are not member of the Rome Convention, and where the term of copyright is 50 years \( pma \). Consequently, the countries of the EU will not treat US musical works the same way as EU-originated ones ('national treatment'); which means that US works will not be entitled to the 70 years \( pma \) available throughout the Community by virtue of the 'Term Directive', but instead they will be granted the term awarded to them in the USA ('country of origin').
On the other hand, as Dworkin notes (ibid.), the USA have vehemently objected to that development maintaining that the Commission is undermining one of the most fundamental principles of international conventions, namely that of national treatment.9

The EU/USA differences could have been resolved in the framework of the GATT/TRIPs Agreement. Because, according to the ‘most-favoured-nation’ principle (Art.4), EU States would be obliged after all to grant the ‘Term’ Directive’s new extended terms of protection to works/nationals of non-EU Member States who are members of the TRIPs Agreement (e.g., the USA). However, the inclusion of the exception of Article 4(b) previously discussed will only complicate matters further, both at a bilateral and an international level. In effect, as Ware et al. (1995, p 409) stress, this exemption makes the TRIPs provisions consonant with the ‘Term Directive’, which looks at countries of origin in the light of the Berne Convention. As a result, the highly contentious topic of (principally US) audio-visual imports to Europe, which has been a source of friction between the United States and the European Union until the last day of the negotiations, was finally omitted from the copyright/related rights provisions of the TRIPs Agreement.10

9 It should be noted, however, that they are cases where the USA have also forsaken the principle of national treatment in international agreements. For instance, in the framework of the NAFTA (North America Free Trade Agreement) between USA, Canada and Mexico, material reciprocity becomes the rule for performers’ rights in sound recordings with regard to the secondary use of these recordings for lack of such rights in the USA and Canada (Gendreau 1995, p 492).

10 The topic of US audio-visual exports to Europe has also been a source a friction during the negotiations of the GATS (General Agreement on Trade in Services), which was also signed on the 15th April 1994 in Marrakesh as part of the completion of the Uruguay Round (it should be borne in mind that trade in services will be one of the three pillars of the successor of GATT, namely the WTO, alongside trade in goods and intellectual property). The focus of the dispute has been the provisions of the EC Directive 89/552 (‘Television Without Frontiers’) which propose quotas on television so that the majority (51%) of programmes shown to be of European production (‘origin’) in order to protect European culture and broadcasters. However, as de Witte (ibid.) argues, the Commission’s main line of defence has consistently been that the audio-visual quotas might arguably be considered as restrictions of the trade in services, but not of the trade in goods, and that therefore the GATT Agreement could not apply to them. In other words, it can be said that the dispute was founded on the different prisms through which the audio-visual works in general are approached by the two sides. The USA see them as commercial products, while most EU countries deem them cultural products. During the last stages of the GATS negotiations, the Americans, who control over 80% of the films shown in Europe, demanded that such limitations should not be introduced. Yet, the Community did not make any specific offer for the reduction of quotas; it also claimed an exemption from the one principle that applies to services immediately, namely the principle of the most favoured nation so as to be able to preserve the privileged treatment of non-EU European states within the framework of the Directive 89/552, and of co-productions with such states in
Finally, it should be added that the copyright industries, succinctly expressed by IFPI ('Press Information', 17/12/1993), characterised the exceptions discussed above as lost opportunities. It is claimed that the failure to secure complete protection from discrimination against foreign performers, broadcasters and phonogram producers is damaging not only to the interests of all rightholders but also to the future influence of the WTO and the multilateralism it represents. All that tension could have been avoided, according to IFPI ('For the Record', January 1994), if TRIPs had transcended the doctrinal differences between copyright and related rights (that could lead to a higher level of protection) without having treading too far into the nearly religious doctrines that have kept the two realms apart in many countries. Instead, the two realms are treated differently within Part II, Section 1 of the TRIPs as it will be seen below.

- Part II, Section 1 (Articles 9-14), deals with the very important issue of minimum standards of protection of copyright and neighbouring rights. While it is explicitly implied that the Berne Convention provides adequate basic standards of copyright protection (Art.9(1)), the ultimate goal of the TRIPs Agreement was to enhance the protection catered for under the relevant WIPO Conventions, namely to craft not only a 'Berne Plus' but also a 'Rome plus' international framework. The ensuing analysis aims at examining whether and to what extent that goal has been achieved.

Article 9(1) specifically exempts Member States from having rights or obligations under the TRIPs Agreement in respect of moral rights conferred under Article 6bis of the Berne Convention, thus creating a 'Berne minus'. It should be noted that this provision was included in deference to the
powerful US lobby (US do not specifically recognise moral rights). However, this does not prevent Member States from recognising moral rights for much longer.

Article 10(1) provides that computer programs are to be protected as literary works under the Berne Convention ('Berne equal'). Article 10(2), following substantially the EU Directive on the subject (see section 9.1 of the present chapter), states that both electronic and non-electronic databases which, by reason of the selection or arrangement of their contents, constitute intellectual creations are to be protected as compilations.

Article 11 is a complex provision. On the one hand, it goes beyond Berne in that it obliges Member States to provide authors and their successors in title the right to authorise/prohibit the commercial rental of originals or copies of their cinematographic works. On the other hand, however, Member States will be exempted from this obligation unless such rental has led to widespread copying of such works which is "materially impairing the exclusive right of reproduction" conferred on authors and their successors in title. Notwithstanding its complexity, however, it should be stressed that Article 11 introduces a rental right in an international agreement for the first time ever, and has a number of parallels with the Rental Right Directive of the EU (see section 9.1 of the present chapter).

Article 14 deals exclusively with the protection of neighbouring rights' holders. Its provisions will be dealt with hereinafter in direct juxtaposition with the relevant WIPO (i.e. Rome) Convention.

The scope of Article 14(1), concerning performers, is significantly limited as opposed to that of its counterpart Article 7(1) of the Rome Convention. Under the former, performers are allowed to prevent the fixation of their (unfixed) performances solely on phonograms and to prevent the broadcasting or public communication of only their live performances, while the latter provides the possibility of preventing both the fixation and the broadcasting or public communication of their performances in general.
As regards phonogram producers, Article 14(2) grants them the right to authorise/prohibit the direct/indirect reproduction of their phonograms ("Rome equal"), and Article 14(4) accords them the right to authorise/prohibit the commercial rental to the public of originals or copies of their phonograms ("Rome plus"). However, the TRIPs Agreement contains an important "Rome minus" element. Whereas Article 12 of the Rome Convention provides for a right to equitable remuneration to be paid when phonograms are published for commercial purposes, or reproduction of such phonograms, are used directly for broadcasting or public communication, the TRIPs Agreement comprises no such provision.

Article 14(3) grants to broadcasting organisations the right to prohibit the following acts: the fixation, the reproduction of fixations, and the wireless rebroadcasting or public communication of their broadcasts ("Rome equal"). This is subject to a considerable limitation, however. The very same Article 14(3) provides that Member States may withhold the grant of these rights to broadcasters if they "provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention." There is an inherent pitfall in that limitation, according to Mihaly Ficsor, Assistant Director General of WIPO ("The 1994 Athens Conference", p 65). He argues that where such rights are not granted, Member States are in reality obliged to provide owners of copyright in the subject matter of broadcasts the same rights as other Member States grant broadcasting organisations. However, those rights are not the rights of broadcasters in their broadcasts, but the rights of owners of copyright of works included in the broadcasts. Ultimately, Ficsor concludes, the essence of this limitation is that Member States are free not to grant at all rights to broadcasting organisations.

As far as the term of protection of neighbouring rights' holders, Article 14(5) is a real 'Rome plus' solely for performers and phonogram producers, who are accorded a minimum term protection of 50 years from the end of the year where fixation or performance took place; whereas for broadcasters, who are accorded a term of 20 years from the end of the year where broadcast took
place, Article 14(5) is a 'Rome equal' (under Article 14 of Rome the minimum term of protection for all three categories of rightholders is 20 years).

Article 14(6) provides that Article 18 of the Berne Convention shall apply to the rights of performers and phonogram producers. These two provisions produce the following result when read in conjunction with Article 70(3) of TRIPs which states that "[t]here shall be no obligation to restore protection to subject matter which on the date of application of this [TRIPs] Agreement for the Member in question has fallen into the public domain."¹¹

In addition to the clear 'plus', 'minus' and 'equal' elements, however, there are some other elements for which the relationship between Part II, Section 1 of TRIPs, and the WIPO Conventions needs to be further studied and clarified. In this respect, Ficsor ('The 1994 Athens Conference', p 66) identifies two emerging problems.

First, Article 12 of TRIPs, concerning the term of copyright protection, states that whenever the term of protection is calculated on a basis other than the life of a natural person, the term shall be no less than 50 years from publication or, failing a publication within that time, 50 years from the making of the copyrighted work. The word 'whenever' used in the article may be interpreted as meaning that the provision allowing a term shorter than 50 years post mortem auctoris is not restricted to cases expressly determined by the Berne Convention (Art.7), but that it is broader without any apparent limitation. However, this open-ended freedom for national legislators may in

¹¹ These provisions can cause a great deal of confusion and concern for rightholders who are nationals of countries both Members of the GATT and the European Union. The likely caveat lies in the wording of Article 10(2) of EU Directive 93/98 which defines the term of protection of copyright and related rights (see section 9.1 of the present chapter). For it provides for the extension of the term of protection of rights, or even the revival of expired rights, throughout the Community if those rights are still protected in at least one Member State on the date of the implementation of the Directive (1/7/1995). However, the TRIPs Agreement, as it is implied in the wording of Article 70(2), does not take into account the situation in the other GATT Member States. That discrepancy, coupled with the previously discussed fact that TRIPs leaves substantial differences in the level of protection of related rights under the laws of different countries and therefore the principles of national treatment and MFN treatment do not apply to those rights if they are not provided under the TRIPs, may well have been the focal point of the row over US audio-visual exports into Europe, a topic finally left out of the TRIPs Agreement.
certain cases create conflicts with the standards of the Berne that could be reflected on the legal practice of the countries party to it.

Second, Article 13 of TRIPs speaks about limitations and exceptions to exclusive rights to cases “which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right owner”. This provision seems to extend the applicability of its counterpart-article of the Berne (Art.9(2)) to the possible limitations/exceptions to any exclusive right under the Convention. In addition, the fact that both terms (‘limitation’ and ‘exception’) are used confirms that both non-voluntary licences and free uses may be meant. However, allowing such a generalised possibility of granting non-voluntary licences and free uses without further guarantees (e.g. right to remuneration for private copying) may result in a substantial decrease in the minimum level of protection obligatory under the Berne Convention.

To sum up this section of the TRIPs Agreement, it can be said that some of its provisions do contribute to an enhanced international framework of protection for copyright and related rights. Real ‘pluses’ include obligations relating to the duration of protection (not for all the categories of rightholders however) and commercial rental. On the other hand, however, it does not deal with important issues such as private copying and public communication rights (particularly in digital and satellite/cable configurations). Furthermore, it contains provisions which limit the scope of exclusive rights for some categories of owners (i.e. performers) and/or created uncertainties for others (i.e. broadcasters); and which could produce further ambiguity for rightholders either by being susceptible to different interpretations or by providing for over-generalised limitations and exceptions to exclusive rights. Notwithstanding these drawbacks, however, there is a positive development that should be noted. The rights stated in Part II of the TRIPs Agreement for performers and broadcasters may, on the whole, fall short of the protection provided for them in the Rome Convention (apart from the extended term of protection for performers’ rights), but this Convention
enjoys a low degree of acceptance internationally. Thus, it is a large step forward to have rights of these two groups mentioned in a worldwide multilateral agreement.

- Part III, Sections 1-5 (Articles 41-61) deals with the quintessence of any IP legal system, be it national or international, namely the enforcement of rights against infringement. For that purpose, it lays down a number of procedures and remedies, a review of which will be attempted hereinafter.

Under Section 1, the most fundamental obligation that Member States undertake is to ensure that enforcement procedures specified in the TRIPs are available under their national laws. These procedures must include expeditious remedies to prevent infringement and remedies which constitute a deterrent against further infringements (Art.41(1)). Procedures must also be fair and equitable as well as time and cost-effective (Art.41(2)).

Section 2 provides the judicial authorities of Member States with civil and administrative measures, which, *inter alia*, include the following. First, the possibility of a reversal of the ‘onus of proof’ from the plaintiff to the defendant, in cases where the former presents evidence sufficient to support his claims and where he has evidence relevant to the substantiation of his claims which lies in the control of the latter (Art.43).12 Second, the vital tool of injunctions to prevent the entry in the channels of commerce of imported infringing goods (Art.44). Third, courts have the power to order the infringer to pay damages (adequate to compensate for the injury caused to the rightholder), and expenses which may include attorney’s fees (Art.45). Finally, the courts have to power to order the disposition and/or destruction of infringing goods (Art.46).

Under Section 3, judicial authorities have the power to take so-called ‘provisional’ measures in order to prevent entry of infringing goods into commerce and to preserve relevant evidence of infringing activity (Art.50(1)). According to Art.50(2), provisional measures are also taken when

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12 The great importance of the reversal of the ‘onus of proof’ as a very effective civil remedy in the hands of the plaintiff in cases of copyright infringement has already been underlined in section 8.2.2 of Chapter 8 of the present thesis (case of BSkyB vs SDS).
delays can cause irreparable harm to the rightholder, or when there is a demonstrable risk of evidence being destroyed.

Section 4 caters for specific ‘border measures’ available to customs authorities, which include the suspension of release into free circulation of infringing goods (Art.51 and Art.58), and the disposal/destruction of such goods (Art.59).

Finally, Section 5 provides for the all important criminal procedures which, as specifically stated in Article 61, are to be applied at least in cases of copyright piracy on a commercial scale. Remedies include imprisonment and/or fines, sufficient to deter and consistent with crimes of a corresponding gravity, as well as the seizure, forfeiture and destruction of infringing goods.

Concluding this Part of the TRIPs Agreement, the following remarks should be made. It can undoubtedly be argued that it was one of the most difficult and complex in the whole TRIPs process because enforcement issues touch delicate matters of judicial independence and deeply held nationals notions of what constitutes due process of law. Nonetheless, it breaks new ground in elaborating procedures and remedies that go a long way to meet the fundamental interests of rightholders in being able to defend their rights effectively and with greater international predictability. Indeed, the set of standards it provides goes beyond many national laws even of countries that are fully committed to the protection of IPRs and especially copyright and neighbouring rights. Finally, it should be added that the TRIPs chapter on enforcement is the first time that this has been done in a multilateral instrument and it truly contributes towards a better international framework of protection.

- Part V (Articles 63-64) contains a major innovation of the TRIPs Agreement. It provides that one of the most important features of GATT, namely Articles XII and XXIII, shall also apply to TRIPs (Art.64(1)). Articles XII and XXIII of GATT cater for a well-tested and effective mechanism, for the adjudication and settlement of disputes, which can be employed when there is a disagreement on a trade issue covered by GATT. Therefore, the significance of the Part V provisions is that disputes
over IP as well as Member States' obligations in the area of IP under the TRIPs will be subject to a functioning dispute settlement system. It should also be noted that Part V deals with the procedures for settlement of disputes between governments over their respective public international legal obligations in connection with IPRs, and thus should be clearly distinguished from the TRIPs topic of enforcement (Part III) which concerns the procedures for settlement of disputes between private parties over their obligations under national laws in connection with IPRs.

According to Otten ('The 1994 Athens Conference', pp 26-27), the TRIPs Dispute Settlement Mechanism (DSM) consists of three features which, as Reinbothe & Howard point out (1991, p 160), indicate the range of options presented.

a) The first feature, which can be referred to as the ‘consultation option’, embodies the philosophy of the GATT dispute resolution system, laid down in Article XII, which is that Contracting Parties should first attempt to reconcile their differences. All disputes shall be dealt with by the Council of TRIPs (established by Art.68 of the TRIPs Agreement) acting in the capacity of a Dispute Settlement Body. Any dispute which cannot be settled through consultations, however, can be brought to a panel of independent persons who will propose alternative solutions. The main objective of the present feature is to make it difficult for a party to a dispute to delay or block the settlement process. This is achieved by introducing stricter time limits, and by reversing the consensus rule required on the adoption of panel reports. This means that panel decisions on alternative solutions will be considered adopted unless there is a consensus against their adoption.

b) The aforementioned panel decisions eventually lead to the second feature of the TRIPs DSM, which is referred to as the ‘cross-retaliation’ option. Such an option can be authorised against a Member State failing to comply with a dispute settlement ruling. The provisions on this matter require an aggrieved Contracting Party to seek to suspend concessions or other obligations not only with respect to the same sector of the same Agreement (TRIPs), but also with respect to other parts of the GATT not related to IP. In practice, that means that concessions and/or obligations
concerning copyright/related rights can be suspended for violation not only of provisions on copyright/related rights but also of provisions under, for example, the GATT Agreement on Agriculture. Furthermore, using that option of the dispute settlement mechanism as a leverage, the government of a rightholder could threaten the imposition of trade sanctions and access-market restrictions on other countries in an effort to induce adequate protection of IPRs. Despite their ominous connotations, however, such retaliatory measures have never been carried out, and have only once been authorised, during the 45 years of experience of the GATT dispute settlement mechanism, as Otten notes (ibid.). Therefore, Otten adds, they are more a threat that gives credibility to the system than anything else, and they are likely to remain very much the exception in the years to come.

c) The third feature of the TRIPs DSM concerns discipline on the use of unilateral methods of dealing with disputes and unilateral decisions on retaliation. This feature is not only closely connected to the ‘cross-retaliation option’ but is also heavily dependent on the effective functioning of the TRIPs DSM as a whole. Its important objective is that multilateral dispute settlement procedures provide a clear alternative and effectively replace the unilateral pressure and measures that states have been using. Therefore, TRIPs Member States seeking redress of a violation of IPRs or of other GATT obligations commit themselves to have recourse to, and abide by, the multilateral dispute settlement procedures under TRIPs and GATT. Moreover, they specifically commit themselves not to retaliate except in accordance with authorisation from the Dispute Settlement Body and the independent panels (first feature of TRIPs DSM). In that light, for example, the trade sanctions that the US government unilaterally imposes on countries that infringe American IPRs under Sections 301 and 337 of the 1988 US Trade Act (see Chapter 8, section 8.2.3) are clearly incompatible to, and violate, the TRIPs/GATT provisions.

To sum up Part V of the TRIPs Agreement, the importance of the addition of a Dispute Settlement Mechanism in the realm of public international law on IP should be underlined. First and
foremost, it induces Contracting Parties to resolve their differences by means of negotiations and not by imposing discriminatory unilateral trade sanctions that nobody benefits from in the long run. Secondly, such a system, which includes the possibility of suspension of concessions, even if never or rarely used, makes it clear that countries in entering into TRIPs obligations are accepting an international liability for their performance in carrying them out. Simply put, it offers leverage that can be used to mandate compliance. Thirdly, the use of a resolution mechanism would facilitate quick enforcement action against states that are in violation of the TRIPs provisions, thereby resulting in effective worldwide protection of intellectual property rights. Finally, as Cottier succinctly argues (1991, pp 393-394), a TRIPs Agreement without efficient dispute settlement, including potential trade sanctions, is in no position to replace the temptations of unilateral action under national law.

9.2.2 GATT/TRIPs or WIPO?

With the inclusion of TRIPs into its premises, GATT (and its successor, the WTO) has effectively become the second multilateral body concerned with intellectual property worldwide, alongside WIPO which administers the IP Conventions. Inevitably, however, with the genesis of TRIPs, the following questions emerge. Which of the two bodies safeguards an effective protection of IPRs? Some favour GATT, while others prefer WIPO. Both arguments are based on deeply-rooted notions and that dissent has resulted into a vehement international debate. Opinions are also divided as to whether the two can co-exist, or one should incorporate or even replace the other. For instance, those who favour GATT believe that WIPO may be used as an interim measure, but the ultimate multilateral solution is likely to involve GATT/WTO, either exclusively or in concert (Stanberry 1990, p 40); and those who favour WIPO argue that WIPO should develop new instruments to eventually embody the TRIPs Agreement (Denis de Freitas, personal interview,
Insofar (section 9.2.1), the aim had been to compare the provisions of TRIPs with those of Berne and Rome Conventions in terms of ‘equal’, ‘plus’ and ‘minus’. Hereinafter, the target will be to contrast GATT/TRIPs and WIPO in terms of their fundamentally opposite philosophies, basic principles and objectives, and in terms of how all these are put into practice.

The different way in which GATT/TRIPs and WIPO approach the subject matter of IPRs has been the subject of several studies, an anthology of which follows. According to Hartridge & Subramanian (International Symposium on TRIPs - Part II, 1989, pp 898-899) an important distinction is that GATT subject-matter relates to products, whereas the WIPO one relates to persons. In other words, as Cottier (1991, p 394) notes, persons and IPRs are protected under GATT/TRIPs indirectly by way of reflection. Comparably, as Geller argues (‘The 1994 Athens Conference’, p 90), the Berne-Rome regime speaks in terms of abstract intellectual properties, while the TRIPs Agreement aims at regulating a concrete marketplace. Further aspects that separate the two regimes are added by Dhanjee & Boisson de Chazournes (1990, pp 6-7). The GATT is concerned with tangible goods and their ‘dynamic flow’, while WIPO deals with intangible rights and the ‘static’ question of their protection. In addition, GATT/TRIPs lay down fairly rigorous standards by which Contracting Parties must abide, and allow governments to adopt IP-related measures provided they are not inconsistent with GATT/TRIPs principles and are not applied in a discriminatory or arbitrary manner. By contrast, WIPO recognises the freedom of Member States to adopt the regime that fits them and allows them to choose their economic systems.

Apart from their philosophy and basic principles, what equally divides GATT and WIPO is their main objective as regards the protection and enforcement of IPRs. Nowhere is that divergence more acutely reflected than, for example, in the provisions of the TRIPs Agreement compared with those of the Berne Convention. Under Article 7 of the TRIPs, the protection and enforcement of
IPRs "should contribute to the promotion of technical innovation and to the transfer and dissemination of technology, [and] to the mutual advantage of producers and users of technological knowledge". By contrast, the Berne Convention, according to its preamble, was adopted "to protect, in as effective and uniform manner as possible, the rights of authors in their literary and artistic works". In fact, what the aforementioned difference in objectives resonates is a real crisis between TRIPs and Berne, which Geller ('The 1994 Athens Conference', p 90) identifies as follows. One the one hand, law-makers seek to keep competition open by avoiding excessively broad statutory monopolies (TRIPs); on the other, they seek to encourage investment by protecting innovation and creation (Berne). And, as Professor Goldstein (International Symposium on TRIPs - Part I, 1989, p 363) adds, IP (under WIPO) and trade policy (under GATT/TRIPs) are at odds in the sense that the premise of the former is protectionist and IP laws are designed to erect barriers, while the premise of the latter is anti-protectionist and is concerned with taking down barriers.

The conflict between the two regimes is also succinctly mirrored on the case of the exclusion of Berne’s moral rights (Art.6bis) from the scope of the TRIPs Agreement (Art.9(1)), as Geller (1990, p 426) points out. The author’s moral rights seem insufficiently ‘trade-related’ to fit within the vocation of TRIPs, which is to protect commercial interests that might be prejudiced by the distortion/obstruction of trade. Consequently, a Berne country enforcing moral rights that the TRIPs Agreement neither incorporates nor reserves could face the charge that such enforcement distorts/obstructs copyright commerce, which is impermissible under the TRIPs Agreement.13 The above example serves only too well to underline another entrenched division between the two regimes. In a nutshell, the Berne Convention (and therefore WIPO) is author-centric, while GATT/TRIPs are economically and commercially oriented.

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13 As already mentioned in section 9.2.1, GATT/TRIPs implicitly recognise that IPRs can be used to constitute barriers to legitimate trade (Ministerial Declaration of the Uruguay Round).
The chasm between the two bodies is further reflected on the way they put their philosophy and objectives into practice. In that respect, the feature of GATT/TRIPs that distinguishes them from the WIPO Conventions is the presence of an effective dispute settlement mechanism. As Geller (1990, pp 423-425) explains, the WIPO Conventions are largely instruments of private international law, while GATT/TRIPs are instruments of public international law. On the one hand, GATT/TRIPs provide concrete means of recourse against other countries, by allowing Contracting Parties to adjudicate violations of the Agreements before international dispute settlement panels which, in turn, they can authorise strict retaliatory measures (e.g., suspension of concessions, trade sanctions). By contrast, the WIPO Conventions have been intended to be, and have exclusively been, applied by national courts that adjudicate foreign claims. In theory, only the Hague International Court of Justice has jurisdiction to adjudicate disputes between countries of the WIPO Conventions concerning the interpretation or application of their texts. However, in practice, such jurisdiction has never been invoked.

Dispute settlement procedures and the consequences they entail touch upon the fundamental precondition for an adequate protection of IP, namely the effective enforcement of IPRs. In that respect, these procedures have been the centre of controversy between GATT/TRIPs and the WIPO Conventions. For the latter, as opposed to the former, lack an effective enforcement mechanism; WIPO Conventions can encourage protection of IPRs, but lack the power to force a Member State to enforce its own law and/or to abide by some international code. That is the main reason why countries which ‘import’ copyrighted material, and frequently violate copyright (commonly referred to as ‘developing’ nations), consider the GATT initiative to introduce TRIPs an intrusion into WIPO provinces. That is equally the reason why countries which ‘produce’ and ‘export’ copyrighted material (commonly referred to as ‘developed’ nations) demand the transfer of IP protection from WIPO into GATT/TRIPs. As Steidmeier (1993, p 157) posits, the theoretical positions on IPRs
vary widely, but nowhere is the difference more sharp than between the developed and developing countries.

Consequently, for the former, the inclusion into TRIPs of a dispute resolution system had been a *condition sine qua non* from the beginning of the Uruguay Round. On the other hand, the latter feared that such a system would result in unacceptable outside control over their internal policies and saw it as another way for developed countries to control the international market, thereby extending their economic colonialism. Developing countries were also concerned that such new standards might mean that the interests of the owners of IPRs would eventually override the social and development needs of their low-income economies.

That fear led a group of developing countries (14 in all) to initially propose, to no avail it should be added, that a TRIPs Agreement should be split in two parts. The first would deal with trade in counterfeit and pirated goods and would be within the GATT sphere. The second would deal with standards and principles concerning the availability, scope and use of IPRs and would be implemented by the ‘relevant international organisation’, that is WIPO.

During the course of the negotiations, however, a consensus gradually emerged on the necessity for IP protection. Nonetheless, the different concerns of all the GATT country Members still needed to be accommodated. For example, an idea for such a middle ground was put forward during an International Symposium on TRIPs (hereinafter referred to as ‘TRIPs Symposium - Parts I and II, 1989’), where scholars/participants proposed that TRIPs adopted a ‘two-tier’ approach. According to Professor Reichman (TRIPs Symposium - Part II, pp 869-870), a compromise should begin by establishing the duty for all Contracting Parties to respect the principles of national treatment and most-favoured nation treatment as regards IPRs, regardless of the applicability of the GATT/TRIPs relevant Articles (Articles 3 and 4 of the TRIPs Agreement, see section 9.2.1). This would thwart the discriminatory aspirations of certain states and ensure that the Uruguay Round closed any remaining loopholes in this field. At the same time, Reichman adds, should the developed
countries accept the principle of preferential treatment, the developing countries that adhere to both the GATT and the WIPO Conventions should expect to strengthen the applicable standards under those Conventions. Professor Goldstein (TRIPs Symposium - Part I, pp 363-365) elaborates Reichman's argument even further by referring exclusively to copyright as part of IP. He argues that if the less developed countries could effectively be brought and kept within the international copyright fold (i.e. GATT/WTO and WIPO), the 'two-tier approach' could return WIPO to what is so good at doing, namely bringing its expertise to bear upon drafting model laws and proposing applicable standards. Goldstein also emphatically posits that if GATT is to be effective in dealing with copyright, it must recognise the difference between copyright and the regulation of trade, which is that copyright law touches a society's cultural, moral, educational, and political aspirations to a greater extent than does any other subject matter within the trade process. Consequently, any GATT standard or set of standards applied the copyright field will have to be a standard that incorporates balances. Finally, Goldstein concludes, the advantage of a 'two-tier approach' is that it could capture the two different congeries of aspirations that can be found among the developed and developing countries.

The 1994 TRIPs Agreement appears to have endorsed the ambitious notion of a 'two-tier approach'. It did establish, albeit with some exemptions, the duty of all Contracting Parties to respect the principles of national treatment and most-favoured nation treatment. And, in a further attempt to incorporate balances, it adopted a 'three-tier' rather than a 'two-tier' approach. Namely, in Part VI (Articles 65-67), it provides for different transitional periods in which Parties would be obliged to apply the TRIPs provisions according to their economic situation. Correspondingly, country Members are divided into three categories: developed, developing, and least-developed. Developed countries will have to ensure that their laws and practices are in conformity with the TRIPs Agreement within one year following the date of entry into force of the World Trade Organisation (WTO is the successor of GATT and was expected to enter into force in 1995).
Developing and least-developed countries, which account between them for two-thirds of all the GATT member states, will enjoy a period of five and eleven years respectively. Most importantly, developed country Members shall provide, on request, technical and financial co-operation in favour of the other two categories of country Members. Such co-operation shall include assistance in the preparation of laws and regulations on the protection and enforcement of IPRs as well as on the prevention of their abuse, and support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel. Finally, it should not be underestimated that developing and least-developed countries, like all GATT Contracting Parties, are entitled to invoke the GATT/TRIPs Dispute Settlement Mechanism if their rights and interests are affected, and therefore could obtain authorisation to impose trade sanctions or other retaliatory measures even against the so-called developed countries.

The introduction of IPRs into GATT, and the subsequent insertion of a Dispute Settlement Mechanism as a leverage to ensure compliance into the field of IP, is a fait accompli. As to the question, posed in the beginning of the present section, namely which of the two bodies, GATT/WTO or WIPO, will be in charge of the difficult task of adequately protecting and effectively enforcing IPRs worldwide in the years to come, the answer can be summarised as follows. One should not substitute the other because each one of them contains important provisions concerning IP protection that the other lacks (as previously examined in section 9.2.1). Also, these two cannot merge because they have fundamentally different philosophies, basic principles and objectives (as outlined above in the present section). It appears that the only viable solution is that the two regimes should supplement each other. Indeed, the 'three-tier' approach that the TRIPs Agreement adopted in its Part VI shows that a middle ground between those who favour GATT/WTO and those who prefer WIPO, be they individuals or whole countries, can be broken. Finally, recent developments also indicate that the two bodies are going to co-operate. One area where such co-operation is likely is the constant monitoring of national laws to ensure that Member States are complying with their
obligations under the TRIPs Agreement. Country Members are required to notify their implementing legislation, and discussions are already taking place between WTO and WIPO so as to minimise duplication of the latter’s present arrangements for overviewing national legislation.

9.2.3 Final Assessment of the TRIPs Agreement

As it has been discussed at length insofar, many—be they scholars or entire nations—have questioned, and even objected to, the authority of GATT to deal with intellectual property or, as Cottier (1991) refers to, the ‘GATTability’ of IPRs. However, as Cottier (1991, p 394) succinctly notes, with the inclusion of IPRs, the GATT system will be considerably enlarged. In fact, he claims (p 385), linking IP to GATT is perhaps the most comprehensive recent effort in the field of IPRs to narrow the gap between fundamentally differing perceptions of justice, fairness and equity in overall trade negotiations. Even those who favour WIPO and would have wanted to see such an initiative come from within its premises, like Mihaly Ficsor (Assistant Director General of WIPO), admit that the TRIPs Agreement offers substantial new elements in the international system of protection of copyright and neighbouring rights, mainly as regards the enforcement of rights and of the settlement of disputes rather than in respect of the substantive provisions determining the level of protection. While the WIPO Conventions provide only in a general way that Member States should adopt the measures necessary to ensure the application of these Conventions, the TRIPs Agreement identifies those measures in detail in respect of enforcement of rights. Finally, Ficsor argues, the provisions clarifying the applicability of the Dispute Settlement Mechanism might also contribute to a fuller and stricter application of the obligations under the WIPO Conventions (‘The 1994 Athens Conference’, p 63). It should be also underlined that the TRIPs Agreement keeps at bay the danger of unilateral/bilateral actions, and takes a heavy hand to combat piracy. As Geller (‘The 1994 Athens Conference’, p 93) stresses, it imposes measures that, at a minimum, are intended to prevent pirates from raiding IP anywhere on the world marketplace.
According to IFPI ('For the Record', January 1994), with the signing of the TRIPs Agreement, intellectual property has reached a new watershed in history. Despite its own pronounced shortcomings, it is almost equal in importance to the conclusion in 1886 of the Berne Convention. Furthermore, the standards negotiated by the Contracting Parties can be considered to represent a benchmark for any future agreement. In other words, the TRIPs negotiations did provide a generally accepted working draft for any future agreement on IP protection. Indeed, the piracy issues of recent years provided a basis of negotiations that may now produce institutional change in the international system. In addition, as Otten ('The 1994 Athens Conference', p 30) points out, the TRIPs Agreement also represents a vote of confidence on the part of the international community in multilateralism. Perhaps, Otten states, nowhere was the risk of a breakdown in multilateralism clearer than in the field of IP, where the existing international rules had ceased to constitute a functioning consensus about the effects of national practices and policies on the conditions of international competition. Finally, as Piatti (1989, p 242) argues, “[t]he effectiveness of a system is to be judged not so much by the existence of laws but by the way in which they are or are not applied.” And the TRIPs Agreement has given more teeth to treaty obligations than any other IP Convention up to date.
CONCLUSION

CAN COPYING BE CONTROLLED? 1

In the second part of the thesis (Chapters 5-9), the focus had been on examining the philosophy that surrounds the phenomena of piracy and private copying, as well as investigating their causes, assessing their occurrence and their impact, and finally, evaluating various ways of dealing with them (legal, technical, fiscal, etc.) at a national, a regional, and an international level. Hereinafter, and by way of conclusion, the aim will be to analyse the necessary components of an effective campaign for the protection of copyright and neighbouring rights on a worldwide basis. That analysis will not only review measures and remedies already discussed, but will also attempt to put forward ideas, proposals and guidelines towards a better understanding as well as a dynamic confrontation of intellectual property infringement in the new media environment that technology has brought about.

The urgent necessity for a well orchestrated anti-piracy campaign became initially felt in the late 1970s. In 1978, IFPI (International Federation of the Phonographic Industry) drew up a guideline for such a campaign with twelve basic requirements (some of which will be analysed in detail hereinafter):

- the existence of adequate legal protection, preferably by means of copyright and/or neighbouring rights;
- reciprocal protection for foreign products;
- adequate civil and/or criminal remedies;
- a special anti-piracy budget;
- a central authority or National Group acting as co-ordinator;
- one or more investigators;
- a lawyer specialising in anti-piracy work retained by the National Group;
- the co-operation of all members companies within the National Group;
- the co-operation of authors' societies and performers;

1 The term 'copying' refers to audio-visual copying and is used in a generic manner to incorporate both piracy and private copying, unless otherwise stated.
- regular international communication and exchange of information;
- the co-operation of governments and government agencies;
- the adoption of strict in-house security by producers to ensure that pirates are not able to obtain material such as inlay cards, studio masters and other items.

To date, very few countries have adopted all twelve of those basic requirements, but it has been shown that their combined implementation can produce drastic results. A typical example is the case of Hong Kong where, in the early 1970s, the market was infested with pirate music cassettes (an estimate of 95% unauthorised material). In 1970, IFPI set up a National Group to co-ordinate its 12-point anti-piracy campaign. By 1980, the level of piratical activity had plummeted to an estimated 5% of the market.

In addition to the twelve points, however, there are other prerequisites that are considered vital for the protection of intellectual property. First and foremost, there must be a public condemnation of piracy by Governments accompanied by a public commitment towards its eradication. In the aforementioned example of Hong Kong, for instance, IFPI could not have succeeded in its task if it were not for the support of the local government. Secondly, the public in a country must be made aware that its Government regards such activity as a form of theft that constitutes a serious crime. Experience shows that knowledge about the copyright system and its foundations is rather scarce, not only amongst the public at large, but also amongst the potential pirates as well as amongst the public authorities and law enforcement agencies, namely the police, the prosecutors and the judges. Consequently, information about the nature and the legal, cultural and economic consequences of copyright theft is of a primary importance for a successful anti-piracy battle. Such information should be directed towards all the aforementioned parties; and should concern all levels of copyright theft, from the individual to the industrial, and from the amateur to the professional. A notable example of an ‘information policy’ is worth mentioning at this point. US Government officials set up a experimental project of seminars in Taiwan, a country that until very recently had a ‘distinguished piracy record’, to educate retail sellers and other distributors of
copyrighted material on the negative repercussions of trafficking in infringing products. The fact that series of seminars showed positive results may prove that such an approach can be far more successful than to threaten trade sanctions against countries who violate copyright, a practice that the US Government in particular has been frequently resorted to up to date (Chapter 8, section 8.2.3 of the present thesis). Finally, awareness and education of public opinion is not a task that rests exclusively with national governments. It is also the responsibility of the copyright industries as well as of the private associations that represent the interests of the rightowners. A possible way of accomplishing that task is through a systematic campaign in the mass media. Indeed, it can be argued that media campaigns should form an integral part of an effective anti-piracy battle. There are quite a few notable examples of such campaigns that can be reported. One such example is the indication on the copies of a work that copyright applies to it, as in the case of pre-recorded videocassettes bound for sale or rental where a warning by the copyright proprietor precedes the actual feature. That warning also explicitly reads: “Video piracy is a crime. Do not accept it. Illegal videocassettes reduce your viewing pleasure and jeopardise future film production”. Another example is the initiative of the UK regional radio station ‘Leicester Sound FM’ to introduce, in the course of 1993-1994, a series of special programmes where anti-piracy co-ordinators from the British Phonographic Industry (BPI) reported on issues such as the definition of counterfeiting and bootlegging, the cost of piracy, the close links of pirates with terrorist organisations, and finally advised the consumers on how to detect an original from a bogus product. A third example is the inclusion of a special report on video piracy in a popular program on British television about the movie industry (‘Film 1995’ introduced by Barry Norman on BBC1), where representatives of the British Videogram Association and of FACT (Federation Against Copyright Theft) reported on matters such as the losses of the legitimate video industry due to piracy, the huge illegal profits of pirates, the links of pirates with organised crime (e.g. drugs cartels, child pornography, etc.), and the often substandard quality of the pirate copies that can even damage domestic recording equipment. As one FACT official once put it bluntly,
"every time they buy an illegal video they may be buying a bullet" (*The Guardian*, 16/9/1995, p 1). A fourth example of the earnest involvement of the private sector in an anti-piracy media campaign is a leaflet published and disseminated by FACT, which is the main investigatory body of all the major British and American video companies in the UK, where is comprehensively described what the problem is, what the crime is, and what the punishment for piracy is (a copy of that leaflet is reproduced in Figure 3). Furthermore, the anti-piracy message can be passed on to all parties involved through public service announcements in journals, periodicals, magazines and newspapers (five such graphic examples are reproduced in Figure 4). Finally, it is worth noting that recently, in UK cinemas across the country, an information film appears on the screen immediately prior to the actual showing of every feature film which stresses the negative effects of film piracy (its costs and its links with organised crime) and concludes: "Film piracy is theft, and it is not worth it."

Besides the basic requirements and practical examples of an anti-piracy campaign, the cornerstone of a successful battle against unauthorised copying is undoubtedly a well-functioning, national and international, legal framework. *National copyright laws* should, first and foremost, be constantly amended to become more effective *vis a vis* the complex, multifold and ever changing face of piracy. The amendments needed should cover the following matters:

- Firstly, adequate civil, criminal and administrative remedies must be in place (Chapter 8, section 8.2.2 of the present thesis). Civil measures ought to include: damages, lost profits, court costs and attorney's fees to be paid by the infringer; the delivery up and/or destruction of infringing copies and equipment; 'search and seizure' orders without advance warning, like the 'Anton Piller Orders' present in the UK legal system; and, interlocutory injunctions that prevent the defendant from violating copyright, similar to the 'Mareva injunction' under British jurisprudence which freezes his assets pending the determination of the case. Criminal procedures must consist in imprisonment and/or monetary fines sufficient to act as a deterrent; namely, they have to be concurrent to the scale and magnitude (financial and/or other) of the particular offence and consistent with the level of
FIGURE 3: FACT's (Federation Against Copyright Theft) Anti-Piracy Leaflet

THIS IS THE PROBLEM

VIDEO PIRATES

Steal over £100m per year from Video Dealers

They are stealing from your till

They are trying to put you out of business

They are threatening your livelihood

THEY ARE CRIMINALS

THIS IS THE CRIME

Copyright exists in feature films, television programmes and other audiovisual recordings.

A person commits a CRIMINAL OFFENCE if, without the authority of the copyright owner, he:

- Makes for sale or rent
- Imports
- Possesses in the course of business
- Sells or rents
- Offers for sale or rent, or
- Distributes

a pre-recorded videocassette incorporating copyright material.

With certain exceptions all titles released or pre-recorded videocassettes must be certified by the British Board of Film Classification.

It is a CRIMINAL OFFENCE to supply or offer to supply an uncertified videocassette or possess an uncertified videocassette for the purpose of supply.

It is a CRIMINAL OFFENCE to show ANY pre-recorded videocassette in public without the authority of the copyright owner.

THIS IS THE PUNISHMENT

IMPRISONMENT

For up to 2 years for each and every offence (CDPA 1998)

FINES

of up to £5000 for each and every offence (CDPA 1998)
or up to £30000 for each and every offence (VRA 1994)

FORFEITURE OF ASSETS

and

A CRIMINAL RECORD
FIGURE 4: Anti-Piracy Public Service Announcements (Source: IFPI)

TO ALL COUNTERFEITERS AND PIRATES!

NOTICE: On May 24, 1982, President Reagan signed into law the Piracy and Counterfeiting Amendment Act of 1982. This new law is designed TO PUT YOU OUT OF BUSINESS AND INTO JAIL. Your illegal activities are now felonies under Federal Law and for your first offense YOU CAN BE PENALIZED UP TO 5 YEARS IN FEDERAL PRISON OR UP TO $250,000 IN FINES OR BOTH. We heartily applaud this decisive action by Congress and the President and look forward to seeing you—first in court and then in jail.

A Public Service Announcement sponsored jointly by the Recording Industry Association of America, Inc. and Billboard

HELP US STOP THE THEFT OF MUSIC by supplying information on any person involved in counterfeiting, pirating or bootlegging records and tapes

ANTIPIRACY 4169677272

The Canadian Recording Industry Association

CUIDADO! Não compre fitas piratas. A lei contra a pirataria ja saiu! Não seja cúmplice de um crime que a lei puna.

IFPI, Portuguese National Group

La Piraterie du Son & de l'Image

IFPI, Belgian National Group

Commission of the European Communities
penalties applied for crimes of a corresponding gravity. Moreover, prison sentences, if and when
given, should not be allowed to be commuted into mere fines. Finally, criminal remedies must also
consist in the seizure, forfeiture and destruction of infringing articles. Administrative measures are
mainly enforced by Customs authorities. These authorities must have the power to restrict and/or
prohibit not only the importation, exportation and distribution within the country of pirate goods, but
also the entrance or exit of persons engaged in piratical activities. Customs officers must also have
the power to destroy or dispose of infringing articles. Finally, given the large scale of today's piracy,
it is vital that Customs authorities co-operate closely with other law enforcement agencies (e.g. the
police) as well as private bodies that represent the rightowners, both nationally and internationally.

- Secondly, national copyright legislation must accord a full range of rights to rightowners in order to
  enable them to exercise effective control over all kinds of use which modern technology makes
  possible. Apart from the already established by international Conventions rights of reproduction,
  fixation, distribution and communication to the public by satellite and/or cable, there are two
  additional rights of particular importance today; namely the right to control the importation, and the
  rental, of copies of a protected work.

- Thirdly, as previously discussed, the rightowner is often faced with the difficulty of establishing
  formal matters in an infringement case, such as ownership of work, subsistence of copyright in that
  work, and knowledge that the defendant did violate his copyright, without putting himself in a
  precarious position. Therefore, modern copyright laws must provide for the following five principles.
  First, the reversal of the onus of proof in cases where the nature of the offence is such that it is
  impractical for the prosecution to establish the actual knowledge of the defendant, but there is no
difficulty in the defendant establishing guilty knowledge. Second, the courts have to presume, unless
the contrary is proven, that the plaintiff is the owner of the copyright and that that copyright subsists
in the work which is the subject matter of action. Third, in addition to the principle of presumptions
described above, provisions must be made for a certificate or affidavit, authenticated in an
appropriate manner, to be admitted in the proceedings as evidence and proof of ownership and subsistence. Fourth, the scale of contemporary piracy, coupled with the difficulty of obtaining the evidence needed, may, in certain cases, render necessary the withdrawal of the defendant's privilege against self-incrimination. Fifth, the prosecution should be given the possibility of *ex-officio* action; namely, the public prosecutor should be allowed to act not only after complaints from the injured party, but also without such complaints and by his own initiative, as, for example, in cases where it is difficult to locate the rightowner and where there is at the same time a public interest that the piracy activities should not be allowed to continue.

- A further two matters that national copyright laws should cater for are unrestricted access to the courts of every country by all rightowners, be they nationals or foreigners; and, speedy trials. As regards the latter, in particular, it is even suggested by copyright experts that one and the same court should handle the whole range of copyright infringement cases, that is both the criminal cases involving punishment and the civil ones involving compensation.

- A final point of consideration as regards national copyright laws should be added. The multifaceted and complex nature of piracy sometimes renders copyright legislation, however modern, impracticable and/or inadequate to resort to. Often, there are other legal approaches, such as unfair competition or trademark laws, under which copyright infringements also constitute offences that can incur penalties heavier than those provided under copyright laws, and thus can be used more effectively than copyright for the deterrence and punishment of piracy (Chapter 8, section 8.2.2 of the present thesis). Therefore, governmental authorities, law enforcement agencies and rightowners alike should, if needed, invoke these alternative legal regimes to complement copyright within the context of a potent anti-piracy battle.

Given the transnational dimensions of piracy, a vital constituent, alongside national copyright laws, of an effective anti-piracy campaign are the relevant *International Conventions and Agreements*.
As far as copyright is concerned, there are two such Conventions in place: The Berne Convention for the Protection of Literary and Artistic Works, which was signed in 1886 and has known several subsequent revisions, the last of which took place in 1971; and, the Universal Copyright Convention, which was signed in 1952 and was revised once in 1971. As far as the neighbouring rights' Conventions are concerned, two are the most renowned: the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms (The Phonograms Convention 1971). The above Conventions have, for years, provided a common sound basis for recognising the necessity for the global protection of rightowners. However, in order to become a effective anti-piracy weapon, they need to overcome certain serious drawbacks.

- Firstly, it should be reminded that they do not constitute law themselves. In order to become legally binding, their provisions have to be incorporated into national legislation. Therefore, as many countries as possible should accede to and/or ratify these Conventions. It should be noted that, until very recently, the number of country-Members of these Conventions has been considerably small, particularly in the case of the neighbouring rights' Conventions.

- Secondly, all these Conventions have already become obsolete in the sense that they were all signed or revised at a time where piracy was not such grave a threat and any infringement was limited merely to traditional, analogue media. Over the past 25 years, however, technology has been moving at a quickening pace. The development of digital means for the creation, fixation, distribution and consumption of copyright works poses vexing challenges to the rightowners; and, as the copyright industries move towards a global market converging with information storage and retrieval systems, the need for a change in the international framework of protection is pertinent. Therefore, the aforementioned Conventions, in order to keep abreast with the technological changes and to accommodate the needs of rightowners and industries alike, should be revised and updated. To that
end, the World Intellectual Property Organisation, which administers three of the above Conventions (Berne, Rome and Geneva), has recently initiated an ambitious dual program for a possible protocol to the Berne Convention, and for a possible new instrument on the protection of the rights of performers and producers of phonograms.

As regards the protocol to Berne, issues to be dealt with include inter alia: computer programs and data bases; rental right; non-voluntary licences for sound recording of musical works, and for primary broadcasting and satellite communication; distribution right, including importation right; communication to the public by satellite broadcasting; national treatment; and, enforcement of rights.

As regards the new instrument for the protection of performers' and phonogram producers' rights, the following topics would be addressed: full range of proprietary rights, namely exclusive rights to authorise reproduction, first public distribution, rental or public lending, importation, adaptation, communication to the public, and public performance; extension of the minimum term of protection from 20 years (Rome Convention) to 50 years; mandatory statutory royalty scheme in respect of private copying, imposed on the sale of either or both recording hardware and media; full national treatment; and, a detailed set of standards for enforcement as well as both civil and criminal remedies.

However, none of the above WIPO efforts did eventually materialise. On the one hand, a revision of the Berne Convention was considered both hopeless and dangerous, as Mihaly Ficsor, Assistant Director General of WIPO, argues ('The 1994 Athens Conference', p 57). To him, it was hopeless because unanimity would be needed for a revision which, with the great number of member countries of the Berne with many conflicting interests, did not seem realistic to achieve; and dangerous because the outcome of a revision could not be predicted, and it might also produce unexpected and undesirable results such as a decrease in the level of protection provided under Berne. Indeed, the lurking danger of a revision of the Convention is succinctly epitomised by Denis
de Freitas, a prominent intellectual property consultant worldwide: “Don’t seek to revise the Berne Convention because you may end up worse than you are now” (personal interview, 24/3/1993). In fact, it should be remembered that the last time the Berne Convention was revised in 1971, the result was the renowned ‘Protocol for developing countries’ (Chapter 3, section 3.2 of the present thesis), which gave a series of important concessions to states that usually ‘import’, and frequently violate, copyright material and thus met with the fierce objections of the ‘producers’ and ‘exporters’ of copyright, namely the developed countries. On the other hand, the possible new instrument on the protection of performers’ and phonogram producers’ rights suffered from several noticeable shortcomings, as Lewis Flacks, Director of Legal Affairs of IFPI, reports (IFPI Review 1993, pp 35-38). First, it did not deal with the transferability of economic rights. Second, it permitted unacceptable derogations from the fundamental principle of exclusive rights; for example, it allowed countries that provide only a right of remuneration for phonograms rental to preserve such a system and withhold exclusive rental rights. Third, the recognition of the exclusive right of public communication would be subject to a reservation under which States could limit producers’ rights in non-digital communications to one of equitable remuneration. Fourth, the extent to which the traditional copyright-based right of adaptation could be adapted effectively to the protection of performers’ and producers’ creative contributions to the modern phonogram remained undetermined. Fifth, the question of the scope of the new instrument, in particular whether the provisions regarding performers should extent to performers in audio-visual works, remained a source of division and uncertainty. Last, but not least, the issue of a national treatment obligation and its scope remained unaddressed.

The third, and most fundamental, inherent drawback of the international copyright and neighbouring rights’ Conventions is the absence of an effective enforcement mechanism. The fact that the aforementioned WIPO initiatives, which contained such procedures, failed to materialise serves only too well to underline that dearth. All four of the Conventions referred to above lack the
teeth to mandate compliance with their provisions, that is they lack the power to force their Member States either to enforce their own laws or to abide by some international code. A successful anti-piracy battle is not so much dependent on the existence of appropriate legislation but on the application and enforcement of it. In that respect, the TRIPs Agreement, recently signed within the provinces of GATT (Chapter 9, section 9.2.1 of the present thesis), appears presently to be the only international framework suitable for an effective protection of intellectual property. For it contains a detailed and complete set of procedures and remedies that must be available under national law, and more importantly, it contains the means to coerce the implementation of such a set. However, the TRIPs Agreement suffers too from a serious drawback; namely it excludes from its coverage the national treatment obligation as regards neighbouring rights' holders.

In view of the aforementioned deficiencies of both the existing conventions and proposed instruments, any new international treaty that will be devised for the protection of intellectual property in the digital and networked age must contain a set of minimum standards. These minimum standards, which constitute a integral part of an effective anti-piracy campaign, ought to cover the following issues:

- The rightowner should enjoy a complete exclusivity over a work that would enable him to control its use, regardless of how it is delivered and regardless of the source of its transmission. Namely, the rightowner should not only have the exclusive right to authorise the reproduction, distribution, rental or public lending, importation, adaptation, public communication, and public performance of a work or copy in a traditional form (e.g. phonogram, videogram, satellite/cable broadcasting); he should also retain the exclusive right to modify and incorporate the digitised work into other works, as well as to upload, transmit, access and download that work electronically.

- Protection should attach automatically upon creation of a work, should not be subject to conditions and administrative formalities (e.g. registration or deposit), and should be provided for all forms of
creative expression, traditional or non-traditional, regardless of the form or medium in which the work is embodied.

- Protection must also be accorded to compilations and derivative works without prejudice to any rights in pre-existing material.

- Transitional provisions must provide retroactive protection for pre-existing works where effective protection was previously unavailable.

- Given that copies of digital works may well be identical to the original, there is even less scope for private copying or other exceptions. Therefore, any limitations or exemptions to the exclusive rights of rightowners should be few and narrowly drawn to avoid unreasonably prejudicing the rightowners’ legitimate interests or conflicting with the normal exploitation of protected works.

- Compulsory licensing should generally be avoided. Rightowners should also retain the ultimate decision whether to enforce their rights collectively or individually. For, as already discussed, collective administration and levy schemes can, *inter alia*, reduce the exclusive rights of rightowners into a mere right to remuneration, involve misallocation of revenues, and can actually serve as an economic incentive to piracy.

- Economic rights must be fully and freely transferable if rightowners are to able to maximise the commercial potential and value of their works.

- Copyright and neighbouring rights should be granted and administered on the basic principle of national treatment.

- Procedures, remedies and penalties to redress infringement of intellectual property should be effective, efficient and strong.

- A final issue that should be included in the minimum standards of a possible treaty is the global mandatory application of certain technical standards that can greatly assist not only the fight against piracy in both analogue and digital media, but also the administration of rights and the settlement of royalties. In addition, these technical standards could enable the rightowners to monitor the activity
of 'private copying', and would allow users to have access to protected material against an appropriate payment. Such technical devices, which are described in detail in Chapter 8, sections 8.1.3 and 8.2.1 of the present thesis, include: the SID (Source Identification Code), which identifies the source of the mastering and the manufacturing of digital carriers, and thus renders possible the detection of pirate and counterfeit products; the ISRC (International Standard Recording Code), which identifies recordings, facilitates the collection and fair distribution of royalties, and can play an important role in the development of DAB (Digital Audio Broadcasting) and electronic delivery systems; the debit card ('smart card') systems with a built-in password, which allow access to interactive cable services and to 'digital jukeboxes' through computer networks, quantify precisely the use of protected works, and guarantee a fully automatic payment and a just allocation of revenue; and finally, an array of spoilers, decoders and scramblers, which enable the encryption, against unauthorised access and copying, of traditional satellite and cable broadcasts, but which can easily be introduced in digital broadcasting as well (e.g. pay-TV, pay-per-view, video on demand). All the aforementioned systems can drastically enhance and supplement the protection of copyright and neighbouring rights if they become part of national and international legal framework.

However, some of the aforementioned minimum standards, such as the national treatment principle, can never be achieved. For there are deeply entrenched divisions that throughout the years have been vested with an almost religious status and have been impaired the uniform protection of intellectual property worldwide up to date. These divergences, which can be found between opposite schools of thought, such as civil law and common law systems, and between conflicting concepts, such as author's rights, copyright and neighbouring rights, entail serious negative effects that have been gravely felt in recent years in mainly two distinct cases. First, the fact that the realms of copyright and neighbouring rights were treated differently during the GATT/TRIPs negotiations resulted in the Contracting Parties being exempted from the obligation of national treatment in respect of rights of phonogram producers, performers and broadcasters (Chapter 9, section 9.2.1 of
the present thesis). Second, the fact that, during the process of harmonisation of national copyright laws within the European Union, the mainly author-oriented Commission granted to the director of a film a droit d'auteur gave great cause for concern to member countries with an Anglo-Saxon jurisprudence.

In view of their adverse consequences, the aforementioned doctrinal dichotomies should be transcended and finally bridged; that, in itself, should be a primary objective of an effective anti-piracy campaign. Because, as Sterling (1989, p 18) submits, a standardisation of usage and translation is of fundamental importance to the achievement of harmonisation of legal principles, and for the removal of misunderstanding between different legal traditions. Indeed, contrary to what many may think, the chasm between the two is neither profound nor unbridgeable. In fact, there are several grounds for such a compromise:

- One such basis can be found in Article 14bis of the Berne Convention, which does not use the term 'author' but the neutral term 'owner', and thus renders it possible to grant ownership either to authors, or to the producer of a work, or both. Maintaining and cultivating this tradition of the Berne Convention is the only realistic option for the global recognition and promotion of the most important common values and interests related to the protection of intellectual property.

- Secondly, a solution is often already present in many national laws where the dichotomy is only theoretical. Namely, the protection afforded to performers, producers of audio-visual works and broadcasters is intended to recognise only the value of their financial investment and their organisational role since their contribution is not considered creative, and thus they are granted neighbouring rights. In practice, however, these neighbouring rights are accorded for the same productions as for those for which authors are granted copyright. Consequently, the solution lies in the open recognition of the creative contribution of those people who are now granted neighbouring rights (Mihaly Ficsor, Assistant Director General of WIPO, 'The 1994 Athens Conference', p 55).
Thirdly, there could even be a terminological compromise. On the one hand, many common-law Copyright Acts (e.g. UK and Irish) make a distinction between Part I and Part II copyright; Part I concerns ‘copyright in original works’ and Part II ‘copyright in sound recordings, cinematographic films, broadcasts, etc.’. On the other, several civil-law Copyright Acts (e.g. Danish, German, Italian) may be simply called ‘Author’s Rights Acts’ but do deal in one of their main chapters specifically with neighbouring rights. Therefore, from a comparative point of view, the two systems are very near to each other and the compromise lies in a change of terms, or as Sterling (1989) calls it, a ‘double harmonisation’. Namely, to call the relevant Acts as a whole ‘Copyright Acts’ and to call the relevant Part I ‘author’s copyright protection’ instead of the Anglo-Saxon term ‘copyright in original works’ (Dietz 1985). A typical example of finding a middle ground between the two systems can be found in the latest reform (1988) of the UK Copyright Act. In fact, that compromise goes beyond mere terminology; namely, ‘Part II copyright’ have been combined with ‘Part I copyright’ in that the beneficiaries of Part II protection have been given civil rights akin to copyright in a manner which integrates them closely with the rights of authors in the classical sense.

A fourth way of striking a balance between the two legal schools at the international level could be the following. Instead of attempting to introduce a Protocol to the Berne Convention separately from a new instrument on the protection of the rights of performers and phonogram producers, as previously discussed, the aim should be to incorporate in a possible Berne Protocol a minimum set of rights in sound recordings which could be subscribed to by Member States that protect phonograms either under copyright or under neighbouring rights. Such a Protocol could bring phonogram protection more closely in line with the exclusive rights enjoyed by authors of literary and artistic works (Lewis Flacks, IFPI Review 1993, p 36).

Fifthly, grounds for a compromise between the notions of copyright and authorship could be also found in historical, philosophical, or even semiotic grounds, as a number of copyright experts
suggest in a recent collective study. For instance, as Mark Rose argues (Chapter 2), if Michel Foucault's hypothesis is correct, who opined that ownership of the text was one of the defining characteristics of the relationship between the text and the author, the modern concept of authorship is intimately connected to copyright law. According to Strowel (Chapter 10), a close examination of the droit d'auteur regime as a property system and of the copyright realm as a monopoly system reveals that the two domains have much in common with each other, particularly when applied in the market-place. Finally, according to Geller (Chapter 8), the overriding norm could lie in Umberto Eco's semiotic theory of 'sign wealth', which involves the maximisation of variety and access in the creation and communication of works. The policy of the maximisation of 'sign wealth' would mean that the work would not have to be treated as static, that the role of the interpreter would be taken into account, and that the more widely disseminated a work becomes the more restricted the scope of copyright becomes.

- Finally, it can be said that a compromise between the aforementioned doctrinal differences will ultimately come about by new technology. Old notions of work and authorship acquire new dimensions in the new digital and networked age. In that environment, the intellectual work must not be confused with the physical manifestation of that work. As Denis de Freitas, a prominent copyright expert, emphatically argues (personal interview, 24/3/1993), distinctions between copyright and neighbouring rights are becoming increasingly blurred and are no longer relevant, if indeed they were ever relevant. The interests of all copyright owners -be they authors, performers, producers or broadcasters- are interrelated and are all forms of intellectual property. The arid discussion to distinguish them in some philosophic way must be relegated to the past. Therefore, when devising new national laws and international agreements, the impact and the rapid and unpredictable applications of technology should be borne in mind. A new formula has to be found under which all

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kinds of new works would be protected in the same way. Furthermore, de Freitas concludes, the overall concept of use is what has to be under the control of the rightowner, and the law ought to be related to all forms of use in order to be able to cope with them as they appear.

In view of all these new uses that de Freitas implies, it seems that, in order for a campaign against unauthorised copying to be effective, old norms need to be re-defined and new solutions have to be found. The copyright industries, vis à vis digital technology, with the applications of today, those of tomorrow (multimedia) and those of the day after tomorrow ('information superhighways'), face a legal and ethical minefield over the issue of copyright and have little idea how to cross it. The challenges are numerous. On the one hand, in the digital environment, text, data, video and audio become fundamentally the same binary code and the current categorisation of works into literary and artistic, and into other derivative works, makes less sense; information loses its centrality as it can be merged, manipulated, transmitted and used more easily; and copyright works are simply de-materialised. On the other, multimedia combine text, graphics, sound, images, computer software and associated computer hardware to create a new, typically interactive, product on a CD-ROM format which can be played on a computer or modified television screen. Finally, the forerunner of 'information superhighways', namely the renowned network Internet, links up millions of people worldwide, has no obvious ownership and is almost impossible to police; and, not only can information not be controlled, but its original owner often has no say in how this information is used.

In view of the above, the complex question that constantly emerges, without any apparent answer, is who does own the copyright? Copyright lawyers and experts believe that the current laws will prove difficult to apply in the digital and networked era because old rules of ownership do not survive in that new world. Consequently, there is talk of creating new rights, particularly as regards the transmission of a work; for, increasingly, one is going to want to protect the transmission rather than the copying of an intellectual creation. The ongoing discussion is focused on whether the fundamental building-block for creators' rights in the new age should continue to be copyright, or
whether it might be possible to introduce a new array of rights based on the control of access. Simon Olswang (1995), amongst others, calls it 'Accessright'. Accessright gathers the following characteristics:

- First, as a legal structure, Accessright will avoid compartmentalisation by category of use; as the distinctions between different forms of use collapse, so should the corresponding legal dichotomies. Under an Accessright regime, the owner’s consent could be granted for read-only access, for viewing and copying access and the many variations which correspond to commercial realities. These contractual structures would thus be reinforced by a proprietary exclusive right, giving Accessright owners direct rights and remedies against users of the networks who do not observe restrictions imposed by their access licence.

- Second, where an illegal copy has been made, an infringer will be liable for breach of Accessright unless he can show that either he knew, or had reason to believe, that the copy in question was authorised. By placing the onus of proof on the possessor of an unlawful copy, rather than the rightowner, Accessright caters for an adequate protection of intellectual property.

- Third, the advent of digital convergence renders it increasingly insufficient to protect copyright works by a series of national regimes and international conventions. Accessright ultimately envisages the internationalisation of protection.

- Finally, Accessright allows the payment for use to be calculated not by reference to what is reproduced -as in a copyright regime- but by reference to the use, which is made of the permitted access, and the value to the user of that access and that use.

The function of Accessright can be greatly assisted and complemented in the future with the introduction of technical, contract-based, systems. Two of these systems, which currently are in an experimental phase and which have been previously described (Chapter 8, section 8.1.4 of the present thesis), are: First, the European Community initiated project called CITED. It consists in a database where software modules allow copyright administrators to assign specific access rights to
users who are linked to a password. The system automatically links the protected material to the licence that applies to a particular reference, and thus maintains an audit trail so that all accesses could be recorded. Second, the Copymart transaction model which comprises two databases: one is a registry of protected material and contains, inter alia, licensing conditions and prices; the other is a market database from which, in exchange for payment, copies of works are distributed to customers in accordance with the licensing conditions. Moreover, both the aforementioned systems guarantee royalty payments without involving misallocation of revenue, and may prove to be a more attractive means to the information owner/provider of obtaining the same, or even a better, protection than that available under copyright, thus serving the interests of the rightowner.

However, regardless of whether the creator's right will be renamed Accessright or not in the years to come, the following caveat should be borne in mind. There will need to be limits to the extent of that right so as to permit fair dealing and to maintain the balance between authors and users, which is the most fundamental principle enshrined in copyright. And any future system that may be introduced to regulate private copying and control piracy must not disregard the needs and the rights of the consumer to have access to intellectual creations. Taking that into consideration, it is worth making a reference to the conclusions of the latest annual G7 Summit which took place at the end of February 1995. Ministers from the world's seven leading industrial nations met to assess the implications of the dawning 'information society' and agreed that intellectual property must be protected through international co-operation and agreements and by appropriate technology if and when it is developed. Nonetheless, it was stressed that any such standards are best developed by consensus among industry and users. For there is an imperative need to make sure that the 'information superhighway' does not develop in a manner which reinforces the imbalances between the 'haves' and the 'have-nots', be they individual or entire countries. Because then the whole purpose of copyright and its protection as we know it will be defeated.
APPENDIX

QUESTIONNAIRE

1. Are the issues of copyright and piracy of a legal, economic or of a philosophical nature?

2. As far as your association/society/federation/industry is concerned when did the phenomenon of piracy first appear? How bad was the situation these days?

3. Have the new technologies been playing a role in its occurrence and in what scale? Can you describe its course up to date?

4. What is the industry's view that you represent/express about the significance as well as seriousness of the phenomenon?

5. What is the size of piracy's impact at present? Are you aware of any statistical data/reports concerning the issue?

6. What sort of discussions have being held so far in terms of its confrontation? Have you any remarks to make?

7. Is there a need for shifts in terms of policy or other that you want to see? Are such changes likely to take place in the foreseeable future?

8. Are there areas more afflicted than others in terms of industries or countries or even continents?

9. Intergovernmental/international bodies are involved in the copyright and piracy juxtaposition (EEC, GATT, WIPO). Which of them represents the interested parties better? What is your opinion about the way they tackle the issues?

10. Can a balance between developed and developing countries be struck using as a common ground the incidence of piracy and the philosophy towards copyright?
BIBLIOGRAPHY

A. GENERAL (Articles and Books)


Barker, R.E. (1970a) 'Copyright concessions for the developing countries', The Bookseller, 13 June, No.3364, pp 2598-2602.


Davies, G. (1994) Copyright and the Public Interest (IIC Studies, Vol.14), Weinheim, VCH.


Strowel, A. (1993) Droit d’Auteur et Copyright - divergences et convergences, Bruxelles, Etablissements Emile Bruylant S.A.


Yarnell, J.E. (1973) ‘Recording piracy is everybody’s burden: an examination of its causes, effects and remedies’, *Bulletin of the Copyright Society of the USA*, Vol.20, No.4, pp 234-244.
B. SPECIFIC

1. European Communities and European Union

a) Commission


b) Council


2. Council of Europe Recommendations


3. Proceedings of Conferences, Symposia, Fora

**International Conference on Intellectual and Industrial Property - Objectives and Strategies**, The Athens Hilton, Athens, Greece, 11-13 April 1994 (organised by the Directorate General XV of the European Commission in co-operation with the Greek Authorities); Athens, "Kapa" Publications.


4. IFPI Secretariat Publications

IFPI 'For the Record', February 1992.
IFPI 'For the Record', June 1992.
IFPI 'For the Record', August 1992.
IFPI 'For the Record', January 1993.
IFPI 'For the Record', April 1993.
IFPI 'World Sales', June 1993.
IFPI 'For the Record', July 1993.
IFPI 'For the Record', October 1993.
IFPI 'For the Record', January 1994.
IFPI 'For the Record', April 1994.